Neutral citation [2014] CAT 23

IN THE COMPETITION APPEAL TRIBUNAL

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

23 December 2014

Before:

THE RIGHT HONOURABLE LORD JUSTICE SALES
(Chairman)
CLARE POTTER
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

AXA PPP HEALTHCARE LIMITED

Applicant /
Intervener in Case No. 1229

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

-and-

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

Interveners

HCA INTERNATIONAL LIMITED

Applicant /
Intervener in Case No. 1228

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

-and-

THE LONDON CLINIC
BUPA INSURANCE LIMITED

Interveners

FEDERATION OF INDEPENDENT PRACTITIONER ORGANISATIONS

Applicant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING

A P P E A R A N C E S

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.

Introduction

1. This is the Tribunal's ruling on various case management, directions and costs matters which were debated at a case management hearing on 15 December 2014. The background to the proceedings is set out in the Tribunal's previous ruling dated 25 July 2014 ([2014] CAT 11 – "the disclosure ruling"), and it is unnecessary to repeat it here. We use the same abbreviations in this ruling as are set out in the disclosure ruling.

Factual background

2. For present purposes, three decisions out of several made by the CMA in the course of its investigation into various aspects of the private healthcare market are in issue:

   (a) its decision that there was an AEC in relation to insured patients ("the insured AEC decision"). There is a great deal of reasoning in the Final Report in support of that decision (including, for example, in relation to high barriers to entry and expansion for private hospitals), but the specific place where the decision is made is the second sentence of paragraph 10.5 of the Final Report;

   (b) its decision that there was an AEC in relation to self-pay patients ("the self-pay AEC decision"). Again, there is a great deal of reasoning in the Final Report in support of that decision (including some matters common to the reasoning in relation to the insured AEC decision, such as in respect of barriers to entry), but the specific place where the self-pay AEC decision is made is the first sentence of paragraph 10.5 of the Final Report; and

   (c) its decision to order HCA to divest itself of two of the hospitals owned by it in central London, as a proportionate remedy for the insured AEC decision and the self-pay AEC decision taken together ("the divestment decision"). Once more, there is a great deal of reasoning in the Final Report in support of that decision, and this obviously includes the reasoning in respect of both the insured AEC decision and the self-pay AEC decision. However, the

specific places where the divestment decision is made are paragraphs 11.132, 13.1(a) and 13.48 of the Final Report.

3. A critical part of the CMA's reasoning in relation to the insured AEC decision was contained in its Insured Prices Analysis ("IPA"). A critical part of its reasoning in relation to the self-pay AEC decision was contained in another analysis, its Price-Concentration Analysis ("PCA").

4. HCA's grounds of challenge to the relevant decisions of the CMA can be grouped under five heads:

   (a) Ground (1): the CMA behaved unfairly in the course of the investigation, in that it did not give HCA an adequate opportunity to comment on the IPA and the PCA;

   (b) Ground (2): there are material errors in both the IPA and the PCA, which meant that they did not provide a sustainable basis for the insured AEC decision and the self-pay AEC decision respectively, nor for the divestment decision;

   (c) Ground (3): the CMA's assessment that HCA's hospitals face weak competitive constraints is also flawed in various ways, including that it is based on an arbitrary definition of the relevant geographic market;

   (d) Ground (4): the CMA's assessment that there are high barriers to entry and expansion in central London is irrational and unsustainable; and

   (e) Ground (5): divestment of two hospitals is not a proportionate remedy.

5. By its disclosure ruling, the Tribunal ordered the CMA to give disclosure, via a data room, of the data and methodology used in the IPA. This was done in September 2014. A team from KPMG has reviewed the IPA data and methodology and produced a report of its findings dated October 2014 ("the KPMG report"). As a result of that review, HCA says that it has identified what it maintains are

substantive and significant issues regarding the robustness of the work done by the CMA for the IPA.

6. HCA has instructed an independent economics expert, Professor Waterson, who also visited the data room on two occasions and who has discussed matters with KPMG. Professor Waterson prepared a report dated 7 October 2014 ("the Waterson report") in which he also comments on findings which emerged from the work by him and KPMG in the data room. As we understand it, the CMA has not accepted that the Waterson report is admissible on the substantive appeal, but all parties accepted that reference could be made to the Waterson report for the purposes of the case management hearing.

7. In the KPMG report, KPMG say that they have identified: (a) errors in the CMA's processing of the raw healthcode data used in the IPA (section 3 of the report); (b) errors in the CMA's regression analysis and calculation of R^2, in particular a computer coding error which meant that the CMA had systematically overestimated the R^2 levels it reported (section 4 of the report: "the R^2 point"); and (c) errors in the CMA's assessment of the statistical significance of price differences between HCA and The London Clinic ("TLC", which is a significantly smaller competitor in the private healthcare market in central London) (section 5 of the report: "the statistical error point"). The Waterson report broadly supports KPMG on these points.

8. HCA applied to re-amend its Notice of Application to refer to these points, in particular within its case under Ground (2), and was given permission to do so.

9. It is important for present purposes to note that the R^2 point and the statistical error point do not change the parameter estimates for the estimated price difference between HCA and TLC, i.e. the basic price differences for relevant treatments which appear from the IPA. Their significance, rather, is to furnish HCA with grounds for an attack on the confidence intervals for the CMA's parameter estimates – that is to say, the robustness in statistical terms of the CMA's parameter estimates.

10. This was explained to us in detail by Ms Smith QC for the CMA in her submissions, and was likewise explained in the evidence of Roger Witcomb, who is the leader of the inquiry group of the CMA with responsibility for the private healthcare investigation.

11. In view of the crucial importance of this issue, as appears below, there was a considerable focus on this at the hearing. We invited Ms Rose QC for HCA to take us to material filed by HCA, and in particular to its pleaded case in the Re-Amended Notice of Application, to show us if Ms Smith's and Mr Witcomb's summary of the position in relation to the R^2 point and the statistical error point was inaccurate and, most important of all, whether HCA was maintaining in its re-amended case that the R^2 point or the statistical error point did in fact change the estimates of price differences between HCA and TLC, referred to in the pleadings as parameter estimates, rather than the confidence intervals for those estimates. Ms Rose could point to no such claim in the Re-Amended Notice of Application, nor did she suggest that any such claim had been made in the KPMG report or the Waterson report (this was unsurprising, since the relevant claims made in those reports had been carried into the Re-Amended Notice of Application). Accordingly, she was unable to demonstrate that the account of the position given by Ms Smith and by Mr Witcomb in his evidence was wrong. Although Ms Rose did point to allegations in HCA's pleaded case of other errors, which HCA claimed did affect the parameter estimates, those errors and their effects were distinct from the R^2 point and the statistical error point and their effects.

12. It should be emphasised that this does not mean that the R^2 point and the statistical error point do not have a material impact on the validity of the IPA. If the robustness of the CMA's parameter estimates can be sufficiently undermined by reference to these points, that would mean that a key part of the statistical reassurance one may have that it is safe to rely on the parameter estimates could be removed and the IPA could not properly be relied upon as a basis for any insured AEC decision or as a basis for any divestment decision. If HCA is successful in getting to this point, there is a very real prospect (to put it no higher) that no insured AEC decision or finding could be made and also a real prospect, therefore, that no new divestment decision should be made.

