IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25th June 2014

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

Sitting as a Tribunal in England and Wales

BETWEEN:

AXA PPP HEALTHCARE LIMITED

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

HCA INTERNATIONAL LIMITED
FEDERATION OF INDEPENDENT PRACTITIONER ORGANISATIONS
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

Proposed Interveners

AND BETWEEN:

HCA INTERNATIONAL LIMITED

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

AXA PPP HEALTHCARE LIMITED
THE LONDON CLINIC
BUPA INSURANCE LIMITED

Proposed Interveners

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Applicant

- v -

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Respondent

- and -

AXA PPP HEALTHCARE LIMITED

Proposed Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

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

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

Ms Emily Neill (instructed by Watson Farley & Williams LLP) appeared for the Federation of Independent Practitioner Organisations.

Mr Rob Williams (instructed by the Treasury Solicitor) appeared for the Competition and Markets Authority.

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

Mr Aidan Robertson QC (instructed by the Legal Department) appeared for the British Medical Association.

Mr Tim Ward QC (instructed by Slaughter and May) appeared for BUPA Insurance Limited.

Ms Anneli Howard (instructed by Hogan Lovells International LLP) appeared for the Association of Anaesthetists of Great Britain and Ireland.

Ms Bernardine Adkins (of Wragge Lawrence Graham & Co LLP) appeared on behalf of Guy's and St Thomas' NHS Foundation Trust.

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THE CHAIRMAN: Good afternoon.

MR WILLIAMS: Sir, I appear for the Competition & Markets Authority. Because we are rather in the middle of all of this, I have been asked to introduce everybody. My learned friends Ms Rose and Ms Boyd appear for HCA. My learned friends Ms Bacon and Ms Love appear for AXA PPP. Ms Neill appears for FIPO on this occasion. Turning to the interveners, and I cannot necessarily claim to be sure that I am going to catch all of them, my learned friend Ms Kreisberger appears for The London Clinic, my learned friend Mr Ward appears for BUPA, my learned friend Mr Robertson appears for the BMA. Ms Howard appears for the Association of Anaesthetists for Great Britain and Ireland. I believe there may be another intervention by Guy's and St Thomas' hospital, which I received notice of in the last 30 seconds.

THE CHAIRMAN: Is somebody here for that? Bernardine Adkins?

MS ADKINS: Yes, I am here.

THE CHAIRMAN: Yes, I wanted to check whether people had received that intervention which came in relatively late.

MS BACON: They have not received it, yet.

MR WILLIAMS: We have not seen it. I have got no instructions at the moment, but we might be able to deal with it at some point during the hearing.

THE CHAIRMAN: Let us see how we go. I and my colleagues were wondering whether a sensible way forward, just because we have got so many parties and so many issues, is if we run through giving preliminary indications where we can of what we think would be a sensible way forward, but that is just to lay out a menu which people can come back at as they wish.

The first item on the agenda, forum: all parties agree that the appropriate forum is England and Wales, and we would so order.

Interventions: there is a series of requests for permission to intervene, which I will run through in a moment. What we have in mind is to grant permission to intervene but give directions or, at any rate, require the intervening parties to co-operate to try to produce, so far as they can, agreed statements of intervention, leaving them with the option, in so far as their case is not fully covered by whatever the agreed statement of intervention is, to add additional representations.

What we have in mind is that it is likely - we will not direct this now, but this is how we envisage it proceeding - that groups of interveners should identify themselves essentially as those seeking to argue for the same broad outcome, or in the same general interest. Some

interveners are intervening to support the CMA in relation to one or other of what seem to us to be the germane topics of the litigation, which are referred as the divestiture issues in relation to hospitals and the orders in relation to consultants. What we would like to happen is for interveners to identify whether they are seeking to intervene in relation to one or both of those topics, then see whether they are intervening to support the CMA in relation to those topics or to join in the attack on the CMA in relation to those topics, and, if they are supporting the CMA, to identify those others who are also supporting the CMA and to seek, as I say, to agree on that topic and produce amongst that group of interveners an agreed statement of intervention so far as that can be agreed, but with allowance for individual points to be taken in addition to that. Conversely, if they have identified as being opposed to the CMA in relation to that issue, to identify the other interveners who are broadly in that camp and seek to do the same in reverse, agree a common statement in so far as they can, and add anything additional which is unique to their particular position.

Let us pause there. Does anyone have difficulties with proceeding in that way?

MR WILLIAMS: Sir, we think we know at the moment who intervenes in support of us and who intervenes against us on which issues. We have certainly got no objection to, in a sense, that being formalised in the way that you have described.

The interventions that are against us are more time sensitive from our point of view than the interventions that are in support of us. It just occurs to me that sometimes co-operation can take longer than individual submissions.

THE CHAIRMAN: That had occurred to me as well.

MR WILLIAMS: The thought that goes through my mind is whether, in relation to those interventions, which is The London Clinic and BUPA, it might be simpler for them to put those interventions in as soon as possible.

THE CHAIRMAN: At the moment, my reaction is that they should at least have a preliminary meeting to see if they think there is a viable way forward within the timetable, which we will come on to discuss. If there is, it is going to make case management later on easier. If there is not a way in which they think they can sensibly co-operate within that timeframe - and I do take your point that you need to know what their case is going to be put your defence in - then it may be that they try, but with the best will in the world it does not work out, in which case we would understand that position. I still think they should try in the first instance. We will come back to dates.

Does anyone want to make observations about that?

MR ROBERTSON: My Lord, on behalf of the BMA we see the sense of trying to agree a common line with those other interveners who are intervening to support the CMA, as we are, on the consultant issue. That is what we are limiting ourselves to.

There is an issue about agreeing a statement of intervention where you have got three organisations each with their own governance structures. There may be an issue as to the time it takes to agree a statement of intervention. This is why we suggested to the Tribunal this morning in an email that I hope you received ----

THE CHAIRMAN: I did not, but I am sure someone did.

MR ROBERTSON: It was sent to the Registry at about 11.30 this morning.

THE CHAIRMAN: It was not a criticism, I do not know what you are about to say.

MR ROBERTSON: We pointed the Tribunal to how the issue of multiple interventions was dealt with in the Mobile Number Portability case, *Vodafone v. Ofcom* in 2008. There the interveners served separate statements of intervention, but were then directed to agree a common approach on agreed issues for the purposes of the hearing. So the co-ordination between the interveners took place after the statements of intervention had gone in for the purposes of the hearing. That was a looser arrangement than has been imposed in the *Skyscanner* case. A common statement of intervention has been proposed in that case because they are operating to a very short deadline, as the Chairman made clear.

THE CHAIRMAN: It is helpful that you make these points. What I would like to propose is that perhaps we park this issue for the moment. You have heard roughly what we think might be a sensible way forward and we come back to it when we talk about timetable, because that may affect things. I can see that if parties feel that they are going to be bumping against the timetable if they are being asked to co-operate, and so on, a possible way forward for them is similar to the response I was giving to Mr Williams previously, at least to have a preliminary meeting to see what scope they think may exist within the relevant timeframe. If, with the best will in the world, they do not think that is going to be workable, I am not envisaging at this stage that the Tribunal would make an order that they do anything in particular. We are giving an indication of what we would expect to happen.

At the moment what I am envisaging is that the Tribunal just gives permission to intervene. At the moment, all the interventions seem to us to be appropriate and we would be minded to do that, with the question of directions in relation to those interventions, as to how they are prepared, being adjourned, although a timetable will be laid down, but with our invitation to the parties to seek to discuss between themselves in the first instance before they finally decide how to approach matters.

If, as I say, with the best will in the world, they cannot achieve it by the time they have got to put in their interventions, then a fall-back for us might be just to receive the individual interventions and then to make some order along the lines that you indicate.

MR ROBERTSON: Sir, we would be content with that approach.

THE CHAIRMAN: As I say, what I propose to do on that is just leave that there for the moment unless anyone wants to make particular submissions on it. We will come back to it in the context of the timetable.

Just running through the interventions that we have received, we have got HCA's request to intervene in support of the CMA in AXA's application, FIPO's request to intervene in support of the CMA in AXA's application, and The London Clinic's request to intervene in support of AXA in AXA's application. That goes back to Mr Williams' point that, in effect, The London Clinic are opposing parties to the CMA in that application. Then we have BMA's request to intervene in support of the CMA in AXA's application, BUPA's request to intervene in support of AXA in that application. That is going to put BUPA in the opposing CMA camp. We have AAGBI's request to intervene in support of the CMA in that application. Now, as has been mentioned, there is the Guy's application to intervene. That application is not focused at the moment on particular issues and does not identify on which side Guy's are intervening, but I rather infer that Guy's are interested in relation to the divestiture issue, and are likely to be intervening effectively in support of the CMA.

MS ADKINS: That is correct.

THE CHAIRMAN: I think that is helpful to know. Where I have been talking about interveners and which camp they are in, that helps others to identify where Guy's are coming from.

Those are the interventions that we have received in relation to AXA's application.

In relation to HCA's application, we have AXA's request to intervene in support of the CMA, The London Clinic's request to intervene in support of the CMA, and BUPA's request to intervene in support of the CMA on that application.

Then on FIPO's application we have AXA's request to intervene in support of the CMA.

That is the list of requests to intervene that I have. Do shout if anyone thinks there are other ones. As I say, we are proposing to give permission for all those interventions. Again, shout if you think that is not the thing to do.

I will come back later to the question of what directions should be set and the timetable for that.

The next matter I have got on our agenda is the interim relief application. Here, so far as the Tribunal is concerned, we are content with the position that the CMA and HCA had essentially agreed between themselves.

Yes, Ms Rose?

MS ROSE: Sir, I am happy to tell you that we have, in fact, subject to your approval, agreed a draft order, if I can hand that up.

THE CHAIRMAN: Let us deal with that now. If no one else has any opposing submissions to make, we will make that order now. Have you seen this, Mr Williams?

MR WILLIAMS: It is agreed, Sir.

THE CHAIRMAN: Let me cast my eye over it. Ms Rose, do you have other copies?

MS ROSE: Yes, we do, Sir. (Same handed)

THE CHAIRMAN: Yes, we are happy with that and we make that order. Thank you very much for agreeing it.

The next topic that we have relates to the preliminary issue. On that, Ms Rose, we keep an open mind on the points, but I have to say at the moment we are not overly impressed by HCA's application to parcel off a preliminary issue. We can come back to that. I will continue going through the other issues because then people know where the road map is going. You can come back to us on that. We have noted that it was a proposal which did not attract any support from anyone else.

Then we come on to the question of how the applications should be heard. In relation to this, our provisional view is that there should be one hearing for all the applications, and in due course we will invite the parties, after the statements of case come in and are exchanged, to consider a timetable within which that hearing will take place. At the moment, what we envisage as likely to be the sensible course is, broadly speaking, a topic based division of the hearing time with the divestiture being taken first. What we have in mind is that all parties with an interest in that issue would make their submissions in relation to that issue in the first phase of the hearing, and then the hearing would move on to the consultant issues for the latter part. Again, it would probably be the same format, all parties with an interest in that topic would make all their submissions in that phase, but formally it would be one conjoined hearing.

That is what we, at the moment, have in mind as being likely to be the sensible way forward. In terms of the timetable for that what we have in mind is six days for the totality with a broad indication of being four days for the divestiture issues and two days for the consultant issues. Does anyone have any observations they want to make about that?

MS NEILL: Sir, I represent FIPO. We have a number of observations. It was not clear to me that was also in relation to our application or whether that was in relation to simply HCA?

THE CHAIRMAN: No, that is in relation to all applications.

MS NEILL: All applications. We have issues which are related to the consultant issues, but also we have points relating to the PMI decision, so a further issue, and that would need to be addressed as well.

THE CHAIRMAN: Just help me, the PMI decision?

MS NEILL: The PMI decision, it is in our challenge to the finding in the final report that the PMIs, the private medical insurers, do not have market power which creates an adverse effect on competition. So that is another issue.

THE CHAIRMAN: I have to say that, in my mind, I was treating that as something within the consultant issues. I will check with my colleagues that that is what they were thinking. Yes, Ms Bacon?

MS BACON: Sir, we have a concern about the allocation of time. FIPO has estimated that its two different consultant issues are likely to have one and a half days, and we had envisaged that our appeal would take, overall, two to three days - so let us say one to one and a half days on the consultant issues. We now know that we have a very large number of interveners on the consultant issues' side of the case. So far there are four against us, and BUPA in favour of us. I am concerned at the allocation of only two days for those issues, given the large number of interveners, and that FIPO had estimated that its appeal alone would take one and a half days. I would have thought that ----

THE CHAIRMAN: Just to clarify, the interveners do not at the moment have permission to intervene orally.

MS BACON: I understand. Even leaving that aside, I would have thought that at least three days ought to be allocated to that in order to ----

THE CHAIRMAN: To the consultant issues?

MS BACON: To the consultant issues, yes. So our grounds 3 to 5, and all of the opposed grounds.

