IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1218/6/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30th September 2013

Before:

MARCUS SMITH QC
(Chairman)
WILLIAM ALLAN
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

BMI HEALTHCARE LIMITED
HCA
SPIRE

Applicants

- and -

COMPETITION COMMISSION

Respondent

_____

Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Audio Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
(info@beverleynunnery.com)

_____

HEARING

APPEARANCES

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

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

Mr. Daniel Beard QC and Miss Alison Berridge (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Applicant, Spire.

Miss Kassie Smith QC and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for the Respondent, the Competition Commission.

_____

THE CHAIRMAN: Mr. Flynn, before you start there are just two points. Obviously, matters have been coming in thick and fast to the Tribunal. We have kept up as best we can with the material coming in but it takes us a while to find the relevant bundle behind us, but we will do our best.

MR. FLYNN: Absolutely sir, and I think I can say on behalf of all of us we are very grateful to the Tribunal for the speed with which we have reached this point, and I think I understand the authorities bundle has just been placed on your desk or somewhere around.

THE CHAIRMAN: Yes, indeed. The other point is simply one of timing. We are conscious we have a number of parties in front of us. It seems to us in order to allow sufficient time for a reply and to finish today the applicants should regard themselves as three quarters of an hour as being perhaps the time they should spend – we will start getting itchy after that, let us put it that way.

MR. FLYNN: Well understood, sir. Indeed, I think all counsel conversed over the weekend and we hope to be well within that sort of time frame and, indeed, replies may be longer, that may be where some of the meat comes.

THE CHAIRMAN: In that case I will not hold you up any further.

MR. FLYNN: Perhaps I should just introduce the parties formally so all members of the Tribunal know who is here and for whom. I am appearing with Mr. Rothschild for BMI. Going down the bench from me, Mr. Beard QC and Miss Berridge are appearing for Spire, Mr. Morris QC and Miss Edwards are appearing for HCA and Miss Smith QC and Mr. Williams for the Competition Commission. I know there is an intervener but I think they were confined to writing so I do not know if anyone is here for them, but that is the front row at any rate.

In terms of running order I think that will also be the order in which we propose to address the Tribunal if that is convenient to you.

As you have said, things are happening thick and fast. Perhaps by way of short update I should say, although the Tribunal is probably already aware that since we last met the Commission has decided that some of what we call the 'requested evidence', in other words some of the stuff that was blanked out in the version of the notes that our inspectors prepared, the Commission has been prepared to release some but not all of it and that is on the terms of some further undertakings which, for those who had already given undertakings, essentially relate to the manner in which they can view and store the further unredacted version of the report, and whether they can make copies, whether they can view it on a stand alone computer – that sort of thing.

In our case at any rate those further undertakings have been given by our three inspectors, so the associate from Shearman & Sterling and the two economists, those undertakings have not been given by anyone else within Shearman & Sterling for the reason you will be well aware of, that they cannot subject themselves to what, perhaps conveniently, we can call the 'adviser disqualification'.

The document in that form has also been made available to counsel, and Mr. Rothschild and I, and I believe my friends for the other appellants have signed an undertaking which, oddly, does not include the adviser disqualification, but nevertheless we have given undertakings. I understand the point of this is so the Commission can make submissions in relation to the further 'unredactions' – if I can use that inelegant phrase – which, if I may say so, rather makes one of our points that perhaps it is necessary to see some of this information in order to make a coherent point about it. Since this hearing is devoted to points of principle I am not, myself, proposing to get into that further version of the document. From our perspective, although things have moved slightly and we would characterise that as the Commission taking further decisions, the position is essentially as it was on Friday of the week before last when, as you will recall, sir, we were prepared to argue the case there and then. In a sense it has got worse in that certain elements of the adviser team are able to see what is thought to be important information and others are not, so it is a funny position we are in, but it does not change the points of principle.

I propose to make my application very simply by reference to our skeleton and frankly not to take too long about it because I think the issues were ventilated at our last hearing even if they were not dignified by references to case law. If the Tribunal has our skeleton, which I think is in my BMI bundle 2, tab 1, but you may have a different system.

THE CHAIRMAN: Yes, I have that.

MR. FLYNN: We say, firstly, of course, the Commission has in effect conceded part of our application by releasing within the confines of the undertakings I have just described, some information which is not own client data. That, of course, was the central biggest problem that we were facing when we made our application. At the time BMI was due to be lodging its response to the provisional findings on 1st October, and was not able, we say, to have available or use the requested evidence. That requested evidence had been redacted on the basis that it was not own client data, as that is defined.

That point has been conceded, at least in principle, the extent is another matter and I know that the Tribunal is not anxious to get into precisely where any borderline should lie in this particular case and really to look at the issues of principle.

Against that background we have identified two issues of principle on which I should like to address the Tribunal. The first of those is, is it open to the Commission, is it lawful for the Commission, to limit the data which our inspectors can have available to them or use when they are formulating BMI's submissions responding to the provisional findings, at whatever may turn out to be the new deadline? Secondly, relating not to those inspectors but to others, is it lawful for the Commission to impose or to require as a condition of access to the information the adviser disqualification of three years? As to that, you will see that we have put in a witness statement of Mr. Bright of Shearman & Sterling, who goes into some detail about that. I will come to that shortly.

Just to remind ourselves, the adviser disqualification which appears in the recitals of both the original undertakings and the revised undertakings which our inspectors have subsequently given is not to advise any party in relation to any pricing negotiations between any hospital operator and any PMI (private medical insurer) concerning the price or terms and conditions of services supplied to patients of the PMI for a period of three years, starting from the date on which the disclosure room closes.

Those are the two issues which we would like to raise with the Tribunal.

In our skeleton bundle there is a degree of correspondence between the Commission and BMI's solicitors, Shearman & Sterling, and we have summarised in our skeleton some of the more pertinent extracts from that, from which you will see, if you are with me in para.3(3), that this issue of how any data room might be managed has been up in the air since early June, since the day after the Commission published a working paper with the time that you see there, "Empirical analysis methodology of price outcomes in negotiations between hospital operators and insurers". So the date after Shearman & Sterling ask about a data room, the Commission says that it has not been able to strike the right balance between transparency and the confidential nature of the results.

Shearman & Sterling respond that if the CC wishes to use that evidence it is going to have to disclose sufficient information, so not necessarily everything but it is going to have to disclose sufficient information for BMI, or at least its advisers, to understand and challenge that evidence, and that point is then reiterated.

In particular, at subpara (7) we quote from an email or letter of 20th August, which relates to the terms that the Commission was then proposing for access to their data room, and goes into some detail as to the objections for what I am calling the adviser disqualification which, at that time, the Commission was proposing should be for five years; that was what was

being proposed towards the end of August. What Shearman & Sterling say in relation to that is:

> "The [Commission]'s actions to date suggest that these negotiations will take place against a backdrop of intervention by the [Commission]."

Then they point out that since it will not be necessary to disclose the confidential pricing information to BUPA as they face no risk of adverse findings, one result of that is that in future negotiations BUPA will have their habitual advisers, and that if the ADQ ("adviser disqualification") is given as a consequence of entering into the undertakings that will not be the position for BMI.

> "BMI has provided clear and consistent evidence that BUPA in particular is using this investigation to achieve or augment its commercial aims – a tactic commonly known as regulatory gaming. There is no reason to consider that this behaviour will not continue especially in light of an intervention by the [Commission]. Disqualifying BMI's competition advisers from helping BMI cope with this foreseeable threat as the 'price' for allowing BMI to exercise its basic rights of defence is quite inappropriate as well as being commercially harmful to BMI".

And so it goes on, in particular saying it would be unrealistic and irrational to think that competition law advisers could undermine the competitiveness of such negotiations. That is essentially the position that we take today; that is a neat summary of BMI's objection to the disqualification for its experienced advisers.

Then you see the Commission's response set out in subpara (8) when they say three years, but they do think that the disqualification is necessary. The rest of the chronology you are probably familiar with from the previous hearing, that a form of undertakings was eventually sent towards the close of business on the Friday, when the disclosure room was to open on the Monday. Three people on behalf of BMI, Mr. Steenson of Shearman & Sterling, and Mr. Davis and Mr. Langer of Compass Lexicon, signed the undertakings under protest, as you recorded at the last hearing, sir, and then handed in the notes and probably the rest we know.

You see in para 14 the correspondence about the three different categories of confidential information relating to the Commission's views on divestment options, where the Commission has allowed a much wider ring, much looser undertakings, accessed by clients as well as advisers irrespective of seniority or other sensitivity such as responsibility for negotiations with a particular party, and a large number of people, 12, being allowed to see that information. Mr. Bright also refers to that at paras. 29 and 30 of his witness statement.

I probably do not need to take you to the rest of this because I think I have effectively brought you up to date with what has happened.

Our first issue we would say is the issue of principle – a fundamental principle – that it is for BMI to decide what information is useful for it to defend itself in response to the provisional findings. We are not, in this application, making any criticism of the amount of information in the data room, for example, we are simply saying that which we were allowed to see and which those who were entrusted with that task thought was relevant, should be available to them in formulating the defence.

The point is really a simple one of fairness. It flows, we say, as a matter of necessary and obvious, and uncontroversial implication from the Commission's duty to consult, that it has to consult fairly. There is plenty of case law about what that means, what the rules of natural justice require. We have cited a few cases which I will take you to because I realise you have not had the chance to open the authorities bundle. What they, of course, all say is that context is everything. It really depends what context you are operating in. Here we are operating in a context where, as the provisional findings indicate, and the remedies notice indicates, the Commission is provisionally of the view - unless it can be persuaded otherwise by a well founded response to the provisional findings - that certain hospital operators be required to divest themselves of substantial assets and that is as intrusive a form of power that a public authority can have. It is hard to imagine anything much more. In personal cases one can imagine worse things, but in corporate life it is getting close to the limit.

We do not think it is controversial that the principles of natural justice apply and we cite a few authorities which say how they should apply. The principle point that we make in para. 8 of the skeleton, and it is an important point, is that this is not just a *Wednesbury* test of whether any reasonable or sane investigator could have reached this conclusion, it is actually for the Tribunal to decide whether the procedure adopted is fair. It does not matter how carefully they have considered it, you actually have to decide in all the circumstances whether the procedure was fair.

If I take you to some of the authorities it may, indeed, not be necessary because we have tried to cite the relevant passages in the skeleton, but they are in the bundle and I will pull out a few if that is going to be of assistance.

THE CHAIRMAN: That might be of assistance, but can I ask you this, Mr. Flynn? Let us suppose we are with you on the proposition, just to take the citation from *Kanda* in para. 9 of your skeleton, that you are entitled to know what evidence has been given and what

statements have been made affecting it, in other words, you are entitled to know the evidence against you, as it were, in order to respond. Would you accept, though, that it is for the Commission in the first instance to decide precisely how that evidence is accessed? In other words, if one is debating between the use of, say, a confidentiality ring on the one hand and disclosure room or data room on the other, that in the first instance would be something for the Commission to determine in the light of the sensitivity of the information that it has seen, but that, having decided to go down a particular route and hear the Commission, it is decided to go down the data room route, it is then incumbent upon the Commission to put in place the mechanics which enable you, as you said in relation to your principle, to have your client and the other applicants to see all of the data and not just some of it.

That then leads to a very difficult question of, can the data leave the data room or should the applicants in the position of your client, be entitled to bring into the data room sufficient infrastructure to enable them as it were on site to craft a proper and detailed response to the provisional findings of the Commission?

MR. FLYNN: Sir, it is plainly for the Commission in the first place to address its mind to the issues and its statutory duties and devise a scheme. I think we fully accept that. I cannot remember where we say it, but we do. We do accept that it is for the Commission to devise the scheme, but the governing principle must be that whatever scheme is devised we have that opportunity which you have described and which the cases underlined on the page in front of you say that we have to be given a fair chance to correct or contradict the points that are being made against us, or have to have an opportunity to controvert it or comment on it. They could say some people can come into the data room and they can have a week there and they can write the response. The Tribunal might, in such a circumstance, say that that was an appropriate way of doing it.

I think we have to focus on the system that was set up at the time, the decision that we are criticising, and that was that people were allowed in between, I think, nine and five on two days, and were not allowed at that point to take out anything except that which was already known to their client. That is really the point that we are on. Yes, it is for the Commission to devise the procedure, but ultimately it has to pass the test of fairness and it has to satisfy that it is a fair one.

THE CHAIRMAN: Indeed, but looking at, for instance, the material that remains, even after the concessions made by the Commission is redacted, as I understand the Commission's position, that is material that must remain within the data room. So is it not going to be part

of what you are submitting to us that somehow that needs to be resolved? You may say it can be resolved by unredacting everything and essentially disclosing into the confidentiality ring, but were Miss Smith to stand up and say, "Sorry, this is material of a different order to matters that can be disclosed into a confidentiality ring, we maintain the need, as regards these redacted materials, we maintain the need for data room", you would say, "Fine, but we need therefore an ability to respond as part of the rules for the data room to the material that remains within it".

MR. FLYNN: I think that is what I would say to you, sir, if that is where we ended up. I think the Commission says in its skeleton that it has effectively moved as regards the data that it has subsequently released from a data room to a confidentiality ring procedure. I obviously do not know what has not been released. I know that it is said to be specific numbers as opposed to ranges, and so forth, but I do not actually know what it is. You will have seen in our skeleton, para.27, that we do report the views of the three inspectors in relation to the new version of the report, if I can put it that way.

Just to be clear, this is not in a witness statement, this is reporting to counsel by the inspectors at a time when they had given the further undertaking and seen the less redacted form of the report and counsel had not. This is an attempt by them to explain the kind of difficulties that they think they are in despite the concession, and to do so without breaching their undertakings. I am really not in a position to amplify those very much.

The decision that we are challenging, as you will recall from our application, is one under which the inspectors were not permitted to, we would say, use the data in formulating the response or to discuss it with other advisers. So even if we ended up in a situation where some of it had, by a subsequent decision, shifted into a confidentiality ring procedure and some of it was to your submission so sensitive that it had to remain in the data room, firstly others of the applicants are saying that, given the steps the Commission has taken even before this hearing, they would want to go back to the data room because they took a different approach to how to write their notes, then I think we would be into a different argument about who should go into that. Of course our adviser disqualification point would still be absolutely live.

At the end of the day there has to be a fair procedure, and we say the one that we are challenging in these proceedings has not been fair, and is not fair.

Sir, if it will help, the authorities - as I say, we have set out the essential principles, and because all the cases are so fact specific, the facts of the case do not really matter very much and they come from a very wide spectrum of facts. We cite *Kanda*, and if I take you to that

we could look at the quotation in context. I do not know how much further it will take us. It is tab 1 in the authorities bundle. You will see that it is an appeal from the Supreme Court of Malaya, as things were in those days, in relation to a dismissal of a chief inspector of police, and it fell to their Lordships' House to interpret the Malayan constitution. That is not going to help us very much, but they went on also to say that the way in which the inspector had been treated did not breach the principles of natural justice. I think, if we turn to p.337 of the report, just about a third of the way down, having discussed how this matter had been handled in the home jurisdiction, as it were, Lord Denning goes on to say:

> "In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims …"

I am trying to avoid the Hampshire accent!

> "The Romans put them in the two maxims: *Nemo judex in cause sua;* and *Audi aleram partem*. They have recently been put in the two words, impartiality and fairness. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard. If the right to be heard is a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

And then he quotes some authority and deals with the risk of prejudice if the Judge has heard submissions from one side which are not available to the person accused, and they find that the inspector had not been given a reasonable opportunity to be heard.

Possibly the most helpful case that we have cited is a summary by Mr. Justice Charles in the *Ex Parte S* case, which is at tab 4 in the bundle. Again, the context somewhat far removed from the present case. It was an application by a child minder under the Children Act because her registration had been suspended. If I take you to p.219, above "G" there is a heading: "Unfairness".

"This only arises if my conclusions on illegality are wrong. As to this head of challenge there was at the end of the day, and in my judgment correctly, effective agreement as to the principles of law to be applied."

Then there is some detail about the case which I am not sure we really need to go into. The points that I wish to cite are those at "B" on p.220:

"The general principles in relation to fairness are that:

(1) It is for the court to determine what is or is not required to satisfy the requirements of fairness."

- citing *Guinness*.

"(2) One of the basic requirements of procedural fairness is that the decision-maker must disclose to the person affected, in advance of the decision, information of relevance to the decision so that the person affected has an opportunity to controvert it or to comment on it. For example …"

He then cites *Lloyd v McMahon* and *Kanda* which I have just taken you to, and to Lord Diplock's statement in *Hadmor Productions Ltd.*

"one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge and to be given an opportunity of stating what his answer to it is."

Then quoting the statement of Lord Mustill in *ex parte Doody*:

"Since the person affected usually cannot make without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer". It follows that what is required to meet the requirements should be considered in the circumstances of each case."

Then he applies the principles to that, as I say, very different facts and law in front of him. The last case that we cite by way of general context is at para. 11 of my skeleton and I see that I am probably approaching the point at which the point may get twitchy, but there is a quotation from Lord Justice Dyson (as he then was) in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd*:

"The common law rules of natural justice or procedural fairness are two-fold. First, the person affected has the right to prior notice and <u>an effective opportunity to make representations before a decision is made</u> …."

- those are the words we have stressed.

"Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from

> an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations."

Sir, really, there are many ways of making the same point and ultimately it is a simple one that you will have to be satisfied that the procedure in the present context, which I outlined in thumbnail and which is well appreciated by the Tribunal, whether that is a fair one. So we say it is not fair for the Commission to determine what can be relied on, seen and retained by the inspectors. We have a case that we did not cite in the skeleton but it is I think a principle that will be well familiar to the Tribunal, this is the Court of First Instance in the *Solvay* case, the Soda Ash proceedings which lasted for some 20 or more years, essentially on fairness grounds, and I will hand that up for what it is worth. (Same handed) This is a case in which the European Court (Court of First Instance as it then was) recognises the point we are making, that it is not for the European Commission to determine what is of use to the recipient of the statement of objections in responding to it – a very similar point. I think you have now been handed the Judgment, and the paragraph is 81. Again, I am not sure the Tribunal will be assisted by going into the history of the Soda Ash proceedings, but the point is neatly made at 81, where the court says:

> "In that context the Commission observes that although its officials themselves examined and re-examined all the documents in its possession, they found no evidence which might exculpate the applicant so there was no point in disclosing them. In that regard it should be stated that in the defended proceedings for which regulation 17 provides, it cannot be for the Commission alone to decide which documents are of use for the defence where [as in the present case] difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed."

We say that is a principle which should be applied here. It is for the company's advisers at least to be able to take an informed view on what they should be using. We say it should not be a memory test, so you have two days in which to review a lot of complex information in a crowded data room, and take your notes to the supervisor to have anything reflecting other than own client data chopped out of it, and it causes great difficulty.

If I could just spend two minutes, because there is just one other authority I wish to draw your attention to and this is in relation to the adviser disqualification. This is a case of

Virgin v Sky which is at tab 11 of the authorities bundle. I think the Tribunal has now been given the proper Weekly Law Report version.

THE CHAIRMAN: Yes, we have that.

MR. FLYNN: With the headnote. It is essentially, as the Tribunal is probably aware, this was an application by Sky in the context where there were various proceedings going on in which Sky and Virgin were being represented by lawyers and had opposing interests, namely High Court litigation, which is the context in which this application was made, proceedings before this Tribunal, the judicial review of the Commission's decision in relation to Sky's holding in ITV and an ongoing Ofcom investigation into Pay TV which led to the long running appeal before this Tribunal in due course. In the course of the High Court litigation normal disclosure was given, which was extensive, and some of it into a confidentiality ring. Sky applied further that certain members of the confidentiality ring on the Virgin side should also not participate in the other proceedings because that information could have been highly relevant to them and, although they were not likely to breach their undertakings, that their approach in advising the client would necessarily be influenced by the information that they had received in the disclosure context.

The Court of Appeal upheld Mr. Justice Lewison in refusing that application. You will see that we cite para. 20 what the Court of Appeal says, and para. 29 of my skeleton where the quotation is to be found:

> "We start with the proposition that it is desirable that a litigant should be free to instruct the lawyer of his choice. This is particularly true if the lawyer is already acting for the client and the client wishes the lawyer to continue to act in a related matter."

The court found it relevant that the advisers were already, as it were, up to speed, and that other proceedings were going on and it was relevant that they should continue to be able to act. The court says that: "The risk that the information disclosed in the High Court proceedings would be improperly used in the Competition Appeal Tribunal was fanciful" and they thought that there would be no justification therefore for the further order that Sky was seeking.

We have said that we have a witness statement from Mr. Bright in which he explains the particular role which he and Mr. Webber play in advising BMI, and have done for many years and to a substantial extent, and this of all times is not the time when BMI should be deprived of their counsel, when in fact the whole landscape is changing into more of a regulatory field; this is the time when they should have their experienced advisers. They are

obviously lawyers, they are not going to breach the undertaking, they know what they have to do. We also set out why, but this may be crossing your line, sir, why the information is not actually all that relevant, and it is, in many cases, old and it is in many cases averages rather than specific pricing points. But whether we have to get into any of those may slightly depend on how Miss Smith puts her case.

THE CHAIRMAN: Yes, I think certainly for now we would be inclined to stay on the non-disclosure side of your submissions.