13. The potentially material impact of the R^2 point and the statistical error point has been accepted by the CMA. In the light of those two points, the CMA recognises that there should be a further opportunity for HCA and others to make representations to the CMA with a view to persuading it to conclude that there is no AEC with respect to insured patients (which HCA maintains), or that there is (which TLC maintains, as does another company which has a challenge to the Final Report on foot, namely the insurance company AXA PPP Healthcare Limited – "AXA"), and further representations regarding the question of remedy. Accordingly, the CMA has now conceded Ground (1) of HCA's claim, acknowledging that fairness requires that HCA (and others) should have an opportunity to make further representations, and consequently agrees that for that reason the insured AEC decision and the divestment decision should be quashed, to allow for further representations to be made relevant to those decisions. It accepts that it "will reconsider the matters remitted to it with an open mind". The CMA's Amended Defence did not seek to "trespass onto the precise extent, impact and effect of the "errors" identified in the [KPMG report]", as it accepts that these are properly matters which are to be considered afresh upon remittal. This is a responsible approach for the CMA to adopt.

14. The CMA indicated that it was willing to proceed in this way by a letter from TSol dated 13 November 2014, in which it was explained that as a result of consideration of HCA's Re-amended Notice of Application and the KPMG report "the CMA acknowledges that … HCA has shown that there were errors in the CMA's [IPA] which it was not given the opportunity to identify and comment on during the market investigation."

15. HCA continues to maintain that its other Grounds of challenge in relation to the insured AEC decision and divestment decision are well-founded. The CMA denies this. If, after considering representations, the CMA decides to make a new insured AEC decision and a new divestment decision (or similar), it is likely that HCA will pursue those other Grounds of challenge in relation to the future insured AEC decision and divestment decision. HCA also maintains its Grounds of challenge to the self-pay AEC decision, which the CMA does not accept. The new issues raised

by HCA in relation to the IPA do not affect the self-pay AEC decision, which the CMA continues to defend in these proceedings.

16. The CMA served its Amended Defence on 25 November 2014 in answer to HCA's Re-Amended Notice of Application. In the Amended Defence, the CMA made the concessions referred to above. Since the CMA accepted that the insured AEC decision and divestment decision should be quashed and remitted for reconsideration, it deleted large parts of the original Defence which had pleaded in answer to HCA's various Grounds (in particular, Ground (1)), matters which would now be academic because new decisions would be taken in relation to divestment and whether there was an AEC in relation to insured patients.

17. For example, as regards Ground (1), the matters deleted in the new pleading included the CMA's case in relation to a particular complaint made by HCA under that Ground, namely that after certain modifications were made to the IPA in light of certain representations about it by HCA in the course of the CMA's investigation, Nuffield (another healthcare provider) had been given access to the revised IPA whereas HCA had not been ("the Nuffield complaint"). The CMA's answer to this complaint had been pleaded in paragraphs 123 to 130 of the Defence. In those paragraphs the CMA explained that Nuffield had been given this access to the revised IPA because its interests had not been affected by the original draft IPA and so (unlike HCA and others) it had not had an opportunity to examine the underlying workings of that model, whereas under the revised IPA Nuffield's interests were affected so that fairness required it should at that stage see the IPA; and the nature of the access given to Nuffield was very different from the access which HCA maintained under Ground (1) that it (HCA) should have been given to the revised IPA in the course of the investigation. Those paragraphs were deleted by amendment because they were not going to be relevant to the outstanding issues in dispute between HCA and the CMA.

18. We have referred to this part of the pleading history because at the hearing before us Ms Rose sought to suggest that the inference from the deletion of those paragraphs in relation to the Nuffield complaint was that the CMA now accepted that it had in fact acted unfairly in relation to HCA by comparison with its treatment

of Nuffield. Ms Rose sought to rely upon this alleged acceptance of unfair treatment by the CMA as part of her submission that the particular Inquiry Group of the CMA headed by Mr Witcomb which had produced the Final Report ("the Healthcare Inquiry Group") had behaved so unfairly in relation to HCA that the matters to be remitted to the CMA could not properly be remitted to the Healthcare Inquiry Group, but should be remitted to another inquiry group and investigation team (see further below).

19. We reject Ms Rose's submission regarding the inference to be drawn from the deletion of paragraphs 123 to 130 of the CMA's original Defence in relation to the Nuffield complaint. No such inference could fairly be drawn as a result of the deletion of those paragraphs in the Amended Defence. No-one could think from that pleading that the CMA had suddenly changed its position in relation to the Nuffield complaint and was now accepting, contrary to its previous stated position, that it *had* behaved unfairly in relation to that point. The reason for the deletion was that this aspect of the case was no longer in issue in the proceedings, not that the CMA had changed its case on the underlying facts. The same point can be made regarding other deletions in the Amended Defence referred to by HCA. Moreover, that the CMA's position on the underlying facts remains unchanged has been explicitly confirmed by Mr Witcomb in his third witness statement.

20. On 4 December 2014, Nabarro, the solicitors for HCA, wrote to TSol for the CMA with HCA's proposals for the order to be made at the case management hearing later that month. HCA proposed, among other things, that the self-pay AEC decision should also be quashed and that if any matters were remitted for reconsideration by the CMA the reconsideration should be by a new inquiry group and case team. This was the first time that HCA had made this suggestion.

21. To understand the suggestion, a word of explanation is required about the working arrangements within the CMA. When the CMA embarks on an investigation, it is conducted by an inquiry group composed of members of the CMA panel, which is supported by a case team of CMA staff members. The CMA panel comprises professionals with experience and expertise suitable to assess evidence and make relevant findings and decisions. For the healthcare investigation which is the subject

of these proceedings, the Healthcare Inquiry Group comprises Mr Witcomb (the Chairman of the inquiry group), Jayne Almond, Tony Morris, Jeremy Peat and Jonathan Whiticar. They all contributed to and took responsibility for the Final Report which is the subject of challenge in these proceedings.

22. The case team assigned to the investigation included economists, statisticians and so forth to carry out detailed data collection and analyses, subject to the direction and review of the Healthcare Inquiry Group.

23. In their letter of 4 December, Nabarro stated that "The CMA conducted its procedure during the original investigation in a manner that was fundamentally flawed and systematically unfair to HCA", and in support of that contention made a number of serious allegations which had been pleaded in HCA's original Notice of Application and Reply, including that the CMA knowingly consulted HCA on a false basis, without revealing that it had adopted a revised form of the IPA; the CMA improperly discriminated against HCA by allowing Nuffield to comment on aspects of the new IPA (this is the Nuffield point, referred to above); and the CMA informed all the main parties except HCA of the existence of the revised IPA and that Nuffield was being consulted on it, and concealed its existence from HCA, falsely suggesting that disclosure to a third party was only being granted in respect of the original draft IPA.

24. This last allegation is based on an email dated 12 February 2014 from Thomas Wood for the CMA to Nabarro, for HCA, sent during the last phase of the CMA investigation. In that email, Mr Wood wrote:

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

HCA contend that this email was deliberately misleading, in that it was intended to conceal from HCA that Nuffield had been given access to the IPA in a revised form rather than in the form it had when HCA was given access to it.

25. The allegations referred to had been made as part of HCA's Ground (1), and in its original Defence the CMA had disputed the allegation of unfairness in relation to all of them, putting factual issues in what the CMA maintains is their proper context in order to explain why there was no unfairness or bad faith involved. As with the Nuffield point, those parts of the Defence had been deleted in the Amended Defence, because the CMA was conceding Ground (1) in relation to the IPA and it was therefore unnecessary to go into these matters.

26. Nabarro seized upon this in their letter. They said:

> "The CMA does not dispute any of the above matters in its Amended Defence, or advance any arguments of fact or law in response to them. Given the serious and pervasive unfairness of the CMA's procedure, it would not be appropriate for the same Inquiry Group or any members of the original case team to conduct any further investigation of these matters."

