IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1228-1230/6/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8th July2014

Before:
THE HON. MR JUSTICE SALES
(Chairman)
DERMOT GLYNN
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

AXA PPP HEALTHCARE LIMITED
HCA INTERNATIONAL LIMITED
FEDERATION OF INDEPENDENT PRACTITIONER ORGANISATIONS

Applicants

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

THE LONDON CLINIC
BRITISH MEDICAL ASSOCIATION
BUPA INSURANCE LIMITED
ASSOCIATION OF ANAESTHETISTS OF GREAT BRITAIN AND IRELAND
GUY'S AND ST THOMAS' NHS FOUNDATION TRUST

Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Ms Dinah Rose QC, Mr Josh Holmes and Ms Jessica Boyd (instructed by Nabarro LLP) appeared for HCA International Limited.

Ms Kassie Smith QC and Mr Rob Williams (instructed by the Treasury Solicitor) appeared for the CMA.

Ms Ronit Kreisberger (instructed by Eversheds LLP) appeared for The London Clinic.

Ms Sarah Love (instructed by Linklaters LLP) appeared for AXA PPP Healthcare Limited.

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THE CHAIRMAN: Yes, Ms Rose? The Tribunal can sit until 5 o'clock. We think, in terms of allocation between the three issues that need to be dealt with, we should have an hour to deal with the expert evidence, an hour on the IPA and the balance, which is 20 – 25 minutes, on the Nuffield case.

MS ROSE: Sir, I am very happy to tell you that the Nuffield material is no longer controversial because you will have seen that the CMA has agreed to provide the majority of what we are asking for.

THE CHAIRMAN: And you are content with that.

MS ROSE: And we are content with that.

THE CHAIRMAN: That is very helpful. In that case an hour and an hour.

MS ROSE: Yes, I am going to take disclosure first.

THE CHAIRMAN: Is it going to inconvenience you very much if we did expert evidence first?

MS ROSE: Yes, because ----

THE CHAIRMAN: Very well, disclosure first.

MS ROSE: -- my submission is going to be that, in relation to the application for expert evidence, the reasons why we need it become obvious once you understand why we need disclosure.

THE CHAIRMAN: Fine.

MS ROSE: First, the raw pricing data which underlay the revised IPA, and I am going to come back to these terms later, so the first item is the raw pricing data. The second item is the cleaned data that was used by the CMA as their input into the IPA. The third is the actual methodology that was used including the regression equation and the STATA codes.

THE CHAIRMAN: Sorry, the regression?

MS ROSE: The regression equation and the STATA codes. STATA codes, as I understand it, are instructions given by means of computer to the software, first, to tell the computer how to clean the data and, secondly, to tell the computer how to apply the regression equation to the cleaned dataset. So they are the tools that enable you actually to conduct the methodology.

The fourth item is the full set of results from each step of the analysis and there are a number of factors here. They include, for example, the individual coefficients ----

THE CHAIRMAN: So sorry, it is my fault, I did not know that – can you just give me that one again?

MS ROSE: Yes, the full set of results from each step of the analysis. I am going to come on to the methodology in a minute, but as we shall see a whole set of individual regressions has been performed on a range of different treatments, and for each we need to see the

regression equation, the coefficients, and then the adjusted R^2 which is the value that tells you how good the fit is between the dependent variable and the exploratory variables – again I am going to come back to this point. We also need the results of the tests for statistical significance and the results of all of the sensitivity tests.

THE CHAIRMAN: Is there a written statement of these various categories that you are asking for?

MS ROSE: We summarise them in our skeleton ----

THE CHAIRMAN: The main reason that I am asking is that I have been scribbling as fast as I can, but I am concerned to get an accurate list. If there is one, that would be helpful.

MS SMITH: Paragraph 3 of the supplemental skeleton identifies three ----

THE CHAIRMAN: HCA's skeleton for 8th July - is that the one?

MS SMITH: Yes, for today. It is not in the terms that Ms Rose has just outlined.

THE CHAIRMAN: That is what I thought. If there is not a list in the form that you have been giving to us, Ms Rose ----

MS ROSE: We can provide it.

THE CHAIRMAN: Yes, if you can, but also could you go a little bit slower.

MS ROSE: Shall I just go through those again?

THE CHAIRMAN: Yes.

MS ROSE: There are five categories. One, the raw pricing data ----

THE CHAIRMAN: Yes, I think even I understand that.

MS ROSE: That formed the basis of the IPA. Two, the cleaned data used by the CMA as the input into the IPA.

THE CHAIRMAN: Yes, I think I understand that too.

MS ROSE: Three, the methodology, including the regression equation and the STATA codes.

THE CHAIRMAN: When you use the word "including", that means there is something else in the methodology as well, is there?

MS ROSE: Not to my knowledge, and there is a slight issue about at what point you are talking about methodology and at what point you are talking about results.

THE CHAIRMAN: All right, but the substance of the methodology is the regression equation and STATA codes.

MS ROSE: Then (d) is the full set of results from each step of the analysis, and that is the regression analysis results, the statistical ----

THE CHAIRMAN: Sorry, the regression analysis results, yes.

MS ROSE: The statistical significance results and the sensitivity tests.

THE CHAIRMAN: Sorry, I am writing it down, statistical significance results, and then the third element was?

MS ROSE: The sensitivity analysis or robustness check results. Can I just tell you, these five categories are, in fact, set out at para.24 of the witness statement of Dr Mazzarotto.

THE CHAIRMAN: Is that the one for today?

MS ROSE: Yes, the one for today, the final paragraph, they are set out there.

MS SMITH: I think Ms Rose is developing the fourth bullet point of Dr Mazzarotto's report.

THE CHAIRMAN: Let me just read it first.

MS SMITH: There is a lot more detail.

THE CHAIRMAN: In fact, you have expanded upon this, Ms Rose, just in terms of what you have given us so far.

MS ROSE: What I have done is, under item four, I have given a fuller description of what we mean by the results, and they include specifically the individual coefficients and the R^2.

THE CHAIRMAN: Yes, and under item three you have expanded it as well, I think, or made it clearer.

MS ROSE: That refers to the STATA codes.

THE CHAIRMAN: But not the regression.

MS ROSE: That is the core, as it were.

THE CHAIRMAN: At the moment, I just want a list which I can treat as definitive, and Dr Mazzarotto's para.24 and fourth bullet point is not, because you have added to the list. I just want to make sure that I have got an accurate list so that I know what is being discussed.

So item four, the full set of results from each step of the analysis, including ----

MS ROSE: Including the coefficients.

THE CHAIRMAN: Including all the standard ----

MS ROSE: The standard outputs will include the coefficients and the adjusted R^2.

THE CHAIRMAN: Are you now saying that the fourth and fifth bullet points and your fourth and fifth categories are, in fact, one category?

MS ROSE: They are all results, but it is simply that we got sensitivity checks listed separately here from other types of results.

THE CHAIRMAN: For your fourth and fifth, can I just treat bullet points four and five as your list, or do you want to expand upon those?

MS ROSE: The expansion is simply to say what is meant by the standard outputs and that includes the coefficients, the adjusted R^2.

THE CHAIRMAN: The coefficients?

MS ROSE: The coefficients, the adjusted R^2 values and the results of the statistical significance tests.

MR GLYNN: (No microphone) Is that including sensitivity analyses as part of the results of …

MS ROSE: We can put them in as separate bullets. And you will note specifically here there is a reference to King Edward VII Hospital results, that is particularly significant and I am going to come back to that.

THE CHAIRMAN: And your fifth category is what?

MS ROSE: It is the sensitivity analysis.

THE CHAIRMAN: I am sorry, it is my fault, item 4, a full set of results from each step of the analysis including the coefficients, adjusted R^2 values, and results of the adjusted - and I just did not get that?

MS ROSE: The results of the statistical significance tests – the tests for statistical significance.

THE CHAIRMAN: Right, and then five is sensitivity analysis?

MS ROSE: Sensitivity analysis or robustness.

THE CHAIRMAN: Thank you.

MS ROSE: Can I very, very briefly touch on the legal test and I am going to take this very quickly. I just want to take you to the *BSkyB* case. Do you have the authorities' bundle that we had last time?

THE CHAIRMAN: The common authorities' bundle?

MS ROSE: That is it. If you go to tab 10 you will see the case of *BSkyB v Competition Commission*. You can see at para. 2 that this was a disclosure application in the context of an application for judicial review under s.120 of the Enterprise Act in which Sky was challenging a report of the Competition Commission relating to the acquisition by Sky of a certain percentage of shares in ITV.

Then if we go to para. 9 you can see the material of which disclosure was being sought. It was certain confidential material that had been submitted by ITV to the Competition Commission on which the Commission relied in finding that it was likely that ITV would need to make major investments requiring external funding for the next two or three years, and that a non-pre-emptive rights issue be the only feasible or efficient funding mechanism for some investments. It was confidential information that had been submitted by ITV to the Commission and had then been relied on by the Commission in its report.

The Tribunal's decision starts at para. 18 on p.7, and there is a reference first of all to the standard being judicial review, and then to the relevant rule in the CAT Rules at para. 20.

Then, over the page we have set out the classic passage from the House of Lords decision in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 and, in particular para. 3 of Lord Bingham's speech in that case:

> "In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions ... for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency, since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protective Convention right is likely to call for a careful and accurate evaluation of the facts.."

Of course, the context of this case is that there is a challenge to the proportionality of the decision in this case.

Then at 4:

> "Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says."

So that is the essential principle. If a document is relied on in the decision and the facts are in issue in the judicial review, particularly in a proportionality context, the best evidence is going to be the underlying material not a summary of it, however conscientiously made, that is in the decision.