THE CHAIRMAN: Right. Anyone else want to say anything?

MR WILLIAMS: Yes, sir, the only thought that goes through my mind is whether a day in reserve might be useful. I am sure that, in a sense, cuts against your plan for a firm timetable for the hearing. We have adopted that approach in the *Lafarge* appeal, in a sense just to create a degree of flexibility with looking ahead to the hearing. I only mention it as a suggestion.

THE CHAIRMAN: Anyone else want to make any observations?

MS ROSE: Yes, Sir, I would have thought that six days in total might be a little tight, particularly given what Ms Bacon has just said about the consultant issues. If the implication of that was that there were only going to be three days for our appeal and for the parts of the AXA appeal ----

THE CHAIRMAN: All right, it is not necessarily helpful to divide it up by appeal, it is by topic. As I understand it, your appeal is essentially in relation to the first topic.

MS ROSE: It is only in relation to the divestiture, yes.

THE CHAIRMAN: So you are getting four days for that.

MS ROSE: Provided the suggestion was not that we remained within the six days, so we were going to be cut down to three days.

THE CHAIRMAN: What we were suggesting ----

MS ROSE: Is an extra day.

THE CHAIRMAN: No, is four days for you and two days for the consultant issues.

MS ROSE: Yes, and the other thing is that I hope that the Tribunal would not take it amiss if we did not necessarily attend for the consultant issues because we are not intervening on those.

THE CHAIRMAN: No, one reason for intimating that this is how we think at the moment it would be sensible to divide up the hearing is so that parties can have a reasonable understanding of what is going to be argued about and when and can choose whether they are represented for that phase or not. We understand that people do not want to come along to listen to the argument in relation to something in which they are not very interested. Yes, Mr Ward?

MR WARD: Sir, on behalf of BUPA, I think we share Ms Bacon's concern that two days might be too tight for the consultant issues. If there was scope for a third day, that would be very welcome.

MS NEILL: Sir, we would agree with that.

THE CHAIRMAN: All right. Anyone else? Very well, the case will be listed, when we come to the timetable, for seven days, with the understanding at this stage that it will be four days for the divestiture issues and three days for the consultant issues. Thank you.

The next topic that we have on our agenda relates to evidence and confidentiality. First of all, we have applications for disclosure of the final report in various guises, and I think an application from FIPO for the full thing. Have you reconsidered that?

MS NEILL: Sir, we have been slightly been misunderstood on that. We were making a suggestion that there might be convenient course to have the full final report disclosed were

there to be a confidentiality ring which was designed in a suitable way. We do not pursue that. Obviously the CMA does not consider it suitable.

We have, however, taken up their offer that they would consider a focused application for disclosure by us, and we have indicated a handful of passages in that regard, but we are not proposing to deal with that today, we think it can be dealt with in correspondence.

MR WILLIAMS: The refined request is agreed, Sir.

THE CHAIRMAN: This is what we think provisionally should happen. It will be a nightmare if we have different versions of the report in different redacted forms floating around, available to some parties but not others in the course of this hearing, particularly where everyone is more or less intervening in relation to everyone else's case. We think there should be one common redacted version which is released generally into the confidentiality ring which would have -- I am sorry, Ms Bacon?

MS BACON: Is that redacted or unredacted?

THE CHAIRMAN: Sorry, when I talk about redacted - there are three versions theoretically. There is the complete all singing, all dancing version, which is confidential. There is the completely open version, which is fully redacted. What I am intending to talk about at the moment is a half way redacted version which would include and make available to those within the confidentiality ring all the confidential parts of the report which are relevant to the determination of the applications that we have to determine, but which would not include every confidential bit of information, including items of confidential information which are not relevant to the applications. I am sorry, that is what I mean by the redacted version. I will call it the semi-redacted version. It is one in the middle.

What I am very concerned that we do not have is about four or five versions of the semi-redacted version all in different form. As I say, our provisional view is that there should be one semi-redacted version, which would include all material of a confidential nature which is going to be relevant for determination of any of the issues in the applications. That semi-redacted version would be released generally into the confidentiality ring. Because it would include a degree of sensitive information, at the moment we think that the confidentiality ring should be bound by the adviser disqualification clause - if you like, it is *quid pro quo* for the ambit of the confidential information that would be disclosed. Yes, Mr Williams?

MR WILLIAMS: Sir, the problem we anticipate, or the potential problem we anticipate with that, is that, for example, a party in the position of AXA will need access to some information for the purposes of its application, but may not want to pay the price of signing up to the adviser disqualification clause simply for the purposes of its intervention in HCA's

application. It may, therefore, take a decision not to have access to that material because of the conditions that are attached to it. If there were only one version of the report with one set of conditions attached to it then it would not be open to a party in the position of AXA to look at the material that it wants to look at, but not to have access to other material.

THE CHAIRMAN: They might have to abandon their application.

MS BACON: Sir, I am not quite sure what your last remark was intended to signify.

THE CHAIRMAN: If the options are that you can have the material in the semi-redacted form on the basis of the protections put in place to safeguard confidential information, you would have that, or you would not be able to pursue your application.

MS BACON: To intervene? Sir, can I perhaps set out our position. We actually envisaged potentially taking the course that my learned friend has just outlined. We understood that it was agreed by the CMA that only a certain amount of the data, particularly relating to the pricing analysis, needed to go into the super-confidentiality ring, if you like, subject to the adviser disqualification clause. The reason why that data needed to go into the super-confidentiality ring was that it had been previously disclosed only in the data room. We never had access to the data room in the first place. We may well take the course that in relation to that data we choose not to see it. We, therefore, pursue our intervention but we just make it on the basis of the redacted versions of the material that we have seen.

Equally, we may choose to nominate a different, for example, economic expert to look at that material in order to avoid the conflict problems.

We had envisaged that if the super-confidentiality ring option were pursued it should be as the CMA has, itself, indicated, limited only to those data which were particularly sensitive, and particularly those data that were originally disclosed into the data room.

As far as we understand, for the rest the CMA is content that a normal confidentiality ring should apply.

THE CHAIRMAN: How would that work in practice?

MS POTTER: Can we perhaps clarify whether if the sections of the report that people have requested across the board were put into a confidentiality ring, would that give rise to any issue about a super-confidentiality ring? Are we saying that it is if the underlying data were to be disclosed?

MR WILLIAMS: Broadly speaking, the material that we are prepared to disclose in connection with the HCA application includes very sensitive pricing data. It is that particular data, plus another category of data relating to bargaining power, in relation to which we say that the adviser disqualification clause is required. So it is only the data pertaining to some of

HCA's complaint. We were not asking for the same level of protection in relation to the data which is the subject of AXA's request, because it is confidential data but of a different level of sensitivity.

THE CHAIRMAN: AXA have requested, have they not, to intervene in HCA's application?

MR WILLIAMS: That is right, and so what we have envisaged, if there were two rings - and I do hear what you say, Sir, about the disadvantages - it would be open to AXA to participate in the ring relating to its application and to opt out of or put different personnel into the ring relating to HCA's application, so that, in a sense, an adviser was not placed in position of having to sign up to the confidentiality ring on one basis for everything.

MS POTTER: Can we perhaps clarify further. Are we talking about appendices in terms of the bits of the report. How self-contained are these particular elements?

MR WILLIAMS: It is certainly in relation to the appendices. Can I just take instructions as to how far the most sensitive data is in the main body of the report? (After a pause) It is in the main body of the report.

THE CHAIRMAN: At the moment, I think we have got severe reservations about what Ms Bacon is suggesting just in terms of workability of the hearing. I will come back to it in a moment. Let us hear what everyone else has to say.

MR WARD: Sir, if I may make just one observation about this, we have not heard about this proposal before today. That is not a complaint, we only served our application to intervene yesterday. Might I ask that the directions make provision for a period of reflection for people in the position of my client who might want to consider, firstly, whether to enter the confidentiality ring at all, and, if so, whether to appoint separate advisers if the adviser disqualification clause is going to bite?

THE CHAIRMAN: I am not necessarily opposed to that, but how would that work? Would you then take a decision not to intervene after all?

MR WARD: Or to confine the intervention to matters that are in the non-confidential version of the decision.

THE CHAIRMAN: I suppose that we could live with interventions in writing. One of our concerns is that the hearing is at risk of becoming unmanageable if we are having to always be self-policing as to what can be said, what cannot be said, whether people are going to go out of the room, come back into the room. I can see that, for interveners who wish to consider not entering into the confidentiality ring and receiving the additional information, and particularly if they are willing to confine their interventions to submissions in writing, that is a practical way forward.

MR WARD: Sir, I, of course, see entirely the concerns that this raises, and really all I ask is this: ordinarily, one tries to agree the confidentiality ring immediately following a case management conference so that confidential versions can go into circulation. I can see that the complexities that this raises will require at least a little period of reflection for my clients, so really at this stage only I am suggesting that we can have perhaps, say, a week before having to sign up to the ring?

THE CHAIRMAN: All right. Yes, Ms Rose?

MS ROSE: Sir, we share your concerns about the impact of this suggestion on the manageability of the hearing. I must say, it is the first we had heard of Ms Bacon's opposition, and we do think it could be very problematic having a situation in which there are people intervening in our appeal who may or may not be able to see particular parts of the report.

We are also concerned about the suggestion that there should be a delay before the confidentiality ring is finalised and before the unredacted report is provided to us, because we are currently in a situation where we may be seeking to amend our notice of appeal.

THE CHAIRMAN: I had not understood what Mr Ward was saying as indicating that there should be any delay in establishing a confidentiality ring so far as the main applicants are concerned in relation to information affecting them. My understanding was that he was saying that some interveners might want to take stock before they commit themselves and assume what may be onerous obligations in relation to that.

MS BACON: Of course they do not have to intervene, it is a matter for them.

THE CHAIRMAN: Or they can modulate the form of the intervention, as I was putting to Mr Ward. I do not think you need to be concerned that we are about to say that you will not get the semi-redacted version as promptly as possible.

MS ROSE: I am grateful.

THE CHAIRMAN: Ms Bacon, I will come back to you. Let me just go along the row just to get views that they want to communicate. Yes?

MS KREISBERGER: Sir, we support BUPA's proposal, as to Mr Ward's suggestion of the period of reflection, we are in the same position. The only concern we have is that if the view was taken that we did not want to enter the super-confidentiality ring, not intervening might not be the remedy given the topic by topic approach. We fully support the topic by topic approach, and we would certainly want to be involved in the divestiture part of the hearing. Even if we were not involved in the HCA case in relation to divestiture, I could see there could be an issue there.

THE CHAIRMAN: It is my fault, but you have lost me a little bit. Why could you not do what Mr Ward was contemplating, that you do not go into the confidentiality ring, therefore you are just left with the existing open form of the report, but you make your submissions in intervention in relation to topics in writing based on that open report?

MS KREISBERGER: We have no difficulty with the intervention in writing, but of course we are not pre-determining the question of oral submissions. You raised the issue of having to leave the room if we were present.

THE CHAIRMAN: That is something that I, at the moment, do not wish to happen.

MS KREISBERGER: We appreciate that fully, but if we were present as an intervener in AXA's case in relation to divestiture, we would be potentially in difficulty if we have only seen the open report, and we are given permission to make oral submissions. That is simply the point.

THE CHAIRMAN: Yes, you would. At the moment what I am contemplating is that you be given permission to make oral submissions specifically on the basis that you had entered into the confidentiality ring - in other words, it may be that the price for coming along to make oral submissions in a hearing which is to avoid, in the interests of manageability, people ferrying in and out, depending on what version of the report is being looked at, that you enter into the confidentiality ring.

MS KREISBERGER: That is understood. We simply put the marker down that not intervening in the HCA appeal would not be the remedy.

THE CHAIRMAN: That is specifically why I canvassed with Mr Ward the possibility of written interventions based on the open report where people did not have to assume the obligations associated with the confidentiality ring.

MS KREISBERGER: That is understood.

THE CHAIRMAN: Ms Bacon?

MS BACON: I am sorry, I have a concern here that the Tribunal may be under a misapprehension as to the division of the confidential information. This is not a question as far as we are concerned about our intervention in HCA solely. We have got our appeal to make, and in our own appeal we do not request anything that falls into the super-confidentiality category. So it is not a question of us paying the price of a disqualification clause in order to make an intervention. We are being told that, in order to pursue our own appeal, which does not require any of that information, and which simply requires disclosure of three tables, or a table and two figures, which the CMA does not consider to fall into the super-confidentiality category, we are being told that the price of pursuing our

own appeal is to have to sign up to an adviser disqualification clause that solely affects the information requested by another appellant in a completely different appeal. That is the concern that we have.

THE CHAIRMAN: Yes, that I understand. The reason for it would be in the interests of manageability of the overall litigation which is a legitimate concern that the Tribunal has. Do you have any practical suggestions to make that would allay our concerns about that?

