IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1230/6/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 January 2015

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

Sitting as a Tribunal in England and Wales

BETWEEN:

FEDERATION OF INDEPENDENT PRACTITIONER ORGANISATIONS

Applicant

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

_____

Transcribed from tape by Beverley F. Nunnery & Co.
(*a trading name of Opus 2 International Limited*)
Official Court Reporters and Audio Transcribers
One Quality Court, Chancery Lane, London WC2A 1HR
Tel: 020 7831 5627 Fax: 020 7831 7737
(info@beverleynunnery.com)

_____

HEARING DAY ONE

APPEARANCES

Mr. Brian Kennelly and Ms. Emily Neill (instructed by Watson Farley Williams) appeared for the Federation of Independent Practitioner Organisations.

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

THE CHAIRMAN: Yes, Mr. Kennelly.

MR. KENNELLY: May it please you, Sir, I appear with Ms. Neill for the Federation of Independent Practitioner Organisations. My learned friends, Ms. Smith QC and Mr. McGurk appear for the CMA.

THE CHAIRMAN: Yes.

MR. KENNELLY: First, by way of housekeeping, you should have in this appeal four hearing bundles and three volumes of authorities.

THE CHAIRMAN: Yes. Very strictly we have one hearing bundle as it has been described to us with three bundles of authorities and then three notices of application bundles. Does that make sense to you? That is how it is divided up for us.

MR. KENNELLY: Yes, I think we can work with that. You should also have, critically, the final report which I see my learned friend, Ms. Smith, has.

THE CHAIRMAN: Yes, we have certainly got that.

MR. KENNELLY: That is well perused. I am coming very late to this particular party and you will need to be patient with me if I repeat ----

THE CHAIRMAN: Not at all.

MR. KENNELLY: -- or take you to passages which have been examined already. There were two further matters to add to the authorities bundle, one is the Enterprise Act which does not appear in the authorities bundle – the relevant passages. You may all have the proper book in which case it is not necessary to give you ----

THE CHAIRMAN: If you have hard copies I would prefer it, because then I will scribble all over it.

MR. KENNELLY: There is a copy of the relevant passages of the Enterprise Act and an extract from the Groceries Investigation, the final report of the CC in 2008.

THE CHAIRMAN: Yes, thank you very much. Shall we just slot those in at the back of what I will call the 'core' bundle?

MR. KENNELLY: In fact, my learned friend, Ms. Smith, has a better idea, if I may say so, to put it at the back of the authorities.

THE CHAIRMAN: Thank you, we will do that – vol. 3 of the authorities?

MR. KENNELLY: Yes, we will add them into the slot at the back after *Skyscanner*.

THE CHAIRMAN: Yes, thank you very much.

MR. KENNELLY: FIPO challenges, under s.179 of the Enterprise Act, two decisions in the Private Healthcare Market Investigation final report.

First, the decision that the buyer power of the private medical insurers ("PMIs") did not give rise to an AEC in the markets for the provision of consultant services, which I shall call the PMI decision. Secondly, the decision to impose on consultants the fee information remedy. I propose to explain first the relationship between these two parts of FIPO's challenge, and then outline briefly my argument, address you on the law, and then take you, if I may, through the relevant parts of the final report in some detail and finally make my submissions on the specific grounds of challenge.

THE CHAIRMAN: Yes.

MR. KENNELLY: Taking you first then to the relationship between the two parts of FIPO's challenge. As regards the relationship between the challenge to the PMI decision and the fee information remedy, I accept that if I fail to persuade you that the PMI decision is unlawful I cannot succeed in my challenge to the fee information remedy. However, if I succeed in my challenge to the PMI decision the fee information remedy cannot, I say, stand.

THE CHAIRMAN: What would happen? Do you say the case should be remitted if you win on your first point, or are you saying that the factual position was so clear that only one possible finding could be made?

MR. KENNELLY: I do not say that.

THE CHAIRMAN: So it is a question of remission, you say?

MR. KENNELLY: Exactly.

THE CHAIRMAN: Irrational or whatever. If your challenge on the PMIs AEC point succeeds there would need to be a remission?

MR. KENNELLY: Yes. Both of that and the question of whether the remedy was appropriate.

THE CHAIRMAN: Yes.

MR. KENNELLY: The CMA's argument which you have seen is the contrary,: that even if I win on the PMI decision the fee information remedy survives. This confuses, I will say, the concept of feature and adverse effect in s.134 of the 2002 Act, which I shall come to. I appreciate this is well trodden ground, but if I may very briefly make my point, which is that under s.134(1) the CMA decides whether any feature or combination of features of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services.

The adverse effect in the final report is that on competition in the markets for the provision of consultant services, i.e. competition between consultants.

The CMA found that a feature of the relevant markets restricting competition between consultants was the lack of information for patients about consultants' quality and price. If I am right that the PMI decision is flawed, the CMA will have to consider afresh whether another feature of those markets also produced an adverse effect on competition between consultants, and in such a way that the mere provision of information could not cure because the fee information remedy proceeds on the assumption that consultants can compete effectively on fees. FIPO's contention is that they cannot and that the fee information remedy is based on a false assumption. We say for that reason it cannot be effective as required by s.138 of the Act.

Turning then to my argument in relation to the PMI decision. The question which the CMA asked itself correctly in the final report, and I shall take you to it – I will not take you to it now, this is my argument in summary – para. 7.48 was:

> ""Do PMIs have market power which may be used to supress consultant fees to a level below those which would prevail in a competitive market?"

The markets being the markets for consultant services. On this issue, the CMA concluded that if extensively and rigidly applied, fee capping consultants could lead to distortion of competition between consultants. However, on the basis of the facts as found by the CMA, fee capping was applied both extensively and rigidly by the PMIs. The CMA found that the vast majority of consultants were subject to contractual fixed fee caps or their equivalents and so the practice was clearly extensive. The CMA also found that the PMIs enforced the fee caps, or their equivalents, with the threat, among other things, of de-recognition. This threat was found by the CMA to be highly effective – only a tiny number of consultants resisted; and the CMA found that the PMIs very rarely agreed to raise the caps for individual consultants. Therefore, I say, fee capping was undoubtedly rigidly applied by the PMIs.

The test which the CMA had set itself was satisfied. Why then did the CMA fail to find that the PMI market power was a feature causing an AEC? Because, say the CMA, five main factors. First, that policyholders may still pay consultants top-up fees above the PMIs' fee caps. Second, the CMA said, competition between consultants was possible below the fee caps. Third, there was no evidence they said of a reduction in number of consultants, quality or innovation. Fourth, that policyholders should – and I use that word advisedly – benefit from the savings made by the PMIs in restricting consultants' fees. Fifthly, that PMIs could be trusted not to oppress consultants because it was in their interest to have a sufficient supply of high quality consultants.

Each of these factors, we say, was obviously wrong as a matter of fact, or based on no probative evidence. That is what the grounds seek to show.

As regards the finding that there was no evidence of a reduction in numbers of consultants, quality or innovation, it is – and this may be common ground – not part of the test to establish an AEC that the CMA must demonstrate consumer harm and certainly not current consumer harm.

A reduction in the number of consultants, quality or innovation would be a consequence of the AEC. A finding of AEC cannot be made conditional on establishing such detrimental effects on customers. That is my argument in outline for my PMI decision.

THE CHAIRMAN: But can the CMA have regard to whether there are detriments or not as part of a global assessment whether there is an AEC?

MR. KENNELLY: I fully accept that a reduction in innovation, for example, could be evidence of an AEC. My point is – and the CMA in its skeleton comes close to this – if it is the CMA's case that they cannot establish an AEC without evidence of consumer detriment that is an error, but maybe that is not their point. I shall take you to their skeleton in the course of my submissions.

Turning then to the legal background and the Enterprise Act itself and that is now behind tab 53 – the very last authority in the authorities' bundle. Section 134 is on page 178, which is an extract, and if you could turn to section 134(1) which provides that the CMA shall, on an ordinary reference, decide whether any feature or combination of features of each relevant market prevents, restricts or distorts competition in connection with supply or requisition of any goods or services. That is the test and no more. There is no reference, as I say, to establishing consumer harm.

If we turn then to 134(4) over the page this, I say, makes my point good. It provides that the CMA shall, if it has decided upon a market investigation reference, that there is an AEC – so an AEC has been established, it shall decide the following additional questions. I turn to (a): "That action should be taken by it for the purpose of remedying, mitigating or preventing the AEC concerned; or..." – I emphasise or – "...any..." – I emphasise any – "...detrimental effect on customers insofar as it has resulted from..." I go on to the next bit, "...or may be expected to result from the adverse effect on competition."

My point is that the use of the term "any" means that the existence of detrimental effect, even future detrimental effect cannot be a condition for establishing the AEC. In any event, to the extent that detrimental effect on customers is relevant is plainly sufficient to show possible future detrimental effect – I get that from use of the expression "may be expected".

Can I trouble you to turn to the further guidance of the Competition Commission, which is CC3 and that is behind tab 37 of the third bundle of authorities? So CC3 guidelines for market investigations, April 2013. Would you please turn to paragraph 28 on page 11? There it is stated:

"The CC is required to decide..."

It quotes the section we have just read. Then 29:

"If that proves to be the case, under the Act this constitutes an AEC. The CC interprets the phrase 'prevents, restricts or distorts' in the Act broadly to cover any adverse effect on competition..."

I emphasise the words "on competition":

"...either actual or potential. It will therefore consider features that affect potential competition in a market (for example, by preventing entry and expansion) as well as those that affect the existing market situation."

The tribunal will appreciate right away my emphasis on the word "potential" because the issue of potential harm arises in this case.

Going to paragraph 94 on page 24, which refers to the AEC test:

"In assessing whether or not an AEC has arisen the CC looks at three basic issues:

(a) the main characteristics of the market and the outcomes of the competitive process;

(b) the composition of the relevant market within which competition may be harmed (market definition); and

(c) the features, if any, which are harming competition in the relevant market (the competitive assessment – which the CC frames using 'theories of harm'), considering also possible countervailing factors, such as efficiencies, which may be remove or mitigate the competitive harm of the features."

The emphasis throughout is competition and the effects on competition which the Tribunal will appreciate is distinct from the question of direct harm to consumers.

THE CHAIRMAN: Presumably harm to consumers would be one factor within 94(a) – it could be an outcome of the competitive process.

MR KENNELLY: Indeed and it could be evidence going towards an AEC but not a requirement for finding that.

As regards the authorities the Tribunal will have seen that there is no dispute as to the legal principles applicable to this challenge. The authorities relied upon are the same in the skeleton to the CC – effectively the same as between the CMA and FIPO. Plainly we emphasise the fact that as a matter of law the CMA was required to make reasonable

enquiries to obtain the evidence necessary to answer the statutory questions which we have just seen, and the CMA was required to have evidence of some probative value to support its conclusions. In one respect however there is a difference of opinion, if I can put it that way, and that is in relation to the *Skyskanner* judgment and it is to that judgment alone that I ask the Tribunal to turn.

THE CHAIRMAN: Since we are looking on your main point at an absence of finding of an AEC would this be right, that the CMA could look at such evidence as there was but simply conclude that there was not enough to positively show that there was not an AEC? You say that they needed evidence of some probative value, but if they had no evidence of probative value on the AEC question, they may not be required then to say, "We cannot find an AEC".

MR. KENNELLY: Yes, provided that they have conducted a reasonable investigation, provided they have asked the question in a reasonable manner. That is what the *Skyscanner* judgment goes to. It is not enough, I say, for them to say, "We recognise that this is a potential problem, the consultees have failed to bring us sufficiently probative evidence, therefore there is no probative evidence and we cannot reach the conclusion urged upon us by the consultees". That is not good enough, we say. The *Skyscanner* judgment, which I will take you to, demonstrates that that is the case. That is behind tab 51 in third volume of authorities.

You will see from para.1 on p.3 that this was an appeal under s.47(1)(c) of the Competition Act. Again, it is decision of the OFT:

> "… to accept commitments pursuant to s.31A(2) of the Act, to remove certain discounting restrictions for online travel agents."

At the bottom of the paragraph you can see:

> "The appeal is brought by Skyscanner Limited, which operates a price comparison website allowing consumers to search for and compare flight, hotel and car hire deals globally.
>
> 4 Skyscanner operates a 'price comparison' or 'meta-search' site. Meta-search sites display prices offered by third parties, and thereby assist consumers to compare pricing."

Over the page at para.6:

> "Skyscanner appeals against the Decision on three grounds."