27. With respect, the contention that the CMA did not dispute the matters referred to was misconceived. As with the Nuffield point, no inference could fairly be drawn from the amendments to the CMA's Defence to take account of the R^2 point and the statistical error point that the CMA was now suddenly agreeing, contrary to its previously pleaded case, that these particular allegations of unfair treatment were well founded. Also, the TSol letter of 13 November 2014 had explained the limited nature of the concession which the CMA was making.

28. Nabarro's first reply to that letter, also sent on 13 November 2014, indicates that they understood that the CMA's concession related to the errors in the IPA, not any wider points of alleged unfairness.

29. TSol's reply to that letter, dated 14 November 2014, again made it clear that the concession being made by the CMA was of this limited character, and explained that "The CMA accepts that KPMG has correctly identified computer coding errors relating to the R-squared statistic and the statistical significance testing carried out by the CMA" (i.e. what we have called the R^2 point and the statistical error point). Again, Nabarro's reply to that letter, dated 17 November 2014, did not suggest that remittal to the Healthcare Inquiry Group would be inappropriate.

30. In their letter of 4 December, in which this suggestion was first made, Nabarro referred to authorities and also advanced additional points in support of it:

> "18. Secondly, remittal of the investigation to the original Inquiry Group and case team would give rise to an appearance of bias. A fair-minded and informed observer would conclude that there was a real risk that the original Inquiry Group and case team would be biased against HCA. As the CMA does not dispute [sc. in the amended version of the Defence], HCA was misled and was singled out for less favourable treatment in the conduct of the previous consultation process, without any proper justification. There is, moreover, now a significant danger of confirmation bias …
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> [reference was then made to the decision of the Employment Appeal Tribunal in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763 – "*Sinclair Roche*" – and 46.5 was quoted: see below]
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> 20. HCA is particularly concerned that the CMA (1) steadfastly refused, without proper justification, to provide disclosure and access to the Data Room in order to enable HCA to uncover the errors in the CMA's existing analysis, maintaining that such access was unnecessary; (2) seeks in the Amended Defence to defend the legality of its substantive analysis where there is no proper basis for doing so; and (3) proposes only a narrow remittal with the ostensible purpose of enabling the CMA, if possible, quickly to confirm its original decisions. In the circumstances, if there were to be a remittal there is an unacceptable risk of confirmation bias, which may only be mitigated if the matter were remitted to a new Inquiry Group and case team.
>
> 21. Thirdly, remittal to a new case team and new Inquiry Group would be proportionate in all the circumstances. Given the significance of the matters in issue, the extra time and cost associated with the appointment of a new Inquiry Group and new case team would be justified. In any event, given the passage of time since the original decisions were taken, the CMA would have to revisit its existing analysis even if the matter were remitted to the original Inquiry Group and case team. Accordingly, significant further work could not be avoided."

31. Nabarro's letter of 4 December provides a convenient summary of the arguments in support of HCA's contention that remittal should be to a different inquiry group and case team which Ms Rose developed on behalf of HCA at the hearing. In substance, Nabarro's letter fulfilled the function of an application notice seeking various orders and directions from the Tribunal, including a direction for remittal to a new inquiry group and case team.

32. In the ordinary way, where such a direction is sought on the basis of serious factual allegations of the kind on which HCA seeks to rely, the opposing party would be entitled as a matter of fairness to put in evidence to respond to the allegations made. In view of Nabarro's assertion that the CMA had, by the amendments to its

Defence, now conceded the allegations of unfair treatment to which Nabarro referred in their letter, the CMA served the third witness statement of Mr Witcomb in the proceedings, dated 9 December 2014 ("Witcomb 3"). Mr Witcomb gave the same explanations in this statement why the CMA did not accept the allegations of unfair treatment now being made by Nabarro as had previously been given in the CMA's original Defence. Mr Witcomb gave a detailed account of the context in which the various events referred to by Nabarro had occurred, in order to explain why the CMA maintained that there had been no unfair treatment of HCA nor any bad faith on the part of the CMA in relation to these events in the course of the CMA's investigation.

33. So, for example, at paragraphs 49-51 of Witcomb 3, Mr Witcomb explained the background to the Nuffield point and the context for Mr Wood's email of 12 February 2014. HCA were fastening on the words "this information" in the second sentence of the passage in that email quoted at paragraph 24 above in order to suggest that the CMA deliberately sought to mislead HCA by stating that Nuffield was only being given access to the original form of the IPA, whereas in fact it was being given access to aspects of the revised version of the IPA. But Mr Witcomb explained that this language was intended as a reference to the IPA generally, not to any particular version of it. He fairly acknowledged that he could understand the point which HCA were making on this language in the email, given the focus of Ground (1), but went on to say that it was "giving the language of the email a significance which it did not have at the time." He said, "If it is suggested that the CMA used the language 'this information' so as to deliberately obscure the changes which had been made to the IPA, then I can confirm that this was certainly not our intention."

34. Mr Witcomb specifically confirmed that the Healthcare Inquiry Group and staff team would approach any remittal with an open mind (paragraph 53 of Witcomb 3).

35. He also referred to the needs of the CMA in being able "to manage its resources in an efficient manner, considering not only the requirement of the remittal, but also the overall workload of the CMA and the specific availability of members and staff" (*ibid.*, paragraph 54). This is a very compressed statement, but the point being

made is clear enough. To require remittal to a new inquiry group and case team would be disruptive not just for this investigation (in that new people would have to read themselves into a complex and elaborate investigation, which would inevitably take some time), but also for other work of the CMA (since teams dedicated to other investigations would have to be pulled off those investigations to do this one, requiring replacements to be found for those investigations who would in like manner have to read themselves in for those investigations). These impacts of loss of detailed understanding of the background of investigations and delay would be contrary to the public interest which exists in the CMA being able to conduct its work efficiently, promptly and effectively.

36. Witcomb 3 was prepared and served promptly after the CMA had notice of HCA's contention in Nabarro's letter of 4 December that remittal should be to a different inquiry group and case team. It was also served in good time before the hearing on 15 December.

37. Despite this, and the obvious requirement, as a matter of fairness, that the CMA should have an opportunity to put in evidence to respond to the allegations made against it in Nabarro's letter and to provide information to the Tribunal relevant to its consideration of the direction which HCA was to invite it to make, by the time the hearing commenced on 15 December HCA still did not accept that Witcomb 3 should be admitted in evidence. Nonetheless, Ms Rose commenced her submissions by making reference to it. This was certainly a realistic stance for her to take, but she said that she was only referring to it on a *de bene esse* basis. From its pre-reading regarding the respective positions being adopted by the parties, however, it was clear to the Tribunal that fairness required that Witcomb 3 should be admitted as evidence in the proceedings, and rather than have the hearing proceed on the contrived basis that Witcomb 3 was only being referred to *de bene esse*, we indicated to Ms Rose that we would give permission for the witness statement to be admitted in evidence.

38. In addition to Witcomb 3, Mr Witcomb also made a fourth witness statement, dated 11 December 2014 ("Witcomb 4"). HCA accepted that permission should be given for this statement to be admitted in evidence. Mr Witcomb made this statement to

respond to certain allegations made in HCA's skeleton argument dated 10 December 2014 regarding a meeting that he attended on 2 December 2014 with Piers Thompson, a Transport, Water and Regulation Specialist at UK Trade & Investment ("UKTI").

