8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

24 January 2024

FILE REF: **SHA/25846**

DECISION MAKING BODY: **NHS ENGLAND & NORTH CENTRAL LONDON INTEGRATED CARE BOARD ("THE COMMISSIONER")**

PMS CONTRACTOR: **TYNEMOUTH MEDICAL PRACTICE, TYNEMOUTH ROAD, LONDON, N15 4RH**

DISPUTE RESOLUTION – NATIONAL HEALTH SERVICE (PERSONAL MEDICAL SERVICES AGREEMENT) REGULATIONS 2015

RE: DISPUTE REGARDING TERMINATION OF THE PMS AGREEMENT

1 Outcome

1.1 I determine that the Termination Notice dated 27 October 2022 was valid on the grounds of Clause 64.4 and was invalid on the grounds of Clause 64.6 as it did not meet the requirements of Clause 64.7 of the Agreement when considered against the timeline which has been set out to me.

1.2 I determine that, as long as the Contractor meets the conditions at Regulation 32(2)(c) the Commissioner must enter into the GMS Contract. I determine that this must be done with effect from 21 days from the date of this determination to allow for the parties to confirm that the conditions are met.

1.3 There are no disputes between the parties as regards interest and I determine that no interest shall be payable in relation to this dispute.

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RE: DISPUTE REGARDING TERMINATION OF THE PMS AGREEMENT

1 INTRODUCTION

1.1 The above Contractor has referred the dispute in relation to its Personal Medical Services Agreement for dispute resolution under Regulation 76 of the NHS (Personal Medical Services Agreement) Regulations 2015 ("the Regulations").

1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 APPLICATION FOR DISPUTE RESOLUTION

2.1 By letter dated 26 January 2023 the Contractor applied to NHS Resolution, for dispute resolution.

2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute: -

2.2.1 Email from the Contractor dated 26 January 2023 together with enclosures;

2.2.2 Email from the Contractor dated 27 January 2023 together with enclosures;

2.2.3 Six separate emails from the Contractor dated 13 February 2023 with enclosures;

2.2.4 Email from the Contractor dated 2 March 2023 with enclosures;

2.2.5 Email from the Contractor dated 15 May 2023 with enclosures;

2.2.6 Email from the Commissioner dated 15 May 2023;

2.2.7 Email from the Commissioner dated 5 June 2023 with enclosures;

2.2.8 Email from the Contractor dated 5 June 2023 with enclosures;

2.2.9 Email from the Commissioner dated 4 July 2023;

2.2.10 Email from the Contractor dated 19 September 2023 with enclosures;

2.2.11 Email from the Commissioner dated 19 September 2023;

2.2.12 Email from the Contractor dated 17 October 2023 with enclosures; and

2.2.13 Email from the Commissioner dated 17 October 2023 with enclosures.

2.3 This dispute relates to the termination of the Contractor's PMS Agreement. I have been provided with a copy of the Notice of Termination served by North Central London CCG for and on behalf of the Commissioner which is dated 27 October 2022.

3 PARTIES SUBMISSIONS

The Contractor's application

3.1 "This is an application by Tynemouth Medical Practice ("TMP") for dispute resolution under the Primary Care Appeals process at NHS Resolution in respect of a termination notice served on 27 October 2022 on Tynemouth by North Central London Primary Care Commissioning Committee ("NCL PCCC") on behalf of NHS England and the North Central London Integrated Care Board ("NCL ICB") to take effect on 27 January 2023. The termination notice has the effect of terminating TMP's Personal Medical Services agreement with NHS England. The decision of the NCL PCCC is taken on behalf of NHS England and the NCL ICB. This application is brought under s.9 of the National Health Service Act 2006 ("NHSA 2006"), reg. 76 of the National Health Service (Personal Medical Services Agreements) Regulations 2015 ("PMS Regs 2015") and cl. 70 and Sch. 6 of the agreement with NHS England.

In short, TMP submits that NCL PCCC was not entitled to serve the termination notice. It sees the appropriate outcome of this dispute as NCL PCCC withdrawing the termination notice, or the termination notice being set aside, and NCL PCCC steps to put in place a GMS contract.

