CHPI Closing Statements

EA/2021/0047 - The Royal Marsden NHS Foundation Trust vs Information Commissioner and David Rowland

What is at issue here is whether the Trust has evidenced a real, likely and substantial risk of commercial prejudice as a result of disclosing the Trust's aggregate profit margin, and whether that risk of prejudice is outweighed by the public interest in the information.

The Information Commissioner's Decision notice found that the Trust did not adequately demonstrate a causal link between disclosure and the prejudice it claims, and we had hoped that given a third opportunity to make its case in this appeal that it would have been able to provide a more plausible mechanism by which disclosure causes it commercial harm.

Mr Hopkins (For the Trust) suggests that the case for prejudice is substantial, which we dispute, but then invites the Tribunal to almost automatically find that the public interest in disclosure is overwhelmed by the public interest in withholding the information.

This is the wrong approach. The public interest test is not simply an addendum or a formality, it must be carefully considered. And its unfortunate that the Commissioner has almost entirely making the case for transparency and the value of the legislation which he safeguards and leaves this up to us.

If, as the Commissioner argues, the prejudiced test is finely balanced then so too must the public interest in withholding the information be significantly discounted. The weight of the risk of prejudice is directly correlated to the public interest in withholding the information.

We do not believe the Trust have adequately demonstrated that risk, and consequently the public interest in withholding the information must be slim.

Witnesses

Mr Rowland and I have not heard a compelling case in OPEN, and I would find it hard to understand how a much more convincing argument could be put forward in CLOSED.

The **onus here** was on the Trust to demonstrate, with evidence, that disclosure of an aggregate profit margin would cause commercial prejudice – and that is not what we have heard.

True – Four well qualified witnesses with experience of these negotiations have said that they believe a significant prejudice would occur. But we have not gone past the level of **assertions.**

None of the witnesses have sat on the other side of the negotiating table, in the position of a PMI, and tried to make what is in Mr Maladwala's words a 'flawed argument' to try and strong-arm an NHS Trust into lowering its prices.

In the course of trying to guess at how these negotiations would go, the Trust's witnesses seem to consistently over-estimate the negotiating position of the PMIs and underestimate their own.

When pressed on these issues, explanations of how disclosure of an aggregate profit margin would inevitably lead to being forced to reduce prices were lacking.

The Trust's best explanation is that this 'non-comparable', 'misleading' and 'inaccurate' figure is simply leverage. A flawed argument cynically deployed by PMIs who are either too lazy or too stubborn to understand it, and that somehow this will **inevitably** result in the Trust having to accept lower prices, or patients being diverted to other healthcare providers with the same or **worse price and quality**.

Again and again we have heard conflation between contracts and referrals being based on price and quality, when all we should be discussing is ***profit margins***.

And not even profit margins on individual services, an aggregate profit margin on a bundle of £130m of services – utterly impossible to disentangle.

This makes no sense.

The best of what the trust has **evidenced** that their negotiations might require an extra item on the agenda to discuss what its profit margin means, how it cross-subsidises its excellent NHS clinical governance PMIs enjoy, and how its not directly comparable to other private or NHS providers.

No-one has been able to explain why the PMIs response to learning the Trust's profit margins would not be: 'Sure. Fine. But can we get back to discussing prices please.'

- The Trust assumes PMIs will use a flawed argument to drive down prices.
- It assumes this will result in contract cancellations or diversion of patients.
- It assumes the PMIs do not already have reliable estimates of the Trust's profit margins.
- It assumes the PMIs will now care about profit margins, where all history points to a focus on price and quality.

That is a lot of assumption for a prejudice as weighty as the Trust claims.

Having it both ways

In our view, the Trust wants to have it both ways.

- The Trust is a world-leading oncology specialist, with an impeccable reputation and the ability to attract patients from around the globe,
    - But it would be **forced** to agree terms dictated to them by the PMIs**, despite** any protests or counter-arguments the Trust may raise.
- The Trust's service is fully integrated for the purposes of filing its financial accounts,
    - but entirely separate for the purposes of employing doctors and billing patients for their care.
- The Trust is already well regulated both internally and externally,
    - But yet it does not share the disputed information with many, if any, of the regulators meant to hold them to account on this issue.
- PMIs are sophisticated commercial operators, able to deploy vast resources and analytical capability to gain any possible negotiating advantage,
    - But they would not care enough to listen to the Trust's explanations of how its aggregate profit margin should, or shouldn't, be interpreted
- The Trust maintains a good working relationship with the PMIs,
    - But lives in fear of being bullied and exploited by them if they choose to pursue flawed arguments in negotiation.

- That to release an aggregate profit margin would cause massive commercial damage,
    - Even while its prices, quality of care, outstanding ratings and international reputation remains the same.
- Mr Maladwala stated that the market for private healthcare was stagnant,
    - While simultaneously worrying about the many new competitors opening up to seize upon this profitable market
- Releasing an aggregate profit margin would jeopardize the Trust's entire financial viability.
    - But the Trust cannot explain why every other 'non-integrated' provider publishing a very similar figures has not similarly been crushed under the weight of the PMIs.
- Disclosure of the aggregate profit margin would be misleading,
    - But it cannot explain to the PMIs or indeed to us the requesters, why that might be the case.

The knot

What we are left with is an impossible knot:

- That this information is a worthless to us (and has no public interest) but is incredibly valuable to PMIs (and is therefore prejudicial)

It does not seem possible for both to be true simultaneously.