And (a) is the one on which I focus:

"(a) In making the Decision, the OFT failed to take into account properly or all the representations that Skyscanner made to it on the impact the Decision would have on the meta-search sector and/or on inter-brand competition."

Pausing there, the basic of Skyscanner was the effect of the commitments decision was to restrict the information which it needed for its business.

Turning then to para.44, p.21 of the judgment, "Did the OFT fail to take into account relevant considerations? The ground which we have just seen.

"This ground is based on procedural impropriety, and was pleaded as Ground 2. Skyscanner argues that the OFT failed to take into account properly or at all the representations that Skyscanner made on the impact the Commitments would have."

Going then to para.83, you see that Skyscanner had made a response in the consultation. The Tribunal said:

"We have referred above to: (i) the two responses to the first consultation, which warned of the possible harm to meta-search and price comparison websites, and (ii) Skyscanner's response to the second consultation, which made the same point. Skyscanner's focus was on the restriction on disclosure of actual discounts outside the closed group."

Over the page at 84 is the OFT's response:

"Although meta-search sites were not explicitly referred to, the OFT appears to have had this point in mind when it described the concerns raised about the impact of the proposed commitments on the structure of the market and, in particular, on consumers' ability to shop around."

Then at 86:

"The CMA put to us that, far from closing its mind to Skyscanner's concerns, the OFT considered them very carefully and explored them further at the meeting, convened three days after the end of the consultation period."

Skipping down to the bottom of the page, the last sentence:

"However, the OFT indicated in clear terms to Skyscanner that it could not take the concerns any further in relation to the proposed commitments without evidence of possible harm to meta-search in general and Skyscanner in particular."

Then 87:

"We do not think this was a fair position to take."

The Tribunal goes on to summarise the OFT's position, and at the bottom of para.87 you see a quote from Mr. Rasmussen's witness statement:

> "'[…] the case team and I thought that Skyscanner' arguments were insufficiently substantiated for them to carry great weight.
> In the absence of any evidence of any harm to meta-search sites the OFT did not consider that it was necessary to carry out any further analysis of that issue before accepting the Final Commitments.'"

Then skipping down to 89:

> "Mr. Rasmussen put the point in the following terms:
> 'Skyscanner's submission might have been more persuasive if it had, for example, explained which hotels and OTAs it had arrangements with and what proportion of rates and hotels it had already had access to …'"

Then at 90:

> "Our view
> We find this quite unsatisfactory. The CMA seems to be saying that, to be taken seriously, a submission in response to a consultation must be accompanied by some material to provide a veneer of substance …"

Skipping down to the sentence beginning, "If a consultation response" and this is important:

> "If a consultation response raises an important and obvious point of principle, it is for the authority to examine it further. This is particularly so where the authority has not carried out an analysis of the economic effects of the practices which it proposes to address …
> 91 In any case, it is not clear what evidence Skyscanner could reasonably have produced in this case."

It explains that Skyscanner was a recent entrant, and then skip down to "In these circumstances":

> "In these circumstances, it does not seem unreasonable for Skyscanner to say, in effect, 'we have the following plausible concerns about the likely effect of the proposed commitments, and this is something we think you, the authority, should consider before proceeding further'. No doubt Skyscanner could have provided some 'material' in the sense described by Ms. Bacon, but in these particular circumstances this would have amounted to no more than descriptive padding to the Skyscanner response with no substantive content.

> Without wishing to add to the CMA's burdens in cases of this kind, it is not acceptable for it to say that when an interested party, operating in the market under consideration, raises a point that puts in question an essential feature of proposed commitments …"

I do not seek to hide it is referring to an essential feature -

> "… the authority will not act on it without supporting material provided by the party raising the point. Of course, the objection cannot be fanciful or frivolous …"

that is the test established by the Tribunal -

> "… but the OFT accepted Skyscanner's point as plausible. In this instance, Sky was not in a position to provide 'hard' evidence based on its past experience and, in any event, the concern was …"

most important for our purposes -

> "… potential effects in a new and previously untried situation."

Could the Tribunal then skip ahead to 98?

THE CHAIRMAN: I think we should just note in passing at 93 the observations about it was not right to say that Skyscanner had to produce the information. At 93 they say:

> "To the extent that the OFT could reasonably have felt the need for additional material, this could relatively easily be obtained and verified by the OFT itself."

MR. KENNELLY: I am grateful for your intervention, Sir, I rely upon that.

THE CHAIRMAN: Sorry, you wanted us to go where?

MR. KENNELLY: To 98:

> "In so far as it may have thought Skyscanner's concern about harm had validity …"

this was the OFT's sop effectively to Skyscanner -

> "… the OFT considered this could be kept under review and if necessary addressed either on expiry of the Commitments after two years or, if the 'evidence' was overwhelming, before then."

The OFT said, "We will not take any positive action, but we will keep it under review". Then at para.100:

> "Accordingly, we find that the OFT failed properly to consider or conscientiously to take into account the objection to the proposed commitments …"

The Tribunal described the objection again and I skip down to the sentence beginning, “In either case”:

> “In either case, the OFT failed properly to investigate a plausible point further and instead insisted on more evidence or supporting material from Skyscanner itself. We find that in so doing the OFT acted unfairly and that the process by which it subsequently reached its decision was procedurally improper.”

That is not the end of it. Please turn to para.155, because there was a rationality argument also made by Skyscanner. That is addressed from para.155 onwards.

> “We now consider Skyscanner’s alternative claim that the Decision was irrational. We described the relevant legal principles [which are not in dispute between us]. In essence, Skyscanner must show, in order to succeed here, that no reasonable authority could have taken the decision that the OFT took on the basis of the evidence before it.
>
> We have already concluded that the OFT failed properly to consider Skyscanner’s objection to the proposed commitments … To the contrary, we find that the OFT acted unreasonably not only in failing properly to consider the objection but also in coming to a decision that effectively ignored the point that Skyscanner and others had raised in relation to the potential impact of principle 19 on meta search and competition more generally."

The CMA obviously relied on the fact it had a wide discretion and the Tribunal says:

> "Whilst the authority enjoys a substantial margin of appreciation in exercising its judgment, where it makes a decision that raises obvious competition concerns that have, on its own admission, not been fully assessed, the Tribunal can and should intervene."

They say then:

> "Whilst we agree that if the OFT had investigated the possible impact of their restriction on disclosure it might conceivably have come to the conclusion that restriction did not harm competition, it failed to do so. The OFT did not acquaint itself with the information needed to answer the statutory questions posed to it and, accordingly, failed to take into account matters it ought to have taken into account. . . "

and they have averred then to the following considerations, and these are relevant for my purposes: the OFT had been aware in the investigation of the importance of the question.

The two respondents had warned of the likely damage, Skyscanner had made the same point, and the OFT had attached importance to price transparency.

THE CHAIRMAN: Just on that, Skyscanner was not a consultee on the first consultation, is that right?

MR. KENNELLY: That is correct, yes. There was a dispute about whether it had been involved or not, but that does not go to the point I am making.

The point is that in (d) the OFT attached importance to the question and "then failed to sustain consideration of the importance of the role of meta search operators in promoting price transparency." Then when Skyscanner repeated its plausible concerns about the potential harm the OFT failed to postpone or alter its proposed decision.

Then para. 159 the Tribunal effectively repeats the conclusion which it reached in 156.

THE CHAIRMAN: Thank you.

MR. KENNELLY: Turning then to the final report. I shall be reading from this document but there is also a confidential extract from it which is annexed to the CMA's defence.

THE CHAIRMAN: I think you should be aware that we shall be working from the blue version, which is the more secret ----

MR. KENNELLY: The super-confidential version.

THE CHAIRMAN: But do you need to give us additional material.

MR. KENNELLY: No, if you have that version then there is no problem.

MS. SMITH: All I am reminded is that the page numbering may be slightly different, so if we can use paragraph numbers.

MR. KENNELLY: Yes, I intend to.

THE CHAIRMAN: If I can ask paragraph and page number because the page number will at least help us roughly find where we are. Thank you.

MR. KENNELLY: If I get my apology in first, I will be taking you in some detail through the relevant parts. I do it because, according to the CMA, and we do not criticise them for this, they say that it is necessary and they rely upon the relevant sections of s.7 in full and in order to avoid any accusation of cherry picking I will need to take you through those in some detail, not least because I am opening this appeal.

Beginning at the beginning, could you turn first, please, to para. 3.65 on my page 54.

THE CHAIRMAN: Is this by way of introduction?

MR. KENNELLY: It is important to set the scene, and appreciate the economic actors in this case. Consultants. The CMA finds that:

"Consultants accept ultimate responsibility for the care of patients referred to them and therefore are in a position of considerable responsibility. This is especially the case in private practice: 'when a surgeon has patients under their care within the NHS, the patients tend to be looked after by a large team, including a variety of grades of trainees. Care in the private sector is generally delivered entirely by the consultant'."

My point simply here is this is not the supply of groceries. Consultants are engaged in life and death work every day and, critically for these purposes, responsibility and liability rests with them personally in these markets.

The next section by way of background is on p.56 and it goes under the heading: "PMI – products and providers" and that is para. 3.75. This explains that the majority of people with private health cover receive it as an employee benefit. The numbers here are important, so I will ask the Tribunal to bear them in mind – I will come back to them later.

""Approximately 5.3 million people are covered under an employer's scheme compared with about 1.5 million who subscribe individually."

About three and half times more are covered by employers' schemes.

"Since 2008, the number of people covered by their employer's scheme has been falling. This has also been the case for the number with individual cover since the mid-1990s."

I will be making the point later that this figure of 1.5 million who are particularly prejudiced as we shall see, that is not an immaterial number of people.

THE CHAIRMAN: Mr. Kennelly, that jogs my memory, we should have mentioned at the outset of this appeal, as we did the last one, that all three members of the Tribunal have private healthcare.

MR. KENNELLY: Of course.

THE CHAIRMAN: I simply mention it so that there is no lack of transparency.

MR. KENNELLY: We are grateful; of course, we raise no issue in relation to that.

THE CHAIRMAN: Yes, thank you, I thought I should just mention that. Please go on.

MR. KENNELLY: Over the page at 3.78, the cost – and this is something perhaps the members of the Tribunal will know then, since you are policyholders! (Laughter)

"The cost of private medical cover has been rising for both individual subscribers and corporate clients. The average price per individual subscriber paid for private medical cover more than doubled between 1995 and 2012, increasing by over 60 per cent in real terms."

Over the page, figure 3.15 shows the market share by revenue. It is important to focus on these market shares because you will recall an issue in the case is how extensively the fee constraining practices are carried out. You will see there Bupa's market share and AXA's market share, which combine to be approximately 65 per cent, plus Aviva, which adds up to 78 per cent, and I shall be focusing particularly on those three insurers.

Then, turning to market definition, my page 81, para. 5.53:

> "On the basis of these findings, the approach we took in relation to product market definition is the following.
>
> (a) In the provision of consultant services, each speciality is considered as a separate product market."

Then, over the page, at para. 5.57, in relation to geographic markets the theme I find in relation to consultant services: "we conclude that the geographic market is local". This is relevant, I say, when considering reduction in numbers of consultants. It is not just the number of consultants overall in the UK, the markets which are under investigation are specific to speciality and location. Therefore, it is in those narrow markets, where one asks is there a risk of fewer consultants being available for private patients?

Turning then to the main body of our section which is on my page 206 entitled "Countervailing power of insurers", 7.48.

THE CHAIRMAN: Yes, it is our p.208.

MR. KENNELLY: 7.48:

> "This section considers whether insurers have buyer power in relation to consultants which may be used to suppress consultant fees to a level below those which would prevail in a competitive market."

That is the AEC question. "If this were the case", if an AEC were established:

> ". . . this could lead to a shortage of consultants in private practice and/or a reduction in the quality of service provided by consultants to patients and incentives to innovate."

At 7.50 there is reference to FIPO's submission:

> ". . . that there was clear evidence that fee capping to uneconomical levels affected patient choice."

At 7.51 there is a reference to the NAO report, and we shall come back to this, which reported in 2012 that there were 15,754 consultants, which was 39 per cent of the total consultant population, whereas in 2006 the number of consultants undertaking private

practice was 55 per cent. Then the number of consultants undertaking private practice work in 2011/12 had reduced by one-third. That was the National Audit Office report.

The Private Patient Forum noted reductions on basically the same NAO figures.

> "The Independent Doctors Federation considered that decreasing reimbursement fees from insurers, particularly from Bupa and AXA, combined with increasing expenses involved with running a private medical practice, were such that newly appointed consultants were reluctant to enter private medical practice. Similarly, the London Consultants' Association took the view that newly appointed consultants could not be kept on grossly reduced fees in the face of rising costs."