For the avoidance of doubt, TMP confirms that the local dispute resolution processes have been exhausted.

Background

TMP has an agreement with NHS England (as the NHS Commissioning Board) to provide primary medical services in the Tottenham area. It currently has approximately 10,000 patients. It is understood from title deeds that GP services have been provided on the premises since approximately 1996, and there is a "pilot scheme" PMS agreement which commenced 1 October 2002. The operative version of the agreement – and the one to which this dispute relates – is a version "varied" on 1 April 2018 and dated 1 April 2004 ("the Agreement").

The Agreement

TMP's agreement with NHS England takes effect as a Personal Medical Services Agreement under the PMS Regs 2015 and section 92 of the NHSA 2006. The Agreement is modelled on the NHS England Standard Personal Medical Services Agreement 2016/17. It is made between "the Board" (meaning the NHS Commissioning

Board) and the individuals listed in Schedule 1. At present, the only individual listed is Dr Christiana Aride.

As is usual, the Agreement has been subject to variations in accordance with cl. 53 in order to comply with changes in legislation: see e.g. variation notice dated 7 December 2020. It was also varied on 1 May 2019 in order to remove Dr Penina Zermansky as a signatory and again on 1 August 2019 to remove Dr Nicholas Frank. TMP has also requested for Dr Adebowale Adesanoye to be added as a signatory but this has never been finalised by NCL ICB.

By cl. 1.2.15, "the parties shall, so far as is possible, interpret the provisions of this Agreement consistently with the European Convention on Human Rights, EU law and any other relevant regulations, order or directions made under the [National Health Service Act 2006]".

By cl. 1.2.16: "...in the event of any apparent inconsistency in, without limitation, any clause numbers, defined terms and/or cross-references the relevant provisions of the PMS Regulations shall take precedence".

The Agreement provides a detailed set of provisions for termination. Clause 64 provides:

> *64.1 Where the Contractor breach of this Agreement is not one to which clauses 60 to 63 apply and that breach is capable of remedy, the Board must, before taking any action it is otherwise entitled to take by virtue of this Agreement, give notice in Writing to the Contractor requiring the Contractor not to repeat the breach (a "Remedial Notice").*
>
> *64.2 A Remedial Notice must specify:*
>
> > *64.2.1 details of the breach;*
> >
> > *64.2.2 the steps that the Contractor must take to the satisfaction of the Board in order to remedy the breach; and*
> >
> > *64.2.3 the period during which those steps must be taken ("the Remedial Notice Period"*
>
> *64.3 The Remedial Notice Period shall, unless the Board is satisfied that ashorter period is necessary to:*
>
> > *64.3.1 protect the safety of the Contractor's Patients; or*
> >
> > *64.3.2 protect itself from material financial loss, be no less than twenty eight (28) days from the date that Remedial Notice is given.*
>
> *64.4 Where the Board is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the Remedial Notice Period, the Board may terminate this Agreement with effect from such date as the Board may specify in a further notice to the Contractor.*
>
> *64.5 Where a Contractor breach of this Agreement is not one to which any of clauses 60 to 63 apply, and the breach is not capable of remedy, the Board may give notice in Writing to the Contractor requiring the Contractor not to repeat the breach (a "Breach Notice")*
>
> *64.6 If, following a Breach Notice or a Remedial Notice, the Contractor:*

64.6.1 repeats the breach that was the subject of the Breach Notice or the Remedial Notice; or

64.6.2 otherwise breaches this Agreement resulting in either a Remedial Notice or a further Breach Notice, the Board may give notice in Writing to the Contractor terminating this Agreement with effect from such date as the Board specifies in the notice.

64.7 The Board may not exercise its right to terminate this Agreement under clause 64.6 unless the Board is satisfied that the cumulative effect of the breaches is such to allow this Agreement to continue would prejudice the efficiency of the services to be provided under this Agreement.