MR. FLYNN: Yes.

MR. ALLAN: Could I just ask one question about the adviser disqualification issue? Does that relate solely to the position of Mr. Bright and Mr. Webber, or does your argument extend to the position of the two economists who have given the undertaking?

MR. FLYNN: We make the point generally, sir, and so we say that it is not an appropriate restriction that anyone should be ----

MR. ALLAN: To be imposed on any adviser in the context of data room rules.

MR. FLYNN: In this context because of the relevance of the information we make the point in a characterised way in respect of Mr. Bright and Mr. Webber, because they are the ones who would really be best placed to formulate the response to the provisional findings. I know when we were here the other week the Chairman said that our application was somewhat vague in terms of relief, and this is partly because we have to see what actually is a fair procedure, and it may be, as Mr. Allan's question implies, that different considerations would apply to the lawyers with their professional obligations than to economists, who are subject to different rules to the extent that they are. Obviously they are men of honour and distinguished people in their own right, who would be highly ill-advised to breach any such undertaking, but it may be that when we get to it a different frame of analysis is appropriate. Is that sufficient for now, sir?

THE CHAIRMAN: That, in fact, dealt with one of my questions. I do have another one: looking at para. 20 in *Virgin v BSkyB*, it is asserted as a starting point that a litigant should be free to instruct the lawyer of his choice. You do not go so far as to say that is an absolute principle. Do you say that it is a balancing exercise in light of all the factors to be taken into account whether a party can choose a particular lawyer or not?

MR. FLYNN: Absolutely, sir. For example, perhaps picking up on Mr. Allan's point, if the lawyer of choice was someone who actually was not on the roll then maybe different considerations would apply. One has that same point in the rights of audience case, for

example. The basic right to pick the lawyer of your choice does not mean that the lawyer of your choice has the right to appear before the Supreme Court of Germany.

Sir, I have probably already got you into twitching zone, so unless I can help further I will hand over to Mr. Beard at this point.

THE CHAIRMAN: Thank you, Mr. Flynn. Mr. Beard?

MR. BEARD: Sir, members of the Tribunal, you will have seen our skeleton argument and I am conscious that there are certain overlaps between the position of the three hospital parties. I am also aware that the Tribunal has indicated that it wants to focus on issues of principle. So in the circumstances I am going to deal with some of the legal issues we raised in our skeleton and look at a little of the case law, and then I will briefly consider by reference to a couple of examples why the material to which we do not have access, or to which access is restricted, is in principle important and why we need access to it.

Sir, dealing with the legal issues, what I am going to do is focus on the common law, but it is important to note, of course, that we would be in the territory of the application of the European Convention on Human Rights, in particular Article 1 of Protocol 1, interference with rights to property, here, and by dint of that Article 6, a right to free trial and determination of civil obligations.

We have not troubled the Tribunal with the screeds of case law that deals with those matters. We think that, in practice, the common law captures many of those features that are dealt by the ECHR. The only issue that might be of significance is if there were a clash between secondary legislation or indeed primary legislation because then, of course, the obligations under the Human Rights Act 1998 would begin to apply.

In our skeleton argument, what we have tried to do is capture what we say is the essence of the duty of fairness, and for those purposes we have borrowed from Auburn on Judicial Review, a recent text on these matters. It is at para.16 of our skeleton. We say:

> "The core obligation imposed by the duty to act fairly is to ensure that a person affected by a decision has an effective opportunity to make representation before it is taken …"

We quite accept that what is required will depend on the circumstances of the case. There is an important issue to identify here, and it is one that Mr. Flynn has already touched upon. It is for the court to determine whether a procedure is fair. It is not, as the Competition Commission seems to suggest, a matter for discretion on the part of the decision maker. As authority for this proposition we have cited Lord Justice Laws in *Abbey Mine v. Coal Authority*. I am not going to take you to the case, but we have quoted the relevant excerpt.

For your notes, the authority is found in bundle 3, the authorities bundle, at tab 10. Lord Justice Laws said:

> "Though the answer to [the question of fairness] must … depend on context, it is not a question of 'mixed law and fact' such as to allow a number of different possible conclusions, all of them lawful and reasonable … The reach of the duty is concluded by the court in the exercise of its responsibility to set procedural standards for public decision making …"

So the duty of fairness is a fundamental one, and it is for the court to determine and not the regulator.

With that in mind, I will take you to the *Eisai v. NICE* case at authorities bundle 3, tab 9, as the starting point. As you will have seen from our skeleton argument, the reason I am going to these cases is because whilst we accept, of course, that the particular circumstances in each situation will modify what is required by the duty of fairness these cases provide some touchstones, some indications of where the duty of fairness lies in a case such as this. As Mr. Flynn already trailed, and we have emphasised in our skeleton argument, in circumstances where you are talking about a divestment of property lawfully obtained, it will be the highest standards of fairness that will be required in order that an effective opportunity is afforded to someone who is facing such a draconian sanction. Mr. Flynn put it close to the line, it is the very essence of a corporate being that it has property and is able to use it. You are diminishing the nature of the corporate being itself by a divestment remedy.

Eisai v. NICE, which was not concerned with a divestment, was concerned with the process followed by the National Institute for Health and Clinical Excellence in the process of approving drugs to be prescribed on the NHS. Eisai was a pharmaceutical company holding a relevant UK marketing authorisation for one of the drugs that was being reviewed by NICE. You can see at para.2 of the judgment:

> "The point is a relatively narrow one, though arising in a context of some technical complexity. In its consultation process NICE made available to consultees, include Eisai, a read-only version of an economic model, in the form of an Excel spreadsheet, which was used to assess the cost-effectiveness of the drugs. Eisai requested, but was refused, a fully executable version of this model. Eisai's case is that non-provision of a fully executable version rendered the consultation process unfair and that the decision to issue the guidance was in consequence unlawful."

The guidance says the NHS does not prescribe because it is not an efficacious and cost effective drug.

Then in the judgment there is a description of NICE's functions and the system of appraisals, and the appraisal process in this case, which is highly involved and very detailed, involving some complex economic modelling.

If we turn on to para.11, we see under the sub-heading "The disclosure issue":

> "As can be seen from the summary set out above, the process of appraisal was exceptionally detailed and elaborate, involving extensive consultation and a high degree of disclosure at all relevant stages. This reflects NICE's fundamental (and highly commendable) philosophy."

Then it refers to some guidance that NICE have promulgated about technological appraisal, where it is employed that:

> "The economic models and their contents are confidential and are protected by intellectual rights, which are owned by the relevant Assessment Group. It cannot be used for any purpose other than to inform the recipient's understanding of the Assessment Report.
>
> The model must not be re-run with alternative assumptions or inputs.
>
> The consultees or commentators will not publish the model wholly or in part, or use it to inform the development of other economic models."

It describes what "read-only" means. Then at 15:

> "Eisai contends that the failure to provide the full executable version (and to do so on a basis that would allow it to be re-run with alternative assumptions and inputs) is unfair. It means that Eisai is unable to determine the reliability of the model by running sensitivity analyses and by tracking the formulae so as to check their accuracy.
>
> NICE's stance is that there is already sufficient disclosure … First, it says that the model is provided to it on terms as to confidentiality which preclude the disclosure of the fully executable version."

The second reason is practical because it would take a jolly long time to run the fully executable model.

If we turn on then to para.24, and there is a sub-heading "Legal principles":

> "It is not in dispute that NICE is subject to the general principles of procedural fairness …"

Then there is a discussion of various cases, including *ex parte Coughlan, Secretary of State for Education, ex parte M, Bushell*. There is also some reference to *United States Tobacco*. It then moves on to para.34, having said that one has to look at all the facts, and goes through and considers the facts in some detail. I am not going to go through all of that. I will just reach the conclusion of the judgment at para.66:

> "Pulling the various strands together, I can express my conclusion briefly. The view I have come to is that, notwithstanding NICE's considered position to the contrary (to which in itself I am prepared to give some weight), procedural fairness does require release of the fully executable version of the model. It is true that there is already a remarkable degree of disclosure and of transparency in the consultation process; but that cuts both ways, because it also serves to underline the nature and importance of the exercise being carried out. The refusal to release the fully executable version of the model stands out as the one exception to the principle of openness and transparency that NICE has acknowledged as appropriate in the context. It does place consultees (or at least a sub-set of them …) at a significant disadvantage in challenging the reliability of the model. In that respect it limits their ability to make an intelligent response on something that is central to the appraisal process. The reasons put forward for refusal to release the fully executable version are in part unsound and are in any event of insufficient weight to justify NICE's position."

You can immediately see what our submission is in parallel to that. We say that in relation to, in particular the insurer pricing analysis, it is critical to the way that the Competition Commission has gone about its analysis of this market. It is critical to the way that the Competition Commission has decided who has market power. It is critical to the Competition Commission's proposal to order divestment of hospitals. It is critical, therefore, that, in order to have an effective opportunity to challenge that, we understand the numbers that it is based on and are able to test them. That is essentially what *Eisai* is saying. Okay, it is a particular set of circumstances, but we say it is, *a fortiori*, that of *Eisai*, because here we are talking about a divestment of lawfully obtained property, not an approval of whether or not a drug is going to be used and approved. In those circumstances, where the methods are key we must have those numbers so that we can effectively comment upon them, test them and criticise them.

I will move on to the next case, if I may, tab 13. I will deal with this one a little more quickly. It is *easyJet v. Civil Aviation Authority*. This was a case concerning Gatwick

Airport, which was subject to a price control process. There were modifications to the airport charges that Gatwick could impose. That modification was made by the Civil Aviation Authority. The process is described in para.1 of the judgment. The statutory framework is inevitably concerned with the way in which airport regulation operates and the way in which the CAA can deal with price control processes. If we turn on to para.5, what became critical in this case was that the cost of providing security at Gatwick Airport was increasing, and these security costs were effectively being fed through to airlines through the price controls and the CAA was enabling that to happen. So there was a consultation, a detailed and lengthy consultation, undertaken in relation to these matters. During the course of it, of course, the airlines put in a good deal of material, and the airlines looked at what it was that was going on here.

If we turn on to para.34:

> "The grounds of challenge are that the March Decision …"

which set the price control that moved the prices up and which easyJet objected to -

> "… was unlawful because (i) there was procedural unfairness in the manner in which the CAA consulted the airlines before making the decision …"

This is obviously an appeal and the position is essentially summarised. The judgment against easyJet is summarised in para.35, and what essentially had happened was that the CAA, having gathered information that it thought was necessary for its consultation exercise, set a deadline for submissions, 31st January 2008, did not feel it was necessary to obtain more material, but then allowed BAA to put in more material in February 2008 and further models, and as it is put in para. 36:

> "In a nutshell, easyJet's complaint is that CAA acted unfairly in failing to consult the airlines after 31 January 2008. After its own clearly-stated deadline for accepting representations from any party had passed, the CAA obtained and took into account highly material evidence from BAA …"

If we move on through what we will see at para. 48 is that counsel for easyJet emphasised the *Eisai* decision, and then I emphasise 52:

> "It was an important feature of *Eisai* that, throughout the consultation process, the claimant was asking for a copy of the fully executable version of the model. In the present case, the airlines had made a considerable contribution to the process between December 2006 and January 2008. They had tested the evidence that had been submitted by BAA before the end of January 2008 and exposed its weaknesses."

You will see at the bottom of para. 52 there is a quote from the airlines. It says:

> "[The airlines] therefore believe the CAA should review and scrutinise such cost closely as we are concerned these too may contain excessive contingency and associated cost".

- this was the BAA late material. The Judge emphasises at 57 that:

> "The essential factual difference between *Eisai* and the present case, therefore, is that in *Eisai* the claimant made it clear that it wanted to see and comment on the fully-executable version of the model. In the present case, the airlines were content to leave the completion of the process of scrutinising and assessing BAA's estimated security costs to the CAA without any further input from them. I accept that the airlines might well have been able to contribute something of value … But the mere fact that they did not have the opportunity of making a further contribution does not necessarily mean that there was procedural unfairness …"

Two points to draw from that: first, context does matter. Secondly, the approach adopted in *Eisai* is being approved and applied here, and we say the approach adopted in *Eisai* tells this Tribunal a great deal about how one must deal with the applications of the principle of fairness in this case.

The third case I am going to go to is at tab 16, it is the relatively recent *Save our Surgery Limited v Joint Committee of Primary Care Trusts* case. This case concerned a situation which had resulted from a report into a death at Bristol Royal Infirmary whereby a consensus had been reached that in order to better achieve safer results surgical expertise in relation to paediatric surgery needed to be concentrated in fewer larger centres. The upshot of that meant that the possibility of various major surgery centres across the UK being effectively shut arose. The arrangements were put in place by the Joint Committee of Primary Care Trusts to carry out an analysis of the performance of paediatric cardiac surgery centres, and it reached a decision on various options about which ones should close and which ones should stay open.

There was a decision in the end that the Leeds General Infirmary Unit should close. There was enormous public loyalty to the Leeds General Infirmary Unit and a campaign was started, following a petition, and a shell company was created for the purposes of bringing a judicial review against the JCPCT. That entity said: "It is terribly unfair what has gone on here. We have not understood the basis for the conclusion that Leeds should be closed."

I am not going to go through this in great detail but you will see in the factual background section alone that the process followed by the JCPCT here involved tiers of consultation and

consideration. It involved an independent assessment panel chaired by Professor Sir Ian Kennedy that looked at issues concerning, for example, the quality delivered by the different centres. The legal challenge, which is described in para. 6 in the judgment is in two parts. At (a):

> "procedural unfairness – a failure to disclose sub-scores awarded by the Kennedy Panel …"

in relation to the various hospitals. So it is the detailed underlying numbers that led to the further conclusions which resulted in closure, which were the focus of the judicial review challenge.

We see in this judgment a lengthy exposition of case law including *Doody* and *Bushell* and *Eisai* at para 21, and *easyJet* at paras. 22 and 23, and a number of other cases.

There is then a consideration of the consultation process and the assessment process, which again is lengthy and complex. For your notes it is just useful to have reference to paras. 32, 33 and 34, certainly to my mind those made what was going on with the Kennedy Panel assessment of identifying scores and weightings to be at least marginally intelligible, and sets out sub-scoring below.

But, notwithstanding that the Kennedy Panel had come up with this analysis, there were further steps in the consultation. There was a review by the Kennedy Panel and then there was further work by PriceWaterhouse and KPMG – you can see that at paras. 57, 59, and 60. There was an advisory group on nationalised specialised services that contributed, and other business plans were put in place. In the end, however, the Joint Committee on PCTs decided that it would adopt a particular option on the basis of all of this open consultation, taking into account the Kennedy Report, notwithstanding that it was clear from the Kennedy Report that Leeds suffered on the quality ranking and, instead, said that the underlying sub-scores should have been disclosed which went to the Kennedy Panel's assessment on quality, which in turn fed into the overall process that in turn was part of a broader consultation involving contributions from all sorts of bodies and much other work.

Nonetheless, because the numbers here, which related to quality scores were seen as being critical to whether or not Leeds or Newcastle should be closed, the court said: "You must disclose those numbers in order that you can properly allow effective opportunity to comment." This is not by a body that owned the hospital, it was by a body that was specifically set up by interested people but nonetheless in a very, very different position from someone owning a hospital and facing divestment of that hospital. You will see in the

conclusory sections some of the reasoning is a little diffuse, but if one looks at, in particular, para. 109:

> "I do not accept the defence description of the sub-scores as being no more than 'underlying workings'. They provided the basis for the consensus score which was ultimately used as one of the most valuable and thus significant tools in the assessment of 'Quality' of the respective centres."

Then down at para. 112 one can work through the considerations that were borne in mind by the court in deciding whether or not the duty of fairness did require disclosure of these detailed sub-scores. Again, what it reinforces is that where numbers are critical to an analysis it is right that people should have proper opportunity to comment upon them.

So with those three principles in mind dealing with general principles of consultation one might say that one has enough here for the duty of fairness. I think it is right, however, just to pick up one of the other cases that are dealt with. The issues concerning availability of information to parties in proceedings, and I use the word "proceedings" advisedly, it is both court proceedings and court challenges to administrative proceedings and therefore involves administrative proceedings too. These issues have troubled the Supreme Court on a number of occasions recently. The one case I will take you to is the *Bank Mellat* case, which is at tab 17 in the bundle.

This is a case, as one can see from, in particular para. 9 onwards, where the Treasury had made a decision that Bank Mellat was essentially to be granted a particular pariah status in the financial community by way of its involvement with Iran, and it was therefore subject to what is referred to as 'listing'. That decision of the Government, the Executive, to list it was one that Bank Mellat needed, it felt, to challenge because otherwise it was not able to operate, certainly in the UK and, as a result, it was concerned to bring this challenge that was eventually percolated up to the Supreme Court.

One of the issues that arose in this case and, indeed, has arisen in other cases involving the position in relation to sanctions on Iran, but also in relation to terrorist cases, is the possibility of sensitive material being relied upon by Government in taking a decision that is not then available to the affected party. What this case does is it emphasises that it can only be in the most exceptional circumstances, and pursuant to a statutory scheme that you can have a 'closed material procedure', as it is referred to, whereby a person who is affected by a particular consequence or proceedings is not able to see all of the evidence that is relied upon against them.

Now, of course, in control order proceedings where a terrorist suspect has been subject to restrictions on their liberty there is a statutory scheme which enables the Government to rely on sensitive material and, indeed, rely on it against the person in circumstances where what is called a 'special advocate' is appointed - sometimes referred to as the 'clean skin lawyers' who do not have contact, once they have seen closed material, with the accused person or the affected person, or the person subject to the adverse administrative decision. Those sorts of systems do apply in many closed material procedures under statute, but it is not of the essence of a closed material procedure. The key thing in a closed material procedure is that the affected person is not seeing all the evidence against them. The special advocate is a partial antidote to that unfairness. What this case and the other case that we cited in the skeleton of *Al Rawi*, say is that it is a fundamental principle of natural justice and fairness that a party has a right to know the full case against him, and a right to test and challenge that case fully. A closed hearing is therefore even more offensive to the fundamental principle than a private hearing. So a private hearing merely being one in which only the parties are involved, a closed hearing being one where the party affected does not see all the material.

What we have said here in relation to these cases is that the articulation of that fundamental common law principle means that the requirement of fairness really does trump all, and where rights are fundamentally affected it is imperative that a person affected has the opportunity properly and effectively to scrutinise all that material. It has changed the climate in relation to the appraisal of fairness.

THE CHAIRMAN: Mr. Beard, when you say "person affected" one needs to be quite clear what we are talking about. Clearly, at the end of the day it is the lay client who is affected, but reading your submissions one way it sounds like an attack on confidentiality rings in general, where the point of the ring is to ensure that the client's advisers get to see all of the relevant material but the client, the person who could take advantage of someone else's confidential material is kept outside the ring. Now, are you suggesting that these decisions of the Supreme Court actually affect the practice of confidentiality rings in this Tribunal?

MR. BEARD: They do not affect the possibility of their existing. What they may affect is the degree to which they are effective in meeting the principle of fairness, because it may be the case that information provided as part of a confidentiality ring enables those who are well versed in the business of the client, that are senior advisers, to put forward the client's case sufficiently in all the circumstances, in which case a confidentiality ring would be adequate. There may, however, be particular pieces of information that are disclosed into a

confidentiality ring in respect of which external advisers say: "We cannot really comment on this". For instance, issues of credibility, perhaps, lay clients that can properly comment on these matters. In those circumstances, in order to be able to have an effective opportunity to challenge that material it may be that in relation to certain sorts of information a confidentiality ring does not meet the requirements of fairness, and the next question is what happens, and the answer is the regulator cannot rely on that material.

THE CHAIRMAN: So at the end of the day it is, as you set it out, a question of context. You have got to look at what is needed to answer the matter fairly?

MR. BEARD: Yes.

THE CHAIRMAN: It may be that I should throw into the mix a decision that Mr. Flynn certainly is aware of, which is an application that was made in the *Cardiff Bus* proceedings to admit evidence which at the end of the day we did not admit because the party making the application did not want the lay client to see the material, and we took the view that in that case at least comment by the lay client was necessary in order to rebut the material. You are saying it is all a question of fact and degree?

MR. BEARD: It has to be a matter of fact and degree because it is not that in any particular case there is a broad discretion, it is that the range of possible circumstances and the range of information at issue that is relevant will vary. It is therefore that the requirement of fairness may demand different things of different pieces of information, and therefore taken across the piece it is a matter of fact and degree, but in relation to particular pieces of information, in particular cases, fairness may dictate that either all senior advisers need to see it, it is necessary for the purposes of fairness, or that actually the lay client may in certain circumstances need to see it. That really covers the principle points here, but of course we make those points of principle well aware of what the practical issues here are, and the practical issues here relate to an analysis based on figures which we have not been able to verify, test, scrutinise the reliability of, in the way that it would be appropriate to do so in order to be able to say, "No, you have got it wrong, we did not have market power, we are more like the hospital operators you found not to have market power than the ones you have found to have market power". We need to be able to test those numbers in order to be able to put our case, and that is the difficulty here.

THE CHAIRMAN: In order to create an intentional framework for addressing these rather difficult questions, the first question is what needs to be seen in order fairly to respond to the case, and secondly, it is by whom that material needs to be seen. Those are rather

separate questions. Obviously they have a context and inter-relationship, but you would say one needs to ask both those questions.