MS BACON: There have been, as far as I am concerned, hearings in which you have two different categories of confidentiality, and I would have thought that we should at least try in the first instance to have two different mark-ups, particularly given that the super-confidential information is only of a particular category. It is limited. I accept that that may appear at different points in the final decision.

THE CHAIRMAN: How would that be policed? How would the hearing be policed? How would we know when we lose Ms Bacon and when she comes back in?

MS BACON: It is not a question of losing me or coming back in. As far as I am concerned ----

THE CHAIRMAN: Surely it is, is it not?

MS BACON: In the first place, this is solely concerned with HCA's appeal and not our appeal. So far as our submissions are concerned ----

THE CHAIRMAN: You have not applied to have your case heard separately.

MS BACON: Actually we have suggested that the case should be heard separately. That was our submission, that the cases should be heard separately and sequentially, and that has been our consistent suggestion throughout.

THE CHAIRMAN: Are you going back to the first point about how the hearing should be divided? You want a separate hearing for your case - is that right?

MS BACON: It may be that this is the only way of resolving that. If that were not to commend itself to the Tribunal and the Tribunal distinctly has a preference for having a consolidated hearing, I would have thought that we ought to at least try separating out categories of confidentiality and trying to proceed simply by not referring to the actual figures at the hearing because they would be marked up, if that was possible.

THE CHAIRMAN: What exactly is the difficulty for you? I do not understand you to be saying that you cannot proceed with proper representation, and so on, if you are subjected to the confidentiality ring and the adviser disqualification clause?

MS BACON: We do have a problem in that one of the external economic advisers who we have instructed, we would probably not want that person to sign up to the super-confidentiality ring because of the adviser disqualification clause. We had envisaged that we simply would

not see that extra information or, potentially, that an alternative economic adviser should be instructed to review that information so as to avoid the problem of conflict, and that we should retain the person who has advised us throughout in relation to all of the other issues. That was our thought process.

THE CHAIRMAN: So might a possibility be that that individual, if it is a problem that relates just to them, is put in a separate little confidentiality ring all of their own where they are not shown outside the Tribunal hearing - sorry, we have now got two semi-redacted reports, have we not? We have got the semi-redacted report which has just the non-sensitive confidential information. That is all that they would be shown. They would not be shown the semi-redacted report with the sensitive information. There might be the impediment that they could not attend ----

MS BACON: Some parts of the hearing.

THE CHAIRMAN: -- some parts of the hearing, or the hearing. I would be very loath to be trying to manage a hearing where we have to keep stopping to let your person out of the room or come back into the room.

MS BACON: Yes, I appreciate that.

THE CHAIRMAN: One way of dealing with that is that they just do not attend the hearing. They can be given transcripts properly redacted afterwards so that they follow what is going on. I want to explore if there is a practical way of dealing with your concerns and also dealing with us. You have not come up with a solution to our concerns, but I am trying to address yours.

MR WARD: Sir, while Ms Bacon takes instructions, we do share the same concern ----

THE CHAIRMAN: Which concern, hers?

MR WARD: Her concern, Sir, that the super-confidential material only relates to one of the two appeals.

THE CHAIRMAN: Sorry, are you now making an application to have her application heard separately?

MR WARD: No, I am not.

THE CHAIRMAN: Do you have any submissions to make to allay our concerns?

MR WARD: Yes, Sir, my submission is that it could be dealt with in the way that you say in respect of external experts, which is where our concern arises to, that such people need not attend the hearing if the hearing is going to be in closed session. It is normal in the Tribunal to deal in open court with cases that do involve highly confidential information simply by not mentioning it, and then occasionally, for short periods, the Tribunal does have to clear

the room and sit in closed session if it becomes necessary to discuss, for example, specific numbers. I do respectfully submit that that suggests, in practice, those kinds of concerns are not insurmountable.

THE CHAIRMAN: How would that work, that there be a single semi-redacted report that all counsel is working to, the Tribunal is working with. That would not be shown to the specially identified economic advisers, and counsel would be subject to an obligation to intimate to the Tribunal when matters were going to be gone into which appeared in the semi-redacted version which had not been given to these economic advisers - is that what you are suggesting?

MR WARD: Yes, I fear we are, Sir.

THE CHAIRMAN: There would be two forms of closed hearing because presumably we will be in closed hearing if you are having to look at the confidential, albeit not highly sensitive confidential information.

MR WARD: Sir, may I take a step back. The starting point of course is that the Tribunal will want to hear these applications openly as far as possible. Of course, in these types of proceedings it is sometimes necessary to go into closed session where people wish to make submissions that essentially turn on specific numbers. Usually it only lasts for a short period and the open session resumes.

Given what Mr Williams has said about the nature of the CMA's concern and that it is restricted to a quite small category of information, it does sound as though, unfortunately, one might end up with two versions, a confidential version which is the semi redacted version that you intimated, Sir, and a super-confidential version which also contains the super-confidential information.

My proposal is that external advisers could be in a ring for the purposes of the ordinarily confidential information, but still excluded from the super-confidential version if they did not want to sign up to the disqualification clause.

THE CHAIRMAN: Yes, that is what I was seeking to explore with Ms Bacon, but you were introducing a new variant on that, that they nonetheless come along to the hearings. As I understand it, if that happened you would have to have two forms of closed hearing in addition to the open hearing.

MR WARD: Sir, in that case I was not clear, I am not proposing that at all. I can see that one needs to make this as manageable as possible, but we do share Ms Bacon's concern, that advisers should not have to sign the disqualification clause in order to address a part of the appeal where that information does not even arise.

THE CHAIRMAN: Does that mean that you would be content with what I was putting to Ms Bacon, which is that one might devise what I call a separate confidentiality ring just for the economic advisers in this particular category, so that they only get shown the semi-redacted version, which has the non-sensitive confidential information in it. They would not attend the hearings, because that would involve us having to duck in and out of different forms of closed hearing, but could be shown the transcript, properly redacted to respect their confidentiality ring outside court?

MR WARD: May I just take a second. (After a pause) Sir, that would certainly be an improvement on the situation. It is pointed out to me that we may be talking about legal advisers as well as economic advisers, but the principle is evidently the same.

THE CHAIRMAN: Yes. I will come back to you, Ms Bacon, but I can I just check whether anyone else wants to make submissions about this, in particular submissions in opposition to what I have been canvassing with Mr Ward and Ms Bacon? No. Yes, Ms Bacon.

MS BACON: We can, albeit reluctantly, live with it. I would suggest then that we give our external economist the option either of signing up to the disqualification clause and being in the big ring, or taking the little ring option.

THE CHAIRMAN: Yes. What I have in mind is a facilitative order where people can choose which they were going to be in. Does anyone want to say anything else? I think we will retire briefly just to consider where we should come out on this.

(Short break)

THE CHAIRMAN: The Tribunal has a concern that we are at risk of being in a position of letting the tail wag the dog. We do not have a clear handle on the extent of the super confidential information in relation to which the CMA wants to have the adviser clause.

What we have in mind to order at the moment - and I will mention it now and people can if they want to say anything further then have that opportunity before we do anything - is to make an order which will create the two confidentiality rings as I canvassed with Ms Bacon and Mr Ward. The onus will then be on the CMA to produce two versions of what I was calling the "semi-redacted report", two versions of the report containing confidential material. One version will contain both what I will call the "ordinary confidential" information and the "super confidential" information, and another version will just have the ordinary confidential information. Both those reports will be provided to the parties. They will have a choice as to which of their advisers to show the report with the super confidential information; if it is shown that will be into the super confidential ring.

However, if at that point it emerges that what we are really talking about is 1 per cent of the confidential information is super confidential, and 99 per cent is ordinary confidential, the order would have "liberty to apply", so that people could come back to us to ask for a variation of the order that we would be making. That would enable parties to consider, with the real information before them, as to what the CMA is claiming to be super confidential and what it does not make that claim in relation to and, whether, in fact, there are practical ways forward for handling the hearing different from those that would, if you like, be the default position set by this order.

Just to recap, the order now would say pretty much as was canvassed by me with Mr Ward and Ms Bacon, but there would be scope for people to come back if, when it comes to it, it emerges there is actually only a very tiny element of super confidential information. The Tribunal obviously wants to proceed as openly as possible and it is desirable for all parties with their advisers to be present and to have an opportunity to participate as fully as possible, consistently with the hearing being conducted in a manageable way.

Does anyone want to make representations about that?

MS ROSE: Just one point of clarification, we obviously are only really interested in the super confidential version, but can I ask that that should have indicated on it which of the confidential material is confidential and which is super confidential in different colours, because we will need to know, for the purposes of making submissions, what we can say to whom?

THE CHAIRMAN: You are absolutely right; I am going to come on to colours and markings in just a moment, because we have proposals for that. Before I do, can I just ask whether anyone wants to make submissions in opposition to what we are proposing to do at this stage?

MR WILLIAMS: I think that is all fine, so far as we are concerned, Sir.

THE CHAIRMAN: All right. Coming on to the documents that will be required: we are going to end up with four versions of the report. There is going to be the entire report which, at the moment, I am contemplating the parties will not have; the completely open report, which is in the public domain and, insofar as it can, the hearing will proceed by reference to that, so that it is open to the public as well as to the parties. In between we are going to have confidential version 1, which includes the ordinary confidential information but excludes the super confidential information, and then we are going to have confidential version 2, which includes both the ordinary confidential information and the super confidential information.

At the moment the Tribunal's order contemplates that the hearing would use just the second of those confidential versions, i.e. including both the ordinary confidential information and the super confidential information and the open report. We would ask that, just as a trigger to everyone so that we know when the Tribunal needs to go into closed session, that the confidential version that the Tribunal will be using, which is with the ordinary confidential and the super confidential information in it, be printed on a different coloured paper, so that everyone knows when we are going to refer to something in that that the Tribunal needs to be considering going into closed session. So that is just a simple, practical way of demarcating for us in the course of the hearing.

In addition to that, Ms Rose is right, when the HCA produces or indicates what is ordinarily confidential and what is super confidential it obviously needs to distinguish between the two for the parties. We would suggest, as a practical way forward, that they do that by producing physically two different versions of the two confidential variations, so that we will have one white paper open report, one, if you like, pink paper report with the ordinary confidential redactions, and then blue paper, or whatever, with the ordinary confidential redactions and the super sensitive redactions. And, within the coloured version that the Tribunal would be using we will need some system of marking, perhaps shading, to indicate those bits of it which are confidential.

MR WILLIAMS: And to further distinguish between the two different categories of confidential for the Tribunal's information or not, Sir? We had assumed so.

THE CHAIRMAN: Yes, although the default position on the order that is contemplated, subject to people coming back and saying: "Actually, we want to divide up the hearing in some way" is that we would just be using the super confidential version or the open version.

MR WILLIAMS: Yes, we understand that, but just to keep track of what is what.

THE CHAIRMAN: Yes, that would be helpful.

MS BACON: Could I possibly suggest one different way forward which would be that the Tribunal only use the super confidential version, but within that the confidential bits that are being disclosed should be in, say, yellow, and the super confidential bits should be in red or pink, and then we can all work off simply one version of everything and you would not have to keep switching between two different versions of the report.

THE CHAIRMAN: Sorry, what I was contemplating was when we were here in court we would not be switching between different versions of the confidential version of the report; we would just have one confidential version and one open version.

MS BACON: I see. I would still suggest that ----

THE CHAIRMAN: No, I think that is what Mr Williams was suggesting that in the hearing domain there would be two versions - this is the default position, subject to people coming back under what I was just indicating, there will be the open report, there will be the confidential report which, for the purposes of the hearing will be a report which includes both the ordinary confidential and the super sensitive confidential information in one report, but there will be some shading or something like that, marking, to indicate which bits are confidential within that and which are super confidential and which not.

MR WILLIAMS: That is all understood, Sir. I will just make one practical point, which is that it is the CMA's practice when producing these sorts of documents normally to use different colours for the different confidential information of different parties, so you might say blue is confidential to AXA, red is confidential to BUPA and so on. I think if we are going to use the system that the Tribunal has been describing, Sir, in a sense one would have to dispense with that complication.

THE CHAIRMAN: That is precisely what we are trying to achieve, to dispense with that complication.

MR WILLIAMS: It just means when you see the information you will not know confidential to whom, you will simply know it is of that category of confidentiality.

THE CHAIRMAN: Yes, thank you for making that point; I think that is fine, so far as I can see.

MR WARD: Sir, may we make one further request of the CMA - I am not sure it needs to be in an order - so that my clients can consider whether to sign up for the super confidential ring, could the CMA write to the parties soon and explain what the passages are that will only be available in the super confidential ring?

THE CHAIRMAN: Yes. I think that that would be desirable. I am not sure it needs to go in the order, but Mr Williams hears us giving an indication that that would be sensible before the parties actually physically look at it, if they give an indication of what is in the super confidential section.

That is where we propose to leave the question of the reports. Mr Williams, I probably should have said at the outset, at the end of this hearing I am going to look to someone to have carriage of drawing up the minute of order, and I am looking at you at the moment.