64.8 If the Contractor is in breach of any obligation under this Agreement and a Breach Notice and a Remedial Notice in respect of that default giving rise to the breach has been given to the Contractor, the Board may withhold or deduct monies which would otherwise be payable under this Agreement in respect of that obligation which is the subject of the default.

Where the Board is entitled to terminate under cls. 64.4 and 64.6, it must, in the termination notice, specify a date on which the Agreement is to terminate which is at least 28 days after the date on which the Board gives notice: cl. 68.1. By cl. 68.3, where a party invokes the NHS Dispute Resolution Procedure before the end of that notice period and gives notice that it has done so, then the Agreement does not terminate at the end of the notice period but instead only in the circumstances set out in cl. 68.4.

Cl. 68.4 provides that the Agreement terminates if and when there has been a final determination of the dispute under Schedule 6 (or by a court) and that determination permits the Board to terminate this Agreement; or the Contractor ceases to pursue the NHS Dispute, whichever is the sooner.

Cl. 70 and Schedule 6 set out the dispute resolution procedure.

Remedial notices

On 13 November 2018, TMP was sent a letter by Vanessa Piper, then Assistant Head of Primary Care, Primary Care Commissioning, Haringey CCG, on behalf of NHS England ("1st Remedial Notice"). The letter stated that Commissioners had approved the decision to issue a remedial notice under cl. 64 of the Agreement, and that this letter constituted that notice. The letter alleged that TMP had breached clauses 11, 14, 20, 51 and 76 of the Agreement and set out a table alleging the details of the breach and the remedial actions required by the deadline of 12 December 2018.

The essential impetus of this 1st Remedial Notice had been a Care Quality Commission ("CQC") report dated 28 September 2018 which had made various findings against TMP.

The practice immediately set out to comply with the 1st Remedial Notice. In the interim, it had, on 3 December 2018, hired a new Practice Manager to assist with improving governance at the practice. On 12 December 2018, it sent to Ms Piper a detailed response to the 1st Remedial Notice, providing copies of the various new policies it had adopted and reviews it had undertaken.

TMP did not hear anything further in response to this document until 23 December 2019, i.e. more than a year later.

In the meantime, on 5 May 2019, the CQC rated the practice as overall inadequate and made a decision to cancel TMP's registration. TMP decided to challenge this cancellation and CQC withdrew the decision, although maintained its overall rating.

On 23 September 2019, Ms Piper sent a further letter to TMP indicating that the NCL PCCC had approved the decision to issue a second remedial notice, and that this letter constituted that notice ("2nd Remedial Notice"). It set out a table indicating clauses within the contract which it alleged were breached and which were required to be remedied by 25 October 2019. The 2nd Remedial Notice did not make clear which breaches were continuations of breaches of the 1st Remedial Notice or which were new breaches.

The practice again set out to comply with the 2nd Remedial Notice. In the interim, a third CQC report was published on 18 October 2019. TMP provided a response on 25 October 2019, again attaching revised policies.

On 23 December 2019, Ms Piper sent a letter to TMP described as an "assessment" of TMP's response to the 1st Remedial Notice in which it is concluded that the 1st Remedial Notice is not met. That assessment, in fact, raised new, further, matters that did not form part of the remedial actions specified in the 1st Remedial Notice: rather than assess the response against the original remedial actions, it instead identifies additional allegations.

On 3 March 2020, Ms Piper sent a further letter to TMP described as an "assessment" of TMP's response to the 2nd Remedial Notice in which it is concluded that the 2nd Remedial Notice is not met. This assessment once again raised new, further matters that did not form part of the original remedial actions specified in the 2nd Remedial Notice. The letter also indicated that the NCL PCCC would issue a third remedial notice in response to the CQC report of 18 October 2020.