39. It appears from the emails which relate to this meeting that HCA, which is a US company, was considering making an investment in the UK and had asked UKTI if UKTI could speak to the CMA about its work in the private healthcare field and about "some concerns" HCA had about investing further in this country (internal Department for Business, Innovation and Skills email dated 26 November 2014). UKTI was keen to encourage investment by HCA and so a meeting was set up between the CMA and UKTI. Mr Witcomb understood that the purpose of the meeting was to discuss general concerns expressed by HCA in relation to potential investment in the UK (paragraph 7 of Witcomb 4), though it seems that Mr Thompson came to the meeting armed with questions from HCA about the current state-of-play in relation to the CMA's private healthcare investigation and Final Report following the CMA's acceptance that there were flaws in the economic modelling. Mr Witcomb says that, given his involvement in the private healthcare investigation and his understanding of the sector, he volunteered to attend the meeting with UKTI, along with two CMA colleagues who had been involved in that investigation.

40. Mr Witcomb was trying to be helpful to UKTI and he did not understand that the meeting was to address the current state-of-play in the investigation and litigation. Nonetheless, given the ongoing legal proceedings against HCA and the CMA's acceptance that aspects of its private healthcare investigation would have to be revisited by the Healthcare Inquiry Group, it seems to us that it was not a good idea for him to go to this meeting and run the risk that something inappropriate might be said.

41. However, the fact that Mr Witcomb made what might be considered an incautious decision to attend the meeting does not in itself indicate that he had pre-judged the outcome of the issues to be remitted to the CMA in any way at all. So far as that is concerned, what matters is what he said at the meeting.

42. The account of the meeting which was relayed back to HCA in an email dated 8 December from Rebecca Mowat, Consul & Head of Trade & Investment (Southeast U.S.) for UKTI at the Foreign & Commonwealth Office (who had not attended the meeting) caused HCA great concern. It appeared to indicate that Mr Witcomb had said words to the effect that the CMA had already made up its mind on the issues to be remitted, before the remittal took place and in advance of the further consultation which the CMA had accepted was required in relation to the IPA. It was this point which HCA raised in its skeleton argument dated 10 December, as an additional reason why remittal of the case should be accompanied by a direction from the Tribunal that it should be to a new inquiry group and case team.

43. In answer to this, the CMA says that Ms Mowat's email contains a garbled account of what was actually said at the meeting: Mr Witcomb did not say anything to indicate that the CMA had made its mind up in relation to any matter which it accepted should be reconsidered by it upon a remittal. Witcomb 4 was adduced in evidence to explain how Ms Mowat's email came to be written and to set out what Mr Witcomb had in fact said to Mr Thompson at the meeting. Witcomb 4 refers to emails and Mr Thompson's manuscript notes of the meeting, which are exhibited. (Neither Mr Witcomb nor his CMA colleagues made notes at the meeting.)

44. In Witcomb 4, Mr Witcomb gives his account of what was said at the meeting. After describing the first part of the meeting, at paragraphs 12 and 13 he says this:

> "12. The discussion then moved on to the current proceedings before [the 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 difference 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.
>
> I explained to Mr Thompson that the CMA had admitted to the Tribunal that it had made errors in its analysis and had requested that the matter be remitted to the CMA to reconsider in light of the errors. I explained that no decision had yet been taken on this, but that it was due to be discussed at a case management conference

> before the Tribunal on 15 December 2014 and that the Tribunal would make the final decision on whether there was to be a remittal."

45. Mr Witcomb also discussed with Mr Thompson allegations made by HCA that the remedy in the divestment decision amounted to a "confiscation" of HCA's assets, which Mr Witcomb said was a misleading way of describing the position, because HCA was not prevented from selling the relevant hospitals at full market value and was given a reasonable time in which to do so.

46. Mr Witcomb's account of what he said at the meeting on 2 December comes only a few days after the meeting, and there is no reason to think he does not remember correctly what he said at it. No-one suggests that Mr Witcomb is dishonest. His account in paragraphs 12 and 13 of Witcomb 4 of what he said is fully in line with the position then being adopted by the CMA in the litigation, namely that it accepted that the R^2 point and the statistical error point in respect of the IPA meant that there should be further consultation on the IPA. It is very likely that Mr Witcomb would have told Mr Thompson the same thing that the CMA was telling HCA in the litigation, especially because he knew that what he said was to be relayed back to HCA. His account is also supported by the manuscript notes made by Mr Thompson at the meeting. These record Mr Witcomb as having referred to a "couple of modelling errors", "R2 error", "Precision of stats relating to insurance prices paid by their rivals" and "confidence intervals lower than thought", and thus indicate that Mr Witcomb focused on the R^2 point and the statistical error point, as he says he did.

47. Mr Witcomb's researches reveal that Ms Mowat's email was based on an email dated 2 December 2014 she had received from Mr Thompson, reporting on the meeting with Mr Witcomb earlier that day. Mr Thompson's email included the following:

> "Roger Witcomb and the enquiry team tried to be as helpful as they can be given the limitations.
>
> In terms of another healthcare sector wide enquiry – the CMA are not aware of this and don't currently have plans for one.

> In terms of HCA's appeal to CAT, the timetable for this will be decided on 15th January [sic] at the CAT Case Management conference. The CAT process has not been stopped and it is HCA's decision to pursue this.
>
> 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)." (emphasis supplied)

48. At the hearing, Ms Rose emphasised the words in italics, and suggested that these indicated that, despite what Mr Witcomb said in his witness statement, Mr Thompson understood him to be saying rather more, namely that the CMA had already made up its mind that the R^2 point and the statistical error point did not change the conclusions to be drawn from the IPA. However, we think it is more likely that Mr Thompson did not understand the specific implications of the factual information which Mr Witcomb sought to give him with precision (we note that this is not altogether surprising: the distinction between the relevant concepts about which Mr Witcomb was speaking is a subtle and potentially confusing one for a non-statistician), and this affected the account which he subsequently provided for Ms Mowat.

49. For these reasons, we accept Mr Witcomb's evidence of what he said at the meeting with Mr Thompson on 2 December.

50. The significance of this is that what Mr Witcomb actually said was that, contrary to HCA's allegation, he and the Healthcare Inquiry Group and case team had not made up their minds about what, on further review and with the benefit of further representations, might be the impact of the R^2 point and the statistical error point on the IPA and on the decisions to be re-visited by the CMA. Although HCA had other arguments, not arising from the R^2 point and the statistical error point, why "the parameter estimates themselves" (i.e. the estimated price difference between HCA and TLC) should change, Mr Witcomb was not addressing those other arguments when he explained the position regarding the R^2 point and the statistical error point to Mr Thompson: he made no statement to suggest that he and the Healthcare Inquiry Group and case team had pre-determined views on HCA's case on the matters to be remitted to the CMA.

51. Ms Rose submitted that Mr Thompson's email of 2 December showed that an independent participant at the meeting thought that Mr Witcomb had gone further than this, and expressed a pre-determined view of the outcome on the remittal, and that his email should be taken to indicate that there were objective grounds for thinking that Mr Witcomb had prejudged the issues. We do not accept this. Where an issue of apparent bias is raised on the basis of something said orally at a meeting, and a court or tribunal is able to find the facts about what was said, then the assessment whether a case of apparent bias has been made out should proceed on the basis of the facts found, and not on a glossed version of them in a report afterwards.

52. Apart from HCA's case, there are other challenges to various decisions in the Final Report brought by other parties. AXA has brought a challenge on five grounds. AXA's first two grounds involve challenges to the divestment decision and remedy in relation to the insured AEC decision. AXA's interest in respect of these matters is opposed to that of HCA. Put shortly, these grounds of AXA's challenge involve a contention that the CMA did not go far enough in its findings and decisions regarding the distortion in the private healthcare market for insured patients and what HCA should be ordered to do to remedy that distortion. The third to fifth grounds of AXA's challenge are concerned with other aspects of the Final Report, and are not affected by the work on the IPA.