MR WILLIAMS: That is all right, Sir, yes.

THE CHAIRMAN: Thank you. The next item on our agenda is HCA's application for disclosure of its representations to the CMA during the investigation. I understand there to be no objection to that.

MR WILLIAMS: No, it is not opposed and it will go into the super confidential ring.

THE CHAIRMAN: I think it will be covered by the super confidential arrangements that we have been talking about.

The next item I have on our agenda is HCA's application for the data and underlying analysis relied on by the CMA for the insured pricing analysis. There, our provisional view is that this ought to be provided. I understand that is opposed by the CMA, but just so you know that is our provisional view and we will come back to that.

Then we have HCA's application to adduce expert evidence from Dr. Mazzarotto, and there, Ms Rose, our provisional view is permission should not be given for that, but I will come back to you for the argument on that.

That takes us down, I think, to questions of timetabling. I appreciate aspects of timetabling are at large, because Ms Rose still has to present her submissions in relation to the preliminary issue, which is the main thing which is likely to affect timetabling. Subject to that, can I just indicate very roughly what we had sketched out provisionally as a possible timetable just so that people can be thinking about it while the rest of the hearing continues?

The first item on the agenda should be that The London Clinic and BUPA's statement of intervention in AXA should be filed, we were going to propose, by 18th July. The object of that is what has been canvassed by Mr Williams already, that they are in opposition to the CMA, and it seems to us fair that the CMA should have notice of the points they are making before they put in their defence.

The next item would be the defence and supporting evidence, including the response to BUPA's and The London Clinic's intervention by 15th August. Then statements of intervention by HCA, AXA and FIPO, and I think, all other interveners - 8th September 2014. Then replies from the applicants on 29th September. Replies by the applicants and each intervener to the other statements of intervention also on 29th September, and then we would be into the timetable for the hearing.

Can I just check with my colleagues and, indeed, with Jenny that I did not miss any out? (After a pause) Yes, I think that is the timetable at the moment that we had in mind. As I say, that is subject to submissions both in relation to the preliminary issue point and, more generally, later on.

What I suggest we do now is hear submissions on the preliminary issue and resolve that. Then, that we hear submissions on HCA's application for disclosure of the insured pricing analysis, and resolve that, and then hear submissions on the application to adduce expert evidence and resolve that. Is that satisfactory to everyone?

MS ROSE: Yes, Sir. Those are all my applications and, if it suits the Tribunal I can deal with them altogether and then the CMA can reply to them altogether, it might save a bit of time.

THE CHAIRMAN: I think, actually, if you do not mind, if we could take it topic by topic, because I will need to make sure everyone has made submissions and I think it is going to be more practical just to do it topic by topic.

MS ROSE: The preliminary issue is addressed in our skeleton argument at paras. 9 to 16 and, as you are aware, the proposal is that the Tribunal should hear Ground 1 of our appeal as a preliminary issue, and Ground 1 is the complaint that the decision was procedurally unfair because the CMA relied in the Decision on a revised insured pricing analysis which was significantly different from the original insured pricing analysis that was shown to us as part of the provisional findings, and we were given no opportunity to comment on the revised pricing analysis, so that is the issue.

I have heard what you have said is your preliminary view on this and that you are not attracted to it, and there are really two points here. The first was, simply, a question of timing and convenience, that this is a self-contained point. It would take only two days to argue, and if we are right about it, it disposes of the entirety of our appeal, because if we are right that both the decision that there was an AEC and the decision as to what remedy is proportionate were tainted by procedural unfairness, then the whole of the Decision would have to be remitted to the CMA for reconsideration. In those circumstances the remaining issues in our appeal, which are all about the substance of the CMA's Decision, would fall away because we simply do not know what decision the CMA would make having reconsidered its position in the light of our submissions on the revised pricing analysis. That is the submission about case management and convenience.

There is another point of principle which is the reason why we do advance this. It seems to us that there is a genuine problem here, a real dilemma. It is actually a fundamental point of principle in my submission, and I just wanted to endeavour to explain it because it is not that straight forward.

The way we see it is that there are real difficulties of principle, both for the Tribunal and for the CMA if the whole of HCA's appeal is heard at one time. The problem is this: the approach, in our submission, which both the Tribunal and the CMA should take to Grounds 2 to 5 of our appeal, will be significantly different depending on whether or not we are right about Ground 1.

We submit that, for that reason, it makes sense as a matter of principle to determine Ground 1 first so that both the Tribunal and the CMA know, if they ever have to come to determine Grounds 2 to 5, on what basis those Grounds are under consideration.

The reason we say this is as follows. If we are right on Ground 1 the position is that we have been denied the opportunity during the administrative phase to comment on the revised IPA, which we say was a central part of the CMA's analysis, both in terms of the existence of an adverse effect on competition and underpinning its decision on remedy.

In the remainder of our appeal we complain that the substantive decision was flawed. Ground 2 is specifically an allegation that the substance of the insured pricing analysis itself is fundamentally flawed, and that is based on submissions which we were not able to make during the administrative process because we had not seen the revised pricing analysis at that time.

Similarly, Ground 5 is the complaint that the remedy is disproportionate, and again a substantial part of that Ground is based on the allegation that the revised IPA is flawed, based on submissions which we were not given the opportunity to make during the administrative process.

If we are right on Ground 1 what would be the right course for the Tribunal in disposing of the appeal? In our submission, on the face of it, the right course, if the Tribunal concluded that the process had been unfair, would not be for the Tribunal to go on to consider whether we were right to say that the substance of the IPA was flawed or whether, on the basis of those flaws, the remedy is disproportionate. The right remedy, if the Tribunal concluded that there had been procedural unfairness because we were not given an opportunity to comment on the revised IPA, would be to quash the Decision and remit it to the CMA so that the CMA could, at that point, operate a fair process and hear our submission on the revised IPA. That, we say, is the right division of responsibilities.

THE CHAIRMAN: Would that not be the outcome if you win on the other grounds as well? Would it not be helpful to the CMA to know what the Tribunal's Ruling was on the other grounds as well?

MS ROSE: I am going to come on to what the problems are in one moment. There are two problems, essentially, that arise.

The first problem is this: if you are considering Ground 1 together with Grounds 2 and 5, the CMA will have to put in a defence on Grounds 2 and 5, and it will have to do that without knowing whether or not we are right on Ground 1, that there has been unfairness.

The difficulty with that is that the statutory decision maker here is the inquiry group - or

now what is known as the 'CMA Group' - that is appointed under the legislation to make the specific decision. That group took its decision on 2nd April, it is *functus*. It took its decision without considering the submissions that we are making to this Tribunal on Grounds 2 and 5. The reason for that is we were not in a position to make the submissions that we make now on Grounds 2 and 5 because we had not seen the revised IPA.

In that situation what is the basis on which the CMA is going to advance a defence to those grounds on this application? In my submission that is a real problem of principle because this is not simply like a situation where you have the Secretary of State exercising a discretion and then on an application for judicial review it is said: "You did not take these points into account, you did not give me an opportunity to make submissions so now I make these submissions", and then the Secretary of State can say: "I am going to reconsider it now during the judicial review, and I do not think it makes any difference to my decision". That happens all the time in the Administrative Court.

This is a different situation because what you have here is a statutory body that has a defined group of people, that has a defined power to take a decision by a particular cut-off date by a two-thirds majority, and took that decision without taking this material into account.

The first question is: what is the basis on which they then put forward a substantive defence to those grounds? It is not easy to understand how it would be proper for them to do so.

The problem then becomes worse, because let us say that the Tribunal then concludes that we are right on Ground 1, and says: "We are therefore going to remit the matter back to the CMA to reconsider Ground 1". At that point there is a problem because the CMA has made submissions to this Tribunal to the effect that it disagrees with us on Grounds 2 and 5, it considers its decision would have been the same. In other words, it has pre-judged the question which now has to go back for reconsideration to the inquiry group; it is a real problem.

THE CHAIRMAN: When you say "it is a real problem" - administrative bodies have to reconsider their decisions, if they are told by the courts they have it wrong, all the time.

MS ROSE: Yes, of course they do.

THE CHAIRMAN: And they are not precluded from doing that, it is not a basis of pre-judgment, or anything like that. Why should it be thought that the CMA would not, if the case were quashed on that ground, properly and conscientiously reconsider the matter as they should do?

MS ROSE: It is a real problem because the normal situation in which a body reconsiders a decision is a situation in which it has got something wrong first time round, and the Administrative Court tells it what it has got wrong and then it grapples with the point again. But here you have a situation where the CMA itself would not have grappled with the point at all, but submissions, on a basis which is not easy to understand, were being put forward on its behalf to this Tribunal pre-empting the question that it is then being asked to consider for the first time under Grounds 2 and 5.

What I am also hypothesising here is that it is not implausible that if the Tribunal was with us on Ground 1 that the Tribunal would conclude that it was not appropriate to reach findings on Grounds 2 and 5, because if you were to conclude that there was procedural unfairness and we had not had an opportunity to make submissions on an issue of central significance to the Decision, it seems to me it is not unlikely that what you would do is then say: "We are not going to seek to pre-judge what decision the CMA may take when it does consider this question. We are simply going to remit it and ask it now to consider the proper representations on the part of HCA."

THE CHAIRMAN: That is one possibility.

MS ROSE: It is, indeed.

THE CHAIRMAN: But another possibility that we have to weigh in the balance is that you do not win on Ground 1 ----

MS ROSE: Yes, indeed.

THE CHAIRMAN: -- and if that has been parcelled off as a preliminary issue what we would have then bought for the process is delay in favour of your clients.

MS ROSE: That is correct, but there is another possibility as well, which is let us say that we do not win on Ground 1; let us say that we lose on all Grounds, and we then appeal. Then we win on Ground 1 on appeal.

THE CHAIRMAN: Or you lose on Ground 1 on appeal, I mean the permutations are various.

MS ROSE: If we lose, we lose, and there is not going to be a problem, but if we win ----

THE CHAIRMAN: There is, because what you are proposing is that everything should be delayed until you know the answer on Ground 1.

MS ROSE: Yes, and the reason I am proposing ----

THE CHAIRMAN: And that, it may be said, is a detriment to the public interest if, in fact, you do not have a good case on Ground 1 or, indeed, any case.

MS ROSE: Well, of course, any appeal could be said to be a detriment to public interest if it fails, because it causes delay. The reason we are saying it is right to take Ground 1 first is

because the outcome of Ground 1 will have, in my submission, a very significant effect on the way that the other Grounds are considered because, in my submission - and the submission I will be making to the Tribunal - if we are right on Ground 1 either the right course is for this Tribunal simply to remit the matter without deciding the other questions, or the right course would be for it to consider issues 2 and 5 substantively on the merits. If the position is that the CMA seeks to take a substantive position before this Tribunal on what it says the effect of our submissions would have been on Grounds 2 and 5 then I will be submitting that it is very difficult to see how it could fairly be submitted for reconsideration.

THE CHAIRMAN: That comes back to the point I was putting to you. Administrative bodies are asked to reconsider matters all the time by the courts. At the moment I cannot see what would prevent, or lead us to think that the CMA was prevented from reconsidering the matter properly according to law and conscientiously on the facts.

MS ROSE: Because they have not at the moment, *ex hypothesi*, if I am right on Ground 1, they have not considered our representations in relation to the pricing analysis.

THE CHAIRMAN: Yes, but what I am putting to you is that they would. If you succeed on Ground 1 and it is remitted, they would do that. Why should we think they would not do that?

MS ROSE: Of course, that is what they would be asked to do, but the problem that I am identifying is that if they have to respond to Grounds 2 and 5 now, before they know whether it is going to be remitted to them, they will be taking a premature position on the pricing analysis before they have heard our submissions on it.

THE CHAIRMAN: I think we are going round the houses; it comes back to the same point. Why should we think, yes, they have said all sorts of things about Grounds 2 to 5, they have lost and the matter has been remitted to them, why should we think they would not then conscientiously reconsider the matter according to law?

MS ROSE: The answer is they would have already made a finding on those facts without considering our submissions.

THE CHAIRMAN: They would not have done, they would have made submissions to us and they would have lost, and they would have been told by us to reconsider. Right, thank you. That is the submission?

MS ROSE: That is the essential submission.

THE CHAIRMAN: Yes, so you have those two points?

MS ROSE: Yes.

THE CHAIRMAN: All right.

MS ROSE: I want to make clear that we are reserving our position as to what we say the right standard of review would be in the event that the Tribunal hears all the grounds together because my submission is going to be that if the CMA is taking a position in relation to the pricing analysis, it may be that the right course for the Tribunal is that it would actually have to decide the questions of the pricing analysis on the merits.

THE CHAIRMAN: That seems to go back to the underlying theme of your submission ----

MS ROSE: Yes.

THE CHAIRMAN: -- that they would be disabled from reconsidering the matter. Obviously you can make that submission again in due course ----

MS ROSE: Indeed.