It was not until 11 August 2020 that TMP received a third letter from Ms Piper which formed the 3rd Remedial Notice. This letter purported to set out where "(1) the practice had failed to remediate the questions set out in the 1st and 2nd remedial notices, (2) there is a repeat and continuation of the concerns detailed in our assessments of your responses to the remedial notices." The deadline for compliance was 11 September 2020. The letter appended two remarkably lengthy and complicated tables. The first simply sets out a series of requests for further information as "questions", rather than as breaches and actions to remedy. The second simply makes a series of points, some of which are duplicative and some of which do not amount to allegations but rather just note facts. The tables ultimately simply repeated the proliferation of new concerns when alleging non-compliance with earlier remedial notices, and they did not properly specify how the previous remedial notices had not been complied with. Further, and crucially, they at no point specify how each clause of the Agreement is alleged to have been breached and what action is required to remedy it.

Notwithstanding the labyrinthine approach adopted by NCL at this juncture, TMP provided a response on 11 September 2020 which attempted to engage with the concerns being raised. Ms Piper responded some 7 months later, on 20 May 2021. She referred to the "105 remedial questions" of the 3rd Remedial Notice and stated that 57 of the "questions" were "not met" by the response.

Local dispute resolution process

On 18 June 2021, Ms Piper notified TMP that NCL PCCC was intending to proceed to terminate the Agreement. It was decided not to implement the decision so as to allow TMP to dispute the decision. This was the local dispute resolution process. On 23 July 2021, TMP through its solicitors provided a document challenging the assessment of the 3rd Remedial Notice and providing further information against the remedial actions.

It was not until 16 March 2022, i.e. some 9 months later, that Ms Piper responded to TMP as part of the local dispute resolution process. She noted that, a whole month earlier, the NCL PCCC members had on 17 February 2022 decided to proceed with the termination. Her letter provided a table which purported (a) to set out whether the practice had provided the required evidence by the remedial notice deadline of 11

September 2020, and (b) to set out whether the practice had by its response of 23 July 2021 demonstrated compliance with the 3rd Remedial Notice. Ms Piper once again referred to her "remedial questions" and specified that 43 "questions" remained unmet. The letter included a list which was a "summary of the concerns identified" which was deliberately specified as "not the full list of concerns". It also included a table noting the responses to the remedial questions.

The parties engaged in further correspondence. Meanwhile, in May 2022, the CQC changed the overall practice rating for TMP to good.

The parties met on 17 May 2022. It was agreed to refer the decision to terminate back to the PCCC to be reconsidered in light of the CQC report.

On 18 October 2022, the PCCC met again to consider the matter and decided to proceed to terminate.

Termination notice

On 27 October 2022, Ms Piper sent the termination notice to TMP, with a termination date of 27 January 2023. Alongside the termination notice she also sent a summary of NCL PCCC's consideration of the matter.

NCL PCCC purported to terminate the Agreement on the following grounds:

> 1. The practice has failed to comply with the 1st, 2nd and 3rd Remedial Notices (clause 64.4);
>
> 2. The practice has:
>
> > a. Repeated breaches that were the subject of the 1st and 2nd Remedial Notices; and
> >
> > b. Otherwise breached the PMS Agreement following receipt of the 1st and 2nd Remedial Notices;
> >
> > and the cumulative effect of the breaches is such that to allow the PMS Agreement to continue would prejudice the efficiency of the services to be provided under the PMS Agreement (clause 64.6).

In respect of cl. 64.4, the termination notice does not set out in detail where it alleges that the 1st, 2nd and 3rd Remedial Notices were not complied with. It simply refers back to the letters of 23 December 2019, 3 March 2020 and 20 May 2021.

In respect of cl. 64.6, it is asserted that:

> (a) the 2nd Remedial Notice "sets out details of the breaches of the PMS Agreement that were either repeated breaches (i.e. repeated breaches that were the subject of the 1st Remedial Notice) or new breaches (i.e. new breaches that were not the subject of the 1st Remedial Notice)."
>
> (b) the 3rd Remedial Notice "set out details of breaches of the PMS Agreement that were either repeated breaches (i.e. repeated breaches that were the subject of the 1st or 2nd Remedial Notice) or new breaches (i.e. new breaches that were not the subject of the 1st or 2nd Remedial Notice)."

This, it is said, gave rise to its entitlement to terminate under cl 64.6.