And even if the Trust is able to convince the Tribunal that the information is indeed a flawed comparator, or would just be misleading to us, or isn't accurate for the purposes of our public interest research….. then the question remains why the Trust wouldn't be able to convince the PMIs of the same thing – negating the very prejudice they claim.

The Trust's case is contradictory, resting entirely on the opinion of its four witnesses that prejudice will occur.

Mr Hopkins has argued that because of Mr Thorman, Pedrick and Maladwala's position their evidence should be given the 'proper' level of deference. And that is quite right. But the crux of their testimony rests on their ability to predict the actions of their negotiating opponents, whose character they cannot even agree upon.

The Trust's witnesses were able to give a very good account of the potential impact on the Trust should negotiations turn sour. But they could not, as far as we can tell, explain the **causal link between disclosing the disputed information and the negative outcome they predict.**

As Judge Cragg noted, all the Trusts witnesses were here defending their employer. That's not an irrelevant fact. The Trust did not seek to rely on an expert or independent witness to describe the attitude of PMIs. Given that medical negligence claims and disputes over insurance payouts are not uncommon, I find it hard to understand Mr Perrys assertion earlier that it would not be possible to find an independent expert witness who actually had direct experience as a PMI negotiator.

Where the Trust relied upon external authorities, such as Mr Pedricks reference to the Competition and Markets Authority, Mr Rowlands was able to challenge him on whether he fully understood the contents.

Furthermore, I think Mr Hopkins has rather a dim view of the Tribunal's own experience. The kinds of commercial negotiations being discussed here are not special or unique, they are the core of almost any FOI covered by Section 43.

Besides, I would say that the caselaw regarding deference to witnesses cuts both ways. The Trusts witnesses are indeed best placed to speak about issues affecting the Trust, but the Tribunal should be showing an equal amount of deference to a public interest-minded charitable think-tank when we say that there is a **clear and overwhelming transparency, accountability, scrutiny and policy gap that needs to be filled by disclosure of the profit margins** generated by the Trust on its private patient care.

The Public Interest

And honestly it is disturbing to me that we have gone almost the entire hearing without hearing anything about the public interest.

It is not clear to me why the Commissioner appeared to abdicate her duties by not considering the public interest the ICO appeal stage. It is even less clear why the Commissioner has neglected to mention it in the course of defending its Decision Notice before the Tribunal.

The public interest is crucial here, because what the Trust is arguing is that is that it has grown ***so reliant*** on this income stream that even to disclose one of the most basic financial measures would put the Trust in mortal jeopardy.

The very size and scale of services it delivers to fee-paying patients rather than free-at-the point of use is exactly what it claims should protect it from scrutiny. The **more reliant** it becomes on non-NHS income, the **less public transparency** the Trust will tolerate.

This is backwards. The more reliance on this funding, the more scrutiny necessary.

The Trust may think it has liberated itself from squeezed NHS budgets, but now it finds itself subject to the whims of PMIs, a volatile and competitive market and the political situation in the Gulf states.

Shouldn't the public have a right to know whether the Trust is at least making a hell of a lot of money doing so? Are the margins worth the risks which the Trust has spent this whole appeal arguing?

Are we supposed to just take that on trust? Or should the Trust be providing facts and figures to back up the statements it makes.

FOIA

In the Trust's skeleton, Mr Hopkins says that CHPI's case rests 'very substantially on what are essentially matters of political or philosophical opinion, specifically the extent to which the provision of private patient services by NHS bodies is a good thing.'

We categorically reject that

We do not have a **political** problem with the Royal Marsden's PPU, we have an **evidential** problem. What we are saying is that it is *literally not possible to know* whether or not PPUs are a 'good thing' unless we know to what extent it has succeeded or failed in its policy objective – namely – whether they are a net financial benefit to the NHS. **Whether, and to what degree, it is profitable.**

When Mr Hopkins suggests there is no reasonable basis upon which we might be skeptical about the Marsden's claims about the benefits of its PPU, he entirely ignores the report we wrote on the issues which found that *several* PPUs were not in fact profitable.

What the Trust is arguing for in this case is that this policy question should *remain* at the level of 'philosophical opinion'. It's proposing that we simply have a political debate **- forever -** around and around and around - devoid of facts and devoid of answers.

This is exactly the problem that the Freedom of Information Act was designed to resolve. Here we have a political debate around risky public spending - and we are asking for the evidence to resolve it.

As we have heard from Mr Thorman when discussing the nature of this information, and how it is calculated. There is no other measure of profitability of the Trust's Private Patient Unit. The Trust intends to release nothing more than the bare minimum it is legally obliged to (its income) and would not create new information as a result of a different request.

Therefore it argues that there is NO measure of profitability suitable to be disclosed to the public. Its integrated services is so difficult to disentangle that there can be no proper accounting for the net benefit of its PPU to the Trust, or to the NHS as a whole.

Failure to disclose this information is effectively Game-Over for any serious analysis of the benefits of Private Patient Units. We will simply never know, and that is that.

This is not a healthy place for a public body, or the wider polity to be in.

So to conclude, we don't believe that the Trust's witnesses have adequately explained the causal link between disclosure of an aggregate profit margin and an impact on their prices. The mechanism of transmission can only be speculated upon by the Trust's witnesses.

Therefore, the public interest in withholding the information **which the trust has evidenced** is similarly slim.

Our submissions that the public interest is significant, weighty and overwhelming has not been challenged whatsoever.

On this basis I hope the Tribunal reaches the decision to disclose.