MR. BEARD: Yes, you do. That is inevitably going to be the case, because otherwise asking what should be seen in order to afford an effective opportunity may, if you have a sufficiently wide group of people that get to see it, answer both questions in the round. If, on the other hand, you have a confidentiality ring or rings with different people in them it may be that the people within the ring are not the people who can effectively comment on that material. If they are not the people that can effectively comment on that material, then the person affected has not had the opportunity they need to be able to deal with it. So it will depend on what it is that is specifically at issue and how it is to be dealt with. In this case what we say is that the framework that we are dealing with is not adequate for the purpose of the concerns that have been raised about this important strand of the Commission's reasoning.

I was going to come on to a couple of examples just to illustrate it. In, I think, BMI's notice of application you should have the non-confidential version of the provisional findings.

THE CHAIRMAN: Yes, we have that. Just an indicator, Mr. Beard, you can go quite quickly through this, because I am not sure how far we are going to be assisted by going to it.

MR. BEARD: I thought it might be useful to see a broad example. I am not going to go through it in any great detail, page 211, Chapter 6, 6.203, what you have here is an exposition of what the CC said it was doing in broad terms in relation to insurer prices. Then at 6.204 it says it is structured in three parts:

> "… we analyse the prices charged by different hospital operators to each PMI and on average … we consider drivers of these insured prices … we analyse the prices charged to different PMIs by each hospital operator … Finally, we present some concluding remarks … The methodology and the full results of our analyses of insured prices are set out in Appendix 6.12 …"

I will come back to that in a moment.

You have this long section here, albeit the length is beguiling in the sense that it is what is represented by the scissors that may be most important, and we see numerous tables with scissors in it. Just to bring home the issue that we are talking about, if we turn to 6.247, which is the conclusions on insured prices, without wanting to be trying to parse the report in an unduly refined manner, if one reads "Conclusions on insured prices":

> "The main findings from our analysis of insured price outcomes are the following:

(a) In comparison with the other four largest hospital operators (i.e. BMI, Spire, Nuffield and Ramsay), HCA charges significantly higher prices to PMIs …

(b) Of the other four largest hospital operators, BMI charges higher prices to PMIs on average than Spire, Nuffield and Ramsay …"

On the face of it, we have got HCA at the top, significantly higher. Then below that we have got BMI, who is higher than the next three. Then:

"(c) Spire is the second highest price operator …"

I think that is excluding HCA, so it is qualified. So Spire is in third after BMI.

What is interesting there is that the second highest price operator after BMI, but we do not have a sense of the difference between the level of its pricing and the other two hospitals' pricing. The reason this becomes important is because the other two hospitals are not the subject of a market power finding. We do not have a sense of how this works. We do not have a sense of what the distinctions are, and this could be absolutely critical to it. What we do not have a proper sense of is how those numbers that have gone to this conclusion were pulled together and worked.

Just reading on:

"(c) Spire is the second highest price operator, after BMI, to PMIs on average on the basis of the insured revenue per admission in 2011 and over time …"

So actually what is being said here is that, "In one particular year you were the third highest, and you were over time, but actually implies that a number of years you were not even the third highest".

That stuff is important, and what I am going to hand up, if I may, is a copy of Appendix 6.12 which underpins this. I am told it is in tab 8 of BMI bundle 2.

THE CHAIRMAN: I anticipate we will have to tread quite carefully with this material - is that right?

MR. BEARD: No, this is a non-confidential version.

THE CHAIRMAN: Yes, I see.

MR. BEARD: I will turn on to p.16. Here we have some particular numbers. This is some of the material that underpins some of the analysis that is critical to the conclusions that are made that lead to proposed divestment findings against Spire. What you see there is a lot of scissors, and if you go down to table 13, more scissors. But what is interesting about table 13 is that it is talking about the percentage difference in the average 2008 to 2011 insured price index for the two PMIs. That material, that particular table, is available to people in

the disclosure room, but it is not available to people outside the disclosure room. Therefore, what you get is a situation where that table will tell you, because you can tell just from the table, what those differences are in the average prices. As I say, that could be absolutely critical. Those are really the outturn figures. These are not the underlying data because the underlying data had been through a process of gathering by the CC, of data cleansing, of methodologies applied to it. We are not saying, "You cannot apply methodologies to data", we all know you have to do that, but what we cannot do is reverse engineer even the figures in relation to us, and we cannot do that even in relation to table 12 where we are not talking about comparators.

In those circumstances, and I am just picking out one example, you have got critical material going to a critical part of the analysis and we cannot understand it. We cannot ask senior advisers about it and we cannot set strategy in relation to it, we cannot decide what it is we are going to say to the CC about it. We have this arrangement whereby there is a disclosure room and two people have gone in and they have seen these figures but not the underlying material, and they are thinking that is interesting, and they have written a report out of which anything that did not come from us has been redacted, and then our client, who is faced with a number of its hospitals removed, cannot even say to its senior advisers, "What do you think, how are we going to set our strategy, what are we going to say here? Are there ways that we can test this? Is this stuff consistent over time? Is it reliable? How are we going to deal with the accuracy of it?" So we are deprived fundamentally of an effective opportunity - I will not go through it, but there is something rather wonderful about the annexes to this appendix, because they just provide a series of frameworks with nothing in them. Those are the underlying data, but nonetheless some tier down material that will be seen in the disclosure room but will not be provided for testing outside it.

I hope that just illustrates why this is not some sort of arid discussion. We are not just talking about some sort of abstract of principle of generally messing with the process that the CC has put in place. We understand they have time limits. We understand they are concerned about confidentiality, but confidentiality can never be a trump to fairness. There are references to s.169 to the duty of consultation. There are references to the operation of Part 9 of the Enterprise Act. They are terribly interesting, they change nothing. You cannot reach a conclusion coming out of the balancing exercise in Part 9 and say: "On balance we have thought about our statutory functions, we have thought about sensitivity in relation to specified material. We have thought about confidentiality. We have thought about the interests of people that would like to look at it. We have decided not to disclose it. We

recognise that conclusion is unfair, but we are carrying on." You cannot do that. That is why, although one talks about a balancing exercise under Part 9 in the end fairness is a trump and it is a trump, the strength of which this Tribunal has to decide, it is not a matter of discretion.

MR. ALLAN: Can I just be clear, Mr. Beard, about how far your case on unfairness is going today, because if I look at para. 45 of your skeleton it says that the prohibition on disclosure to the lay client undermines the fairness of the procedure.

MR. BEARD: Yes.

MR. ALLAN: Are you maintaining in relation to at least some of the redacted material that fairness dictates disclosure to your lay client so that even a confidentiality ring would be insufficient.

MR. BEARD: We do not know at the moment. We do not know whether it would be necessary to say that in relation to this sort of material. We are happy to take it in stages. We understand that what you may need to do is to allow material out into the wider confidentiality ring in order that those people who have knowledge and expertise can look at it and say: "We can test this sufficiently, we can consider this enough. We can put in sufficient representations." But it may be that, having seen this material and considered it, they do say: "Actually, we are going to have to go further". We recognise that is not the application for today. We recognise that this Tribunal wants to deal with things in principle, but it would be wrong for us to turn up and say: "Yes, it is fine, it is a panacea if you forget about the confidentiality ring" because we do not know. That is the difficulty we have. So I am not taking our submissions further, but it would be wrong, as I say, to suggest that this was the end of the story necessarily in relation to this material.

MR. ALLAN: So when, in para. 69.2 you say: "The Tribunal should give detailed directions governing the future management and disclosure of the disclosure room information", they are directions of the kind that you have just summarised that you are asking for?

MR. BEARD: That, in the first instance seems to us a perfectly reasonable stand, yes. That it should be requiring that specific pieces of information must go to the lay client at this stage is not something that we are in a position to make submissions about, nor did we understand that that is what this Tribunal wanted to deal with today.

THE CHAIRMAN: Miss Smith?

MISS SMITH: I hesitate to rise, but also one point I think requires clarification before Mr. Beard sits down, and that is whether or not he is pursuing the argument that the material made available into the data room is insufficient. From what he has just said it appeared contrary,

I think, to what Miss Berridge said at the last hearing, but he is making that argument, or at least was getting very close to that argument, and obviously we need to know whether or not he is pursuing that, it is para. 12(a). You will recall we referred to at the last hearing and Miss Berridge explicitly said: "No, we are not complaining that the material that went in was insufficient."

THE CHAIRMAN: Yes, I recall that exchange.

MR. BEARD: Well, not today, is the answer. We have been asked to deal with matters primarily on the basis of principle, as we understood it.

THE CHAIRMAN: Absolutely right.

MR. BEARD: And so the answer is "not today". It may well be that we look at this stuff and we say: "Actually, we do need to see the underlying data" in which case the stuff that went into the disclosure room would be inadequate. But that is not where we are. BMI put in an application. We sought to intervene; the Tribunal properly decided we were an applicant not an intervener. We are not trying to change the parameters, but it would be wrong to suggest that this is the be all and end all of issues of procedural fairness.

THE CHAIRMAN: So I think we can tell Miss Smith that it is not today.

MR. BEARD: It is certainly not today. The one other point I think it is worth bearing in mind in relation to the directions that may be required is the opportunity to re-enter the disclosure room, depending on what other directions are set, in order for there to be a further opportunity to prepare a different additional report.

Unless I can assist the Tribunal further, those are the submissions of Spire.

THE CHAIRMAN: Thank you very much, Mr. Beard. Yes, Mr. Morris?

MR. MORRIS: Thank you, sir. HCA's position is set out in its original application and in its skeleton. We support the submissions that have been made on behalf of BMI and Spire, and as a matter of general proposition do not propose to repeat the points that have been made. With your permission, sir, I propose making submissions under the following heads. First, the particular position of HCA, secondly, some observations on the relevant legal principles without going into the case law. Thirdly, some observations on the use of what we call the 'remaining redactions' that HCA seeks. Fourthly, the other side of the coin, namely the risks and sensitivity of the material; and fifthly, a discrete issue, which is an HCA issue, which is the issue about the basket of treatments. For your clarification and, in particular, for Mr. Allan's, that is an item of material which HCA does say should be permitted to go to the client.

HCA's case is summarised in its skeleton. I believe you have an HCA skeleton bundle. We have two bundles, our initial application and then we have a bundle which has the skeleton in it with some attachments, I have called that "HCA2". The skeleton is at the front of that and paras. 20 and 21 of our skeleton summarises HCA's case. You will see there that HCA seeks an order that the remaining redactions should be unredacted and available to the Advisers, and that is the three original advisers, and other advisers which are people who are admissible now to the ring on the terms of the further undertakings. The remaining redactions are sought in order to enable HCA effectively to respond. They need access to check that they have read all the figures correctly, to be able to illustrate and make good the submissions made on behalf of HCA by reference to the actual evidence, and to conduct analysis on the data, including in particular the ability to compare different data and different tables.

We then make the second aspect of the submission that the remaining redactions are not of such commercial sensitivity as to justify the most severe measure of protection by being kept in a disclosure room. Other, less severe, safeguards, the confidentiality ring provisions are more than adequate to protect against any risks relating to this material.

Then in para. 21 we set out or case in the basket of treatments. We seek an order that this should be unredacted and made available not only to advisers and other advisers but also to an appropriate number of employees of HCA itself. The list of treatments included within the basket is not *of itself* (and without access to the remaining redactions) commercially sensitive. Further, it is not possible for the advisers or other advisers to interpret its content and impact on the CC's insured price analysis without input from HCA itself. To this extent only, HCA *does* seek an order which provides for disclosure to HCA itself.

So that is our overriding case. Before I go into my various topics could I start with one or two general observations?

THE CHAIRMAN: Yes, I have one of my own though. This does seem to be coming quite close to crossing the line, if not actually crossing the line of principle versus specific application, in the sense that I anticipate Miss Smith may well be saying that the Tribunal would need to inform itself very fully of, for instance, the basket of treatments material before making an order that it go all the way down to a lay client.

MR. MORRIS: If your concern is specifically about the basket of treatments issue, can I deal with that when I get to it?

THE CHAIRMAN: Yes.

MR. MORRIS: Our submission is that it is quite a simple issue. The basket of treatments, as far as I am aware is an Excel list of a series of CCSD codes combined with, I believe, some medical description of the particular treatment. That has been disclosed now within the confidentiality ring. The simple question is, we say, that we would like to be able to take our client's instructions on the contents of that list for the adviser to respond effectively. That is an issue which has been highlighted in correspondence since 4th September. I believe that the CC is well versed in the issues. We say it is a very straightforward issue. It is not really a matter of delving into the detail and I can explain a little bit more, if I may, when I get to that section, but I take on board your point, sir, entirely.

If I may, with that observation, make some general observations, and I start by breaking my own self-imposed rule against repeating what my learned friends have just said, but I do say that the issues at the heart of this investigation are obviously of the utmost importance to HCA and its business. It is facing the possibility of seriously intrusive remedies and it feels strongly that it must be able to put its case in response, effectively, and in the most comprehensive manner, that it is able to do.

My second general observation, I would remind the Tribunal that what we are talking about at today's hearing is the difference between, on the one hand, a tightly drawn confidentiality ring, imposed and limited to professional advisers, and a disclosure room. Of course, that is not the basket of treatment issue, but the general issue before you is what we are talking about here is a confidentiality ring versus a disclosure room. I am not talking about things going beyond the confidentiality ring.

Thirdly, I would venture to suggest that the Commission has somewhat overstated its case in two respects. First, we submit that it has sought to elevate what is an issue on the facts of this case to one of high principle relating to its ability to use disclosure rooms, or data rooms as they are usually called. Secondly, we would suggest that it has overstated the commercial sensitivity of the particular information it wishes to retain within the four walls of the disclosure room. Those are my overriding observations.

I turn now to the particular position of HCA. Of the material in the disclosure room, which the Commission still refuses to release, HCA's main and overriding concern is with the material which forms part of the CC's insured price analysis. There are other aspects but it is the insured price analysis. The reason why HCA is so concerned about that material is that it is at the very heart of the CC's allegation that HCA's prices are substantially higher than those of its nearest and other competitors and that that difference in price is due to HCA's alleged market power. That allegation in turn goes to the heart of the case against

HCA and ultimately the case that may be made by the CC for divestment. HCA contests those allegations and wishes to be able to respond to them effectively and properly, and upon the evidence upon which those allegations are based.

Now, I am very conscious of your observation about not going into the detail. I am also aware of the fact that Mr. Beard has just taken you to the relevant sections of the provisional findings and Appendix 6.12. First, we summarise the position in paras 5 and 30 of our skeleton. Perhaps I will not take you to that but just for your note, because I am conscious of, first, time and, secondly, not transgressing.

There are two aspects to the case that is made against HCA. First, you saw the sentence where it was stated that HCA's prices are substantially higher than the other main hospital providers. I would invite you to look at the relevant paragraphs of the provisional findings, and I will give you those paragraph numbers in a moment, but what you did not see is that there is a specific allegation that HCA's prices are substantially higher than those of another hospital in London called The London Clinic, which we refer to as "TLC". The Competition Commission's case is that those higher prices, even within London are not explained by factors other than HCA's market power.

The key evidence for those propositions are in the insured price analysis, and they in turn are to be found in a particular number of tables in Appendix 6.12, which again I do not perhaps take you back to them, but particularly, for example, tables 8, 9 and 10, which were not the tables that Mr. Beard took you to. He took you to table 13. The key paragraphs, perhaps, for your understanding, if I may give you them in the PFs, and the PFs are BMI bundle 1, tab 7, are 6.212, 6.216 where HCA are stated to be significantly higher than national operators. Then the explanation of why there was a separate price index within London. Those are to be found at 6.218, 6.219, 6.220 and 6.221. Those are the key allegations on the issue as between HCA and TLC. Then you have the conclusions, some of which Mr. Beard has taken you to, but we would invite you to read 6.247(a) and (d) and 6.248(a).

Those are the key provisional findings, and they in turn feed back into the key aspects of Appendix 6.12. Appendix 6.12, which explains the insured price analysis, explains at para.12 how the indices work, it explains about sensitivity tests that have been carried out, and then has a whole series of tables which are essentially full of scissors.

That is the background to the issues, and that is the explanation for why HCA is particularly exercised by this data, and we do ask you to bear in mind that there is a very specific case being made against HCA, distinct from the case being made against BMI and Spire.

That is my first heading.

Can I now just make some observations on the legal principles, and since Mr. Beard has covered the ground so comprehensively I would make four short points, some of which may partially cover the ground that Mr. Beard has covered. Firstly, as we have said in our skeleton, this is a challenge based on the judicial review ground of procedural unfairness, procedural impropriety, this is not an issue of *Wednesbury* reasonableness. It is for the Tribunal ultimately to conclude whether the procedure adopted in this case has been fair. Sir, you raised with Mr. Beard the question of the balancing decision. Ultimately, we submit that it is for the Tribunal to adjudicate upon whether the scheme devised by the Commission is procedurally fair, and not just whether it is rational or irrational.

Thirdly, we adopt Mr. Beard's approach on the approach to Part 9, and we adopt the proposition that confidentiality cannot trump procedural fairness. We put it this way: fairness is the dominant concern, it is the predominant issue. That is borne out by a passage from the Competition Commission's own guidance in CC7, and para.5.3, and perhaps I can just take you to that briefly. It is the Commission's evidence bundle, which is the exhibit to Mr. Witcomb, tab 7. In fact, while you have got it open I will take you to other passages, even though they are not specifically on the point.

This is the Chairman's Guidance on Disclosure of Information, which is the most detailed explanation of it, the approach, expanding upon statements in other bits of the Commission's Guidance more generally about its procedure. Whilst we are there, perhaps I can take you, first of all, to para.2.2, p.4, where transparency aims are set out:

> "Transparency facilitates inquiries for a number of reasons:
>
> (a) First, it is a means of achieving due process and of ensuring that by having a better of the CC's analysis affecting them, the main parties in inquiries are treated fairly …
>
> (c) Thirdly, transparency helps main parties and other interested parties when they are providing the CC with information, including identifying inaccuracies and incomplete or misleading information."

Then 3.3(c):

> "Although this Guidance sets out the general framework … the circumstances … may call for flexible approach … There can be many reasons for this including, for example:

(c) the relevance of the information to the case - the information may be confidential but nonetheless disclosure may be necessary because of its relevance …"

Then over the page at 5.2:

"Additionally, Groups should have regard to:

(c) the need to disclose information supplied to the CC so that interested person (min parties or other interested persons) are able to comment on matters affecting them and so they can draw to the CC's attention any inaccuracies, incomplete or misleading information …

These considerations may inform the Group as to whether particular information should be disclosed …"

Then over the page, which was the particular paragraph which I was referring to in this context:

"For the most part these factors will not be in conflict with the CC's transparency aims and its statutory functions. However, when decisions are finely balanced, Groups should pay particular attention to the need to achieve due process."

Whilst you have that open, could you also go to 9.17, which deals with data rooms, and there you will see that in 9.18 the Commission states, as is stated elsewhere on the facts of this case:

"… data rooms may be used when a Group concludes that it is appropriate to provide access to data in order to enable the parties' economic advisers to gain further understanding of the CC's analysis and to examine the data in order to respond to the CC's findings."

Could I just ask you, whilst you note that and in the interests of time, to note that that statement was repeated in this particular case first in the opening letter in this issue of 15th August from the CC, certainly to HCA and I suspect to the others, when introducing how they were going to approach the disclosure room, the CC stated expressly that the purpose of allowing access was in order to enable the interested party to respond. That letter you will find in our case in what I call HCA bundle 1, which is the application, at annex 1, and we also repeated the sentence in our skeleton.

I would also draw to your attention that that very same statement appears actually in the substance of the undertakings given. I believe it may be recital 9 in our case, but it may be recital 11. I give you those references just to emphasise the fact that in this case the CC

itself recognised that they were doing by virtue of the disclosure room process was a process to enable responding.

That is some of the guidance. Then we cite in addition, the only other case we cite, is the *Umbro* case, and I will perhaps take you to it very briefly, tab 6 of the authorities bundle. This was the replica kit case, which may be familiar to some people in the room, but it may be only me. In this case what happened was that there were a number of parties found guilty by the OFT of price fixing in relation to replica kit. One of those parties was the manufacturer, Umbro, and it had applied for leniency. Umbro and a number of the parties, including the retailers, had appealed to the CAT on liability and on penalty, and there was a question about whether the leniency application that Umbro had made to the OFT at an earlier stage should be disclosed more widely within the proceedings.

It is fair to say that the actual statutory regime in place specifically was that which applied to the Tribunal rather than that which applied to the OFT under Part 9, and you can see that, just for your note, if you look at paras.18 to 23 of the judgment. Sir Christopher Bellamy first sets out the provisions of Part 9, which are those which apply to the OFT and to the Commission in our case, and then sets out at para.22 the position as it affected the Tribunal. We would respectfully submit that if you examine those two sets of provisions the basic approach is the same, and it may be, of course, that there are different factors involving the fact that there is a public record of a judgment. The essential tests set out in both Part 9 and in Schedule 4, para.1(2) are essentially the same statutory tests.