The CAT in this case then went on to apply the principle in *Tweed* and at para. 24 they looked at the circumstances of the individual case and they said:

> "Prominent amongst those circumstances are likely to be the nature of the decision challenged, the nature of the grounds on which the challenge is being made, and the nature and extent of the disclosure being sought. Mere fishing expeditions will not be allowed. Where the disclosure sought is very onerous in extent that will be a factor to be weighed, although there will no doubt be cases where unavoidably onerous disclosure is nevertheless required in order that the matter may be dealt with in accordance with the objective in rule 19 to deal with the case justly. Where

> a particular document is significant to the decision being challenged, it is usually better to disclose the document as primary evidence rather than to attempt to summarise it."

Then, over the page, at 26, "What are the specific circumstances of this case?", and there are references there to the particular findings that the Competition Commission had made. Then at 27, the argument of Sky was that the Commission was not entitled to make those findings on the basis of the evidence before it, in other words, those findings are said to be irrational or perverse.

Then there is a reference to the *IBA* case where Lord Justice Carnwath said:

> "The present case . . . is not concerned with questions of policy or discretion, which are the normal subject-matter of the *Wednesbury* test. Under the present regime the issue for the OFT is one of factual Judgment. Although the question is expressed as depending on the subjective belief of the OFT, there is no doubt that the court is entitled to enquire whether there was adequate material to support that conclusion."

And that, we submit, is very similar to the challenges made in this case under ground 2, because in this case, under s.134 of the Enterprise Act the Competition Commission (now the CMA) had to make a decision as to whether there were adverse effects on competition and that is essentially a question of fact. They have made a decision here that, first, our prices were higher than those of our closest competitor and, secondly, that the cause of the higher prices was our market share. Those, essentially, are findings of fact which we were saying they were not entitled to make on the material before them.

Then there is a reference to the substantial evidence of a confidential nature that was relied on by the Competition Commission in that case. Then what is said here at the top of p.11:

> "The effect of this ITV material has been summarised in this Report but the material itself has not been disclosed. Sky's disclosure application relates to this evidence.
>
> 29. It seems to me in these circumstances the principle referred to by Lord Bingham at para. 4 of *Tweed* (cited above) is in point: the Commission is relying upon ITV's evidence as significant to the findings that are under challenge. The Commission's summary of the effect of that evidence is no doubt conscientious and skilful, but the material itself is the best evidence of what it says. 30. Further, the disclosure sought is expressly tailored to the findings under challenge. It is not

> a wide-ranging request but is specifically focused on the material relied upon by the Commission in relation to the findings."

Then, over the page at 33, he rejects the submission that it is a fishing expedition, it is a focused request for specific material on which reliance has expressly been placed by the decision maker. The Tribunal can see here the stress that is laid in this case on the fact that where it is evidence on which reliance has been placed by the decision maker in making the decision, the normal position is it ought to be disclosed if the facts are in question.

Then at 34 the Tribunal address the submission that had been made "that the application would risk blurring the distinction between judicial review and an appeal on the merits because it would in effect invite the Tribunal to reappraise the evidence". The Tribunal there said that this seemed to be off the mark:

> "As Mr Flynn for Sky submitted, there is nothing inconsistent with judicial review in the court being asked to look at underlying material; it is the purpose for which it is being asked to look at it which must reflect the distinction between a merits appeal and a review. That is a matter for submissions in the course of the substantive application; we are only at this stage of disclosure at the moment."

And ultimately the decision was to grant the application for disclosure. That is that case, and we say there are strong analogies there because essentially what is being discussed there is a situation where the underlying material, which is relied on by the decision maker for making the decision, has not been disclosed but has simply been summarised by the decision maker in the decision.

The second point is that we, of course, have a complaint of procedural unfairness. Essentially, ground 1 of our challenge is that we have been seriously prejudiced in this case because the fact that there had been a significant revision to the IPA was not disclosed to us, although it now transpires it was disclosed to our competitors during the course of the investigation, and we were given no opportunity to respond to the Competition Commission's (now the CMA) case against us. We were given no opportunity to respond to this analysis during the investigation, and we submit that in that situation there is a particular onus on this Tribunal to consider closely the factual basis for the conclusions reached by the CMA. What the CMA has done in this case is to reach a conclusion which requires us to divest ourselves of two of our hospitals. That is plainly a very serious interference with our property rights, and we submit that, to date, we have had no opportunity to answer the case against us which is the central justification for the interference with our property rights. In that situation our submission is going to be that s.6

of the Human Rights Act requiring this Tribunal to act compatibly with both Article 1 of the First Protocol and Article 6 requires that there should be proper scrutiny of the analysis in the IPA which we were deprived of the opportunity to scrutinise during the investigation. On the question of procedural unfairness, I just briefly want to show the Tribunal the *Eisai* case, which is at tab 11 of the same bundle. *Eisai* is a classic case on the unfairness of a decision maker failing to disclose an executable version of an economic model during a consultation process. You will see at para.34 that there is a discussion of the case law on what fairness requires in consultation. Then at 35, "Application of the facts", and it is said:

> "The importance of the model within the appraisal process is not in doubt. It is central to the Appraisal Committee's determination of a drug's cost-effectiveness and in particular to the cost per QALY and whether it comes within the threshold of acceptable cost."

We say similarly in our case the IPA is absolutely central to the CMA's decision in this case. It is essentially the rationale for the decision that there is an AEC and the decision that it is proportionate to require us to divest.

Then at 36:

> "The robustness or reliability of the model is therefore a key question. For the thorough testing of reliability, there can be no doubt that a fully executable version is required. NICE uses that version for quality assurance of its own model and insists that, if consultees put forward a model of their own, they provide a fully executable version to facilitate the view."

I am going to come back to that point because, as we shall see in a minute, the Competition Commission also requires respondents to consultations to provide all the data that underlies a regression analysis on which they seek to rely, and the regression and the coefficients and all the outputs of the regression. The Competition Commission would not be satisfied with a summary of the type that has been disclosed to us.

Then at 37:

> "There is significant disagreement between the experts about the extent of disadvantage to a consultee if NICE provides it with only a read-only version of its model."

I just pause here to note, and this is relevant to the second application in relation to expert evidence, the Court of Appeal in the *Eisai* case entertained expert evidence on the question of the extent of the disadvantage to the claimant in that case of the non-disclosure in the consultation process. There is discussion of that evidence in the following pages. There

was a disagreement in relation to some aspects which the court concluded it could not resolve. If you then go to para.44:

> "In relation to sensitivity analyses, however, there is no relevant disagreement: it was found by the Appeal Panel, and is common ground, that such analyses cannot be carried out with the read-only version. Further, I do not see anything in NICE's evidence to contradict what Eisai's witnesses say about the importance of the sensitivity analyses in checking for problems in a model."

Ms Smith wants me to look at 43:

> "In so far as there is a disagreement between the experts as to the significance of the inability to track formulae automatically in the read-only version, the court is plainly not in a position to resolve the dispute."

They say that they will proceed on the basis that it is a problem but it is not insuperable. They accept that without the read-only version the consultee could not have conducted any sensitivity tests. As we shall see in a minute, that is a point that also arises in this case. Then at para.45:

> "The Appeal Panel, as I have explained, took the view that it was for NICE to quality assure the model and that it was not for consultees to perform that function; and a similar point was made by Dobbs J. I accept, of course, that NICE, as the decision maker, is responsible for checking the reliability of the model. But I agree with Mr Pannick that this does not answer the question whether fairness requires consultees to be given the opportunity to test the reliability of the model themselves, for the purpose of making informed representations on it. The Appraisal Committee has to rely on others to check the model is robust … The checking is not something on which SHTAC and NICE's technical staff alone may have a relevant input. Whether the model has weaknesses is a matter on which consultees may properly have something to say. Indeed, they already do have things to say on the basis of the read-only version, and attention is properly paid to their representations. The carrying out of additional tests that are possible only with the fully executable version does not give rise to any difference of principle. On the face of it, to limit the extent to which consultees can engage in the legitimate task of testing such an important element in the appraisal process does seem to me to be unfair. Moreover, the possibility cannot be excluded that work done by them on the

fully executable version will bring to light hitherto unrecognised weaknesses in the model."

So the conclusion in that case was that it was unfair not to disclose during the consultation process a fully executable version of the economic model.

THE CHAIRMAN: And "executable", that just means a model that the party can play with?

MS ROSE: The party can play with, and the equivalent in this case would be what we are asking for, because we cannot run the IPA unless we have the data that was used as the input into the IPA and the regression equation that was identified to run the data, and also without seeing what statistical tests were carried out. Without those materials we cannot run the model and we cannot sensitivity test the model.

THE CHAIRMAN: Just so that I am clear, you are asking for this disclosure, as I understand it, to go into the super-confidentiality ring?

MS ROSE: That is correct, yes. I understand that there is discussion both from TLC and from the CMA as to whether or not there should initially be a data room. If the Tribunal's conclusion is that, a matter of principle, we ought to see the material, of course we are open to discussion about what is the most proportionate way to deal with that, whether there could be an initial stage in a data room and then there could be a decision that only the material that we want specifically to rely on would have to be put into the super-confidentiality ring to be put before the Tribunal. That is a possible way forward, and we certainly do not exclude that.

THE CHAIRMAN: At that level you say it becomes a practical ----

MS ROSE: Exactly. The key point is that without the material we are seeking we cannot stress test the model. We simply cannot identify whether there were significant flaws in it. Before I turn to the specific points here, I just want to show the Tribunal the Competition Commission's own guidance. Can I just hand up copies of that? It is referred to in the witness statement of Dr Mazzarotto, but unfortunately in the rush to get that lodged it did not get exhibited to it. (Same handed) This is the Competition Commission's own guidance on suggested best practice for submissions of technical economic analysis from parties to the Competition Commission. This is what it expects from consultees. Our submission is that what is sauce for the goose ought to be sauce for the gander. You can see "General principles" at para.4, then "Clarity and transparency":

"Submissions should not only present clearly the results and conclusions of the economic analysis undertaken, but they should also clearly state the methodology used, the assumptions made in reaching results, the justification

for the methodology and the assumptions, and the robustness of the results to any assumptions made. Submissions should be understandable to non-economists …"

Then "Completeness":

"Submissions should contain a complete description of the analysis undertaken. All relevant assumptions should be discussed and choice of techniques explained. Relevant econometric output …"

That is the results of econometric tests, like the regression analysis -

"… diagnostic tests and checks for robustness should be included."

