IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15th December 2014

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Applicants

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

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

Interveners

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DIRECTIONS HEARING

APPEARANCES

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

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

Ms Emanuela Lecchi (Partner, Watson Farley Williams) appeared for the Federation of Independent Practitioner Organisations.

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

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

Mr Aidan Robertson QC (instructed by the Legal Department) appeared for the BMA.

Ms Anneli Howard (instructed by Hogan Lovells) appeared for AAGBI.

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

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THE CHAIRMAN: Ms Rose, thank you very much for the representations we received about the batting order today. We think the fair course, and division of time, is as follows: HCA will have two hours to open their points. I know that there is a point that Ms Bacon wants to raise in relation to AXA confidentiality; that will be dealt with at 2 o'clock. Our concern in relation to that is we do not have a clear idea what the battle lines are between you and anyone else, so if you could use the short adjournment, please to identify what the issue is that we will be deciding it would speed things up.

MS BACON: There are not actually any battle lines, it is more to discuss with the Tribunal how to manage it.

THE CHAIRMAN: That makes me even more worried! I like battle lines (Laughter). You need to compare notes rather than come back for a general chat, so you will have 15 minutes at 2 o'clock. The CMA will have the one hour 50 minutes, so that will take them from 12 until 1 o'clock and then after the imposition of Ms Bacon to about 3 o'clock, AXA then 25 minutes, TLC five minutes, that takes us to about 3.30 with HCA then to have 15 minutes in reply, and I think that actually allows everyone time for argument in something little over what would be a full court day. We will then retire with a view to producing a Ruling, if we can, later this afternoon. Yes, thank you, Ms Rose.

MS ROSE: Sir, there are four issues that arise today and they arise in two halves. The first two arise under the heading: what is the appropriate form of order that should be made by the Tribunal to resolve HCA's appeal, and the two issues under this head are, first, which decision should be quashed and, secondly, what directions, if any, should be given in relation to remittal, and in particular should this Tribunal order remittal to a fresh case team and inquiry group.

THE CHAIRMAN: Yes.

MS ROSE: I just want to flag in relation to the second issue that the CMA are seeking to rely on a third witness statement of Roger Witcomb ----

THE CHAIRMAN: Third and fourth I think they are seeking to rely on.

MS ROSE: Yes, we do not contest the admission of the fourth, which arises out of the Foreign & Commonwealth Office issue, which is a new point. As the Tribunal will have seen, we do contest the admission of the third witness statement, which is purporting to take issue with allegations that were pleaded in our amended notice of application and which the CMA did not plead to in its amended defence. You have seen our position on that.

THE CHAIRMAN: Yes.

MS ROSE: What I propose to do is to address the witness statement *de bene esse*.

THE CHAIRMAN: I think that that would be sensible. We have compared notes. We admit the third witness statement, we think that is the fair and . . .

MS ROSE: Yes, I ----

THE CHAIRMAN: It is to admit it, so your submissions will not be on a *de bene esse* basis, but on an admission basis, but thank you.

MS ROSE: So those are the first two issues. The second set of issues arises in relation to costs. The general question is what order should the CAT make about the costs of HCA's appeal. The two questions are, first, what proportion of its costs should HCA receive. There is no dispute that we should get some costs, the question is how much and in relation to what issues? The second question is the basis for assessment, whether the costs should be assessed on the standard basis or on an indemnity basis.

Central to both groups of issues is the question of the CMA's conduct, both in the course of the investigation and in the course of this appeal. What I would propose to do is to take the Tribunal through the history of this affair by reference to the chronology that we served on Friday, and I hope that you now have that behind tab C in vol. 10 – it has been updated this morning, I hope – p.263 behind tab C. I am hoping that you have an updated version of tab C.

THE CHAIRMAN: I have p.263, it is a chronology of relevant events, thank you.

MS ROSE: I am going to proceed with reference to this chronology and just take you to the key documents. So, the starting point is the working paper that was published by the CMA on 6th June 2013 on the empirical analysis and the methodology of price outcomes. That was the first iteration of the original insured pricing analysis. HCA responded to that on 20th June and, in our response, we made it clear that it was essential for the Competition Commission to consult on the methodology. Can I just show you that letter? That is at appeal bundle 4 or our application bundle, tab 20. If you go to p.1854 you can see at para. 2.4 we said:

> "Overall, HCA's concern is that the CC has failed to identify important features of the market in its methodology paper, or, where it has identified features of the market capable of distorting its insurer price analysis, the CC has not taken appropriate steps to strengthen its proposed methodology. These issues impact on the relevance and accuracy of each of the analyses conducted by the CC and any inferences that could be drawn from the results."

And then this:

"As an aside, in light of the complexity and potentially distortive impact of the above factors, it is imperative that the CC consults hospital operators about the precise workings of its methodology, the exact size and composition of all 'baskets of treatments' it adopts, the identity of comparator hospitals and any adjustments or data cleaning it performs."

So we made our position clear on that right at the outset of this process, as long ago as June 2013.

What then happened, as you can see from the chronology was that a data room was proposed on very restrictive terms, and there was a challenge to this Tribunal brought initially by BMI and subsequently joined by HCA, complaining that the terms on which access to the data room to look at the original IPA had been provided were too restrictive and therefore unfair.

On 2nd October 2013 this Tribunal upheld the challenge on the grounds of procedural unfairness, and the Judgment is in the authorities bundle – I hope you have an authorities bundle for today?

THE CHAIRMAN: Yes.

MS ROSE: It is at tab 10 and if you go to para. 61 on p.27 you can see that the Tribunal emphasised a number of points. Over the page at (3) the Tribunal accepted the applicant's submissions that:

". . . in order properly to respond to the Provisional Findings the underlying data relied on by the Commission would have to be understood, and detailed and quite possibly highly technical responses would have to be prepared by the parties. Just as we are not inclined to second-guess the Commission in its determination of how to handle the confidential information, neither are we inclined to dispute that the Applicants need to see this material in order to meet and prepare their response."

So, again, it is made very clear by this Tribunal at the outset of the process that it was essential for the hospital operators to see the data in order to be able to respond to the provisional findings.

Going on in this Judgment to para. 73, p.32, the Tribunal said:

"[t]he period of time in which the Advisers were allowed access to the Disclosure Room was unreasonably short. As a general rule of thumb, a data room ought to be open at reasonable business hours up until the end of the consultation period and ought to provide for multiple visits. The latter requirement is important not simply to enable the Advisers to correct or complete their notes but, more

fundamentally, because drafting a response to the Provisional Findings which incorporates an effective response to the matters arising from the Confidential Information is necessarily an iterative process…"

In my submission, the point that the Tribunal are making there is that the analysis is likely to evolve over the course of the consultation and that is why it is important for multiple visits to the data room to be permitted. This was made clear to the CMA, right at the outset in October 2013, before the events that we are concerned with, so the CMA had the benefit of that guidance from the CAT before matters started to go seriously wrong.

If you then go back to the chronology you can see that there was then a second procedural challenge lodged by BMI because even after that Judgment had been given by the CAT the CMA were still refusing to provide access to the data itself. Following the lodging of that challenge, the CMA conceded that point and the data room was then opened. You will see, in passing, on 25th October, that just before it opened the data room the CMA wrote to the parties following an audit saying it had identified some errors in its analysis. You will see that this is a pattern that is repeated later, that typically, immediately before inspection of its analysis the CMA apparently does some sort of internal audit and finds errors in it.

So then the new data room was opened and then on 11th November 2013 the consultation responses were received, and HCA in particular gave a response in which it seriously criticised the methodology of the original IPA.

What we now know is that after that criticism was received in November 2013 the CMA then began to revise the IPA and Mr Witcomb's second witness statement tells us that that process began in November 2013.

What then happened was in January 2014 two crucial events, and they both happened on 21st January. First, on that day the CMA's team presented its new methodology, the revised IPA, to the inquiry group. On the same day the CMA released and published its provisional decision on remedies. But the provisional decision on remedies did not take into account the revised analysis that had been presented on the same day to the inquiry group but was still based on the original analysis which was no longer being maintained internally by the CMA. We say that was a serious procedural flaw.

Mr Witcomb has given two accounts of this timing. The first was in his second witness statement at para. 66 where he indicated that a decision was taken to consult in relation to the original analysis and not the new analysis.

THE CHAIRMAN: Where do we have that?

MS ROSE: I have it in a separate bundle, which says "Second witness statement of Roger Mark Witcomb". I can probably just read you the relevant paragraph in order to save time. It is para.66 of that second witness statement. He says there:

> "The CC published its Provisional Decision on Remedies on 21 January … the review of the parties' comments to the IPA was a lengthy process. Given the statutory deadline for the Investigation was 3 April 2014, the CC could not have delayed publication of the PDR, while waiting for the conclusion of the review … Accordingly, both work streams had to run in parallel. Therefore, the Group decided not to reflect the revised IPA results in the PDR."

That is obviously an inadequate explanation, because even if it had to release the PDR on that date, there would have been nothing to prevent it from issuing a rider to its consultation saying, "We now have a revised IPA, we want you to be aware of it".

In his third witness statement Mr Witcomb seeks at paras.28 to 38 to clarify the evidence that he gave here. He says essentially that they did not take -----

THE CHAIRMAN: Sorry, this is?

MS ROSE: This is behind tab C in volume 10, p.167. I do not invite you to read paras.28 to 38 now, but when you do you will see that essentially he is saying, "We had originally intended to publish the PDR earlier but it had got slightly delayed". Then at para.38 he says:

> "It follows therefore that, contrary to the impression that Witcomb 2 gave to HCA, the Group did not positively decide on 21 January 2014 to publish the PDR notwithstanding the result of the revised IPA. The decision to publish the PDR had already been made. The last sentence of §66 of my second witness statement should have said that the Group considered that the PDR had to be published at that time even though it was aware that there was continuing work on the IPA, which the Group was due to consider at around the same time."

That, of course, does not address the central point, which is that if they knew at that time that they were on the verge of substantially revising the IPA they could have dealt with it by a rider to the consultation.

The PDR relied significantly on the analysis in the original IPA. You can see that the provisional decision on remedies is at bundle 8, tab 32. Would you go to appendix 2.5, p.4420. This is an appendix headed "Quantifying the price benefits of divestiture". The key question in relation to the provisional decision on remedies is, is it going to be effective and is it going to be proportionate? When considering proportionality there is a balance

between costs and benefits. This is the quantification of the benefits of the divestiture remedy. The quantification of the benefits depends critically on the original IPA. As you can see, if you go to para.4 they discuss the options for quantifying benefits, and (b) is using the results of our insured pricing analysis, and they explain the methodology. Then at para.6 they say:

> "In central London, we thought that it was appropriate to estimate the likely reduction in prices (and hence revenues) using both the PCA approach … and by applying the difference in insured price between HCA and its closest London competitor …"

The remainder of this appendix then goes on to apply that methodology. So the assessment of the benefits of the divestiture remedy was calculated in this document on the basis of the original IPA.

Mr Witcomb attempts in his third witness statement to explain why he says it was not unfair to conceal, or not to disclose the new IPA in this process. He does that starting at para.21 of his third witness statement (p.165 of tab C). You can see at para.21 that he acknowledges that the average difference in prices charged by HCA and TLC was relevant for the proportionality assessment. He puts it rather oddly. He says that only one of the results of the IPA was relevant. In my submission, if you read this witness statement as a whole what is striking about it is the extreme defensiveness of Mr Witcomb's tone. In my submission, this is a work of advocacy in which he consistently seeks to downplay the unfairness of the procedure, and you can see it operating in this paragraph where what ought to be a simple acknowledgement that the original IPA was relevant to the assessment of proportionality is sought to be minimised.

Then at para.22 onwards he seeks to explain why he says it was not unfair to deprive us of access to this. If you go to para.22, and I will not read it out because it has got some confidential figures in it, you can see that what he is arguing is that the effect of the revised IPA methodology was to make the price benefit of the divestment remedy higher, and hence the justification for the remedy clearer. That is what he says at the end of the paragraph. He says that, on that basis, it did not make any difference to the decision we were intending to take, it just reinforced the reasoning from the original IPA so we did not need to disclose it. In my submission, that fundamentally misses the point, because what has actually happened here is that the CMA had an original pricing analysis which has been significantly criticised and, as a result, they decided they cannot to rely on it. They have produced a new analysis which seems to make the case for proportionality stronger, and they do not give us

an opportunity to respond to that analysis. Of course, had they done so, we would have been able to show them that they did not make the case for proportionality stronger, because actually the analysis contained some basic flaws. That, in my submission, shows precisely where the prejudice was to us, and what is troubling about it is that Mr Witcomb even now, even after the procedural unfairness ground has been conceded, does not appear to understand the point. He says, "We did not need to disclose it to you because it made our case stronger". Of course, that is exactly the reason they did need to disclose it to us.

He then says that there was no prejudice to us (para.25) because they say that in our response we did not dwell on the issue of the IPA. Of course, we had already made detailed submissions criticising the original IPA in our response to the provisional findings. We had no reason to believe that a new IPA was being used. Had we known there was a new IPA we would certainly have responded on it. Again we say that the suggestion made by Mr Witcomb here that there was no prejudice is also false.

It is also, with respect, a very strange position for Mr Witcomb to be adopting now, because he is making these submissions saying it was not unfair and there was not any prejudice in a situation in which the CMA has conceded before this Tribunal that the procedure they adopted was indeed unfair. So there was actually an inconsistency between what he says here in his evidence and the CMA's position. That, of course, is going to be relevant later when we come to consider the question of remittal.

What then happens, this consultation on the provisional decision on remedies is taking place, and if you go back to the chronology you will see that the next event is 30th January 2014.

THE CHAIRMAN: Sorry, what is the date of this witness statement, number 3?

MS ROSE: Witcomb 3 was produced last week, Sir, on the 9th. Back to the chronology, and 30th January 2014 is the next date. On that date the CMA informed Nuffield, one of the other hospital operators, of the changes made to the IPA and how Nuffield's position might be affected and invited it to see the revised IPA. We have given you the reference to that document and we have quoted in particular the point that the CMA reassured Nuffield that [redacted]. That is relevant because what the CMA have said in these proceedings, and what Mr Witcomb says, is that it was not discriminatory or unfair to tell Nuffield about the revised IPA but not you, because Nuffield's position changed as a result of the IPA because they now appear to be an AEC in relation to Nuffield. That was explained at Witcomb 2, paras.79 and 80.

The key point about that is that actually Nuffield's position had not changed because the CMA was still saying, [redacted], whereas in relation to HCA the CMA was saying there should be a divestment remedy and we think that the case for the proportionality of that remedy has been strengthened by the revised IPA, but they were not telling us that.

THE CHAIRMAN: That was Witcomb 2, paragraph?

MS ROSE: Paragraphs 79 and 80, Sir.

The next event is 6th February 2014, and on that date the CMA told all of the other hospital operators, but not us, that there was a revised IPA and that Nuffield was being given access to the data and to look at it. Again, we do not need to look at the letters, you have got the references and they are all in the annexes to the reply. So they were given that information but we were not.

What information we were given you can see if you turn up the application bundle 8, tab 35, p.4471.

THE CHAIRMAN: Just while we are looking that up, does Mr Witcomb explain the reasons for that approach?

MS ROSE: Yes, he does. I am going to deal with that when I have looked at this point.

You can see that we sent an email on 11th February 2014 saying:

> "We note that the CC has refused HCA's request that its advisers be allowed to access the disclosure room in order to prepare its response to the PDR."

THE CHAIRMAN: This is not on your chronology?

MS ROSE: Yes, it is, Sir, it is the top of p.3.

THE CHAIRMAN: I thought you said this was 11th February?

MS ROSE: Yes, but it is the same page. You can see from that that we had requested access to the data room in order to respond to the PDR and had been refused access. That, we say, is, in itself, pretty surprising given by what was said by the CAT in the paragraph that we looked at in the BMI case. Then we say:

> "Please confirm as soon as possible that no other party is being granted access to the disclosure room or to any of the data in the disclosure room."

So we actually asked for reassurance that we were being equally treated.

The response that we got from Thomas Wood of the Competition Commission was:

> "… I can confirm that no party has been given access to a disclosure room in order to prepare a response to the PDR.

> Advisers to Nuffield Health Trust have been given access to a disclosure room to review our insured prices analysis and the extracts from the national bargaining analysis which are relevant to Nuffield. You will recall that Nuffield's advisers did not have access to the Data Room when the advisers to HCA and others reviewed this information."

Please note those words "reviewed this information", this information referring to the insured pricing analysis and the national bargaining analysis.

> "For the avoidance of doubt, the material disclosed to Nuffield does not contain information confidential to HCA."

We say that this email is seriously misleading. Not only is it the position that all of our competitors have been told that there is a revised IPA and that Nuffield has been given access to it, but we, when we specifically enquire, are not told that there is a revised IPA. On the contrary, we are sent an email which gives us the very clear understanding that Nuffield is now looking at the same information, and the reason they are being given access to it is that they did not look at it before, they did not have access to it before.

We know that was not the right reason, because the reason that Mr Witcomb explains as to why Nuffield was given access to it is that Nuffield's position had changed because of the revisions that had been made to the IPA.

So the reason we are given is false and we are wrongly told that Nuffield is given access to the same information.

Mr Witcomb in his third witness statement has denied that there was an intention to mislead us. Let me just show you that paragraph. That is para.51, p.172, behind tab C. He says, "The CC stated", and then he sets out the relevant paragraph:

> "The wording of this information did not refer to any particular version of the IPA but to the IPA generally, to which Nuffield had not had access through the data room process."

We say that is ----

THE CHAIRMAN: Just give me a moment to read that. (After a pause) Yes.

MS ROSE: We say that that is not really a legitimate reading of the email because the purpose of this email is to reassure HCA that it is not being less favourably treated because Nuffield is not seeing anything it has not seen, it is simply seeing now the same information that HCA had had the opportunity to see at an earlier stage. That was the whole point of what the CC were saying in that email.

THE CHAIRMAN: Who is Tom Wood?

MS ROSE: That is the next point, Sir. If we go back to para.51 for a minute, what is then said by Mr Witcomb is:

> "If it is suggested that the CMA used the language 'this information' so as to deliberately obscure the changes … then I can confirm that this was certainly not our intention."

We say that is not appropriate, with respect, because this email did not come from Mr Witcomb, it came from another member of the team, Mr Wood, and Mr Witcomb does not say in his witness statement that he has taken instructions from or spoken to Mr Wood, and we have no idea whether Mr Witcomb had any involvement with this email at all. So we say, with respect, that is not an adequate response.

THE CHAIRMAN: You are going to address us presumably as to the test we should be applying, if it is a real possibility ----

MS ROSE: Indeed, then it does not matter.

THE CHAIRMAN: You say it does not matter, but is the most relevant person not the head of the team, who I understand Mr Witcomb to be, rather than Tom Wood - I do not understand where he fits into things - whose display of prejudice, or absence thereof, is the relevant thing that we should be looking at.

MS ROSE: Sir, in my submission, when we come to it, the question of appearance of bias is only one of the issues. There is a general question about confidence and competence. The whole of the team is critical, because what we are going to submit to you is that in the whole of this process a whole catalogue of serious errors has been made, both substantive and procedural, which have not been picked up. So whether it is a failure of supervision or a deliberate attempt to mislead or obscure does not make a lot of difference either way. It is a matter that seriously undermines confidence in the process.

THE CHAIRMAN: I think I understand, at least for present purposes, sufficiently the point that you are making. Just on para.51, do you accept that Mr Witcomb at least did not intend deliberately to mislead?

MS ROSE: Sir, we do not know if Mr Witcomb knew anything about this email.

THE CHAIRMAN: Whether he did or he did not, in para.51 he has made it clear that certainly so far as he was concerned there was not a deliberate attempt to mislead. My question is: do you accept that or do you say that in some way we go behind that?

MS ROSE: Sir, we are in a real dilemma because we received Mr Witcomb's witness statement at the end of last week. We have had no opportunity to ask for disclosure of documents that

underlie that statement, for example. He is making a statement there which is unsourced, unsupported by disclosure, and we have had no opportunity to cross-examine him.

THE CHAIRMAN: He was head of the team.

MS ROSE: He was indeed.

THE CHAIRMAN: And he was speaking for the team. The question is, do you accept that there was no intention to mislead?

MS ROSE: Sir, I am not in a position to accept that, because we have not seen evidence that would substantiate that.

THE CHAIRMAN: We are here dealing with these matters today on the evidence that we have before us. At the moment I am struggling to see how we can do other than take Mr Witcomb's evidence at face value at least in relation to his understanding and his understanding of the team's approach.

MS ROSE: Sir, that is precisely one of the reasons why we were objecting to its admission.

THE CHAIRMAN: First of all, are you saying that we cannot do that? You say you object to its admission. The reason that we admitted it is that it seems to us obviously fair to the CMA that they should have an opportunity of addressing the serious allegations you made against them. That is why we admitted it. On the basis that it is admitted, how do you say that we should react to this?

MS ROSE: Sir, one of our objections to its admission is that we were prejudiced by its lateness because we have had no opportunity to make requests for the disclosure of underlying material. For example, we do not know whether there are any internal communications within the Competition Commission that relate to the sending of this email, or how it came to be sent.

THE CHAIRMAN: At the moment I do not see how underlying documents will go to the statements that Mr Witcomb makes about his intention at the time.

MS ROSE: Because we do not know if there was any communication between Mr Wood and Mr Witcomb.

THE CHAIRMAN: What, saying, "Please lie now"? Seriously, is that what you are suggesting, that we should speculate that there is?

MS ROSE: What I am suggesting is this: there has been a history of serious procedural problems in this case already. There had already been one successful challenge to the CAT on the grounds of procedural unfairness, and then a second challenge issued which was then conceded. There had clearly been a policy decision taken by the Competition Commission that they were not going to tell us that they revised the IPA. The wording of this email, in

my submission, furthers that policy intention because it makes sure that we do not know that the IPA has been revised, and therefore makes it impossible for us to mount another challenge.

One can see why, in a situation where they are right up against the statutory time limit, there would be an incentive for members of the CC to avoid trouble. In a situation where they were making what they knew was going to be a hotly contested divestment decision, the last thing that they wanted was another procedural challenge before they made their decision. One can see in that situation why there would be a temptation not to stir it up.

We do not know exactly what happened internally because we have not seen the material and Mr Witcomb does not tell us. The email speaks for itself, and on its face it is misleading.

THE CHAIRMAN: Yes, thank you.

MS ROSE: You asked me for the reference to the reasons why the other parties were given information. What Mr Witcomb says is that they needed to know because it was giving them the context of the use of their confidential information. That is his second witness statement. You can see it at para. 49 of Witcomb 3. He is referring back to Witcomb 2 where he dealt with it at para. 84. He said that the group considered that only those parties whose confidential data was to be disclosed to Nuffield should be notified in writing. The reason for informing them that the IPA had been revised was to provide context for the disclosure of their confidential information to a third party.

That does not immediately make a lot of sense because there is no connection between the revision of the IPA and the disclosure of their confidential data to Nuffield. Equally, if they were going to be giving context, when they were telling us that Nuffield had been allowed back into the data room it would have been equally relevant, in fact, more relevant to tell us that the reason ----

MS SMITH: There is no Nuffield going back into the data room, Nuffield never went into the data room.

MS ROSE: Sorry. If they were going to say that Nuffield was being allowed into the data room and the reason for that, in fact, was because Nuffield's position had been affected by the changes in the IPA, that would have been the obvious context to give us. There was no explanation of why that context was provided to the other parties, but it was not provided to us.

THE CHAIRMAN: Is not para. 49 explaining why?

MS ROSE: Yes, but that explanation applies with equal force to us, because we asked: "Has anybody been allowed into the data room?" and we were told "Nuffield has been allowed in but only because they did not see this information when you saw it", but that was not the reason.

So what then happens is the oral hearing on 18th February and at that hearing we were invited to make general submissions. You can see the invitation in the annex to Witcomb 3. It is behind Witcomb 3, and it is p.211, second paragraph:

> "The aim of the hearing is to provide HCA an additional opportunity to supplement any of its written submissions – whether on the provisional findings or the provisional decision on remedies – with oral submissions and to raise any new issues with the members it thinks necessary".

So this was a general hearing dealing both with the provisional findings and the provisional decision on remedies.

We attended with KPMG who, of course, we had instructed to attend, they had spent time preparing, and detailed submissions were made at that hearing by KPMG in relation to the original IPA which, of course, we still understood to be the basis of the proposed decisions. Nothing was said by the Competition Commission at that hearing about the fact that they were no longer relying on that material.