THE CHAIRMAN: The Directive Care Model is what?

MR. KENNELLY: That is effectively where insurers were dictating the care which patients should receive and from whom they should receive it.

THE CHAIRMAN: Is it defined somewhere in the report, do you know?

MR. KENNELLY: Yes; that is a concern and a concern that arises again and again, that insurers are effectively making clinical decisions about the care and who should provide it; and of course insurers are not regulated by any medical authority.

Over the page to 7.57:

> Bupa's fee schedule..."

This is important:

> ...also known as Bupa Benefit Maxima is regarded as the industry standard and consultants and insurers submitted that it was generally perceived as having the lowest reimbursement rates of the insurers. Until recently, it had not been materially revised since the introduction of CCSD codes in 2006."

Those are the codes for the treatments that will be covered by insurance. If you go down to the footnote 618 you will see:

> "Many consultants and their trade associations submitted that in reality there had been no increase in reimbursement rates at least since the mid-1990s."

It is suggested there that that is a potentially contentious submission, but if you permit me to ask you to go back in the report to footnote 587, which on my version is page 199.

THE CHAIRMAN: 201 for us, the larger PMIs.

MR. KENNELLY: "...confirmed that their reimbursement fee schedules had not increased since the 1990s and for some procedures had decreased."

Again, in reference to Bupa and there is a reference there to declining consultant earnings, which we can come back to later in this report.

Turning to 7.57 and going down to 7.59:

"Insurers – in particular the largest, Bupa and AXA – have embarked in recent years on a number of initiatives to seek to control their costs in relation to consultant fees, whilst also seeking to reduce the need for policyholders to pay additional fees to the consultant. Such initiatives may include:

(a) AXA said that in order to provide greater clarity to policyholders, in 2011 it published a fee schedule similar to Bupa's Benefit Maxima..."

(b) Bupa has been carrying out full reviews of its fee schedules, and Aviva is also carrying out a rolling review of its fee schedules."

Skipping down to (c):

"Some insurers have introduced a requirement on policyholders under some insurance policies to obtain open referrals. Under an open referral, the referring clinician does not name the consultant and/or hospital but merely specifies the nature of the condition, enabling the PMI to direct policyholders to consultants (and hospitals) named by the PMI whose fees are the lowest.

(d) Bupa and AXA have introduced new consultant contracts under which the relevant consultants cannot charge above the PMIs Bupa and AXA PPP have introduced new consultant contracts under which the relevant consultants cannot charge above the PMI's fee schedule, thus making the PMI's fee schedule the maximum amount such consultants can charge for their services."

At 7.61 under a review of PMI fee schedules:

"As noted above, AXA PPP introduced a schedule of fees in 2011 for its policyholders. The fee schedule was set at a level that AXA PPP considered to be the mode of consultant fees for each procedure..."

I emphasise these words:

"...broadly in line with Bupa's Benefit Maxima."

Then at 7.63:

"However, it is Bupa's review of its Benefit Maxima which has had a significant impact on consultant fees, given that it is regarded as the industry standard and the lowest reimbursement schedule, as described in paragraph 7.57 above."

Bupa then explains why it is changing its level of reimbursement, but I emphasise at the sentence beginning 49 these are different procedures.

"49 saw increases in rates of on average 19 per cent, but 184 were reduced by an average of 32 per cent."

These are unilateral reductions taken by the PMI.

Over the page at 7.68, consultant fee capping:

> "As noted in paragraph 7.14, Bupa and AXA have introduced new recognition criteria for new consultants. Bupa and AXA said that these new criteria were aimed at addressing what they termed shortfalls. Where a consultant's fees were in excess of an insurer's reimbursement rate, a consultant generally may charge the patient the difference, assuming the insurer did not meet the difference. This difference between the insurer's reimbursement rate and the consultant's fee was termed a top-up fee if the patient was aware of and agreed to pay the difference in advance of treatment."

For the definition of a top-up fee:

> "However, if the consultant for whatever reason had not made the patient aware of this potential difference in advance of treatment, the difference was termed by the insurer as a shortfall."

There is an important distinction between the two.

THE CHAIRMAN: How does that work? Is the top-up fee payable because the patient has agreed it.

MR. KENNELLY: Yes.

THE CHAIRMAN: If there has just been an omission to agree it then it is a loss to the consultant.

MR. KENNELLY: No, the consultant will still charge it but the concern is if it is called a shortfall it means the patient did not know there was going to be a difference between the fee charged by the consultant and the reimbursement rate by his insurer.

THE CHAIRMAN: So it is still contractually recoverable by the consultant.

MR. KENNELLY: Yes, that is in principle. I define those because at 7.69:

> "According to the insurers, shortfalls are identified by policyholders as a key concern. Bupa stated that in 2013..."

THE CHAIRMAN: Shall we read that to ourselves.

MR. KENNELLY: If you read it down to "...the consultant's fees were higher than Bupa's Benefit Maxima" then I can make my point. You will see right away that what is referred to by Bupa are the percentage of procedures where the fees were higher than Bupa Benefit Maxima but it does not tell you whether those higher consultant fees were as top-up situation or a shortfall situation. A top-up, remember, is where the patient has agreed it and is happy to pay it. The shortfall is where the patient has not been warned.

THE CHAIRMAN: The patient must be warned that it is contractually binding – it may be in the small print.

MR. KENNELLY: Yes but it is a question of whether it is done in advance of the procedure or not because if the patient has been aware of it and agreed to pay it, it is called a top-up fee.

THE CHAIRMAN: That is why I was asking whether there is a difference in the contractual recoverability.

MR. KENNELLY: In terms of strict contract there may well be – I will be corrected. It is not a question that came up in the investigation – there may be no difference.

THE CHAIRMAN: You cannot have a contract unless at some level you have given someone notice that you are making a contract with them and these are the terms.

MR. KENNELLY: Yes, but the point here is that as far as patients are concerned whether they are aware in advance, in the sense of aware with the consultant in that particular situation there is a particular fee that is going to be charged. The patient may have agreed in general by the contract to be bound but the question is for that particular treatment has the patient agreed in advance to pay that fee and has it been explained to him and is he happy to pay it.

THE CHAIRMAN: Is the difference then between top-up fee there has been a discussion with the consultant in advance and they say, "You will be expected to pay X pounds".

MR. KENNELLY: Yes.

THE CHAIRMAN: In the shortfall the patient assigns the relevant contractual documentation that says there may be a contractual obligation on you to pay an additional sum above the insured amount.

MR. KENNELLY: I am trying to make the point that very often the patient does not see a bill, but that is not an answer to your question.

THE CHAIRMAN: I was puzzled. You seemed to be suggesting that somebody could be contractually bound without knowing anything about the terms.

MR. KENNELLY: No, that is not my submission. I am focusing here, because we are talking about ----

THE CHAIRMAN: So it is different levels of notice then?

MR. KENNELLY: Yes, exactly.

THE CHAIRMAN: Very specific notice against general notice that you may have to pay more and you will be bound to pay more?

MR. KENNELLY: Indeed, and that is very important, because, as a matter of strict contract, there may be a very limited distinction. In terms of patient welfare, there is a very significant distinction, and my point here is that Bupa's evidence is that there was a difference in these percentages of cases between the consultants' fees and what the insurer was covering. You will see straight away that those percentages are not enormous. You

can see that the balance, in respect of the surgical procedures, the fees were not higher than Bupa's Benefit Maxima , which you will recall is regarded as the lowest level of reimbursement rates. In these percentages of cases there was a difference, but Bupa does not say whether the patients in those particular cases had it specifically explained to them and were happy to pay it. That is the point.

Similarly in relation to Aviva, you will see approximately X per cent of its recognised consultants invoiced for fees exceeding its fees schedule and that, as a result, approximately X per cent of its policyholders might have an additional fee to pay to consultants. As a result of Aviva not reimbursing in full the consultants invoiced fees.

Skipping down to 7.70 and the case of AXA in relation to consultant fee capping:

> "Under the AXA PPP scheme introduced in 2008, AXA PPP required all newly recognized consultants, who were also largely newly qualified, to sign up to an agreement whereby in order to be recognized by AXA PPP they must charge AXA PPP insured patients only fees set within its fee schedule and agree not to charge AXA PPP insured patients any top-up fees.~"

That is even where the patient is aware of and happy to pay the difference.

> "We refer to such consultants as 'fee-capped consultants. For such consultants, AXA PPP's reimbursement rate therefore is the maximum fee that the consultant can charge for their services. AXA PPP told us that as at 31 December 2013, around X per cent …"

and you see the figure -

> "… of its 24,000 recognized consultants were subject to this contract, compared with X per cent in July 2012. AXA PPP also told us that between 2011 and 2013 …"

THE CHAIRMAN: Sorry, you say that we see - this is an unfortunate feature of our super-confidential report, sometimes we have got things deleted, and I am afraid in that paragraph the numbers have been deleted.

MR. KENNELLY: You will get it from the annex to the defence. This is important. If you turn to the CMA's defence, hearing bundle 4, it has annexed to it ----

THE CHAIRMAN: Unfortunately I have an index to annex, section 7 of the final report.

MR. KENNELLY: We had agreed an index and this should have been put in.

THE CHAIRMAN: It is the one with the red spine.

MR. KENNELLY: I am on 7.70, which is p.17 of the annex.

THE CHAIRMAN: I am just trying to look at this document, because I was wondering whether this was the fully unredacted version. Even here, not in the paragraphs you need to go to, there are still some deletions. We have more text here than we did have. Which paragraph are you in?

MR. KENNELLY: Paragraph 7.70, and I want to show the percentages of AXA's recognised consultants that are subject to the cap.

THE CHAIRMAN: Thank you very much.

MR. KENNELLY: Half way down 7.70 you will see that it says:

> "For such consultants, AXA PPP's reimbursement rate therefore is the maximum fee that the consultant can charge for their services. AXA PPP told us that as at 31 December, 2013, around X per cent of its 24,000 recognized consultants were subject to this contract, compared with X per cent in July 2012. AXA PPP also told us that between 2011 and 2013, it had signed up on average each …"

and you see those numbers -

> "… previously recognized consultants (ie those recognized prior to 2008) to the new contract."

So the new consultants, in order to be recognised, they are required to sign a contract, and some of the older consultants have also signed, and the number you see.

Then 7.71:

> "In addition to the X per cent of consultants who are fee-capped in 2013, approximately X per cent of AXA PPP's recognized consultants are fee-assured based on a 'usual and customary approach'. There is no contract in place between AXA PPP and these consultants but they have historically charged within reimbursement levels deemed acceptable by AXA PPP. However, if such a consultant …

- that is one without a formal agreement -

> "… were to routinely charge policyholders significantly higher fees than the previously had, AXA PPP would review its charges and practice. If, after discussion with AXA PPP, this charging practice were to continue, the consultant would then be told that they were no longer on AXA PPP's list of fee-assured consultants, and their fees would be capped and limited to the published schedule. This meant that AXA PPP did not recommend such consultants to policyholders, and when a policyholder sought pre-authorisation

to see a non-fee-assured consultant, AXA PPP informed the policyholder that they might be liable for additional fees. However, AXA PPP policyholders could use their benefits to see such consultants and were free to pay top-up fees."

Then 7.72:

"Although newly-recognized consultants from 2008 must adhere to AXA PPP's fee schedule, AXA PPP told us that it monitored the number of fee-capped and fee-assured consultants that it recognized to ensure that its policyholders had adequate choice. AXA PPP also confirmed that it would keep under review the level at which fees were capped as those fee-capped consultants became more experienced in order to keep the proportion of fee-assured and fee-capped consultants at over [X] per cent of its recognized consultants."

You see the size of that number.

"This meant that after a number of years, some consultants who were contractually obliged to charge within AXA PPP's fee schedule might be able to increase their fees. [X]"

As to whether and how that happens, you should read the rest of that paragraph, which is entirely confidential.

THE CHAIRMAN: Yes.

MR. KENNELLY: My submission would be that how can consultants compete, how can it be said that there is proper competition when the PMIs are dictating the prices consultants can charge, either strictly through the fee cap or informally through this fee assured process.

Then over the page at 7.73, turning to Bupa:

"As at December, Bupa had approximately 19,000 active recognized consultants and a total of 25,000 odd recognized consultants. Bupa had a number of different categories of recognized consultants depending on when the consultant became a recognized Bupa consultant and whether the consultant had agreed to charge only within agreed fee levels.

The footnote at 642 tells you what is meant by active consultants. That means consultants who have billed Bupa between November 2012 and October 2013.