Then "Replication of results":

"In a number of cases, the CC will want to replicate the results of the analysis that has been submitted. This means that parties should be prepared to respond to a CC request, at very short notice, for all relevant computer code and data files necessary for the CC's economists to reproduce the results presented in the parties' submissions. This will include the raw and the cleaned data and the programs for obtaining the latter from the former."

So that is the raw data, the cleaned data and the STATA files, and, as we have seen in the previous paragraph, also the outputs and results of econometric analysis. That is what they require.

Then we go further down and we come into the detail, "Econometric modelling":

"The submission should contain a clear explanation of any economic modelling that underpins the empirical analysis. Although formal economic modelling is not required in every case, econometric analysis is often based on important assumptions. The CC should be able to understand any assumptions that parties have made in setting up their analysis, so that it can assess the reasonableness of those assumptions and test them against all the evidence it has received in the case."

Then at 17, "Presenting results":

"When presenting the results of statistical and econometric modelling in written submissions, parties should always include the appropriate diagnostic test results, (t- statistics, R^2, etc)."

So that is the adjusted R^2, which is a diagnostic test showing how close the fit is between the regression and the pricing.

"Unless the CC is able to understand both the statistical and economic significance of the reported results it will not be able properly to evaluate the importance of modelling output and the results will be less influential."

So this is the CC itself saying that without the results of the statistical significance test and without the adjusted R^2 it cannot evaluate the importance of the econometric modelling, and that is exactly the submission we make in this case.

Over the page: "Underlying data and files".

THE CHAIRMAN: I must check you are coming to the end of your submission.

MS ROSE: I am not, Sir.

THE CHAIRMAN: You gave us an estimate of an hour last time, and we have allowed you an hour this time, so I think you must finish within five minutes.

MS ROSE: There is no way I can finish within five minutes.

THE CHAIRMAN: Why did you not correct the estimate that you gave us last time, or say, when I said that there was to be an hour for this part of the argument ----

MS ROSE: The position is that this is by far the longest part of the argument. The Nuffield point is now agreed, and the expert report submission is going to be very largely parasitic on what I say on this. So I am very happy ----

THE CHAIRMAN: So if we give you another 15 minutes on this and reduce the time equivalently for your submissions on the expert report.

MS ROSE: If you can give me 20 minutes.

THE CHAIRMAN: With the corresponding reduction, you are happy with that? Yes, all right.

MS ROSE: "Underlying data and files" – "parties should be prepared to submit data and files at very short notice, to enable the CC to replicate any analysis." Then "Providing data".

THE CHAIRMAN: Sorry, where are you reading from now?

MS ROSE: Paragraph 20.

" … if a piece of analysis is based on daily transaction price data but only uses monthly average prices, the CC will require access to the daily data. Because the aggregation and cleaning of data may have a significant impact on the outcome of statistical or econometric analysis, it is important the CC has access to the underlying data."

Again, we make exactly the same point in relation to this case. Then "Providing program files" you see there at para. 22, and 23 – "The files generating the econometric and statistical analyses should also be provided."

Then, over the page at 29 – "Algebraic manipulations and proof".

"All key results should be clearly derived, setting out the relevant algebraic manipulations and proofs."

So you have to provide the equations. That, we say, is an entirely accurate summary by the Competition Commission of the reasons why you need this material because, without it, you cannot interrogate the significance of an econometric analysis, you cannot see whether it is flawed or biased or whether there are spurious co-relations within that analysis.

If I can now come to the application of that test. The first point that we make is that this is the critical material that is central to the CMA's decision.

The second point we make is that we are making these complaints in a situation in which the initial non-disclosure meant we have been unable to deal with it at the time of the investigation and you already have my submission on that point.

I now want to come to some specific examples, and I am going to touch on matters that are in the confidentiality ring when dealing with this, so there may be some people who may need to leave.

THE CHAIRMAN: Yes. For the purposes of the submissions about to be made we need to go into closed session. Anyone who is not within the confidentiality ring, members of the public and so on, I am afraid, need to be asked to leave.

MS ROSE: The hyper ring.

THE CHAIRMAN: Can I just check, for how long are we likely to need to be in closed session?

MS ROSE: The remainder of my submissions.

THE CHAIRMAN: So for 10 or 15 minutes, please.

MS ROSE: It is only people who have signed the adviser disqualification.

THE CHAIRMAN: "Ring 1" I think it is being referred to, the super confidentiality ring with the signed adviser disqualification clause – only people who are within that ring may stay at this point.

(For proceedings in closed session see separate transcript)

THE CHAIRMAN: Thank you, let us resume.

MS SMITH: Thank you, Sir. I am trying to make sure I do all my submissions in open court first rather than switching from one to the other. Sir, this was originally, as set out in para.268 of the notice of appeal, an application for disclosure for data and underlying analysis, which the CMA used to support the revised IPA. That is what we have addressed in our evidence which I hope you have had an opportunity to consider, the first witness statement of Mr Witcomb, and in our supplementary skeleton argument.

THE CHAIRMAN: Yes. What are you saying, because you were not given notice in the application of the width of the application now being made ----

MS SMITH: The application in so far as it is an application was simply contained in para.268 of the notice of application.

THE CHAIRMAN: I follow, but I am trying to ----

MS SMITH: There are two stages. There is the stage at which Dr Mazzarotto said at the end of his witness statement, "And here is what I want to see", which we got yesterday afternoon; and then there is Ms Rose standing up this afternoon and developing that even further. Until I heard what Ms Rose said this afternoon we had no indication of the detail of what was being sought. Mr Witcomb's statement, which was served on the parties yesterday, was produced in response to para268 of the notice of appeal only. Dr Mazzarotto's witness statement was not given to us until after we had provided Mr Witcomb's statement.

THE CHAIRMAN: When did you get Dr Mazzarotto's latest statement?

MS SMITH: At about one o'clock yesterday afternoon. I think they may have been at about the same time.

MS ROSE: Ours was served first.

MS SMITH: Sorry, yours was served first by about half an hour or something. All I can say clearly is that Mr Witcomb's statement was produced not in response to Dr Mazzarotto's statement, which we did not get until about one o'clock yesterday afternoon, and certainly was not produced in response to what Ms Rose says now, because obviously I did not hear that until just now.

THE CHAIRMAN: Where does that take us?

MS SMITH: Where that takes us is that I am rather handicapped in responding to the very detailed points that Ms Rose is now making orally.

THE CHAIRMAN: I can see that. Speaking for myself, I do have a concern that we seem to be dealing with what is potentially a very important matter - Ms Rose, herself, has emphasised that - both in terms of the claim that is made and what the CMA says in terms of the burdens that it would impose on them if it has to deal with it in this way, almost on the hoof, with Dr Mazzarotto's witness statement coming in at one o'clock yesterday.

MS ROSE: … the unredacted report was only served on 2nd July.

THE CHAIRMAN: That is as may be, but my concern is that the CMA is almost on next to no notice at all of the precise ambit of the disclosure which is now being sought.

MS ROSE: There is no substantive difference in what we are asking for now and what we asked for last time. We have always been asking for this.

THE CHAIRMAN: All right.
MS ROSE: And central point I made about ----
THE CHAIRMAN: All right. I accept that.
MS ROSE: -- about the regression is the same point I made last week ----
THE CHAIRMAN: Right.
MS ROSE: -- in relation to the same footnote.
THE CHAIRMAN: Right, well let me go back to Ms Smith.
MS SMITH: The big difference is the indication now that HCA wish to see the raw data. That was not the data that was fed into the model. The data that was fed into the model was the clean data, which you can see from the face of the report – the portions of the report which were never redacted and so have been in the public domain for a long time, and there was no indication that HCA wanted to go to the underlying data in effect by going back to the raw data. The clean data was fed into the model, not the raw data, and that expansion – and I use the word advisedly, because it is an expansion – of HCA's application does have real consequences for the issue of proportionality.
THE CHAIRMAN: What submission are you making to us as to how we should deal with it?
MS SMITH: The point I will make is on proportionality, that it makes a real difference to the issue of proportionality.
THE CHAIRMAN: All right, so you are not saying we cannot deal with the application now. You are going to deal with it, you are going to make a submission in relation to it.
MS SMITH: I am going to make a submission, I am merely making the points I have already made.
MR GLYNN: Could I just be clear, you are saying that it was not clear to you until very recently that HCA were trying to get at the raw data?
MS SMITH: That is what I am saying.
THE CHAIRMAN: Yes.
MS SMITH: The relevant legal principles, Sir, I am not sure if you have had an opportunity to look at our supplemental skeleton argument for today.
THE CHAIRMAN: I have, yes, at some speed.
MS SMITH: It may be helpful then, rather than taking time going through the underlying documents, I can make a number of points I want to make just on the face of the skeleton and then I will go to the underlying documents if necessary.
The relevant legal principles are set out in paras. 9 and 10 of our skeleton, and we refer again to the *BSkyB* case in paras. 18 to 25, which Ms Rose took you to, and we draw out at

para. 10 the principles that are to be taken from that case. I do not think I need go back to the *BSkyB* Judgment, which I would ask you, Sir, when you go back to look at it again, to note that when Ms Rose was reading out the Judgment from *Tweed* she jumped from para. 3 to para. 4 without reading out what I say is a very important aspect of the principles to be taken from that case, which is at 10(b) of our skeleton, which is that even in cases involving issues of proportionality, disclosure should be "carefully limited to the issues which require it in the interests of justice." That quotation is taken from para. 3 of *Tweed*; it is notable that Ms Rose did not read that out.