You can see the transcript of that hearing is in a volume headed "Reply of HCA" and tab 1 is our reply to the CMA's defence. There were some annexes with it including the transcript of the oral hearing on 18th February, which is at annex 1. If you go to p.40 you can see that we start to deal with pricing. Mr Biddlestone is there on behalf of HCA and he says: "Shall we move on to pricing", and Mr Witcomb says: "Yes, please do." Over the next 10 pages detailed submissions are made on pricing, and you can see if you go to p.41 that Mr Mazzarotto is there from KPMG to make those submissions, and you can see, for example, if you go to p.45 that questions are asked by Mr Witcomb of Mr Mazzarotto. He asks a question on p.45:

> "So your position there is the bias arises because HCA gets a disproportionate number of complex cases?"

Then at the bottom of p.46 Mr Witcomb talks about prices to insurers: "Is it on a line by line basis . . . or is it a much more aggregate level?" So he asks question of Mr Mazzarotto in relation to Mr Mazzarotto's analysis of the insured pricing analysis. But, throughout the whole of this process Mr Mazzarotto does not understand that he is addressing an analysis which is no longer being relied on by the CMA because they have rejected it in favour of a

new analysis which he has not seen. Nobody from the CMA tells anybody from HCA that that is the case. So throughout the whole of this oral hearing HCA is making shots at the wrong target and, of course, has spent time and money doing so.

The response of Mr Witcomb to our complaint that effectively we are deprived of the opportunity of making an intelligent response to the consultation in this hearing because we are directing our fire at the wrong analysis, is in his third witness statement, para. 47:

> "The purpose of the hearing was therefore to give HCA . . . a further opportunity to expand on their representations. The CC had however clearly understood HCA's views as regards the PFs, including HCA's main comments on the IPA, which were repeated at the hearing.
>
> 48. It is in the nature of the market investigation process that the CC may receive further comments from parties at a time where it has already developed its thinking. The fact that HCA was given a further opportunity to make its case orally even though the CC had in fact already considered and addressed the points it made does not mean that the consultation was a sham. The position is rather that, because HCA's previous representations had been clear, its oral representations did not materially add to the points it had made in writing."

They say they did not want to shut them out. They said that:

> "As explained in Witcomb 2, the Group had . . . already reached the view that re-consulting HCA on the IPA was not required, because the position of HCA… had not materially changed as a result of revised IPA results. The fact that we had a hearing . . . at which HCA was given the opportunity to address the Group did not change that assessment, although the position has now changed as a result of developments in this litigation."

We say that that simply does not answer the point because to say that we already understood your criticisms of the original IPA does not meet the point that it is completely pointless when they are no longer relying on the original IPA to hear us making submissions on that analysis. What we needed to make submissions on was the revised IPA that they were actually proposing to use. Of course, they did not know our response to that document because they had never given us an opportunity to develop it.

We say that these paragraphs again, with respect to Mr Witcomb, reveal that he still does not understand the defects in their own process; he does not understand what was wrong with this procedure.

There is then the oddity at the end of the paragraph where he says: "the position has now changed as a result of developments in this litigation."

That reflects what we submit is a misconception on the part of the CMA about what has actually happened in the course of this appeal. What has actually happened is that when the IPA was finally disclosed to us and we looked at it, it became clear that it was flawed, and it could not withstand scrutiny. But, that does not make the procedure any more or less fair. What that course of events goes to is our case on grounds 2 and 5. It means that the original decision could no longer be rationally sustained, because the analysis both as regards the insured AEC and as regards divestment was based on data and a methodology which is flawed.

THE CHAIRMAN: Yes, and Mr Witcomb's evidence appears to indicate that at the time he and the CMA thought that the procedure was fair.

MS ROSE: Yes.

THE CHAIRMAN: They are now accepting that it was not.

MS ROSE: Yes, but my submission is that they have not really understood what the problem was, because he is still maintaining that that was a reasonable position. What he is saying is that we think it is unfair now because when you did see the IPA it became clear there were flaws in it. But, the fact that when we did see the IPA there were flaws in it does not make the procedure any more or less fair, that has no bearing on it. The reason the procedure was unfair was because it was unfair for the CMA not to tell us that an essential underpinning of their proposed decision had changed, and that would have been so had there been flaws in it or not.

THE CHAIRMAN: Yes, but in para. 48 is Mr Witcomb not giving an account of the CMA's thinking processes at the time, and we know that they did not think it was unfair because until later developments they did not concede the point and he is explaining why at that time maybe mistakenly, but that is what they thought at the time.

MS ROSE: I am sure that is right, but it does not detract from the point I make which is that this process was, in fact, a sham, because the fact is that they were sitting there, listening to us, making submissions on an analysis that they were not proposing to adopt and not telling us. They may have thought that that was an okay way to behave. We say it obviously was not, but more profoundly there is nothing that suggests that they now really appreciate that it was not. The only reason they now think it was not is not because they understand that that was wrong in principle, but simply because it turned out that there were actually errors in it, which is the wrong reason.

If you go to para. 5 of Witcomb 3, he is responding here to our letter in which we were proposing remittal to a different inquiry group and he says: "I note HCA's letter suggests the CMA does not deny the allegations summarised in paragraph 16" and, indeed, they have not denied them. He says: "That is incorrect, for reasons I have set out previously and for the further reasons I set out below." So they are actually seeking now to put in dispute ----

THE CHAIRMAN: So where do we have that letter just so we can follow what you are saying now.

MS ROSE: Yes, our letter of 4th December is behind tab C, p.131. The second bullet is relevant to what we are looking at now. It is part of that process. Page 134, para. 16, the second bullet.

> "As part of that process the CMA heard HCA's submissions on the old analysis without informing HCA that the analysis had been abandoned, and thereby conducted a sham consultation which seriously misled HCA and its advisers".

Whether it was their intention to do so or not does not matter, that was the effect. He seeks to say that he is denying that allegation, it is not at all clear how he can, because he does not deny that by the date of this hearing they were not any longer seeking to support the old IPA but were actually intending to base the decision on the new IPA, and he does not deny that we were invited to make submissions on all aspects, including the IPA. We turned up with our economic advisers and did precisely that, they asked us questions about those submissions and did not tell us that actually we were hitting the wrong target. That is the nature of our complaint, that they allowed us to go down that road.

THE CHAIRMAN: What you call the "old IPA" and the "new IPA", on my understanding the new IPA was not, if you like, a total abandonment of everything in the old IPA, it was a modification of certain parts of the old IPA?

MS ROSE: It was a very significant change ----

THE CHAIRMAN: Yes, I appreciate you say "very significant" ----

MS ROSE: -- because whereas before there were simply comparisons between episodes and one of our main criticisms was that that was not comparing like with like, you had no way of knowing whether the episodes were comparable. They had now sought to undertake this regression analysis where they used the criteria of age of patient, length of stay and so on, in order to try to standardise it. That was a crucial change and that is, of course, where all the errors crept in.

THE CHAIRMAN: I follow you say that, but what I was questioning was the strength of the dichotomy which you are seeking to draw between the old IPA and the new IPA, which

appears to me to go to your submissions about the sham nature of the oral hearing on 18th February, because if there were aspects of what you call the "old IPA" which were still relevant to the provisional determination that the CMA was making, it might be said on the other side that the CMA wanted to hear HCA's submissions and representations in relation to those parts of the old IPA which, in their minds might still be relevant to the decision they had to make and therefore, the oral hearing is not a sham – it might be said.

MS ROSE: The only difficulty with that is that one of our main criticisms that we were developing at that hearing was precisely that point about the lack of proper comparability between the TLC episodes and the HCA episodes. That was precisely the point we were developing, and which they did not respond to.

THE CHAIRMAN: Yes. Thank you.

MS ROSE: The next development, if we come back to the chronology, is 2nd April when the final report is published in a redacted form. The redacted form, for the first time, gives us an understanding that there have been significant changes to the IPA. The first thing that we did in response to that, before we issued this challenge, is that we asked for disclosure of the revised IPA and that is in bundle 10 tab C, p.1. You can see from the first paragraph that we are asking for disclosure, and then we say that the final report is based on a number of significant changes to its methodology, and these cover all aspects of the analysis. This goes to the point you were just putting to me, Sir. We here summarise the ways in which the revised IPA is very significantly different and we asked for disclosure.

That request is refused, if you go to p.5, on 24th April, and they say that if we lodge an application for review then questions of disclosure will arise and can be considered further at that time.

So, by doing that they compel us to issue our application and these proceedings without access to the IPA, which means that when we incur the cost ----

MS SMITH: Sir, without access to the IPA is a gross misrepresentation. Ms Rose's clients had access to the IPA in October, disclosure ran for a number of weeks. What she is saying is that they did not have access to the amendments that were made, to the further iteration of the IPA. It is very misleading the way it is put in the chronology.

MS ROSE: Sir, it is not misleading. I am talking about the new IPA. We were forced to issue these proceedings without any access to the new IPA, which meant that we incurred the costs of putting forward evidence, and a pleading without knowing the details of the target we were hitting. We were forced to try to infer what was in the new IPA from the redacted report.

We served our application in these proceedings on 30th May. What then happened, less than three weeks after that we wrote to the CMA attempting to resolve this application, and you can see if you go to p.7 behind the same tab, this is our letter of 18th June. We make two proposals in this letter. First, we make two proposals in this letter, the first is that we suggest a preliminary hearing just to deal with the issue of procedural unfairness, and the second, if we go to p.2, we say:

> "We also invite you to consider whether, on reflection, the CMA agrees that its procedure was defective and would accordingly be prepared to consent to the quashing and its reconsideration after a proper consultation in relation to the IPA. It goes without saying that such a course will result in significant savings in time and cost for all involved."

So we suggest that as a solution to this case right at the outset before any significant costs have been incurred by anybody except us. The reply we get two days later is at p.11. They resist the preliminary issue. Interestingly, Sir, you will note at the top of p.2 that one of the reasons they resist a preliminary issue is that they say that if there is to be a remittal to the CMA that remittal should address any and all grounds on which HCA might succeed in its application. Not some grounds and not others, with further applications for review stored up for the future.

We respectfully agree with that, Sir, and it is relevant to the question of the proper scope for remittal now. It is clearly inefficient and a recipe for trouble in the future for the CMA to conduct a partial reconsideration leaving other matters unresolved.

Then, in the middle of p.2:

> "You have also invited the CMA to accept this procedure was defective and should therefore be quashed by consent. The CMA does not accept this and will oppose your client's application."

So, by this stage they are, of course, in possession of our fully pleaded case on procedural unfairness, but they make it clear that they are standing by their procedure.

In my submission, nothing has really changed since then in terms of the fairness of the CMA's procedure. Of course, after disclosure it became clear that there were actually errors in the IPA, but as I have already submitted that does not bear on whether it was fair for them to do what they did or did not do. What is not easy to understand is why at this stage they were saying: "We stand by our procedure, it was fair", but now they accept it was unfair. It is particularly unclear in the light of Mr Witcomb's witness statement which rejects most of the substantive allegations of unfairness that we have made.

So what then happens is we apply for disclosure and as this Tribunal will recall there were two hearings on 25th June and 8th July at which the application for disclosure was hotly resisted by the CMA. The Tribunal ruled on disclosure on 25th July and you have that in the same bundle. It is behind tab D8. This is your Judgment on disclosure, and if you go to para. 12 at p.4 the CMA resists the application for disclosure. It says that:

> "The disclosure sought goes well beyond what is required at judicial review. The CMA says that in reality all that HCA is seeking to do is check the CMA's calculations in circumstances where there is no good basis for thinking there is any defect in those calculations."

So we do take serious issue with that because the situation here was a public authority that was in exclusive possession of this material, and which was resisting its disclosure to us and making the assertion to the Tribunal that there was no good reason to think that there were defects in it.

In our submission a public authority should think long and hard before it makes that submission, and should conduct the most anxious checks before it commits itself to that position. In fact, the errors that were in this analysis were not difficult to spot, they were patent. We addressed this, and if you go to our skeleton argument at para. 50 we summarise the very serious errors. They include, for example, a basic mathematical error in which the CMA's team has confused the way that you increase prices with percentages with the way you decrease with percentages.

THE CHAIRMAN: Sorry, para. 50?

MS ROSE: 50(3). There is a basic arithmetical error to the tune of tens of millions of pounds.

Also, in relation to statistical significance, we invite you to look at the footnote where Professor Waterson says he was immediately puzzled when he saw the results because of their empirically unusual nature. The point being that what the results appeared to show was that very small percentage price differences were extremely robust in terms of their statistical significance, and that is a very surprising result which should immediately have sent out a warning bell.

In any event, we submit that it is very troubling that a public authority was resisting disclosure on that ground in circumstances where there were such serious flaws.

Going to para. 17 back in your decision behind tab D8, the Tribunal said:

> "We have not found the determination of HCA's application for disclosure easy."

And it is clear from that statement that this was a very finely balanced decision by this Tribunal. It could easily have gone the other way, and if it had gone the other way we would never have found out the errors in this analysis.

What then happens is on 12th August, if you go back to the chronology, we are now at the top of p.4, the CMA served its original defence, and in that defence the CMA continued to defend the substance of the IPA. Now, presumably they must have gone back to it, and re-examined it in detail both before they resisted disclosure on the grounds that there was no good reason for saying there were errors in it and before they served this defence in which they robustly defended it. We do not need to turn it up, but can I invite you to look at paras. 224 to 232 of the original defence in which the CMA defends specifically its conclusion on statistical significance.

THE CHAIRMAN: Just give us a bundle reference.

MS ROSE: Their defence is in a separate bundle as far as I am aware - I have it in a separate bundle which does not have a number on it. It is paras. 224 to 232 where they defend precisely the matter that we now know to be flawed.

That raises a serious concern in terms of remittal. We certainly are not suggesting that there is any bad faith in relation to this. We accept that they genuinely did not spot the errors, but the problem is how can we have confidence in this same team doing a fresh analysis?

THE CHAIRMAN: Are you not going to point out problems?

MS ROSE: Sir, you say, "Are you not going to point out problems?", but you have to have a situation where the decision maker can be trusted, first of all, to understand the model that they are implementing and to do it correctly. What this has shown is that not only did they implement a model that was riddled with errors, but when they were auditing and checking the model for the purposes of this appeal they did not spot the errors.

THE CHAIRMAN: Is it not part of the point of natural justice to give your clients the opportunity to point out problems either with the model or with the analysis that is provisionally being undertaken by the CMA ----

MS ROSE: Sir, the difficulty is, are we then going to be given ----

THE CHAIRMAN: Allow me just to finish putting the point to you and then you can comment on it - so that they may, with the benefit of being guided by the representations that your clients would make, consider the matter without making the errors that they had been making previously?

MS ROSE: The difficulty with that, Sir, is that it would involve us ultimately having to sit beside them and hold their hands through the process. We do not know under what

conditions they are proposing to reopen the consultation, but as you have seen it is very, very far from that. What they tend to do is to give us time limited and person limited access to a data room where we are able to make submissions, but we certainly are not in a position to check all their workings and second guess their decision. What we know here, with respect, is that this team simply has not been able to implement a model properly. It is a question of public confidence and the risks to our business of allowing this process to proceed with the same team, which has shown that it is not capable of operating a model.

THE CHAIRMAN: So basically too incompetent to be reliable is the submission?

MS ROSE: That is the submission, yes. What then happens is on the same date, and this is back in the chronology, still on 12th August, they write to us telling us about some more errors they have found. We can see that they did indeed audit the model before they produced their defence and they found some mistakes in it. We do not need to turn it up, you have got the page reference there. That is the second time that this happened - we saw it happened in 2013 before they opened the data room - but they do not uncover any of the real big errors. They miss them. They have never explained to us why they never were able to spot these errors.

Our economists go into the data room and on 8th October we wrote to the CMA notifying them of the errors we had found. That is back in tab C, p.17.

THE CHAIRMAN: Just out of interest, do either Dr. Mazzarotto or Professor Waterson say that on the basis of what they have seen the CMA team is too incompetent to carry out work of this nature?

MS ROSE: They do not say that, but they say there are basic errors. Professor Waterson's comments are summarised in the footnote to para.53, and I invite you to look at his statement. He makes some pretty strongly worded comments about the quality of this work.

THE CHAIRMAN: Where do we have his statement?

MS ROSE: Bundle 9, tab 50.

THE CHAIRMAN: I am sorry, Ms Rose, we are looking elsewhere.

MS ROSE: Sir, I am getting very concerned about time.

THE CHAIRMAN: Just give us the paragraph numbers and we will look at it over the short adjournment.

MS ROSE: It is paras.27 to 30. Sir, can I just flag up my concern about timing. The matters that we are dealing with are obviously critical and central, and I am very anxious that I should have an adequate opportunity to develop what I want to say.

THE CHAIRMAN: Are you asking for an adjournment now? You have known about the day's estimate for this and you have not said that it is wrong. Are you asking for an adjournment at this point?

MS ROSE: You have seen what we said was the amount of time that we needed to develop our submissions. It is fair to say that the issues ----

THE CHAIRMAN: Forgive me, you have known that it was a day's estimate for this hearing.

MS ROSE: Yes.

THE CHAIRMAN: We have broken down the timing available to all parties so as to do fairness to all parties and within the scope of a period of time which is longer than an ordinary court's sitting time, because we sat early and we are sitting late. In our view at the moment, we are giving you a fair allocation of time. Are you asking for an adjournment, because obviously everyone else needs to have time to develop their submissions as well?

MS ROSE: I appreciate that. Sir, you will appreciate that the issues in this case became significantly wider last week when we received the third witness statement of Mr Witcomb.

THE CHAIRMAN: No one asked for an adjournment of this hearing at that time. Are you asking for one now?

MS ROSE: I am not asking for an adjournment, but I am asking you to ----

THE CHAIRMAN: Then you should press on.

MS ROSE: What I am asking you to consider is, if necessary, to continue over a second day if we have to.

THE CHAIRMAN: That will not be possible. I am not sitting in this jurisdiction tomorrow.

MS ROSE: It does not have to be tomorrow, Sir.

THE CHAIRMAN: So you are saying that we should break this hearing?

MS ROSE: If necessary. What I am concerned about is this: Sir, you will obviously appreciate how important these matters are for my client in terms of its business.

THE CHAIRMAN: It seems to me that if you were going to come to us and say that we need more than a day's hearing time to deal with it, the logical position would have been to have asked for an adjournment at that time, instead everyone has come here ready to deal with matters within the scope of the day that has been allocated.

MS ROSE: Sir, the only time that I could really have done that would have been now, because matters were developing last Thursday and Friday when we were receiving Mr Witcomb's third witness statement, the fourth witness statement, and matters relating to the FCO. All of those matters developed, as you will be aware, at the end of last week.

THE CHAIRMAN: Even if that is right, and I am not going back through the archaeology of it, you did not start today by saying, "We have insufficient time, there should be an adjournment", you just did not.

MS ROSE: Sir, that is indeed correct, but I am making my ----

THE CHAIRMAN: Are you asking for an adjournment?

MS ROSE: Let me just take some instructions? (after a pause) Sir, the answer is yes, because I do not think I can deal with this in another 40 minutes, given the number of issues.

THE CHAIRMAN: How much longer do you say you need?

MS ROSE: Sir, I would be able to finish my submissions by one o'clock.

THE CHAIRMAN: So that is an additional hour. Let me ask all the other counsel what their position on this late application for an adjournment. Who wants to go first. Ms Smith, do you want to go first?

MS SMITH: Sir, I think I have nothing further to add to the point that you have already made, this application should have been made at a much earlier stage. Mr Witcomb's third witness statement responded on 10th December, Wednesday, to an allegation that had been made for the first time only, the allegation that it should be remitted to a new Tribunal in a letter from HCA on Friday, 4th December. The point about remittal to a new Tribunal had not been made in any of the previous pleadings even though the allegations which are now said to underlie that application were included in the reply and in the amended notice of application. The only relief that was sought in those pleadings was a simple remittal. There was no suggestion of it going to a new Group and case team. That was only raised for the first time on Friday, 4th December. We had to respond to the allegations of a sham consultation, of falsely misleading HCA, and we did so very quickly in the form of the witness statement of Mr Witcomb. Having received that, if HCA's position was that it needed an adjournment, it should have made the application earlier. We obviously need time to respond to the submissions and we do not want our time to be squashed simply because HCA say they now need three hours. Sir, we resist an adjournment at this stage.

THE CHAIRMAN: I am looking at HCA's proposal as it was put to us. They said that they wanted an opening from 10 until 12.30. I am wondering whether, Ms Rose, if we forego what we were hoping to have as time to produce a ruling today and give you until 12.45 and limit your reply to 15 minutes you will have had the three hours. Are you happy with that?

MS ROSE: I am very grateful for that.

THE CHAIRMAN: We will give you until 12.45 in opening.

MS SMITH: Can I just have clarification as to how much time we are going to have to reply to those submissions in the light of that if I am not on my feet until 12.45?

THE CHAIRMAN: If we were not going to have time to prepare a ruling, you were asking for two and a quarter hours. I think we would allow you to have that, because we are foregoing the time to prepare a ruling.

MS SMITH: I think that takes me to three o'clock, but then there are the AXA submissions and the TLC submissions and then a reply.

THE CHAIRMAN: They have got the short periods of time that we have indicated. No doubt someone will sit here working it out, but what we are minded to do is to allow Ms Rose to go to 12.45 and she will have 15 minutes, and for the timetable to allow the CMA two and a quarter hours, which is what they asked for if we were not going to take time today to do the judgment. We will sort out the timetable in terms of minutes in due course, but Ms Rose knows that she can carry on until 12.45.

MS ROSE: I am very grateful, Sir. Sir, we were on 8th October, which is the date on which we send them the two reports.

THE CHAIRMAN: Let us be clear, are you pressing for an adjournment in the light of that?

MS ROSE: No, I am soldiering on, Sir.

THE CHAIRMAN: You are content with that?

MS ROSE: Yes, I am. So on 8th October we write to the CMA drawing their attention to the errors in the IPA, and sending them the expert reports prepared by Professor Waterson and the report prepared by KPMG on what it has seen in the data room. That is behind tab C, it is pp.17 to 20. Sir, we give them all the details of the errors that we have found, which are set out in full, and we invite them to concede the application. If you go to p.20, we explain at para.9 that, because of the flaws, the CMA has made an irrational decision based on erroneous facts, and we ask them to agree that the only appropriate course is for the Decision to be withdrawn or quashed, invite them to agree, and then say that if they do not we will hold them responsible for costs and we reserve the right to seek indemnity costs. You can see that at para.13.

The response to that on the following day is at p.23. The CMA refuse to concede. They say they were not prepared to do that and we should plead our amended notice of application. Again, there has been no explanation from the CMA about why they took this course. We have given them details of the errors we had found. Its team was in a position to check if we were right or not, and, when they checked it, to know whether their position was assailable. It is not clear why they needed us to plead a case based on the errors, but they

did, and therefore we incurred the further costs of re-amending our notice of application. That was served on 17th October.

On 20th October we drew the attention of the CMA to the further error in the calculation of the benefits, the price impact. I do not intend to go through this in detail, but you can see the references to it in the chronology and the underlying documents. The 20th October letter is at p.39, and that was finally conceded by the CMA on 29th October. That is at p.59.

What then happened is that on 24th October, Sir, this is towards to the bottom of p.4 of the chronology, the CMA wrote to this Tribunal asking for an extension of time to 21st November for filing its defence. That is at p.55, if you turn that up in the same tab. They say, if you go to the top of p.2, that HCA has, in essence, completely re-pleaded Ground 2, and that they need time to respond to it.

This is more than two weeks after we had sent them the full reports from KPMG and Professor Waterson and there is no hint in this letter that they have any intention of conceding, or any intention of not serving a defence.

This Tribunal, in response to that letter, gave the CMA until 14th November for their defence. That is at p.64.

The day before that defence was due, 13th November, the CMA announced that it was not intending to plead a defence. We see that at p.73, which is a letter to my instructing solicitors, and they said that they acknowledged there were errors, that we had not been given the opportunity to identify and comment on, that it was minded to accede to the appeal on Ground 1 and the quashing of the Decision in respect of the insured IPA, and they say, "This is the relief your client seeks" at para.64. They make suggestions on how it should be taken forward, and suggestions on costs. They said that, in the light of that, they do not intend to serve a defence.

We responded to this letter at p.83, the same day. We said:

> "[y]ou state the CMA does not propose to file an Amended Defence "in circumstances where the CMA has agreed to the quashing of its decisions relating to the AEC"… You do not identify which errors the CMA accepts have been made in the insured pricing analysis. You also do not explain why Grounds 2 and 5 (which allege errors in the CMA's insured pricing analysis) should not also be upheld… No agreement has been reached with HCA to compromise these proceedings. HCA cannot consider the appropriateness of your proposal without seeing what admissions the CMA is making as regards the errors in the IPA.

> Furthermore, the Tribunal cannot be expected to reach a view as to the terms on which HCA's appeal is to be upheld and the matter remitted to the CMA without knowing what the CMA's position is on each of HCA's grounds of application. It is, therefore, essential that the CMA should file and serve its Amended Defence as the Tribunal has directed."