Then 7.74, skipping down to:

"In June 2010, Bupa closed the voluntary scheme to new members and introduced a new mandatory consultant contract, which sets out the terms of recognition between Bupa and consultants who are newly recognized as of June

2010. Like AXA PPP, as a condition of recognition under the terms of Bupa s new contract, consultants are required, among other things, to charge Bupa policyholders in accordance with the fees set by Bupa. They are not permitted to charge Bupa-insured patients any amount over and above the Bupa agreed fees including for consultations, even if this has been discussed with the patient in advance of treatment. Such consultants are referred to by Bupa as 'Contract Consultants',"

7.75:

"If a consultant was already recognised by Bupa in 2010, they were not required to sign up to the new contract capping their fees. However, Bupa has encouraged pre-2010-recognised consultants to sign up voluntarily to a new contract. Between 2011 and 2013, it has signed up around [X] pre-recognised consultants to its contract and refers to such consultants as 'Premier Partners'. In return for agreeing to have their fees capped, such consultants are given additional benefits by Bupa such as enhanced promotion by Bupa to GPs, Bupa policyholders and the public on the Bupa consultant finder facility on its website. Such Premier Partners also receive a higher scoring and are, all else equal . . . listed higher in Bupa's consultant search engines.

7.76:

"As at December 2013, a total of approximately [X] consultants were therefore fee capped (i.e. either Contract Consultants or Premier Partners). Bupa also has informal agreements with some consultants that they will bill within its Benefit Maxima. . ."

That is my informal fee cap.

"(referred to as 'Consultant Partners') and a number of recognized consultants who habitually bill within its Benefit Maxima (referred to by Bupa as 'Guarantee Consultants'). Approximately [X] consultants fall into these two further categories."

Pausing there, you have seen, and it is not confidential, that Bupa has approximately 19,000 active recognised consultants. You can see right away if you add the figure at the top of 7.76 and the figure for consultants on the last line of 7.76 what proportion of that 19,000 are subject to some form of fee cap imposed by Bupa. What happens to the others that are not covered? 7.77:

"In addition, since August 2011 Bupa has undertaken a program to negotiate with consultants whose charges are higher than 90 per cent of their 'peers', adjusting for specialty, sub-specialty interests, geography and, in some cases, experience. Bupa approaches all such consultants and seeks to negotiate a lower fee rate which it regards as reasonable. Since August 2011, over [X] Bupa-recognized consultants have been asked to provide a clinically valid reason for their high fees or to lower their fees when billing to Bupa customers. Twenty-seven consultants have been derecognized as a result of this process since August 2011 . . ."

- and this is more significant: "the remaining consultants", the difference between 27 and the number which you saw above it, have "agreed to lower their fees or are still in discussions with Bupa over whether to do so". That demonstrates the extent of Bupa's buyer power.

Turning then to 7.78:

"Bupa said that none of its policies limited policyholders to using only fee-capped consultants."

Then, three lines down: "However, unlike other insurers", and we think this is wrong, and we will explain why:

"". . . as explained above, Bupa derecognises consultants whose fees it regards as too high, meaning that policyholders irrespective of their policy type can no longer access such consultants under the terms of their policies. As noted above, this has affected 27 consultants . . ."

- which the CMA say is a very small percentage of consultants in private practice. Then, you can see below that other ways in which Bupa guides the policyholder towards consultants who have agreed to charge within their Benefit Maxima. If you could read the rest of that paragraph to yourselves, please.

THE CHAIRMAN: Yes.

MR. KENNELLY: 7.79: "Policyholders on open referral policies can only be treated by 'plan-approved consultants'." Please skip down to the last sentence:

"Bupa stated that 'plan-approved' consultants and, as noted previously, Bupa recognised over 25,000 consultants compared with approximately 22,000 estimated active consultants in 2011/12 in private practice."

Pausing there that is a reference to the number of estimated active consultants in 2011/12 recognised by Bupa. If you look back at ----

THE CHAIRMAN: You gave us a figure just now of 19,000.

MR. KENNELLY: Precisely. You have my point.

THE CHAIRMAN: Well, where do you get 19,000 from?

MR. KENNELLY: From the first line of 7.73. That is what Bupa said they had in December 2013.

THE CHAIRMAN: I see.

MR. KENNELLY: I am not suggesting – I will make my submission later that the CMA has settled on a figure of how many consultants there are actually available, there is no such final figure.

THE CHAIRMAN: So it is the difference between active recognised consultants, and just recognised consultants?

MR. KENNELLY: No, Sir, the difference is between active consultants – I am not focusing on recognised, just active. They are the ones who bill at least more than once a year. There is a figure of 22,000 in 2011 which falls to 19,000 in 2013.

THE CHAIRMAN: Oh, I see. It is the 22,000 to the 19,000 figure.

MR. KENNELLY: Yes.

THE CHAIRMAN: Sorry, the 25,000.

MR. KENNELLY: That is the number of recognised ----

THE CHAIRMAN: That is where the difference is between recognised and active recognised.

MR. KENNELLY: Yes, exactly. 25,000, the bigger number is recognised. They could have not done any treatments for years and years. "Active" are the ones who have billed at least once in the previous year.

We have looked at AXA and Bupa, and now Aviva. 7.80:

> "During 2013, Aviva made a number of changes to its specialist registration terms and conditions, including that new consultants seeking to obtain 'approved status' must agree to charge in accordance with its fee schedule and may not ask Aviva policyholders to pay a top-up fee. However, the registration process allows new consultants to opt out of obtaining approved status. Such consultants remain recognized but Aviva advises its policyholders that a top-up fee may be payable."

So then, over the page to "Open referral", 7.82, I am not going to read the paragraph, you have already seen what open referral is. Then 7.83, the middle of the paragraph:

> "Bupa has been actively encouraging all its policyholders, whether under an open referral policy or not, to obtain open referrals."

There is obviously an emphasis on that. 7.84, and this is an important paragraph:

"Bupa considered that open referral policies enabled it to constrain claims costs by directing its policyholders to fee-assured consultants. Bupa also argued that open referral enabled it to direct its policyholders away from those consultants which it considered might overtest or overtreat patients. Unlike GPs, who in Bupa's view often referred patients to consultants 'with little or no objective data about a consultant's care practices or charges', Bupa stated that it had a 'comprehensive database' giving it an 'insight into which consultants provide higher quality care'."

Then you will have my submissions later about whether Bupa's concern is higher quality care or controlling costs in this paragraph.

THE CHAIRMAN: Well, it could be both, could it not? Presumably, part of the logic for customers is that they think they are going to get better care than they would do elsewhere, that is why they pay the money.

MR. KENNELLY: That is their perception, yes. The bottom of 7.85:

"Bupa considers the location of the policyholder and the specialty required. However, Bupa's consultant scoring criteria . . ."

This is about whether they are rating them according to how good they are:

"However, Bupa's consultant scoring criteria also include cost criteria such as the consultant's historical outpatient fees, their average treatment costs, the charges of the hospital at which the consultant practises and whether the consultant is a Premier Partner, Contract Consultant or Consultant Partner."

Then at 7.86, turning to AXA, AXA has a similar policy of open referral. Skipping then to 7.87, Aviva has a similar scheme called 'Guidewell', and PruHealth has a similar thing "called Guided Option, which requires the customer to obtain an open referral" – 7.88.

Over the page at 7.90:

"In particular, the IDF [Independent Doctors Federation] submitted the views of a number of its member GPs, which expressed concern that when a GP referred a patient to a consultant there were a number of aspects to consider, including the condition of the patient, the expertise of the specialist, the availability and impairment of the patient and the personality of the patient and the consultant. The IDF argued that as a result, open referral could never take into account the specific needs of individual patients. It also stated that a GP could be held responsible if an inappropriate referral was made and a patient was harmed. However, insurers did not have such responsibility."

FIPO said the CC had ignored the concerns expressed in relation to open referral schemes expressed by it and by other professional bodies.

At 7.92:

> "Many considered that insurers should not be permitted to make clinical decisions relating to consultants and/or courses of treatments."

Turning now to the critical part: "Assessment of insurer's buyer power" 7.93:

> "In light of the above, we focused our investigation on two key issues."

I emphasise the word "key" issues. The CMA is recognising that these are the important questions:

> "relating to consultants fees: first insurer reimbursement rates and secondly insurer restrictions on top-up fees including the impact of open referral policies."

Over the page "PMI reimbursement rates" 7.95, and skipping down to Bupa's evidence about this, and I am looking in the middle of the paragraph:

> "[Bupa] provided analysis comparing consultant reimbursement per member by Bupa between 2007 to 2011..."

THE CHAIRMAN: Which paragraph are you on?

MR. KENNELLY: 7.95. This is the comparison that Bupa is making. The comparison made by Bupa is between outpatient consultations which were not subject to the Benefit Maxima and for surgical procedures which were subject to the Benefit Maxima.

> "Bupa's analysis showed that spend per member for consultant consultations grew at a significantly faster rate than for surgical procedure spend per member and general inflation."

They are saying, unsurprisingly, that the spend grew at a faster rate absent the price cap.

At 7.96:

> "Bupa did not consider that its Benefit Maxima should be automatically increased each year. In its view, the size of the PMI market was similar to that in the mid-1990s..."

That is the number of patients:

> "... but the number of consultants available for private work had increased over the period. Moreover, in its view, improvements in technology had reduced the complexity of, and the skill and time required for, a number of treatments."

In the middle of 7.97:

> "Like Bupa, AXA also said that it had no evidence that consultants who charged above its reimbursement levels were of higher quality."

At 7.98

> "As set out in Appendix 7.2, our preliminary analysis and the evidence submitted by parties on consultants' fees did not suggest that consultants' fees were either increasing or decreasing significantly."

We will come to that because that is not quite what Appendix 7.2 says. It is relying upon the Stanbridge Associates Limited report, so in the middle of 7.98 you see:

> "Appendix 7.2 contains further analysis by Stanbridge Associated Limited, which suggests that net average incomes for ten key special-ties between 2005 and 2010 have been relatively stable over time."

You will see right away that the examination by the expert relied upon by the CMA is between 2005 and 2010 and you have seen already that the practices which are in issue in this case began to update and accelerated after 2010. At 7.99:

> "In addition, on the basis of the information we received, we are not able to ascertain whether the level of PMI reimbursement rates mean that consultants' charges are being constrained by the insurers at a level which is more or less appropriate com-pared with the charges previously made."

A surprising question since the question is whether they are at a level which is competitive currently. Then at 7.100 two points are made:

> "However, we have not seen evidence to indicate that the insurers' reimbursement rates are leading to lower quality of services, to lower incentives to innovate or dissuading consultants from entering or remaining in private practice in sufficient numbers to affect consumer choice or cause long-term detriment."

That is the first point. The second point:

> "Further, it is in the insurers' own commercial interest to balance carefully their desire to constrain consultant fees (the benefits of which can be passed on to their policyholders in the form of lower premiums) and their need to ensure that their policyholders have access to high quality, appropriately located and available consultants – such access is fundamental to their business as insurers."

Then at top-up fees:

> "Bupa and AXA PPP argued that their fee-capping of consultants enabled them to offer their policyholders the assurance that consultants' fees would be fully covered, with 'no surprises'. They also argued that price was not necessarily an indicator of quality."

You will recall that the reference to surprises is a reference to shortfalls and a top-up fee is one where the patient has had explained to him the difference and has agreed to pay it.

THE CHAIRMAN: I am not sure that that is the distinction of no surprises. It might be a nasty surprise to the patient to be told in advance "There is going to be a top-up fee; do you want to pay it?"

MR. KENNELLY: That might well have been the question the CMA ought to have asked.

THE CHAIRMAN: I may have misunderstood but you seem to be suggesting that the reference to no surprises is just a reference to the shortfall cases.

MR. KENNELLY: Yes that is the inference I am drawing from the report.

THE CHAIRMAN: I am questioning that inference; does that say that somewhere?

MR. KENNELLY: No Sir, that is not what it says; but where the CMA has made a distinction between shortfalls and top-up fees the distinction it draws---

THE CHAIRMAN: They are not making that distinction here are they?

MR. KENNELLY: No they are not; that is an inference I draw but I draw that inference from the distinction that the CMA draws between a shortfall and top-up fee.

THE CHAIRMAN: I am pressing you on how sensible it is to draw that inference. I confess that I read "no surprises" as covering both shortfall and top-up.

MR. KENNELLY: You have my submission on how I draw this inference.

THE CHAIRMAN: Tell me, how important your submission on this is because if it is important then we will need to examine it more carefully; if it is not very important we will leave it.