I rely on this case for the analysis of Sir Christopher Bellamy where he concluded that when trying to balance questions of confidentiality and questions of fairness. At para.23 he says:

> "Although that statutory provision …"

this is the statutory provision dealing with the Tribunal -

> "… deals only with what is to be included in the Tribunal's judgment, the Tribunal takes the view that, for that provision to be effective, the Tribunal should protect … information that it would be likely to regard as confidential for the purposes of its judgment subject, of course, to the overriding requirement of ensuring the fairness of the appeal proceedings."

Then at para.33 he states the proposition that:

> "… in a case such as the present, which takes place in a setting in which the parties have had penalties imposed upon them, it is, in the Tribunal's judgment, of overriding importance that the parties should be able to exercise their rights of defence without having possibly relevant material held back or inaccessible.

> In the event of a conflict between the rights of the defence and other claims to confidentiality there must be, in our judgment, a presumption that the rights of defence prevail."

It is, of course, the essential proposition that both Mr. Beard and myself are making.

We do also submit, and this is a point made in para.29 of our skeleton, that if it is the case that no sufficient confidentiality safeguards can be put in place via a confidentiality ring, then the predominant nature of the right of procedural fairness means that the Commission should not, itself, be able to rely upon that confidential material. That is a proposition that we make in para.29 of our skeleton, and we submit that it dovetails with the analysis that Mr. Beard puts forward to the Tribunal.

The fourth point I make under this heading, it is a general statement and you have seen it referred to in the cases, is that the purpose of disclosing the evidence to parties subject to the investigation is not just so that that party should know what the evidence against it is, but so that it can respond to that evidence and respond effectively. I am not going to expand on the proposition, it clearly emerges from the case law that Mr. Beard has taken you to. There is one paragraph in the *Al Rawi* case, the speech of Lord Kerr at para.89, where he neatly, in our submission, summarises and states that proposition.

That then takes me, if I may deal with it quickly to the use of the remaining redactions and the practical issue for HCA. The remaining redactions comprise really two elements: those parts of its advisers' report which may remain redacted even after the provision of what we call the second report, and other materials which were seen in the disclosure room and noted as seen but which were not in fact written down in the report because of a degree of self-censoring. That is a point I make at para.8 of my skeleton, and perhaps I can just take you to it so that you see the point that is being made, rather than taking you to the actual report. You will see that we say in the first sentence that we have also sought further use of other information. This is in part apparent from the italicised comments. As I hope by now that you have picked up, what happened is that the advisers were told they could not take out certain types of information in any event, so there was a significant element of self-censoring in relation to what they actually put in the report in the first place. There are certainly aspects, in particular something at annex D, where they did not include, but they would have wanted to had they been able to take it out of the room.

Secondly, on the actual material, the Commission suggests in their skeleton that the remaining redactions are "very limited". We would ask you not to be put off by that. They are not. The remaining redactions go to the very heart of the case made against HCA. We

accept that in the second redacted report there have been unredactions, but the key data in the tables has not been unredacted. They go to the critical point at issue which is the allegation that the price differences between HCA and TLC are “substantially higher”, and the proposition which the advisers wish to make is that the gap is "relatively small". I use that term, that is a term you will see if you look at the first redacted report. I am not going to take you to it, but it is actually set out there on p.2 at annex 11 of HCA’s application bundle. That is the battleground.

In that context, and picking up on what Mr. Beard has said, the debate about the importance of these remaining redactions has to be seen in the context of the relative narrowness of what was in the disclosure room in the first place, which is this point that the underlying data was never put there in the first place. We absolutely adopt Mr. Beard’s position in relation to that, which is that that is not an issue for today, and I do not invite you to consider that issue.

We have, I understand, this morning received a letter on that issue which we will consider in due course. But in considering whether these remaining redactions are important we do invite you to consider that actually what is in there itself is in itself a summary of the underlying data. For your note, as long ago as 4th September, before the disclosure room process took place, Nabarro wrote to the CC – it is annex 8 of our first bundle – where, effectively, in that letter HCA raised serious concerns as to how meaningful the exercise in itself was. Now, of course, that battle itself, in terms of what has gone in, is for another day, but that context, we submit, is something which you should bear in mind when considering: are the remaining redactions significant?

Then we say – and we say this in our skeleton – we need to see this material to support the case by referring to specific detail, and to be able to carry out considered analysis of that material. Being conscious of not wishing to bury down too much into the detail, we explain at para. 33, by reference to table 8 – and table 8 is something that you can see from Appendix 6.12 to the actual provisional findings – why it is that HCA say that with what they have been given to date they can submit no more, and I cite here line 5 of that paragraph of the skeleton: …will be able to submit no more than we have seen the numbers and we disagree that they show that HCA’s prices are substantially higher. However, it is our submission that the advisers would be in a position to illustrate and explain why they disagreed, and we give an example in relation to table 8 of the sort of analysis that they would wish to carry out in order to test the CC’s case.

So that deals in relatively short order with the use to which the advisers wish to make of the remaining redactions.

Can I now just turn to the asserted justification for the withholding? The Commission's entire case here is founded on this assertion, not that this material is confidential, or very commercially confidential, but rather it is said in a number of places that it is of the utmost commercial sensitivity, so it is right in that top, top bracket – I do not know how to put it, but it is the nugget, it is the key element of utmost commercial sensitivity. They say that the key concern is that the material is material that should not get into the hands of those engaged in future negotiations. But, of course, that carries with it a prior assumption that the information will be of material use to those engaged in future negotiations. In our submission the Competition Commission has not made out its case that these remaining redactions relating to the insured price analysis are of such utmost commercial sensitivity and, given the overriding, importance of a fair procedure in relation to an investigation, with such severe consequences for the subjects of that investigation, there is an onerous burden on the Commission to satisfy the Tribunal of this utmost sensitivity. Remember, this is utmost sensitivity which justifies it being held within the disclosure room, as opposed to being let out into the safety, we would say, of the ring.

What we are talking about here, this data, are price indices constructed by the Commission and rankings. These are not actual prices, they are aggregated data, they are historic data, and they are for a basket of treatments which is a basket which has been constructed by the Commission itself, and which does not reflect the basis upon which hospitals and BMIs negotiate. This is the point we make in our skeleton, the contrast between the basket and what we call "the envelope", where the negotiations for treatments is done on a wider basis, and that is, in fact, a point made by the Competition Commission itself (for your reference Appendix 6.12 of the open provisional findings at para.4).

We deal with this point in some more detail at paras. 38 to 46 of our skeleton, but essentially we submit that it is far from clear that the information that is being talked about would be useful in price negotiations. That is our first point on how sensitive this information is, and you will see that we make observations in that regard on the evidence of Mr. Witcomb at paras. 41 to 46, and we conclude that in our submission there is no sufficient evidence as to how these pricing negotiations, in fact, operate, necessary to support their conclusion that the disclosure would be harmful to the operation of competition.

We then make the second point in relation to the sensitivity of this material by reference to the position of third parties. You will recall, sir, that at the hearing on the 20th, the Commission indicated that it was concerned about the position of the third parties. I would also draw to your attention that in its, in effect, decision letter in relation to HCA, which is in our skeleton bundle at tab 22 – I perhaps ought to point that document out to you. This is our skeleton bundle, tab 22. There is an email and then there is a letter. The point was made in the skeleton, this was in fact received on 26th not on 25th, something went awry with it being sent, but this actually is the decision on the remaining redactions as against HCA, which in fact we got I think a day after we were told what was going to happen. The critical point for present purposes is in the fifth paragraph down, it is said the Commission says:

> "In considering the possible harm caused by the disclosure of the excised material in the Report, the Group concluded that the information was so sensitive such that its disclosure would be prejudicial to those persons to whom it relates, and went on to consider whether such disclosure would be harmful to the operation of competition in the market."

So the consideration was that it would be prejudicial to those persons to whom it relates. As I have said, what happened was at the hearing on 20th there was an indication by Miss Smith that she was concerned, or the Competition Commission was concerned about the third parties and it looks as if, and, to be honest, I cannot recall whether this was done at the behest of the Tribunal – I suspect it was – but the CC notified a number of potential third parties, such as BUPA and The London Clinic, and I do not know however many more it notified. All we do know is that the only persons who have come forward since the last hearing to make observations on this issue are the TLC and BUPA.

In our respectful submission when you look at their responses, neither the London Clinic, nor BUPA, the only persons who have expressed concern, are contending that their information is so sensitive that it can only be protected by staying within the four walls of the disclosure room. Of course, I accept that is not definitive, but it is an indication, we say, and this goes to my submission that the Commission has overstated its position about the sensitivity, they have not said that disclosure into a confidentiality ring of the sort contained within the undertakings is insufficient. For your note, I deal with this first in my skeleton at paras. 49 and 50, which deal with The London Clinic, and para. 51 which deals with BUPA. The relevant material so far as those two parties are concerned, I do not know where you have it, sir, but I have it in the HCA skeleton bundle, and if you have that to hand, for your

note the relevant material is tab 12, which is The London Clinic's application for permission to intervene which, sir, you will have seen, because you have granted permission to intervene, and tab 15, which is The London Clinic's actual skeleton argument. In that context we invite your attention to para. 8, because effectively it says two things.

> "TLC submits that insofar as there is any additional disclosure, the additional disclosure of its commercially sensitive material should be kept to the minimum possible to enable those three parties to respond."

But they accept that there is a right to respond, put it that way, or the purpose of it is to enable those parties to respond. It then goes on in the next sentence to indicate the sorts of safeguards that it would wish to see as a minimum, and if you examine those safeguards you will see that those safeguards are essentially the safeguards that are within the confidentiality undertakings – a small group of named individuals, used only for the purpose, and then the restriction on involvement in negotiations.

MISS SMITH: Just to avoid having to go back to this in the time available to me, could I just ask that the Tribunal note that in para. 8 on the last line of p.2 the TLC makes two points. It says that additional disclosure should be kept to the minimum possible, and it says: "In addition any additional disclosure" should be subject to these requirements.

MR. MORRIS: I am very grateful. I was not intending to avoid reading that little bit. I was trying to just take you to the paragraph as a matter of speed. Of course, the whole of that paragraph must be considered, but the point still remains that if there is additional disclosure it should stay within the ring.

The point is this, and it is the point also for your note, there is a letter on behalf of BUPA, which is at tab 13, the short point is that neither party asserts that this material must stay in the disclosure room.

Can I then go on, in the last few minutes that I have in my allotted time, just to deal with the basket of treatments point?

THE CHAIRMAN: Yes. Just to make a point on these communications, and in a sense it is reflected in the fact that the Tribunal only gave the intervener a rather limited right to respond, I anticipate that they are proceeding on the basis the Commission will be acting to protect the interests of third parties, and I question how much weight can be put on what third parties say in correspondence and written submissions to the Tribunal.

MR. MORRIS: If I can make this observation. It appears that there was some correspondence between the Commission and those third parties. That is evidenced, actually, within those submissions. We have not seen that communication and I cannot really comment any

further, but there have been obviously communications. I do not know whether your proposition, sir, is the position or not. I think I can put it at this level, there is not a strong submission, particularly from The London Clinic, that this information is of such commercial sensitivity that on no account must it be let out of the disclosure room. I think that is probably as high as I can put it in the light of activity, but we do say that goes into the mix of considering whether or not these concerns are perhaps slightly more apparent than real. Of course, the Commission has a wider consideration, but I raise this because it was specifically raised at the last hearing, that we are here to protect these people, and we say the submissions that have come in are obviously expressing their concern but they are not in the utmost commercial sensitivity bracket.

Just dealing with the basket of treatments point, the way that the price index is constructed is that the Commission has taken a group of treatments for the comparison between different hospitals, and it has selected those treatments. It has selected those treatments on the basis which it sets out at para.12 of Appendix 6.12. Our submission is that it is very important for HCA itself to be able to analyse and make submissions as to what is in the basket, because that in itself would have an impact on the analysis of the pricing data results.

Eventually, last week, the Commission has now disclosed, after about three weeks of pressing for it, and it may be the Commission has had a lot on its plate, it has to be said, as we all have, to HCA's advisers and its other advisers this list of treatments. I am talking about it as a self-standing piece of information. I am not talking about it being linked to any price data, I am just talking about the actual list.

The advisers, both economic and legal, cannot sensibly use that list without being able to discuss it with HCA because it does not know what the codes mean, and it does not know what the medical terms mean. I am going to give you an example of a code, and I understand that in doing so I am not revealing anything confidential. For example, code "MO940 percutaneous nephrolithotomy including cystoscopy and retrograde catheterisation", I need only say that, in my submission, to make the point that legal and economic advisers cannot possibly know what is being talked about there.

We, for example, would wish to make a case that there can be widely different prices for one and the same treatment, one and the same code, to show that this is the case in fact for all or many of the treatments in the basket. We can only do this by going back to HCA itself who, having looked at the codes, can then give us chapter and verse on what is contained with each code and what variations there would be. For example, there are likely

to be differences between patients, their underlying condition and co-morbidities. It is HCA's case in this inquiry that they do, as a rule, treat patients who have more complex and higher acuity conditions, and by talking to HCA itself about the specific codes that could be tested in due course by the taking of evidence, for example, from consultants who practice at both hospitals. That is just illustrating the point shortly.

Our submission is that that limited category of information, namely the codes and their description that are within the basket, should be allowed to be disclosed to HCA personnel. We submit that that information is not, of itself, confidential, and we submit that no reason has been offered as to why it should not go to that wider category. I hope now I have explained to you why it is quite a narrow self-standing point.

For your reference, annex 8 to HCA's original first bundle, which is the letter of 4th September, explains on p.2 the position about why we say this is not confidential.

I think I am running up against time. The only concluding observations I have, subject to take instructions from behind me, are these: first of all, as far as the adviser restriction is concerned, which is Mr. Flynn's submission, we support the BMI position on this. We say there is no need for such a restriction, certainly upon our legal advisers, but we do not wish to make any further distinct submissions and you will see we have not emphasised it.

You will also see, and this probably matters for subsequently, we have two observations on timetable that we have made in our skeleton. One is the 14 day time limit, and two is, we do raise the question about whether there should be effectively a deferment of the hearings which the CC has to date not accepted. I flag those because I do not think they go to the centrality of the issues before you.

Can I just take instructions?

THE CHAIRMAN: Of course.

MR. MORRIS: No, those are my submissions, we are most grateful.

THE CHAIRMAN: Thank you very much, Mr. Morris. Miss Smith, I see the time. We are in your hands. We could rise now and resume at ten to two, or we could have ten minutes from you now?

MISS SMITH: Let us go for ten minutes and see where we get to, sir.

Sir, what is the Tribunal and the Commission faced with today? First of all, despite the assurances given by the parties at the last hearing that their cases would not go beyond BMI's notice of application, each of their submissions does raise new and different points from those raised in the submissions, and there are three of those issues which we say do go beyond the notice of application. The three year restriction contained in the undertaking

about which complaint is made by BMI. Second, HCA's points on the basket of treatments, and third, the point which I do not think is pursued by Mr. Beard - he says it is not for today - that disclosure should be made to Spire employees as well as external advisers. On the face of the skeleton, that did appear to be a point that was being made.

We make the point that those three points are clearly outside the ambit of the application, and were only raised for the first time in skeletons served late on Friday morning. We appreciate that the Tribunal might want to deal with those matters, given the urgency of the issues in front of it, but we are obviously necessarily limited in what we can say, but we will do our best to address them orally in the time available.

The structure of my submissions today is that I will address first the issue identified by the Tribunal in its order of 20th September. That is the points of principle regarding the operation by the Commission of the disclosure of any investigation. As to that first point, that first issue, as a matter of principle, there appears to be very little, if anything, between the parties. There is clearly a balancing exercise to be carried out between the requirements of fairness and the requirements of confidentiality. I think everyone agrees with that, or it appears to be that they agree with that. Some greater weight may need to be given to requirements of fairness, but that is clearly recognised in para.5.3 of the CC's Guidance of Disclosure which is cited in our skeleton, and we do not seek to resile from that (para.29 of our skeleton). So there is a balance to be carried out. There does not appear to be really any difference as to the matters of principle.

The applicants go on to say that fairness was not respected in this case, and they have given in their skeletons and in oral submissions specific examples of particular redactions which they say show the process was unfair. In our submission, the Tribunal cannot decide whether the process was unfair in the present case solely on the basis of assertions by the applicants, or assertions by their counsel, as to the fairness or otherwise of the process at a high level. As has been accepted explicitly by Mr. Beard, and I assume would not be resiled from by counsel for the other parties, this is a question of fact and degree in any particular case.

We submit, therefore, that the Tribunal does need to look at what was actually done to some extent in this case. We say it would be wrong for the Tribunal to reach a conclusion in this case as to the fairness of the process employed in this case in complete isolation from the facts. The applicants are not seeking to do this, they have made points on the facts, they have given examples. We do say the case needs to be placed in its factual context. So we

do have to respond to the examples that have been cited against us as to the fairness of the process.

THE CHAIRMAN: Miss Smith, just taking us through at a level of generality, looking simply at the undertakings that the parties' advisers signed and their instructed firms signed, and the disclosure rules, but pausing at that point and not looking at the subsequent communications that occurred after the disclosure had been used for the two days, is it the Commission's position that that process was fair or was not fair?

MISS SMITH: We say the process cannot be considered stopping at that point. The process was always anticipated to be a two stage process, and when one looks at the undertakings and the rules and explicitly the emails to the parties - and I will come back to these particular examples - it was always clear to the parties that there would be this two stage process.

THE CHAIRMAN: Could you take us then to the part of the undertakings and the rules which show this two stage process?

MISS SMITH: I will, if I may, when I get to my submissions on that. In the five minutes that I have got, could I make submissions first on the point of principle and then tie it to this case. There is a very fine line between a point of principle and how the process worked in this case, but on the point of principle it is important I think to recall first what was originally in BMI's notice of application. The substance of the application proceeded on two grounds. The first ground was an argument of irrationality. They seek to resile from that now and say, "No, no, it is a question of fairness". I think Mr. Beard definitely said this is not irrationality, this is a question of fairness, but the case in BMI's notice of application, the first ground was a ground of irrationality - para.27 of their skeleton. The irrationality was characterised as follows: in para.27 of the skeleton (I can take you back to that), I think it is a fair paraphrase that BMI said, once requested evidence has been provided to the advisers in the disclosure room, it is irrational not to let it be used in response to the provisional findings. That just begs the question, what do you mean by "used"?

Their second ground of challenge was based on the breach of the duty to consult, the duty of fair consultation, and that was para.33 of the skeleton. They say there that confidentiality concerns are not a sufficient countervailing consideration to nullify the principles of fair consultation. We would not disagree with that. Of course not, and we have never argued that they are. In fact, on the contrary in this case, we have made disclosure, and we say substantial disclosure, to ensure that the principles of fairness and fair consultation are respected. I will make that good, if I may, after lunch.

They go further, BMI, in para.33 of their skeleton. They appear to say that any legitimate confidentiality concerns can be met by an appropriate confidentiality ring, appropriate confidentiality undertakings. What this appears to boil down to is a challenge to the disclosure room process in principle, that once confidential information has been disclosed into a disclosure room, it is irrational or contrary to the principle of fair consultation, not to let it out of the disclosure room into an appropriate confidentiality ring. We say that is wrong as a matter of principle.

In outline, we say that the statutory scheme requires the Commission to balance the requirements of fairness against confidentiality, and that balancing exercise goes not only to the extent of disclosure, whether something should or should not be disclosed, but it also goes to the method by which disclosure should be given. In certain cases, and we say this is one of them, the confidentiality and sensitivity of the material that we are dealing with means that disclosure into a confidentiality ring, whatever the undertakings, is not enough to give protection to that material. In such cases the risk of unintentional disclosure, leaking of the material, which is inherent even in a confidentiality ring - documents can be left by mistake, documents containing confidential information can be left by mistake on a photocopier, they can be emailed to people that they should not have been emailed to. There are inherent risks, even in a confidentiality ring. It is recognised in the case law and I will take you back to that.

In certain cases disclosure into a disclosure room may be both necessary and appropriate. That is clearly open to us, we say, both under the relevant statutes and under the relevant case law.

At least two of the applicants appear to agree with that position. In HCA's skeleton at paras.28 to 29, HCA says that there may be a balancing exercise to be carried out between interests of confidentiality and the interests of a fair hearing, the predominant concern (para.29).

Paragraph 29, the third line, if the relevant information is of such utmost sensitivity it cannot be released from the disclosure room then by definition such a restriction is justified. So, as a matter of principle, they appear to agree.

Paragraph 60 of the skeleton argument of Spire:

> "The CC argues that this approach would imply that a Disclosure Room would never be an appropriate means of handling confidential information in a CC investigation … Of course, there is no such implication …"

So the parties do not appear to argue that, as a matter of principle, in particular factual circumstances a disclosure room may be necessary. What they argue is that in the circumstances of this case it was not.

One more point before we close, only BMI appears to maintain the purest position, if that is the right way of putting it, which is paras. 20 to 21 of BMI's skeleton. At paras. 20 to 21 of BMI's skeleton (top of p.12) they say that the Report to BMI's inspectors should not have been redacted at all, and they say that on the arguments set out in para. 21:

> "… if a consultee's representative has already accessed a disclosure room in which he has legitimately seen information … the information is no longer confidential as between the Commission and that representative. It is irrational for the Commission to deny that representative further use of the same information for the same purpose."