We are clearly making the point there that we cannot respond to the proposals in relation to the terms of remittal until we have seen their defence. One of the important points about that is that we, in our amended notice of application, have made the allegations which Ms Smith, with respect, erroneously said we had not made until 4th December. Our amended application said, "You treated us unfairly in relation to the discrimination in respect of Nuffield, misleading us in relation to what Nuffield had been given access to, allowing us to attend the oral hearing without telling us we were hitting the wrong target". All of those points were made in our amended notice of application. We were saying to them, "We need to see your response to our amended pleading before we can reply to your proposals for remittal".

They responded to us on the following day, the 14th, and I just want to draw your attention to the penultimate paragraph on that page.

THE CHAIRMAN: This is p.85?

MS ROSE: Page 85, yes, Sir:

> "In circumstances where your client has obtained the relief it seeks we do not propose to serve an Amended Defence today."

That, I am going to submit, is significant, both in terms of the order that the Tribunal ought to make and in relation to costs, that they were making it clear, rightly, that they were conceding the relief that we were seeking.

We, on 17th November, p.92, wrote to the Tribunal asking that the Tribunal should direct them to serve a defence and we explained the reasons why at p.91. Then at p.92 we identified issues for the future conduct of the appeals, and we said that it would be necessary to decide how to dispose of HCA's appeal, including what direction, if any, the Tribunal should make when remitting the matter to the CMA, having regard to the Tribunal's powers under s.179(5) of the Enterprise Act 2002.

Sir, at this stage we still had not seen their defence, we did not know if they were resisting our allegations under Ground 1, we were flagging up that the question of what is the right direction for remittal is live.

That is entirely consistent with the relief we were seeking in our application, because the relief we were seeking in our application was an order for quashing with appropriate directions for remittal, depending on the Tribunal's ruling. You can see that if you look at our amended application. The last paragraph of our amended application, para.264, invites the Tribunal to quash the decisions finding AECs in respect of central London or ----

MS ROSE: It is para.264, right at the back of our amended application. It is bundle 9.

THE CHAIRMAN: We have it.

MS ROSE: The relief we were seeking was a quashing order in relation to the finding of AECs and the imposition of the divestiture remedy and to remit the matter to the CMA with appropriate directions. The question of what directions are appropriate would depend on the ruling made by the Tribunal. So that is why we were asking to know what was in their defence.

As you know, there was then a situation where this Tribunal did order a defence by 20th November. That is at p.93 behind tab C, and you, Sir, stated that it is of the utmost importance that there is specific and formal clarity about the CMA's case, particularly where there is a suggestion that only parts of HCA's application continue to be contested. There was then an issue where the CMA sought an extension, and eventually the defence was ordered to be prepared by 25th November, and was produced.

On 26th November, the day after the defence was served, proposals for future conduct were served by the CMA and we replied to those proposals on 4th December. You can see those letters. The letter of 26th November is 115 to 118, and our response is at 131. It is in our response on 4th December that we say that there should be remittal to a different inquiry group.

That is only six working days after we have received their defence, and what they have done in their defence is that they have not disputed any of the allegations of procedural unfairness under Ground 1, including all of the allegations about discrimination, being misled and a sham consultation. All of those allegations were made and none of them were disputed. They were not pleaded to all. That is the context in which that proposal was made, and of course, in circumstances where you, Sir, had specifically asked them to plead their case with formal clarity.

Not only that, Sir, they had actually deleted from their pleading their original defence in relation to Nuffield.

THE CHAIRMAN: I am going to regret this question, but where do we find their defence?

MS ROSE: I have got a separate bundle, and you can see that there two versions.

THE CHAIRMAN: I have found it, thank you very much.

MS ROSE: You should have two versions, one of which has got changes tracked and one of which is clean. Can we look at the tracked changes one? I want to show you what they did in this amended defence. In relation to Ground 1, you can see they deal with that starting at p.23. If you go over to p.25 at para.88 they summarise the error in relation to the R-squared and in relation to statistical significance. Then at 89 they say:

> "… the CMA's position is as follows:
>
> (b) the CMA agrees that there was the computer coding error in the statistical significance testing identified …"

THE CHAIRMAN: I am so sorry, which page are you on?

MS ROSE: Page 26, para.89(b). This is the second admission:

> "the CMA agrees that there was the computer coding error in the statistical significance … which increased the proportion of insurer specific price index differences which are found to be statistically insignificant in terms of the chosen statistical test."

So that is the admission they make on that. They say that in the light of that we should be given the opportunity to comment, and then it should be remitted.

Then, as you can see, they delete essentially the rest of their pleading on Ground 1, and that includes deleting their original defence in relation to Nuffield. If you go to p.33 you can see on that page deleted paragraphs 125 and 126 where they had originally sought to justify the difference in treatment between us and Nuffield. They withdrew that pleading.

THE CHAIRMAN: When you say they withdraw that pleading, at the moment I am not aware that anything that Professor Waterson said went to that particular issue.

MS ROSE: Indeed it did not.

THE CHAIRMAN: So there was no reason, was there, to think that their case had changed in relation to that by reason of any new points that had been raised arising out of review of the data room?

MS ROSE: Not out of the data room, Sir, but in the meantime we had made further requests for disclosure and information from them which had revealed more information about the Nuffield situation. There had been the second witness statement of Mr Witcomb, and they then withdrew their pleading in relation to Nuffield. They specifically withdrew it.

THE CHAIRMAN: This point seems to be a technical issue about what one is to take from a withdrawal of a pleading in these particular circumstances. Am I right in thinking that that

is against the background of an explanation already given in Witcomb 2 in relation to their thinking of the Nuffield chapter of your complaints?

MS ROSE: Sir, it is not entirely straightforward, because the original ----

THE CHAIRMAN: Just in terms of chronology, am I right in thinking that there had been an explanation in Witcomb 2 of the Nuffield issue?

MS ROSE: That is what is not straightforward, because there are different iterations of the Nuffield complaint. Our original complaint was simply that Nuffield had been given access to the data room and we had not. That complaint was then expanded in our re-amended notice of application to include the complaint that we had been misled in the email that we have looked at. That was not addressed in Witcomb 2.

THE CHAIRMAN: That is in your amended pleading at which paragraph? At the moment I can see that there may be technical arguments. I would need to look again through the amended defence as to whether they have technically done something wrong in pleading terms. I would not have thought there was very much doubt about what the substance of their case was having regard to what Mr Witcomb had said previously. Against that background, what I am struggling with is that it might be difficult to infer from the way in which they have deleted these paragraphs in their pleading that actually they are saying none of that was right.

MS ROSE: The point is a simple one. We, in our re-amended notice of application, had given them a series of complaints of procedural unfairness. Their reaction was to say, "We now accept that there were errors in the IPA that you should have been given an opportunity to look at, therefore we concede Ground 1", and not to plead to any of those points. So there was no positive case being mounted by them in response to the sequence of complaints of unfairness that we had made. That is the point.

THE CHAIRMAN: Right.

MS ROSE: It may not be hugely significant, given that you have decided to admit Witcomb 3, but the point I am making is that we had no reason to believe that they were disputing any of this material, because they had not ----

THE CHAIRMAN: Other than Witcomb 2. That is why I was asking you about the ----

MS ROSE: Witcomb 2 does not dispute the new allegations that were in the re-amended application for the first time.

THE CHAIRMAN: Give me just the references for the new allegations in the amended application?

MS ROSE: It is paras.42 and 43 which give the overview. They cross-refer to paras.4 to 20 of the reply where these allegations were first made. They were first made at an earlier stage in the reply and were then incorporated by reference into the re-amended notice of application.

THE CHAIRMAN: Was there an answer to them in some pleading in response to the reply?

MS ROSE: No, at no stage.

THE CHAIRMAN: What is the formal position so far as this Tribunal is concerned? If you do not respond to their reply are points put in issue - is that the formal position?

MS ROSE: Sir, it is not clear.

THE CHAIRMAN: That would be the usual position in ordinary litigation.

MS ROSE: They were put in the amended notice of application. You specifically ordered that they should plead a proper defence responding to the allegations so that there was formal clarity about their position. They chose to plead without referring to any of these matters. So we had no basis for thinking that they were disputing them until we received Witcomb 3. It is actually not clear from Witcomb 3 whether he is disputing them. He is not disputing any of the facts. He simply seems to be to disputing whether or not they were unfair which of course is really a matter for the Tribunal. That is that point.

The point from this is what is said in relation to the significance of the errors in relation to Ground 2. If you come back to their amended defence and go to p.44, this is Ground 2, errors in the pricing analysis. At 93 they say they do not accept they acted irrationally, but if there is going to be a remittal it should include Ground 2. Then at 94 they say this:

> "In order to assist HCA and the Tribunal, he CMA comments below on the matters identified in Ground 2 …"

Then they say that it would not be appropriate to pre-judge the presentations that may be made by HCA and other interested parties:

> "The CMA will re-consider the matters remitted to it with an open mind. Therefore, the CMA's comments below do *not* trespass on to the precise extent, impact and effect of the 'errors' identified in the Data Room Report, as these are properly matters which are to be considered afresh upon remittal …"

We agree that that is the right approach, and it was very importantly stated by the CMA here that they would not trespass on the precise extent, impact and effect of the errors. It is important to bear in mind that at the heart of our amended case - if we just take up the amended notice of application again. If you go to para. 118 at p.48.

THE CHAIRMAN: This is the re-amended notice of application.

MS ROSE: The re-amended notice of application at para. 118. The essential point we are making is:

> "In short, the result of the IPA, when correctly analysed, do not disclose consistent statistically significant price differences between HCA and TLC either over time or across insurers for a particular year."

That is a crucial question. There is obviously a second question about causation, but the first point is that we say when you properly analyse it you cannot find a statistically significant or consistent price difference at all, so that is essential. The CMA understands that that is our position and, as a result, if you look at their amended defence they are at pains not to trespass on to it.

THE CHAIRMAN: Para. 94 you showed us.

MS ROSE: Yes, we have looked at para. 94, but you see the same thing in later paragraphs. If you go to para. 115, this is where they start to deal with the statistical significance point.

THE CHAIRMAN: Page 56?

MS ROSE: Yes, and you see at para. 117 that the CMA refers to the paragraph I have just shown you at para. 118 of our re-amended application. So they understand that that is the burden of our complaint. Then they deal with causation at 119, and at 125 they say this:

> "HCA's submissions in this regard have not been amended as a result of its access to the Data Room. The CMA accepts that, if there is to be a remittal, it will reconsider the IPA and what that shows as regards price differentials between HCA and TLC. Depending upon that reconsideration, as to which the CMA keeps an open mind, the CMA *may* need to consider whether to re-visit the question of whether any price differentials which do exist are materially explained by other factors."

So they are making it very clear there that they understand that it is our case that there are no price differentials, and that is why they are putting it very rightly and carefully in that way.

So that is the position in their re-amended defence, very carefully understanding that we are saying there are not price differences, that that is a matter for reconsideration and that they are not going to trust us on it.

What then happens is that last week we receive a report from an official at the Foreign & Commonwealth Office describing a meeting which a Foreign & Commonwealth Office official has had with the CMA.

THE CHAIRMAN: A different official?

MS ROSE: A different official, yes, a regulatory expert from the Foreign & Commonwealth Office. We had been in contact with the British Consul in Washington because, as you will know, the senior management are based in the United States, and they had referred the matter to the United Kingdom, and a regulatory specialist – that is how this person is described – from the Foreign & Commonwealth Office had had a meeting with the CMA.

THE CHAIRMAN: Just so we are clear who we are talking about, the regulatory specialist is?

MS ROSE: Mr Thompson.

THE CHAIRMAN: Yes, but the email report – we are going to look at it?

MS ROSE: Yes, we are going to look at it now. What we receive initially is behind tab C in vol. 10 at p. 149. This is a report to us from an official called Rebecca Mowat describing the meeting that we now know occurred between Mr Thompson and members of the inquiry team.

You can see from the first paragraph that she is surprised by the differences between what apparently the CMA have been saying and what she understands to have been coming from us. She says:

> "It may well be I misinterpreted some of the points raised by your team, but some of the comments made by the CMA seem to contrast with what we discussed and, indeed, what has been reported in the press. I want to ensure the HCA has all the information possible."

Then she sends us what she understands to have been a summary of a meeting and at point 3 she says:

> "The CMA stated that the modelling errors which were identified by HCA advisers do not change the actual results or conclusions of the modelling. The errors concern the confidence intervals for the results of the modelling which were lower than thought by the CMA. They noted they looked at over 1,000 treatments across six hospitals for six years and the results were unchanged by the errors that have been found."

So, in the light of what was said by the CMA in its defence, you can understand why this is a matter that caused us the very greatest concern.

THE CHAIRMAN: Yes, as I understand it in light of Witcomb 4 it said: "This is a garbled report of what actually was said".

MS ROSE: Let us see what Witcomb 4 says, because my submission is that, in fact, Witcomb 4 confirms our concern.

THE CHAIRMAN: The reason for me raising the point is should we not be looking at Witcomb 4 rather than this email?

MS ROSE: Of course. I am going to go to Witcomb 4 but I wanted you to see how the matter arose.

THE CHAIRMAN: Of course, yes.

MS ROSE: So what we then receive is Witcomb 4 which you have at p.231. You are right to say that Mr Witcomb says this is a garbled response. He gives us his recollection of the meeting and he has also produced two further documents, one you have at p.243, that is a handwritten note made by Mr Thompson at the meeting, and the second is an email which is at p.238, which was sent by Mr Thompson to Rebecca Mowat. That, as you can see, was sent at 11.45 on 2nd December. We know the meeting was on 2nd December, so this email giving his understanding of the meeting must be very shortly after the meeting had ended. It is on the same morning.

At para. 8 he tells us that his recollection of the meeting broadly accords with the notes made by Mr Thompson. Then at para. 12 he says:

> "The discussion then moved on to the current proceedings before the Competition Appeal Tribunal. I explained that HCA's advisers had identified two main errors in the CMA's modelling of insured prices, namely an error in the CMA's statistical significance testing and an error in the calculation of R squared. I noted that both these errors went to the confidence intervals for the CMA's parameter estimates (i.e. the robustness of the CMA's estimates), but did not change the parameter estimates themselves (i.e. the estimated price differences between HCA and TLC). In particular, I explained that the confidence intervals were lower than had originally been found by the CMA. Neither I, nor my colleagues at the meeting, made any comment as to the impact of these errors on the CMA's conclusions. The explanation I gave was purely a factual explanation as to the nature of the errors."

There are two problems with that. The first problem, in my submission, is that Mr Witcomb should not have been having this conversation at all. These proceedings are at a highly sensitive stage and for him to be involved in a discussion about the precise nature and impact or extent of the errors was, in itself, contrary to the stance that was very properly taken by the CMA at para. 94 of its amended defence. He should have simply said: "Look, I cannot discuss the matter with you, it is all subject to remittal".

THE CHAIRMAN: I can see that he might have been well advised to have proceeded in that way. But, as I understand it, he was joining the meeting to try to provide information to your clients to assist them to understand in some sense where the CMA might be going in the healthcare sector, including some sense of what might be happening in relation to their further inquiries on this investigation.

MS ROSE: Sir, I do not think that is right. He explains that the purpose of the meeting, as he understood it, at para. 6 and it is actually to provide information to the United Kingdom Government, not to HCA.

THE CHAIRMAN: I thought it was HCA that had asked for assistance from the person in New York?

MS ROSE: HCA had raised concerns about this whole situation, and the Foreign & Commonwealth Office had raised its concerns with the CMA, as you can see from para. 6.

THE CHAIRMAN: Was the FCO doing that to try to help HCA in understanding what was happening in the U K regulatory system?

MS ROSE: We do not know why the FCO were doing it.

THE CHAIRMAN: Your clients know why they were raising this with the FCO surely?

MS ROSE: Yes, but we did not know that the FCO was going to raise this with the CMA.

THE CHAIRMAN: Just tell me the background then, how did your clients raise anything with the FCO? Why were they talking to the FCO?

MS ROSE: As you can see, what is said by Mr Witcomb at para. 6 ----

THE CHAIRMAN: He is not the one party to what I am asking about.

MS ROSE: I know, but you can see ----

THE CHAIRMAN: Your clients were, you need to help me.

MS ROSE: I do not have any evidence on this, and he gives a summary here. He says that:

> "UKTI was keen to talk to CMA about its work in the private healthcare sector, in light of some potential investment that HCA was considering making in the UK and certain concerns that had been expressed by HCA to UKTI."

THE CHAIRMAN: I am looking back at the FCO email that you took me to, at p.149, where it says: "On the CMA I raised your concerns with my senior leadership", that is the FCO talking to HCA. That suggests HCA said: "We have some concerns, can you help us out?"

MS ROSE: That is right.

THE CHAIRMAN: And the FCO says: "We will do our best" and they go and ask people including ----

MS ROSE: That is right, that is exactly what is said by Mr Witcomb at his para. 6.

THE CHAIRMAN: I just come back – I am trying to understand where this takes us in relation to what we have to decide, and what I was putting to you was I understand the submission you make that it may have been ill-advised for various reasons for Mr Witcomb to have participated in this meeting, but it seems that he was doing it in an attempt to provide information to respond to queries your client had raised with the United Kingdom Government. At the moment I am struggling to see why that shows that Mr Witcomb could not be relied upon ----

MS ROSE: I am not saying that that is what shows it.

THE CHAIRMAN: You were ----

MS ROSE: No, what ----

THE CHAIRMAN: You said that there were two things to come out of this ----

MS ROSE: Yes.

THE CHAIRMAN: -- Mr Witcomb should not have had conversations at all – I understood you to be saying that to support your submission that now it could not be remitted to him, and I am struggling to understand that submission.

MS ROSE: There are two points. The first point is that he should not have been getting into the question of the nature, extent and impact of the errors. That was the submission I made, not that he should not have been talking to the FCO at all, but he should not have been discussing the precise question of the nature of the errors, given the sensitivity of the situation

The second point is what he actually said and this is on his own evidence. He says at para. 12:

> "I noted that both these errors went to the confidence intervals for the CMA's parameter estimates (i.e. the robustness of the CMA's estimates), but did not change the parameter estimates themselves (i.e. the estimated price differences between HCA and TLC)".

So, on his own evidence, what he is saying to the FCO, as his understanding of the nature of the errors is that they do not impact on the question whether there was a price difference, they only impact on the question how robust is the conclusion that there is a price difference. That is a highly contentious question. It is going to be at the heart of the submissions that we want to make to the CMA, because our position, as we have explained, in our amended notice of appeal is that the effect of the error on statistical significance is that there is not a price difference, because a statistically insignificant price difference is no different from zero; that is what you mean when you say a price difference is statistically

insignificant. To characterise that as saying that all this does is to go to the robustness of the confidence intervals which are lower than we think, but does not affect the parameters, and then to equate the parameters with the price difference, that we say begs some of the most important questions that we want to raise with the CMA, and that is the real vice here.

THE CHAIRMAN: Can you just give us, as a cross-reference that we can look at during the short adjournment, where Professor Waterson makes that clear?

MS ROSE: Yes, it is made clear both by KPMG and Professor Waterson. The starting point is para. 118 which I showed you in our amended notice of application, where we made the point that it was our case that there was no price difference that could be shown.

THE CHAIRMAN: Yes, I am just asking for a paragraph number for Professor Waterson.

MS ROSE: Yes, I understand.

THE CHAIRMAN: Do not take up time, Ms Rose, if your junior could ----

MS ROSE: We will give you the references, in KPMG, Waterson and in our pleadings.

THE CHAIRMAN: Yes, if that could be done by the short adjournment we will read it.

MS ROSE: Yes. That is at the absolute heart of the submissions we want to make. What Mr Witcomb is saying here is that his conclusion that those parameters are not changed, and that the price differences are not changed, the only question is the robustness. He presents that as "a purely factual explanation as to the nature of the errors", whereas, in fact, it is a highly contentious statement.

I want to make it clear that I do not blame him in any way for having that approach; it is completely understandable given the extent to which he has been involved in this investigation throughout.

The problem is that it illustrates exactly the difficulty with remitting it back to the same decision maker.

Can I also show you what the handwritten notes say?

THE CHAIRMAN: Yes, certainly you can, but I just want to put down the marker that before you sit down at 12.45 we will need your assistance on the legal test that you say we should be applying.

MS ROSE: Yes.

THE CHAIRMAN: So, the handwritten notes?

MS ROSE: The handwritten notes at p.243. There are, in fact, some differences – significant differences – between what the handwritten notes say and what he says. If you look just opposite the first hole punch, what Mr Witcomb is quoted as saying is: "couple of modelling errors". What he says in his statement at para. 12 is: "I explained that HCA's

advisers had identified two main errors". Now, of course, we know that KPMG had not just identified two errors, they had identified a whole range of errors which are set out in detail in their report, and these two are only two of the errors they have identified. There are, in fact, other errors that do go to the parameters, and the price difference because of the issue where there were negative prices or prices wrongly set at zero, which do affect the parameters.

What he is contemporaneously recorded as saying is: "a couple of modelling errors". We say that is significant, first, because it is wrong, there were not a couple of modelling errors, there were more; and secondly, because the language downplays it: "Well, we made a couple of modelling errors". Then, the errors are referred to, and characterised as precision of stats relating to insurance prices paid by their rivals, and then confidence intervals lower than thought, standard errors on insurance prices.

So, simply presented, as a situation in which the robustness of the analysis is somewhat less than had been expected. That is different from the admission made from the CMA in its own amended defence, because I showed you before para. 89(b) where they have conceded that the effect of this error is that there are not statistically evident price differences in a number of instances. That is different from saying it is a lower confidence interval so it is not statistically significant at all.

We submit both on his evidence and the contemporaneous note, it is not an accurate characterisation of the extent of the errors. It downplays the number and importance of the errors, and crucially it pre-judges one of the central questions which is going to be: is there any price difference at all between the operators. We can see also that that is how it was understood at the time by Mr Thompson, and we can see that from his email that we see at 238. This is his report after the meeting to Rebecca Mowat and in the fourth paragraph of that email he says:

> "The modelling errors which were identified by HCA's advisers do not change the actual results or conclusions of the modelling. The errors concern the confidence intervals for the results of the modelling, which were lower than thought by the CMA. [The CMA looked at over 1000 treatments across 6 hospitals for 6 years and the results are unchanged by the errors which have been found]."

We say that in the light of Mr Witcomb's own evidence and the written notes of the meeting that was a fair summary of what Mr Witcomb was saying. It was not garbled. Not only that, that was the understanding of what Mr Witcomb was saying, which a neutral, well-informed, and reasonable observer had after speaking to him. That makes us a very unusual

case, because normally where you are looking at appearance of bias you do not actually have the benefit of a genuine and reasonable well-informed observer to test the proposition. We submit that what this meeting showed was that whether it was subconscious or not, one simply cannot tell, and it is completely understandable given the history, that Mr Witcomb downplayed the significance of the errors, the scope of the errors, and trespassed into the very area that the CMA at para. 94 of its amended defence was at pains to say it would not trespass into, and reached a conclusion that the results were not affected, but begged the very question that was going to be before it on remittal.

THE CHAIRMAN: Yes.

MS ROSE: Can I now then turn to the submissions that we make in the light of that history, and can I ask you to take this up with reference to our skeleton argument which is back in vol.10 at tab 1? The first question is the scope of the order that this Tribunal should make. The application that we have made is effectively a judicial review, a statutory judicial review of decisions of the CMA, what you challenge are decisions. You can see that from the Enterprise Act 2002, s.179, if you just take up the authorities bundle, it is at the front behind tab 1. Section 179 is at p.257 of the print out, this is the jurisdiction that you are exercising. "Any person aggrieved by a decision of the [CMA]" or various other people may apply for a review. Then, at the top of p.257, subsection (4):

> "In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
>
> (5) The Competition Appeal Tribunal may -
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

So those are the powers. When you are asked: "What are the decisions?" You find those identified at s.134 of the same Act, which is back on p.178 of the print out, s.134. There are two types of decision made by the CMA. The first is there is a decision as to whether or not there is an adverse effect on competition. You see that at s.134(1):

> "The [CMA] shall . . . decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition."

Then at subsection (2): ". . . there is an adverse effect on competition if any feature, or combination of features . . . restricts or distorts competition." So the first decision is: is there an adverse effect on competition?

THE CHAIRMAN: In point of form the decision – is this right – is the report that the CMA produces determining that there is an adverse effect on competition?

MS ROSE: In fact, what you will see is that the report contains the decision and the reasons for the decision; that is the way the statute expresses it. So the first decision is, is there an AEC? The second decision at subsection (4): "The [CMA] shall, if it has decided . . . that there is an adverse effect on competition, decide the following additional questions" and the first of those is: "whether action should be taken under s.138 for the purpose of remedying, mitigating or preventing the adverse effect on competition." So the second decision is the decision on remedy

Then if you go to 136, this is the report: "The [CMA] shall prepare and publish a report."