MR. KENNELLY: It is not unimportant – we will come back in the grounds as to how important it is. You do need to appreciate, in my submission, the distinction between shortfalls and top-up fees because a top-up fee I submit, based on what I have taken you to, is a fee which the patient has had explained to him which he has agreed to pay – positively agreed. That is the distinction which the CMA has made between shortfalls and top-up fees.

Ms. Smith may explain to you in greater detail but that is the distinction which the CMA has made.

THE CHAIRMAN: That is another place for another purpose but not here. They have made that distinction in another place in the report for another purpose but they do not make it here.

MR. KENNELLY: Indeed that is correct. It is certainly not important for my case but no surprises must mean---

THE CHAIRMAN: Did you say "not important" for your case?

MR. KENNELLY: 7.101 is not---

THE CHAIRMAN: Let us not take up time with that.

MR. KENNELLY: I will happily do that. So 7.102(b) – this is what the consultants say:

> "Consultants could no longer set their fees based on their experience, their specialist knowledge, the local market in which they operated and the quality of the service they provided but purely by reference to the standard rates that AXA and Bupa were willing to reimburse. In addition, consultants' fees varied depending on the patients' insurer rather than the consultants' own costs or the treatment provided."

At (c) the codes were relatively rigid and at (d):

> "A policyholder might wish to pay a top-up fee in order to secure the services of a consultant with particular expertise, which enhanced patient choice and transparency. This would provide an incentive on consultants to develop expertise and compete on quality and did not affect insurers' claims costs."

At 7.103:

> "Nuffield said that it saw no reason why top-up fees should not be permitted by insurers. Consultants should be able to charge fees that reflected their experience and expertise, provided that any anticipated excess was made known to the patient at the first available opportunity."

At 7.104:

> "There is clear disparity in organisational size between an individual consultant (and indeed most consultant groups) and an insurer. In addition, we find the argument that Bupa recognition and AXA PPP is critical to many consultants persuasive, given their share of private patients. Furthermore, a consultant who is not recognised by Bupa and/or AXA or who loses a significant proportion of Bupa referrals because they refuse to agree to be fee-capped could well find it uneconomic to run a private practice."

I would submit definitely uneconomic to run a private practice. At 7.105:

> "The two largest insurers have been able to agree standard fees without negotiation with a significant number of consultants (and in relation to all new consultants impose a standard fee in order to be recognised)."

Pausing there, you know the significant number of consultants because you have seen the market shares of Bupa and AXA and the proportions of the consultants recognised by them which are subject to the hard or informal fee caps.

> "We note that the BMA's recent survey of consultants found that the number of consultants threatened with de-recognition by insurers has risen from 11 per cent in 2011 to 34 per cent in 2012. We also refer to paragraph 7.77 above and the fact that

since August 2011 Bupa has asked approximately 10 per cent of its active non-fee-capped consultants to lower their fees, failing which they will be derecognised, almost all of whom have agreed to lower their fees. We consider, therefore that at the very least Bupa and AXA have buyer power in relation to consultants. Consequently, Bupa and AXA actions in relation, in particular, to capping some consultant fees..."

You have my submission about the proportion of consultants who are capped:

"...and the recognition of consultants has the potential to distort competition between consultants."

Now for the surprise in my submission, the CMA says:

"If extensively and rigidly applied, fee-capping consultants could lead to distortions in competition between consultants and to reduced consumer choice. Fee-capping (and de-recognition of consultants who do not agree to abide by the insurer's fee schedule) has the potential to increase the disincentives on consultants from setting fees to reflect their costs, experience, expertise and the local market conditions. This distortion may potentially be increased, the greater the number of insured patients on policies that require open referrals from GPs as policyholders are channelled to lower cost consultants. Moreover, assuming that Bupa continues with its policy of de-recognising consultants who charge prices which are higher than 90 per cent of their peers and not recognising new consultants unless they agree to be fee-capped, this is likely to lead to the majority of consultants being required to charge Bupa's standard national reimbursement fees and the ability of policyholders to pay top-up fees to have a greater choice of consultant significantly limited irrespective of the terms of their policy.

However, we have not received evidence that Bupa's and AXA's contracts with new consultants are leading to the number of new consultants being recognised reducing annually since their introduction. Over the period from 2011 to 2013, we observed no material reductions in the total number of consultants recognised by Bupa, with the number of actively billing consultants remaining constant..."

Skipping down:

"Bupa confirmed that it continued to recognize around X new consultants annually. The number of consultants recognized by AXA over the period also remained constant....

> As discussed above, and this is seen mitigating against the market power of the insurers, the CMA says Bupa and AXA have only derecognized 27 and 21 consultants respectively for charging in excess of contracted fee levels since 2011."

That is, of course, because the others fell into line:

> "We also do not have evidence that the number of consultants in private practice as a whole is being adversely affected by the actions of the insurers, nor that, as a result of the fee-capping of some consultants, consultant fees are being constrained to such a level that this is adversely impacting on consumer choice or quality, discouraging innovation or otherwise causing long-term consumer detriment."

Then 7.109:

> "There are clear benefits to policyholders, which should be passed on to consumers, resulting from insurers promoting lower-cost consultants.
>
> 7.110 Moreover, corporate policyholders can relatively easily switch providers if this were to become an issue for their members … It can be extremely difficult for a personal policyholder to switch insurer and on taking out a policy or at renewal a personal policyholder may not be able readily to understand the implications in terms of consultant choice of an open referral policy or the likely impact of the insurers' consultant fee and recognition policies on choice of consultant at the time of claim."

That is 1.5 people. Then 7.111 and this very surprising finding, the core, I say, of the CMA's conclusion.

> "We also recognize that whilst the insurers encourage policyholders to see fee-capped or fee-assured consultants, policyholders—with the exception of those that hold open referral policies—can pay top-up fees under the terms of their policies if they wish to see any recognized consultant."

I skip down to the first sentence in 7.112:

> "We therefore do not find that insurer buyer power in relation to consultants has an adverse effect on the provision of consultant services in the UK."

To be clear, that means on a provision of consultant services competing in markets, consultants competing in markets for the provision of consultant services.

The next heading is "Other issues with regard to insurers and consultants", and 7.113 lists other criticisms of insurers' conduct which were sent to the CMA, which were not found by the CMA to give rise to an AEC, but some of them are relevant to the issues in this case.

7.115, the very bottom of that paragraph:

> "The issues that appeared to generate most submissions from consultants and trade associations included de-recognition of consultants, insurers restricting choice of consultants and authorization of treatment and providing misleading information as to why a policyholder was directed to one consultant over another.
>
> In response to concerns raised by consultants and trade associations, we sought further information from the four major insurers about the number of consultants that had been derecognized …"

You have seen material about that. You see the reference at 7.117 to the number derecognized by AXA. You will recall that earlier that only Bupa derecognised. AXA derecognised also.

Then the conclusion at 7.121:

> "We have not received persuasive evidence that these issues indicate a competition problem in the provision of consultant services. As described above, derecognition levels are low."

I say that is evidence of the market power of the insurers.

Over the page, 7.122:

> "However, we recognize …"

This is about the plausibility of the concern:

> "... we recognize the level of concerns expressed by consultants and their trade associations and we consider that this raises important issues with regard to effective communication by the insurers of their strategies to consultants given the critical role consultants play in facilitating choice and quality and innovation in the sector. Insurers increasingly determine not only fee levels but also which consultants a patient may see. Depending on …"

again this language -

> "… how rigidly and extensively they implement standard national fees, direct policyholders and fee-cap consultants, this could lead to a shortage of consultants and/or a reduction in quality and innovation. "

Next paragraph, second sentence:

> "In the light of the factors referred to above regarding the large insurers, consultants need to be clearly informed as to why they are not being recommended to patients and/or why their fees are not being reimbursed.

Material and sudden changes to a consultant's reimbursement levels or flow of patients has the potential to affect significantly the viability of a consultant's practice. Consultants need and should be provided with some certainty over reimbursement levels and sufficient advance notice of changes to enable them to alter their practice accordingly or seek to negotiate higher fees [if that were possible] in an orderly and transparent way … We have also received some evidence that consultants are not given notice, or only given very short notice, of changes to reimbursement levels which in some casers are material changes, or have had difficulties in obtaining responses …"

7.124:

"We have received some evidence …"

Again you will see later by the CMA suggestion that there is no evidence, but here they say some evidence -

"… some evidence that some of the language used by insurers in distinguishing between consultants who are recognized but not fee-capped may suggest to patients that a consultant who is not fee-capped overcharges for their services. Similarly, we have received some evidence to suggest that some patients understand that quality rather than primarily cost (together with location and specialty) are the driving factors for the insurers' recommendations and that a consultant to whom a patient has been referred but who is not fee-assured may provide a lower quality of care than one who is recommended by the insurer."

Just to take a point against me, 7.125:

"To the extent to which initiatives such as open referral achieve the insurers' objectives of lowering costs and these are passed on to policyholders in the form of lower premiums, this will be beneficial to consumers. If they are unsuccessful in reducing premiums, we have no evidence to suggest that in particular the corporate sector, where many of these initiatives have not been launched, will not respond accordingly."

No evidence to say that they would not.

THE CHAIRMAN: Is not the suggestion there that ordinarily you expect people who are price conscious to react to a failure to pass on price savings?

MR. KENNELLY: Yes, that is the inference, and I shall come to that because you will see in my grounds that is an assumption which the CMA are making.

THE CHAIRMAN: At first blush it does not look like an unreasonable assumption, does it?

MR. KENNELLY: In the abstract, no, but in the face of the evidence which has been put forward we say it was not enough to simply assume it in that way.

THE CHAIRMAN: Thank you.

MR. KENNELLY: Then, "Summary of our findings on consultants". There is an element of repetition here because it is a summary. Can you turn, please, to 7.132:

> "There are clear benefits to policyholders in insurers promoting lower-cost consultants …"

This is the point just made to me by the Chairman -

> "… which should be passed on to their policyholders in the form of lower premiums. We have some concerns that if fee-capping is rigidly and extensively applied, competition between consultants could be distorted as the fee levels adopted by Bupa and AXA PPP, whilst maximum fees are in practice actual fee levels and are uniform fees and therefore do not take into account a consultant's degree of specialism, patient mix, experience or geographic location. There is also the risk that without transparent and fair review mechanisms and flexibility in application, uniform fees could lead to a distortion of competition between consultants and an adverse effect on quality and innovation."

Then here, apparently contrary to what the CMA in 7.111:

> "Whilst all policyholders are able to pay top-up fees under the terms of their policies …"

That is, a matter of contract, the policyholders can pay top-up fees -

> "… to both corporate and personal policyholders that do not require open referral, the ability to pay top-up fees and the choice this provides policyholders is dependent upon the insurers' consultant recognition policy."

That is the section on consultants.

Before I finish on that, I want to, if I may, take you to the section on the remedy, which I say is material to what the CMA had in mind when it reached its conclusions in that section 7. Could you turn to 11.628. This is a section in relation to the effectiveness of the fee information remedy.

> "We considered FIPO's arguments that without the ability of consultants to set their fees without interference from the insurers and for patients to freely choose a consultant there could not be effective competition on price among

consultants. We did not agree with this argument. We do not find the price caps imposed by the insurers were forcing consultants out of private practice …"

I say that is not the same thing as being able to compete on price:

". . . at the aggregate level, which would have reduced the choices available to patients, nor do we see any reason that insurers should not sell restricted policies, provided it is made clear to patients what they were purchasing. Patients who preferred to have a free choice of consultants could choose a different insurer or different policy to give themselves this option."

You have seen the market share of the insurers in issue.

"For those patients who had chosen restricted policies, we thought that even in a context where insurers set an upper limit to the fees charged to their policyholders, consultants could still compete below this level on price . . ."

And here, the critical part, making the remedy effective. That is all I want to get from the final report. Please turn then to the appendices, which should be a separate volume, and I will ask you to turn to Appendix 7.2, which is p.1029 in mine, Ms. Smith will tell me ----

MS. SMITH: 1042.

THE CHAIRMAN: Thank you. This is headed "Consultant remuneration".

MR. KENNELLY: Yes. I emphasise para. 2:

"In many specialties, our initial analysis showed a real-term decline in revenues, in particular since 2008/09, depending on specialty. Trauma and orthopaedics was the largest specialty by revenue by a significant margin and it was the only specialty to have seen a significant increase in revenues between 2006 and 2011. However, this appeared to have levelled off since 2009."