53. The Federation of Independent Practitioner Organisations ("FIPO") has also brought a challenge to aspects of the Final Report. Like the third to fifth grounds of AXA's challenge, FIPO's challenge is not affected by the work on the IPA.

54. Some months ago, the Tribunal fixed dates in January 2015 for the hearing of all the challenges to the Final Report.

The positions of the parties at the case management hearing

55. The concession by the CMA in November 2014 that there are errors in the IPA and that, as a result, its insured AEC decision and divestment decision should be quashed to allow for further consultation on the IPA and for those decisions to be looked at afresh was the responsible thing for it to do in the circumstances. However, it has created a complicated situation in procedural terms.

56. After debate, certain matters emerged as common ground at the hearing:

(a) It is agreed that it is possible and appropriate for FIPO's challenge and the third to fifth grounds of AXA's challenge to be heard within the existing hearing slot in January 2015. Those challenges are not affected by remittal of the insured AEC decision and divestment decision to the CMA for re-determination; and

(b) It is agreed that the appropriate order for the Tribunal to make in relation to the insured AEC decision and the divestment decision is to quash those decisions, as expressed in the particular passages in the Final Report where those decisions are stated to be made: for the insured AEC decision, the second sentence of paragraph 10.5 of the Final Report; for the divestment decision, paragraphs 11.132, 13.1(a) and 13.48 of the Final Report. This will leave all other parts of the Final Report, including all the reasoning in it and the other decisions regarding various other AECs on foot. The task of the CMA will be to consult further on the IPA and then re-determine the questions whether any new insured AEC decision should be made and whether any new divestment decision should be made. The CMA will have to consider what impact the new information and representations it receives in relation to the IPA has upon the existing statements of reasoning contained in the Final Report with respect to those decisions.

57. Other matters remained in dispute between the parties and require determination by the Tribunal.

58. First, HCA submitted that in addition to the decisions which the CMA agrees should be quashed, the self-pay AEC decision should be quashed as well. The CMA disputes this.

59. We agree with the CMA on this point. The self-pay AEC decision is not based on the IPA. The errors in the IPA conceded by the CMA do not show that the self-pay AEC decision is flawed. Nor do they indicate that any further consultation is required in relation to the PCA or the self-pay AEC decision. The CMA intends to continue to defend and seek to uphold the self-pay AEC decision. In our view, there is no good reason why it should be quashed at this stage.

60. We add this, however. If in the course of the further consultation on the IPA anything emerges which, contrary to expectations at this point, does have an indirect knock-on effect on the reasoning in relation to the self-pay AEC decision, the CMA will need to give careful consideration to that question and the implications it may have for the overall reasoning in the Final Report. Although the self-pay AEC decision has not been quashed at this stage, if as a result of the IPA matters to be re-consulted upon a party shows good cause to think there is a material change in the reasoning in relation to that decision, the CMA will have to assess whether the points made are of sufficient force to require it to revisit that reasoning, which they may be if they could be relevant to the reasoning in respect of the divestment decision.

61. The outcome on the point of dispute regarding what should happen in relation to the self-pay AEC decision, therefore, is that it will not be quashed. HCA's challenge to it remains on foot. That challenge will be stayed pending the outcome of the CMA's reconsideration of the insured AEC decision and the divestment decision.

62. An issue also arises regarding what should happen in relation to HCA's Grounds (2) to (5) in respect of the insured AEC decision and divestment decision, which have not been conceded by the CMA. The CMA proposed that Grounds (2) to (5) with respect to these decisions should be stayed under rule 19 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372 / 2003), pending the making of new decisions by the CMA in relation to the matters remitted to it. HCA, on the other hand, submits that

since the insured AEC decision and the divestment decision are being quashed, that fully disposes of those decisions and there is no scope to stay grounds of challenge which have been made in respect of those decisions which have completely fallen away. In support of that submission, HCA relied upon the decision in *Office of Communications v Floe Telecom Ltd* [2006] EWCA Civ 768, in which the Court of Appeal held that the Tribunal had no power under its Rules to give directions to maintain control over a matter in relation to which the decision in issue had quashed and the whole report of the regulator remitted for reconsideration: see in particular paragraphs [28] and [40].

63. Ms Rose is right to point out that new decisions are to be made in place of the insured AEC decision and divestment decision which are being quashed, and if and when new decisions are in due course promulgated by the CMA the parties, including HCA, will have a new right in an appropriate case to bring a challenge under section 179 of the Act in respect of the new decisions. The grounds to be pleaded in that challenge will have to be formulated by reference to the content of the new decisions and the circumstances in which they were made (having regard to whether they made fairly, with adequate consultation and so forth).

64. On the other hand, the situation with which we are confronted is rather different from that in *Floe Telecom*. The Final Report will not be set aside in its entirety, and there remain on foot a series of challenges to it, including HCA's challenge to the self-pay AEC decision. The Grounds in relation to the challenge to that decision are closely related to Grounds (2) to (5) in relation to the decisions which have been quashed. Moreover, it not infrequently happens in judicial review cases that the respondent agrees to reconsider the decision challenged in the judicial review proceedings, and the High Court stays the proceedings to allow that reconsideration to occur, with liberty to the claimant to amend the grounds of challenge when the new decision is promulgated so as to adjust them as appropriate to the new decision. That can be beneficial from the claimant's point of view, since it means he does not have to pay the fee that would need to be paid to issue a fresh claim to challenge the new decision, in relation to which the same grounds of claim may in substance still be in issue. By contrast with that sort of case, on the facts in *Floe Telecom* the Tribunal had already decided that the decision was quashed and had remitted it

before any question arose regarding the exercise of case management powers under rule 19: see paragraphs [17]-[21]; also, there are passages in the judgment which indicate that the whole objective which the Tribunal in that case was trying to achieve was an illegitimate one, which again meant that the purported exercise of power could not be lawful. The present case, however, is more closely similar to those in the High Court, where proceedings remain on foot at the time the order is made, it is contemplated that the proceedings will or may very well continue in some form in the future, and the exercise of case management powers is directed to controlling that process, rather than some wider, illegitimate objective.

65. The power of the Tribunal to give directions, as set out in rule 19(1), is very wide indeed: "The Tribunal may at any time, on the request of a party or of its own initiative … give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings." As the text makes clear, this wide power is not limited to the directions set out in rule 19(2). We tend to think that rule 19(1) does include a power for the Tribunal, in an appropriate case, to stay proceedings even while a decision is being re-taken, as the High Court sometimes does.

66. However, it is not necessary for us to make a determinative ruling on that issue, because there is a more straightforward approach available here which meets the justice of the case.

67. In this case, the real point in issue in relation to this part of the debate is what costs order should be made at this stage in relation to HCA's success in obtaining quashing orders in respect of the insured AEC decision and divestment decision. HCA says that it has won, and should have the whole of its costs in relation to all its Grounds of challenge to those decisions. The CMA says that it has only conceded that HCA should succeed on Ground (1), and disputes that there is any merit in the other Grounds. It says that in an order made at this stage, HCA should only get its costs in relation to Ground (1), and that costs in relation to Grounds (2) to (5) should be reserved. HCA hopes that if the Tribunal accepts its submission that Grounds (2) to (5) cannot or should not be stayed, that will assist HCA in its

argument that it should have the whole costs of all its Grounds of challenge in relation to the insured AEC decision and the divestment decision.