I have tried to make sense of that. It appears to say that once something has been disclosed into a disclosure room it is irrational not to let it go into a confidentiality ring. We say that is wholly unsustainable. There are good reasons why, in particular cases, a disclosure room process may be necessary. Based on what we hear this morning there does not appear to be any obvious argument developed as a matter of principle, which is any different from the approach taken by the Commission in this case.

Perhaps I can stop there, sir, and develop those points after the lunch time adjournment.

THE CHAIRMAN: Yes, just let me leave you with one point that is troubling me at the moment – I do not want an answer now but after the short adjournment it would be helpful to have the Commission's position. Let us suppose that we agree that the method by which confidential material is to be treated is, at least in the first instance, a matter for the Commission and we have seen in the CC Guidance no.7 that there are a whole range of ways in which confidential material can be treated. But let us suppose that in this case the option is between a confidentiality ring and a data room or a disclosure room. The advantage, you have put it very clearly, of a data room is the material is fixed in terms of location, there is no risk of it escaping the data room and being unfortunately emailed or photocopied to people who should not see it, so that is obviously an advantage of a data room. So let us suppose that the Commission decides that, given the material in this case, or material in a case, that the data room was the appropriate way of handling it, and that the material should not leave the room. I do not understand the parties to be saying that it is irrational on the part of the Commission to say that the material should not leave the room. What I think the parties are suggesting is that they need, within the context of that

framework, an ability to respond to that material, and that is either to be dealt with by causing the data room regime to change into a disclosure regime, but if that is not appropriate, somehow the parties need, within the context of the data room, to be able to respond, and does that not imply an ability actually to go into the room and craft submissions there, not simply to take 20 pages of notes, but actually to go in and deal with the confidential material in the data room, as if it was back at the solicitor's offices which the data room precludes.

MISS SMITH: Sir, my immediate point on that is to say that one needs to look at what was actually done, because we say that the data room process in this case did give the parties an appropriate and proportionate opportunity to go in and consider the data, and make the points they wanted to make on the back of that data, put them into reports which they have produced and take those reports, subject to the redactions that we have made of the most ultimately sensitive material, out of the data room in order to develop their submissions to the PFs. I need to make good that submission by reference first to the process, and secondly by reference to some of the reports, so you can actually see what was done, because it is misleading and dangerous to make submissions in a vacuum. One needs to see what was actually done in this case, and that is why we have asked that the Tribunal be provided with copies of the reports and why counsel for the other parties have also been provided with copies of those reports redacted, subject to the confidentiality ring, because we say that when you look at the reports you can see the points, the work that was done in the disclosure room on the basis of the data. The work that was done, the points that the applicants wished to make on the back of that data are contained in those notes on the reports, and those reports can be used properly and fairly, we say, to make submissions on the provisional findings. They cannot refer to every piece of information that was in the disclosure room but the balance, and this is all about balance, the balance between respecting the confidentiality of the third parties on the one hand, and enabling the applicants to make responses in the consultation process fairly, can be seen when you look at the reports. The disclosure room gave them the opportunity to do that. It gave them the opportunity to analyse, to take notes and, on the back of those notes, to formulate submissions. But I do need, in that respect, to look at the examples given by the parties that they say show that it was not a fair process and actually, when you look at those examples, in our submission they do not stand up to scrutiny.

THE CHAIRMAN: Obviously, we will look at those with great interest, but on my understanding, and you may well have to correct my understanding of the rules of the

disclosure room in this case, I see great difficulty in understanding how the applicants in this case could have made an *Eisai* point, in other words, a point that is rooted in the factual detail of the figures without actually having more time in the data room in order to craft a specific response, or, alternatively, having an ability to take the data out of the data room into a confidentiality ring.

MISS SMITH: Sir, I will make submissions on those but I would, as we rise, give just the warning, sir, that one cannot judge those sort of issues either in a factual vacuum or at a high level of principle without looking at what was actually done, and we would caution the Tribunal against trying, with the greatest respect, to do that in this case. One needs to look at what actually happened.

THE CHAIRMAN: Thank you very much. We will resume again at 2 o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Miss Smith?

MISS SMITH: Good afternoon, sir. Could I just address briefly the law as set out in the submissions made this morning and in the applicants' skeletons. I think perhaps the most efficient way of dealing with that is to ask you to look at our skeleton on the law. I cannot tell you exactly where that is in your bundles.

THE CHAIRMAN: We have it.

MISS SMITH: Could I ask you to turn to our analysis of the legal framework, which starts at p.21 on p.7. Could I also ask you to have open, while you are looking at our skeleton, the relevant provisions of the Act in the Purple Book, which I hope you have. The first section is s.169 of the 2002 Act, which is at p.202, top of the book. There is a duty to consult before making a decision that there are adverse effects on competition. As you can see from s.169(2), it is a duty to consult so far as practicable, so it is not an absolute duty. Importantly, s.169(4) sets out what the relevant authority has to consider when considering what is practicable, and those include at (a), the timetable for making the decision. We may come back to that, but that really is something that presses on the shoulders of my clients at all times, but the timetable for that decision; and (b) any need to keep what is proposed, or the reasons for it confidential. As we say at para.23 of our skeleton, the statute recognises the extent of any consultation may be limited by the need to protect confidential information.

Then the CC is also subject to Part 9 ----

MR. ALLAN: Miss Smith, can I just stop you there because I would like your comments on one point. I notice when, I think it was Mr. Flynn, although Mr. Beard took us to *ex parte S* this

morning, and I do not know whether you want to look it up, but in the general principles of Mr. Justice Charles' judgment, there is a reference to *Lloyd v. McMahon*, where Lord Bridge said that the court will not only require the procedure prescribed by the statute to be followed, but will readily imply so much, and no more, to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. Are you saying that the statute is in and of itself sufficient to meet the requirements of fairness?

MISS SMITH: I am saying that the statute, and I will come on to make this point, if I may, provides the framework. Obviously in approaching the framework set out by the statute one has to bear in mind common law principles of natural justice and fairness. The statute is the starting point, it sets out the structure and obviously on top of that one overlays the approach taken in the cases. I think that is fairly reflected in the approach taken in the CC Guidance, which I will also refer you to.

Just starting with the structure of the statute, we go to Part 9, s.237, which is on p.214 of the Purple Book, and s.237 applies to specified information which relates to:

> "(a) the affairs of an individual;
>
> (b) any business of undertaking.
>
> (2) Such information must not be disclosed -
>
> (a) during the lifetime of the individual , or
>
> (b) while the undertaking continues in existence, unless the disclosure is permitted."

Of course, a disclosure room can relate not just to business information, but it can also relate to and contain information that may be personal information that is also protected under the Act. The Tribunal needs to bear that in mind when thinking about, in principle, how a disclosure room might be used.

Section 238 deals with specified information. Section 241 says that the CC is permitted to disclose confidential business information in connection with the exercise of its functions, and those would include the consultation function at s.169.

Then in s.244, the considerations relevant to disclosure, and we see that all three of considerations are relevant. First of all, the first consideration, which is s.244(2):

> "… the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest."

The impact on ongoing competition in the market and the commercial negotiations in the market we say does come as well under the first consideration.

> "The second consideration is the need to exclude from disclosure -

(a) commercial information [which] might significantly harm the legitimate business interests …"

That is to be balanced against the third consideration, which is the extent to which disclosure is necessary for the statutory purpose.

The extent of the need for disclosure we say relates both to the scope of the material to be disclosed, of what material should be disclosed and what should not, but also the terms on which disclosure should be given.

In my skeleton at para.28 we refer to the CC's Guidance. You have been taken to that by Mr. Morris, so I am not going to take you back to it, but we, I hope, fairly summarise the relevant parts of the Guidance in para.29 and following of our skeleton.

Clause 2.1, which Mr. Morris emphasised, the aim of the CC to be open and transparent while maintaining confidentiality, and at the bottom of , para.5.3 of the Guidance, when decisions are finely balanced, we should pay particular attention to the need to achieve due process.

Then in para.9.14 of the Guidance, which I think Mr. Morris also took you to, the various approaches to the disclosure of confidential information are set out, including a data room.

In para.31 we summarise when a data room may be used according to the Guidance.

We also draw the Tribunal's attention to the European Commission's administrative procedures which of course are based on a very different starting point. The starting point of the Commission is one of access to file, and that is not the relevant statutory provisions that I have shown the Tribunal. It is not the starting point for a CC investigation, but even when we are considering access to file, the European Commission obviously recognises the possibility of using a data room.

The quotations that are set out in paras.32, 33 and 34, just for your reference those documents are submitted to Mr. Witcomb's statement at tabs 8, 9 and 10. I am not going to take you to those, but you will note that it is relevant that the Commission recognises the use of a data room, where, as we say, in para.33, advisers are strictly prohibited from taking copies, notes or summaries of the documents and may remove from the data room only a final report, which is verified by the case team to ensure it does not contain any confidential information, but nevertheless the Commission envisage that through this process the advisers may make use of that information for the purposes of defending their client. We say that is exactly the approach that was taken in this case.

As the Tribunal has already indicated, there is a difference - there may be a choice - between different methods of disclosure, a confidentiality ring versus a data room, and I

have already made the point that a confidentiality ring may not be enough, and that is recognised by the Tribunal in *Claymore*.

The arguments that the applicants made this morning and are in their written submissions, they argue, or appear to argue, that this is a question of fair process not rationality, leaving to one side the fact that the notice of application actually proceeded on the basis of a challenge on the grounds of rationality. We say it may not be as clear as this. The balancing under s.144 requires a judgment to be reached by the Commission. If that judgment results in a conclusion that the Tribunal feels is unfair to BMI - for example, because BMI does not have the ability to make effective representations - then that, we accept, would be unlawful and the Tribunal might, as a matter of principle, reach that decision. It is not that clear cut, we say, because throughout the process judgments need to be reached on the degree of confidentiality of the material, the level of protection it requires, a disclosure room versus a confidentiality ring, and the terms of the undertakings for the confidentiality ring. There is a lot of detail that feeds into the balancing exercise.

I think our position is that although ultimately there is a question of law as to whether the applicants have been afforded a fair procedure, it does not follow that there is a single right answer to each of those detailed assessments, each of those are components of the analysis. We say that the Commission is well placed to judge the sensitivity, for example, of the information based upon the work it has done, and those sorts of judgments that go into each of those elements of the process should, we say, only be overturned if they are unreasonable. I will go on to say why we say they are not unreasonable in this case.

Mr. Beard for Spire referred to extensive case law. In our submission, none of it says very much more than that they had a strong right to make effective representations in response to the provisional findings. We do not dispute that. We do not resile from that. That is exactly why we have given them disclosure of all the relevant material. We have given them disclosure of all the relevant material, some of it into a disclosure room, some of it subject to confidentiality rings, some of it not subject to confidentiality requirements, but we have given them disclosure of all the material.

Spire says that natural justice is not to be tempered by the terms of s.169, which is the point, Mr. Allan, that you were developing. We say that the nature of the process has to be understood in the context of that statutory framework, but the statutory framework is a starting point. That is recognised in, for example, para.27 of Spire's skeleton, and the quote that is contained in that paragraph from *Al Rawi*. We are not saying that the statutory

framework set out in the Act takes away the entitlement to a fair procedure, but the statutory framework has to be relevant to what is a fair procedure, and it has to be the starting point. The protection of confidentiality is an acute concern, as reflected in the statutory regime. The Tribunal has heard wide ranging arguments, as I understand it, because I was not there, about these issues in the *Eurotunnel* hearing a couple of weeks ago. The issue in *Eurotunnel* arose, and the issue in almost, I think, all of the cases cited this morning by the applicants, because in those cases the Commission had not put material in a confidentiality ring at all. Disclosure was refused completely.

In this case we say that obviously the Commission has given disclosure. *Al Rawi* and *Bank Mellat* that Mr. Beard referred you to this morning, which were about closed procedures in which the evidence is not disclosed at all, we say are of very limited relevance to the issue in this case.

Going back to the approach adopted in the particular circumstances of this case, as I indicated, there was a two stage process. This was not done by way of concession. It was always anticipated that there would be a two stage process. The first stage was access to the disclosure room by three inspectors nominated and chosen by the applicants. Spire, I think, in the event only chose for two inspectors to go in, but that was a choice that they made. They had the opportunity to nominate who they wanted to go in. Those three chosen inspectors have seen all the confidential information - that is all the information that was behind the masses of scissors that Mr. Beard referred to this morning - in the provisional findings and in the Appendices, 6.11 and 6.12. Obviously that was within the confines of the data room.

THE CHAIRMAN: When you say it is a two stage process, was that two stage process articulated before or after?

MISS SMITH: That is what I am coming to, if I may, and I will take you to the relevant documents. Those three inspectors prepared reports and they were redacted by the Commission to exclude confidential non-own client data. The second stage was then the consideration by the Commission of those redactions, which were to be treated by the Commission as an application by the applicants for further disclosure. The result of that further consideration was that most - I can say that fairly - most of the confidential non-own client data was disclosed outside the disclosure room to the original inspectors who had given the confidentiality undertakings, and up to three more inspectors of the applicants' choice subject to them giving confidentiality undertakings. There was some very limited data to remain in the disclosure room.

As to the process, if I could start by the disclosure room rules, which are found in tab 19 to the exhibit of Mr. Witcomb. They are found in a number of places, but as I am going to be referring also to his statement it might be best to refer to them there. Tab 19, rule 11 which says that advisers are not permitted to remove any items from the Disclosure Room except for their notes of no more than 20 pages. These materials must not contain any data except own client data, and data is confidential data.

> "These materials must be inspected and approved by a member of CC staff prior to being removed … Where necessary, CC staff will redact from the notes any information, including but not limited to any information which may lead to the disclosure of any Data. CC staff will permit the parties an opportunity to make representations on any proposed redactions, and this may take up to 48 hours to complete."

Mr. Witcomb explains that process at para. 62, the process which led to the drafting of the final version of the rules, and I should say, before we leave para. 11, that the two sentences, I think were put in shortly before the disclosure took place in the disclosure room in response to questions raised by the applicants, specifically by BMI.

THE CHAIRMAN: Miss Smith, on rule 11, is it not absolutely clear that the advisers in the room can only take note of own client data, nothing else?

MISS SMITH: Yes, sir. The last two sentences were sought to deal with the point made by the applicants that they wanted to take non-own client data out of the room. The rules themselves on their face as a matter, perhaps, of contractual interpretation may not be clear, but I make the two points --

THE CHAIRMAN: Well, it is absolutely clear ----

MISS SMITH: I make two points in response to that. First, the situation was clarified in emails and in discussions between the Commission and between the applicants and I will show you those. That is the first point, that the position was clarified.

THE CHAIRMAN: Are you referring to the emails after the event, or before the event?

MISS SMITH: Before the event, and during the two days of the disclosure room process, before and during the disclosure room process. That is the first point, the position was clarified. The second point is that when one looks at the reports, and I will take you to these as well, one can clearly see that the applicants understood that they could include, and they did include, confidential non-own client data in the reports, which was redacted and which would then be subject to this second stage of further application for those to be unredacted. So, two points: the position was clarified before they went into the room, and the second

point: it is clear from the reports produced by the applicants in the disclosure room that they understood what they could do.

So, if I can deal with the first point, para. 62 of Mr. Witcomb's statement. I should preface this by saying that Mr. Witcomb's evidence is addressing the application made by BMI. He addresses the position as regards BMI. It was not until Friday at the very earliest that the issue was crystallised in HCA's and Spire's skeleton arguments that they argued that they may not have understood the process and that they engaged in a self-censoring process. That is not in any evidence either for Spire or HCA, and it is important to note that Mr. Witcomb's evidence deals with BMI in the first instance. So para. 62:

> "BMI expressed its concern in relation to not being able to take evidence out of the disclosure room in a telephone conversation with the CC. The CC followed this conversation with an email…"

- the 6th September email.

> "The email explains that, although the CC considers that a blanket ability on advisers to remove any confidential data from the disclosure room would undermine the purpose of the disclosure room, if the party's advisers considered that particular information is relevant to their defence so that they need to remove it from the disclosure room, they can make that request to the CC. This might be permitted subject to particular safeguards."

You see there the reference to tab 25 of his exhibit. If I can take you to tab 25, starting, if I may, with the email at the bottom of the first page of tab 25. This is an email from Miss Kent of 6th September at 15.36 and that is sent to BMI's advisers. That says:

> "I write further to your conversation … and your email yesterday.
>
> We note your concerns about the disclosure room process and in particular your request that more data be disclosed."

Then she says:

> "We have reviewed your comments on the draft undertakings and data room rules as well as those of other parties and attach final versions. Key changes are: …"

And if I could ask you to look at no. 6, this refers to para. 11 of the rules.

> "Whilst in practice this is the position, we have expressly referenced that representations can be made with regard to redactions in the report."

Then I understand that an email in the same terms was sent to all applicants, and you can see that would have been the case because she has reviewed not just BMIs comments on the

draft undertakings and data room rules, but everyone else's and attaches final versions, and explains the key changes.

Then a further email ----

THE CHAIRMAN: Paragraph 6 seems to be referring back to something.

MISS SMITH: That refers, I think, to the change to rule 11. Why it is no. 6 - I am sorry, maybe I am really straying into giving evidence ----

THE CHAIRMAN: It looks as though this is a response to ----

MISS SMITH: The comments.

THE CHAIRMAN: -- the conversation and email referred to in the first paragraph. It does seem to me that in order to understand what the Commission is getting at in para. 6 one needs to see the earlier communication.

MISS SMITH: Yes. It is slightly unsatisfactory because this was not an issue that crystallised until Friday, and we are trying to do the best we can on that. But we can see what we can do. In the meantime I think it is further clarified in the email of 6th September, at 18.12 at the top of the first page of exhibit 25:

> "Chris,
>
> Further to our conversation this afternoon ----"

- this is the conversation referred to in para. 62 of Mr. Witcomb's statement, which appears to have taken place after the sending of the 15.36 email:

> "I thought it might be helpful to reiterate and expand on my comments regarding the ability of advisers to request that particular non-own client data be removed from the disclosure room and, if so, subject to what conditions. We do consider as I mentioned that a blanket ability on advisers to remove any information would undermine the purpose of the disclosure room.
>
> Whilst the disclosure room rules and undertakings have been established as per my earlier email, as I mentioned if a party's advisers consider that particular information is important to their defence that they need to remove it from the disclosure room, they can make that request to us, and this may be permitted and may be subject to particular safeguards."

So that was made explicit to BMI. As I said, the limitations are that this evidence was prepared in response to an application by BMI, but I understand that the same, or similar clarificatory conversations were had with HCA and Spire in the disclosure room, and we say it is clear from the reports prepared by HCA and Spire that they understood the position as set out in this clarificatory email to BMI. If I can ask you to look at those reports, and

one can look at the reports for the purposes of this point, and one does not have to stray into anything confidential for the purposes of this point for the moment. Where you find those reports – HCA's Report, and we can start there, perhaps, in its fully redacted form, which is good enough for my purposes at this point, is in their bundle 1 tab 11. This is the fully redacted report, and I want to come back to the one that is the second ----

MR. MORRIS: If I can just remind Miss Smith through the Tribunal, that of course this document is confidential in the context of these proceedings

MISS SMITH: Yes.

MR. MORRIS: In other words, BMI and Spire do not have it and I suspect we would want care to be taken in case anything was read out.

MISS SMITH: In that case tab 11 HCA's bundle 1. It is a document that is entitled: "CC Disclosure Room Report".

THE CHAIRMAN: We have it.

MISS SMITH: You see the statement in square brackets at the very top in italics. We say that that statement, which is in square brackets and italics makes it clear HCA understood what the position was, and again p.2, at the bottom of that page the last bullet point there is another statement in square brackets in italics, which we say makes it absolutely clear that similar conversations were had between the Competition Commission and HCA.

MISS DALY: Which was that?

MISS SMITH: The same document, tab 11, HCA bundle 1, the bottom of the second page of that document. The position has been made clear to BMI in emails, and the position is made clear to HCA. As to Spire, I am not sure whether, sir, the Tribunal has Spire's reports in any bundles – I know that you have been supplied with confidential versions of the second stage redacted report by Spire, which is also supplied to counsel subject to the confidentiality undertakings. I am not going to read anything out, I am just going to refer to the points that we say make it clear Spire also understood what was going on. I am afraid because we do not have any agreed bundles we are not sure where that has gone.

THE CHAIRMAN: We will be with you in a second. (After a pause) Yes.

MISS SMITH: The Spire report should have at the top, again a note in square brackets, which is highlighted in yellow. I would ask you to note that statement, and also to note that if one just flicks through Spire's report, one sees a number of tables containing data which has been redacted with the little scissors. So the original report prepared in the disclosure room clearly included non-own client data, confidential data. There was not this self-censorship

that Spire now, on submissions not in evidence, suggest was the case. It is clear that they included the non-own client confidential data that they thought they needed.

The parties were aware of the two stage process. They were aware that they could include confidential non-own client data in their reports with a view to subsequently applying for further disclosure. So I say only that we would have put all this in evidence had we known that it was going to be an issue before Friday, and we can if necessary.

THE CHAIRMAN: That is fine, it is very helpful to know the position. Does that mean that the Commission's stance is that, for instance, para. 12 of the disclosure rules would not apply to the extent that anything other than own client's data was included in the 20 pages? So, for instance, when any of these advisers were writing up their notes were told by the Commission supervising the process: "You can't do that, it is contrary to rule 11" they would be able to say: "No, it is not contrary to rule 11, we cannot be obliged to leave the room because that is not actually what the rules mean"?