The test is, as the Tribunal said in the *BSkyB* case, that the Tribunal must be satisfied that he disclosure sought is necessary as well as relevant and proportionate to determine the issues. The need for requested disclosure must be examined in the light of the circumstances of each case. Prominent among those are likely to be the nature of the decision challenged, the nature of the grounds, and the nature and extent of the disclosure. Disclosure simply to identify further adventitious grounds of challenge will not be allowed.

Ms Rose sought to argue that the approach taken in the *BSkyB* case was very much on all fours with the approach that should be taken in the present case, and we say that *BSkyB* needs to be read on its own facts. That was a case about documents and evidence that were provided by ITV to the CMA, and that were relied on by the CMA in reaching its decision and the Tribunal held that those should be disclosed rather than summarised, which is very different from here. We are not talking about evidence in the form of materials or documents. We are talking about the pricing data, methodology and results.

Insofar as there is material on which the CMA relies in this case, the material on which it relies, if any analogy is to be drawn with the *BSkyB* case, are the results of the IPA.

THE CHAIRMAN: You only get those by going through the whole process and then putting ----

MS SMITH: You can get those from the final report, Sir, with respect. The results are given in the unredacted version of the final report. If I could ask you to turn to the witness statement of Mr Witcomb, which explains in quite careful detail what has been done and what has already been given to HCA. Mr Witcomb's statement starts at para. 9. He explains what the IPA is. It is a price index, that is explained in para. 11, which is based on a common basket of treatments offered by different hospital operators to each PMI. That index aggregates into a single number the prices paid to a hospital operator by PMIs for patients treated at hospitals owned by the operator. In the final report there were three versions used of a price index.

In para. 12: the IPA is based on invoice data received from Healthcode, and he describes what the invoice data provides.

THE CHAIRMAN: Paragraph 11, just so as I am clear in my mind: the process of aggregation being talked about there is different from the process of aggregation being explained by Ms Rose, is that right?

MS SMITH: Yes.

THE CHAIRMAN: She is talking about aggregating what is in a single ----

MS SMITH: Yes, that is what is done between the raw data and the cleaned data. You take an invoice which has a number of different lines on it, and you take out irrelevant material such as ancillary services, newspapers while you are in the hospital, and you aggregate the relevant lines from each of those invoices to give you the cost for each treatment. What this is about is getting a price index for the price paid to each hospital operator by the PMI. Those price indexes are the figures that are compared between operators for different PMIs and then compared with the levels of concentration for each of those operators which lead to the conclusion that in relation to the prices charged by operators with higher concentrations, higher market shares, there is a causal link between those two factors.

Then in para. 12 Mr Witcomb explains that the IPA is based on invoice data and says what that includes. He says in para. 13: "To carry out the IPA, we began by undertaking a process of 'cleaning'," and he says that is all set out in Annex A of Appendix 6.12 – that was the document I sought to refer you to, Sir, when Ms Rose was trying to summarise it. Then there was a cleaned dataset, and the cleaned dataset is what we understood to be referred to as the underlying data, because that was the data that was fed into our model, the insured pricing analysis.

Then para. 15: "Using the clean dataset, we applied the methodology as described in Appendix 6.12 of our Final Report." Ms Rose took you to some parts of it, but the methodology is set out, in my submission, in a great deal of detail in those paragraphs of Appendix 6.12. It says exactly what we did, how the methodology worked, and how it was applied to calculate the price indices described.

THE CHAIRMAN: We will obviously read those in our own time.

MS SMITH: Sir, I am grateful. That process produced the results, and the results are set out in these paragraphs at Appendix 6.12. So what is important, Sir, is that in the unredacted version of the final report which HCA now has, they have the detailed methodology and the results of the IPA.

First, it is now suggested by HCA in the supplemental skeleton para. 2 that the report does not contain a complete description of the methodology. We say "no", it is described in full detail in the report, paras. 5 to 28 of Appendix 6.12 and, in any event, further disclosure of data is not going to give you a better description of the methodology. The methodology is set out in minute detail.

Secondly, as regards the results, HCA now suggest that the final report is deficient because it only contains a summary of the results. They say, as I understand it, they want access to the regression equations and Ms Rose, earlier said: "We want the results from each step of the analysis."

What they are asking for are the equations that were produced at each stage during the application of the methodology. We say, first, there are hundreds of those regression equations that give the intermediate results. Disclosure of those equations is obviously onerous but also not particularly informative. What we say are important are the final results, unless, of course, HCA simply want to re-run our model, and we say that is not the basis for disclosure under judicial review principles, and I will come back to that.

As regards the application for the data and underlying results, I have dealt with the methodology, I have dealt with the results – I am sorry, I am using the data and underlying analysis now. We say the burden is on HCA to say that disclosure of that further and additional material is necessary – not just relevant, but necessary and necessary for them to be able to make their case in this judicial review forum.

We address that point at paras. 19 onwards of our supplemental skeleton. I am trying to tie this back to what their case actually is, because Ms Rose, to you just now, made a number of criticisms on the back of the report. What I say she has to do, and she has failed to do is say that the case she wants to run cannot be run without access to the data and underlying analysis, this additional material.

So para. 19 of my skeleton – first, in their original skeleton HCA sought to argue that they needed this material to argue ground 1. We say, in para. 20, obviously ground 1 is a procedural unfairness challenge, and they do not need access to the data and analysis to make that challenge.

One of the ways in which they say: "we need it" is because "we need to be able to allow the Tribunal to have informed consideration of the full extent of the differences between the IPA and the previous analysis". In fact, those differences are already pleaded by HCA in para. 55 of its notice of appeal and by reference to the detail of Dr Mazzarotto's report.

HCA obviously fully understands the differences, and has been able to plead them. They do not need access to the data and underlying analysis to make that point. They do not need the data to enable informed consideration by the Tribunal of the full extent of differences between the IPA and the previous analysis of inshore prices.

Similarly, and this point (c) under para. 20, they fully understand these differences, they do not need access to this additional material, the data and the analysis to identify the full extent of disadvantage. These were the points they were putting forward. We say they do not need this material to make these points under ground 1.

They say, secondly, that they need access to this material to make their points under ground 2, irrationality points in essence. There are two ways in which they say we need this data. First, they say we cannot fully develop our case in relation to the errors we have already identified by reference to the analysis, and in that regard they rely on the Mazzarotto report, and I will come back to that. Secondly, they say there may be further features that we have not yet found and we need to look at the data and underlying analysis to find those. We say that is clearly, as *Tweed* makes clear, an unacceptable basis for disclosure in a judicial review case in order to seek further grounds of challenge. *Tweed* has made it clear that that is not a proper basis for disclosure in a judicial review case and so we say on that basis that provides no grounds for the application for disclosure.

As regards the various paragraphs of the Mazzarotto report where they say, and I think Ms Rose put it at the last hearing, he says: "I am handicapped in making these points because I do not have access to the data." But when you actually focus in on what he says in his report you realise that he has, in fact, identified the ground of challenge without having access to that data. I would ask you, sir, to take the time, subsequently, to look at para. 26 of our skeleton, which is where we address each of the paragraphs which were relied upon by HCA in their skeleton argument, each of the paragraphs of Dr Mazzarotto's report, and we say when you look at them either it is clear on the face of those paragraphs that he already has a case which he has articulated without reference to the data, or when he says: "I need reference to further data" that data has now been provided as a result of the unredaction of paragraphs from the final report. I do not have the time to take you through each of those, but if I could just take you to one or two by way of example.

If I take para. 2.3.13 of Dr Mazzarotto's report, which is addressed at para. 26(d) of my skeleton, if I can ask you to have 26(d) open, and Dr Mazzarotto's report as well. I take this because this is a paragraph Ms Rose referred to in her submissions just now. If you look at Dr Mazzarotto's report, this is tab 1 behind HCA's notice of appeal in their Notice of

Application bundle. At paragraph 2.3.13 Dr Mazzarotto makes the point - it actually starts at para. 2.3.12 - that the CMA failed to report the results of a number of tests that should have been undertaken.

Over the page he sets out in the bullet points the various statistical tests that he says should have been undertaken by the CMA. Then he says in para. 2.3.13:

> "…the CMA did not report the results from these standard statistical tests, I am not in a position to comment further on the potential implications of their results. Their omission from the Final Report is noteworthy, since these basic tests (or checks) would have allowed the CMA to support or reject some of the conclusions it drew from its analysis. I have not been able to perform such tests myself without access to the underlying data."

The point is that the criticism made here is that the CMA failed to report these tests and Dr Mazzarotto says the CMA should have carried them out. He does not need to replicate those tests in order to make that point.

MR GLYNN: Forgive me, what he is saying is that he can make the general points but he cannot see what the potential implications of running the tests would be without having the numbers?

MS SMITH: Yes, but the point is this is a judicial review we are dealing with here, and the legal ground for judicial review is that these were not carried out, and they should have been carried out. You do not need to re-run the tests in our submission and replicate those tests in order to make that submission. There is a difference between re-running the analysis carried out by the CMA, which might be acceptable in an appeal on the merits or a re-hearing and may very well be the approach that the CMA will take to material that is presented to it in the course of an investigation, but it is very different when you get to the point of a judicial review.