68. On the underlying question of the costs order to be made at this stage, we consider that the position of the CMA is just and appropriate, and fairer than that of HCA. The merits of HCA's Grounds (2) to (5) have not been conceded by the CMA, nor determined by the Tribunal. That might not be a strong factor in favour of the CMA's position, if the Tribunal would never subsequently have cause to examine the competing merits on those other Grounds (in that case, it might well be that the ordinary presumption would be that HCA should get all its costs: see *R (M) v Croydon LBC* [2012] 1 WLR 2607). But in the present case, it is likely that the Tribunal will in due course closely examine the merits of HCA's arguments in relation to Grounds (2) to (5) in the context of its determination of HCA's challenge to the self-pay AEC decision, which remains live, and there is moreover a real prospect that it will do so in the context of any challenge HCA may bring in relation to any fresh insured AEC decision or fresh divestment decision. The Tribunal is likely to be better informed in future about the merits of Grounds (2) to (5), and thus better able to decide more fairly in future who ought to bear the costs in relation to those Grounds. Accordingly, in our view, it is just and appropriate in the complicated procedural context which has arisen here to award HCA its costs on Ground (1), but to reserve costs on the other Grounds.

69. To achieve that just result, it is not necessary to make an order of a controversial kind in jurisdictional terms, staying HCA's Grounds (2) to (5) in relation to the insured AEC decision and the divestment decision until fresh decisions are made (in relation to which those Grounds may be purely historic and academic). It can be done more directly, by ordering that HCA's applications for its costs in relation to those Grounds are stayed; the object being that the stay will operate pending the CMA's re-determinations in relation to the insured AEC decision and the divestment decision, and the hearing of any challenge to such fresh decisions as may be made, conjoined as appropriate with the existing challenge to the self-pay AEC decision. The effect of this order is that the costs of Grounds (2) to (5) in relation to the insured AEC decision and the divestment decision are reserved (indeed, that is what an order reserving costs means: the application for costs is

reserved or stayed to be decided on a later occasion). HCA's applications for its costs are live applications before the Tribunal now, and will not become academic in future just because of the quashing order which the Tribunal makes at this stage.

70. Finally in this section, we address AXA's submissions as to the procedural directions to be given. The CMA and HCA agree that, on the footing of the determinations above, the appropriate case management directions are that HCA's challenge to the self-pay AEC decision should be stayed pending re-determinations by the CMA in relation to the insured AEC decision and the divestment decision, with a view to any new section 179 challenges brought against any new decisions in that regard being directed to be heard together with that part of the existing HCA case which remains on foot. That makes obvious sense, because of the closely inter-linked factual background common to all such challenges. The CMA says that the first and second grounds of AXA's challenge share that same background; AXA's first and second grounds of challenge may very possibly be affected by the reconsideration of the IPA which the CMA is to undertake; they should therefore be stayed in the same way. AXA opposes this. It wants all its grounds of challenge heard in January 2015.

71. In our judgment, there is a compelling logic to the CMA's submissions on this point. It makes little sense to continue to hear AXA's first and second grounds of challenge while there is a potentially fundamental reconsideration of the basis for the critical decisions in issue under those grounds which is ongoing. We therefore order that the first and second grounds of AXA's challenge be stayed.

Other costs issues

72. Two further issues were raised on costs. First, HCA submits that such part of its costs in relation to the insured AEC decision and the divestment decision as the Tribunal orders to be paid (i.e. those in relation to Ground (1): see above) should be paid on the indemnity basis.

73. We reject this submission. The costs are to be paid on the standard basis. There is nothing to indicate that the CMA's conduct of the litigation has been outwith the norms to be expected in litigation of this character.

74. Ms Rose complained that the CMA behaved unreasonably by not being more open with information for HCA, and in particular by resisting HCA's application for access to the IPA data, which led to the Tribunal's disclosure ruling. But it has to be borne in mind that the CMA has at all stages had to be alert to protect sensitive commercial confidential information provided to it by HCA's customers and competitors in the course of the CMA's private healthcare investigation, particularly in circumstances in which inappropriate disclosure of such information to a company with such a strong market presence as HCA could exacerbate possible market distortions in HCA's favour. The fact that some of the CMA's judgments about how to strike the balance between competing considerations might be contestable, and the fact that its judgment on a particular aspect of this was overturned by the disclosure ruling, on a finely balanced judgment by the Tribunal, does not show that the CMA has behaved unreasonably in the context of the litigation. We do not consider that it has. It has sought to behave responsibly, taking account of all considerations.

75. Secondly, a question arises whether the costs to be awarded to HCA should include the costs of the data room review conducted by KPMG as a result of the disclosure ruling. It is clear from what we were told that this was a very intensive exercise, involving considerable deployment of KPMG resources, and the costs of it are likely to be very large. HCA says that the CMA should be ordered to pay those costs as costs of the litigation.

76. We reject this submission as well. As the CMA contends, the costs of the data room exercise were not incurred by reason of any unlawful action by the CMA; on HCA's own case, it was an exercise which HCA says it ought to have been permitted to undertake in the course of the CMA's investigation. The effect of the Tribunal's disclosure ruling was to give HCA the opportunity to review the IPA data in the way that HCA, under Ground (1), said it should have had during the administrative, investigation phase. Had that occurred, as (by the CMA's concession on Ground (1)) is now common ground it should have done, the costs now claimed by HCA would not have been recoverable from the CMA. We can see no good reason why, just because that exercise occurred belatedly and as a result of

the ruling of the Tribunal, the costs of that exercise should now be payable by the CMA. That would be to give HCA an unmerited windfall.

Direction on remission

77. We return at this point to HCA's submission that the Tribunal should direct that the matters remitted to the CMA should be considered by a different inquiry group and case team. We have already made reference above to some matters relevant to this submission. The CMA opposes such a direction, as does TLC in some powerful submissions made at the hearing.

78. Both the CMA and HCA presented their submissions by reference to guidance given by the EAT in *Sinclair Roche*, in relation to the question whether a determination which had been overruled on appeal should be remitted to the same employment tribunal or a different tribunal. The EAT said this, at paragraphs [45]-[47]:

> "45. We are satisfied that the Tribunal's conclusions that there was direct discrimination against SF and SH (the referrals issue) and indirect discrimination of SF (the part-time working issue) cannot stand. Mr Gatt QC submits that the case should be remitted for hearing before a different Tribunal. Mr Bean QC submits that this would be catastrophic for his clients, and in any event unnecessary. He refers to the somewhat different procedure which we have been adopting at the preliminary hearing, and indeed sift, stages, by reference to English, as explained in Burns v Consignia (No 2) [2004] IRLR 425 , by way of what he referred to as a carefully controlled remission. That however is a practice which is adopted at the interlocutory stage where, inter alia, there is a case alleged of inadequacy of reasoning, or absence of a finding, and the case is sent back to the same tribunal simply to answer specific questions, based on its existing notes of evidence. That is not the case here, where we have concluded that the Tribunal has in fact not done, or at any rate finished, its job. This is not a question of what has been described in Burns as a referral back, but of a straightforward remission. The issue nevertheless remains as to whether it should be remitted back to the same Tribunal, which, subject to our guidance, will be able to make use of its existing knowledge of the case and notes of evidence, or a fresh tribunal to start again.
>
> 46. There is no authority which has been cited to us, or of which we ourselves know, which would assist us in such a situation, and we set out what appear to us to be relevant factors:
>
> > 46.1 Proportionality must always be a relevant consideration. Here the award was for £900,000, and although we are conscious that ordering a fresh hearing in front of a different Tribunal would add considerably to the cost to parties on both sides who have already invested in solicitors and Counsel, both at the Tribunal and on appeal (in the case of the Applicants, two Counsel

for the appeal), sufficient money is at stake that the question of costs would from the one point of view not offend on the grounds of proportionality and from the other not be a decisive, or even an important, factor. Similarly the distress and inconvenience of the parties in reliving a hearing must be weighed up, but (a) are rendered necessary in any event by the decision to set aside the original decision and (b) will not be greatly less by virtue of the extra time taken by a fully, rather than partially remitted, hearing, the main distress and inconvenience being caused by the matter being reopened at all.