MISS SMITH: Sir, we say the disclosure room rules as first drafted were trying to prevent wholesale carrying out of confidential data. In response to the comments made by BMI and others in the email those rules were amended. The position was made absolutely clear in the emails before the disclosure process took place, and in the disclosure room itself as to what the process would be, and plainly there was a relaxation of the rules during the process. I have shown you, I hope, evidence that that is the case, and evidence as well that the parties understood that those rules were being relaxed and clearly included non-own client confidential information in their reports, with a view subsequently to making an application to the Commission to allow further disclosure non-redaction of those parts of their reports. No one was excluded from the disclosure room, I do not think anyone has ever suggested that that is the case.

THE CHAIRMAN: No, I was putting a hypothetical question.

MISS SMITH: Yes. The second point on the process was that, sir, you brought up some points about the operation of the disclosure room, the specific rules as to the time to be spent in the disclosure room, two days in this case, the number of people going in, etc. We say that obviously must, as well, in fact be a matter of judgment which all depends on the nature and volume of the material in that particular disclosure room. Mr. Witcomb gives evidence that an earlier data room process that was engaged in by the Commission which involved more extensive data was a five day data room process. In this case, a judgment was made that the material could be considered in two days, and obviously we have no evidence, or even submission, to the effect from the applicants that if they had, say, five days, or if six people

went in or if 40 pages of a report – I am talking wholly and completely hypothetically here – they do not say if that were the case the process would have been fair, but this particular process was not.

This all depends on the material in issue. We say that the applicants had the opportunity to take the legal and economic advisers of their choice into the disclosure room. No one told them who could and could not go into the disclosure room, as long as they were external advisers it was up to them to choose who would go in. When they were in the room they prepared these reports which identified the respects in which they thought they could undermine the CC's findings on the insured prices analysis. I am not saying that these are the submissions that they will make on the provisional findings. What I do say is that these reports identify the weaknesses that the applicants had identified when in the disclosure room, the weaknesses in methodology, the weaknesses in the patterns of results, and contain the points that will then be used in submissions, and that is exactly why they were given access to that material.

The Tribunal has the reports, and I am going to take you to them to give some examples, but we say they are very detailed and forensic. They are full of points and arguments and criticisms of the data used by the Commission to found its conclusions on the adverse effect on competition and the disclosure room has done its job. The issue here is not about whether the applicants should be given disclosure, they have been given disclosure, it is whether, having been permitted to see this data they are denied a fair hearing by the Commission having redacted their notes in this limited respect so as to keep the most sensitive data into the disclosure room. We say that they have not been denied such a fair hearing.

Mr. Beard made a number of points about wanting to re-analyse the material, or to check calculations, but those points actually go not to the material that was in the data room, which is the unredacted provisional findings and the appendices and the tables contained in the unredacted provisional findings and the unredacted appendices. Those points go to the point which he said he was not raising today, which is about access to the underlying data that led to those tables. He explicitly said that that was not a point that he was going to make today. That underlying data was not in the disclosure room, and there is maybe an argument to be had another day about whether it should have been, but that is not the purpose of today. So his point does not take the case any further.

I will bring you to the reports with the examples given by the applicants, but those are the reports. Balanced against that what is the risk? There is no risk, we say, that the

Commission will not understand the points made in the reports or subsequently on the basis of the reports in the provisional findings.

The Commission will clearly understand the points that the applicants wish to make because, first, it has given them the disclosure which has enabled them to make those points; and secondly, it is very familiar with the material, even the confidential material.

If I could first then make good those submissions by looking at the nature of the material, which was particularly attacked by Mr. Morris, and if I can take you back to Mr. Witcomb's witness statement. At para. 37 onwards he explains the insured prices analysis, and he makes clear that the information in the disclosure room was that which is now contained in paras. 6.203 to 6.248 of the confidential version of the report, Appendix 6.12 and the list of treatments. So in the data room was everything behind the scissors that Mr. Beard, I think, showed you in those paragraphs of the provisional findings. That was in the disclosure room.

Mr. Witcomb explains why that material is commercially sensitive – it shows the CC's analysis of average prices for a basket of treatments. It sets out the prices charged by different hospital operators to each PMI, and on average, and it compares across hospital operators, insured prices and characteristics.

> "The information was considered to be extremely sensitive because of its potential relevance to future negotiations and the potential it had to distort future competition in the market."

He then goes on to deal with the point that I think was made, again by Mr. Morris, this morning – the information is not as sensitive as the CC suggests. It has been suggested by the applicants the information is not as sensitive as the CC suggests because the prices are an average. So they are average, they are not individual prices, and they are, as Mr. Morris put it this morning, "historic", between 2006 to 2007. Then he says that the basket of treatments is based on the most common procedures, and the prices, whilst an average show each hospital operator their relative position to each other with each insurer. So what they say, for example, is that supplier X has been the cheapest for insurer Y by Z per cent over the last few years. So it gives the hospital operators details of their relative positioning for each individual insurer, and the percentage by which those relative positions are set, the percentage between the first, second, third and fourth.

He says, in para. 38:

> "The Group's view was that information would be likely to influence behaviour in future negotiations. The Group's understanding, based on the evidence received, is

that negotiations generally do not take place on the basis of individual prices for treatment but on the basis of a percentage increase overall. So if BMI knows that previously it was x per cent cheaper than Spire or Nuffield for a particular insurer it strengthens its bargaining position in future negotiations."

So this information will impact on future commercial negotiations. Then, in para. 39, Mr. Witcomb addresses the age of the information. Just for your note, I am not going to take you to it now, if I could ask you to look at paras. 6.203 and 6.208 of the provisional findings which give more detail of the nature of the negotiations and why this information is sensitive.

In paras. 40 and 41 Mr. Witcomb gives evidence as to why the Group did not consider that a confidentiality ring would provide sufficient protection, and that stronger protection was needed.

In para. 47 he addresses the national bargaining analysis. This is an analysis of the bargaining carried out at a national level between the hospital operators and the PMIs (Private Medical Insurers), particularly BUPA, and the concern there was that this information reveals the party's strategy in negotiations, in particular, the insurer's own assessments of their bargaining position vis-à-vis BMI and others and that that, therefore, needed to be disclosed into a disclosure room because, by definition, it could impact on future commercial negotiations, if the parties to those negotiations knew what position was being taken in previous negotiations by the counterparty.

In para 48 Mr. Witcomb sets out the purpose of the disclosure room.

In para. 63 he gives evidence on and I think I have already explained what was actually disclosed into the disclosure room.

In para. 67 he refers to the reports produced by BMI, Spire and HCA and he considers in paras. 76 to 81 the subsequent consideration of redactions by the Group on 19th September, where the Group balanced whether further disclosure was required of the material initially redacted. He says there in para. 78 that most of the material could be unredacted into a confidentiality ring and no objection to another three advisers seeing the material subject to the same constraints, but at para. 79 some information should remain redacted and he explains the nature of that information and the Group's view that it would not prevent those receiving the report from understanding the reason why the adviser noted the information and the purpose for which it was envisaged the information would be used.

Before taking you to the reports I just need to deal with one more point made at a general level by Mr. Morris, which is his suggestion that the third parties are not actually concerned

about disclosure of this material. We would ask you to re-read the letter to the Tribunal from BUPA of 23rd September, and the skeleton from The London Clinic. The CC has also received submissions from Nuffield and Axa which I can share with the Tribunal and the other parties if necessary, and Aviva, if the parties want to see them. The submissions from TLC, BUPA or other third parties do not contain detailed submissions on whether or not this material should be disclosed, because the third parties have not seen the redacted reports. They do not know what the applicants want to take out of the disclosure room, and they rely on the Commission to protect their interests in that regard.

THE CHAIRMAN: Miss Smith, you can take it that we will obviously re-read the Freshfields' letter and the TLC submissions but, as I indicated to Mr. Morris, we are of the view that it is very much for the Commission to take points on confidentiality and I do not think we will be assisted by seeing any further material that you have received from third parties. Obviously, if any of the other parties want to make submissions on that we will hear them, but frankly I think we have enough material to be getting on with.

MISS SMITH: Yes, sir. Then if I could take you to the reports, and to the examples specifically that the parties give in their skeletons as to how they have been treated unfairly.

First I want to deal with HCA, and if I could ask you to have HCA's skeleton open in front of you, and if I could ask you to have open next to that the confidential version of their report. So that is the report that has been given to you and to HCA's advisers subject to the confidentiality undertakings on the part of HCA's counsel, and which I think has, I hope, green highlighting. I hope you can read what is there, this is HCA's report.

THE CHAIRMAN: We have the HCA bundle, which tab is it?

MISS SMITH: It is not in the bundle, it is the redacted second stage report.

MR. MORRIS: It is what I referred to as the "second unredacted report" rather than the "first redacted report".

THE CHAIRMAN: Right.

MISS SMITH: The HCA report has in it two sets of redactions. If you look, for example, on the third page – again the pages are not numbered – at the top of that page there are two tables there, and I see the fact that there is table 8 is referred to in the skeleton, so I can refer you to table 8. There is table 8 on that page and another table above it, and you will see there are green, turquoise-blue redactions. Those are the redactions which the Commission decided could be disclosed into the confidentiality ring after its meeting of 19th September, but which were originally redacted from the report. The little scissors in table 8 are the

information that is still to be contained in the disclosure room, that is not to be disclosed at all outside the disclosure room.

In para. 30 of their skeleton HCA makes a point on table 8, by way of illustration. Table 8, which is on p.3 of the first redacted report, and on p.12 of the Appendix 6.12:

> "The relevant redacted material is the comparative index figure for TLC and is a key element of the CC's case - as to alleged higher prices, and thus as to the first AEC and in turn as to the contemplated remedy of divestment. The CC's case against HCA is centred upon its comparison of HCA's pricing with TLC and upon the propositions that HCA's pricing is 'substantially' higher than that of TLC and that the differences are not explained by legitimate factors … By contrast, the Advisers say in the First Redacted Report that 'the gap is relatively small'. Table 9 contains similarly relevant material relating to TLC in earlier years. The material relating to TLC in the Remaining Redactions is at the heart of the issues between the CC and HCA."

So the complaint is made that this material remains unredacted, but if you look, sir, at the notes that are made by HCA on table 8, which are on the fourth page of the redacted report, under table 9 submissions are made as to the analysis or figures contained in table 8 in the fourth bullet point, and this has never been redacted at all, but it is confidential from everyone else, so the fourth bullet point, the sixth bullet point, the seventh bullet point which is the last bullet point on that page, and over the page the eighth bullet point, which is the first bullet point on p.5, all these points are made on the basis of table 8 and go to exactly the points that HCA says they need to make on the basis of the material, and we say those points are clearly, and in extensive detail, made in these redacted reports, without need for the figures in the tables to be disclosed, and so they can make those points, and use these points that are made in substantial detail in those bullet points as part of their submissions on the provisional findings.

THE CHAIRMAN: What happens if the adviser who is making those submissions realises that he or she needs to go back to table 8 to have a look at it and to work out whether particular points can or cannot be made good.

MISS SMITH: This is where the balance is struck, sir, because they have been given two days in the disclosure room to consider the figures, the figures that are behind the scissors, and to draw the points out from those figures. We say that, yes, there must be some restriction because this is a disclosure room, and that is where the checking is carried out in the disclosure room itself during the period of the disclosure room process.

THE CHAIRMAN: Miss Smith, in effect these are the submissions of this particular applicant.

MISS SMITH: They are the points that they make on the table. I cannot read them out.

THE CHAIRMAN: No, no, I am not asking you to.

MISS SMITH: But they are the points they make on the table which can then be developed to undermine the provisional findings.

THE CHAIRMAN: Your position, so that I understand it, is that if, when articulating those submissions, the advisers think they may have made a transcription error, or in some way misunderstood the data they have to put in their submissions to the Commission without going back. Effectively, this is as good as it gets in terms of material from the data room.

MISS SMITH: Our first point is that they do not need the exact figures to make the points that they subsequently made, those points were made and noted and written down when they had the exact figures in front of them. If, for example, they say: "The point I make at bullet 4, looking at it I need to check the exact figure in table 8" then it may be that they would be able to ask the CC for that particular figure, again to be considered under the same constraints. But that is never closed off. What we say is that they make their points clearly, having seen the figures and if, for example, they think: "I can't remember, that doesn't appear to be consistent", then obviously they are able at any time to ask to see the figure again. That is fundamentally different from saying that once you have seen the figures in the disclosure room you should be able to take them into your confidentiality ring.

MR. ALLAN: This may be just a variant of the same hypothesis as the Chairman put to you, but intrinsic in the nature of the disclosure room structure that you put up is that there is a subset of the adviser group that looks at the actual material. Suppose that group takes the report back and one of the senior advisers, who is outside that narrow ring, says: "We want to say more. We want to develop this point. The note that you have put down is inadequate." We all know that the development of these arguments is an iterative process. Is it open to the parties to come back and say: "We need to do further research"?

MISS SMITH: The first point in response to that, sir, is that it was wholly for the parties to decide who to send into the data room.

MR. ALLAN: But there is always "but", "but it was always going to be a limited number".

MISS SMITH: So the first point is they could decide who to send in. We see that BMI sent in a junior lawyer, that was their choice, but they sent in Peter Davis, one of their economic advisers – we cannot say he does not know what he is talking about, an ex-deputy Chair of the Competition Commission - so they had a balance there, they chose who they wanted to send in.

The second point is that, yes, the disclosure room process has to be manageable from the point of view of practical arrangements, and has to be manageable within the time table to which the Commission are operating, and I refer you there back to s.169(4)(a), in considering what is practical by way of disclosure the Commission shall have, in particular, regard to restrictions imposed by the timetable.

So the disclosure has to be practicable, and that one of the issues to be taken into consideration when deciding what is practicable is the timetable. The Commission have to put in place something that will work as a matter of practicality and so in this case, as a matter of judgment, the Commission decided it should be two days and there should be three advisers. The parties objected in principle to the disclosure room, but they chose to put three people in and, in fact, in the circumstances Spire only put in two.

Also, the point is, of course, that we have constructed this data room in this way, and the disclosure room in this way, and the disclosure room is a disclosure room which necessarily has some restrictions on how it works, and it should not be collapsed into a confidentiality ring.

THE CHAIRMAN: What about going the other way, Miss Smith? Did the Commission give any thought to creating around the disclosure room the infrastructure that would have enabled the parties, through their advisers, actually to draft the submissions in and around the disclosure room, so that one could actually create detailed and fully fledged submissions without any data leaving the room at all.

MISS SMITH: First, no one ever asked for that. Perhaps, more importantly, one needs to record what the disclosure room did. The disclosure room disclosed material from two sections of the provisional findings, the insured prices analysis and the national bargaining, and it disclosed the material that was behind the redactions. The Commission's reasoning, the Commission's arguments, everything else is set out in the provisional findings not behind the redactions. So the material that went into the disclosure room forms only part of the provisional findings and will form only part of the submissions. The purpose of the disclosure room is to allow the parties to look at the material behind the redactions and to work out what points they want to make on the basis of the material behind the redactions and then they will want to feed that into the overall submissions they make on the provisional findings that will address the unredacted sections of the report on the national bargaining analysis and the insured prices analysis, but will also address the other parts of the provisional findings that go to that adverse effect on competition and will address other adverse effects on competition. So the purpose of the disclosure room was to allow access

to certain material which the possible could then consider in their view either undermined the conclusions reached by the CC or had to be interpreted in a different way, the way in which the CC had interpreted did not stand up to scrutiny, or the methodology that the CC used did not stand up to scrutiny, and those points are then going to be used in the submissions.

There is also the practical point that the nature of the data room is that the dissemination of the information is, by its very nature and for good reason, meant to be limited. So there will be restrictions on the number of people and the time and whatever the environment into which the data is disclosed.

MR. ALLAN: Is there not a trade-off between the tightness of the restrictions you place on access and dissemination and the compensating, as it were, facilities that need to be provided to allow respondents fully to develop the case as they think effective to make the points, so that the tighter the number of people you put constraints upon getting it is three people, you might look rather more favourably on broader access and broader facilities to enable that material to be used effectively in the response.

MISS SMITH: Yes, and that is why in this case there was a two stage process, that the disclosure room was put in place with certain restrictions. You do not have any of the applicants saying those particular restrictions prejudiced them in any particular way - there is certainly no evidence to that effect. The Commission made it clear that it then carried out a second stage of analysis and a second balancing exercise and disclosed what is in blue.

MR. ALLAN: I am sorry to interrupt you, but the two stage process deals with the release of information and the disclosure dissemination prohibition. I think what we are talking about now is the type of information exemplified by the scissored material in table 8 which cannot be disseminated but which parties may feel they need to be able to rely on more precisely than has been done in the notes that you pointed to in order effectively to make their client's response to the Commission. I did not understand you ----

MISS SMITH: There is a judgment and a balance to be struck there.

MR. ALLAN: Is that a judgment that the Commission should make?

MISS SMITH: I think it has to be, because it is a balance that has to be struck at its most fundamental between on the one hand the interests of the parties who have provided that information, but also on that side of the balancing exercise the impact on the process of competition in the market going forward.

MR. ALLAN: I am sorry, I think we are confusing two things here. We are confusing dissemination of that information outside the very restricted ring of advisers and the ability

of that information to be used by respondents in the submissions they make to the Commission consistent with the restricted access.

MISS SMITH: I am not sure if I understand the point, but if you are saying if these parties identify some figures and say, "We need those figures to make our submission, therefore we need to use them", what does "use" mean? They have used them to the extent that they have been in the disclosure room, looked at them, spent two days analysing them, taking from them points they think they need to make, producing a report, taking that report out of the room without those figures in it, and making the submissions. If you mean "use them", they can take them out of the disclosure room, show them to other advisers within their solicitors or their economics teams, that is the first point; show them to individuals within the companies, then we say, no, at that stage, there is a judgment to be made, and the judgment of the Commission has been that that use, taking them out of the disclosure room, showing them to external legal advisers, external economics advisers, who have not given a confidentiality undertaking for the very sensitive information, we say that further use, taking out to the advisers, taking out to the company, no, on balance, we have looked at that data in minute detail and we have decided that those particular figures cannot be used in that way. That is a balancing between the competing interests, public interest versus the ----

MR. ALLAN: The point I am making I hope is reasonably straightforward. If you take table 8 in the HCA report as an example, suppose that HCA's advisers feel that they want to make some specific points about the comparison between one of those HCA numbers and one of the other numbers in that table that is redacted and not permitted for dissemination outside the ring, at the moment, as I understand it, and maybe I wrong, they cannot make that specific point to the Commission in a submission.

MISS SMITH: Sir, this is exactly the sort of point that they do make on the fourth page, which is the page below table 9, the fifth bullet point that refers to table 9 makes exactly those sort of points, but without referring to the figures.

MR. ALLAN: Supposing they feel they need to make a specific reference to a number to make their point good?

MISS SMITH: If they had, one would have anticipated it being in this report.

MR. ALLAN: I am just testing it as a hypothesis.

MISS SMITH: One would have anticipated, in the first place, it being in this report, and they decided who they send to analyse the data and it is for them to decide to send in the people who are best placed to analyse the data. They identified in these reports the points that they wanted to make, and they have made those points, for example, at the bullet point. If they

decided that they needed in the bullet point to refer to the specific numbers in the table, then one would have anticipated that they would have put that in the bullet point and it would have been redacted and there would have been a conversation subsequently with the CC about whether there should be further redactions.

I think the point is actually also quite well illustrated in the BMI report, if I can take you to that, because they also make a number of criticisms of the fairness by way of specific example. Would you go to BMI's skeleton, para.27, and have that open, and have BMI's second redacted report to see whether those points are good points. These are the points that were identified by the inspectors, the people who had been in the disclosure room and they are exactly the sort of points, sir, that you say can come out of the disclosure room, these are the best points we could find to say why we think the process was unfair.

Paragraph 27(1), if you have BMI's report open, it again has the turquoise blue highlighting and the scissors, and could you have open the skeleton. In the skeleton, para.27(1), they make the point:

> "At para.98 in Appendix 6.11 to the public version of PFs, the Commission refers to Figure 2 outlining BUPA's view during its 2011/12 negotiation with BMI of the potential impact on BMI's profit on a per annum basis if its hospitals were removed from BUPA's lists. The Commission has now provided Figure 2 to BMI's Inspectors. Figure 1 in the public version is headed 'BUPA analysis …' Although it was part of the Requested Evidence, the Commission has not allowed BMI's Inspectors sight of Figure 1 when formulating their submissions. The Commission has provided a relevant number but not other relevant numbers. This precludes BMI's Inspectors from comparing the cost to BUPA (using data from Figure 1) with BUPA's assessment of the impact on BMI (using data from Figure 2) so as to test BUPA's conclusion on which the Commission relies."

If you actually look at the report, p.3, at the bottom of the page figure 1 is redacted, you see the scissors, but they have made the point they want to make immediately above figure 1, in the last bullet point above figure 1. That is the point they want to make on figure 1. Then they say in their skeleton that they want to be able to compare figure 1 and figure 2. That is exactly what they do in the unredacted paragraphs on p.4.