"(2) The report shall, in particular, contain –

(a) the decisions of the [CMA] on the questions which it is required to answer by virtue of s.134;

(b) its reasons for its decisions; and

(c) such information as the [CMA] considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions."

So the report contains all those items, but there are two decisions, and it is the decisions, and not the reasons that are the subject of the challenge. Section 138 is the action it can take in relation to remedy. So, that is the structure and in this case we challenge three decisions. First, the decision that there was an adverse effect on competition in relation to insured prices; it is now agreed that that should be quashed. Secondly, the decision that there was an adverse effect on competition in relation to self-pay prices, that remains a matter of dispute, and third, the decision that the appropriate remedy was the divestment of two of our hospitals. Again, it is agreed that that should be quashed.

We submit, subject to the self-pay question, which I am going to come back to, in relation to the insured pricing analysis, and in relation to remedy the order that this Tribunal makes is clear, it must quash those decisions.

THE CHAIRMAN: Can you show us where the decisions are in the document?

MS ROSE: In the report?

THE CHAIRMAN: Yes. Does the CMA produce an order at the end?

MS ROSE: No, it does not. It does not produce an order.

THE CHAIRMAN: So we have to look at the report to identify the decision.

MS ROSE: That is right.

THE CHAIRMAN: Just give us the references. That would be helpful, so we know ----

MS ROSE: Perhaps I can ask Mr Holmes or, indeed, Mr Mussa, to provide us with the paragraph numbers. Those are the decisions, that is not in dispute, those are the decisions they have made in the report.

THE CHAIRMAN: I am not sure, it depends what you mean by the "decisions', but you go on.

MS ROSE: By statute, those are the decisions – two types of decisions, whether there is an AEC and, if so, what is the right remedy. Those are the decisions under s.134, which must be contained in the report, under s. 136, and which then give rise to the judicial review application under s. 179.

We say that is a straightforward question. There is an odd position that has been taken by the CMA on this, which is that it suggests that what you should do is to uphold the appeal on certain grounds, and stay, or even dismiss other grounds. We say that is not the right approach at all, because once the decision has been quashed, the grounds of appeal against that decision will fall away. There is no way that you could stay a ground of appeal against a decision which has been quashed, there is nothing to argue about. I know, Sir, you will be familiar with the old cases, such as *Lake v Lake*, where people try to appeal because they do not like the reasoning of the Judgment even though the outcome of the Judgment has gone in their favour, and the Court of Appeal says you cannot actually do that, because what you are appealing against is the decision not the reason ----

THE CHAIRMAN: No, in those cases what you are appealing against is the order.

MS ROSE: That is right.

THE CHAIRMAN: Which is why I asked whether there was an order, and there is not an order you said.

MS ROSE: No, but what there is is a statutory decision.

THE CHAIRMAN: That is why I am quite interested to see the form of that.

MS ROSE: I understand. But, the grounds of appeal, of course, are not related to the decision, they are the reasons why we say the decision was flawed. So, for example, we say under Ground 1 it was procedurally unfair, under Ground 2 that the IPA was irrational, under Ground 3 the wrong definition of 'market', and so on.

THE CHAIRMAN: Yes.

MS ROSE: We have explained this point, if you go to our skeleton argument, paras. 17 to 19, and we have cited the *Floe Telecom* case where, in the context of an appeal to this Tribunal in

the telecoms jurisdiction the Court of Appeal commented that it would be wrong to stay an appeal, or any part of an appeal, once the underlying decision has been quashed, there is nothing left of the appeal. But then we go on from para. 20 onwards ----

THE CHAIRMAN: Sorry, was that a case where the entirety of a decision was quashed?

MS ROSE: Yes, that is right.

THE CHAIRMAN: And was it a case where the entirety ----

MS ROSE: Yes, do you want to take a look at it?

THE CHAIRMAN: No, I am happy to look at it in my own time, just for the purposes of the present submissions I just wanted to understand that was a case where the entirety of the report had been quashed.

MS ROSE: It was not an appeal against the Competition Commission, it was an appeal against a decision by Ofcom. Ofcom had taken the decision under the Competition Act, as a matter of fact, and that decision had been quashed.

THE CHAIRMAN: Yes, thank you.

MS ROSE: What had then been suggested was that the matter should be remitted to Ofcom, but that there should be a stay of parts of the appeal pending the remittal and they said "You cannot do that".

We say the same applies on any basis in relation to the insured AEC and the divestiture remedy, and for reasons I am going to come to we say it applies to self-pay as well.

In relation to the actual grounds of appeal, starting at para. 20 we have addressed the CMA's points, because what the CMA have said is that our appeal should be allowed in relation to Ground 1, stayed in relation to Grounds 3, 4 and 5, and dismissed in relation to Ground 2. We say that makes no sense at all because, taking Ground 2 first, the effect of the submissions that have been made by the CMA is that the CMA cannot now sustain its findings in relation to insured pricing, because they were based, as it now accepts, on an erroneous understanding of the facts, and whether you characterise that as irrational or a failure to take account of relevant considerations, namely the actual facts, it cannot stand, so there is no basis for dismissing Ground 2, that would be a very curious stance for this Tribunal to take, when the effect of the admissions is that we were right on Ground 2.

So far as Grounds 3 to 5 are concerned, we say, again, it is wrong in principle for those grounds to be stayed, where the underlying decisions are going to be quashed, and the clearest instance of that is Ground 5. Ground 5 is the challenge to the proportionality of the divestiture remedy. In circumstances where the CMA accepts that the divestiture decision is to be quashed we say what basis could there be for staying Ground 5?

THE CHAIRMAN: Might there not be a basis in the Tribunal's Rules to stay, let us say, Ground 5, contemplating that a new decision is going to be taken in relation both to Grounds 1 and 2, so that will have an effect, or may have an effect on what remedy there should be, leaving the proceedings on foot but essentially with a liberty to apply once a new decision is produced that HCA would have the opportunity, rather than starting a completely new case, a new challenge, within the context of the existing proceedings, but some bits of the proceedings are going to go on, having an opportunity at that point to come in a new decision, re-plead any challenges they want to make to the new decision within the stayed part of their existing claim, rather than, as I say, having to start again.

MS ROSE: We think that would be wrong in principle because our appeal for this purpose is an appeal against the decision that was made on 2nd April 2014 ordering divestiture. The CMA concedes that that decision should be quashed. If that decision should be quashed, there is no basis for staying our appeal. Our appeal against that decision is allowed by consent. If the CMA subsequently makes a new decision, finding that divestiture is proportionate, we can bring a new appeal against that decision, but it would be a different appeal against a different decision, and we say that that is the logic that applies to all of the grounds of appeal and explains why the CMA stance is wrong.

THE CHAIRMAN: Yes.

MS ROSE: AXA suggest that you should actually hear argument on Grounds 3 to 5, and on the part of Ground 2 that deals with the self-pay analysis. We have responded to that in our skeleton argument at para. 25.

THE CHAIRMAN: I think it is right to say that the CMA do not think that is a good idea.

MS ROSE: No, it is obviously not a good idea because considerable time and cost will be spent arguing points that may be entirely academic, and we are in agreement at least to that extent.

That then brings me to the second question which is, indeed, contentious, and that is the question of a new inquiry group and case team. The question of the appropriate legal test ----

THE CHAIRMAN: Do you want to say any more about the self-pay ----

MS ROSE: Yes, you are quite right, the self-pay decision – we deal with the self-pay decision in our skeleton argument. It is at paras. 40 to 43. We make two points on that. It is absolutely right to say that the self-pay AEC condition is not affected by the errors that we have found in the IPA; that is absolutely correct. We say there are two good reasons for quashing that decision. The first is this: that when the CMA has to reconsider the question of whether or

not there are AECs and whether or not to give a remedy, it ought to do so on the basis of the facts as they are now.

The starting point for whether there are AECs depends on questions such as: are there barriers to entry? Are there weak competitive constraints?

THE CHAIRMAN: Sorry, if the decision on the AEC in relation to self-pay is not conceded to be wrong, then I do not understand how the challenge to that depends upon evidence now rather than looking at the evidence that was before the CMA.

MS ROSE: Because when the CMA comes to give its decision about whether it is proportionate to give a remedy it must do so on the basis of up to date evidence.

THE CHAIRMAN: But that would be an issue about whether there has been any material change of circumstances affecting the decision that has been made in relation to the self-pay AEC. That is not necessarily the same as completely re-opening the case. My understanding is that they would be able to do that and, indeed, might well have to invite people ----

MS ROSE: Everybody to ----

THE CHAIRMAN: -- to have representations made as to whether they say that there is a material change of circumstances affecting the remedy as you said.

MS ROSE: Yes, but there is a certain unease here because they are going to have to reconsider the insured AEC in its totality because that is being quashed, and that will include, the question, for example, are there significant barriers to entry in the central London market? The central London property market has changed very significantly over the past year, as is obvious. It was booming then, it is now very far from booming and, indeed, recently, proposals for a new hospital have been announced, so there are significant differences. If that is being fed into the AEC decision for insured pricing, but not the AEC decision for self-pay, only the remedy; in our submission that could give rise to an undesirable tension for the CMA. That is the point.

MR GLYNN: Would the updated circumstances not come into the remedy?

MS ROSE: Yes, they would. I do not want to take time on this point because I have a more important point to make which is in relation ----

THE CHAIRMAN: Just before we move away from it, at the moment, it seems to me that you are right to the extent that when one comes to look at remedy, which is going to be a decision which is opened up, the CMA, because of the lapse of time due to the litigation and otherwise, will have to at least consider whether to invite representations on whether there has been a material change of circumstances and, in doing so, it may well be that if they

proceed in a particular way they would do that after they produce whatever new decision they may produce in relation to the first AEC.

MS ROSE: Yes.

THE CHAIRMAN: I follow all of that and, indeed, that seems to me, untutored by anyone else's submissions, likely to be the right course. It does not follow from the fact that they have to proceed in that way that we should be quashing now the determination on the self-pay AEC because there is a perfectly adequate mechanism to take account of the point that you have made.

MS ROSE: I do not want to say any more about that, except ----

THE CHAIRMAN: Allright, I just wanted you to be clear where, provisionally, I was in case you wanted to say anything further.

MS ROSE: Can I now turn to the question of remittal to a different inquiry group?

THE CHAIRMAN: Yes.

MS ROSE: You asked me about the legal test. Can we go to the authorities bundle tab 6? This is the *Sinclair Roche & Temperley* case which is, as far as I know, the only case to actually consider this question as a matter of principle. It is a decision of the Employment Appeal Tribunal concerning the circumstances in which a matter should be remitted to a different Employment Tribunal for reconsideration. If you go to p.773 at the top of the second column on that page, the issue is identified. Then, at para. 46, the EAT identified a number of factors. The first is proportionality, the second is the passage of time, the third is bias or partiality, the fourth is totally flawed decision. They say this:

> "It would not ordinarily be appropriate to send the matter back to a tribunal where, in the conclusion of the appellate tribunal, the first hearing was wholly flawed or there has been a complete mishandling of it. This, of course, may come about without any personal blame on the part of the tribunal. There could be complexities which had not been appreciated, authorities that had been overlooked or the adoption erroneously of an incorrect approach. The appellate tribunal must have confidence that, with guidance, the tribunal can get it right second time."

Then "Second Bite":

> "There must be a very careful consideration of what Lord Phillips in *English* called 'A second bite at the cherry'. If the tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult, if not impossible task to change it: and in any event there must be the very real risk of an appearance of pre-judgment or bias if that is what a tribunal is asked to do. There

> must be a very real and very human desire to attempt to reach the same result, if only on the basis of the natural wish to say 'I told you so'. Once again the appellate tribunal would only send the matter back if it had confidence that with guidance the tribunal, because there were matters it had not, or had not yet considered, at the time it apparently reached a conclusion, would be prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion, if so advised."

We say that passage is very important, because that is what we have called 'confirmation bias'. It does not depend on any finding of unfairness by the Tribunal first time round. It is simply a point that it is very difficult when you have already made up your mind on the central facts to then come to a different decision. I do submit that, in this case, you see that operating in the case of Mr Witcomb in the way that he presents the errors to the FCO official. But, if we did not have that evidence, my submission would be the same. This is not a case where the CMA first time round failed to take a decision on insured pricing, did not make a decision and now has to go back to consider it. It did take what it considered to be a completely robust and defensible decision on insured pricing, and it defended that decision vigorously in the course of these proceedings in its original defence. It was only after we, after a hotly contested disclosure hearing, uncovered the errors, that it was forced to concede that that decision was wrong.

We say that that gives rise to this concern in its most acute form.

THE CHAIRMAN: Are you going so far as to say that there would be an appearance of bias if it were remitted to this inquiry team?

MS ROSE: Yes.

THE CHAIRMAN: I can see that if you meet the appearance of bias test, which is the well-known test ----

MS ROSE: Yes.

THE CHAIRMAN: -- that it would not be lawfully right for us to remit to the same team, but am I right in understanding that your submission goes ----

MS ROSE: Goes beyond that.

THE CHAIRMAN: So you are saying, yes, we do meet that standard but, even if we do not, there is this wider consideration.

MS ROSE: Yes.

THE CHAIRMAN: Just in relation to the wider consideration, can I ask, remission in public law cases to the original decision making body is, I think one could go so far as to say, standard form ----

MS ROSE: Yes.

THE CHAIRMAN: -- even in cases where it will involve a reconsideration of the facts and so on. If one thinks of quashing planning permissions and so on where the local planning authority does it all over again, and that is not thought to cause a problem. So where is the dividing line on your second submission? The first I understand.

MS ROSE: There are certainly cases where the Administrative Court has remitted cases to a different decision maker. We have included to examples ----

THE CHAIRMAN: Certainly, but that tends to be relatively unusual, and also there are lots and lots of cases where they remit to the same, and I am asking for your assistance on that category.

MS ROSE: Yes. There are really three reasons here. The first is what we characterise as the 'complete mishandling of the case' both in terms of the substance and the procedure. You have seen what we say about the process and the unfairness that came right from the early stages when we had to make an application to the CAT at that stage. Even after the CAT had given guidance to the CMA, telling it that it should keep the disclosure room open, that it should engage in an iterative process, we were not permitted back into the room, we were not told about the new IPA, all of those matters developed, so that was after they had had guidance from the CAT, so there is that wholesale process.

Then there is, we say, the complete mishandling in substance. They hinge their decision on an analysis which is completely wrong, that contains basic errors and, not only do they do that, they refuse to reconsider, they refuse to disclose the analysis and they say to this Tribunal that there is no good reason to think there are errors in it. That is deeply, deeply troubling because what that suggests is that the team were simply unable to detect the flaws in their own reasoning. We submit that ultimately this is a question of public confidence and good administration, and we simply cannot have confidence that we will be fairly treated or get a proper reconsideration with this tribunal.

The third point is the appearance of bias in its classic form. We say that that can be seen, not only from the original history of this investigation but more acutely from the recent developments. It should be said that this is a case that has already had serious reputational consequences for the CMA and with which Mr Witcomb is closely personally identified. He has been personally identified in the media as the principal decision maker. In my

submission, that actually is not fair on him, to require him to head the inquiry group a second time given what has happened.

THE CHAIRMAN: I think his position is: "Don't worry about me, I've got broad shoulders". (Laughter) I am sorry, you put it in terms of fairness to him, he says: "I've got broad shoulders. We can take it", he feels that way. Anyway, you have made your point, but I think ----

MS ROSE: I want also to address the question of proportionality. This Tribunal is well aware of the critical importance of the matters under consideration to my client. Essentially we were being ordered to sell a third of our business in the United Kingdom, hundreds of millions of pounds worth of assets, so it is of the utmost importance.

The CMA has very great powers, and it is subject to review only to a judicial review of rationality standard. You, Sir, in your earlier Judgments in the *BAA* case have made it very clear that it has a wide margin of discretion.

THE CHAIRMAN: Yes, that is a fluctuating standard, because there are Convention rights in issue as well.

MS ROSE: Of course, but going by what you said in the *BAA* case, where there were Convention rights in issue, they have a wide margin of discretion. They have very, very great powers, subject only to a light touch review. The decision in issue here requires not only significant technical skill but also very considerable exercise of judgment. Anybody who has engaged at all with econometric analysis knows that the question of the design and execution of an econometric model is not a science it is an art. There are many circumstances in which the conclusions you get out of an econometric model depend on the choices that you make at the outset about what the parameters of that model may be, what the variables are going to be.

We have a situation here where this inquiry group has tried two different pricing models, and they have both failed. In my submission, there is a real risk at this stage that you get a cherry-picked model designed to produce the outcome, and if that happens it would be virtually impossible for us to appeal it, because we will be met with the repost: "This is a matter of expert judgment for the CMA." In my submission this is a real cause for concern, given the history of this case. It is a problem of reverse engineering, whether consciously or not, and I want to make it clear, I am not making any suggestion of bad faith. What I rely on is the points made in this case about the natural human desire not to be proved wrong.

THE CHAIRMAN: On that how do you address the situation that I was putting to you, say, the local planning authority, which has a decision in relation to granting planning permission

quashed and it goes back to them to reconsider. They, likewise, could say, or the challenger could likewise say, there are matters of planning judgment, evaluative matters, we are stuck with the judicial review standard, and yet the court does that all the time. That is what I am struggling to understand, what the parameters of the decision are.

MS ROSE: The answer is that the court does not do it all the time, because sometimes the court remits it to a different decision maker. Sometimes the court has no choice because the decision maker is the Secretary of State, so it has to be remitted to the Secretary of State. On other occasions, the point is simply not taken. What I do not believe has been identified is any case that says: "It is okay", even in a circumstance like this, to remit to the same decision maker.

THE CHAIRMAN: Yes, thank you.

MS ROSE: The next point to make is that the CMA does not suggest in this case that there is any difficulty attached to remission to a separate inquiry team, and that is significant because they suggested they were going to say that but they did not. Can I explain what I mean? If you just take up Witcomb 3, that is vol.10 behind C p.161. If you go to para. 8 he gives you a summary at the outset of his statement of what he says he is going to address in his statement. The last item, he says at the top of p.163:

> "I comment on the difficulties which the imposition of an entirely new Group and case team would cause for the CMA".

Then he comes back to this at the end of his witness statement at paras. 52 to 54, and if you read those paragraphs you will see that he does not identify any difficulty that would be caused to the CMA by remission to a different inquiry group or case team. We say that is very significant because it was plainly the intention when this statement was first drafted that such difficulties would be put before the Tribunal but the conclusion was then reached that actually none could be itemised. We say that you have a situation here where matters of the very greatest possible significance are at stake for my client. A very serious substantive error in the analysis, a catalogue of procedural flaws undertaken after there had already been a successful procedural challenge, and the incautious words of Mr Witcomb to the FCO, and we submit that in the whole of that situation in terms of public confidence, good administration and the maintenance of confidence in the integrity of this process, the fairness of this process, we submit it is an exceptional case that requires remission to a separate inquiry team, particularly in circumstances where it is not said that that will cause any difficulty.

THE CHAIRMAN: Yes, thank you very much.

MS ROSE: Now, can I finally turn to the question of costs?

THE CHAIRMAN: Yes.

MS ROSE: Our position is that in relation to costs it is obviously right that we get the costs of the appeal against the insured AEC decision, and the divestiture decision, because in relation to both of those decisions the appeal is conceded.

What the CMA says is that we should only get the costs of Ground 1. We say that does not make any sense at all, the proper principle is: have we obtained the relief that we were seeking? If we have then we are entitled to our costs. That principle is developed in detail by Lord Justice Neuberger in *R(M) v Croydon*, which is in the authorities bundle, paras 44 to 62, tab 8.

THE CHAIRMAN: Yes.

MS ROSE: The crucial question is: did we get the relief we were seeking? The answer is yes, that means we are entitled to our costs. What is then said by the CMA is that we should not get our costs of the data room exercise because it is said that you would have had to do that anyway if there had been a fair process.

We say that is wrong for a number of reasons. First, you can see from the history that we incurred very significant wasted costs, both in the investigation and in this appeal because of the refusal to disclose the IPA to us. For example, we attended the oral hearing and made submissions hitting the wrong target with KPMG. We then had to plead our notice of appeal without the benefit of the revised IPA. They then required us to plead an amended notice of appeal even though we had already sent them the errors. So there were numerous occasions on which we had to incur excessive costs because they would not concede the errors.

We will now incur a whole range of new costs because of the new procedure, which would not have had to be incurred if they had done it first time round. We say essentially they took the risk of the errors in the IPA and when they refused to disclose it to us and they now must pay our costs of having to take them to this Tribunal in order to uncover those errors.

The final point is indemnity costs, and we address the proper approach at para. 49 of our skeleton argument. We say that this is, indeed, a case that goes out of the ordinary, and that there was unreasonable conduct by the CMA.

THE CHAIRMAN: Yes, thank you.

MS ROSE: Can I just, very briefly, identify the heads of unreasonableness.

THE CHAIRMAN: Well, will we not pick it up from your skeleton, because you are now ----

MS ROSE: Yes, you can pick it up from our skeleton. It is essentially para. 50 of our skeleton argument.

THE CHAIRMAN: Yes, thank you, Ms Rose.

MS ROSE: Yes, can I give you the references? References to the decisions in the final report: the AECs are at paras. 10.2 to 10.5. I do not know if you want to look these up.

THE CHAIRMAN: We will look at them over the short adjournment. The AECs are paragraphs?

MS ROSE: 10.2 to 10.5, so that is the self-pay and insured AECs. The divestment decision, paras. 11. 9 to 11.11, 11.132, and 13.1(a). The other references I was going to give you related ----

THE CHAIRMAN: Forgive me for asking, why are they dotted around?

MS ROSE: I do not know, this was handed to me by my Junior. It is the summary and the conclusions so, as always, you get everything three times: you get the summary, then you get the analysis and then you get the conclusion.

THE CHAIRMAN: Right, thank you.

MS ROSE: Then the references to how we put the statistical significance error, and the point that the effect of it was that there was not a difference in pricing. Re-amended notice of appeal paras. 112 to 121.

THE CHAIRMAN: I think it was Professor Waterson ----

MS ROSE: Yes, I am going to give you Waterson and KPMG. Waterson, appeal bundle 9 ----

THE CHAIRMAN: Sorry, the amended notice of appeal paragraph is different to the one you gave us before?

MS ROSE: I gave you 118, which is in the middle of that sequence, 118 is the summary.

THE CHAIRMAN: The amended notice of application ----

MS ROSE: 112 to 121 is the whole of the development of that point. The Waterson report, application bundle 9, tab 51, paras. 26 to 35, and the KPMG report, appeal bundle 9, tab 49, is s.5 and that is at pp. 4771 to 4778.

THE CHAIRMAN: Thank you very much.

MS BACON: Sir, with the Tribunal's permission, Ms Smith and I would suggest that, rather than coming back at 2 o'clock to deal with the case management issues for our Grounds 3 to 5, we deal with them now, and that would allow Mr Robertson and Ms Howard to leave and not come back after the short adjournment.

THE CHAIRMAN: All right, very well, we will do it that way.

MS BACON: I am very grateful. There is a one minute point, which is a point of clarification about timing, and then there is a 10 minute point which will I think need the court room to

be cleared of those who are not in the confidentiality ring. The one minute point is simply to confirm whether it is possible for Grounds 3 to 5 to start at the end of the hearing window, assuming that Grounds 1 and 2 in the remainder of the HCA appeal do not go ahead.

THE CHAIRMAN: When you say "Grounds 3 to 5" are you talking ----

MS BACON: Our grounds.

THE CHAIRMAN: Your grounds?

MS BACON: Our Grounds 3 to 5. The point is that the consultant issues were originally scheduled to take place at the end of the seven day hearing window, starting on the Friday, 23rd and going until Tuesday 27th. As far as I am aware there is general agreement that that timetable should be maintained even if the remainder of the appeal does not go ahead.

THE CHAIRMAN: My understanding is that the CMA is content with that and no one had any objections to that.

MS BACON: No.

THE CHAIRMAN: I think, so far as the Tribunal is concerned, that is what we will do.

MS BACON: I am very grateful. I have just been asked to clarify that. Now, I have the 10 minute point and I would ask the Tribunal ----

MR ROBERTSON: I just have the one point of clarification, and that is AXA Grounds 3 to 5 to start first on 23rd, and to be followed by the FIPO application?

THE CHAIRMAN: Yes.

MR ROBERTSON: I think it is envisaged that will start sometime in the middle of the following day.

THE CHAIRMAN: Yes, but the parties do need to divide up their time sensibly between themselves before the hearing begins, so we do not have wrangles about the start, and we will be looking to finish on Tuesday, 27th.

I direct that the courtroom be cleared now, for everyone who is not in – is it confidentiality ring 1?

MS BACON: It is the ordinary confidentiality ring, so I think that is 2.

THE CHAIRMAN: So everyone not in confidentiality rings 1 and 2, please leave the court now.