Then para. 5:

"Our preliminary analysis is broadly in line with analysis carried out by Laing & Buisson. According to Laing & Buisson's analysis, consultants' aggregate private fee income, in real terms, grew rapidly in the ten years to 2005 before it levelled off in the second half of the 2000s, growing by around 20 per cent between 2002 and 2009 (after which it fell)."

Paragraph 9, where profitability is discussed, the CMA concludes:

"there is no evidence of a sustained reduction in the profitability of private medical practice within any of the specialisms though ophthalmologists' average profits appear to drop between 2007 and 2008 and then remain relatively flat."

But I emphasise the fact that the source for this conclusion I, as I said, the Stanbridge Associates Limited report, which stops at 2010. You can see that in figure 5.

At para. 17 over the page there is a reference to the National Audit Office report, which I referred to earlier, which finds that whatever about the absolute number of consultants in private practice, the proportion of consultants in private practice has reduced significantly between 2000 and 2012.

THE CHAIRMAN: Sorry, which paragraph were you on?

MR. KENNELLY: 17, I hesitate to give you a page number, because I am out, but it is para. 17 which references the National Audit Office Report to which I have already referred.

THE CHAIRMAN: That is not necessarily a pure market fact, is it? Have there not been changes in the attitude of the NHS to people undertaking private consultancy work?

MR. KENNELLY: Yes, para. 21 it says:

> "The vast majority of consultants who undertake private practice also work within the NHS: very few doctors who work in the private sector do so exclusively. There are a number of reasons why the percentage of consultants in the NHS also in private practice may have declined in recent years"

And then reference made to NHS starting salaries:

> ". . . more progressive pay structures and a longer working week introduced in 2006 with the aim of limiting private practice work . . . Furthermore, the rising costs of professional indemnity insurance. . ."

Because you will remember, Sir, that in the private sector, this is important about the risk of reduction in numbers, consultants in the private sector pay their own indemnity insurance, in the NHS, the NHS has a global policy.

> ". . . may also have been a factor depressing the numbers of consultants undertaking private practice as a proportion of the total number of NHS consultants."

So these are factors going the other way. My submission will be that it is not enough simply for the CMA to refer in general terms to this material, it needs to address it and look at future trends.

THE CHAIRMAN: Do they do that in 23.

MR. KENNELLY:

> ""These factors might signal that the pool of NHS consultants available to the private sector might shrink in the future. However, drivers in the other direction include the fact that basic pay in the NHS has been frozen for the past two years

and, as indicated by responses to our survey of consultants, even with a longer working week, 47 per cent of consultants who responded said that they had time available and would like to undertake more private work."

Yes, that is a paragraph upon which the CMA will rely, but we say that is entirely inadequate in view of the importance of the issue. Remember if that is the evidence on which they rely they must demonstrate that it is probative. We say that it is plainly not. The importance of the issue requires much greater attention, particularly in view of the material which was given to them by FIPO.

So, the CMA asked itself, as I said, two questions, whether PMIs have market power, which may be used to supress consultant fees to a level below those which would prevail in a competitive market, and if so whether it could lead to a shortage of consultants, quality service and innovation.

Our submission, as I said in opening was that the only logical conclusion, which could be drawn from the facts as found by the CMA was that there was an adverse effect on competition resulting from the PMI's buyer power.

It is trite, I say, to point out that for competition on price between consultants to be effective the consultants need to have some freedom to set their own prices. The facts, as found by the CMA demonstrate fee constraints are imposed extensively and rigidly by the PMIs.

THE CHAIRMAN: I am so sorry, you said that the only logical conclusion was AEC, but I thought you said right at the beginning of your opening that if you succeed in your challenge you do not say to us that there was only one logical finding that could be made, that there should be a remission?

MR. KENNELLY: Yes.

THE CHAIRMAN: How do you marry up ----

MR. KENNELLY: Well, I say it is a question of what I say and what the Tribunal is likely to determine. I say the only logical conclusion is that there was an AEC but I entirely appreciate ----

THE CHAIRMAN: Sorry, but is not the logic of that that we should not remit, we should find that there was only one logical finding, an AEC, and not remit.

MR. KENNELLY: The difficulty with that is the remedy, because the CMA did not properly investigate this issue at all on the factors found by them I say all the facts point towards there being an AEC. However, when the Tribunal comes, in its discretion, to give me a remedy after the decisions are quashed, the Tribunal cannot be satisfied, and I would agree with this, that the questions were properly investigated by the CMA in the first place.

THE CHAIRMAN: It may be the case that one would remit on remedy because the consideration on this footing has gone off on a false basis, but you told us that it was not just remedy, you accepted that if your appeal succeeded there should be remission on both these points, and I do not follow how that squares with what you have just told us that there is only one logical conclusion.

MR. KENNELLY: It is because there has not been a proper factual analysis by the CMA. On the factors found by them with their inadequate factual examination, which I shall explain, they indicate, I say, that there was an AEC on the part of the PMIs. But, I would accept that if the Tribunal agreed with me and quashed it, the appropriate course notwithstanding my submission there is only one logical conclusion on the facts as found by them would be to remit it.

THE CHAIRMAN: Why? If there is only one logical conclusion on the first topic that there is an AEC what on earth is the point of remitting it on that issue?

MR. KENNELLY: Because they have not asked themselves sufficient questions about the underlying facts.

THE CHAIRMAN: That suggests that your submission actually is not there is only one logical conclusion, there is an AEC, but that it was irrational for them to discount the possibility of an AEC on the material available to them.

MR. KENNELLY: I can see the point, yes; I can see that.

THE CHAIRMAN: There is quite a big difference between the two. Which is your submission?

MR. KENNELLY: It is of importance in terms of remittal. On the facts as found by them I say that they could have, and ought to have found an AEC on the part of the PMIs.

THE CHAIRMAN: Right, so do not remit on that, there is just one conclusion, AEC?

MR. KENNELLY: I am compelled to say that should be my primary submission, but I accept as a matter of practicality that because I also say that they made inadequate factual inquiries that the most likely event and the one I would accept is that it should be remitted to them, because I accept ----

THE CHAIRMAN: It may be that you are allowed to have two submissions. I am literally trying to understand your submission at the moment. If you are saying there was only one logical possibility available to them on their findings, namely that there was an AEC, surely the logic of that is that we do not remit, or, if we remit it is with a direction that they find an AEC, not for them to reconsider.

MR. KENNELLY: I accept that.

THE CHAIRMAN: And do you submit that?

MR. KENNELLY: Yes, I do.

THE CHAIRMAN: Are you making an alternative submission if you do not succeed in that?

MR. KENNELLY: That is what I am saying.

THE CHAIRMAN: Let me make sure that I do understand the submissions that you are making. Thank you that is helpful.

MR. KENNELLY: I may not properly reflect the relief which we sought in the application, just to be clear. We have asked the Tribunal to quash the decision and remit it; therefore if the Tribunal is taking a strict approach to me on the Pleading it is not open to me that you should find an AEC on the basis of the findings in the report.

THE CHAIRMAN: Subject to whatever Ms. Smith says to us I would not be inclined to rule you out of the Pleadings for making that submission, not least that we can remit with a direction if necessary.

MR. KENNELLY: I am grateful for that and I apologise for having tested the Tribunal's patience.

THE CHAIRMAN: That is quite all right but it is important that we understand. At the moment you are now developing what I understand to be your primary case in fact which is that there is only one logical conclusion, which is that they had to find an AEC.

MR. KENNELLY: Exactly because all the facts point that way. I say that the CMA found that without recognition by the major PMIs consultants cannot operate in this market and the CMA accepted the obvious facts that aside disparity between the consultants who wish to practise privately and the insurers means that the insurers can and do dictate terms to the consultants. I say it is a telling piece of evidence, as Bupa said. The PMI market was about the same size in the mid-1990s but the number of consultants absolutely has increased and they are in no position to negotiate, and the CMA found that the reimbursement rates had not increased since the 1990s and that Bupa had imposed significant fee reductions in 2012. In view of the combined market share of the PMIs and the fact that practically all of the active consultants recognised by Bupa and AXA were subject to informal fee caps and the fact that only a small number of consultants have resisted the formal or informal fee caps, this demonstrates the overwhelming market power of the PMIs. So on any view, applying the CMA's own test, these restrictions are applied extensively; and as to whether they are applied rigidly I draw the Tribunal's attention to the CMA's own findings that these fee caps, the formal ones and the more informal ones, are enforced by threats of de-recognition, acts of de-recognition and favourable treatment for the consultants who fall into line. How then, I say, could the CMA conclude that there was no AEC?

Based on the final report a number of factors are raised which appear to be the basis for declining to find an AEC in this context and those are the factors which we challenge in our grounds.

On the basis of the fact that the challenge to fee information remedy depends on my challenge to the PMI decision I shall begin with the challenge to the PMI decision and take you first to ground two.

The challenged finding is in paragraph 7.111 of the report.

THE CHAIRMAN: Page 223 in our copy.

MR. KENNELLY: It is the paragraph that begins:

> "We also recognise that whilst the insurers encourage policyholders to see fee-capped or fee-assured consultants, policyholders – with the exception of those that hold open referral policies – can pay top-up fees under the terms of their policies if they wish to see any recognised consultant."

That might be true, I say, as a matter of fact or a matter of contract between the policyholder and the PMI, but of course if Bupa or AXA or recognised consultant accepts a top-up fee he risks being de-recognised and excluded from the market, for in the case of some of the AXA consultants not under a formal fee-cap they risk having the patients warned off.

This finding at 7.111 is highly material to the CMA's conclusion. You will recall at 7.93 the question of whether top-up fees were restricted by PMIs was a key issue, to use the CMA's language, and of course 7.111 is followed immediately by the conclusion that there was no AEC.

Can I ask the Tribunal to turn to the CMA's defence, which is in hearing bundle 4 at tab 1, paragraph 70?

> "Moreover, FIPO's contentions that the CMA had found that the 'paying of top-up fees was effectively prohibited" and the ability of patients to see a variety of consultants by paying top-up fees is in fact 'severely limited' are each wrong. As to the former, the CMA made no such finding and the CMA notes that this allegation is not supported by any cross reference..."

As to the latter, the ability of patients to see a variety of consultants by paying top-up fees and as to whether that is severely limited:

> "Provided that a consultant is 'recognised' by the PMI, open referral policyholders can see approximately 90 per cent of consultants recognised by Bupa. Bupa has approximately 19,000 active recognised consultants compared to approximately 21,000 active recognised consultants in private practice. The contention that the ability of patients to see a variety of consultants by paying top-up fees as being 'severely limited' is therefore incorrect."

So the CMA does not engage at all with the point that the policyholder might think in theory they have to pay them, but the consultant who is recognised is likely to be prohibited from accepting it on pain of de-recognition.

Then we turn to CMA's skeleton argument which should be in the same volume, paragraph 36:

> "The CMA's points at 7.111 of the Final Report have to be read in light of that prior conclusion."

The prior conclusion is the one at 7.106.

THE CHAIRMAN: Shall we just remind ourselves?

MR. KENNELLY: Yes in fairness please read that; it is the indented italicised part in paragraph 35.

Then at 36:

> "There was therefore nothing irrational or illogical in CMA's observations that, in circumstances where (i) the majority of the consultants were not required to charge Bupa's standard national reimbursement rate and (ii) there was no restriction on policyholders from seeking to pay top-up fees was one further factor in the range of factors leading to the conclusion that these practices had not yet generated competitive harm, such as to give rise to an AEC."

They are basing it on one fact, they say, that the majority of consultants were not requiredto charge these rates, and there was no restriction on policyholders from seeking to pay top-up fees to those consultants who charged such fees, the ability to pay was just another factor which led to the conclusion that there was not yet competitive harm.

Taking the first point first, you have already seen the CMA's finding that the Bupa reimbursement rates, the Benefit Maxima, are the industry standard and that AXA changed its fee schedules to be in line with the Bupa fee schedule. You have that in the final report. As to whether that means the majority of consultants are in substance required to charge these fees, you have the evidence about the combined share of Bupa and AXA.

THE CHAIRMAN: Sorry, which is the paragraph where AXA requires consultants to follow the Bupa figures?

MR. KENNELLY: It is 7.61. In any event, in the paragraph which the CMA refers to itself, the Bupa rates are the industry standard and likely to lead to the majority of consultants being fee capped. My submission is that the majority of consultants are already subject to the hard fee cap or the informal fee cap identified by the CMA in its final report.

The second point which the CMA makes, that there is no restriction on policyholders from seeking to pay the top-up fees is obviously wrong, because the finding in the report refers to payments to recognised consultants. By definition, the majority of these are very strongly discouraged from receiving these top-up fees. Interestingly, the skeleton does not refer to payments to recognised consultants, which is what para.7.11 says, it says "no restriction on policyholders from seeking to pay top-up fees to consultants who charged such fees". As I

have said, the paragraph in the report refers to recognised consultants. They are either prohibited or very strongly discouraged from receiving these fees. So the reference to consultants who charge such fees is inappropriate.