THE CHAIRMAN: -- but at the moment there does not seem to be anything that would lead to think that they would be prevented from doing that. Partly, it will depend on what they do say and one will need to reassess it in those circumstances, but ----

MS ROSE: I want to make the point that it is not just the question of whether they could reconsider it with an open mind, it is also a question of what is the basis on which they would be advancing a positive case before this Tribunal.

THE CHAIRMAN: Yes, but I do not know at the moment.

MS ROSE: Of course, we have not seen their Defence, but the point I make is there is a point before you get to the question of reconsideration, and the point is this, that the CMA has already made a decision on 2nd April and it made it without considering our representations on the revised pricing analysis because we had not seen the revised pricing analysis.

So, in their situation the CMA has not taken the position in its reasons, it has not taken a position on the criticisms that we make of the revised pricing analysis; it could not have done because we have not taken a position on that.

The question that I ask is what is the lawful basis on which the CMA would propose to take a positive position on that question on this application?

THE CHAIRMAN: Then we have to wait and see. You say you ask that question, I am not going to answer it. Ultimately, the CMA will consider what position they are going to adopt on your application. I do not know what they are going to say and now is not the occasion for them, on the hoof, to make detailed submissions on that case which may be complex.

MS ROSE: I accept that, but that is the reason why I am suggesting this is potentially a solution for a difficulty for the CMA. It is not just a point that I am putting forward in the interests

of my own clients, I am putting it forward because it seems to me there is a genuine problem of principle here, which could affect the CMA as well.

THE CHAIRMAN: All right. My understanding is the CMA have taken a considered position in response to your application for a preliminary issue that they do not want it, so that would seem to be ----

MS ROSE: That certainly is what they have said.

THE CHAIRMAN: So unless Mr Williams tells me different, their position in relation to you saying: "I am usefully telling them what is in their interests" might be: "Thank you, but we will make up our own mind, thank you very much."

MS ROSE: Sir, that may well be right, but ----

THE CHAIRMAN: All right.

MS ROSE: -- the only point I want to make clear is that that issue is on the agenda.

THE CHAIRMAN: Yes, thank you; you have made that clear. Does anyone want to say anything in support of Ms Rose's application? No. Mr Williams, did you want to reconsider your position in the light of what Ms Rose has said?

MR WILLIAMS: I do not have any instructions to reconsider our position, no, Sir.

(The Tribunal confer)

THE CHAIRMAN: Thank you, Mr Williams, we do not need to hear further from you.

In relation to the application by HCA that Ground 1 of their application should be considered as a preliminary issue, we do not accede to that application.

Ms Rose emphasised two particular points. She says that the first Ground of application by HCA, which is to the effect that the CMA's procedure was unfair, is a matter on which, if her clients are successful will allow her clients' application to be resolved in a speedy and convenient way. She says it is a self-contained matter which would take two days to argue, which could dispose entirely of the application. The difficulty with that, of course, is that she may not be successful in relation to that, in which case it would not dispose entirely of the application and the net effect would be that a considerable additional delay would have been built into the process.

So far as that is concerned, we accept the submissions on behalf of the CMA in TSol's letter dated 20th June 2014 in setting out their reasons for opposing the present application. It is unnecessary to say anything additional in relation to that point.

The second matter that Ms Rose presses upon us is that she says there will be a fundamental difficulty of principle if the different Grounds are considered together at one time. She says that the CMA will have to adopt a position in the hearing on the merits as to its case in

relation to Grounds 2 to 5 on the predicate that it might lose on Ground 1. She makes the submission that that might pose difficulties for the CMA later reconsidering the matter if, in the event, it does lose on Ground 1 and the matter has to be remitted to it for reconsideration.

As things stand at the moment we are not impressed by this point. It seems to us very unlikely, as things are at present, that one would end up in a position where anything said or done by the CMA in resisting the present applications on all Grounds would be likely to result in a situation where the matter could not be properly remitted to the CMA for reconsideration.

Administrative decisions are set aside all the time on various grounds, or remitted to the relevant body for reconsideration. The usual approach is to expect such a body to reconsider the matter according to law and conscientiously on the facts. We see no grounds for thinking that there would be any difficulty, as things stand at the moment, for the CMA to approach matters in that way should the position turn out that they lose on Ground 1 and that the matter has to be remitted to them, notwithstanding that they would have obviously advanced their case in relation to Grounds 2 to 5 as well. For these reasons we reject the present application. Thank you.

I think, Ms Rose, you were then on to the IPA disclosure?

MS ROSE: Yes. Sir, we say that the right principles in relation to this are summarised in the *BSkyB* case in tab 10 of the authorities bundle.

THE CHAIRMAN: Forgive us, Ms Rose, I do not have to hand an authorities bundle.

MR WILLIAMS: We have copies, Sir.

THE CHAIRMAN: Do you have three spare copies, because we are all going to have to follow it?

MS ROSE: Yes, we have two. (Same handed)

THE CHAIRMAN: Brilliant, we have three between us. Thank you very much to everyone who is giving up their authorities bundle for us.

MS ROSE: If you go to tab 10, it is a decision of this Tribunal in the case of *BSkyB* against the Competition Commission, and you can see at para. 2 that this was a disclosure application in the context of a judicial review application under s.120 of the 2002 Act; it was arising out of the acquisition of shares in ITV.

If you then go on to para. 18 you will see that there is a review of the legal framework for disclosure and over the page, para. 21, the key passages of Lord Bingham in *Tweed* are set

out, and I know this will be very familiar to you, Sir, but the key passages at paras. 3 and 4 of *Tweed*:

> "3. 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. But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.
>
> 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."

So that is the key principle.

THE CHAIRMAN: Yes.

MS ROSE: That was then applied in this case. If you go over the page to para. 26 you can see that there were particular findings of fact as to the influence that Sky was likely to exert over ITV, and the argument at para. 27 was that Sky was saying 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."

There is then a reference to Lord Justice Carnwath in the *IBA* case. I just want to show this to you because it is relevant also to the issue of expert evidence.

> "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 (unlike the 1973 Act) 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."

That then refers to para. 28:

> "…the Commission refers, both in the Report and in its Defence, to 'substantial evidence' of a confidential nature received from ITV. The effect of this ITV material has been summarised in the Report but the material itself has not been disclosed."

If you then read on - I will not read all these out - you can see going right down to para. 34 and then para. 38 that the conclusion was that the material ought to be disclosed because it was the underlying evidence that had been relied on to support the findings in the report. We submit that the material that we are seeking, the actual underlying analytical material that led to the IPA, which is summarised in the report, is in exactly the same category because this is the evidence which justifies the conclusions that our prices were higher because of our market share, which is fundamental on AEC and fundamental to the decision on remedy.

We submit that we simply cannot respond effectively to the Decision without disclosure of that material. This is, of course, intimately linked to Grounds 1, 2 and 5 of our appeal. I do not know if you have had the opportunity to read our expert report which is, of course, itself a matter of some controversy, but you will have seen in it at s.2 that there are multiple occasions on which Dr. Mazzarotto says: "I cannot tell from what is in the report exactly what the analysis is; I am handicapped in responding to it". We simply cannot respond to the IPA without seeing the underlying analysis. That, in itself, ought not to be controversial because ----

THE CHAIRMAN: Just on that, you say it is relevant to Grounds 1, 2 and 5?

MS ROSE: Yes.

THE CHAIRMAN: Speaking for myself, I can see considerable force in the relevance of this material to Grounds 2 and 5. You say there is at least the possibility, supported by objective grounds, you say, of miscalculation having regard to erroneous matter in the underlying calculations which then feed into the finding of AEC and the proportionality of the remedy.

MS ROSE: Yes.

THE CHAIRMAN: I can see all of that. I ought just to mention that in relation to fairness it seems to me less likely that the IPA is going to be directly relevant to your case on Ground 1 because your case on that, as I understand it, is one of fairness: "You did not show us parts of your analysis where you should have done."

MS ROSE: Yes.

THE CHAIRMAN: I simply mention that. I am not sure that it reduces the force of the submissions, but ----

MS ROSE: It may not make any difference. But, of course, we are in some difficulty because we do not know what their defence is, and there is always a problem with trying to make a disclosure application before the pleadings have closed.

THE CHAIRMAN: I am saying this as much, really, for Mr Williams to hear.

MS ROSE: Yes. But if, for example, in response to Ground 1 they were to say there was no significant difference between the original IPA and the revised IPA one would need to see the revised IPA, the data they were actually using in order to see whether or not that was right. That is an example, but I simply do not know what their response is going to be. I do not know if you want me to show you the relevant paragraph ----

THE CHAIRMAN: Speaking for myself, at the moment I think we understand the points that you are making and the submission you make on the law.

MS ROSE: What I do want to flag is the *BMI* application, which the Tribunal may be aware of. At an earlier stage of the investigation there was an application to this Tribunal complaining about procedural unfairness because of the conditions on which the parties' expert advisers were given access to the data room to look at what was then the original pricing analysis. This Tribunal ruled that the conditions of access were procedurally unfair. In the course of that Ruling this Tribunal stressed the importance of having access to the underlying calculations and data in order for the parties to be able to respond. Can I just show that to you very briefly? It is at tab 18 of the authorities bundle. If you go first to p.12 you can see at the top of that page it is said:

> "The Confidential Information had been used by the Commission to carry out what was termed an 'Insured Prices Analysis'."

That is the original Insured Prices Analysis. Then, if you go to para. 61 they say: "In this context, the following points bear emphasis" and then:

> "(2) The Confidential Information in the Disclosure Room is clearly highly technical in nature, as is evidenced by the description contained in Recital V of the Personal Undertakings and, indeed, from the passages in the Provisional Findings that we were shown. Given the technical nature of the material, we consider it to be the case that a fair disclosure of the 'gist' of a case will require – as in *Eisai* (see paragraph 39(7) above) – a high degree of disclosure and transparency on the part of the Commission.
>
> (3) This was borne out by the Applicants' submissions before us, which suggested that in order properly to respond to the Provisional Findings, the underlying data relied upon by the Commission would have to be understood, and that detailed and quite possibly highly technical responses would have to be prepared by the parties. Just as we are not inclined to second-guess the Commission in its determination of how to handle the Confidential Information, neither are we inclined to dispute that

the Applicants need to see this material in order to meet and prepare their response."

We say that the point is exactly the same now in terms of the revised pricing analysis as it was in relation to the original pricing analysis.

THE CHAIRMAN: Yes, thank you. Yes, Mr Williams.

MR WILLIAMS: Sir, I would ask you to keep *BMI* out because I will be going to it in just a minute. The Tribunal will appreciate that the material sought under what I have called 'category C' of the application is quite different from the material in categories A and B in the sense that it is ----

THE CHAIRMAN: Sorry, you will have to help me - category C?

MR WILLIAMS: Category A was the submission and category B were the extracts from the report that we dealt with ----

THE CHAIRMAN: I beg your pardon. So now we are talking about the IPA?

MR WILLIAMS: So we are now talking about what I called 'category C', which is the underlying data and analysis. This is different because it is material which sits outside the Commission's final report; it is underlying data and analysis of that data. It may help to describe what, in practical and physical terms, that consists of. It is essentially a model and a number of data files of pricing information. The nature of the analysis that was carried out in relation to that is set out in the report - for your note in 6.333 to 6.383 and in appendix 6.12, and there is a detailed explanation there of what the Commission's methodology was. Those passages are partially redacted but that material forms part of the material which is now going to go into the ring in unredacted form, so essentially the entire account in the report of this analysis will form part of the confidentiality ring that we were dealing with.

THE CHAIRMAN: Not the entirety of what is now being sought?

MR WILLIAMS: No, not the IPA and the underlying data. As Ms Rose was just explaining, the way that disclosure of this modelling was dealt with during the investigative stage was through a data room, and that is essentially because of the level of the sensitivity of the material. In essence the point is that the analysis is based on very detailed pricing data with prices for each individual procedure performed between 2007 and 2011 at a very high degree of granularity indicating the gender of the patient, the age of the patient and the length of stay, so the information is extremely confidential and provides an extremely clear insight into the pricing practices here as between competitors.

THE CHAIRMAN: Am I right in thinking that this is data that has already been made available for the parties in the course of the investigation?

MR WILLIAMS: Through a data room, that is right. The point I am making goes to the manner in which the information was disclosed during the investigative phase and not whether it was disclosed. The material was disclosed and ----

THE CHAIRMAN: Why was it disclosed in the investigative stage?

MR WILLIAMS: It was disclosed during the investigative stage to allow parties to respond on the merits to the Commission's provisional findings.

THE CHAIRMAN: Because it was relevant to what the Commission might do.

MR WILLIAMS: That is right. At the moment I am just focusing on the term 'the practical way in which the information was disclosed', and the passages I wanted to show you in *BMI* were para. 47:

> "… the Commission emphasised how sensitive the Confidential Information was. We have not, of course, seen that material, and are not minded – certainly not on the hearing of these Applications – to second-guess the Commission in this regard. The Commission is the primary arbiter of what is and what is not sensitive."