MS BACON: Anyone who is in 2 but not in 1 can stay. 1 is super-confidential, and this is not a super-confidential matter.

THE CHAIRMAN: No, that is what I was saying; I think that is what I said.

(For closed hearing see separate transcript)

(Adjourned for a short time)

THE CHAIRMAN: Yes, Ms Smith.

MS SMITH: Sir, if I could ask you to turn up the CMA's skeleton, which I think is in the CMC bundle at tab 2, and I will make my submissions by reference to this. The three issues that we were asked by the Tribunal to address at this CMC are set out in para.1, disposal or partial disposal of HCA's application for review, the impact on AXA and FIPO's applications and costs. The first is the disposal or partial disposal of HCA's application for review. We identified in para.2 four issues between the parties on this which were effectively adopted by Ms Rose, so what part of the Decision should be quashed in consequence of our admitted error under Ground 1, should there be a remittal and, if so, what should the scope of that remittal be? In the light of our concession is it necessary or appropriate to determine any other grounds of HCA's application or Grounds 1 and 2 of AXA's application, and if there is a remittal must the matter be determined by a fresh inquiry group and case team? We set out our submissions on each of those four issues in para.3.

This morning, Sir, you and your colleagues heard lengthy submissions on the CMA's conduct. Obviously the purpose of today's hearing is not to conduct a mini-trial on Ground 1. The CMA has conceded that ground. In our submission, the submissions that were made by Ms Rose on the CMA's conduct go only to the issue of whether there should be a new remittal to a new inquiry group ----

THE CHAIRMAN: And costs?

MS SMITH: And costs. With your permission, Sir, I will deal with those submissions then. The first topic on which I wish to make submissions starts at para.4 of our skeleton, which is the parts of the Decision under challenge to be quashed, or the Decisions under challenge to be quashed.

THE CHAIRMAN: Can I just say, we looked at the passages that Ms Rose identified for us in the Decision and Report, which it may be helpful to have to hand, volume 1, and the paragraphs that she gave us in relation to the AECs were paras.10.2 to 10.5. As we read it, that covers both the finding in relation to the insured's AEC and the self-pay AEC, and if we were not minded to quash in relation to the self-pay AEC - it is a matter which we debated with Ms Rose - then it seemed to us provisionally that what we would quash would be the second sentence of para.10.5, which is the actual finding of an AEC in relation to insured pay.

MS SMITH: Insured prices in London, because it is also important that it is limited to in London. In fact the relevant paragraphs are 10.2, 10.3 and 10.5. 10.4 relates to the decision that was not made of an AEC on insured prices outside London.

THE CHAIRMAN: Are you saying that we should quash more than 10.5?

MS SMITH: No, Sir, you have identified the relevant paragraphs.

THE CHAIRMAN: Then in relation to divestiture remedy, the paragraphs we were given to look at were 11.92, 11.111, 11.132 and 13.1(a), and it seemed to us, but again we would welcome assistance from you and indeed Ms Rose in reply, that actually what one would quash would be on p.313, 11.143, which seemed to us to be the actual conclusion or finding, and then para.13.1(a) on p.440, because this is, in fact, setting up the analysis of whether a particular remedy would be effective and proportionate, but I think one would also add, although Ms Rose did not identify this for us, para.13.48 on p.448, which is the actual decision that they should introduce the package of remedies summarised in 13.1(a).

MS SMITH: That seems sensible, Sir, but I will double-check.

THE CHAIRMAN: I am hearing Ms Rose saying *sotto voce*, "only a part of that". It did not seem to us that it was only a part of it, because is not the effect of quashing the AEC on insured pay in London that one could not be sure that it would be proportionate to require the remedy in 13.1(a), and therefore it is the entirety of 13.48. That seemed to me to be a point, if anything, in your favour. Subject to argument on whether we should also quash the first sentence of 10.5, which is the distinct finding of AEC in relation to self-pay, can I take it that we all *ad idem* as to what the relevant parts of the Decision and report are which would be quashed?

MS SMITH: Yes.

THE CHAIRMAN: Forgive me, I am looking at Ms Rose as well just to make sure that I am not going off on a false basis.

MS ROSE: Yes.

THE CHAIRMAN: Thank you. That is helpful.

MS SMITH: As to the questions of the parts of the Decision to be quashed and then the remittal or the ambit of the remittal, I think it is important to start by making some brief submissions on the precise ambit of the concession that has been made by the CMA under Ground 1.

It is also important to be clear as to what the errors are which the CMA has accepted were uncovered in the data room which lead to its concession of procedural impropriety.

THE CHAIRMAN: I am not going to stop you doing that, but I just question in what detail we need to go into that for the purposes of deciding what we quash in the report. We have identified certain paragraphs which it is now common ground that we do quash on the basis of the acceptance by the CMA of error under Ground 1.

There is a question mark, because Ms Rose, although she did not press it very strongly she certainly did not abandon it, as to whether we should be also quashing the first sentence of

10.5 which is the finding of AEC in relation to self-pay patients. You oppose that, as I understand it?

MS SMITH: Yes.

THE CHAIRMAN: If we are with you on that then is it not straightforward that all we quash are the paragraphs that I have already identified? If we are against you on that, is it not the case that we add to those paragraphs the first sentence of 10.5? All the reasons support a range of other findings of AECs, and so on. At the moment, I have not understood Ms Rose to say we go back trying to edit the report, and you are not suggesting that. Subject to that very narrow argument on the first sentence of 10.5 ----

MS SMITH: I can address the AECs to the sub AEC and then address the scope of the remittal, but I do think the extent of the concession that we have made and the nature of the errors is important to set the scene for subsequent submissions on remittal and on the subsequent submissions on a new inquiry team.

THE CHAIRMAN: Certainly, that I understand, and I just want to keep it clear what we are debating at any one point in time.

MS SMITH: Let us just focus then on the parts of the Decision to be quashed. We have identified and we agree with your indication on that, Sir.

It is important to make these following points.

THE CHAIRMAN: Can you allow me a moment.

(The Tribunal conferred)

THE CHAIRMAN: I think you can take it that we will not quash the first sentence of para.10.5. We have heard the argument from Ms Rose and in due course we will give a ruling, but you do not need to take up time on that.

MS SMITH: In that case, if I may just make my submissions by way of introduction as to what the concessions are on Ground 1, and what the errors are which the CMA has accepted were uncovered by KPMG in the data room which led to that concession, the concession of procedural impropriety, and this is important because Ms Rose at various points in her submissions this morning made generalised references to various substantive errors which we are supposed to have accepted. It is important that our concession on Ground 1 is limited to two errors that are identified by KPMG in the data room. If you have, and I am not sure where it is in your bundle, the amended defence, you can see our pleaded case on that. I think it is in a bundle just called "Amended Defence". Ground 1 is addressed at p.23 of the amended defence, under the heading "C. Ground 1: Procedural Unfairness". At para.87 we refer back to the pleading in para.64 of the re-amended notice of application and

the assertion that is made in that pleading which relates solely to errors identified by KPMG in the data room during the summer of 2014, and HCA's assertion that:

> "… had it been given access to the new analysis during the administrative they would have wished '*to persuade the CMA in relation to the quality and probative force of its New Analysis.*"

We then go on in para.88 on p.25, so the way this red lining has worked is that the "The" at the start of that paragraph has found its way back up to the top of p.24, but there are two errors that we identify in para.88, a computer coding error in the calculation of R-squared statistic in the CMA's regression analysis, which consists of omitting a command in the software package that was constructed specifically by the CMA for this modelling:

> "Correcting for the computer coding error reduced the levels of the R-squared relative to the R-squared levels computed in the New Analysis and reported in the Final Report."

That is the first error and I will explain that, if I may, briefly.

The second error is again a computer coding error in the statistical significance test for insurer specific price indices.

The first error on the R-squared statistic, I think it is important just to put it in context, is relevant to the following issue: there is a clear variation found by the CMA in episode prices, prices for patient treatments, charged by HCA and TLC. HCA's case has always been that that is due to thematic differences in the offerings made by HCA and TLC, and particularly the nature of the patients that they treat. It is nothing to do with a lack of competition. Those price variations can be explained by these differences, and the CMA needs a control for the systematic variations in price. That is addressed in para.98 of the amended defence, p.45:

> "HCA's first argument is that patient "episodes" cannot form the basis of a like for like comparison unless it is established that the factors that drive "episode price" do not vary systematically as between different providers."

That is their NoA 84. So as a result of this submission that has always been made by HCA throughout the original consultation approach, the regression analysis carried out by the CMA controlled for factors of age, gender and length of stay, factors which the CMA could identify from the data. That is para.99 of the amended defence at p.46. You see it there, I am not going to read it out, but para.99 explains that point.

The R-squared statistic shows the proportion of a variation in episode prices that can be collectively explained by those factors. So if you have an R-squared statistic of 1, those

factors, age, gender and length of stay, explain all of the variation in episode prices between HCA and TLC. If the R-squared statistic is less than 1, they do not explain all of it, and you look for other factors which might provide a systematic explanation of the variations. The CMA looked for those and held that there was none.

The CMA's conclusions, the issue is - can I take you now to KPMG's data room report, which is in appeal bundle 9, tab 49?

THE CHAIRMAN: Just before we go there, I do not want to lose sight of the nature of the claims which are now being made in the re-amended notice of application. I think we should tell you now that in due course we will need your assistance on para.12 of Witcomb 4, I think it is, in relation to what is said by way of HCA's case in their re-amended notice of application, in particular para.117 and ----

MS SMITH: Yes, which is exactly what I am trying to do by explaining ----

THE CHAIRMAN: I appreciate that, and that is very likely where we are going, but I just want to get on the record what I need assistance with. Thus far, you have been explaining the nature of the concession that has been made by the CMA. At the moment, I think it may be the case that although the CMA has made a concession to some extent, the nature of the criticism that is being made by HCA goes wider than that concession, and it is in relation to the criticism that they wish to make about the materials that they say Mr Witcomb in para.12 has indicated arguably, on the face of things, that he has made up his mind.

MS SMITH: We absolutely take issue with that, and that is why it is necessary ----

THE CHAIRMAN: Take issue with what?

MS SMITH: With their submissions on para.12 of Mr Witcomb's fourth witness statement.

THE CHAIRMAN: We will come back to that. Do you take issue with the point of the analysis that I was putting to you that the complaints made by HCA about the work that has been done in the IPA go wider than the particular points on which the CMA has made its concessions?

MS SMITH: I am not sure exactly which paragraph Ms Rose referred to on that.

THE CHAIRMAN: That is why I was going to give you the assistance of referring it to you now, para.117(a), of the re-amended notice of application:

> "The impact of these errors is substantial. When the correct tests are performed, the results show that:
>
> (a) there is no statistically significant difference in the insurer-specific price indices in [certain numbers]."

Then also (c) and (d) and then para.118. I am very concerned that this part of the argument does not just go off on what the CMA has conceded.

MS SMITH: I am not sure that this criticism does go wider and I will explain why. Can I explain the first error, which is the R-squared statistic? The second error is statistical significance, which is what is being argued about in 117 and 118.

THE CHAIRMAN: Speaking for myself at the moment, I do not have clearly in my mind a clear difference between the R-squared analysis and statistical significance.

MS SMITH: They are quite different things. The R-squared analysis goes to the extent to which the regression analysis can deal with the variations in price and the regression analysis control for systematic differences in the differences in price. That is quite different from statistical significance, but I will go on to ----

THE CHAIRMAN: Why? If you had an R-squared value of 1, you said you would statistically have eliminated any impact of other factors, including the ----

MS SMITH: Yes, the statistical significance testing was applied to something quite differentwhich is that the model produces figures. The figures that it produces are one figure for the average price difference between HCA and TLC. That is the average price index. I cannot say what that figure is, because that is confidential, but that is one figure. It also produces a number of other figures - the percentage price difference between HCA and TLC - for each of the insurers for each of the years for which there was data, so the average pricing difference between HCA and TLC and prices charged to BUPA for 2007. It does that for each of the insurers in each of the years. So you have a number of price indices - the average price index and the insurer specific price index. They each have numbers attached to them of, for example, 2 per cent, 3 per cent ----

THE CHAIRMAN: I am sorry to interrupt you again, Ms Smith. We are going now into some detail of your submission, and, perfectly fairly, that is because you were responding to points that I had raised. However, I have to say you slightly left me behind. You have made your point that ----

MS SMITH: Perhaps I could deal with it step by step. I think it might be helpful to deal with, first of all, the regression point, and the point that this goes to in the pleaded case brought by HCA. Could I take you to the data room report, which is at bundle 9, tab 49? Let us start at p.4769 of the bundle numbering, part 4.2 of the KPMG report. This is about the R-squared statistic, and what this goes to is a separate issue from statistical significance. It goes to whether the CMA introduced adequate controls in its regression analysis for

characteristics that may explain differences in price. At para.84 KPMG cites the relevant paragraph in the final report:

> "For each treatment in the common basket, we regress episode prices on patient characteristics …"

So a regression is carried out on the episode prices before they are fed into the average indices. So they regress the episode of patient characteristics of age, gender and length of stay. So those characteristics are controlled for before the figures are produced.

Then para.85 of the KPMG report said:

> "The CMA went on to state:
> '… these variables and the constant collectively explain the majority of variation in insured episode prices for the majority of treatments'."

The footnote is:

> " The adjusted R-squared varied between 48 and 99 per cent in regressions for the four national operators …"

I should possibly not be reading out the numbers because the whole of this, though it is not marked up as confidential but I believe it is. You see the footnote at para.86. That leads to the conclusion in 87:

> "… the evidence quoted above was used by the CMA to conclude that the three factors (age, gender and length of stay) sufficiently accounted for any systematic differences between patients attending HCA and TLC to allow a like-for-like comparison."

So those controls were introduced to allow a like-for-like comparison between the price differences.

Then KPMG found that there was this computer coding error in para.89, which led the CMA to overstate the R-squared levels, so led the CMA to overstate the extent to which the regression analysis controlled for these various factors, of age, gender and length of stay. That is the error explained in para.89. This led to KPMG reworking the R-squared values over the page in table 9.

THE CHAIRMAN: I am sorry, the over-estimate of R-squared values means what?

MS SMITH: It means that the factors that the CMA identified of age, gender and length of stay might have explained less of the variation in price than we had decided in the final report. So there may be more of a variation in price that might be explained by other differences between the patients that HCA and TLC treat.

THE CHAIRMAN: Which might include AECs - is that right?

MS SMITH: No. The point is, are the figures for the price differences that you are comparing a comparison of like-for -like? HCA said, no, they are not a comparison with like for like because we treat different types of patient. We say, all right, we have identified from the new data these various factors that go to the nature of the patient - age, gender, length of stay. We have put these into our regression analysis so that the figures that come out at the end are not affected by those factors of age, gender and length of stay, but only a small proportion of the variation in price is explained by something other than those factors. So if you look at table 9, the first column headed "CMA R-squared on KPMG Data Error Correction IPA" shows that these factors explain the very large proportion of the variations in price. You can see the figures in that column. You see the reworked figures that KPMG have done once they have corrected the computer coding error, and you can see that these factors explain for a lesser proportion of the variation in price.

Then they make the submissions set out in paras.91 and 92. They attack therefore ----

THE CHAIRMAN: I am being slow here. If the CMA has over-estimated the R-squared levels, that suggests that they have been treating a higher proportion of the cases of differences in pricing as being attributable - is this right - to age, gender or length of stay?

MS SMITH: That is right.

THE CHAIRMAN: So if you reduce the R-squared levels, you decrease the proportion that are attributable to those factors - is that right?

MS SMITH: Yes.

THE CHAIRMAN: Then why is that not opening up the scope for those other differences not explained by age, gender and length of stay to be explained by other possible causes, including the AECs?

MS SMITH: No, the point that HCA are attacking is what is set out at the end of para.92 of the report. They attack ----

THE CHAIRMAN: Let me just read that.

MS SMITH: It is whether or not a likefor-like comparison could be carried out.

MR GLYNN: In other words, if the R-squared is low, it looks as though you have got many other factors to take into account. If you have not grappled with those you cannot be sure.

MS SMITH: Exactly, whether you are carrying out a like for like account. The note that I am being handed, and I think this clarifies it. The variation is for episode prices for a single hospital or insurer pair. It is not about the general differences between HCA and TLC. So when there are differences between episode prices for a single hospital or insurer pair, is

that a like for like comparison between the episodes, or are the differences in the prices due to these other factors?

THE CHAIRMAN: Does it work this way: you have to give yourself sufficient assurance you are comparing like for like before you have a sufficient platform on which you can then perform other analyses? If is not sufficiently like for like it is just like random information.

MS SMITH: Exactly, and the point is that the R-squared statistic is one way of measuring that, and the computer coding error meant that we had a higher R-squared statistic than we might have had without the computer coding error. So it is the first stage of comparing like for like when you are comparing episode prices.

The second error goes to ----

THE CHAIRMAN: Just on that, the CMA had excessive confidence that it was truly dealing with like for like information?

MS SMITH: Yes, the concession that is made is in para.106 of the amended defence.

THE CHAIRMAN: Yes, I was not looking so much for how it is formulated in the pleading, I just want to understand how it works.

MS SMITH: Yes, that is essentially it, we say.

THE CHAIRMAN: All right, I have understood.

MS SMITH: But we will reconsider this.

THE CHAIRMAN: Sorry, where did you want us to look, p.26, para.89, CMA's position that there was a computer coding error which led to this R-squared statistic being overstated. We have seen that. HCA should be given the opportunity to comment. Was there anything additional you wanted to show us?

Speaking for myself, I think I now have sufficient understanding at least to understand the R-squared analysis.

MS SMITH: The second point of statistical significance, which is looking at the numbers that come out at the end of the model. The numbers, as I said, that come out at the end of the model, once you have reassured yourself you are comparing like with like, you compare episode prices and you create a model to produce a number of price indices. The average price difference between HCA and TLC for a common basket of treatments is the average price index, which is a percentage figure. I am not going to say what the percentage is. Then also the insurer price indices which I have indicated. That is the price difference as a percentage for TLC and HCA for each insurer for each year. These showed consistent differences in prices of various different percentages. I am not going to say what the actual percentages were, but some of them were 1 per cent, some of them were 4 per cent, some of

them were 8 per cent, but each of these indices showed a difference in price and the majority were showing that HCA charged a higher price than TLC.

We had those figures that come out at the end of the model, and they are each percentage figures, for example, 2 per cent, 3 per cent, 8 per cent.

The CMA then tested those insurer price indices for statistical significance, and it is the statistical significance testing in which the second error is identified. That is para.117 of the amended defence, which is on p.57. HCA says that the results of the IPA do not disclose consistent statistically significant prices - this is para.118 of the re-amended NoA. They rely upon analyses of the CMA's statistical significance testing. That is testing that was carried out on the numbers after they came out of the model.

Paragraph 118 over the page, p.29, we accept that there was the computer coding error in the CMA's statistical significance testing:

> "… which increased the proportion of insurer specific price index differences, which are found to be statistically insignificant in terms of the chosen statistical test. The precise extent, impact and effect of this error will be considered afresh if there is to be a remittal …"

So the statistical significance error is addressed in the KPMG report back in bundle 9 at para.99 through to 105. Again it is a computer coding error in carrying out a particular statistical significance test. This is a bootstrapping. Once you have the figures coming out of the model for the insurer specific price indices, and the statistical significance testing was only carried out on the insurer specific price indices, you have a number of different percentages and you then subject them to subsequent tests for statistical significance, whether those price differences are, in fact, significant or not.

There was a computer coding error in the test that was carried out and that had the result, according to KPMG, on the results shown in table 10 on p.4777. The results originally obtained by the CMA are set out in column A. KPMG's work is in column E, and you will see that for each of the insurer price indices for these various years the figures were subjected to significance testing and many more on KPMG's analysis were found to be insignificant. The point is that these errors do go essentially to the robustness of the results that come out of the model. They do not alter the actual results that come out of the model. The insurer's specific price indices is still 2 per cent, but is that 2 per cent figure statistically significant or statistically insignificant when this testing is carried out on it. Is it robust enough to rely upon?

So the numbers do not change. It is just that when they are subjected to the statistical significance testing, do they stand up to that testing or not? That is what the statistical significance point was. So the insurer specific price indices, the numbers do not change. That is what Mr Witcomb was saying. What he was saying is that the test that was subsequently applied in this case, the statistical significance testing as to the robustness of those figures, did change.

THE CHAIRMAN: I am sorry, when you say that the numbers do not change, can you identify for us which numbers you say do not change - in a table or ----

MS SMITH: The numbers are not here in the table. I can find you the insurer specific price indices in the Decision. The point is that the KPMG report only goes to the statistical significance testing which was carried out on those figures.

MS POTTER: Ms Smith, can I just stop you there, because I did want to come back, and this might be the right time to do so, to para.88 of the amended defence which does say that the errors set out in the data room report included the following, and then it lists those two. Of course, the KPMG report does cover a number of areas. I do not know whether the CMA is actually setting out its position on this?

MS SMITH: The CMA then goes on in para.89 to set out its position on those errors, "We agree the errors took place and that they led to …"

MS POTTER: That is on the two errors.

MS SMITH: Then we say that in the light of those two errors at para.90, HCA should be given the opportunity to consider and comment on the new analysis. So it is those two errors that we say are not immaterial and which mean that - this is the point I was going on to make - they were matters upon which the HCA had not had an opportunity to make representations. We accept they are not immaterial and in those circumstances it is appropriate to allow re-consultation on the IPA.

MS POTTER: My understanding is presumably the CMA's position is that you do not know whether the other errors are material or not, or are you expressly saying that the other errors are immaterial?

MS SMITH: We are saying that at the moment we do not accept - if I can take you an example. For example, there are some other errors in the KPMG report. If you look at para.100 of the defence, p.48 of our amended defence, there are other errors in the KPMG report which are in section 4, where they have identified the incorrect calculation of episode pricing. This is paras.101-103:

"HCA states that KPMG's analysis in the data room revealed that (a) for a number of treatments the CMA's regression analysis predicted zero on negative prices…. and (b) the CMA's regression analysis contained 'out of sample predictions'. [The CMA notes] that KPMG identified in its Data Room report four instances of negative prices…, four instances of zero prices and , two instances of out of sample prices"[in a total of] "705 regressions.... As for the out of sample prices, …KPMG accepts that their impact on the differences in insurer specific price indices is 'immaterial'."

So they have already accepted that that error is immaterial.

"As for the zero and negative predicted prices, on KPMG's analysis, these led to some price differences being over-estimated and some under-estimated but the average price difference… was broadly the same."

That is a different point. Then we go on to say over the page, para.104:

"KPMG recognises that "[when there is]" a small number of observations "[you can have]" extreme "[results]. [We]" recognised this in conducting itst sensitivity analysis."

So we say, and this is the point I am trying to make in 105, that we do not accept that those matters in themselves remittal and reconsideration because we do not accept that they are of the materiality to merit remittal and reconsideration on their own, but as there is going to be a remittal they will be reconsidered on remittal anyway.

MS POTTER: So you will be considering the impact of them, so therefore there are potentially some price differences?

MS SMITH: We have carefully considered the KPMG report. We have identified what Professor Waterson himself said were the two main errors that he had found in the report, being the R-squared statistic and the statistical significance testing, and we have said, yes, we accept those are not immaterial, and that they merit reconsideration. We say there should be a remittal for reconsideration of the IPA and further submissions on the IPA, and obviously all those matters will be considered on the remittal even though, in themselves, they may not have merited the remittal and reconsideration.

I am sorry if that has not been clear before now.

THE CHAIRMAN: Yes.

MS SMITH: In any event, the average price indices are set out - I am sorry, I do not have the correct version of the Decision, but for your records - in figure 6.2 under para.6.345 of the Decision. There you will see the average price index and the ----

THE CHAIRMAN: Do you have a page number in the report for that?

MS SMITH: I am not sure I have got the correct page number. This is volume 1 of 2 ----

THE CHAIRMAN: Page 159.

MS SMITH: Page 159, thank you. That is the average price index. What I wanted to find were the insurer specific price indices, which are in the appendix. Perhaps I could come back to you with that reference.

THE CHAIRMAN: If you could give us the page number on that.

MS SMITH: Those are the errors that we accept are not immaterial, and basically we accept that they were matters which HCA have not had an opportunity to make representations on during the consultation, so it is appropriate to allow re-consultation on the IPA, but we accept obviously that when there is re-consultation on the IPA submissions will be made on all the other errors, and we will consider them.

In this regard, it is also important to note that, despite what the CMA says, in effect Ms Rose was saying that this is one in the latest in a series of what she described as substantive errors, up to then it is quite clear that we have not accepted that those errors were material.

On Ms Rose's chronology, if you could just look back at that, there are two points that I do need to correct. HCA's chronology starts at p.263 of the CMC bundle, tab C. There is a chronology of events and there were two points at which Ms Rose said, "They had already accepted that there were substantive errors in their analysis". The first of those was 25th October 2013, and HCA says in its chronology that the CMA writes to the parties to explain that, following an audit, it had identified various substantive errors. What happened is characterised in a certain way by HCA, which we says mischaracterises what went on.