It seems to be the CMA's point that this restriction that I am referring to now is some future concern. There is nothing future about this. As I have said, the CMA found that the majority were subject to fee caps or their equivalent, and, as I said a moment ago, even though the CMA says 7.106 that it is likely to lead to the majority of consultants being required to charge along these lines, on the CMA's findings that is already happening.

THE CHAIRMAN: Do we not have to read the whole of sections 7.101 to 7.112 together? It might be said that 7.106 is the point where the CMA faces up to the point you have been emphasising to us that the consultants may find themselves constrained, but then there is the following reasoning starting from the "however" in 7.107 down to 7.110 which, for what it is worth, seems to be the reasoning in answer to that. Then at 7.111 the CMA seem to be changing their focus and looking to see if there are constraints directly upon the policyholders: answer, no, not to a material extent.

MR. KENNELLY: Sir, I can see that. I would say that if ----

THE CHAIRMAN: You seem to be suggesting that there is a problem with 7.111 because the CMA has left out of account what you say is a very material consideration, the restraints on the consultants themselves?

MR. KENNELLY: I go further than that. I say ----

THE CHAIRMAN: Let me just press you on that: how can you say that when they have specifically faced up to that in 7.106, and given reasoning to try to answer that point? One would not expect 7.111, if that is the right way of reading the report, to be the place where they would try to answer that particular concern, if they think they have answered it already.

MR. KENNELLY: In my submission, there is no clear link between the point that is being made at the end of 7.106 and the point that is being made at the beginning of 7.111.

THE CHAIRMAN: What about the word "also"? They dealt with part of the argument, and then at 7.111 they are making an additional point.

MR. KENNELLY: The question is rationality, whether the analysis stacks up. It is a very high threshold. The word also

THE CHAIRMAN: If the test is rationality - I am sorry to interrupt you - and what you say is the key point for you, which is that the consultants are constrained, is it not the rationality of 7.106 to 7.110 that we should be looking at? Is that right?

MR. KENNELLY: I say no, because I do not see a clear link. My primary submission is that there is no clear link between 7.106 and 7.111, but if I am wrong about that ----

THE CHAIRMAN: That is sort of what I am putting to you. There is not that clear link because might it not be said that the CMA has addressed the consultant constraint point at 7.106, and then he has given reasoning at 7.107 to 7.110 to deal with that point?

MR. KENNELLY: If that is the way that it should be read, it is still irrational for the CMA to rely as a factor going towards its conclusion, and it acknowledges that it is a factor, on the finding at the first sentence of 7.111.

I should say, pausing there, the CMA accepts that this is a factor which went to its conclusion in para.71 of its skeleton argument. The word "can" in the middle of that first sentence of 7.111 is meaningless in view of the restrictions which currently exist. It is not something that is likely to happen in the future, "restrictions which currently exist" on consultants. It may be that the CMA is saying in 7.106 that this is a problem that is likely to arise, and we do not think that is sufficient to give rise to AEC, and 7.111, in any event or in addition policyholders can pay top-up fees. That is meaningless, in my submission, because, as things currently stand, as they found, policyholders' theoretical ability to pay top-up fees to recognised consultants is meaningless, because the majority of them cannot accept them, as found by the CMA.

THE CHAIRMAN: Yes, thank you.

MR. KENNELLY: The CMA says in its skeleton that even if this is an error, this factor was only one of a number upon which the CMA relied. That is para.71 of the skeleton argument.

The other factors are set out in para.57 of the defence. Can you just turn to those.

THE CHAIRMAN: Sorry, 71 does not seem to say it is an error.

MR. KENNELLY: Forgive me, 42, and this in relation to Ground 2, and they say that there is, therefore, no basis whatever for FIPO to contend the CMA's findings in relation to top-up fees, one finding amongst a number upon which the CMA relied ----

THE CHAIRMAN: I am sorry, I do not read that as saying, "Even if we were irrational on that finding, look at all these other findings where we were not". That just seems to say, "It is a multi-factorial assessment, Tribunal, do not get too fixated just one factor, there are a number of factors".

MR. KENNELLY: Yes, they acknowledge that these are findings among a number upon which the CMA relied. You will have seen in the defence ----

THE CHAIRMAN: So there is a positive assertion, they relied on it. If they are wrong and it is irrational, they accept that they would have erred in law, I think, from that sentence.

MR. KENNELLY: Indeed, and the reason I refer to 71 of the skeleton is because that makes the same point in the middle of that paragraph.

THE CHAIRMAN: But that is different from what you were saying to us that this was their argument in the alternative, in other words, assume that we are irrational in 7.111 it does not make any difference.

MR. KENNELLY: Yes.

THE CHAIRMAN: I have not yet detected that they are making that submission.

MR. KENNELLY: I respectfully agree, but there are factors upon which they do rely on their multifactorial assessment in 57 of the defence. Before I turn to that, just for your note, and I am conscious of the time para. 71 that I mentioned earlier makes the same point that this is a factor relied upon.

THE CHAIRMAN: It clearly is on the face of the report.

MR. KENNELLY: Well, you say that, Sir, but in their defence, and I will not dwell on this because the position is now clear, they say this was an observation and they tried to downplay it or to suggest that it was not relied upon. That is not their current position.

THE CHAIRMAN: All right.

MR. KENNELLY: Paragraph 57 of the defence sets out the other factors which they rely upon in their multifactorial assessment.

THE CHAIRMAN: So you want defence para.57?

MR. KENNELLY: Yes, please. A number of these are addressed in my grounds, and so where they are I will not develop them. (a) and (b) in para. 57 – I am looking at the subparagraphs – refer to there being no evidence before the CMA that the contracts with new consultants were leading to a reduction in the number of new consultants, and (b) "There was no evidence that the number of consultants in private practice was being adversely affected by the actions of the PMIs." I address those in my Grounds 4 and 5 and shall move on from them.

THE CHAIRMAN: Let me just follow this. Defence para. 57 you say sets out their answer to your case on the irrationality in 7.111.

MR. KENNELLY: No, these are the factors.

THE CHAIRMAN: Sorry - more generally?

MR. KENNELLY: More generally

THE CHAIRMAN:. You pointed us to (a) and then you said that is my Grounds, and I did not catch it, and then you said "I will move on".

MR. KENNELLY: Yes, (a) and (b) are addressed in my Grounds 4 and 5, and I shall only develop now the ones which are not addressed in my Grounds. (a) and (b) are 4 and 5.

THE CHAIRMAN: So does that mean you are going to come back to them?

MR. KENNELLY: Yes, I will.

THE CHAIRMAN: All right, so, note to self: "Wait for this".

MR. KENNELLY: Yes. Then (c), this is the point about there being "clear benefits to policyholders which ought to be passed on to consumers, as a result of the PMIs promoting lower-cost consultants." That, obviously, I say is wrong, and that is my Ground 6. So again ----

THE CHAIRMAN: You are going to come back to it.

MR. KENNELLY: Yes. (d):

> ""The ability of corporate policyholders to switch providers if fee-capping were to have any adverse consequential impact and the ability of individual policyholders to choose PMIs and different types of policies who/which did not require open referrals and/or did not restrict access only to consultants who were fee-capped."

Again, I will come back to that. The next sentence in (d) is:

> "The CMA also found that even those Bupa policyholders who are on open referral and required to obtain pre-authorisation to use a particular consultant still have access to over 90% of Bupa's 25,000 recognised consultants."

My answer to that, obviously, would be that is simply a function of their buyer power. The consultants have toed the line, and I shall deal with that in my Ground 6.

Then (e):

> "The number of consultants who are fee-capped compared to the total number of recognised consultants and the tiny number of consultants who have been de-recognised since 2011 for charging in excess of contracted fee levels."

You already have my submission about the proportion of consultants who are subject to fee-caps, or any form of fee-caps as a proportion of active recognised consultants. That is obviously a massive majority, and the tiny number of consultants who have been de-recognised – again, I am sorry to repeat it – is not evidence of a lack of an AEC, in fact it demonstrates the buyer power of the insurers.

Finally, at (f):

> "There was no evidence of any adverse effect on quality or innovation."

No evidence. So you have seen in para. 7.9, this I will address now, the question of the fact there was no evidence of any adverse effect on quality or innovation, focusing in particular on innovation.

This, as you know, was recognised by the CMA as a risk, the fact that if extensively and rigidly applied the fee constraints on consultants could lead to a decline in innovation. This was recognised in 7.122 of the final report. So it is a risk, the question is, is there evidence? Well, there was evidence. FIPO adduced evidence on this, and that is in bundle 3.

THE CHAIRMAN: Should we not look at 7.108 first, because that is what the footnote from the defence says.

MR. KENNELLY: Yes. There is no reference to any evidence there, it simply says that they do not have evidence that it is discouraging innovation, no evidence. But there had been evidence, and it is in, among other places, FIFO's response to the provisional report, and that is FIFO's response, and the relevant part is in vol.3 of the appeal bundle, so it was the original application bundle, tab 19.

As I say, this is FIFO's response to the provisional findings report, and notes on remedies, and the part that I wish to draw your attention to is at p.1597, para. A1.53, and please read from seven lines down beginning: "Regarding the impact on innovation" to the end of that paragraph 1.53.

THE CHAIRMAN: (After a pause) Right, we have read that.

MR. KENNELLY: So, it is not fair, I say, or rational for the CMA to describe this evidence as "no evidence". The CMA needs to explain why it dismisses the evidence, and if it has better contrary evidence available it should say so, but it is not the situation where it can say rationally that it had no evidence showing a potential adverse effect on innovation.

THE CHAIRMAN: And which of your Grounds is this one?

MR. KENNELLY: Ground 2. And the reason why I am looking at para. 57 of the CMA's defence is because – and I should have taken you to this part at the beginning – in the skeleton paragraph 29, where the CMA raises its defence to the PMI decision---

THE CHAIRMAN: Paragraph 29 of the CMA skeleton?

MR. KENNELLY: Exactly, where it sets out its broad answer to our appeal against the PMI decision. If you read that you will see the reference to the CMA’s defence, paragraph 57, which is why I take you to it now. So this is its broad answer to the challenge to the PMI decision, which is why I am taking you to this part of their defence and the factors which it lists. My point is that by rebutting them one by one, either in my grounds or as I have done now, I am showing that to the extent that the CMA says this was a multi-factorial

assessment, and even if this factor about top-up fees is wrong, these are the factors that still allowed us to reach a rational conclusion that is not the case; so none of these other factors are accepted as being properly founded or evidenced.

That is my submission on ground two.

Ground three is the finding by the CMA that it is possible to compete below the fee caps.

THE CHAIRMAN: Just looking at your ground two in your skeleton, does that refer to what you have just pointed us to?

MR. KENNELLY: I do not believe that it does.

THE CHAIRMAN: So one might say that is not a very helpful skeleton argument on that point.

MR. KENNELLY: Sir, I will accept the criticism made to me.

THE CHAIRMAN: Show me where in your grounds you deal with that?

MR. KENNELLY: The fact that innovation is not---

THE CHAIRMAN: The reference to the FIPO response to the provisional report. It is ground two you told us.

MR. KENNELLY: Yes, you will see that I took you to paragraph 57.

THE CHAIRMAN: Yes; I am asking you for the paragraph in your notice of application.

MR. KENNELLY: I do not believe that I made a specific reference to that part.

THE CHAIRMAN: So how is the CMA supposed to deal with that if you have not dealt with it in your notice of application or your skeleton argument and you have just done it now? Have I understood correctly, you have just referred to it now?

MR. KENNELLY: Yes, although we have referred in more general terms in our grounds – and we will supply the references – to FIPO's response to the provisional findings' report. To be clear – and this is what I was trying to say to you, Sir, a moment ago – I make this point about innovation because the point is taken against us in the CMA's defence. The CMA's defence to my grounds is that this is a multi-factorial issue; it means there are other factors which you need to look at. So I am perfectly entitled, if I may say so, to criticise those other factors because they were relied upon by the CMA in its defence.

THE CHAIRMAN: I understood you to say that you have the ground of challenge in relation to paragraph 7.108 of the final report because they said there was no evidence of an effect in innovation, but you say that there was evidence and they did not deal with it.

MR. KENNELLY: I am very sorry if I have misled you; that is not what I am saying at all. Where I have grounds of challenge I have not addressed you because I want to come to those now. The reason why I have addressed you on innovation is because I have no grounds for saying this is an error.