In that regard, it might be a sensible point to address what is said about the CC's guidance that Ms Rose handed up, and I will come back to this, if I may, because it is what Dr Mazzarotto relies on in his latest witness statement. This is a guidance for best practice for submissions of economic analysis from parties to the CC when the CC is carrying out a full investigation of a market, carrying out an assessment on the merits of how a market works. It sets out guidance to parties so the CMA can test that evidence before it relies upon it. It is a world away from a judicial review and the test that should be applied to disclosure for the purposes of judicial review. HCA cannot seriously suggest that the court should carry out a full reinvestigation on the merits applying the CC's guidance to the standards that

should be applied to evidence that is submitted during a full merit investigation. That seems to me what is underlying a great deal of what is going on here and what we say is the fundamental misconception in this application.

In the time available I am not going to go through any other examples, but the other examples are set out in para. 26 of the witness statement.

THE CHAIRMAN: I think you can take it that the Tribunal is not going to deliver a Ruling now, we are going to go away and do further reading, assisted by the parties' submissions.

MS SMITH: In that case, Sir, it might be helpful if I move on to the witness statement of Dr Mazzarotto which was served on us yesterday afternoon, where I have made the point that if we look at Dr Mazzarotto's witness statement, para. 8, it says:

> "The potential for errors in econometric modelling, and the need for close scrutiny of such analyses, are recognised facts in competition enforcement."

Yes, of course they are. "Indeed, the CMA's predecessor, the CC, published guidance", and this is the guidance that Ms Rose handed up to you today as you see in the footnote. He says that guidance sets out three general principles that inform the degree of disclosure that is appropriate, etc. In fact those are principles to be applied to the submission of evidence in the course of a market inquiry. Then, at para. 9, he says, and this is telling: "The CMA has failed to provide sufficient information to meet its own standards in this regard."

He then goes on, in para. 10, the first CC guidance, para. 13 - the second principle, para. 17 - the third principle. What he is doing is he is testing the information he has received against the CC's guidance. That is not the test for disclosure in a judicial review. Dr Mazzarotto has failed to address himself to what we say is the relevant question, which is what is necessary for him and HCA's other advisers to see to enable HCA to make its case in its judicial review. He has not, in my submission, indicated any particular ways in which he says HCA cannot make its case without access to this data. He has identified ways in which he says the CC has not met these standards to be applied in a wholly different situation.

My second submission on Dr Mazzarotto's statement is this. His evidence is not entirely clear and it is not helped, I would submit, by lack of cross-references to HCA's pleaded case, or even to his previous report, but I can make the following points. First, a number of the points he makes in this witness statement appear to be a re-working in slightly different terms of points that he already made in his report, and which we have addressed in para. 26 of our skeleton and Mr Witcomb's first statement. If I could, for your note, on the edge of

his report, identify what I say where I say he does this, para. 11 is essentially a rehash of para. 2.3.32 of his report, which we have addressed in our skeleton at para. 26(h). Paragraph 14 is a rehash of para. 2.3.9 of his report, which we have addressed in our skeleton at para. 26(b). Paragraph 15 reflects para. 2.3.13 of his report, and we have addressed that in para. 26(d) of our skeleton. Paragraph 20 reflects para. 2.4.2 of his report, which we have addressed at para. 26(i) of our skeleton. Paragraph 23 reflects para. 2.5.5 of his report, which we have addressed in para. 26(k) of our skeleton. He does appear to make, in para. 16 a slightly different point that has not been raised before, which is about the King Edward VII Hospital. He makes the point that Ms Rose made, which is that the comparison of prices between the King Edward VII Hospital and HCA's hospitals was at an average level rather than at the level of individual insurers - I do not know if you recall that she made on the basis of the report.

THE CHAIRMAN: Yes.

MS SMITH: If I could take you to back to Appendix 6.12 in the second volume of the report.

THE CHAIRMAN: Are we getting back into confidential matters?

MS SMITH: I am not going to read out any figures, I am simply going to draw your attention to certain parts ----

THE CHAIRMAN: Let us try and press on.

MS SMITH: -- and I think I can do that without referring to any confidential material.

THE CHAIRMAN: It saves time. So 6.12.

MS SMITH: 6.12, para. 39, which has not been redacted, so all of this is public.

THE CHAIRMAN: Could we put in a plea when we have further hearings? Could we have a properly paginated copy of the report. It is almost impossible to use this.

MS SMITH: Yes, perhaps we will just get someone in even to just go through and page number what you have already because producing these all over again would be ----

THE CHAIRMAN: No, I am sure that is true, but it is very difficult and time consuming to use this.

MS SMITH: Perhaps we can send someone to the Tribunal to number consecutively through, yes.

THE CHAIRMAN: Just help me again, we are looking for - is this the King Edward VII?

MS SMITH: Yes, Appendix A6.12.13, para. 39.

THE CHAIRMAN: Which of the A6.12s is it - the first one?

MS SMITH: I am very sorry, it is the first, yes.

THE CHAIRMAN: "We found that our results were robust"?

MS SMITH: Yes.

> "HCA argued we should also compare HCA's prices with prices charged by King Edward VII's Hospital Sister Agnes. We performed this comparison, and found that HCA is more expensive than its operator (see Annex B, Figure.4)"

And that was the figure that Ms Rose took you to, which was based on the average prices. Then footnote 38 gives the reason why. I am not going to read out any of footnote 38 ----

THE CHAIRMAN: I see, because that is confidential.

MS SMITH: -- but it makes the observation and gives the reason as to why the CMA focused on the average rather than the inshore and specific prices.

In any event, and I am starting to feel like I am pleading the defence while standing in front of you, this is an explanation that will be given in the defence as to why this approach was taken. It does not, in my submission, give any basis for an application for disclosure of the underlying data and analysis. What it really seems to boil down to, and I am here referring to paras. 11 and 12 of Dr Mazzarotto's statement, and para. 19, which is where he starts to say what he wants to do with the raw data ----

THE CHAIRMAN: Sorry, 11, 12?

MS SMITH: 11, 12 and 19. He is effectively saying that he wants to test the robustness of the CMA results; he wants to re-run the methodology and check the CMA's arithmetic. We say that that is not the test for disclosure in a judicial review.

Two points come out of that. They relate to wanting to re-run the methodology with the cleaned data. We say stress testing or re-running the model would be with the cleaned data ----

THE CHAIRMAN: Sorry, you are moving on from the specific, the King Edward VII?

MS SMITH: Yes, absolutely. I am moving on to the general submission which is made in paras. 11, 12 and 19. The heart of what Dr Mazzarotto wants to do is basically to re-run the model and check the CMA's arithmetic. We say that, even with the cleaned data, that is not a valid basis for disclosure using the cleaned data to re-run the model. Even more so when one comes to the raw data because the raw data was not what was fed into the model. It is the raw data that was then cleaned and the clean data was fed into the model. We are now descending to the real detail. He is saying: "I want to check that you have cleaned it properly" and replicate that cleaning process. Again, we say that that is not a proper basis

for disclosure, and it is important in this regard, I think, that I address the case of *Eisai*, because Ms Rose says that it is almost on all fours with this case, "it provides support for our application", and superficially it appears to be similar to this case, but I think it is important if I could ask you, sir, to take you back to that case at tab 11 of authorities' bundle. This goes in particular to the point on raw data, and also the point on re-running the model.

I make two points on this case. First, that you cannot apply it ----

THE CHAIRMAN: Sorry, what paragraph?

MS SMITH: I am just making the first general point about what the case is about. This case was a procedural impropriety challenge as to whether the failure to provide a fully executable version of the model during an investigation, during a fact finding process, was a procedural impropriety or not. It was about what is fair at the stage of an investigation when you are reaching a decision on the merits, and whether the decision maker should have given the fully executed version of the model. It is not what should be disclosed after the event in a judicial review proceeding. The test for disclosure is set out quite clearly in the other authorities, namely, *Tweed, BSkyB* etc. This is a question that goes to the substance of fairness of a decision on the merits, what is needed in the decision on the merits. That is the first point.

The second point then is that on its terms the Judgment should be limited to the facts of this particular case. If you look first at para. 33 of the Judgment, I am sorry, there is no internal page numbering, para. 33:

> ". . . this case depends not on the resolution of any real dispute about the legal principles, but on the application of well established principles to the particular context and particular circumstances of NICE's appraisal process."

So very much limited to its own facts. Then paras. 43 and 44, which Ms Rose took you to. I am not going to read them out, Ms Rose has already done so, what is important in para.44 is that fundamental issues were agreed between the parties. The parties agreed that sensitivity testing was important in this case - again, a decision on the merits - and that you could not carry out that testing, which was important on the circumstances of this particular case with only the read-only version. So, in those circumstances, disclosure in this context was required. Where there is not that level of agreement, para. 43, the court is plainly not in a position to resolve the dispute: "but the court should proceed on the basis that it has not been shown to be an insuperable problem".

I am simply saying that there are so many factors about this case which are specific to the facts of this case that you should not read it across into the current application.

In contrast, the approach taken by the Tribunal in a case such as the present in *Claymore Dairies*, which is a case attached - I am sorry yet another document - attached to Ms Kreisberger's skeleton for TLC, which was submitted today - she has copies if it would be easier. This is a case that we say is more relevant to the task the Tribunal is carrying out today because this was specifically addressing the issue of disclosure. If you look at para. 109, on p.34 of the internal page numbering, the Tribunal refers back to an earlier Judgment on disclosure and makes the point that the primary purpose of that case, as in the present case, "is to identify whether the OFT has made any material error of law …" etc, the JR standard of review.

Then in para. 110:

> "The Tribunal has borne this in mind when considering the issue of recovery and inspection. As we made clear on that occasion, it should not, at least ordinarily, be necessary to go in great depth into the underlying documents in order to establish whether the decision under appeal is soundly based. This is not an occasion for Claymore to seek to rework all of the workings ----"

THE CHAIRMAN: Sorry, can I just check "recovery and inspection", is that "discovery" or is this ----

MS SMITH: I think that must be "discovery", Sir, yes.