The points are made in the green turquoise highlighted confidential section so they can be discussed with the further advisers who have given confidentiality undertakings outside the

confines of the disclosure room. What has been redacted that cannot come out of the disclosure room is the exact figures.

Then going on to the second point that is made in para.27 of BMI's report, they say:

> "(2) Paragraph 97 of Appendix 6.11 to the public version of the PFs refers to a report the BUPA Group Chief Executive on developments in negotiations as it was approaching the stage of delisting BMI. BMI's Inspectors are constrained by their undertakings but are able to say that the excised text is directly relevant to demonstrating a point that is impossible to make without being allowed to quote the redacted information …."

Paragraph 97 of Appendix 6.11 is to be found at the bottom of the first page of the report, the last bullet point on p.1 quotes what was redacted from para.97 of Appendix 6.11 of the public version of the PFs. So they now have that redaction in full into a confidentiality ring. They have all the texts that they indicate in para.27(2) that they were interested in. They can show it to the inspectors and to the further external advisers subject to confidentiality undertakings. They are able to use the quote that they now have in full.

THE CHAIRMAN: Yes, but just to make a point going the other way, it is quite clear that the bit that is highlighted is making a specific point out of multiple points, we do not know, but the "in particular" rather suggests they are selecting one point out of several.

MISS SMITH: That was the choice they made when they were in the disclosure room. Sorry, which point ----

THE CHAIRMAN: The bullet point on p.1, third line.

MISS SMITH: That is, as I understand it, the point that they ----

THE CHAIRMAN: What I mean is that the drafter of this is selecting from a wider universe, and no doubt he is doing so because that person has got 20 pages and two days in which to do it.

MISS SMITH: Yes, the purpose of the disclosure room is that, for BMI, you go into the disclosure room and you have access to every point that has been redacted from the provisional findings and the appendices, not every one of those redacted points will be relevant to you, but the whole point is that in the disclosure room you have identified those points that are relevant to you that you do want to make submissions on and you include them in your report. That was what they did. I do not think that is what is being suggested, but we cannot do their reports for them, they know what they are looking for, they know what is important, they have been provided with the data, all the data in the disclosure room, and it is up to them to identify within that period, which we say is a reasonable

period, the material that is relevant to them. Some of it may not be, some of it is, and they have identified that which is relevant to them and put it in the report.

Their complaint has never been, "We need 30 pages", or, "We needed three days", or "We needed five people" ----

MR. FLYNN: I hesitate to interrupt Miss Smith, but I think I should just point out that the paragraph that she was on, sub-para.(2), is extremely vaguely worded because, as I explained to the Tribunal, the inspectors were trying not to breach the terms of their undertaking to counsel at the time who were not subject to the undertaking and therefore could not see it. We have just had a discussion with Mr. Steenson, who explains that the point he was making to us in sub-para.(2) actually relates to stuff which is to be found at the bottom of p.4 of these notes.

You may think this discussion is not really going anywhere anyway, but I have to say we are just discussing the wrong thing at the moment.

MISS SMITH: Sir, our point is that the complaint that is being made against us is that this process is so unfair, the disclosure room could not be used, and the information should all go into a confidentiality ring. We say, no, we carried out a very careful balance here between confidentiality on the one side and the ability of parties to be able to fairly engage in consultation on the other side - due process. We are looking here at the point of due process, which we say the judgment that the Commission was reached was that these reports at the end of this two stage process were enough to ensure the fairness of the fair consultation when weighed against the confidentiality on the other side.

If, on this particular point, the point relates to a point on p.4, which we are now told by Mr. Steenson, the bullet point on p.4, para.97, Appendix 6.11, the only parts that remain redacted are an explicit period of time. The sense of the points is all there. The fact that the figure for that number of months, years, weeks, days, is not there, we say is not enough to make this process unfair. That is the judgment.

Sir, we do have points to make on the third and fourth sub-paragraphs at para.27, if you would be assisted by that, but I think the thrust of our position is absolutely clear, I hope.

THE CHAIRMAN: Absolutely, Miss Smith, I do not think you need labour the further examples. I think we have the point that you are making.

MISS SMITH: It is just these examples have been made against us, and they, we say, do not stand up to scrutiny.

Spire does not give any examples. Their argument essentially is that the advisers misunderstood the rules and the undertakings so that the self-censored. I have addressed

that point, and I hope it is clear when one looks at the Spire report, which I would ask you to do after today's hearing, is that they did not self-censor, they clearly included a great deal of confidential information in the report.

It is important to note that although the submission is made that Spire's advisers self-censored, there is absolutely no evidence to that effect, and it is clear that neither BMI nor HCA laboured under that misunderstanding.

In conclusion, what we say is that the CC was entitled to, and in fact was required to carry out a balancing exercise of the requirements of fair process against confidentiality. In all the circumstances, the approach that it took in this case was neither irrational nor unlawful. The CC put a great deal of emphasis on due process and came to the conclusion that a fair consultation could be carried out on the basis of these reports with their minimal remaining redactions.

Unless I can help you any further on that main point of principle on the disclosure room, I need to deal with the three outstanding points we say were new and did not feature in the notices of application, which are the three year restriction and the basket of treatments and possibly disclosure to client, but I do not think that is being pursued.

Sir, if I could address, first of all, the BMI point on the three year restriction contained in the undertakings. I have made my point that this is not a point of principle, it is a detailed aspect of the rules that was arrived by the Commission after careful consideration, and the explanation for this three year disqualification in this particular case on the back of the particular circumstances is contained in Mr. Witcomb's witness statement, and I do think it is worthwhile going back to that, if I may.

Again, I emphasise that this was prepared before we saw BMI's skeleton argument, and most importantly Mr. Bright's witness statement, and we would make the point, without labouring it, that there is nothing in Mr. Bright's witness statement that could not have appeared with the notice of application. There is absolutely no reason why it did not come until Friday, but the result of that is that our evidence obviously does not address that detail. I will do the best I can, and Mr. Witcomb's evidence on the three year restriction is set out in paras.43 and 44 of his statement. He says at para.43 that some of the information was readily memorable, as regards the rankings, for example, the relative rankings. It was felt that even constraining access to a data room would not sufficiently ensure that its disclosure did not lead to subsequent distortion of competition in the market. The risk was that, if an adviser had seen the information, he would not be able to "unlearn" it, and that consciously or unconsciously that would affect any advice he might provide subsequently.

Paragraph 44:

> "As a result, the Group considered that one of the undertakings to be given by participants in the data room should be that those individuals … were precluded from advising their clients on pricing negotiations …"

At that stage, which I think is July, that was proposed to be five years.

Submissions were received from the applicants on that proposed restriction and were considered by the CC and Mr. Witcomb explains this in paras.50 to 53:

> "Similarly, the parties argued that the proposed restriction on the giving of further advice for 5 years goes beyond the objective of protecting the confidential information."

He summarises the points made by BMI. Then he says in para.51:

> "The CC did not accept those representations. In its letter of 27 August 2013 …"

and I would ask you, please, to look at that, I am not going to take you to it now, but I would ask you to look at it.

> "… the CC explained that, although this type of restrictions has not been imposed in previous cases, it was necessary to assess each individual case … The CC considered the restriction necessary and proportionate given the nature of the disclosure made in the present case to prevent the risk that competition in the market may be distorted. The purpose was to ensure that the knowledge of the external advisers of the relative pricing …"

would not impact on the advice they would give to their clients in the next round of negotiations.

At para.52, they had been told that at least some of the hospital operators used the same firms advising on the investigations and advising in negotiations, and that was true of BMI's Mr. Bright and Mr. Webber. The CC felt they could not start properly to draw distinctions between exactly what role the individual advisers may or may not play in negotiations based on what they had done historically, particularly because the outcome of the investigation itself could affect those negotiations. Indeed, they noted that parties had on the one hand argued that not allowing them to advise would distort the negotiation process, but on the other hand said that who the advisers would not affect the negotiations. So they could not be sure there was not a material risk. The undertaking related to negotiations with PMIs on price and terms and conditions of services supplied. If the

advisers did not play a role in those negotiations then the undertakings would not impose a significant restriction on them. If they did then it was required.

The CC nevertheless decided to limit the restriction to a period of three years, by reference specifically to the upcoming rounds of negotiations between the operators and the PMIs. The key agreements operate for three years, and then are re-negotiated, so it was felt that a restriction for three years would provide the necessary protection.

That is the position of the Commission.

First of all, BMI rely on the *Sky v. Virgin* case, which is in tab 11 of the authorities bundle. I think I can make some introductory points, and then I may refer you to this one case.

There is no issue, and we do not take issue with the principle that a party can choose their own lawyers. The question here is whether there is a good reason to restrict that choice in certain circumstances. We say that there is in this case, and that this case is plainly completely different from *Sky v. Virgin*. *Sky v. Virgin* was a case about disclosure in litigation, and whether Virgin was allowed to use the same lawyers in two pieces of litigation that were going on in parallel and one set of regulatory proceedings in which there were potentially overlapping issues.

The litigation is, as we know, subject to an obligation to use the information only for the purposes of the proceedings. However, that obligation does not mean there is a conflict of interest where a lawyer acts in two cases and the information in one of those cases may be material to the other. If you look at paras.19 and 21 of the judgment, in 19 the court referred to CPR 31.22, where the court has a discretion to permit disclosed documents to be used for a purpose other than the litigation in which they are disclosed. The court makes the point in the last sentence of para.19 that it was actually desirable that in certain circumstances lawyers acting in two sets of proceedings should be in a position to apply to the court for permission to place sensitive documents or information contained in them before the CAT. If there were relevant documents that were relevant to the issues in the two sets of proceedings, they should be aware of those to enable them to make this application under CPR 31.22.

The point is taken up in para.21, the second sentence:

> "The difference is that in the former case …"

that is the duty not to make ulterior use of disclosed documents -

> "… the court can give permission for the use of a disclosed document for a purpose other than the action in which it was disclosed of a disclosed document

for a purpose other than the action in which it was disclosed. This is an important distinction in the context of the present case."

So it was key in that case that Virgin might legitimately under the relevant provisions of the CPR apply to use information in different cases. There is no parallel with the issues of conflict of interest arising in this case.

If you look at paras.28 and 29, that is made even clearer. Paragraph 28:

"Each set of proceedings is concerned with ensuring fair competition in relation to the supply of pay TV. That aim justifies the requirement that the parties give disclosure in the High Court proceedings. It is in the public interest that the court should have regard to the contents of the parties' confidential documents, in so far as these are material. It seems to us that the same public interest would be served by the tribunals in the other sets of proceedings having regard to the information in those documents, in so far as material in those proceedings."

Then para.29:

"In the unlikely event that information in the sensitive documents were to suggest that the CAT, Ofcom or the Competition Commission were proceeding on a false basis in one of the other sets of proceedings, it seems to us desirable that the lawyers should be aware of this and in a position to apply to the High Court for permission to draw the documents in question to the attention of the relevant tribunal."

So that was what was underlying the judgment in that case. The court concluded on the facts that there was no risk of improper use of the information in that case because this scenario intrinsically involved no risk of improper use. In fact, cross-use of the information in two sets of proceedings would have been inherently proper given the rules under the CPR.

This case, the private health care investigation, is completely different. Any leakage or cross-use of the information from the investigation into negotiations is not justified on the basis of the principles that are set out in *Virgin v. Sky*. It is much more about conflicts of interest and the case is a million miles from that of *Virgin v. Sky*. In that case, *Sky*, the court obviously thought that cross-use between two sets of proceedings was desirable. It is not desirable that any information obtained by advisers during this investigation as to past negotiations is used in some way in subsequent negotiations.

MR. ALLAN: Miss Smith, can I ask, is the scale of the risk that the Commission foresees here influenced by the evolution of the scale of the redactions. In the discussions that you were

having just now about the advisers' reports, you have emphasised how precise the remaining redactions are, down to specific figures or specific periods of time with information about trends and broader relationships now seeming to be unredacted. If that is the case, it seems to me that it may be that the sensitivity to the Commission of adviser disqualification may be reduced because I would have thought that a relevant factor for the Commission to consider would be the likelihood that very precise information would make a difference to the competitive process going forward, particularly, and I note that Mr. Witcomb says in his witness statement, para.52, third sentence:

> "This was particularly so, given that the outcome of the CC's investigation could affect the nature of those negotiations in the future."

It seems to me that the relevance of historically precise information for the future for the purity of the competition process may well be rather more limited.

MISS SMITH: Sir, the judgment reached by the CC, obviously the undertaking included for those who were going into the disclosure room and seeing everything, including the precise undertaking. Then there was also a judgment reached that the redactions that were provided for the second round were also such that it meant that they could impact on future negotiations. Obviously the outcome of the investigation may also impact on future negotiations, but at the moment there is no final decision as to exactly what the outcome of that investigation will be. Certainly one cannot, with confidence, say that the outcome of the investigation will be that any past information will become suddenly irrelevant. Bearing that in mind, if I could just go back to the BMI report and look at the sort of information that is now contained in the material that is proposed to be disclosed into the confidentiality ring, subject to that undertaking, I think it illustrates the risk very well, the considerable risk.

If you look at BMI, because we are talking here about Mr. Bright and Mr. Webber ----

MR. ALLAN: Sorry, can I just be clear that that information goes into the confidentiality ring, but people within that confidentiality ring are subject to the disqualification requirement?

MISS SMITH: Yes, the requirements of the confidentiality ring that was imposed on the disclosure room and the confidentiality ring that is disclosed on the individuals to whom the second redacted report was given both include this three year disqualification.

MR. ALLAN: My point falls away. I was on a misapprehension because you are applying the disqualification to the same body of information.

MISS SMITH: Yes. Perhaps it might be helpful, while we are talking about that point, to look at the BMI report, to look at the sort of information that will be disclosed into the

confidentiality ring, which informed the need for this three year disqualification. If you have the BMI redacted report, at p.9, there are three paragraphs. If you look 12 lines down from the top of the page there is a sentence that is redacted about relative pricing that we say is very commercially confidential. That could permeate into an advice even by a competition lawyer, and I will come back to that, during commercial negotiations. We say that justifies the imposition, for example, of the three year restriction. For example, in para.15 of his witness statement, Mr. Bright says that he advises on volume discounts and rebates as part of his competition law remit. He says these are competition law issues, they are not commercial issues. Of course, he will want to give competition law advice that meets his clients' commercial objectives, and you cannot say that there is no risk that his advice will even unconsciously be shaped by having seen information like this.

Likewise, if you look at p.1 of the BMI report, the text at the very bottom of that page, the last two sentences on that page that are highlighted, and that are anticipated to go into the confidentiality ring, there are real risks if Mr. Bright, for example, is asked to advise on whether BMI can take a particular bargaining position vis-à-vis an insurer when he has seen material of this nature. Those are risks which the Commission decided it could not run and that, therefore, it imposed limitation, limited to three years only so as to apply to one round of negotiations.

Mr. Bright in his witness evidence says that there is him, because he has spent about 75 per cent of his time on the investigation, Mr. Webber, who has spent about 50 per cent of his time on the investigation, both are experienced competition lawyers, who have extensive experience, I think in the case of Mr. Webber about ten years, of advising BMI.

BMI could choose to have Mr. Bright represent them in the inquiry or they could decide that, given his wider role of advising on commercial negotiations as well, the competition law issues arising, that he should not give the undertaking, but Mr. Webber could. The reality is that they have two highly experienced commercial lawyers advising BMI and they could divide up responsibilities, but they decided that neither of them should give the undertaking, and that was their choice. We say that that three year undertaking was not unreasonable in the circumstances.

The second point is the basket of treatments. HCA says they want the basket of treatments taken out of the confidentiality ring altogether. I say again, like a scratched record, that is not in the notice of application. They also said that they would limit their intervention to the ambit of the appeal when we last appeared in front of you. Leaving that to one side, the substance, first of all, they say the information is not confidential in itself. It is confidential.

It reveals overlapping treatments, those treatments that operators all offer. In other words, it tells the operators exactly what products they are competing on and with whom they are competing on those particular products. The view that the Commission reached was that the net information is confidential.

The second point HCA make is that they cannot understand the impact of the basket of treatments on the Commission's analysis without input from their clients because that depends on exactly what is being compared. We say that they can understand the methodology, because that is based on the use of the CCSD codes to identify substitutable products and they can comment on that methodology and any weaknesses that may arise from that methodology.

Beyond that, commenting on the legitimacy of the comparison and the treatments that were actually chosen to go into the basket would depend on a detailed understanding of what their competitor, The London Clinic, is offering, and that understanding would breach confidentiality, in our view, and would impact on competition subsequently between TLC, The London Clinic, and HCA.

Mr. Morris in his submissions gave a number of examples of the sort of points that HCA might want to make on this methodology, and those points can be made. The exact make-up of the basket of treatments, we say, is confidential and would impact on competition between The London Clinic and HCA and should remain within the confidentiality ring.

We are not talking here about external advisers not seeing it. They can and will make whatever comments they want on that choice. The question is whether it should go one step further and be disclosed to clients, those clients who are engaged in the commercial negotiations day to day and competition with The London Clinic.

There was the point, as I have said, from Spire which seemed to be made in paras.45 and 46 of their skeleton, which is that it is unfair that disclosure is restricted to external advisers and they want disclosure to the client. I do not think that is being pursued by Spire today.

THE CHAIRMAN: Miss Smith, I think not for today.

MISS SMITH: I think it is another one of those ones that are not for today.

Finally then, some points were made on the timetable, and I do not need to remind the members of the Tribunal just how tight this timetable is for the Commission, and Mr. Witcomb sets out details as to what needs to be done in the remaining time before the Commission needs to make its decision on 4th April 2014 – extensive consultation on the proposed remedies, and further work that needs to be done. The timetable is very, very tight, and we are very concerned by suggestions today by the applicants that there could be

wholesale reopening of the disclosure room. The impact that that will have on the timetable would be very, very difficult. We have, it is accepted, given the indications that the Tribunal gave at the last hearing, that there should be a delay of 14 days for submission of the applicant's responses on the provisional findings from the date of judgment, but it is absolutely crucial that no further delay be caused to that date. The Commission need to be able to consider properly the applicant's responses on all aspects of provisional findings, which are not just these points which are being considered by you today, their responses go much further than that, and we need to be in a position to consider them properly, so I just put down that marker on timetable.

Unless there are any further questions, sir? Unless I can assist you any further?

THE CHAIRMAN: No, thank you very much, Miss Smith. Mr. Flynn.

MR. FLYNN: Sir, if I may make just a few points in reply, and I will not try to be long about this. Could I make a preliminary point that BMI does not accept that all relevant information has been disclosed. That is a 'not for today' point, all we are on is the issue of restrictions on access to the data in the disclosure room, that is for today. We do not accept in every other respect that all relevant info has been disclosed one way or another. If I can just put that marker down.

Secondly, Miss Smith made a bit of play with the fact that our application and our skeleton included an irrationality ground. We stand by that, we do ask: what on earth was the point of the procedure that the Commission put in place, and which is challenged in our notice of application? To echo a comment you made before lunch, sir, one struggles to see what the idea was of a short period, three advisers allowed to take out 20 pages of notes containing information that the client already knew. In any event, our application clearly extends to the duty to consult and fairness, irrationality and unfairness frankly merge in these proceedings, so I do not think there is anything in that essentially pleading point.

The third point I would like to make is that this was not a two stage process, that is a revisionist view of what has actually happened. If one looks at the undertakings, and the disclosure room rules, a procedure was set up. A procedure was set up under which the limited number of advisers into the data room would not be allowed to have anything other than own client data in their notes. The suggestion that it was always meant to be a two-stage process we say is belied by the differing actions of the three appellants, the approaches that they took.

Paragraph 11 in those disclosure room rules, which you spent a bit of time on with Miss Smith, could logically have been about whether a particular redaction proposed by the

Commission related, or did not relate, to own client data. It could be to make sure the redactions proposed were consistent.

We have made this point already, but I must make it again, these notes are not reports. They are notes made by the people who were able to go into the data room in the time available. In particular the BMI inspectors who signed their undertakings under protest, as you are well aware, decided that they would challenge the procedure that the Commission had laid down, but had it been intended to be a two stage process you would have seen something different in the undertakings or the rules, there would have been some system for identifying other relevant material and allowing it to be vetted. It was not there, and the undertaking did not allow for that either, so the inspectors decided to simply note down what they thought was relevant, put that in their report and then leave it to the Commission to redact it.

THE CHAIRMAN: After flagging that they were effectively in breach of undertaking B.

MR. FLYNN: In writing it down, but they did not take it out of the room.

THE CHAIRMAN: No, I can quite see that no loss occurred, but if you read undertaking B it is very clear that you make copies of data which really means only own-client date.

MR. FLYNN: As you pointed out, sir, they were probably at risk of being thrown out of the room if the undertakings had been applied to the letter by the Commission. But having taken the view that this was an unfair and pointless process, the report was written on that basis. I lapsed into calling it "reports", at other stages the word "report" was intensified to be submissions. In my submission on that it is simply a category error for the Commission to be standing in front of you saying: "Look at the reports, they are adequate, they are able to make the points they need to be able to make". That is just simply the wrong approach. It is an unacceptable approach; it is contrary to the rules of natural justice, contrary to the principle exemplified in the *Solvay* case, which I took you to this morning. Paragraph 27 of our skeleton sets out some matters. You were taken to that, Miss Smith got about half-way through it, I think. It sets out some matters which our inspectors consider that, even in the further unredacted version, there are difficulties in making points that they would wish to make, that is the advisers who have been able to be put in that position. It is for us, it is not for the Commission. It is for us to decide which are the relevant points, it is not for Miss Smith and the Commission to tell the Tribunal that we have had an adequate opportunity. For all the reasons you gave in questioning – the inspectors could have got it wrong, they could have made transcription errors, they could have confused something, the conclusions that they made may not go far enough, they may suggest a line of inquiry that someone else

sparked off in what Mr. Allan called ‘an iterative process’; this is just not an appropriate way of carrying on.