> "On 25th October 2013, the CMA writes to the parties to explain that following an audit conducted prior to providing access to the new Data Room, it had identified various substantive errors in its analysis."

They refer to AB7, p.26. I am not sure whether it is worth me taking you to that, but what is clear in the letter of 25th October 2013, the CC says, "Yes, we have identified these errors, and we have updated results in response to these errors, but the updated results are not materially different to the previous results". So at that stage this was a different level of error, if you want to call it that.

The same point can be made as to the chronology from the letter of 12th August 2014. Again HCA characterises this as the CMA accepting substantive errors. This is 12th August 2014. The CMA had carried out an internal audit of the IPA prior to HCA being provided

with access to the data room, and the CMA had identified a number of substantive errors. If you actually look at the letter, which is in bundle 9, tab 46 ----

THE CHAIRMAN: We do not have a bundle 9.

MS SMITH: I think you had it over the KPMG report, the data room report.

MS POTTER: We were looking at this in a different version, I am afraid.

MS SMITH: Perhaps I just need to make the point and the document can be sent subsequently.

Again, yes, this internal audit was carried out, and some errors were identified. Again, these were very minor errors which did not have any impact on the results. The CMA has been careful to go back and look at the IPA at all stages, and when it has found errors it has admitted them. When it has found errors that have been drawn to its attention which it considers are not immaterial then it has taken the course that it is taking in these proceedings, which is to accept that the IPA should be reconsidered. We do not accept, and I make this submission in the light of what Ms Rose was saying this morning, that these two latest errors which are identified in the KPMG report should have been spotted by the CMA before they were drawn to its attention by KPMG, or that our failure to do so shows that we are so incompetent that we cannot be trusted with a remittal.

Those errors, the statistical significance testing and the R-squared statistic, were found by KPMG after it had ten members of its team in the data room every day for 30 days. I have the order. The 13 economists were identified to go into the data room. There were ten computers in the data room and a limit of ten members of the KPMG team in the data room every day for the period the data room was open.

In fact, Professor Waterson himself accepts that these sorts of mistake are easy to make, and I do think it is important that I take you to Professor Waterson's report in this regard, although with the caveat that we have not accepted that his report is admissible to support the points. It is in response to the submission that we should have found these before KPMG did. Professor Waterson's report is at tab 50 in bundle AB9, para.29. There he is looking at the bootstrapping test, the statistical significance testing. He says about half way down para.27:

> "By contrast, in the problem at present in hand the appropriate ("bootstrapping") technique to obtain standard errors required for statistical comparison is not available as a standard statistical routine that can be called directly within the computer package (Stata, for example) through a one line command. It has to be coded within the package as a bespoke process requiring care and skill. It is easy to make mistakes in doing this type of task and the

> results will need to be checked carefully. Unfortunately for the analysis performed in Appendix (6.12), a rather clear mistake has been made.
>
> I was immediately puzzled on my first visit to the data room where I saw CMA results for differences in insurer prices, including statistical significance, as between HCA and TLC. It is unusual empirically that a mean difference of less than [x] …"

and the figures are confidential -

> "… to take one example, in basket prices between operators would turn out to be statistically significant, equally unusual that the reported standard error there was less than one-tenth of 1 per cent of the means."

The point is that when these mistakes are drawn to our attention we have properly accepted that the IPA should be reconsidered.

The important point is that the error of law, in our submission, the failure to consult on matters that we should have consulted on, vitiates the IPA and only the IPA.

How does the IPA fit into the CMA's Decision? I think you are already there, Sir, but the point is addressed in paras.5 through to 10 of our skeleton argument. There are two structural features that are identified by the CMA, the structural features of high barriers to entry and expansion and weak competitive constraints. Those structural features are unaffected by the IPA. The CMA finds, para.6 of our skeleton, that those structural features in combination give rise to AECs in the market which lead to higher prices - that is the self-pay decision, and para.7, higher prices being charged by HCA to private medical insurers in central London. The IPA goes to proving the higher prices.

We say that the errors of law do not vitiate the structural features, the errors of law only vitiate the IPA. We accept, of course, that the IPA was one of the elements that went to the finding of an AEC for insured prices in central London, and so we accept that that decision should be quashed.

We also accept that the package of remedies which the CMA decided to adopt proceeded on the basis of there having been an AEC plan for insured prices in central London. So in that way the IPA feeds into that decision; but also that the IPA was used to calculate the potential price benefits of divestment. So it also came in, in effect, sideways into the divestment remedy. We also accept, therefore, that the divestment remedy decision should be quashed. We do not accept, and I do not need to make any further submissions on that, that the self-pay AEC decision should be quashed. It bears no relationship whatsoever to the IPA.

Then the question is, given those concessions, what should be remitted to the CMA? This we address at paras.16 to 19 of our skeleton argument. The first important point is that the scope of a remittal of a general point should not be determined by reference to grounds which have neither been conceded nor which have succeeded in front of the Tribunal.

THE CHAIRMAN: I am a little bit unclear to what extent we need to do anything in relation to remittal other than quash the paragraphs that we have identified and make a decision on Ms Rose's submission that there should be a direction on remittal, that the matters in relation to which the decision has been quashed should be considered by, I think she says the whole team should be different, but that is susceptible of division between the inquiry group and the case team. There may actually be a very important distinction between the inquiry group and the case team on those submissions. We are going to come to that. You seem to be building up to some other directions that would be given on remittal, which I do not understand at the moment.

MS SMITH: Sir, what is the purpose of the remittal? There are questions as to who the remittal should go back to and that is a separate issue. HCA's position is that, bizarrely it says in para.26 of their skeleton argument, there should be no remittal at all. They say in para.26, we have won, that is the end of the matter, the Decision should just be quashed and then is a matter for the CMA whether it wishes to open a new investigation, there is no reason why the Tribunal should remit the matter for reconsideration. We say it should be remitted, but remitted only to the extent necessary to ----

THE CHAIRMAN: Just on that, I did not understand Ms Rose to be pushing for that outcome when she made her oral submissions. I did not understand that to be the case.

MS SMITH: I am not sure what she says should be remitted. We say the Decision should be remitted to the CMA. The important point is ----

THE CHAIRMAN: Just on that that, your position - is this right - is that if we quash those identified paragraphs, which we will quash because it is common ground that those are the relevant ones on the determination that we will make in respect of not putting the AEC in relation to self-pay in the same bracket, we quash those and remit for reconsideration as to whether any findings should be made in relation to that identified AEC and what remedy, if any, should be directed?

MS SMITH: We may be at cross-purposes, and you may be thinking that this is provided for in your proposed order, but the point is that we do not propose that there should be a reconsideration, for instance, of the findings on structural features, that there are high barriers to entry and expansion and that there are weak competitive constraints. Though the

challenge to those findings of structural features are contained, for example, in Grounds 3 and 4, we do not concede to those grounds. We only concede the procedural unfairness under Ground 1, which relates only to the IPA, the insured pricing analysis.

THE CHAIRMAN: What I am struggling to understand is, why would we be trying to control what the CMA reconsiders beyond quashing the particular finding which we have identified, quashing the direction on remedy which we have identified, and remitting to the Tribunal for reconsideration those aspects of its Decision. Having said that, it will be for the CMA to consider whether anything that it does in relation to that finding, that determination, might constitute a material change of circumstance which would affect any other part of the remedies which it has identified should be carried through.

MS SMITH: The CMA is concerned to ensure, given that its concession is limited to procedural unfairness on Ground 1, which was simply the argument that HCA should be re-consulted on the "new analysis" contained the IPA, that by accepting that the matter should be remitted to it, it is not required to go further than carrying out effectively remedying that admitted error of law and that particular procedural unfairness. The procedural unfairness identified by HCA in its Ground 1 is that it was not re-consulted on the new analysis contained in the IPA. What we are proposing is the process set out in para.18 of our skeleton argument, which was also set out in our correspondence.

THE CHAIRMAN: That is not asking us to make directions, is it? I read it as the CMA saying what they were proposing to do. At the moment, I am at a loss as to whether it is appropriate for us to endorse that, say anything about it, beyond quashing the identified parts of the decisions that we referred to and remitting those questions to the CMA for re-determination.

(The Tribunal conferred)

Ms Smith, what my colleagues are raising with me as a concern is that you seem to be wanting us somehow to bless these proposed procedures by the CMA as things go forward, and at the moment I am not persuaded that that is an appropriate thing for us to do. If you are saying you want our blessing you had better tell us what directions you want us to make and then we will consider those.

MS SMITH: We have sent a proposed draft order to HCA on a number of occasions.

THE CHAIRMAN: All sorts of issues might be thrown up when the CMA reconsiders, with the benefit of informed representations from HCA, what should be done in relation to the finding in particular of an AEC in relation to the insureds pay part of the market.

MS SMITH: The order that we were asking for, if I could just draw your attention to it, Sir, which is we say is well within the Tribunal's power to order, just to clarify the position, we are worried that if there is not the clarity then what we do not accept is that by conceding Ground 1, we have to go back to the beginning and redo the whole exercise. That is essentially what HCA say we should do.

THE CHAIRMAN: At the moment what I am contemplating will not direct that you have to do that. On the other hand, it will not say that you do not have to do that, because it just leaves all arguments at large as to what fairness may or may not require in relation to other parts of the reasons for the decision which may or may not be affected by the additional work that is now going to be done.

MS SMITH: Before I perhaps take stock on that, let me just show you what we propose ----

THE CHAIRMAN: Show us what the directions that you wanted were.

MS SMITH: If I can show you what the proposal was to see if you are concerned by that, Sir, it is at p.119 of the CMC bundle, tab C, attached to a letter from the Treasury Solicitor of 26th November, a draft order that was put to HCA. What we had envisaged is in para.3 on p.120. It is simply to obtain clarity as to what happens on remittal and what happens to the outstanding grounds of appeal.

THE CHAIRMAN: Even this proposed order that you put before us does not achieve, I think, what you seem to be intimating that you wanted, which was the Tribunal's blessing on how the CMA now propose to proceed. Speaking for myself, I would have difficulty in giving that blessing because I do not understand enough about all the ramifications.

MS SMITH: No, but we do not agree, faced with essentially what HCA is saying now, that we have to do the whole job again. It was an attempt to say that, effectively, the matter has to be remitted in so far as necessary for reconsideration of the error of law which has been accepted - in so far as is necessary to vitiate the error of law that has been accepted. The error that has been accepted is limited to the procedural failing in Ground 1. This is simply to make it clear, because HCA have submitted in their skeleton - I am not sure explicitly today, because Ms Rose's oral submissions were not clear, but my understanding is that they want a full remittal of everything because they say that once the Decision is quashed, that is it, everything has to go back. We are saying that in order to obtain clarity, that has been ----

THE CHAIRMAN: No doubt Ms Rose will clarify her position in reply, but at the moment I do not see how what we do today will result in everything going back, as you say, because all

the reasons in the report have potentially some relevance to a whole range of AEC findings - not the ones that we are now debating but other AEC findings in the report.

MS SMITH: The KPMG report, Sir, are you talking about?

THE CHAIRMAN: No, I am talking about the CMA Decision.

MS POTTER: What we are saying is that we are assuming that you would be standing by that report given that it underlies a whole series of different things ----

MS SMITH: Absolutely.

MS POTTER: -- but at the same time presumably in relation to this specific AEC, you have already, I think, accepted that you would need to consider any representations on changes of circumstance.

MS SMITH: Yes.

MS POTTER: So that does not seem to be particularly covered by your draft order. If it were the case that, in the light of representations you considered, you thought that further economic analysis was necessary in order to decide whether or not there was an AEC, again I assume you would consider that you were at liberty to do that?

MS SMITH: I think we would think, yes, it is necessary to do that.

MS POTTER: So I think, therefore, really we are saying you want to have the flexibility to carry out whatever investigations you consider are appropriate in the light of this Decision having been quashed?

MS SMITH: If I could have a moment in the light of that clarification?

MS ROSE: In case it assists, we respectfully agree with the approach that is being put forward by the Tribunal that there should simply be a quashing of the relevant decisions, a remittal back to the CMA and then the question of exactly what submissions have to be made and what tasks need to be performed will be a question for dialogue between HCA and the CMA.

THE CHAIRMAN: That rather suggests that you do want to achieve what Ms Smith suspects you want to achieve, which is to set the whole thing at nought.

MS ROSE: What I am saying is that it will depend on what submissions are made and what they are prepared to reconsider. There may or may not be disagreement at that stage between the CMA and HCA as to what the CMA has to reconsider. For example, we may say that this is a material change of circumstances and the CMA may say, "We do not accept that is a material change of circumstances, so we are not going to reconsider". That is an issue that will then presumably find its way into a new decision and might or might not be the basis for another appeal on another day.

THE CHAIRMAN: Certainly, but that would be a material change of circumstances under s.138.

MS ROSE: Yes, but I am not suggesting ----

THE CHAIRMAN: You are just trying to keep open that possibility, the point made on s.138(4).

MS ROSE: That is right, all I am suggesting that the appropriate course is simply quashing, remittal and then both the CMA and the affected party engage in a new process, and there is argument between them as to what its proper scope should be.

THE CHAIRMAN: Is this right, that what you are contending for is, if you like, a basic data set, because lots of work has been done in collecting in lots of data from lots of providers and users of these services? That data set remains the given data set which is the platform for the decisions to be retaken. There will be a debate about what statistical testing ought to be applied and what indeed potentially other testing may have to be applied to that database. You are not contending for there to be a separate gathering of data ----

MS ROSE: You mean in relation to pricing data?

THE CHAIRMAN: Yes, in order to redo that exercise. However, you wish to leave open the possibility that arguments can be presented both by your clients and others that there may have been a material change of circumstances affecting the implementation of the divestment remedy or any other remedy?

MS ROSE: Or any part of the AECs.

THE CHAIRMAN: Just so that we are clear and that we are not going off on different tracks, that would be under s.138(4) of the Enterprise Act 2002?

MS ROSE: Yes. Of course, 138(4) deals with remedy, but the assumption here is that you could use 138(4) to look at the underlying AEC decision - for example, the key finding that there is a barrier for entry in the central London market because of property prices.

THE CHAIRMAN: Yes, because there may have been a change of circumstance since the original data was acquired?

MS ROSE: That is right. The change of circumstances is technically in relation to the divestment remedy, but actually what it is going to is the question of whether the AEC that you found last year is still relevant in the light of what has happened since.

THE CHAIRMAN: When you say “the AEC you found last year”, that is what is going to be reconsidered?

MS ROSE: That is right. I mean the structural feature, the structural feature giving rise to the AEC - one of the structural features that is said to give rise to the AEC is barriers to entry in the central London market. If the central London market has changed significantly over the past year then that is a matter that they would have to consider when asking whether, in the light of that finding they made in 2014, it is appropriate in 2015 to give a divestment

remedy, but it is looking back actually to the question of a structural feature in the market rather than the remedy. Does that make sense?

THE CHAIRMAN: Yes, it does to me, but I just want to put it in my words so that I can understand. So far as the structural feature of the market is concerned, that is a separate part of the reasoning of the CMA, which is not affected by the arguments which have arisen in relation to the IPA?

MS ROSE: Yes.

THE CHAIRMAN: What has happened is that there has been a lapse of time. Often there is in these decisions a lapse of time, and you are saying that it may well be the case that you will seek to come forward to the CMA with additional arguments not on the part of the Decision, in effect, that we are remitting to do with the IPA, but in relation to a part of the reasoning behind the Decision which is not brought into question by problems with the IPA, that is to say the structure of the market. You would wish to be able to put to the CMA that there have been material changes of circumstances which ought to dissuade them from now insisting on implementation of the remedy, even if they come back with a finding that the remedy should be revisited?

MS ROSE: Yes, that is right. There is another aspect ----

THE CHAIRMAN: On that, nothing that we say can prevent you from doing that.

MS ROSE: Indeed, no. There is another aspect which is this: of course grounds of appeal, Grounds 3 and 4, that relate to those structural features, and those grounds have not been determined by this Tribunal because of the concessions that have been made in relation to the underlying Decision. So if the same decision is made again, it would be a new Decision because it would be a new finding on AEC and a new finding on divestment, but the underlying reasoning, for the sake of argument, on barriers to entry is the same. We would still be able to appeal that Decision because that would be a new Decision. The ground of appeal might be similar to the ground of appeal that we ran under Ground 3 or 4 in this appeal, but it would be in relation to a future Decision. That is just as a result of the quashing of the AEC and divestment decision.

THE CHAIRMAN: I am unsure whether that analysis is correct, and so I simply reserve my view on that. I am not sure how far this debate is taking us.

MS SMITH: Sir, I have managed to take instructions and it has been a very useful discussion with the members of the Tribunal. We are content with the way forward suggested by the Tribunal.

THE CHAIRMAN: Which bit, I was throwing out ideas!

MS SMITH: That the decisions be quashed and the matter remitted to the CMA for reconsideration in the light of its concession on Ground 1 with the understanding ----

THE CHAIRMAN: Sorry, when you say "the matter remitted", what would be remitted?

MS SMITH: I am sorry, the decisions.

THE CHAIRMAN: So the two identified decisions.

MS SMITH: The two identified, the insured prices in central London AEC decision, and the divestment decision. The conversation subsequently has been very useful in that it accords with our understand that the concession that we have given on Ground 1 does not mean that we have to reconsider everything *ab initio*, but that if, and we have made this clear in our skeleton argument, the parties come to us with submissions that there has been a material change in circumstances then we have indicated that we will, during the course of the reconsideration, consider those, but that does not need to be reflected in the order.

MR GLYNN: As I understood it from your skeleton, you were also saying that if the further work that you did on the statistics led you to want to reconsider some other aspect of your report and finding, then that is what you propose to do, which seemed to be a fair minded way of proceeding.

MS SMITH: I cannot recall making that specific point, but I think that must be right, yes.

THE CHAIRMAN: In so far as the order that we are being asked to make is concerned, you say quash the three identified paragraphs and simply remit the decisions in those paragraphs for re-determination by the CMA, full stop? That is what you say?

MS SMITH: Yes.

THE CHAIRMAN: Let me just check with Ms Rose whether she is saying anything different from that?

MS ROSE: No, we are content with that.

THE CHAIRMAN: Good.

MS ROSE: The other point is, of course, what happens to the self-pay AEC? That is the decision which is not going to be quashed, but which has not been determined.

THE CHAIRMAN: Which has not been?

MS ROSE: The appeal against that decision has not been determined. That part of the appeal does remain live and that would have to be stayed.

THE CHAIRMAN: Yes, I think that is right. I am looking at Ms Smith.

MS SMITH: Yes, I am just trying to think that through.

THE CHAIRMAN: Ground 2 may go away if there is a full re-determination of the finding on - wait a moment, no.

MS SMITH: Ground 2 considers the IPA and a small bit at the end considers the self-pay analysis. The part of Ground 2 that relates to the IPA will almost inevitably be rendered academic because the part of Ground 2 that relates to the IPA is that, given these errors, your Decision is so irrational you cannot maintain it, but we have now accepted that we are going to go back and look at these errors again. So there will be no basis for that part of Ground 2 on the IPA. That part of Ground 2 will fall away. There may be other reasons which they say subsequently our new decision is irrational on the IPA, but that is for another day. Ground 2 on ----

THE CHAIRMAN: Ms Rose is saying in relation to HCA's Ground 2 the order should simply be that that is stayed.

MS SMITH: No, I am not sure that is right, I think it is simply that HCA ----

MS ROSE: I think we may be at cross-purposes, I am talking about the self-pay AEC.

THE CHAIRMAN: Sorry, the second decision.

MS ROSE: Yes, the second decision. I am not suggesting that you allow or dismiss any grounds of appeal. What I am suggesting that you do is simply quash the decisions which are consented to be quashed, namely the insured the AEC and the divestment decision. The third decision that is under challenge is the self-pay which is the subject of about ten paragraphs of Ground 2, and that is the appeal that we say should be stayed because it has not been determined one way or the other, but we are agreed that it may well be academic.

THE CHAIRMAN: Yes, and do you have any difficulty with that?

MS SMITH: And we agree with that.

THE CHAIRMAN: Right, okay.

MS SMITH: The only point on what is to happen with the other grounds, I think - we are happy with that order - all that arises from the other grounds is the costs of the grounds, and we will come to that.

THE CHAIRMAN: We will come back to that. So far as the order is concerned, my understanding is that as between HCA and the CMA we have reached a consensus.

MS SMITH: I think we have.

THE CHAIRMAN: Admittedly, on the footing of a particular ruling that we made in relation to the self-pay AEC, but on that footing that is agreed. Does anyone else want to say anything at all about the form of order that is made now? That is obviously subject to the question of a direction on which body it is remitted to?

MS BACON: I was not sure if the Tribunal reached a view on the stay question, because the stay does not only apply to the self-pay AEC. HCA has an issue regarding its Grounds 3 to 5,

and we have a similar issue. Indeed, our issue mirrors that of HCA's Ground 5, which attacks the divestiture remedy, and our Grounds 1 and 2 go to the divestiture remedy, though in the opposite direction. If the Tribunal makes an order that effectively provides that all of HCA's other grounds apart from the self-pay ground fall away, because there is no subsisting decision in that regard, then the same must apply to our Grounds 1 and 2.

MS SMITH: Yes, I think that must be right.

MS BACON: If the Tribunal's view is that there is no decision in respect of which an appeal can be stayed, the same must apply. While we had said in our submissions that if the CMA's proposed order were to be followed, and the CMA had proposed staying HCA's remaining grounds and our remaining grounds, we would then be content for that to happen and for our costs to be reserved. If the Tribunal makes an order that provides that everything else apart from self-pay falls away, then we are in the same position as HCA.

THE CHAIRMAN: I am sorry, when you say "everything else apart from self-pay falls away", there is a range of other findings which are not being ----

MS BACON: I am speaking in shorthand, HCA's Grounds 3 to 5, if they fall away because there is no decision in respect of which an appeal can subsist, then no different finding can be made in relation to our Grounds 1 and 2. We would also then have to have that debate about our costs now.

THE CHAIRMAN: I think certainly what I was contemplating and what I had intended to address in debating matters with Ms Rose and Ms Smith was really to put aside what will happen in relation to HCA Grounds 3 to 5.

MS BACON: You are addressing, in effect, a stay.

THE CHAIRMAN: It is to leave open that those grounds be stayed, and indeed such grounds as are relevant to the self-pay AEC will be stayed. Thus far, this is what I had in mind ----

MS BACON: If that is what you understood, I have just raised the point.

THE CHAIRMAN: The only thing that I am contemplating is that there be a quashing of the insured AEC finding, which is the second sentence of paragraph whatever it is, and the finding and conclusion as to remedy which was para.13.1(a) and 132, or whatever it was, and a remittal to whichever body - and we are about to come on to the debate on that - for re-determination of those matters with all other grounds of challenge being stayed, but obviously with the liberty to apply because things may change thereafter, and the effect of staying them would be to allow the parties at some point in the future when the dust clears a little bit to reformulate such parts of those grounds which remain live for the new

determination. What I had in mind was simply to stay those other grounds at the moment, but Ms Rose ----

MS SMITH: Can I perhaps ----

THE CHAIRMAN: Ms Smith first and then Ms Rose.

MS SMITH: This is eating into the time which I have been allocated. I think that must be right because Grounds 3 and 4 relate to the structural features which form part of the self-pay AEC decision as well as the insured prices AEC decision. Those two structural features, barriers to entry and weak competitive constraints, plus the higher self-pay prices, which were obtained from a different model, not the IPA, go to the self-pay AEC decision. So Grounds 3 and 4 also relate to the self-pay AEC decision. So I agree with your proposal that Grounds 3 to 5 of HCA's appeal and Grounds 1 and 2 of AXA's appeal, which attack the proportionality of the divestment remedy - in fact, AXA is saying it should have gone further - should also be stayed, because these will all be affected by the new decision.

THE CHAIRMAN: Ms Rose was on her feet as well.

MS ROSE: We say, with respect, that is not the right analysis, and the reason is that the appeal is against particular decisions, particular statutory decisions, it is not against particular reasoning.

THE CHAIRMAN: All the reasoning stays there, and there remains a report because there are other AECs which are not under attack.

MS ROSE: Leaving aside remedy for a moment and just looking at the two AEC decisions, Grounds 2, 3 and 4 ----

THE CHAIRMAN: There are more than two.

MS ROSE: I am talking about the two that are of concern to us.

THE CHAIRMAN: Yes, but others are of concern to others.