46.2 Passage of Time. The appellate tribunal must be careful not to send a matter back to the same tribunal if there is a real risk that it will have forgotten about the case. Of course, tribunals deal with so many different cases per month that it is impossible for them to carry the facts in their minds, nor would they be expected to do so. But they can normally refresh those minds from the notes of evidence and submissions if the case occurred relatively recently. This case was a relatively long one, and will not on that basis alone have completely evanesced from the minds of the tribunal. It was only just over a year ago. That in itself is quite a long time, though the lengthy reserved decision sent to the parties on 30 July 2003 would have kept the case in the minds of the Tribunal at least until then: but in addition they have held a remedies hearing which began in October 2003, the hearing lasting until 18 December, and then required consideration in chambers' meetings in January and March, and did not result in a promulgated decision until as recently as 19 March 2004. We are satisfied therefore that the question of delay and loss of recollection is not a material factor in this case one way or the other.

46.3 Bias or Partiality. It would not be appropriate to send the matter back to the same Tribunal where there was a question of bias or the risk of pre-judgment or partiality. This would obviously be so where the basis of the appeal had depended upon bias or misconduct, but is not limited to such a case.

46.4 Totally flawed Decision. 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 which 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.

46.5 Second Bite. There must be a very careful consideration of what Lord Phillips in English (at paragraph 24) 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 which 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.

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. Employment law changes; indeed it has been a rapidly developing area of the law. Employment tribunals are therefore all too familiar with the need to apply a different legal approach to a case today from that which they applied last year, or even last week, where the law has changed, although the cases may be on all fours as regards their facts. Some areas of employment law have not been easy, and the approach to be adopted in considering whether there has been race or sex discrimination in a case such as this is just such a matter which has understandably caused problems for tribunals. 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.

47. We are satisfied that this is a case where we can and should remit the matter to the same Tribunal:

47.1 Although this will not be in any way analogous to a Burns situation of simply sending back the matter with a question or list of questions, but will be a genuine rehearing with fresh evidence, and certainly fresh submissions, a great deal of time will be saved by leaving the evidence which has already been taken where it is, namely in the Tribunal's notes of evidence and, after sufficient refreshing of recollection, in the minds of the Tribunal and the parties. None of the evidence so far given will be wasted, although in the light of the issues which have now become clear, and the guidance from this Appeal Tribunal, by no means all of it will be relevant. Much of it can simply be taken for granted as the Tribunal and the parties move on.

47.2 As can be seen from this judgment, we are satisfied that the reality of this case is that there is unfinished business to be done. So far as the indirect discrimination case is concerned, now clarified, the Tribunal has not in our judgment even reached the halfway point. As for the referrals issue, the Tribunal is more or less at halfway, although it needs to set out clearly its conclusions, after hearing further evidence, as to the nature and extent of the unfavourable treatment insofar as it so finds it, but it will in any event need then to move on to consider in detail the Respondents' explanations. In our judgment this will not involve the Tribunal in an exercise either of straining to change its mind or straining not to change its mind (as was canvassed before us), but rather to realise that it was previously making a decision without all the necessary information or ammunition.

47.3 We are satisfied that this is not a case either where bias or partiality is or was involved, or indeed prejudgment, nor where there was a complete mishandling of the case. We are confident that, like any judge or judicial body, this Tribunal will approach its renewed task, free of preconceptions and with an open mind. In any event the reopening of their conclusions may not

> go only one way. While the Respondents will be persuading the Tribunal that there was no unfavourable treatment and/or there was a non-discriminatory explanation in respect of events after January 2000, the Applicants will also be seeking to persuade the Tribunal to come to a different conclusion, namely in relation to events prior to January 2000 — with the consequent need, in that event, to look at the Respondents' case in that regard. As we are about to say in respect of Ground 2, all bets will be off and the book will be open."

79. One needs to be a little careful here. The EAT was speaking about the approach relevant in respect of remission to a judicial tribunal, in relation to which the strictest standards of independence and impartiality apply. The CMA, on the other hand, is a specialist administrative body, and the standards of independence and impartiality applicable are not necessarily the same: see *Bryan v United Kingdom* (1995) 21 EHRR 342 and *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295.

80. Nonetheless, where an administrative body takes a decision which is determinative of a person's civil rights and obligations (as an order that HCA sell hospitals would be), the requirements of Article 6 of the European Convention and as set out in the Human Rights Act 1998 (requiring determination by an independent and impartial judicial tribunal) may be satisfied if the area concerned is a specialised one, as here, and there is a combination of fair treatment by the administrative body and the availability of judicial review by a court or judicial tribunal (such as the Tribunal). Where this combination of factors exists, it may be appropriate to allow the administrative body a substantial margin of appreciation or evaluation in determining facts and making relevant assessments: see [31] of the disclosure ruling. That margin presupposes that the body is required to act fairly in making its findings and assessments. Moreover, the CMA is subject to the general public law duty to act fairly.

81. In the present context, we consider that it is inherent in the requirement of fairness at the stage of consideration by the administrative body, the CMA, that there should be no bias or pre-determination of the issues to be re-considered; and also that there should be no objective appearance of bias or pre-determination. We note that the CMA accepts this. This is to subject the CMA, in this regard, to the stringent standards to be expected of a court or tribunal: for recent authority on the well-known standards applicable, see *Resolution Chemicals Ltd v H Lundbeck A/S*

[2013] EWCA Civ 1515; [2014] 1 WLR 1943. It means that we agree with Ms Rose and Ms Smith that *Sinclair Roche* provides relevant guidance in relation to the question whether a direction should be given in respect of the remission to the CMA.

82. In our judgment, this is not a case in which the direction sought by HCA would be appropriate. No case of actual bias or pre-determination of issues has been made out. Nor, in our view, are there objective grounds to consider that the Healthcare Inquiry Group and case team might fail to approach the matters to be re-determined professionally, and with a genuinely open mind. We accept Mr Witcomb's evidence that they would approach the re-consideration required professionally and with a genuinely open mind. We agree with Ms Smith that paragraph [46.6] of the guidance in *Sinclair Roche* is highly pertinent here. The Healthcare Inquiry Group is composed of people of high repute and professionalism, who can be expected to understand their obligation of open-mindedness on a reconsideration and who can be expected to be sincere and genuine in their efforts to comply with that obligation.

83. It is because of the stringency of the requirement that there be no appearance of bias or pre-judgment that we have examined so carefully what Mr Witcomb said to UKTI at the meeting on 2 December 2014. As set out above, we are satisfied on the evidence that Mr Witcomb did no more than give UKTI a strictly factual account of the current state of play in the proceedings. He did not say anything to indicate that he or the CMA had pre-judged any of the issues which would fall for reconsideration on remittal to the CMA.