THE CHAIRMAN: All right, yes. It is a Scottish case, perhaps it is just ----

MS SMITH: You are absolutely right, I think.

THE CHAIRMAN: -- the Scottish terminology.

MS SMITH: Yes.

> "This is not an occasion for Claymore to seek to rework all of the workings that the OFT made on the basis of the raw material supplied to it."

We say that is a more proper approach in the present context.

Finally, we say that on the raw data - I have already made the point that that affects substantially the question of proportionality. I am afraid this is not in evidence, given that we only received the statement yesterday, but the volume of raw data on instructions is huge. It was received from Healthcode, and it required the CMA to run it. They had to put it on a server because of the volume of the data rather than a normal computer. The cleaning process for the data, as I have said, it is every invoice with each line identified with a price, so the price for drugs, the price for consultancies, the price for ancillary services,

such as newspapers when you are in the hospital, some of those had to be taken out in order to leave the proper price for a treatment.

THE CHAIRMAN: Can I just get clear in my mind the cleaning process? Is that stripping out items from the individual invoices?

MS SMITH: Yes.

THE CHAIRMAN: Or is it taking out outliers after you have done that process or a combination of the two?

MS SMITH: No, the best way, perhaps - rather than me to summarise it - is to refer you to the actual description in the document, the final Decision. It is in Appendix 6.12, Annex A, which is where we go from A6(12.23) to A6(12.0) if that helps.

THE CHAIRMAN: Right, I will read that in my own time.

MS SMITH: That shows that, first, a price is created which excludes things such as consultants' fees and ancillary services. The cleaning of the data is when two filters are applied remove inconsistencies, things that are obviously wrong where, for example, an admission date occurs after a discharge date; all the prices are negative. So taking out stuff that is obviously wrong and then about 3 per cent of patient episodes were excluded from the dataset.

Then there was a further process of identifying the relevant data which is inpatient and day case treatments, excluding outpatient episodes and episodes before 2007 or after 2011, and then further cleaning.

THE CHAIRMAN: All right, let us not take up time on that, I will read that.

MS SMITH: I am instructed that this cleaning process took three people three months.

THE CHAIRMAN: Does the dataset, both the raw data and then the clean data, not continue to exist?

MS SMITH: No, they exist. The datasets exist. I am saying that the size of the raw dataset is huge. It requires a server to run it. The CMA only has two servers. If, for example, we put the raw data into a data room we would probably need to buy a new server because we cannot tie up one of our two servers; other investigations are going on.

THE CHAIRMAN: Certainly.

MS SMITH: It would be a huge undertaking to allow access to this data and it would take a very long time for HCA to process this data if that is what they want to do with it.

THE CHAIRMAN: If the Tribunal were to order that the data be made available presumably we could direct that that be done on the basis that HCA provide their own server to run it?

MS SMITH: The other point is not just the volume of this dataset but the extreme sensitivity of this dataset ----

THE CHAIRMAN: Sorry, and just on the time to process it, that would be very much for HCA to sort themselves out if they cannot do it within the time frame set for the proceedings, they would not be able to use it or they would have to come back with very good explanations why the existing timetable should be postponed.

MS SMITH: Yes, Sir, but I have to stress it would not just impose requirements on HCA. This material, which is extremely sensitive, for the reasons set out in Mr Witcomb's evidence and in my skeleton argument, and supported on behalf of Ms Kreisberger's clients, TLC, this material could not be trawled through off the premises. It contains at a micro-level the prices that HCA's one major competitor in London is charging for all of the services that it offers.

On this point I should say that Ms Rose made some points about Nuffield being a competitor of HCA. They are not. Nuffield do not have any hospitals in Central London. HCA's hospitals are in Central London. Their competitor is TLC.

THE CHAIRMAN: I thought the Nuffield issue of disclosure had gone away.

MS SMITH: Yes, it had, but there were various points that obscured the real position, which is that in London the only real competitor, and Ms Kreisberger will make these points, is the London Clinic, TLC. This is incredibly detailed sensitive information. Certainly at a raw data level, even at a clean data level, it is very sensitive. It could not be looked at off the premises.

THE CHAIRMAN: When you say "off the premises"?

MS SMITH: It would have to be in a data room.

THE CHAIRMAN: Just in terms of practical handling, if the Tribunal did order disclosure ----

MS SMITH: This is obviously all without prejudice to my ----

THE CHAIRMAN: Yes, of course it is, but I just want to get a grip on what the practicalities would involve, not least to assess your disproportionality argument. In principle at least a room could be provided within the CMA, HCA could furnish a server in that room - is this how it would work - and then that room could be established as a data room for people to come in, scrutinise the data and not take it away with them?

MR GLYNN: All having signed the -----

THE CHAIRMAN: Yes, all having signed the adviser disqualification clauses?

MS SMITH: I do not want to respond to this on my feet. May I have a couple of minutes?

THE CHAIRMAN: It is important that we do know, because otherwise we cannot assess your ---
-
MS SMITH: I know, and I need to take instructions on that suggestion. Could I just say, our position on how this disclosure should be done is para.30 of our skeleton argument. It would have to be made in the first instance in a data room, and then any notes or submissions made would have to be put into a super-confidentiality ring.
THE CHAIRMAN: As I understood Ms Rose's position, she was amenable to that as a practical handling approach, that the data room be established, and I will obviously hear from her again in a moment about HCA providing a server, and so on.
MS SMITH: That was not what she said in her skeleton, but it is what she said on her feet, so I will tick that.
THE CHAIRMAN: If the reason why the raw data and then the clean data is being provided is for Dr Mazzarotto to do his own checks of the accuracy of the inputs and to test sensitivity, and so on, at the moment I would have thought that in the first instance those were procedures that could be done within a data room and then, depending on whether anything was brought to light, the question would then arise of how could that be introduced into evidence directly that the Tribunal could use?
MS SMITH: That is what we have addressed in our para.30.
THE CHAIRMAN: I follow that you make all the submissions, you do not resile from them, that this would involve a disproportionate burden, it is not required by the test in judicial review disclosure, but, if we were against you on all of that, that would be a practical way forward?
MS SMITH: I am not sure it would be the only way that we could counter the sensitivity. It would be incredibly burdensome and probably take a long time. It would impact on the timetable.
THE CHAIRMAN: At the moment no one is suggesting there is an impact on timetable. At some level it would be for HCA to fund KPMG to throw the people at it to do it within the time that they want.
MS SMITH: It would not just be that. It would also be the fact that the CMA would have to make a room available, but also a person in that room to make sure that the data was being dealt with properly. Even if the server was being provided by HCA, there would have to be someone there to oversee the data room process. It is not simply a question of leave them to their own devices in a room on their own. The whole point of a data room is that the access to the data is controlled.

THE CHAIRMAN: If we were minded to order disclosure, presumably the parties could then debate the terms of a protocol governing the access.

MS SMITH: That has been done, and it would probably be done along the lines that were put in place for a data room previously.

THE CHAIRMAN: Last time round.

MS SMITH: Definite controls would have to be put in place.

THE CHAIRMAN: I follow all of that, but the fact that it was done before rather indicates that it can be done.

MS SMITH: It was done for a short period of time before. Obviously, without prejudice to all the submissions, it was in a different situation being done for a very different purpose. It was being done for the purpose of ensuring that there was a full investigation of the merits at the time during the inquiry process.

I just want to make the point that it could be done, but the impact on resources and cost and time is not simply HCA throwing people at it, it is the CMA facilitating access to that data room which also has an impact on cost and resources for the CMA.

THE CHAIRMAN: About which we, I do not believe, have evidence.

MS SMITH: We have some evidence, but not for the raw data, because we did not have a chance to respond to that.

THE CHAIRMAN: What is the evidence?

MS SMITH: The evidence on the data room generally is in Mr Witcomb's statement, 51 and 52, towards the very end of his statement under the heading "Practicalities of disclosure", and he addresses the sensitive nature of the material by cross-reference to earlier paragraphs of his witness statement, and then goes on to address it in paras.51 and 52. This is about the clean data not the raw data, which would add another level of complexity.

THE CHAIRMAN: Is there anything further you wanted to say in relation to the disclosure application?

MS SMITH: No, thank you, Sir.

THE CHAIRMAN: Ms Kreisberger?

MS KREISBERGER: Thank you, Sir, I am grateful.

THE CHAIRMAN: I think, with an eye on the clock, we must limit you to ten minutes.

MS KREISBERGER: I will do my best. I was going to suggest a maximum of 15, but I think I can get there in ten. I am certainly not going to duplicate Ms Smith's submissions. There was some confusion at the outset as to where we stood on this application. The reason we

oppose the application and support the CMA on that point is that much of what we are debating today is TLC data.

THE CHAIRMAN: I follow that.

MS KREISBERGER: What I want to do briefly is focus on the type of data being sought that TLC supplied to the CMA, why it is so sensitive and why that is relevant to the analysis of the disclosure application. The Tribunal has seen our written submissions, and I am grateful for the indication that you will be going back to them, Sir.

What I would like to do now is to make a few short responsive points in the light of the skeletons on the following three issues: the approach, the type of data at issue, in particular the distinction we now know is being drawn between raw and clean data, and the question of safeguards. Ms Smith has already raised the issue of the role TLC plays in the market.

Could I just direct the Tribunal to para.9 of our skeleton? We have set it out there. Briefly, this is a David and Goliath market. It is a highly concentrated market. On certain measures, TLC's share of supply is less than a third of that of HCA. There are only a few other much smaller players. That is highly relevant, we say, to the question of whether the large volume of data now being requested should be disclosed.

Turning first to the question of legal principles, Ms Smith took you to *Claymore*. I would like to take you very briefly indeed to two additional paragraphs which are referred to in our skeleton.