MS ROSE: Under our appeal Grounds 1, 2, 3 and 4 all relate to the insured AEC and Grounds 2, 3 and 4 also relate to the self-pay AEC. The position is that the insured AEC is going to go, and the self-pay is going to be stayed. What is necessary is to stay the appeal as it relates to the self-pay AEC, but the appeal as it relates to the insured AEC is allowed, and that includes, of course, the reasoning ----

THE CHAIRMAN: I think these are points for you to make in reply.

MS ROSE: Yes, but can I just also flag the point that Ground 5 ----

THE CHAIRMAN: No, in reply.

MS SMITH: Thank you, Sir. Just to deal with that point, the points on the insured AEC under Grounds 3 and 4 have not succeeded and are not conceded, so the stay must be the correct

way forward. I think, given the time, I need to address the alleged requirement for a new inquiry group and a new case team. I have already made the point that this application, so far as you can call it that, was made only for the first time in a letter of 4th December, which you have seen. The letter of 4th December is in the bundle at p.131, the CMC bundle, tab C, and allegations are made at p.132. Page 131, this is the response to the letter of 13th November and 26th November from the CMA. Page 132, the appeal must be allowed. Page 133, the need for a new inquiry group and new case team. In para.15 HCA submits that in this case any remittal should be on terms considered afresh by a new inquiry group and a new case team, so the whole lot have to be replaced.

Paragraph 16, HCA refers to *Sinclair Roche*, and relies on the four bullet points on p.134. Those points in 134 which are now used by HCA to support its suggestion that there should be a new inquiry group and a new case team were pleaded in the notice of appeal and reply, but there was no pleaded case that remittal should be to a new inquiry group and new staff team.

The relief sought in para.64 of the re-amended notice of appeal was simply remittal.

The CMA's response in our amended defence, as you have seen, is to concede Ground 1, and accept that there should be remittal as provided for in the re-amended notice of application, para.64. In those circumstances, we did not specifically plead to the additional allegations now being made of consulting on a false basis and conducting a sham consultation, because the ground had been conceded. Those arguments in the light of the re-amended notice of application, the pleading, were academic and historical because we were offering HCA the relief they sought in para.64 of the re-amended notice of application - that is remittal for reconsideration of the new analysis. It was not until this letter of 4th December that these points were now being used in support of a different argument that there should be remittal to a new inquiry group.

I note, and I think you have this point already, Sir, that the points at the third and fourth bullet points as regards Nuffield have, to a certain extent, already been addressed in the original defence and in the second witness statement of Mr Witcomb.

To say that HCA thought these matters were conceded or that we accepted these allegations of procedural impropriety is just unrealistic in the light of that history.

Sir, you have accepted or you have ruled that Mr Witcomb's third witness statement should be admitted in evidence, so I will address those allegations in a moment.

The allegations are misconceived. First of all, the case law that HCA relies upon in order to support this argument that there should be remittal to a new inquiry group, the cases upon

which they rely, in our submission, show only that in some cases where there is good reason to do so the court has found that it might be appropriate to remit to a different decision maker. We say the general course is remittal to the same decision maker unless there is good reason not to do so.

In their skeleton argument, though Ms Rose did not take you to them today, HCA relied on two cases, *Secretary of State for the Health Department v. The Mental Health Review Tribunal*, which is in authorities tab 5, and the case of *Grabinar* in authorities tab 12. I am not going to take you to those cases, Ms Rose did not take you to them orally, but the *Mental Health Review Tribunal* case, when you look at it, clearly turned on its own facts, it sets out no general rules or general approach. In *Grabinar* - para.30 is the paragraph that is cited by HCA in its skeleton argument, authorities tab 12 - there was an explicit concession by the counsel for the defendant that it should go back to a different decision maker. So again this does not help.

The only case that Ms Rose referred to which purports to set out some general principles is the *Sinclair Roche* case and that is at tab 6 of the authorities bundle. What I would like to draw your attention to in the *Sinclair Roche* case are the parts of para.46, p.773, of the report, the elements that Ms Rose did not draw your attention to. Paragraph 46 says:

> "There is no authority which has been cited to us, or of which we ourselves know, which would assist us in such a situation …"

that is whether or not to refer back to the same Tribunal -

> "… and we set out what appear to us to be relevant factors."

The first is proportionality; the second, 46.2, passage of time; 46.3, bias or partiality; 46.4, totally flawed decision; 46.5, second bite.

Then importantly, over the page, which Ms Rose did not draw your attention to, is 46.6, Tribunal professionalism:

> "In the balance with all the above factors, the appellate tribunal will, in our view, ordinarily consider that, in the absence of clear indications to the contrary, it should be assumed that the tribunal below is capable of a professional approach to dealing with the matter on remission. By professionalism, we mean not only the general competence and integrity of the members as they go about their business, but also their experience and ability in doing that business in accordance with the statutory framework and the guidance of the higher courts."

Towards the end of that paragraph:

"It follows that where a tribunal is corrected on an honest misunderstanding or misapplication of the legally required approach (not amounting to a ;totally flawed' decision described at 46.4), then, unless it appears that the tribunal has so thoroughly committed itself that a rethink appears impracticable, there can be the presumption that it will go about the tasks set them on remission in a professional way, paying careful attention to the guidance given to it by the appellate tribunal."

We say that that case takes HCA no further. They have to show either apparent bias or a totally flawed decision which effectively means that we got it so wrong that we cannot be trusted to do it again on remittal. We say that that cannot be established in this case. Trying to focus the submissions, could you look at para.32 of HCA's skeleton argument? In that paragraph they rely upon three matters which they say in effect mean that we cannot now be trusted to carry out the remittal because the previous process was wholly flawed or completely mishandled. Those three reasons are, first, that the CMA conducted a sham consultation which seriously misled HCA, namely consulting on a false basis. We wholly reject those allegations. They are covered comprehensively and carefully in Mr Witcomb's third witness statement. I can take you back to that third witness statement if necessary.

THE CHAIRMAN: I think, in view of the time, you can take it that we have read it and we will re-read it.

MS SMITH: Sir, those points are addressed in that witness statement. Paragraph 32.2, that the CMA discriminated against CMA in the conduct of the consultation process because it allowed Nuffield to see and comment on aspects of the new analysis, and did not allow HCA to do so. It has already been explained, and this is Mr Witcomb's second witness statement, paras.79 to 83, that Nuffield were not in the same position as HCA. Following the revised iteration of the IPA the CMA proposed to make an AEC finding against Nuffield where it had not previously proposed to do that, and so Nuffield had not previously been granted access to the data room in October 2013 when HCA had. So Nuffield were allowed access only to a summary of the new analysis, not to a full data room, as demanded by HCA. As I have said, that is paras.79 to 83 of Mr Witcomb's second witness statement. Paragraph 32.3 of CMA's skeleton, this is the allegation that the CMA informed all the main parties except HCA of the new analysis, and that Nuffield was being consulted upon it. That allegation is addressed in para.84 of Mr Witcomb's second witness statement, and paras.49 to 51 of Mr Witcomb's third witness statement. In so far as Nuffield was being granted access to material that related to insured pricing outside central London, those

parties whose information that was were put on notice that Nuffield was being granted access to that confidential information, Nuffield was not being granted access to HCA's confidential information.

THE CHAIRMAN: Presumably that process is followed in case one of those parties whose confidential information it is wants to put their hand up and say there is some reason that you, CMA, have not thought about which ought to stop that?

MS SMITH: Exactly. Sir, on the basis of all this evidence, we reject the argument that something has gone so wrong with the previous process that we cannot be trusted on remittal of the new process. We also submit that there is no evidence that our conduct, the CMA's conduct, is such as to cause a fair minded and informed observer to conclude that there is a real possibility of bias under the *Magill v. Porter* test. That test of apparent bias, we say, cannot be fulfilled.

As regards the meeting with the FCO of 2nd December, which HCA relies upon specifically, I believe, in support of this allegation of apparent bias, that is addressed in the fourth witness statement of Mr Witcomb, and I think it is worth going back to that witness statement now. That is in the CMC bundle behind tab C at p.231. Can I just draw your attention to the indication, first of all, in para.6, p.232, of what the CMA was told the meeting would be about? They were told that UKTI (UK Trade and Investment, part of the FCO:

> "… wanted to talk to the CMA about its work in the private healthcare sector in the light of some potential investment HCA was considering making in the UK."

That is the email that appears exhibited to Mr Witcomb's statement at p.241 of the bundle:

> "Someone from UKTI is keen to talk to someone at the CMA about the private healthcare work in light of some potential investment that HCA is considering making in the UK and some concerns they have. Please could you let me know who the most appropriate contact is."

So that was the contact that was received by the CMA from BIS on behalf, effectively, of the UK Trade & Investment, the FCO body.

THE CHAIRMAN: Yes.

MS SMITH: So that was the indication of what the meeting was to be about. The meeting appeared to focus more specifically, once the CMA representatives went along, on the appeal, and Mr Witcomb's evidence in para.12 - I want to take you, first, to para.12 and para.16 of his evidence which goes really to point 3 of the email. He explained that HCA's

advisers had identified two main errors in the CMA's modelling of insured prices, namely an error in the CMA's statistical significance testing and an error of the calculation of R-squared. I have explained those errors to you.

> "I noted that both these errors went to the confidence intervals for the CMA's parameter estimates, that is the robustness of the CMA's estimates, but did not change the parameter estimates themselves, that is the estimated price difference between HCA and TLC."

I hope now I have explained that that was factually correct.

> "In particular, I explained that the confidence intervals were lower than had originally been found by the CMA."

Again KPMG showed that the confidence intervals were lower. Again factually correct. Then he says, importantly:

> "Neither I nor my colleagues at the meeting made any comment as to the impact of these errors on the CMA's conclusions. The explanation I gave was purely a factual explanation as to the nature of the errors."

THE CHAIRMAN: Can we just compare what he is saying there with the re-amended notice of application, paras.112 to 120? This goes back to the point that I was raising with you, that we have got to compare what he has said with the case that is being presented, or is proposed to be presented, by HCA.

MS SMITH: Paragraph 112 of the re-amended NoA just refers to the insurer specific price indices, there were 36 of them, that essentially the vast majority of them showed HCA's prices being higher than TLC's. Then the CMA, 113, calculated that those price differences were statistically significant in all but four of the 36, so this was the position in the original report. 114:

> "KPMG's and Waterson's analyses have revealed that the CMA's statements concerning statistical significance are incorrect. They only performed statistical significance tests on 25 out of 36, and more importantly the statistical significance tests they did perform were vitiated by two manifest errors: first, a computer coding error had the consequence that the statistical significance tests with each index comparison were performed in relation to the price for only one treatment."

THE CHAIRMAN: Which of the errors is that?

MS SMITH: That is the data room report 100 to 105, which is the error we admit.

THE CHAIRMAN: But which error, you admit two?

MS SMITH: That is the significant testing error, yes.

THE CHAIRMAN: Right.

MS SMITH: Then:

> "The CMA multiply the standard error obtained in respect of the single treatment for its analysis would form by the weight of that treatment in the basket".

THE CHAIRMAN: This is not referring to the R squared?

MS SMITH: This is not. This is simply the statistical significance testing. They say the impact of these errors is substantial. When the correct tests are performed the results show - this is simply, I think table 10.

THE CHAIRMAN: So up to now you have been talking about two main errors, the R squared test and the statistical testing?

MS SMITH: Yes.

THE CHAIRMAN: If I am understanding what you are saying now, you are saying that the two manifest errors identified in this pleading are first and second ----

MS SMITH: Solely go to the statistical significance point.

THE CHAIRMAN: And they are both limbs in relation to the statistical testing?

MS SMITH: Exactly, yes.

THE CHAIRMAN: And are they both aspects of the problems with the statistical testing that the CMA have conceded?

MS SMITH: Yes, and that we are going to reconsider. That goes on in 118, they are not statistically significant.

THE CHAIRMAN: Sorry, one moment.

> "The impacts of these errors is substantial. When the correct tests are performed the results show that there is no statistical significant difference in the insurer's specific price indices."

MS SMITH: Those are the confidential figures. That is the impact that Mr Witcomb said he would not comment on, because we are going to consider that impact on reconsideration. This is the extent to which the significance of the error did, in fact, have this effect. Then they say at 118: "When correctly analysed the results of the IPA do not disclose consistent statistically different price differences. This is going to be reconsidered. On reconsideration . . ." They say compare what you did outside London, you cannot have come to the conclusion that ----

THE CHAIRMAN: So is there a pleading that, to use Mr Witcomb's words in para. 12: "there has been a change in the parameter estimates of ----"

MS SMITH: No. The point on the R squared statistic, if I could just finish my submissions, is addressed before. The point here is that they say that because these figures that come out at the end, the insurers' specific price indices, fewer of them are statistically significant than we said was the case and you cannot rely on them at all because they are not robust enough to be relied upon. So those figures, the 2 per cent difference, the 4 per cent difference - I am just plucking figures out of the air - you cannot rely on those differences because they are not robust at all because they do not withstand the statistical significance testing. We are not saying that instead of two it should have been three.

MR GLYNN: People would be saying if the estimates were not sufficiently robust in statistical terms then you should not rely on them?

MS SMITH: Exactly, but that is not saying that the price indices for - and I am just making this up BUPA for 2007 was 3. They might say: "That figure was 3, but it does not withstand statistical significance testing so you cannot rely on it". What they are not saying is that figure was not 3 it was 4.

MR GLYNN: But they are saying that it is neither here nor there what the number is ----

MS SMITH: Yes.

MR GLYNN: -- if it is not sufficiently robust.

MS SMITH: Yes, and Mr Witcomb's evidence is not inconsistent with that. Sir, if there is anything else on Mr Witcomb's fourth witness statement on that point.

THE CHAIRMAN: Just out of interest, does Professor Waterson say anything about the parameter estimates themselves?

MS SMITH: No, I do not think he does.

THE CHAIRMAN: And the KPMG reports, did they say anything about it?

MS SMITH: If you mean the parameter estimates, what I am addressing here ----

THE CHAIRMAN: I have just picked the language from Mr Witcomb's paragraph 12.

MS SMITH: Absolutely. As I understand it the parameter estimates are the figures that come out that are the figures for the insurer specific price indices, and the average price index.

THE CHAIRMAN: What he says is "i.e. the estimated price difference between HCA and TLC".

MS SMITH: Yes, and there are a number of different estimated price differences. There is the estimated price difference on average completely across the board between HCA and TLC as a percentage, and then there is the estimated price differences between HCA and TLC for BUPA in 2007, for AXA in 2010. So there are a number of different figures that are the estimated price differences between HCA and TLC.

THE CHAIRMAN: And, you say, neither Professor Waterson nor KPMG in its report, say that there would be a different parameter figure?

MS SMITH: I am not sure that is entirely relevant with respect to what is said in para. 12.

THE CHAIRMAN: Well, it is, and I will tell you why I am concerned with it, if that is the nature of the case which HCA wish to bring and have intimated, and Mr Witcomb is expressing a view inconsistent with that case, that seems to me that that would be indicative that he had prejudged a particular issue that they wanted to argue about. At the moment, I have understood your submission: "No, that is not so" but that is why I am asking you about ----

MS SMITH: Yes, I do not recall, although there is lots of huffing and puffing on the other side of the room, which makes me pause. I do not recall that in the KPMG report or in the ----

THE CHAIRMAN: Well, can I say, it is a very important point to my mind and so if I can invite those behind you to check .

MS SMITH: Yes.

THE CHAIRMAN: I have noted your submission as being neither Professor Waterson, nor KPMG suggest that the errors are such as would affect what Mr Witcomb calls the parameter estimates themselves.

MR GLYNN: Paragraph 58 of Waterson says:

> "My own reading of the revised evidence is that there is support provided by the empirical analysis is either completely undermined methodologically or at least severely eroded."

MS SMITH: Yes, that is the robustness of the figures rather than the figures being truly evident.

MR GLYNN: I think in a way this discussion is a little bit odd because if the reliability of the best estimate is not sufficient then the CMA would not want to base any decisions on that---

MS SMITH: Absolutely, and I do not think Mr Witcomb's witness evidence cuts across that. It is simply explaining to those present at the meeting, what the two main errors that HCA's advisers had identified were, and what they went to.

THE CHAIRMAN: Speaking for myself I can see that if the only errors intimated at this stage were errors that went to the confidence intervals for the CMA's parameter of estimates then looking at para. 12 of what Mr Witcomb says, he expressly says it was explained that the CMA had an open mind on those points.

MS SMITH: But also it is important to say what he says in the second line of para. 12. He says: "HCA's advisers had … two main errors". As I said, these maybe the only errors they had

identified, it says "two main errors", and those are identified by Professor Waterson as the main errors identified by KPMG. So he is entirely consistent on that.

He then explains as a matter of fact what those errors were, and then he says: "We do not make any comment on the impact of those errors. I gave a purely factual explanation."

Then in para. 16 he goes back to address the email which was sent by the woman who was not present at the meeting.

> "The CMA stated the modelling errors which were identified do not change the actual results or conclusions in the modelling. The errors concern the confidence intervals for the results of the modelling which were lower. While the second sentence is an accurate reflection of what I said the meeting, the first sentence is not. I did not say that the errors identified by HCA's advisers do not change the CMA's actual results or conclusions of the modelling. As explained above what I said was that the errors do not change the parameter estimates."

So, exactly your point, Sir. He is not saying that where we are going to be . . . at the end of the day is that this IPA should be upheld, if we do not feel that the figures are robust enough. He does not say that the errors do not change the actual results or conclusions. He has simply explained that they do not change the parameter estimates, i.e. the estimated price differences.

> "Importantly, I did not make any statement as to the consequences of the errors in terms of the CMA's conclusions, including its AEC finding and the appropriateness and proportionality of the divestment made."

Sir, I hope he was entirely clear as to what he was doing at that meeting, simply trying to explain a very technical point, but certainly not pre-judging what the results of those errors might be.

THE CHAIRMAN: Did you want to say anything about practical problems if we direct that the matter be reheard, either by a different inquiry group or by a different case team?

MS SMITH: We rely simply on what is in the last few paragraphs of Mr Witcomb's third witness statement and the submission we would make is that there is nothing in the evidence to support HCA's suggestion that a new inquiry group and case team is required and that in those circumstances the general approach is to remit to the decision maker, the same decision maker ----

THE CHAIRMAN: Correct.

MS SMITH: -- and we say simply at para. 54 that:

"The composition of the team and group should be a matter for CMA to determine. This would provide the CMA with the necessary flexibility to manage its resources in an efficient ----"

THE CHAIRMAN: That is all assuming that you have won the legal argument, I am asking you is there anything you want to say on the assumption you had lost the legal argument?

MS SMITH: No, that is the extent of my submissions.

THE CHAIRMAN: So you are just neutral as to whether it is the inquiry team that is removed from reconsideration or the case team, you are just completely relaxed about that?

MS SMITH: I would say there is nothing to support the argument that there should be a new inquiry team ----

THE CHAIRMAN: No, no, I follow, that is for legal argument. I am asking you if you have any ----

MS SMITH: No, we are not saying: "No, it would be okay if you took off X, but leave Y on, please, and it will be okay if you took off ----" because the point is that we ----

THE CHAIRMAN: So, is this right, you accept that if you lose on the legal argument it must be a completely new inquiry team and case team?

MS SMITH: No, because ----

THE CHAIRMAN: Well, that is what I am asking you for?

MS SMITH: Yes, sorry ----

THE CHAIRMAN: A submission why not?

MS SMITH: I suppose there are two points, are there not? Did the previous process go so wrong that we cannot be trusted, the CMA cannot be trusted, the same team cannot be trusted not to do it again ----

THE CHAIRMAN: But is there a different ----

MS SMITH: -- and that goes to the team as a whole, and then there is a point about apparent bias which appears to be focused on one individual.

THE CHAIRMAN: Speaking for myself, I would not necessarily accept - but if you tell me, I will - that the first point goes to the team as a whole. I can see an argument for removing the inquiry group but leaving the case team in place. But I would be strained to reach that conclusion if you accept actually if you lose the legal argument there is no sensible distinction to be drawn between the case team and the inquiry team?

MS SMITH: Yes, Sir, I will just take instructions. (After a pause) Sir, I will obviously have to accept that there would be inconvenience and increased time taken if the staff team and the group are replaced. The group are, I am instructed, the importance, the heart of the decision

making process, so having to replace the group would be more of a problem for the CMA than replacing the staff team. The staff team carry out the work, but they are requested to carry it out by the group. It is the group who make the decisions and who have the accumulated knowledge. So, if there was a choice between the two ----

THE CHAIRMAN: I was not putting you ----

MS SMITH: Just to try to give you, Sir, a feel for what the issues are. Obviously, our primary case is that we should be allowed to determine what should be done by whom on remittal.

THE CHAIRMAN: Yes, thank you very much.

MS SMITH: Sir, on costs, I have 15 minutes left, I do not know what you want to ----

THE CHAIRMAN: I thought Ms Bacon was going to have a period of time, and TLC was going to have ----

MS SMITH: I started at 2 and I was given 2 hours and 15 minutes. I have not addressed you on costs.

THE CHAIRMAN: All right, you may have 10 minutes on costs.

MS SMITH: I should actually make the point as well on the apparent bias and open mind, and remittal ----

THE CHAIRMAN: This is coming out of your costs, I am just ----

MS SMITH: I understand that is going into the time. As to the process being flawed, it is important as well to recall that the CMA did change its mind in this case between provisional findings and the final decision as regards the AEC on insured pricing outside central London. So to say we had a closed mind or that we did not engage in the process properly is disproved by that, to that extent, but when there was changed evidence on the AEC outside central London on the short pricing, the CMA was open to changing its decision in that regard.

Our submissions on costs are set out in paras. 38 and 39 of our skeleton argument. Quite simply we say that HCA has not succeeded on Grounds 2 to 5, and that insofar as those Grounds are stayed, costs as regards Grounds 2 to 5 should be reserved.

HCA argues it should get all of its costs of all the Grounds including those which have not been conceded. We say that that is not the case, the cases upon which it relies in para. 45 of its skeleton argument do not assist it. The starting point, this is *Eventim*, the case they rely on in para. 45 say no more than that the starting point is that the winner should get their costs, but the starting point is not a finishing point but, in any event HCA has not won on Grounds 2 to 5.

As to Ground 1, we accept we should pay the reasonable costs of HCA on Ground 1. We do not accept that those reasonable costs include the costs of the data room exercise insofar as that exercise is one that HCA says they should have been permitted to undertake during the administrative stage in any event. In support of that I would draw your Lordship's attention to the *Eventim* Judgment. It is cited in HCA's skeleton, it did not make its way into the authorities bundle. If I could hand up some copies and ask you to put it at tab 14 of the authorities bundle I would be grateful. (Same handed)

THE CHAIRMAN: Yes.

MS SMITH: I will take you to para. 13 in that Judgment. It is a Judgment of the CAT. It is obviously not binding but informs . . . It is a slightly different case, but similar principles.

> "It was not seriously contested by Eventim that the work done by Eventim in compiling its Notice of Application would be useful to Eventim in making submissions to the Commission in respect of a new decision that the Commission must now make."

So this is a quashing and a remittal for the Commission to make the new decision.

> "Given that Eventim must now make such submissions to the Commission, and would have had to have done so if it had been asked to comment on the Commission's changed views after publication of its provisional findings . . ."

So if there had not been the procedural failing.

> ". . . we consider that Eventim should not be able to recover all of its costs from the Commission, given that some of these costs would have been incurred in any event and would have been irrecoverable as costs."

and they make an estimate as to how much. We say, simply, in this case, the costs of going into the data room are costs that HCA said it should have been allowed to incur as part of the administrative process in any event. They say we are seeking to rely on our unlawful conduct in order to avoid liability in costs and we should not be allowed to do that.

We are not saying that. We are not saying that HCA cannot have its costs of arguing Ground 1. We are accepting that they should have their reasonable costs of arguing Ground 1 and of persuading us to concede. The only costs we are saying they should not have are those of carrying out the data room exercise, which they say they should have been allowed to do in any event as part of the administrative process.

As to an assessment on an indemnity basis, we say that the CMA has not acted so unreasonably as to merit an award of costs on an indemnity basis. That is addressed in paras. 46 and 47 of our skeleton argument. We say that having accepted a need for remittal

is precisely the opposite of conduct meriting an award of indemnity costs. As to the points made by HCA in para. 50 of its skeleton argument, which Ms Rose did draw your attention to at the end of her submissions, if I could ask you to look at para. 50, this is where HCA says that we have exhibited such a significant level of unreasonableness in our conduct to justify an order of indemnity costs. They say, first, we acted unreasonably in conduct, and they refer to the *BMI v CMA* Judgment. That Judgment was not a challenge to a failure by the CMA to disclose data but simply to the format of that disclosure. The rules imposed on access via a data room. The CAT's Judgment accepted it was a matter for the CMA that the material was so confidential as to merit a data room. What the Judgment was concerned with is what safeguards should be in place and rules applied to that data room so the parties could prepare their submissions in that data room.

As to subparagraph 2, the further serious procedural breaches and the sham consultation, and the misleading and false basis, you have our submissions on that, we reject those.