Then in relation to the adviser disqualification, first, I contest the assertion that this is new. We say that it was in play in our application because the vice that we identified was a process under which the inspectors, those who were allowed in the data room, were not allowed to discuss the data with other advisers of BMI. Now, I will accept that it has received much more prominence in our skeleton, and we put in evidence with our skeleton last Friday. I will accept for the purposes of argument that it could have been put in with the application, but at the time of the application we were facing a situation in which only own client data could be recorded in the notes, and that had been confirmed by the Commission in the email which Mr. Witcomb refers to in para. 68 of his witness statement. That was the point at which, and this is also in our skeleton, that we filed the notice of application. Of course, the Commission can always change its mind, it can always issue a further decision, it can offer access on other or different undertakings, but that was the position at the time.

I took you to the correspondence to show that the adviser disqualification and the particular problems it causes in the case of Messrs. Bright and Webber had been flagged to the Commission from early June, so this has hardly taken them by surprise. In our submission it is a point of principle. It is a point of principle whether the best qualified advisers by experience and familiarity with the clients are able effectively to respond to the provisional findings on behalf of their client.

As I have said, in these proceedings we are not suggesting that any of this data needs to be seen by the client, but at the very least, as was clear from the correspondence all along, BMI’s position was that it should be available to their advisers.

In terms of the restriction I was a bit rushed for time this morning, and that is not a criticism, but I did at least draw the Tribunal’s attention to Mr. Bright’s witness statement, and for your note it is particularly paras 21 to 28 of that, summarised in para. 34 of our skeleton, as to what we say is wrong with the adviser disqualification. It is extremely long, three years – if one thinks of the law on restrictive covenants three years is a pretty lengthy period. I think we have just had a suggestion from my learned friend that BMI should be put to a sort of ‘Sophie’s Choice’ as to which of its advisers it will effectively disqualify from advising it once this process is over.

There is evidence to say from our point of view, and this will simply be a matter which I think the Tribunal is going to have to assess and it is in its discretion, there is evidence from

us as to why the requested evidence – the material that is not at present available to those who will not sign up to the adviser disqualification – why that material is not particularly helpful in expected negotiations, why it is old and so forth. It is relevant, and I think it is a point that Mr. Allan made, but it is also a point we make in our skeleton and in the evidence as well, that the whole landscape is going to change and has already changed by virtue of this investigation, as much material that is already out there in the publicly available versions of the Commission's provisional findings and remedies document that is already affecting the commercial picture, and that is an important relevant factor for the Tribunal to take into account.

This is my last point. The question for this Tribunal is whether this procedure, as devised, is a fair one? That is the question. It is plainly to be read into the statute. We quoted the *Lloyd v McMahon* case in our application and it was referred to in the useful summary of principles by Mr. Justice Charles, the procedure has to be fair. If the procedure is, in the Tribunal's judgment, not a fair one the consequence is that either a fair procedure will have to be devised, or the Commission will not be able to rely on the evidence, it is one or the other, and that is what happens in these closed material cases as well. If people take objection to the type of evidence that the accused cannot hear then the prosecution cannot carry on. That is what happens in wire-tap cases and that sort of thing.

If a procedure is to be devised, a fair procedure, that is going to have to consider who can see the data, when they can see it and in what conditions, and the Tribunal has thrown out some possible examples of extended access to allow the formulation of submissions – real submissions – real responses to the provisional findings in circumstances in which leakage of the data is minimised if the data is to be regarded as so sensitive. Ultimately, members of the Tribunal, the practicalities and the timetable issues simply cannot override the fairness issue. The procedure has to be a fair one, and ultimately a fair procedure will lead to a better decision at the end of the day and that is what everyone in this room probably wants to see.

Unless I can help further, I think that was probably all I wanted to say.

THE CHAIRMAN: Thank you very much. Mr. Beard?

MR. BEARD: I will try and whirl through a miscellany of points. First, on the balancing test, Miss Smith on occasions talked about the balancing of confidentiality and fairness or due process. Just to be clear we say "no", you have to ascertain what is required for the purposes of fairness. If confidential information is necessary to be disclosed in the interests of fairness, and it either is disclosed or you do not rely on it, if it does have to be disclosed

there may be questions about how far, to whom, in order to afford effective opportunity to comment, but fairness is not a strong right, as she put it, it is a fundamental right and it must not be underplayed in these proceedings.

Miss Smith talked about the reports a great deal. Whilst we signed up to the undertakings so that counsel could see the reports, obviously those behind us have not seen the details of the reports, and the extent to which we can make comment on the materials in the report are issues that we struggle with. So for Miss Smith to go into those reports and rely on them as comprehensive as putting all our arguments, ironically does not get us anywhere further forward. The rhetorical question is that when she suggests the report shows that that is all we wanted to say –how on earth does she know, because we do not?

She says that the CC will understand any points that are going to be made in the report – yes, but that is irrelevant and, of course, it is true because they have read them already, but that is just an oddity of the process that is gone through, that is not the ordinary way in which reports are submitted. But the answer overall is "No", the reports do not set out all the points that we would want to make, and that is even before we get into issues about what else should go in, because that is for another day.

Just to pick up the point that Mr. Flynn made, it is not right to say that all relevant material has been disclosed. As I made clear, what those in the disclosure room saw were what the scissors replace. What those in the disclosure room did not see was the data that went to create those figures that are replaced with scissors.

The truth is on the material available we are not in a position to decide what lines should be taken because, of course, those are lines and strategies to be devised by others with more experience. Miss Smith says: "There is no evidence of self-censorship. That is not what went on, actually, everyone knew it was a two stage process". We have set out in our skeleton argument how we approached the reports, or those entering the disclosure room approached the reports – paras. 62 to 65. The only concern the CC has is that we have not provided a witness statement in support of that; we are very happy to do so.

As to the timing and access in relation to such material, as is made clear we could not test even the material available because we could not take it out, we could not vigorously test it. In fact, there was this self-censorship because the data and rules just did not involve a two stage procedure. Here, I just will, very briefly, go to tab 19 of Mr. Witcomb's exhibits.

You have seen these rules, you have probably read rule 11. Miss Smith suggested that there was a 48 hour period in which there could be comments or criticism about redactions and that this was to be read as a two stage process whereby those in the disclosure room could

put in any material and then argue about whether or not it should be redacted or otherwise. It is just not right. That was about arguments about whether data was own client data, that is what the 48 hours was about. Just to make that particularly good, if we go on to tab 25, which was the email, not to Spire but to BMI advisers, that somewhat obscurely in para. 6 Miss Smith said it makes clear that actually there is a two stage process – this was point 6 on p.2 that says: "Whilst in practice this is the position. We have expressly referenced that representations can be made with regard to redactions to the report." If you just drift three paragraphs down:

> "We would like to clarify that the only data the advisers can take out of the disclosure room in their report, and which they can use afterwards for the permitted purpose is solely their own client data, and/or the data derived solely from their own client's data."

What in that suggests that there was a two stage process involving non-own client data? A point was made that we only used two people – well, the fact we are efficient does not take anyone any further – a lawyer and an economist.

MR. ALLAN: Could you just expand, or let us have your comments in relation to the second email from Miss Kent to Mr. Bright on 6th September, which is in the same tab, at the top of that email. I have only just skimmed it, but it talks about non-own client data, and representations. Just tell me how you read that email and whether it influences anything?

MR. BEARD: I do not think it can influence anything for me because it is all directed to BMI, I would have to look at a Spire one. I am only dealing with the submission ----

MR. ALLAN: You do not have this?

MR. BEARD: I would have to check. We may well have had something like this. It does undoubtedly refer to non-own client data. There was clearly a discussion going on. The point I was making was a much narrower one that in relation to rule 11 it was not a two stage process. The paragraphs that Miss Smith was referring to do not make it clear that it is a two stage process, in fact, further down the email it is not. There is an argument going on, I entirely accept that.

I am sorry, I am not sure I can be a great deal of assistance, I can ask those behind me. Apparently we do not have a mirror email, we would have to go back and check exactly what has been sent. I am not going to say that there are no emails that refer to non-own client data for Spire, but that may well be right.

Two people – I do not see what the point is. That was appropriate, they were not going in to make final submissions, they were going in to make notes. That takes us just, if we may,

briefly to the report. As Mr. Flynn has said, they are referred to as reports, they were the gathering of notes, plainly they were gathering of material that would be used in the exercise of response, the advocacy that would be undertaken by Spire, by the other parties. But more input was needed in relation to the setting of strategies, more input was needed from senior people and that, of course, is why the adviser restriction that Mr. Flynn has already referred to is so pernicious, because effectively the more use you will be in setting strategy the more restrictive the impact of these arrangements, and the more the client is effectively penalised over time in relation to the use of someone that actually knows about what is going on.

Just to pick up the point that Mr. Flynn touched on just now in relation to the comments of Mr. Allan, there is an irony here about this issue to do with market-sensitive information in negotiations, because what is going to be most important are the trends and relative positions of people. Of course, that material is already open and unredacted. The very precise pricing information is actually going to go stale, that is perishable in a way that the general stuff is not seen as being in relation to negotiations. So even there there is an issue. But the point is that in relation to this adviser restriction it undermines the ability of the parties concerned effectively to respond and set their strategy.

Miss Smith referred to the first part of the report, I think the Tribunal has it, which is entitled: "Spire's Assessment of the CC's Analysis of Insured Prices" and made play of the fact that there is a note there. "We understand that our paper includes confidential information. Please remove all elements which the CC deems confidential. It is a criticism of conscientiousness here. The fact that that note is included does not suggest that actually the person undertaking this exercise, the economist undertaking this exercise would not have looked for other material because actually as you turn on through this report, and if I may I will just turn on three pages to a large table with a lot of scissors in it. This is a breakdown of the insured price index with summary price differences. As you will see, it says at the top "Rank Spire"and then "differences". I highlighted in opening, just as one of the examples I gave of the concerns that arise in relation to access to material, that those debates about where rankings arose and the differences between people at different times, and in relation to different insurers may be very, very important to Spire's submissions about the extent of market power it holds, and whether or not divestment should be permitted. So it is perfectly understandable that a conscientious economist says there is all this data there that you may think is important but she cannot do anything with it. She puts it in, it is redacted by the Competition Commission, but this is precisely the sort of

information that we say should be made available more fully to a range of people who are not subject to impossibly onerous conditions and can direct strategy and make comment upon it.

So when Miss Smith says that most of the information in this report has been unredacted, I will not do a scissors count but there is an awful lot of material – clearly relevant material – material pertaining to Spire that is not available to us and if we were in a different position and were not focusing only on client data then in those circumstances there may well have been more that the economists would have wanted to include.

If one goes on, there are typeface changes after several diagrams and appendix, and then there is a page which is p. 1, which says: "Evidence on National Bargaining" and that material is actually from the lawyer who went in, and there are fewer redactions there, clearly a greater degree of self-censorship applied in relation to that.

THE CHAIRMAN: It may not matter, Mr. Beard, but how was this document produced? It looks very word processed. You use the word processor in the data room is that how it works?

MR. BEARD: Laptop in the room apparently.

THE CHAIRMAN: So when we are reading the rules everyone has a laptop which has the data on it and they can use that?

MR. BEARD: Yes, I think that is right. It was not just manuscript notes, you were allowed a laptop to do your typing on.

THE CHAIRMAN: You were not allowed to bring a laptop in, it was a CC supplied laptop?

MR. BEARD: No, they were given one. To remove the possibility of being able to communicate and so on, it was a CC laptop you used for these purposes.

THE CHAIRMAN: On a file in the directory of the laptop's hard disk, yes, I see.

MR. BEARD: Yes, I am sorry, we were not disputing those sorts of matters.

THE CHAIRMAN: I just wanted to understand.

MR. BEARD: So it is understandable that that sort of material was being put in. Most of the relevant material has not been revealed, that would be putting it far too high, and you cannot tell what else the parties in the disclosure room would have identified as important. There was a degree of self-censorship going on.

Just to be clear, Miss Smith referred to the fact that I had made submissions about re-analysis of material, that applies both to the material that was available in the disclosure room and, potentially for another day, in relation to other material, but we do say we could do more with the re-analysis of that material if it was allowed out or we had much greater access to it and other people were able to comment on it for strategic purposes.

We have stressed, I think sufficiently in this context, the importance of our having our senior advisers at least in the first instance to see this material, and as I say other matters are for another day. We are confident that we will be able to deal with the Competition Commission case, but that does mean that these people must be able to see and test the disclosure room material. That is the minimum that fairness requires, to be able to do so without fundamentally being undermined in their ability to work with clients in the future. Whilst the Commission may be confident that everything that might be said has been said in those reports, there is a sort of resonance of that comment from Robert Megarry about anyone who has ever had anything to do with the law will know that the path of law is strewn with examples of open and shut cases which somehow were not of unanswerable charges which, in the event, were answered, and with inexplicable conduct which was in the end fully explained. We are confident that we will be able to explain these matters, but we do need to have proper access to the material. That is the only fair process.

Unless I can assist the Tribunal, those are my reply submissions.

THE CHAIRMAN: Thank you, Mr. Beard. Yes, Mr. Morris?

MR. MORRIS: I am grateful, sir. I, too, have a miscellany of points. I have six in number perhaps on the latest totting up. The first point is a short point on legal principles. We, like the other applicants, do say that ultimately fairness trumps. Miss Smith suggested that in our skeleton we accepted the proposition that it was a matter of balancing. Just for your reference, if you read the whole of para.29 of our skeleton, and in particular the second half of it, we make plain that ultimately if there are no possible other ameliorating measures then the inspecting parties' rights should prevail, and that in that instance the Commission should not be able to rely upon the material kept within the room. It is a point which was made by both the other applicants, but we do say that fairness trumps.

Secondly, I have notes here, the points have been covered by my learned friends, firstly, our redacted report is not a submission, we make that perfectly plain in our skeleton, and I am sure that you have that point well on board. These were notes taken down essentially by economist advisers. [Secondly], we also make the point that Mr. Beard just made, that there was a substantial degree of self-censorship. That is plain in part, at least from the terms of our report itself, and you will see that - perhaps this is worth you getting out our report, the second redacted report, because I am going to be wanting to refer to that in a moment in any event. This is the version with the green on it, just by way of example, and we have made the point before, but if you go to the tenth page, you will see that italicised paragraph after the three bullet points. There is a reference there to certain annexes. That was material that

is not included in this, and is an indication of, "We have not included it, we have kept it out, but we would want to see it", and one of those annexes is, we would submit, in any event version important. That goes to the self-censorship point. The point can be seen also on p.1. You have got the big block of bold italics and then you have got a bit of non-bold italics, and that is an indication of things that were not included. Those are short points that have been made by my learned friends but we, too, were in that position.

The next point which again was made by Mr. Beard, but we make in respect of our position, is that it is not a fair representation that what we would term the newly unredacted material represents most of the material. It may be that in terms of actual physical size of the excisions on the piece of paper it looks as though it is more, but the essential point is that the key material which is in relation to the insurer price analysis is not unredacted and remains redacted.

That takes me to the meat of the point really, the high water mark of the point made by Miss Smith, and for that purpose can I, first of all, take you to my skeleton at paras.31 and 33. In para.31 we identify the three purposes for which the advisers wish to see the material, to check and recollect, to support submissions by referring to specific material, specific figures, and very importantly to be able to carry out considered analysis of relevant material. Just to make it plain, and this is a point that arose in the course of submissions, it is our case that we would wish to do further work not on the underlying data which is not in the disclosure room, but on these particular redacted figures that are in the report and are in the disclosure room.

If you go over the page to para.33, we explain by way of an example how we say we need to do some work on table 8. Can I just highlight one sentence in that, it is about two-thirds of the way down, it is the line beginning "Average", and if you take that next sentence, it says:

> "This would be done by taking those PMIs …"

this is the PMIs with the lower number of basket of treatments -

> "… out of the analysis (on the basis of the sample size being too small to be robust) and then recalculating the weighted average difference between HCA and TLC."

That point is not made anywhere in the report, the redacted version of which you have seen. Can I just, to illustrate that, take you to p.4 of that redacted report? There is a table at the top and then there is a series of bullet points. Can I draw your attention to the fourth bullet point, which I think relates to the table I am talking about in the skeleton? I am obviously

not going to read that. It is clear that to some extent the point that is made in para.33 is made there, but the point that is not made in there and cannot be made is the further analysis that would need to be done to create, as we say in the skeleton, a recalculated weighted average. That cannot be done, and effectively, in our submission, merely referring to that one example demonstrates this proposition that everything we want to say or want to do about these tables is already included in the report.

A further point is this: once KPMG would have a sense of what the actual recalculated number would look like, they would then wish to do further analysis to test whether that number can really be seen as indicating that HCA is more expensive because of greater market power, or whether that difference can be explained by differences in other factors - for example, quality and co-morbidities, which reflect any difference in prices.

I can say that, in fact, KPMG are preparing a model to demonstrate how and the extent to which quality of care can influence prices. That model would then be used against the numbers in the Commission's tables to check the extent to which the price differences can be explained by quality, and whether, once quality is taken into account, it is safe for the CC to have reached the conclusion that it did reach.

That is the essential submission by way of example as to why what is in the redacted report is not sufficient and does not constitute a submission or the full case which HCA would wish to put to the Commission.

Before turning finally to the basket of treatments point, can I just come back on this general point and posit this: let us imagine that after the Commission reports, and let us assume that they reach the same conclusions, it is possible that HCA may wish to argue that the Competition Commission's conclusion that the price difference between HCA and any other competitor was substantial was an irrational conclusion. We ask rhetorically, how is HCA going to be able to put that case before this Tribunal on any application for substantive review of the decision? If matters lie as they do they would be as hampered before this court as they currently are before the Commission in making good their case. We submit that that demonstrates the essential unfairness of the approach which the Commission has taken, and that that is a useful and good touchstone to test whether this procedure has been fair.

Those are my general submissions, and I just finally deal with the basket of treatments point. Firstly, we say it is plainly sensible for the Tribunal to deal with this issue now. I can, if need be and in the time available I am not actually going to offer, show to you that

we say it is properly within the ambit of these proceedings. Putting it the other way, it would be ridiculous if we were to come back next week to deal with it.

This point was raised now 26 days ago, nearly four weeks ago. That is in annex 8 to HCA, our first bundle, and I would invite you just to look at that document. It is an email of 4th September. This is the HCA's initial application bundle, and it is at annex 8. I am not sure I put this earlier. If I did I apologise for repeating it. It is an email from Nabarro on 4th September. It is the email which I referred to about this is not really a meaningful process at all. On p.2 at the bottom you will see that there is a request to disclose certain information to HCA, line 2, which either pertains solely to HCA or represents information available in the public domain and is therefore not confidential in respect of HCA. Item 1 is the list of procedures against which HCA has been price benchmarked with The London Clinic. The fact that HCA or The London Clinic offers a given procedure is not confidential and is readily ascertainable, and I will come back to that in a moment. Furthermore, and importantly tables 7, 8 and 9 the CC will note does not disclose any revenue or admissions data relating to this basket for either of the two hospitals. Therefore, the disclosure of the components of this particular basket would not risk revealing commercially sensitive data regarding The London Clinic to HCA.

We say that this information is not confidential, we have been pressing for it, certainly for a considerable time, and we complain, or make the point in our skeleton that no exposition has ever been given as to why it is confidential. Now, after four weeks, and - I was going to say at the 11th hour - about 3 o'clock we are given the explanation that the reason this is confidential is that it reveals overlapping treatments of other operators to which we make two points. One, that information can be found out, is readily ascertainable, first by asking consultants and, secondly, and more significantly, that the list of treatments that private hospitals operate are available on their websites; the question is: what is in the basket? What each of them offers is not confidential and, in our submission, it is actually very important information because it enables HCA, the client, to give input to the advisers in consideration of the basket of treatments and how that impacts on the relevance of the relevant price indices. In our submission, no adequate case has been made for it being confidential, it is something which you can deal with here and now, and it is something which we say, for the reasons we gave earlier, is significant and will assist the advisers in putting forward HCA's case.

Unless I can help the Tribunal any further, those are my submissions in reply.

THE CHAIRMAN: Thank you very much, Mr. Morris. We will reserve our judgment and try to hand something down as quickly as possible. I cannot say exactly when that will be, but I take it the parties would not object if we gave short notice of when handing down was going to occur. We would normally give a half day.

MISS SMITH: Sir, we are very grateful for that indication that you will hand down. I think we sent a letter to the Tribunal on 26th September asking, given the agreement to the 14 days extension for the provisional findings, that the judgment be handed down if at all possible within 48 hours, by 2nd October. We are in your hands, but you understand the concerns.

THE CHAIRMAN: We do understand the concerns and rest assured the midnight oil will be burned. Thank you all very much.