The letter goes on to provide a narrative of a selection of alleged breaches. This is prefaced with the following paragraph "examples below have been provided which

detail the specific continuation of concerns that have been listed in the ICBs (formally NCL ICB) assessments of the practice's response to the 1st , 2nd and 3d remedial notices issued and the practices response as part of your dispute. The concerns below are not the full list of patient safety concerns identified and the ICB ask's that you refer to the ICB's assessment documents for all the notices issued." The termination notice does not, however, specify the complete series of breaches which NCL PCCC is relying on. This narrative is the only part of the document which sets out an explanation of the alleged breaches, even though it is expressly said not to be "the full list".

Outline of the issues

It is understood that, pursuant to the NHS Resolution "Guidance Note for Parties Involved in Dispute Resolution", as well as s. 9 NHSA 2006 and reg. 76 PMS Regs 2015, once NHS Resolution has determined it has jurisdiction to hear this dispute, the parties will then be offered an opportunity make full representations and provide further evidence. It is also understood that TMP will be given an opportunity to respond to anything NCL ICB submits in this adjudication. Consequently, the issues highlighted below are only in outline and are subject to full argument.

General approach to be taken by NHS Resolution

The Agreement is an NHS contract under s.9 NHSA 2006 in that it is a PMS contract and so an NHS contract by default, and neither party objected to this status prior to its conclusion: reg. 9(1) PMS Regs 2015. Further, the parties have confirmed that TMP is a health service body and that this Agreement has "NHS contract" status under cl. 2.1. The consequences of this are that the Agreement does not create any contractual rights or liabilities: s.9(5). It therefore cannot be the subject of a claim for breach of contract in private law: Pitalia v NHS Commissioning Board [2014] EWCA Civ 474 at §37 and 46.

Decisions made in relation to the Agreement, and determinations by the adjudicator in respect of the Agreement are, however, amenable to claims for judicial review: see most recently R (Shashikanth) v NHS Litigation Authority [2022] EWHC 2526 (Admin) at §150.

However, it would not in practice be possible for TMP at this juncture to bring a claim for judicial review against the termination, as the court would conclude that TMP has an alternative remedy available to it, namely the NHS dispute resolution procedure under the Agreement and in pursuance of s.9 NHSA 2006 and regs. 76-77 PMS Regs 2015.

It is in that context that Primary Care Appeals has to consider the present dispute. This is not a claim like in other cases in which ultimately the adjudicator is having to determine pure contractual liabilities. The NHS is subject to an overlay of public law constraint on its discretion to exercise any right of termination it may have under the Agreement.

That the NHS is subject to public law constraints when exercising its contractual powers in respect of NHS contracts was also confirmed in Jones v NHS Commissioning Board [2017] EWHC 3457 (QB) at §§57-59. It is recognised that those public law constraints include an implied duty of procedural fairness; an implied duty to act reasonably and proportionately, and an implied duty to exercise contractual discretions in a way that is not arbitrary, capricious and in breach of the contract: see generally R (Haffiz) v NHS Litigation Authority [2020] EWHC 3792 (Admin). This must also include an implied duty to comply with the NHSA 2006, the PMS Regs and the applicable guidance.

As to that, the Primary Medical Care Policy and Guidance Manual (PGM) (v4) (February 2022) ("Primary Medical Care Guidance") states at Part C, para 1.1.2 provides:

"*1.1.2 Given that any decision to issue a Breach or Remedial Notice, apply sanctions or terminate a contract or agreement can be challenged by the contractor under appeal, it is essential that the Commissioner follows, and can demonstrate that it has followed, due process in investigating, communicating and implementing actions in this respect and that the Commissioner has acted fairly and reasonably throughout."*

Para 1.3.10 goes on to provide:

> *1.3.10 A Remedial Notice must specify:*
>
> > *details of the breach, which led to the Remedial Notice being issued and any evidence gathered in respect of the breach;*
> >
> > *the steps the contractor must take in order to remedy the breach to the Commissioner's satisfaction;*
> >
> > *the period in which the steps must be taken;*
> >
> > *any arrangements for reviewing the matter to ensure that the requirements of the Remedial Notice have been met; and*
> >
> > *the actions that the Commissioner shall take if the contractor fails to satisfactorily remedy the breach.*