Subparagraph 3, it was unreasonable to adopt the decisions contained in the final report given the basic and serious factual errors which it accepts it committed. As to those errors which we accept are material enough to have given rise to the procedural error, you have seen and we do not say that we should have seen them, they were the sort of errors Professor Waterson accepts were easy to make.

As to subpara.4, and in any event the most important point is that we have accepted there should be a remittal to reconsider these matters. So our conduct in that regard does not merit an award of indemnity costs.

At subpara. 4 we chose to defend our decisions, despite the basic and serious factual errors. The same point - once we have had an opportunity to consider those we accepted that there should be remittal and reconsideration.

At subpara. 5, we unreasonably refused to concede Ground 1 at an early stage. This is the proposal at the very beginning of these proceedings that the ground should be heard as a preliminary issue - letter dated 18th June 2014, and that we should concede Ground 1. It was a very different situation in June 2014.

Subparagraph 6, we unreasonably refused to provide disclosure. This is the disclosure Judgment that this Tribunal considered. We would simply say that the CAT indicated in its Judgment that the decision on disclosure was difficult, the position we took cannot be said to merit an award of indemnity costs.

Subparagraph 7, we should have conceded earlier I think is what is said here, and we should have consented to the quashing of the decision without requiring HCA to go to the expense

of producing an amended notice of application. It was not unreasonable for us to ask HCA to plead its case, particularly as there was a substantial difference of emphasis in the KPMG and Waterson reports, and it was necessary for the CMA to see which of those errors relied upon in the KPMG report and the Waterson report HCA were relying on as part of their pleaded case.

Unless I can assist you and your colleagues further, those are our submissions.

THE CHAIRMAN: Yes, thank you. Yes, Ms Bacon?

MS BACON: Notwithstanding my request for clarification during Ms Smith's submissions, for which I am very grateful, as you are aware our primary position is that our Grounds 1 and 2 should proceed to be heard now, and we say that notwithstanding whatever may happen to HCA's Grounds 3 to 5, in other words, even if those are stayed, we would still like our Grounds 1 and 2 to be heard now, because we have an entirely separate appeal. In our submission the Tribunal could do that in two ways. One would be to make any quashing and remittal order after having had the hearing in January and reached a decision on our Grounds 1 and 2, as well as our Grounds 3 to 5.

The alternative, which I think would also work, would be if the Tribunal were to make a quashing and remittal order in the terms that we have now canvassed following this hearing. It ought also to be possible to proceed to hear our Grounds 1 and 2 nevertheless - there might have to be some tweaking to the timing of any reconsideration by the CMA of the divestiture but it should in principle be possible. The reason why we maintain, as our primary preference, that our oncology appeal should be heard now is our concern that these issues are, in any event, going to be ventilated in due course when the CMA comes to reconsider the divestiture. In our submission it is much preferable for that reconsideration to take place in the light of the Tribunal having considered and given a ruling on an issue which, in our submission goes to the heart of the divestiture for the reasons that we have explained in our pleadings.

Can I start by just taking the Tribunal to the CMA's own position as expressed in the letter that we were shown this morning by Ms Rose? That is in the bundle for today's hearing, I think that has been labelled as bundle 10, tab C.

THE CHAIRMAN: Why are you taking us to that because their position is it depends what you are proposing.

MS BACON: Their position originally, and I think I cannot find a better articulation of it ----

THE CHAIRMAN: Well, if you cannot do better yourself, all right, in that case I will turn it up.

MS BACON: I think it is well expressed, it is at p.11 behind tab C. This was the CMA's response to a proposal for a hearing of a preliminary issue, and at the bottom of that page the CMA said:

> "We can see no advantage in a remittal to the CMA in circumstances where large parts of the application remain unaffected and unresolved by the limited preliminary issue determined."

Then, over the page:

> "If there is to be a remittal to the CMA that remittal should address any and all grounds on which HCA might succeed in its application, not some grounds and not others with further applications for review stored up into the future."

Then, the next paragraph:

> "Thirdly, even to the extent that Ground 1 does have implications for other grounds it is in our view undesirable that any aspect of the inquiry should be remitted to the CMA with HCA's current complaints unresolved. The Tribunal's ruling on Grounds 2 or 5 is likely to have implications for the conduct of any remittal."

You will remember Ground 5 is their attack on divestiture, Grounds 1 and 2 of our appeal are our attack on divestiture. They then continue:

> "It would, therefore, be more effective and efficient for the whole of the application to be resolved before any remittal takes place."

In our submission that still applies now and it certainly applies in relation to our Grounds, Grounds 1 and 2 because, as we have seen, what is going to happen is there is going to be an initial reconsideration and the CMA says it will do that mainly by reference to the areas identified in the KPMG report and any material change of circumstances. What the CMA has said, though, and it said it in its skeleton argument, is that once it adopts a provisional decision on remedies, if a new provisional decision on remedies is adopted that will be put out to consultation to all interested parties in the usual way. So, our understanding, is and I think that that would be right, that if any modification to the provisional decision on remedies is made, then there would be a free for all at which everyone would have the opportunity to comment. At that stage, HCA no doubt is going to reopen many issues in relation to the remedies and would be well advised to do so, indeed, it would be extraordinary if it did not, given its strategy of leaving no stone unturned, and knowing what we have said about oncology and our Grounds 1 and 2. We would then effectively have to address all of those issues that we have addressed in our Grounds 1 and 2 in the course of the CMA's reconsideration of the remedies package. So we are very concerned

that, in any event, all of this is going to be rehashed by a number of parties and, for exactly the same grounds as made by the CMA in its own correspondence, we say that it would be inefficient for that to take place without having a determination on our Grounds 1 and 2. We just cannot see that it is going to be an effective use of our time and resources to have a renewed rehearsal before the CMA of precisely the points that will be the subject, on that hypothesis, of the pending appeals with the likelihood that whoever loses the point, or partially loses the point, will then come back before this Tribunal at a later stage for a further review and a further remittal.

That brings me on to the second concern that we have, which is that we are setting ourselves up for a sequence of remittals. If there is a remittal now, without having heard at least our Grounds 1 and 2, there may then be a remittal following the January hearing, and then once the CMA has adopted a new decision there is every possibility, indeed, likelihood of renewed appeals at that stage when the current appeals, which have been on the Tribunal's proposal stayed, are then revived, perhaps tweaked or amended, so then we have a possibility of a third remittal, which we do not see as an efficient use of anybody's time of resources and not least the Tribunal's.

We are concerned about this process of never ending appeals, and we think it would be much better if we had a single hearing in January. It may be that HCA is content for this rehearsal and reconsideration to take place without having any ruling from the Tribunal on its remaining Grounds, 3 to 5, but in our submission we would prefer to have our Grounds 1 and 2 decided together with our Grounds 3 and 5 and, if necessary, we could accommodate a timetable that would allow those to go ahead in January with Grounds 3 to 5. Obviously, we have not served a skeleton argument on the original timetable, but we would be willing to do so fairly quickly in order for those Grounds to be heard in the existing trial window in January; alternatively, to do so at the first available date thereafter. That is our primary position, Sir.

We have said that there is an incidental benefit of dealing with the appeals in that way that it will resolve the question of costs. We are not submitting that the Tribunal should hear our appeals solely to resolve costs, that was never our submission. It is an incidental benefit. Our primary position is that this would be the most efficient way to manage those. As I have said, we would be content for that to be our appeal alone, we do not say that the same should apply to HCA, but we have our own party here, it is not solely HCA's appeal that is in issue.

THE CHAIRMAN: Yes, thank you.

MS BACON: If the Tribunal does not agree with that course and decides, as per the exchanges earlier, that a remittal now is the right way forward, we have some comments to make as to how that should occur, in particular we do have a concern about delay. In that regard, we reiterate and support Ms Smith's submissions that there is no basis for there to be a remittal to a new inquiry group and case team. We are concerned about the delay that that would cause if that were to be the order.

In our submission, the Tribunal can go further than that and actually order or require an undertaking for the further process of consultation to take place within a specified period of time. That happened in the groceries' market investigation.

THE CHAIRMAN: So have you got an application notice in for an order to that effect.

MS BACON: No, the Tribunal ----

THE CHAIRMAN: So, am I right in thinking that you have come to the court, you are raising this now, no one else has had an opportunity to think about it?

MS BACON: I am raising this now.

THE CHAIRMAN: In the circumstances that I have just asked you, with no one else being on notice of it, or having an opportunity to ----

MS BACON: I am raising this now because we have been considering the issue of delay over the weekend ----

THE CHAIRMAN: I am sorry, I was just asking you to confirm, are you raising it now ----

MS BACON: I am ----

THE CHAIRMAN: -- in the circumstances that I have just put to you?

MS BACON: I am raising it now, for the first time, yes. I should note that the Tribunal did say in the letter that it sent to the parties that it would be willing to hear appropriate submissions from the parties as to the conduct of any remittal. I am making that submission now, and I entirely accept I have not put this to the parties; we have been considering it over the weekend.

It is within the Tribunal's power, in our submission, to order that the remittal should take place within a specific period of time, or the Tribunal could ask for an undertaking as a condition of remittal, and that is what happened in the *Tesco* case - I have copies of the Judgment if you want it, but I hope that it is not contested. What you can do is say that you will make a remittal on condition that there be an undertaking to reconsider within a specified period of time.

THE CHAIRMAN: Speaking for myself, I do not doubt that we have the jurisdiction to do that. What I am questioning is whether it is sensible or, indeed fair, to anyone else to do it in the circumstances that you raise it now, at 4.20pm.

MS BACON: That is a feature of the way that the timetable has worked today.

THE CHAIRMAN: It is a feature of the way litigation occurs that, usually, if people want things they give fair notice to the other parties.

MS BACON: I accept that, but I am making it as a suggestion to control the process of delay. We did say that we reserved our position if the Tribunal adopted the remittal which was not our preferred position. We did say that we reserved the right to make further submissions in due course, and this is something that we have been considering. What the Tribunal could do is ask for an undertaking to reconsider within an appropriate period of time, and we are not asking for an unreasonable guillotine. In the present case, the time period between the provisional findings and the final report was, I believe, something along the lines of seven months, and we are suggesting that it would be appropriate for a time limit of, say, seven to eight months to reply to any remittal to control the problem of delay, which in our submission would be in the public interest.

The other concern that we do have, and whether this is dealt with simply by guidance in the Judgment, and this is something that we have raised in correspondence, is the fair consultation of all parties. What the CMA has suggested is that any initial consultation should be limited in two ways. First, that HCA should have ----

THE CHAIRMAN: I think we have already made it clear that we are not going to give directions or our blessing to any particular way forward that the CMA come up with. Obviously, they have duties of fairness, everyone knows that.

MS BACON: But what the Tribunal could do in its order is to attach reasons to the order and to give guidance in the reasons which would say that the Tribunal expected that the CMA would appropriately consult all interested parties, and that would not be an order binding on the CMA, it would not form part of the order but would form ----

THE CHAIRMAN: It sounds like a truism which does not need to be in any order for people to understand what their legal obligations are.

MS BACON: It is our submission, because we are concerned at the proposal from the CMA that it should only be HCA that comments on the implications of the KPMG analysis, for example, and other parties' submissions at that stage should be limited to material changes of circumstances.

The final point that I need to make on the question of remittal is a point that I trailed earlier. If the Tribunal does order a remittal with a stay of our Grounds 1 and 2 - as I said, it is not our preferred option, but we accept that the Tribunal might do that - we do reserve our rights in respect of costs ----

THE CHAIRMAN: I think, if that was happening, the proposal is it should be done with costs being reserved ----

MS BACON: Exactly. If, following the exchange that you had with Ms Rose earlier, the Tribunal agreed with HCA, that actually there is nothing to be stayed then I would need also to make an application for my costs - if the Tribunal effectively dismisses in one way or another our Grounds 1 and 2.

THE CHAIRMAN: Right.

MS BACON: Those are my submissions.

THE CHAIRMAN: Thank you very much. TLC, I think, was next - five minutes?

MS KREISBERGER: I am grateful, Sir. You will be pleased to hear I can be very brief, indeed.

THE CHAIRMAN: I will be pleased to hear that, yes.

MS KREISBERGER: I wish to add purely to what has been said about HCA's call for a fresh panel and contribute what that would mean in practice from The London Clinic's perspective, which is relevant to the question of proportionality, which was one of the criteria laid down in the legal test as we have heard.

The Tribunal will be aware that The London Clinic is HCA's main competitor in the central London market, but it is a far smaller entity. It is a single site operator with a market share of around a quarter of HCA's in central London, so it really is David to HCA's Goliath.

The London Clinic is also a charity and, as one might expect, it is cost constrained, and you see this reflected in our approach in these proceedings. As an intervener we have made no written submissions for this hearing.

Educating a new panel will invariably lead to delay as Ms Bacon has already addressed you on. Our interest here is that TLC is in a very different position in the market from HCA whilst waiting for the question of divestiture to be resolved. It may be unsurprising to find that HCA's interest is in delay, is in maintaining what we say is an anti-competitive *status quo* as identified in the report as currently formulated, and in putting off divestment; that is not The London Clinic's interest, it does not benefit from the current *status quo*.

THE CHAIRMAN: I think you can take it that the Tribunal understands that, although it might be open to question, there is also a serious issue that it is anti-competitive for the current state of affairs to continue, and it is against the public interest for that to happen. There is

an issue as to that which we need to take into account, which I think is basically what you are saying.

MS KREISBERGER: I am grateful, Sir. That is what we are saying. We just wanted to really underline the point that we have not really discussed in detail what a new panel would mean in terms of the subsequent report, but The London Clinic made a very significant contribution to the existing report, particularly in terms of the case study concerning The London Clinic.

Sir, that contribution comes with a cost, it does not come cheaply, both in terms of resource and time it has a real cost, and it is for that reason that it would have real, practical adverse effects on The London Clinic if a new panel were instituted for a fresh inquiry.

Sir, in the respectful submission of the TLC we say that the Tribunal should not accede to HCA's call potentially to lay waste to much of the costs already incurred in that regard because delay, whilst it may be in HCA's interest, will weigh disproportionately heavily on The London Clinic in the market, and that is not justified in these circumstances.

THE CHAIRMAN: Yes, thank you.

MS KREISBERGER: That is all we are proposing to say.

THE CHAIRMAN: Yes, Ms Rose?

MS ROSE: Sir, can I turn first to the question of remittal to a fresh panel, and you asked a particular question of Ms Smith which was whether or not what was said at para. 12 of Mr Witcomb's fourth witness statement was correct, that the errors that were identified did not affect the parameters. We submit that what he said at para. 12 has been put in issue by us as a matter of fact, and as a matter of substance, and that what he said was wrong factually, and also wrong in terms of the significance of the errors.

Can I turn to the first point? It was actually said by Ms Smith that we had not pleaded that the parameter estimates changed as a result of the errors. That is incorrect. If I can ask you to take up the re-amended notice of application.

THE CHAIRMAN: I should mention that we will go on until 17 minutes to, to give you your full 15 minutes, but we need to finish absolutely then.

MS ROSE: I understand. If you can take up the re-amended notice of application, of course, the statistical significance and the R-squared errors were not the only errors identified by KPMG. There was a range of other errors as well. If you go to p.38 you can see: "Incorrect calculation of predicted episode prices" starting at para. 89. Here we identify the fact that the regression analysis irrationally predicted zero or negative prices for one or the other operator in a number of treatments.

Details are given there of the error, and then at para. 92 we identify the significance of the error. It caused the CMA first:

> ". . . to overestimate differences in the insurers specific price indices for certain insurers in certain years. For instance, the error in respect of [a particular treatment] caused the CMA to overestimate the difference between the HCA and BUPA prices for 2011 by. . ."

And you can see both the figure and the proportion. Then a second error: "causing the CMA to overestimate the difference between HCA and TLC BUPA price indices for 2007", and again you can see to what extent that relates to the whole of the price difference in the confidential material.

Then, at (b):

> "to overestimate the differences in the average price indices for 2007, 2010 and 2011."

So it was pleaded, and it is set out in detail in the KPMG report that the errors affect the pricing parameters ----

THE CHAIRMAN: But, if I may say so, I do not think these are the errors that Mr Witcomb is talking about at paragraph ----

MS ROSE: That is correct.

MS SMITH: (No microphone) Paragraph 12 says: "The two main errors" ----

MS ROSE: Just a minute, there are two points.

MS SMITH: (No microphone) And these were pleaded to, these points in the amended notice ----

MS ROSE: I know they were pleaded to, and the way they were pleaded to was that the CMA said that their significance and impact would be considered on remittal, and that is para. 105, p.50 of the amended defence:

> "Although the CMA does not accept these matters in themselves merit remittal and reconsideration, the CMA considers remittal is the appropriate course of action. The extent, impact and effect of this ‘incorrect calculation of episode prices’ will be considered afresh on such remittal."

So they were accepting that there was an error that needed to be reconsidered on remittal together with the other errors.

Turning to what Mr Witcomb said, what he says at para. 12 is that he referred to the two main errors. Paragraph 16 of his witness statement gives a slightly different version, he says:

"I did not say that the errors identified by HCA's advisers do not change the actual results or conclusions of the modelling. As explained above what I said was the errors do not change the parameter estimates in the modelling, i.e. the estimated price differences."

So there he just refers generally to the errors. We say that is significant when you look at the handwritten notes of Mr Thompson, which do not refer to him saying: "two main errors". They say that he said "couple of modelling errors", at p.6. That is then reflected in the text of Mr Thompson's email on the same morning, in which he says:

"The modelling errors which were identified by HCA advisers do not change the actual results or conclusions."

In my submission, when you look at the handwritten notes, the email of Mr Thompson, and the inconsistency between paras. 12 and 16 ----

THE CHAIRMAN: Do the handwritten notes not rather support para. 12?

MS ROSE: No, Sir, because they do not say that he said these were the two main errors. What they say is that he said there were a couple of modelling errors. He did not say there were any others, that is the point.

THE CHAIRMAN: But if he is focussing on the R squared area and the statistical analysis areas at the moment you do not seem to be saying that it is suggested that those areas change the parameters.

MS ROSE: That is the second point.

THE CHAIRMAN: We are going to come back to that. So just so you can understand where I am thus far. He says what he said in relation to those two errors is what is at para. 12?

MS ROSE: That is right.

THE CHAIRMAN: And he made it clear that the CMA's mind, his mind, was open as to the significance of those errors.

MS ROSE: He does not actually say that, as a matter of fact. More importantly, he does not identify ----

THE CHAIRMAN: All right, he did not make any comment then ----

MS ROSE: No, on the other errors.

THE CHAIRMAN: No, as to the impact of these errors, the two errors he was focusing on.

MS ROSE: He only referred to those two errors, and he specifically said that they did not change the difference in prices, they only affected the confidence interval.

I am making two points. The first point I am making is that he is there ignoring other errors which do, indeed, affect the parameters. The second point is that, even in relation to the

two errors he is focusing on, what he is saying, in our submission, is contentious and does not accurately reflect our criticism, because the criticism that is summarised at para. 118 of our re-amended notice of application that you looked at earlier, was that the effect of the error on statistical significance is that there are for a number of years and for a number of insurers no statistically significant price differences. That means that, even though you may get a chart that shows different prices, it has no meaning; it is no different from a chart that shows the same prices and, therefore, for him to say it does not affect the price difference, only the confidence interval is a complete understatement of the importance of that error, because it is not that the confidence interval is lower. There is no relevant confidence interval because they are not statistically significant at all, and therefore you cannot say whether there are or are not any price differences any more, that is the point and, in my submission, that is the question which is going to be at the heart of our submissions which is begged by what he says at this meeting, and that is the way he is understood by Mr Thompson, so that is that point.

Can I come to the question of the disposal of the appeal and the issue of grounds of appeal versus decisions? In my submission, there is a confusion displayed with respect both by Ms Smith, and by Ms Bacon on this issue. The grounds of appeal are not the point, the question is what is the relief we were seeking and what is the relief we were granted. The relief that we were seeking was the quashing of three decisions on a range of different grounds. Two of those decisions have now been quashed by consent. All of the grounds of appeal that relate to those two decisions now fall away because the decisions have been quashed by consent. The fact that we may have had different arguments to make about those decisions, some of which are or are not accepted by the CMA, is simply irrelevant now because there is nothing to argue about, the decisions have gone, and that is why we submit there is nothing to stay. The only thing there is to stay is all the grounds of appeal insofar as they relate to the self-pay AEC, because that decision has not been quashed. That is why, with respect to Ms Bacon, her submissions are completely misconceived. How on earth is this Tribunal going to hear AXA PPP's appeal against the proportionality of the divestment remedy - are you saying it should have been more extreme?

THE CHAIRMAN: Just one moment. (After a pause) Please go on.

MS ROSE: How could the Tribunal hear Grounds 1 and 2 of the AXA PPP appeal against the divestment decision in circumstances in which the divestment decision is no longer being defended, because the starting point, if you are looking at proportionality is what are the

costs and the benefits of the divestment that has actually been ordered, and should they have ordered further divestment, or given a further remedy.

It is now accepted that the calculation of the price benefits is flawed, and therefore there is no rational basis, with respect, on which this Tribunal could entertain AXA PPP's appeal. It may be in the future, if a fresh decision is made, based on correct analysis, as to whether or not any investment is appropriate, that AXA PPP might want to appeal that, but they will be appealing a different decision, they will not be appealing this decision. That is why we say that focus on the grounds of appeal is simply wrong. The right focus is on the quashing of particular decisions, and the relief we were seeking. That, we say, goes not only to the order that the Tribunal ought to make but also to the question of costs, because the key point that was made by the Court of Appeal in the *R(M) v Croydon* case that I referred you to in my opening submissions is that in a situation in which a judicial review claimant has, by concession, achieved the relief that they were seeking, they are to be regarded as having succeeded on the claim for judicial review, and should normally receive their costs of the claim.

If you want to look at the specific paragraph ----

THE CHAIRMAN: I think you gave them to us already, did you not?

MS ROSE: Yes, I did, but there is one paragraph in particular, which is para. 58:

> "In a case where the settlement involves the defendants effectively conceding that the claimant is entitled to the relief which he seeks in such a case the claimant is almost always the successful party and should therefore, at least prima facie, be entitled to his costs."

That is the point. So we say that, prima facie, we are entitled to our costs of the appeal against the insured AEC and the divestment decision. So far as the self-pay decision is concerned, since that appeal is going to be stayed the costs of that appeal should also be stayed, and we say that is the right order for costs, and it is not right to start dividing up the costs looking at which grounds of appeal have or have not been conceded. Of course, this Tribunal has not considered the arguments on the merits of any of the grounds of appeal, but the effect of the concession is that we have won our appeal. The decisions that we were appealing against have now been quashed.

It is, of course, also the case that that is precisely what we invited the CMA to do at the very outset of the appeal on 18th June, when we invited them to concede. There is no answer to that point from the CMA. All that was said by Ms Smith was that the situation was very different in June. With respect, it was not different in June. The procedural unfairness that

we have drawn their attention to was exactly the same then as it is now, and the errors that were subsequently discovered do not go to the procedural unfairness, what they actually go to is Grounds 2 and 5, not Ground 1, and it is Ground 1 on which the appeal was conceded. Sir, unless I can be of any further assistance, those are our submissions in reply.

THE CHAIRMAN: Thank you very much. We are grateful to all counsel for their assistance. If you bear with us, we will rise just for a few minutes to see whether we are able to indicate rulings on any of the points. Obviously, we are not going to give Judgment now, but if you could wait for five minutes or so and we will come back if we are able to do that.

(Short break)

THE CHAIRMAN: Thank you all for your patience. We think it is going to be helpful, insofar as we can, to give rulings now with reasons to follow, but there are some matters where the Tribunal wishes to consider further before reaching a final decision.

So far as the order we make is concerned in relation to the decisions which are in issue, as we indicated in the course of the hearing the particular decisions in relation to the insured AEC and the divestment determination will be quashed, that was a matter of agreement.

All other issues and grounds, that is both as raised by HCA and as raised by AXA, will be stayed.

So far as direction on remission as to the identity of the inquiry team to conduct the further examination of matters is concerned, we give no ruling today. We will seek to give a reasoned determination in relation to that by the end of this week.

In relation to costs, we order today that the CMA will pay HCA its costs in relation to its Ground 1 to be assessed on the standard basis. All other costs are reserved.

In relation to the data room we do not give our ruling today, that is another matter on which we wish to consider our decisions and we will seek to address that particular point in the determination that we produce, as I say, we hope by the end of this week.

The costs are to be assessed on the standard basis, not the indemnity basis.

The Tribunal feels that is as far as it is able to go after our brief discussion after the hearing and, as I say, our written reasons in relation to the rulings that I have indicated and our further rulings on the points which we have put to one side this afternoon, will follow.

I repeat our thanks to all counsel for their assistance.

The Tribunal will rise now.

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