Then you can skip para. 48. Paragraph 49:

> "We do not consider that the decision of the Commission, in this case, to protect the Confidential Information by way of a data room …"

- and you can read it. Essentially that is a decision that there could be no challenge to the Commission's decision that the information merited the protection of a data room, i.e. it could not be disclosed simply through a confidentiality ring, the information needed to be made available to the parties by setting up a facility within the Commission where they would come into a room where the information was available on a computer and they were given access to that material to work with it and then prepare submissions. That is the practical way in which the disclosure ----

THE CHAIRMAN: We are now in litigation.

MR WILLIAMS: That is right.

THE CHAIRMAN: So I cannot see, myself, a practical way in which we could deal with this material by way of a data room.

MR WILLIAMS: Sir, the question is whether you, yourself, would need to deal with the analysis or the data or whether you would simply ----

THE CHAIRMAN: If Ms Rose says that there is some defect in the underlying analysis that has been performed, whether by the way in which the data has been put together or fed into the model, then we would.

MR WILLIAMS: Sir, I think the point you are putting to me is a point about the submissions they would want to make, having had access to the material. I was simply focusing on the modelling itself. I was just making the point that ----

THE CHAIRMAN: My understanding is that modelling is actually critical to the way in which the Commission (as it was) has analysed the economic environment in which they found an AEC.

MR WILLIAMS: That is right, Sir.

THE CHAIRMAN: I am struggling, I have to say, to see how, as a matter of fairness in the course of this litigation where the challenge is being made, and has fairly been intimated to the CMA, that it is said that defects have been made in the way in which the modelling has been prepared, that the litigation could be fairly resolved without Ms Rose's clients having access to that material in order to make the submissions they may wish to make.

MR WILLIAMS: As I say, at the moment I am separating out two issues. One is: on what terms, if HCA were to have access to this material, would it have access, would it be on the basis of a confidentiality ring ----

THE CHAIRMAN: It would be on the basis of the super confidentiality ring.

MR WILLIAMS: That is not Ms Rose's application. Her application is for either in a confidentiality ring or through a data room. The points I am making to you at the moment are focused on why any disclosure would have to be through a data room.

THE CHAIRMAN: I suppose I do not have a particular difficulty with it being through a data room in the first instance, but then I come back to the point that I was putting to you. Ultimately, if Ms Rose's clients say: "Actually, there is something here that we want to rely upon in the litigation" I do not see how the hearing could proceed by reference to something in the data room, it would need to be by reference to evidence and submissions made to us in court, probably in closed session.

MR WILLIAMS: I think what we are dealing with at the moment, Sir, is just a practical question of what exactly Ms Rose would want to put before the Tribunal in the event that HCA had that access to the material. Can we park that issue for a minute, and shall I come on to the reasons why we have opposed the application?

THE CHAIRMAN: Yes, all right.

MR WILLIAMS: The point I was really making to you is that preparation for a data room is a resource intensive process. My instructions are that it would take a week to set the data room up, to create the facility to provide the disclosure ----

THE CHAIRMAN: So perhaps let us not have a data room, let us cut to the chase. There is a fair chance that Ms Rose's clients may wish to make some use of this material, is there not?

MR WILLIAMS: Even if we did not have a data room, if the material were to be disclosed in a manner which would allow HCA to replicate the Commission's analysis, it would take about the same period of time to prepare instructions. At the moment I am making the point that it would be a resource intensive process, and in our submission that sort of disclosure should only be ordered where there is a clear justification, and that is the point I am about to come to, Sir, because I do understand that is where your concerns are.

We resist the application, as I say, both on grounds of necessity and disproportionality. First, we have accepted that HCA should have access to the unredacted report, which they have not seen so far, and they will therefore see the full reasoning in the passages that we were dealing with before the short adjournment. We say it is that reasoning that is the target of their application. Their application is directed at the report. We say it is not necessary or proportionate for them, at the same time, to be provided with all of the underlying data and all of the analysis.

THE CHAIRMAN: How can we assess that? How can Ms Rose assess that? We do not have the report.

MR WILLIAMS: In our submission, at the very least the matter ought to proceed in stages, in the sense that HCA ought to have access to the full unredacted reasoning in the report and, having seen that, to pursue their application for disclosure if, at that stage, they take the position that the disclosure afforded through the confidential report is inadequate for their purposes. At the moment, they are, in a sense, missing out a stage and going straight to disclosure of the underlying analysis and data which, as I have indicated, is of a highly sensitive nature, and only to be disclosed if there is a clear justification for it. In our submission such a justification has not been articulated.

You, yourself, Sir, have already, I think, indicated that you do not see the argument for disclosure in relation to Ground 1.

THE CHAIRMAN: What is Ground 1?

MR WILLIAMS: Sorry, the fair hearing Ground.

THE CHAIRMAN: Well, I think….. Ms Rose came back at me on that. I did not express any final view. I can see some possible permutations in which it may be relevant, it is a little bit

difficult to judge at the moment. The main point I was seeking to make was: I could very definitely see why it seemed, on the face of it, to be relevant to, at least, Grounds 2 and 5.

MR WILLIAMS: The way we put the argument is this: under Ground 1 HCA contends that it has not been afforded a fair hearing in relation to this very material and, under Ground 2, it complains that even though it has not been afforded a fair hearing, it says they are still able to identify and articulate substantive criticisms of the analysis that has been carried out.

THE CHAIRMAN: Yes, because they saw part of the product of the analysis. As I understand it, they saw round 1, which is what you have asked for their comments on, they commented. You then come out with the final Decision, which is round 2 of the analysis. So they have seen part of it which enables them to make the criticisms that they do. But they say: "In order to carry through our criticisms we would like to see the underlying material as well; that will help us."

MR WILLIAMS: Sir, that is right, but they will also see, of course, the account of the final iteration of the modelling in the final report and in the appendices which described that in detail, and that is to form part of the disclosure that we have been dealing with today.

THE CHAIRMAN: One might have thought that if your case was going to be either: "they will be completely satisfied by seeing the redacted part of the report", or "we will be able to respond to their application: look at the redacted part of the report, it is clearly disproportionate, the additional disclosure that you are seeking", that you would in advance of this hearing have disclosed the redacted parts of the report, so that we could have that debate now.

MR WILLIAMS: Sir, we were not, obviously, in a position to do that without the confidentiality ring being established, and without the terms of the confidentiality ring being established.

THE CHAIRMAN: It seems to me that it would have been possible for you to have established a confidentiality ring limited to that issue and to the people concerned with that to enable this matter to be dealt with today. As I understand it, in effect you are saying: "It is just premature for us to decide because we do not have the full material which you would wish to rely upon in answer to it".

MR WILLIAMS: Sir, we make that point. We say that ----

THE CHAIRMAN: If you are making the point that this is irrelevant material I have to say that I struggle to see how that can be said, that it is irrelevant, because you accepted that the financial modelling was critical to the decisions taken by the Commission and the inputs obviously are what come out of the model. On the face of it one would think that that is centrally relevant material.

MR WILLIAMS: We do not make the submission that the material is irrelevant, Sir, plainly we cannot make that submission. The submission we make is that it is not relevant and necessary to provide disclosure of this level of granularity in order to ----

THE CHAIRMAN: Because of the terms of the report which you have not shown us. That is why I say it seems to me that your argument seems to be coming down to a prematurity point - unless you say: "Take it from us, oh Tribunal, the redacted part of the report will be magnificent and will satisfy all questions that Ms Rose might have", which, as I have already said we cannot assess, and it seems a little bit unlikely just at first blush.

MR WILLIAMS: No.

THE CHAIRMAN: In that case then is this not right, it comes down to some sort of prematurity point that you say: "It is relevant material but it would be unnecessary and disproportionate for us to order its disclosure. You, Tribunal cannot deal with that at the moment because you do not have all the relevant material that would enable you to determine that." "Come back another time, postpone consideration of this until we do have all the relevant material" - is that the point you are taking?

MR WILLIAMS: One point we are taking, Sir, is that disclosure would be burdensome because it would need to take place through a data room.

THE CHAIRMAN: I have that point on board.

MR WILLIAMS: And certainly we make that the beginning of a submission that it would be disproportionate.

THE CHAIRMAN: But you have to weigh that against: is it centrally relevant to the fair determination of the proceedings? If it is then you might have to set up a data room, or put the information into a confidentiality room. That is the usual way these things work.

MR WILLIAMS: The other point we make is that HCA has already articulated in Ground 2 of its application, a very large number of highly detailed criticisms of the insured pricing analysis.

THE CHAIRMAN: Yes. And they want to say: "And what is more, if you look at the IPA we would have even more to add to that, on which we would win, and we might lose on the first but win on the second" or "we might win on the first because we have got the information". That is what they want to say.

MR WILLIAMS: I understand. I think you have my submissions, Sir.

THE CHAIRMAN: Well, no, I have not because I am not quite sure what you are asking for, that is why I was pressing you. Are you saying to us: "All right, decide now", in which case - speaking for myself - since you have not demonstrated that this material, though relevant, would be unnecessary and disproportionate to disclose, you are likely to lose. Or, are you

saying that it is unfortunate that things have turned out this way, "but we do wish to maintain an unnecessary and disproportionality argument. We can see that the Tribunal cannot assess that, sitting here now, we would like this matter to be postponed." Which do you want me to do?

MR WILLIAMS: I will take some instructions. (After a pause) Sir, the submission is that this is a public law challenge to a report which is set out over hundreds of pages, a detailed analysis is set out, and one would expect the applicant to be able to articulate its public law challenge to the report on the basis of the reasoning in full once seen in unredacted form. We do say that it is disproportionate to require the Commission to establish a data room to facilitate this sort of disclosure before the applicant has seen that reasoning in full; so it is the second of your two possibilities, Sir.

THE CHAIRMAN: Sorry, postponement?

MR WILLIAMS: Postponement.

THE CHAIRMAN: Ms Rose, if it is put as a postponement point, what do you say about that?

MS ROSE: That seems calculated to disrupt the whole of the timetable that is proposed.

THE CHAIRMAN: No, it is not, because you are still going to get the unredacted report. You are going to get the report with confidential bits that you need to see. So you are going to have the main information that you need to start preparing and focusing your case.

MS ROSE: Except we are not. Can I just give you an example of the sort of problem that arises?

THE CHAIRMAN: Sorry, you are going to have that document.

MS ROSE: What I mean is it is not going to be sufficient.

THE CHAIRMAN: No, no, it is not sufficient but it will be something that you can be getting on with. What is being proposed at the moment is that there be a postponement - for my part it would need to be a short one - in order for this argument about the IPA to come back with proper evidence on both sides so that the Tribunal can take a sensible view.

MS ROSE: Can I just make a couple of points? First, it was suggested that what we were seeking was something nobody else had had. In other words, access to the data room which, it was said, would have to be set up specially, in order to see the underlying analysis for the new IPA. It has very recently come to our attention that that appears not to be the case because it appears, from a close textual reading of the report, that, in fact, one other party was shown this material. Can I just show this to you, Sir, because ----

THE CHAIRMAN: Why? At the moment I am interested in your submissions in relation to the postponement proposal.

MS ROSE: Our submissions in relation to the postponement proposal are that there is no reason to postpone this application because it is inevitable that we are going to require this material. Can I deal with that point first, just by giving you an example of where it is inevitable that we are going to need the underlying data?

THE CHAIRMAN: All right.

MS ROSE: If you go to our expert report, this is vol. 1 of the application bundle, behind tab 1. If you go to para. 2.3.8 this is where our expert attempts to address one of the central differences between the original IPA and the new IPA. 2.3.8: "The CMA purported to control the patient mix by designing a representative patient". The point is this: what the CMA was trying to do was to determine whether our pricing was higher than the pricing of one of our major competitors. In the original IPA they did that simply by comparing episodes of treatment. We criticised that and said you are not comparing like with like, because you have patients with very different characteristics systematically from one provider who deals with more serious conditions than another, and therefore comparing episodes of treatment may not be a like for like comparison.

They sought then in the revised IPA, which we were not shown, to conduct a regression analysis. What they did was take a basket of treatments and they looked at the pricing of those treatments and then sought to control for a number of variables, and the variables that they chose were the age and sex of the patient and the duration of stay. They then, on the basis of that, came out with what they said showed still a systematic difference in price. That is the analysis that they have done that we have not seen.

If you look here at para. 2.3.9, we make this point:

> "CMA's own analysis, and this is from the report, showed that a potentially significant amount of variation was not accounted for by these three patient characteristics. The CMA stated that between 60 and 99 per cent of the variation episode charges was accounted for by such patient characteristics along with the identity of the hospital operator, adding that for a large majority of treatments such proportion exceeded 80 per cent. The CMA did not clarify these findings or provide more detail, but on the basis of these figures alone it appears that up to 40 per cent of episode level variation and charges, up to 20 per cent in the large majority of cases, was not accounted for by a patient's age, gender and length of stay. This suggests that there are additional explanations for differences in prices that the CMA did not control or account for."