THE CHAIRMAN: So it is not an error, why do you take us to---

MR. KENNELLY: I take it because it was relied upon against me in their defence. I said under ground two that it was irrational to find that patients could pay top-up fees. In response in general to the PMI decision challenge they say that the Tribunal should be regard not only to the matters that I mentioned but also to other factors---

THE CHAIRMAN: They just recite what is in the report; they are summarising what is already in the report.

MR. KENNELLY: Yes but they rely upon that to say that these are reasons why the challenge should fail.

THE CHAIRMAN: Surely if you wanted to say there is some particular problem with paragraph 7.108 of the report it was incumbent on you to explain what your case was so that they could deal with it but not pull it, if I may say so, like a rabbit out of a hat at the hearing.

MR. KENNELLY: Plainly nobody wants to surprise the CMA.

THE CHAIRMAN: That is what you seem to be doing.

MR. KENNELLY: I understand that Sir but just to be clear, I am taking this innovation point in response to a point they have taken in their defence against the challenge.

THE CHAIRMAN: But one can take it back; it is a point that they took in their final report – see paragraph 7.108 – and if you wanted to challenge that surely it was incumbent on you to explain your case to challenge that.

MR. KENNELLY: Yes I see the concern, but if FIPO chooses to challenge a limited number of things and in any response the CMA relies on something which is wrong by saying there is no evidence of an effective innovation, it cannot be right that I am precluded from challenging that argument in a defence simply because I did not challenge it directly in my application for review.

THE CHAIRMAN: With all respect to you I think it is the case that unless you plead a challenge to a particular bit of the report – if all they have done in their defence is say, "Look at the report, the report says no evidence consultant fees are being constrained to such a level that this is adversely impacting on consumer choice or quality, discouraging innovation or otherwise causing long term consumer detriment..." – that is what they say in their report – all they have done in their defence is say, "Look at the report and that was one of the things that we said in the report." If you want to challenge that finding in the report then it would be incumbent on you to challenge it. It may be that perhaps overnight you can consider your position. If you want to apply to amend your pleaded case then we can hear that application tomorrow, but unless you amend, certainly speaking for myself, there is a

difficulty with you just suddenly running what seems to me to be a new point not pleaded so far.

MR. KENNELLY: Just to be comprehensive my learned junior refers me to Mr. Glazer's first witness statement which we did lodge with our application for review and which does refer to the---

THE CHAIRMAN: So not a pleading; is the CMA supposed to guess at what your case was from that? You consider your position as to whether you want to apply to amend because, as I say, at the moment it seems to me that this is a distinct attack on the reasoning not in the defence but in the final report, paragraph 7.108.

MR. KENNELLY: First of all, just to complete the picture let me give you the reference to Mr. Glazer's witness statement. It is at paragraph 46 of his first statement. I will consider my position. I am not seeking to challenge the final report, I am simply seeking to refer to the defence.

THE CHAIRMAN: Forgive me; if you are not seeking to challenge the final report on this point then it seems to me that we are stuck with what it says in 7.108: that they do not have evidence; that as a result of fee capping consultant fees are being constrained to such a level that this is adversely impacting on consumer choice or quality, discouraging innovation or otherwise causing long-term consumer detriment. That is where we are; that is what it says in the report. I now understand that you say you do not challenge that.

MR. KENNELLY: Plainly because I have not challenged in the review. For the third time I have said that I only criticise it because it is against me in their defence. I do not want to test your patience and I will consider my position overnight.

Ground three, the finding that it was possible to compete below the fee caps. If I can ask the Tribunal to turn to paragraph 11.628. This you have already read but obviously the part on which I rely is the end of 628 which says:

> "For those patients who had chosen restricted policies, we thought that even in a context where insurers set an upper limit to the fees charged to their policyholders, consultants could still compete below this level on price, making the remedy effective."

If the Tribunal turn over the page to 11.631, this is about the proportionality of the remedy. I begin four lines down:

> "Although it is not possible to quantify what proportion of this cost..."

The cost of treating private patients:

"...may be saved by patients as a result of increased competition between consultants, even a one per cent average decline in prices is equivalent to a £15.9 million decline in costs annually, some of which will be saved directly by patients, via lower shortfalls, top-ups and/or co-payments, and some by the PMIs, at least a proportion of which we would expect to be passed through to patients in lower insurance premiums. While the extent to which the PMIs would pass through lower costs will depend on the level of competition in the insurance market, economic theory suggests that this will range from full to partial depending on the nature of competition in providing medical insurance."

The critical part for my purpose is where the CMA is saying at the beginning of the passage I have read that "it is impossible to quantify the proportion of the cost which could be saved, but as a result of increased competition between constraints". So if you are with me that the fee cap or the equivalent is applied extensively and rigidly, the competition that is referred to here must be competition below the fee cap, which then, they say, would result in reduced fees and pass-through in those circumstances.

My submission on this is that there is no probative evidence at all that the consultants could compete, even with the fee information remedy, below the fee cap. This is important because, having found that fee caps operated, the CMA obviously needs to consider if competition on price between consultants would be possible at all, because such competition would, in large part, have to be below the fee cap. There is no evidence at all on the part of the CMA that such competition is or would be possible. The lack of any evidence vitiates, as a matter of rationality, both the PMI decision, because it is necessary, I say, in the PMI decision although not, I acknowledge, referred to in section 7, and the fee information remedy in which section this finding appears.

The CMA's defence is, in summary, that there was no positive finding in section 7 in relation to competition below the fee caps. It appears that the CMA's case is that this was a prediction of what would happen once the fee information remedy was in place.

THE CHAIRMAN: What is the cross-reference to the chapter 7 paragraph?

MR. KENNELLY: The cross-reference to section 7? I do not have one. That is my point. I acknowledge that in section 7 there is nil express finding that competition was possible below the fee caps. I have to persuade you that the CMA plainly had this in mind because otherwise their findings on competition do not make any sense. The reference in section 11.628 to competition being possible being possible below the fee cap should inform as to

the basis for the CMA's decision in section 7. The whole of section 7 is focused on an adverse effect on competition, including competition on price between consultants.

THE CHAIRMAN: Yes.

MR. KENNELLY: As I have said, the CMA found that fee capping in various forms was extensively and rigidly applied. Nevertheless, concludes the CMA, no adverse effect on competition. It must be that the CMA was content that there would still be competition between consultants, and in view of the fee caps there can only be competition below the fee caps. I say that, although it is not referred to in section 7, the CMA's final report and the reference to it in 11.628 is obviously part of the CMA's reasons for its conclusion in 7.112, and plainly a basis for finding that the fee information remedy was effective. "Making the remedy effective" was the language used by the CMA. There is no evidential basis for this at all. It is pure assumption.

If you turn to para.96 of the defence, you will see a further point which was taken. The defence is in tab 1 of volume 4.

THE CHAIRMAN: You are going where?

MR. KENNELLY: Back to the defence, the CMA's defence.

THE CHAIRMAN: Paragraph?

MR. KENNELLY: Paragraph 96. There it says:

> "… the CMA did not, however, positively find that there was competition below the fee caps, merely that there could be, following the introduction of the Fee Information Remedy."

They say:

> "Even if, as FIPO suggests, there is limited likelihood of competition below the caps, that does not mean the Fee Information Remedy will be ineffective: given the broader aims of the remedy, its imposition is not only reasonable but likely to improve competition on price between consultants who will be incentivised to compete as a result of the greater transparency of their fees."

That, in my submission, still does not address the basic question: how can the CMA predict or assume that consultants can or will compete below the fee caps? There is, I say, no basis for that assumption where, as we have seen, there has been no increase in reimbursement rates since the 1990s, and significant reductions in 2012 and a real time decline in revenues. The CMA has not investigated whether there was capacity for further fee cuts by consultants.

FIPO said that effective competition between consultants was impossible where the fees were so strictly constrained by the PMIs. This, in my submission, is where *Skyscanner* is directly in point, because this question of whether competition was possible below the fee caps was a significant issue. FIPO placed the CMA on notice and the CMA had a duty, I say, to investigate this question. The CMA cannot simply decline that and rely upon a pure assumption which you have just seen. The CMA says in its skeleton argument that *Skyscanner* is inapt, because it is impossible to investigate the consequences of a remedy until it is imposed. My submission is that it is perfectly possible to examine the likelihood of this question by reference to what consultants were capable of doing currently.

As regards the procedural fairness point, there is obviously a tension between the CMA's arguments in this respect, because on the first point they say the finding is barely material as to whether consultants could compete below the fee cap; and their second on particular fairness is that it should have been obvious to FIPO that the CMA believed that consultants could compete below the fee caps. In truth, this is a highly material point, and it was not referred to previously by the CMA in any earlier document.

I can take you now to the Enterprise Act and the legal test, s.169(2), which requires that the CMA give advance of the reasons for its decision. Reasons are required by the statute. Here, if I may, I will take you to one authority which is the judgment of the Supreme Court in the *Moseley* case.

THE CHAIRMAN: Just before we leave your *Skyscanner* point, do you want to say anything about 7.98, where the CMA gives reasons why they do not think they should vest the time and resources in carrying forward the investigation on this particular point, and the contrast that seems to bear with the position in *Skyscanner*. You will remember I drew your attention to a paragraph in *Skyscanner* where the point was made that actually it was very easy in that case for the CMA to investigate. Did you want to say anything what seems to be a material difference between the two cases?

MR. KENNELLY: Sir, you were referring at 7.98 to the declining consultant revenues and consultants' fees.

THE CHAIRMAN: The second sentence:

> "The extremely wide variation in the levels of consultant earnings and costs depending on specialty, locality and size of practice would have made any profitability analysis extremely difficult, resource intensive and likely to be inconclusive."

MR. KENNELLY: Yes. I acknowledge that that particular point is a difference between this case and what the OFT could have done in *Skyscanner*. But, the CMA, in this case, did examine profitability by reference to Stanbridge Associates Limited Report which you have seen in Appendix 7.2. So, although they say that here they do reach a view as to profitability in their appendix, relying on outdated data, and I say they could have obtained more up to date data.

The Medical Defence Union – I will give you the reference – put forward material to FIPO, which FIPO could have produced to the CMA, explaining that revenues had declined by 9 per cent, and it was open to the CMA to explore that.

THE CHAIRMAN: What do you say is the test that is open to them to explore it? They could explore whatever they like.

MR. KENNELLY: It is a question of degree, and plainly it is a question for the decision maker, for the CMA to decide what it needs to look for, but the court does exercise a supervisory function, and they are required to make reasonable inquiries. I do not accept that it would have been extremely difficult for them to improve on their analysis in appendix 7.2, the analysis based on the Stanbridge Associated Limited point.

THE CHAIRMAN: I rather think that the CMA may say that the relevant test is one of rationality for them, do you accept that that is the test.

MR. KENNELLY: It is, but the rationality, as you know very well, can be a flexible standard depending on the context, and here the question whether consultants could compete – and remember the question is not simply – 7.98 refers only to consultants' fees, whether they are increasing or decreasing and the question of profitability. That is the narrow question there.

The broader question is whether consultants could and would – because a future looking question for the remedies – compete below the fee cap. That does not depend only on the matters which are referred to in 7.98, and that was a critical question because it is competition between consultants, including competition on price that is looked at here, and whether they can compete below the fee cap is of critical importance.

In 7.98 they do not say we find it too difficult, or it is too onerous for us to examine the question of whether consultants do or could, compete below the fee cap; that is not what they say. In spite of that the OFT were clear of all they could and could not do, that is not the situation and this critical question of competition below the fee cap was never looked at by the CMA and suddenly this reference appears in section11 for the first time, and with no evidential basis.

THE CHAIRMAN: Yes, thank you, is that a convenient moment?

MR. KENNELLY: Yes, thank you. I should still be able, the Tribunal will be grateful to know, to finish within my time tomorrow. You will have seen the parties have agreed the time estimate.

THE CHAIRMAN: Yes, and that is satisfactory to us as well.

MR. KENNELLY: I am grateful.

THE CHAIRMAN: Mr. Kennelly, if you are going to seek to apply to amend the pleaded case, can you make sure that Ms. Smith knows that that is going to happen this evening and has a draft amendment this evening so she can prepare for that tomorrow?

MR. KENNELLY: Yes.

THE CHAIRMAN: Thank you very much.

MS. SMITH: (No microphone)

THE CHAIRMAN: Of course, yes, all right. Very well, we will resume at 10.30 tomorrow.

(Adjourned until 10.30 am on Tuesday, 27th January 2015)