84. As to the other matters relied upon in Nabarro's letter of 4 December 2014, and highlighted by Ms Rose in her submissions:

(a) It cannot be said that the investigation by the CMA was "wholly flawed" or that there was a "complete mishandling of it" (see *Sinclair Roche* at [46.4]). That is very far from being the truth. At various points in the investigation, the CMA had to make difficult judgments about how to proceed which took into account the interests of all parties, and it sought to act responsibly in doing so. Even if some of its judgments might be contested and argued

about, and even if it did not get the balance precisely right in some cases, that is a long way from saying that the CMA's conduct could be characterised as "wholly flawed" or a "complete mishandling" according to the standard set out in *Sinclair Roche* and relied upon by HCA. The CMA has offered reasonable explanations for the particular matters relied upon by HCA, both in its original pleading and in Mr Witcomb's witness statements. Ms Rose failed to persuade us that we should discount those explanations. She failed to persuade us that, on the evidence before us, we should accept the serious allegations made by HCA that the CMA knowingly consulted HCA on a false basis; that it conducted a sham consultation; that it deliberately misled HCA by means of the email of 12 February 2014 from Thomas Wood; and that it improperly discriminated against HCA in its handling of the Nuffield point. On all these points, the explanations given by the CMA and by Mr Witcomb for what happened appear reasonable. HCA falls well short of persuading us that the CMA acted dishonestly and in bad faith. As regards the Nuffield point, as a matter of fairness to Nuffield, it had to be informed about aspects of the revised IPA which now affected it, which had not been the case previously; and since Nuffield was to be given access to confidential information of some other parties (but not of HCA), then as a matter of fairness to them, they had to be given notice of this, in case they had some objection of which the CMA should be informed. On this account, HCA was not improperly and unfairly singled out for special treatment: the reasons relevant to provision of additional information to Nuffield and to other parties did not apply in relation to HCA;

(b) We disagree that a fair-minded and informed observer would conclude that there was a real risk that the Healthcare Inquiry Group and case team would be biased against HCA, or that the risk of confirmation bias (cf *Sinclair Roche* at [46.5]) was such as to infringe the relevant standard. As the Court of Appeal noted in *Resolution Chemicals*, at [36], while the test of "a real possibility of bias":

> "is certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of 'any possibility' but of a 'real' possibility of bias."

85. In our view, HCA's submissions failed to give proper weight to the professionalism which can be expected of a body like the CMA and, in particular, of the Healthcare Inquiry Group: see *Sinclair Roche* at [46.6]. It was telling, as Ms Smith observed, that Ms Rose made no reference to that sub-paragraph in her oral submissions and did not attempt to address it. It cannot be said that the Healthcare Inquiry Group and case team have, or appear to have, "so thoroughly committed itself that a rethink appears impracticable"; in accordance with the guidance in *Sinclair Roche*, then, there is a fair presumption that the CMA will re-consider matters in an open-minded and professional way. It is also telling that in *Sinclair Roche* the EAT decided that the decision could be remitted to the same employment tribunal, in part by reason of the weight to be given to its professionalism: see [47.3]. In our judgment, HCA has no good answer to the professionalism point.

86. At the hearing, Ms Rose took us on a whistle-stop tour of a potted history of the CMA's investigation and of the litigation, in an effort to suggest that the CMA, by the Healthcare Inquiry Group, had conducted itself with conspicuous unfairness and had completely mishandled things. The main points made have been covered above. It is not necessary to burden this judgment with a blow by blow account of the history of the investigation and litigation over a number of years. It suffices to say that nothing in the further aspects of the history to which Ms Rose referred persuaded us that the CMA had conducted itself in such a way.

87. We refer to the points highlighted in paragraph 20 of Nabarro's letter of 4 December. HCA's concerns about the CMA's refusal to give disclosure of information and access to the data room, prior to the disclosure ruling, do not provide objective grounds for thinking that the CMA is biased or has pre-judged any point, or that it acted on a wholly flawed basis. It responsibly sought to balance a range of competing interests: see above. Similarly, the fact that the CMA has not conceded in its Amended Defence that its substantive analysis was unlawful (i.e. Ground (2)) does not provide such objective grounds. The CMA's pleaded position is accurate and unobjectionable: at the end of the day, it is possible that its substantive analysis may be found to be lawful, including after taking into account the work it is to do in revisiting the IPA. It was not necessary or appropriate for the CMA to concede on Ground (2). It is clear that while it maintains its defence on

Ground (2) as things stand, it will be keeping an open mind about what its further consideration of the IPA might reveal and what implications that might have for its position on Ground (2) and all other Grounds. It is indeed important that it should do so. The "narrow remittal" (Nabarro's characterisation, not ours) of matters proposed by the CMA is the correct course, as indeed – subject to the argument about whether the self-pay AEC decision should be quashed, on which she has lost – Ms Rose accepted at the hearing. No inference of bias or improper pre-judgment can be drawn from this.

88. Finally, as to the points made in paragraph 21 of Nabarro's letter and pressed by Ms Rose, we do not consider that there is anything in them. On the contrary, there are persuasive reasons why – if, as we have found, no case of an appearance of bias or pre-judgment has been made out – the remittal should be for reconsideration by the Healthcare Inquiry Group:

(a) There would be significantly greater difficulties and risks of error going forward if there were a remittal to a different inquiry group and case team. The Final Report remains on foot as the basis for a range of AEC findings which are not being quashed and includes a large amount of reasoning in a form which is not being quashed (in particular, the reasoning apart from that founded on the IPA) for the insured AEC decision and divestment decision, along with the reasoning for the self pay AEC decision, all of which decisions might still be affirmed after further consideration of the IPA. The reasoning is integrated and inter-linked throughout the Final Report. It is difficult to see how a new inquiry group would be supposed to accept part of that reasoning (which is not theirs) and bolt onto it their own assessment of the IPA, and then reach new final decisions. Very difficult questions could arise for a new inquiry group, requiring difficult mental gymnastics on their part: for instance, what if they do not agree with the reasoning in the Final Report which is not based on the IPA (e.g. they think it makes a stronger case, or a weaker case, for intervention than the existing Inquiry Group thought)? The decisions made by reference to the contorted reasoning which is likely to be required might be highly contestable, with a greatly increased risk of error and further litigation. By contrast, the Healthcare Inquiry Group

understands its own reasoning and the inter-connection between different points, and is far better placed to integrate new findings in respect of the IPA into the existing reasoning in the Final Report, and to understand how that reasoning should be adjusted in the light of the further consideration;

(b) For similar reasons, it would be much more appropriate for the existing Healthcare Inquiry Group to have further carriage of all matters relating to the investigation, so that if appropriate it can perform the necessary overall reconsideration of remedy under section 138(3) of the Act before any final implementation of a divestment decision occurs. The Healthcare Inquiry Group is better placed than a new inquiry group would be to understand and take account of the impact of any material changes in circumstances upon the decisions that have been made (and are not disturbed by the quashing order now being made) or future decisions which may be made (in part by reference to existing reasoning in the Final Report);

(c) HCA itself acknowledges that there would be extra time (i.e. delay) and cost involved in a remittal to a different inquiry group. In fact, delays would be likely not just for this investigation, but for any other from which the CMA had to divert staff. All that would be contrary to the public interest; see also, in that regard, paragraph [15] of the disclosure ruling ("If it transpires that the CMA's findings of relevant AECs and its decision regarding the divestment remedy are all lawful and proper, delay in implementation of the remedy will be to the detriment of the public interest in the prompt implementation of that remedy").

89. For all these reasons, we dismiss HCA's application for a direction that the remittal should be to a new inquiry group and case team. The Healthcare Inquiry Group and case team will be in no doubt having regard to the way matters have developed, the disclosure ruling and this ruling, that they must give very careful consideration to the requirement of fairness to HCA and other affected parties in working through the practical steps to undertake a genuine and effective reconsideration.

Conclusion

90. The parties should seek to agree the terms of an order, for approval by the Tribunal, to give effect to the rulings set out in this decision. Any matters arising in relation to that should be addressed by way of written submissions.

The Right Honourable Lord Justice Sales (Chairman) | Dermot Glynn | Clare Potter

Charles Dhanowa O.B.E., Q.C. (Hon)
Registrar

Date: 23 December 2014