That is a classic example. This is not something that is redacted from the report, it is simply something that we cannot unpick from the report because we do not have the regression analysis. We do not have the equation, we do not have the data sets that they used for the purposes of the regression analysis. What we have is a report of a summary of the outcome that raises a suspicion that there is something wrong.

THE CHAIRMAN: Which is all going to be explained in the redacted bit that you have not seen yet.

MS ROSE: No, Sir, it is not, because this is not about redaction.

THE CHAIRMAN: How do we know? There may be other things said.

MS ROSE: I can show you the relevant bit of the report. If you go to the report itself, appendix 6.12. This is in volume 2 of our application bundle, p.845. If you look at para.17, they are describing the construction of the insurer specific price index, and they say at (a):

> "We identify the 'common basket of treatments'…
>
> (b) For each treatment in the common basket, we regress episode prices on patient characteristics (age, gender and length of stay) and a constant term using all episodes associated with the hospital operator for the given PMI in a given year. We noted these variables in the constant collectively explain the majority of variation in insured episode prices for the majority of treatments."

Then there is a footnote 19:

> "The adjusted R-squared varied between 48 and 99 per cent in regressions for the four national operators, between 60 and 99 per cent in regressions for HCA and TLC…and the large majority of regressions have an adjusted R-squared above 80 per cent."

Sir, you can see there is no redaction here. This is not a point about redaction.

THE CHAIRMAN: I do not know whether it is dealt with elsewhere in the report.

MS ROSE: It is not dealt with. This is where they deal with it. This appendix ----

THE CHAIRMAN: How do we know?

MS ROSE: Sir, what we can say is that this is an appendix in which they are describing, summarising, the methodology that they have used. The problem is that we do not have the model. It is exactly the problem as in *Eisai*, but without the model you cannot address it.

THE CHAIRMAN: My understanding is that Mr Williams says that the CMA wants to come back actually with a non-redacted version of this report, and that he is going to refer to the

parts that had been redacted, and on the basis of those he is going to make a submission that it is not necessary or proportionate for your clients to have the underlying IPA data. Speaking for myself, at the moment, I just have great difficulty in being able to assess the submissions one way or the other in advance of having the unredacted version of the report and have Mr Williams make his submissions by reference to that. It may be that they go nowhere. I do not have the ability to assess it one way or the other.

As I understand it, you are trying to say to us, "Ah, well, you can if you look at this one footnote in the report that goes over a whole lever arch file, and you can look at that and be sure that whatever else is in the unredacted version of the report, his answer to your application must fail". All that I can say at the moment is that I have great difficulty in assessing that submission as wellequipped as we are at the moment.

MS ROSE: Sir, I understand that, but that, of course, as you pointed out to Mr Williams, is because of the way that the CMA has chosen to respond to our application. Our application was made in our notice of appeal. It has not been sprung on them at the last minute. They have had it for weeks. We are now in a situation where what is being said is that we should all go away and then incur the very significant costs of a further hearing on this issue. If that is going to happen, then it should be at the expense of the CMA, not at the expense of my clients, because there is no good reason why this could not have been dealt with today.

THE CHAIRMAN: Alright. I am sure we will come to costs at some point. I wanted your submissions in relation to whether that is a feasible way forward. It sounds as though it is, but you say they should pay.

MS ROSE: Let me just make two further points. One point is the point that I made to you in opening, which was ----

THE CHAIRMAN: Can I just be clear: are you submitting it is not a feasible way forward?

MS ROSE: Sir, it is obviously technically feasible that we can adjourn this application and have it again next week. That is obviously technically feasible, but, in my submission, the court ought not to proceed in that way for two reasons: firstly, because it is a waste of time and costs.

THE CHAIRMAN: If I may say so, that depends upon you being able to satisfy us on the basis of this footnote that the answer is obvious. I have already said, I have great difficulty myself in assessing that submission. So, with the two minutes that you have got to make good that submission, it does not sound like that is going to happen.

MS ROSE: The first point is that actually it is inevitable and this footnote does show that it is, but I accept that it is going to be difficult to persuade you of that in two minutes. The

reason that this footnote shows that it is, is that this footnote shows you the summary that they are giving us of their regression analysis without giving you the detail of it. There is no place in the report where there is a redacted version of this material.

MR GLYNN: If you had the original data you would be able to check that their calculations were correct. You might be able to find that the summary that they give you of how much the variations are explained by the factors they have identified is correct, but it would be a technical check on both the accuracy of their work and on the integrity of their summary.

MS ROSE: Exactly, sir, and those are the crucial points.

THE CHAIRMAN: If I may say so, those are precisely the sort of arguments that will weigh in the balance in an argument about whether it is necessary and proportionate to impose the additional obligation on the CMA.

MS ROSE: Sir, we can already see that this is a classic instance of why it is necessary and proportionate, because this is a matter that goes to the absolute heart of the revised pricing analysis. What they have done is to say, "We have constructed this notional representative patient, and we have shown through our regression analysis that on average the prices charged by you to that representative patient are higher than the prices charged by TLC".

THE CHAIRMAN: I think we do understand why you want the data. Broadly speaking, we are sympathetic at the moment. What we are having difficulty with is the idea that we should - speaking for myself - plough ahead now on the basis of this footnote and you saying it is all obvious in advance of the CMA having an opportunity with proper information to seek to persuade us that, although it is relevant information it is not necessary and proportionate that you should have it.

MS ROSE: They need to be able to explain what their answer is to this point then, because if they are going to say, "Actually the underlying data that makes up these figures here that shows the unexplained variables that are in this regression analysis is just redacted in this report and you will get it", that is one thing, but if they are not going to say that, and I really do not think that is the position, then it is necessary for us to see the underlying data, because otherwise we cannot stress test the regression analysis. We just cannot do it.

(The Tribunal conferred)

THE CHAIRMAN: Thank you, Ms Rose.

MS ROSE: Sir, there is another point I want to make. Sir, the first point I make is that it really is inconceivable that it would be said to be disproportionate, and that is because you can see, and that is just an example, that it is necessary for us to see the underlying model.

The second point I make as to why it is inconceivable it would be disproportionate is that they have already provided this information to one of our competitors, but have not provided it to us, and this has only become apparent to us very recently on a close reading of the report. Can I just show you what I mean?

THE CHAIRMAN: Can you just bear in mind that we are going to have to stop, I am afraid, at ten to five because I have a meeting. We have also got your expert evidence application.

MS ROSE: I understand that, Sir, but this is obviously very important.

THE CHAIRMAN: I follow that, but I am just saying that everyone should bear in mind that we need to fit everything in within the next 20 minutes.

MS ROSE: If you go to p.458 in the report, you see para.23. They say:

> "In February 2014, we held four hearings with parties to consider their views on the provisional decision on remedies. Summaries of these hearings have been published on our website."

Then this:

> "Also during February, external advisers of one hospital operator were invited to attend a disclosure room at the CC's premises. Following submissions made by the main hospital operators, we made revisions to methodology used in our insured prices analysis and its results. The revised results of our analysis have a significant impact on our assessment of that hospital operator's position. Accordingly, the revised results were made available in the disclosure room to external advisers of that hospital operator for comment."

So it appears that the data that underlies the revised pricing analysis was made available to one of our competitors but not to us during the administrative process.

The question of who that is then emerges if you go back to the passage that we were just looking at ----

THE CHAIRMAN: Very strictly, just looking at this paragraph, and again speaking for myself, it is quite difficult to know in concrete terms what has gone on. They are talking about "the revised results were made available in the disclosure room". That is the results of the calculations rather than the underlying data.

MS ROSE: Sir, if you go back to A6.12, p.846, the passage we were just looking at, the matter becomes slightly clearer. If you look at footnote 17, here they are discussing the regression that I have just been referring to. They say, "we do not repeat this regression step for every hospital operator", then they say they have included dummy variables for each hospital

operator and interactions between these and the patient characteristic variables, and then they say at footnote 18:

> "Nuffield questioned whether these patient characteristics were meaningful predictors of prices."

Then they go on to record submissions that were made by Nuffield commenting on this regression analysis. So it appears that Nuffield was shown the revised pricing analysis, although we were not.

I am flagging this for two reasons: firstly, because, in my submission, it is inconceivable that it could be fair for one of our competitors to have been shown this during the process of the administrative proceedings and us not to have disclosure of it during the appeal; and secondly, because, having now pieced together those paragraphs, we do intend to amend our notice of appeal to add as another particular under ground 1 that there was discrimination in the way that we were treated by reference to Nuffield. That is a separate point, but I just raise it now to make it clear that there is really no sensible basis on which it can be said to be disproportionate for us to have this material.

You will also be bearing in mind two further points: one, the *Eisai* decision and the stress that was laid on the importance of having access to an executable model that could be tested for robustness in that case.

THE CHAIRMAN: I do have that in mind. I have already a sympathetic view of your application. My concerns, and I believe they are those of my colleagues as well, remain: is it right for us now to rush ahead to actually make a ruling without the CMA being afforded an opportunity of putting forward their full case as to why we should not.

MS ROSE: On that basis, and given the time, it may be that we ought to adjourn this and also the expert evidence issue to a further CMC, because I do not believe I can deal with the question of expert evidence in ten minutes.

THE CHAIRMAN: Right.

MR WILLIAMS: Sir, I do feel there is one thing I ought to say having heard your exchanges with Ms Rose. First of all, very briefly in relation to that last point, we will deal with the matter in our defence in due course.

THE CHAIRMAN: We do not have a pleaded case.

MR WILLIAMS: One of the points to make is that it was concerned with a different part of the pricing analysis because ----

THE CHAIRMAN: At the moment I am struggling to get to grips with the case already pleaded. I have noted what Ms Rose has said, and we will wait and see what new pleaded allegations are made.

MR WILLIAMS: We have not come here equipped to argue to the nth degree the footnote that Ms Rose looked at, but I would just like to make one point, which is that I am not making a submission to you, Sir, in relation to that footnote or anything else that when HCA sees the unredacted report there will be more explanation of particular points. In relation to that point I do not have instructions at the moment. I am not in a sense saying that when I come back in due course that we would be making that submission. The point we wanted to make is that if one reads 2.39, which is the paragraph of the expert report which Ms Rose took you to, it makes a series of criticisms of the analysis as it stands and it says we have only been able to take it this far, but it does not say that we need to do this piece of analysis or that piece of analysis if we have further data. The criticism that is made is a free-standing criticism. In a sense, either that will be sustained in due course or not, but the case is not put at the moment that HCA needs the data to do further analyses to make that point good. That is just not the way the report is expressed.

THE CHAIRMAN: You are not inviting us to determine this point at the moment. You are asking for ----

MR WILLIAMS: No, I just did not want you to proceed on the misapprehension that when we come back in due course I will be saying, "And here is the rest of the reasoning in the unredacted report". We say that the way that it has been put today with references to these sorts of paragraphs of the expert report just does not disclose a basis for disclosure at the moment.

(The Tribunal conferred)

THE CHAIRMAN: Thank you very much. We are not persuaded in relation to the application for IPA disclosure that it would be just and appropriate for us to make a ruling now for the reasons that have been intimated, that we do not have a sufficient basis in terms of the material before us on which we can assess the submissions being made by both parties. Moreover, it has become clear that we have run out of time to deal with another potentially major topic which is the admission of expert evidence and the hearing today will need to be adjourned for that matter to be dealt with in any event.

Therefore, what we propose to direct in relation to both those remaining matters - that is the IPA disclosure and the expert evidence - is that they be adjourned off to a further hearing.

We can come back in a moment to discuss the mechanics in relation to that. Before we do so and before we conclude today, can we go back to the timetable which affects everyone to see whether anyone has objections to make to the proposed timetable that I indicated previously. Who wants to go first?

MR WILLIAMS: Sir, we did have one concern which is the statements of intervention from The London Clinic and BUPA.

THE CHAIRMAN: 18th July.

MR WILLIAMS: The timetable we were working to was that our defence would be put in at the end of the first week of August, and the practicalities of that were that people will start to disappear on holiday from the end of July. The document in substance would be finished by the end of July and one would then have a week for the practicalities of dealing with the document.

THE CHAIRMAN: I hear all of that, but I think we just feel that 9th July is too fierce for them.

MR WILLIAMS: All I can say is that every day counts. I think the 14th is the Monday, and that would then give us at least all of that extra working week.

THE CHAIRMAN: So you are suggesting 14th July rather than 18th July?

MR WILLIAMS: Yes, it would give us another week, the point being that those at the CMA are going to have to provide instructions on the substance, and then those are going to be factored into draft the counsel team. That all takes time, and really, if one starts on 18th, there is really very little time before we are right into the holiday period.

THE CHAIRMAN: Yes. Unfortunately, I do not think we can conduct the litigation purely by reference to people's holiday arrangements.