THE CHAIRMAN: Why do you not just give us the paragraph numbers?

MS KREISBERGER: The paragraph numbers are 114 and 115 and I can read them very briefly.

> "The need for the party seeking discovery to show necessity, relevancy and proportionality is all the more acute in cases such as the present, where the information concerned is commercially confidential and belongs to a direct competitor of the party seeking access to it. It is well known that Express, Claymore's parent company, and Wiseman are the two principal competitors on the Scottish milk market. Theirs is by all accounts an intense rivalry. Great care is necessary when the issue concerns the potential disclosure of sensitive business secrets by one competitor to another.
>
> Whilst the Tribunal is prepared, in some cases, to order disclosure within a confidentiality ring (as happened earlier in this appeal), such confidentiality rings have disadvantages. There is undoubtedly scope for error. The amount of information disclosed within them should be kept to a minimum necessary to do justice in a case. They should not be overloaded."

Sir, the issue here is the same, we are a direct rival and confidentiality rings are certainly not a perfect panacea.

The Tribunal has also been referred by both parties to the *Sky* case, and I would like to make one point in addition on that case, which is at tab 10 of the authorities bundle. One of the key considerations in that case has not yet been drawn out, Sir, and that is that the confidential material at issue belonged to ITV, and ITV was content for that material to be released into a confidentiality ring in that case. ITV made specific written submissions to the Tribunal to that effect. Sir, I will not take you to the case, but for your note the relevant paragraphs are 7 and 12.

THE CHAIRMAN: Thank you.

MS KREISBERGER: As the Tribunal noted in that case at para.25, the analysis to be adopted is highly context specific and each application must be assessed individually. The analysis in that case will at least in part have been driven by the absence of any objection by ITV. In assessing the necessity and proportionality test, the Tribunal is required to take account of the interests of parties whose data is being disclosed and their right to confidentiality.

Again, Sir, I will not take you to the case. That is in our skeleton, para.11 of the *Ryanair* case, which was also appended to our skeleton. I can hand that up if that would be helpful.

The point, Sir, is that it is a highly relevant point of distinction here with the *Sky* case that TLC do firmly object to the disclosure of the information. That applies to both the raw data and the clean data.

I would like to turn to my second point, and that is access to the raw data and the clean data and the relevant distinction. With the submission of the recent skeletons, we now know that HCA do seek the raw data as well as the clean data, and I would like to make some short general comments on the sensitivity of that data, so it is categories one and two that Ms Rose referred you to at the outset.

The data is highly sensitive. Could I refer you to paras.6 to 9 of our skeleton argument? I will not read them out. In short, we are talking here about the 'Crown Jewels' of pricing data. This is highly disaggregated data which would give a full insight into detailed pricing by TLC for individual treatments and also pricing trends and overall pricing strategy. Just to be clear, the data is no less commercially sensitive after cleaning. The same level of disaggregation when one is talking about treatments - I take the point about aggregation that has been discussed at length - but the point is that the clean data is just as revelatory as regards the information that it contains as the raw data. That is an essential point on

whether to order disclosure at all, and in relation to the debate we are also having on safeguards if the Tribunal is against us on that.

Having said all of that there is an additional issue which firmly militates against disclosure in relation to the raw data, and that is its scope. Could I take the Tribunal to Appendix 6.12? I will not be referring to any sensitive information at all. Could I ask you, Sir, to turn to paras.10 and 11, which deal with identifying the relevant data for the CMA's analysis. This is Annex A to Appendix 6.12, paras.10 and 11. That is where the CMA tell us what they did in the cleaning process. This is highly relevant because what the CMA explains there is that certain data was excluded and that is data which relates to, para. 10(a) out-patient episodes ,and para. 10(b) episodes that either pre-date or post-date the relevant period.

What we learn here, and this is not confidential, is that the proportion of episodes excluded was 83 per cent, so the overwhelming majority of data held by the CC was excluded at that stage, simply on grounds that it was not relevant. Sir, it is our submission that there is no justification for giving HCA's advisers access to all of this irrelevant pricing data on out-patient treatment, or treatments outside the date range. In particular, there is nothing in Dr Mazzarotto's report which suggests that HCA needs to verify the categorisation of out-patient treatments or the date range. If they needed that data they should have specifically said so, and explained why. This is data that has not been disclosed before. It is irrelevant data. It is highly confidential and would be highly damaging to TLC's out-patient business were it to be accidentally disclosed.

MR GLYNN: Is your feeling about the sensitivity affected at all by the fact that it relates only to 2011?

MS KREISBERGER: It is not, sir. That is still data that gives a very clear picture. The individual data is still highly confidential. 2011 is sufficiently recent for it to be sensitive on that basis alone. The other point is that because it is so disaggregated it gives a very clear picture of trends and strategy. What we say is it would be very easy to extrapolate current prices from 2007 to 2011 prices. We maintain it is highly confidential. I am also reminded that price negotiations take place every three years.

THE CHAIRMAN: You need to conclude your submissions quickly.

MS KREISBERGER: Sir, all that HCA have said as to why they need this data is simply that the process of cleaning can lead to errors and there may be systematic differences in the circumstances of the treatments provided. Effectively what HCA are referring to there is

patient characteristics, such as gender, age and length of stay. They do not refer to this issue of irrelevant data.

Two points emerge. Firstly, they are looking for errors in this data, and that form of 'fishing expedition' is plainly unacceptable in the light of *Tweed*. Secondly, and critically, it is not being suggested that the CMA cannot tell the difference between an out-patient episode and an in-patient episode, or whether the date of the episode fell within the relevant date range. So, on that basis they have not met the threshold of necessity and proportionality in respect of what is a great volume of entirely irrelevant data, yet very sensitive data.

My final point is on safeguards. I think I can be very brief. I am grateful for the indication from Ms Rose that they do not now contend that it is disclosure within a confidentiality ring only, so I will not address the points in their skeleton on that. I take that now as common ground. It was set out in their skeleton.

THE CHAIRMAN: I have to say that if disclosure is ordered I think it is pretty clear that there will need to be a step by step approach - data room first, identify what, if anything, comes out, and then the parties will need to address again how to handle that.

MS KREISBERGER: I am grateful for that. Those are my submissions, thank you, Sir.

THE CHAIRMAN: Thank you for doing it so promptly. Yes, Ms Rose. What I suggest is that you take five minutes to reply on this and then we will have to deal as promptly as we can with the expert evidence application.

MS ROSE: It is said that we did not ask for the raw data until yesterday. That is not correct. Our original application was for the underlying data. The original expert report of Dr Mazzarotto, if I can give you the paragraph references, 2.3.4 to 2.3.6, and 2.3.32, you will see that the point that I outlined to you today about aggregation is outlined in 2.3.4 to 6, and that there is specific reference to raw data at 2.3.32.

Indeed, TLC produced a skeleton argument on 4th July, before Dr Mazzarotto's witness statement or our skeleton argument, in which they addressed the question of disclosure of their raw data and the sensitivity of that, so they knew before they received our witness statement or skeleton argument that we were asking for the raw data.

THE CHAIRMAN: That is the TLC skeleton.

MS ROSE: Yes, for today. You will see that that is dated 4th July and they addressed the sensitivity of the raw data before they received our skeleton for today or the witness statement of Dr Mazzarotto. It was not a surprise to anybody.

THE CHAIRMAN: I thought Dr Mazzarotto's latest witness statement was circulated on 2nd July.

MS ROSE: No, it was circulated yesterday, Sir. So they knew it was not a new point.

Why do we need the material? Ground 1, the key question is, how significant is the non-disclosure, and that is the question that was being addressed in *Eisai* in particular. How far were we prejudiced by being deprived of the opportunity to point out flaws? That requires disclosure of the data.

So far as Ground 2 is concerned, we simply are unable to identify whether there are flaws in the model sufficient to render it unsustainable without sight of the model. For all the reasons expressed in *Eisai* and the reasons that are set out in the Competition Commission's own guidance. What is said in response to this by Ms Smith is, "Oh, well, *Eisai* and the Competition Commission's guidance are setting out good practice at the investigation stage not at the judicial review stage". That puts us in a *Catch 22* situation because what has happened to us is we were given no disclosure at all of this material during the investigation stage, which is why we say that this Tribunal now needs to consider these questions at the judicial review stage. What is now being said is because it is a judicial review we should not get it at this stage either. That is the reason why I say that that approach is an error of law which would amount to a breach of our rights, both as a matter of common law, fairness and under the Convention, because it would deprive us of any opportunity to identify flaws in the model.

Of course, the standards of fairness to be applied by this Tribunal ought to be no less than the standards of fairness which the Court of Appeal in *Eisai* said should be applied to an administrative decision maker.

So far as Ground 5 is concerned - that is the challenge to the proportionality of the remedy - the essence of the case on proportionality that is mounted by the CMA is that it is said "Divestment of these hospitals would lead to a price fall for consumers of this amount". That is based on this pricing analysis. If they are wrong about that, their remedy is disproportionate, and that means that the substance of the pricing analysis is directly in issue in this case.

So far as the King Edward VII Hospital is concerned, Ms Smith referred to para.39 at p.6.12.13, and she said that the reason why it was only average was at footnote 38. I have read footnote 38 and it sheds no light at all on the matter, and anyway it does not answer our point which is that we need to see the insurers' specific analysis to see whether or not it is

correct that there is a price difference for individual insurers in relation to the King Edward VII Hospital.

It was suggested that we wanted this material to see if there was an arithmetic error. Of course, if there was an arithmetic error that would be a classic instance of irrationality. It is not just about the arithmetic, it is about whether the regression is spurious, whether the correlation is spurious. That means looking at the coefficients. Are the signs in the right direction? Are they significant in the way you would expect them to be? If they are not, it suggests that there is an underlying problem with the model.