MR WILLIAMS: I understand that, Sir.

THE CHAIRMAN: You are proposing 14th July.

MR WILLIAMS: In our submission, the 14th is enough time anyway and that strikes a balance.

THE CHAIRMAN: TLC and BUPA, can they live with that?

MR WARD: Pardon?

THE CHAIRMAN: I am asking The London Clinic and BUPA, who we are talking about.

MS KREISBERGER: We would ask for the 18th, as initially proposed. That would make our lives easier. We are at a disadvantage in that our request to intervene went in at the beginning of this week. Unlike the CMA's team, we are not up to speed at all with many of the documents. We have not seen all of the notices of appeal.

THE CHAIRMAN: So you need the time, you say?

MS KREISBERGER: We do need the time.

THE CHAIRMAN: And BUPA?

MR WARD: Sir, the only thing I would add is that recent experience of trying to agree a statement of intervention between multiple parties showed it needs a great deal of time to reach agreement.

THE CHAIRMAN: I have already covered that by my observations, that people should try. If it appears pretty clearly early on that it is not going to work, all right, we will go with Mr Robertson's alternative.

MR WARD: I only mention it again because it is for that reason that I would support Ms Kreisberger's submission.

THE CHAIRMAN: (After a pause) We think still the 18th in relation to that. Does anybody else want to make points in relation to the other dates?

MS HOWARD: If I may. I appear on behalf of the AAGBI. We are an organisation that represents 10,000 anaesthetists, and we have already shown restraint in the FIPO appeal, we have not intervened in that appeal because we feel that FIPO can make the arguments in relation to the second consultant issue, which is the position of the PMIs. We have made the decision to intervene on the first issue, which is the consultant groups because the AXA appeal directly targets anaesthetist groups. It may be that the interests of our members are divergent from the members of the BMA or the members of FIPO because we are representing anaesthetists only. Therefore, we do not want to be constrained into putting in a joint written report. We may want to make ----

THE CHAIRMAN: I think I have already made it clear, I am not going to order that joint reports be filed. We will order a timetable. We are inviting the parties to consider if they can co-operate. It would help us if they can. If you are intimating that there may be reasons why you cannot, so be it.

MS HOWARD: I just wanted to put a marker down that we may want to put a short and focused report ----

THE CHAIRMAN: All right, but you are not objecting to the timetable that we have indicated?

MS HOWARD: The only request is that we could push out the joint statements of intervention to the end of that week which would be 12th September, the Friday, simply because if we are going to have to try to liaise that may need more time, and we would like the benefit of that week to try to avoid duplication. That should not impact too wildly on the wider timetable. I understand that my learned friends acting for FIPO and the BMA have no objections to that deadline of the 12th.

THE CHAIRMAN: Does anyone object to that deadline being pushed from 8th September to 12th September?

MS BACON: I do not object as such. What I am concerned about is that we are going to have to meet potentially four statements of intervention opposing us if, following best endeavours, it proves unfeasible for them to put in a joint statement. If that is the case, I think that we need more than two weeks in which to review those and respond, which is at the moment what we would have. If they put theirs in on the 12th and if it turns out that there are four separate statements of intervention, then I think we need longer than the 29th. It may be that that could be accommodated depending on when the hearing date is set.

THE CHAIRMAN: I think then the answer is that it should remain as 8th September because Ms Bacon will need the time to consider it. (After a pause) Yes, I think it will remain as 8th September. I think there is force in what Ms Bacon says about the range of intervention she may be facing.

Yes, Ms Rose?

MS ROSE: I just want to raise a concern that it is likely that we will be amending our notice of appeal when we see, first, the unredacted decision, and then, if we do see it, the data underlying the IPA. We will not be in a position finally to amend our appeal until we have seen all the material that is going to be disclosed to us. I do not know when the intention is that we should reconvene the CMC, but there is obviously a potential problem of slippage in the timetable in relation to the CMA's defence, because we will need time to read the material that is disclosed to us and to draft amendments to our appeal.

THE CHAIRMAN: I am not sure we have been given a timetable by you for that.

MS ROSE: No. We have not been given a timetable for when we are going to get the unredacted decision, and now the question of when, and indeed whether, we are going to receive the underlying IPA analysis, the timing of that is completely up in the air. I am in some difficulty in responding to that.

THE CHAIRMAN: What are you saying, that we do not try and set any timetable at all at the moment?

MS ROSE: Sir, what I am saying is that we do need to work out, first of all, when the unredacted decision is going to be made available and the confidentiality ring as a matter of urgency.

THE CHAIRMAN: Do you know when that can happen? That ought to be able to happen quite soon.

MR WILLIAMS: A week, Sir.

THE CHAIRMAN: As long as that.

MR WILLIAMS: I think that the process of redaction and excision always takes longer than one expects.

THE CHAIRMAN: We are told a week.

MS ROSE: So that is going to arrive on something like 2nd July - would be right? After that date we will need to fix a date for the reconvened CMC.

THE CHAIRMAN: Why after that date? It probably will be after that date, but why does it need to be?

MS ROSE: I understood the position of the CMA to be that they need ----

THE CHAIRMAN: Yes, you are quite right.

MS ROSE: They need to say that the unredacted decision was sufficient. There will need to be a sufficient gap for us to be able to look at the unredacted decision and they will need to serve a skeleton argument, and we will need to fix a date for that. We are going to be looking at the second half of July before we even see - then I do not know how long they are going to need to disclose the underlying IPA analysis. The likelihood is that we are not going to get that until the end of July. At that point we have to amend our notice of appeal. I am concerned that this timetable may not work.

THE CHAIRMAN: On the other hand, everything could proceed according to this timetable, and then, when you amend, an additional timetable can be set to cope with the need for amendments. Would it not be better to have everyone focused on things now, getting everything as prepared as it can be, always subject to your amendments, and when your amendments come in then people will just amend, in so far as they need to, their statements of case going forward. That is the way litigation usually happens.

MS ROSE: We can do that, but it is going to result in the CMA probably having to produce two defences, one shortly after the other.

THE CHAIRMAN: An amended defence. Only two defences if you completely change your case. People do produce amended defences. It is not unheard of litigation. Let me hear what Mr Williams says.

MR WILLIAMS: That seems to us to be the lesser of two evils in the circumstances. The only point I would make is that, in preparing our defence, we do need to know where we stand on expert evidence. I appreciate that we have run out of time today, but that is obviously a key point in terms of how we deal with ground 2. If we do succeed in resisting that application, Ms Rose will need to amend her claim in order to remove the reliance on the expert report which is currently there, so we know how they put the points. Whether it is simply deleting those cross-references or not, I do not know.

THE CHAIRMAN: I have to say, at the moment it seemed to me that it would be an exercise of deleting the cross-references. All the points she makes she can make.

MR WILLIAMS: If that is right then perhaps this is not on the critical path.

THE CHAIRMAN: People need to know where they stand, I can see that. Ms Rose needs to know where she stands on that and on the IPA. We need to reconvene sooner rather than later, but I am not sure that we are going to be able to give you a date, and it will be giving you a date at this stage.

MR WILLIAMS: As I say, the concern is that if we are talking about the second half of July that is really very close to the end of the period for our defence for us to know where we stand on the expert report.

THE CHAIRMAN: What I have in mind is that it would be in the week commencing 7th July at the moment. I have not been able to compare with my colleagues as to our availability, but we would be looking for that to happen very quickly.

MR WILLIAMS: For the time being we are proceeding on the basis that it is in abeyance, Sir, we are not preparing responsive expert evidence, and so on.

THE CHAIRMAN: In terms of the order at the moment my understanding is that you say, yes, we should set the timetable, and as and when there are amendments they will have to be worked through with their own timetable.

MR WILLIAMS: That is what we say, Sir, yes.

THE CHAIRMAN: Does anyone else want to make observations about that procedural approach? We think that the appropriate way forward is for a timetable to be set now. We note Ms Rose's point about the likely need for amendment, and amendments will have to be dealt with as and when they arise and timetables will be adjusted in the light of whatever happens.

Moving then to the question of hearing dates, we are proposing to list the case to begin on 19th January and run for the seven days that have been indicated.

In terms of setting the date for the adjourned part of the CMC we will need to rise and compare dates, and it will probably be tomorrow that we indicate when that can happen.

Ms Rose and Mr Williams, how much time do you think you need to deal with the IPA and expert evidence points?

MS ROSE: I do not know what the CMA are planning to say in relation to the IPA, Sir, so I am in some difficulty. In relation to the expert evidence point, I would have thought it is about an hour in total, maximum.

THE CHAIRMAN: It certainly would be maximum, because you did not suggest we needed another hearing than today to get everything, including the expert evidence. So I do not think you could have been thinking that it was going to take an hour if we dealt with it today.

Mr Williams, how much time do you say?

MR WILLIAMS: I do not think I will be awfully long on the expert evidence. I have put in a full written submission, I would have thought I might be 20 minutes, something like that.

THE CHAIRMAN: I had rather assumed that Ms Rose's hour was everything.

MR WILLIAMS: I am well within her hour, I would have thought.

THE CHAIRMAN: All right, and on the IPA?

MR WILLIAMS: It really depends on what the application and how detailed the application is. I would have thought ----

THE CHAIRMAN: You have got the application, it is a question of what your answer is.

MR WILLIAMS: I thought we were anticipating that, having seen the report ----

THE CHAIRMAN: Yes, you are right, they are going to get the unredacted version and you are hoping they will re-formulate their case.

MS ROSE: No, we are not going to re-formulate our case. The position is that we have got an outstanding application for disclosure of the analysis that underlies the IPA. What the CMA are saying is we do not need that because there is enough analysis in the unredacted report. They want to make that good by showing you unredacted report so they can do that.

THE CHAIRMAN: I am sure you are going to at least consider that case, are you not, in deciding what position you are going to adopt?

MS ROSE: I am sure we will consider it.

THE CHAIRMAN: Good, that is all I was envisaging would happen.

MS ROSE: We are not intending to make any separate or different application.

THE CHAIRMAN: No. I think we are *ad idem* that Ms Rose will look at it and give it her consideration.

MR WILLIAMS: I think we had anticipated that, having seen the unredacted report, they would say what they want.

THE CHAIRMAN: It may be they say, "We want the same as before".

MR WILLIAMS: It may be there is nothing to add. The point we have made is that so far what it is they need to do with that.

THE CHAIRMAN: It sounds like we need to be looking for half a day to deal with both matters.

MR WILLIAMS: I am afraid so.

THE CHAIRMAN: It seems to us that the order from today can be drawn up reflecting the decisions we have made today, Mr Williams, if you could take the carriage of that and seek to agree a minute of order with everyone.

MR WILLIAMS: That does not include the confidentiality rings, does it? Normally the Tribunal draws those up, or does it?

THE CHAIRMAN: We have got a rather unusual confidentiality arrangement in place with the CMA in particular saying they want this super-confidentiality approach, so I would have thought that the best way forward is for the CMA to make its proposals. You can do it to the Tribunal, circulate it to everyone else for information, as to what the two confidentiality rings should say, and then the Tribunal no doubt will apply its own mind to that as well.

MR WILLIAMS: Understood.

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

MS HOWARD: Can I just check one point? It would help the interveners to have early access to the notice of applications of the parties that we are intervening in, because obviously some of us may want to be front-loading on the statements of interventions to get ahead, and we all need copies of the notices, presumably at the same time as the redacted final report.

THE CHAIRMAN: That certainly sounds sensible. Does anyone have any difficulties with that happening or that timetable?

MS BACON: From our perspective there are a few figures in our notice of application that are confidential, so we would want the confidentiality ring to be in place first, and we would hope that at least the ordinary confidentiality ring rather than the super-confidentiality ring could be established fairly quickly on the basis of previous Tribunal decisions.

THE CHAIRMAN: I was not envisaging a staggered implementation of confidentiality rings. The confidentiality rings, such as they are, will need to be in place when the report is disclosed, and I think that goes with the logic of what you are suggesting, that since *ex hypothesi* the confidentiality ring will exist then, that will be the appropriate time for the interveners to have the application notices.

MS BACON: Exactly, yes.

THE CHAIRMAN: I cannot see any difficulty with that. Does anyone have an objection to that happening and on that timetable? No. Very well, so perhaps that could go into the order. Is there anything else?

In relation to costs, I do not have a strong view on that. Do people want to make submissions on costs in relation to this? I would have thought it should be generally costs in the case or costs reserved. I would actually suggest costs in the case, which obviously

leaves open an awful lot of working through at the end of the day because it will be a grey and fuzzy outcome with some people winning and some people losing, but it indicates the general principle. I am getting nods apart from, I think, Mr Williams.

MR WILLIAMS: It is only that we dealt with the preliminary issue, there was an argument on that, and so on, but I think at the moment costs in the case for a case management conference.

THE CHAIRMAN: Very well, costs in the case then.

I think that is everything which we can usefully deal with today. Does anyone disagree? It remains for us to thank you all for your submissions and we will rise now.

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