Is the fit good? Is the fit good across the board, or is it clustered in relation to particular treatments? Are those treatments where there is a wide variability? All of those points we cannot address without the results.

Very briefly, *Eisai*: *Eisai* at para.44, it was said by Ms Smith that there had been agreement in that case that sensitivity testing was important, and that it could not be undertaken without the model. Absolutely wrong, the stance taken by NICE in the *Eisai* case was that it was unnecessary for there to be disclosure to permit sensitivity testing because that was simply second guessing the regulator. That is at para.45 of the *Eisai*. That argument was rejected by the Court of Appeal in that case.

Finally, on proportionality, the key paragraph, 52, of Mr Witcomb's witness statement makes it clear that a data room could be set up within a week or two. It is difficult in those circumstances to see why this is said to be unmanageable. It is said that the raw data is a lot of data. Yes, but it is on a computer database and it is simply one more database on the server.

The other argument on proportionality relates to the sensitivity of the data.

THE CHAIRMAN: There was another point, which is about the delay of analysis. If disclosure were to be ordered, I think it would need to be on terms that made it clear that that was not to hold up the timetable that has already been set, because that timetable already, if it transpires that there is not any unlawfulness in the Decision, is benefiting your clients through delaying the remedy which has been found to be required. If that analysis is ----

MS ROSE: Sir, I would like to apply on that, because until we have seen what there is it is difficult for us to react, and there is an underlying ----

THE CHAIRMAN: I think then you need to address us under the heading of proportionality on what you say the delay is likely to be, because if ----

MS ROSE: Sir, I am unable to say without having access to any of the data.

THE CHAIRMAN: You have got Dr Mazzarotto sitting next to you.

MS ROSE: Dr Mazzarotto has not had access to the data. [Pause for Ms Rose to take instructions].

THE CHAIRMAN: No, but he has heard the descriptions of what the data is.

MS ROSE: We think it would probably take about a month to analyse the material, which should not delay the hearing that is due to take place in January provided we get prompt disclosure.

THE CHAIRMAN: Thank you.

MS ROSE: The issue of confidentiality and sensitivity: yes, of course, we accept this data is sensitive and we are happy to accommodate confidentiality by any means that we reasonably can. It is, however, of course the case that it is not now up to minute data. The latest data is 2011, the oldest data is 2007.

More fundamentally on proportionality, the importance of this decision for my clients is profound. We are being asked to divest ourselves of about a third of our business. It is hard to say exactly how much it is worth, but we are in a ball park figure of something around £500 million. In that context, in my submission, to complain about administrative inconvenience and delay is, in itself, disproportionate.

THE CHAIRMAN: Yes.

MS ROSE: Can I now turn to the question of expert evidence?

THE CHAIRMAN: Yes. You have ten minutes on that.

MS ROSE: There is obviously a fairly basic point which is that if the Tribunal is going to order this disclosure, in our submission expert evidence will be inevitable because what will happen is ----

THE CHAIRMAN: I do not follow that. Anyway, at the moment the application is for the existing report. I think we should focus on that at this stage. If things change later we will need to consider matters.

MS ROSE: Sir, can I make it clear that we will be making an application for permission to adduce additional expert evidence when we have seen the report, and in any event in the light of ----

THE CHAIRMAN: You can make that clear, but we are not going to deal with that now. How could we possibly do so?

MS ROSE: Very well, Sir. So far as the original report is concerned, the reason why we seek expert evidence is set out in our original skeleton argument, paras.17 to 32.

THE CHAIRMAN: And indeed in your notice of application.

MS ROSE: And in our notice of application. Just to make a couple of points, first of all, *Eisai*: from the passages that you saw earlier, you will have seen how expert evidence was used in

that case to demonstrate the significance of the omissions in the disclosure provided in the administrative process. Section 2 of Dr Mazzarotto's report performs that function. It explains the significance of the non-disclosure of the IPA.

Can I just turn to *Lafarge* quickly? This is the common authorities bundle, tab 20. If we go to para.10, what is said in *Lafarge* is:

> "Whilst, exceptionally, expert evidence may be admissible and useful as recognised in *Lynch* in order to enable the reviewing court to understand technical issues, it does not seem to us that this is such a case."

We say our case is distinguishable. This is a case in which there are highly technical issues arising out of econometric analysis for which expert evidence is necessary.

The second point in *Lafarge* is that the experts in *Lafarge* have had the opportunity to submit expert submissions during the investigatory process. The point was made by the Tribunal at para.12:

> "We already have the benefit of Professor Higson's earlier reports which cover much of the same ground as his latest report."

We are not in that position because the material was not disclosed in the investigative process and therefore it is necessary for the material to be addressed now.

Sir, the final point I want to make is in relation to *Powys*. *Powys* makes it clear that fresh evidence is admissible in judicial review where there is a question of jurisdictional fact, and also where there is an allegation of procedural unfairness. You have seen already my submissions that this is a case of procedural unfairness, and it is like *Eisai* and expert evidence is admissible for that purpose.

In my submission, it is also strongly arguable that this is a case of jurisdictional fact, because the question here was, as a matter of fact is there an adverse effect on competition, namely is there high pricing and is that pricing caused by high market share? That gives rise to the jurisdiction that the CMA has to impose a remedy. We say that is an objective question of fact that has to be determined and fresh evidence is admissible for that purpose.

We will certainly be seeking permission to adduce fresh evidence on the basis of the unredacted report and, if we get disclosure, on the basis of what is revealed in the data room.

THE CHAIRMAN: I have already said we cannot possibly deal with those.

MS ROSE: I understand, Sir. I will leave that question for now.

THE CHAIRMAN: (After conferring) Thank you very much. Ms Smith, we do not need to hear from you in relation to the expert report.

The application to adduce the expert report will be refused. We will give reasons for that in due course.

As I said before, we are not in a position to give a ruling now in relation to the disclosure application. We have been given quite a lot of homework to do and we are going to go away and do that and we will produce our decision in due course with reasons for it.

It remains for me to thank everyone ----

MS SMITH: I hesitate to rise, but just on that last point, Sir, something that does arise out of your judgment on the expert evidence. Obviously the notice of appeal will have to be amended to remove references to the expert report of Dr Mazzarotto and we would ask for that to be done within seven days.

THE CHAIRMAN: Let me just check with Ms Rose. Is there a difficulty with that?

MS ROSE: Sir, I am not sure that it will need to be amended, because we incorporated the expert report by reference into the notice of appeal in any event.

THE CHAIRMAN: The expert report is not in evidence, but I think it is just cross-references, as I read the notice of appeal. It is a question of deleting -----

MS ROSE: Yes, and we adopted the expert report as part of the notice of appeal expressly in the notice of appeal.

THE CHAIRMAN: The expert report is not being admitted.

MS ROSE: I understand that.

THE CHAIRMAN: I think that all that needs to happen, but you tell me if I am wrong, is that the notice of application does need to be re-served, but all that needs to be done, I think, at the moment is that the cross-references to an expert report, which is not in evidence, just need to be deleted.

MS ROSE: Sir, can I suggest that it would be more efficient for us to amend our notice of appeal in one go, because there will be significant amendments to be made in the light of the unredacted report that is being served.

THE CHAIRMAN: At the moment I am not attracted by that. We have reached a point where it is clear that the notice of application does need to be amended. I have already indicated that that can be done, as it seems to me, in very short order. I cannot see that there is a good reason for not doing that so that that is in proper form at least. Whatever may happen hereafter - you say that lots of things are going to happen hereafter, but we just do not know at the moment.

MS ROSE: It is only that we are going to have to amend the same document twice.

THE CHAIRMAN: Yes, absolutely, but I think I am right in saying that the Tribunal would prefer that the notice of application be put in proper form now concluding upon the ruling that has been given on the expert report. The suggestion is that that be done within seven days, and that seems reasonable to me at the moment, but is there anything you want to say about that?

MS ROSE: We do not think we can do it in seven days, I am sorry, we think we will need 14.

MS SMITH: Sir, that suggests that there are going to be amendments far beyond striking out paragraphs, and we want to know ----

THE CHAIRMAN: Ms Rose, what we are talking about are amendments purely consequential upon this ruling on the expert report.

MS ROSE: If material cannot simply be incorporated by reference to the expert report, we may have to draft fresh submissions in the notice of appeal that makes the same points through the agency of a notice of appeal.

THE CHAIRMAN: I have to say that, at the moment, I thought you had made the points of substance and the ----

MS ROSE: We will need to go through the notice of appeal carefully and check that.

THE CHAIRMAN: How long do you say you need?

MS ROSE: We say 14 days, Sir.

MS SMITH: Sir, we are up against a deadline at the moment of 15th August, and we are working on the defence. We are drafting the defence at the moment. The suggestion that we are going to have to draft a defence that responds to the expert report being cut and pasted into the notice of appeal when you have said the expert report is not to be admitted ----

MS ROSE: I am sorry, but it cannot possibly be the position that the Tribunal is saying that we are barred from making submissions.

THE CHAIRMAN: I am sorry, Ms Rose, I was conferring with my colleagues. (After a pause) An amended notice of application must be filed within seven days, and the amendments are to be limited to those consequential upon the ruling that has been made.

MS ROSE: Sir, finally, I would like permission to appeal that ruling.

THE CHAIRMAN: It is a case management ruling. We refuse permission to appeal. So it remains for me ----

MS ROSE: Can you give us an indication of when we are likely to get a decision on the disclosure application?

THE CHAIRMAN: As soon as maybe.

MS ROSE: Is it likely to be before the August break?

THE CHAIRMAN: Yes.

MS ROSE: Thank you very much.

THE CHAIRMAN: Is there anything else that we need to deal with now?

MS SMITH: No, Sir, thank you.

THE CHAIRMAN: It remains for me to thank all counsel once again for their assistance and we will rise now. Thank you.

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