In respect of termination, para 1.6.3 states "The Commissioner must consider all relevant information available and decide on the appropriate course of action and whether the contract should be terminated." Factors that are listed include, at para 1.6.9, the "PMS to GMS" provisions. Para 1.6.12 also refers to the General duties "NHS England has a number of statutory duties relating to the exercise of its functions including reducing health inequalities and public involvement. The Commissioner must ensure that its actions in terminating a contract and any consequential actions ensure compliance with these duties." Para 1.7.49 states that "NHS England's general duties may be triggered by termination in these circumstances."

<u>Issue 1: termination notice relies on defective remedial notices and defective reasoning as to non-compliance with those remedial notices</u>

Entitlement to terminate under cl. 64.4 depends on the Contractor not having taken the "required steps" to remedy "the breach" by the end of the remedial notice period. It is contingent on the proper service of proper remedial notices. Similarly, entitlement to terminate under cl. 64.6 depends on the Contractor having repeated "the breach" that was the subject of a remedial notice, or otherwise breaching the Agreement resulting in a further breach notice.

TMP's position is that, in all the circumstances, entitlement to terminate did not arise because:

> (a) The remedial notices did not properly spell out the actual detail of the breach of which parts of the Agreement, or what steps were required to comply with it. This was particularly acute in respect of the 3rd Remedial Notice, which, in TMP's submission, is not a proper remedial notice at all: its "remedial questions" are not "steps...to remedy the breach" under cl. 64.2 but rather simply questions.
>
> (b) In respect of each remedial notice, it did comply with the actions specified, so far as it was possible to do so in circumstances where the actions were specified, within the time for compliance. NCL ICB developed a practice of "moving the goal posts". In respect of its response to each remedial notice, rather than refer to the specific breaches in the remedial notice which had not been remedied, instead the ICB identified new allegations which had not

actually formed part of the remedial notice to justify its conclusion of noncompliance.

(c) In reaching its conclusions on non-compliance in respect of each remedial notice, the ICB relied on data that was significantly out of date, providing assessments of TMP's responses an extremely long time after they had been submitted.

(d) The termination notice does not specify at all which breaches actually formed part of the assessment of the termination. A narrative is provided of a selection of allegations, but the notice also cross-refers to historic documents which had obviously at that point been superseded. It is procedurally improper not to set out all the breaches which it is said give rise to the right to terminate.

TMP thus submits that no termination notice could properly be served on the basis of the remedial notices. The decision to terminate was unlawful.

Issue 2: termination in breach of requirements of procedural fairness and altogether unreasonable

Further, in light of the defects in the process giving rise to the remedial notices and termination notice, the termination was in breach of the requirements of procedural unfairness and altogether unreasonable and perverse.

Put shortly, it was not possible for TMP to have any reasonable understanding of what allegations of breach were actually being made against it and maintained against it, and of what steps were actually required to be taken to remedy the breaches, or of when it is said that they had failed to comply with those allegations. The remedial notices and termination notice are marked by vagueness and obscurity. The goalposts have shifted at every juncture, to the point where, in the final analysis to trace through the history of the allegations from the termination notice back to the 1st Remedial Notice is impossible.

Issue 3: the cumulative effect of the breaches is not such that to allow the contract to continue would prejudice the efficiency of the services to be provided under the contract

In order to terminate under cl. 64.6, the Board must be satisfied that "the cumulative effect of the breaches is such to allow this Agreement to continue would prejudice the efficiency of the services to be provided under this Agreement".

This was in all the circumstances an unreasonable conclusion. The primary impetus for all the remedial notices had been the initial findings of the CQC and subject demotion to an overall rating of inadequate. By the time of the termination notice, however, the CQC had instead given TMP an overall rating of good. Indeed, as things stand, TMP continues to hold a good CQC rating. It has taken significant steps to overhaul its processes. The practice continues to provide good quality care to its approximately 10,000 patients. The up-to-date position is crucial for reaching a lawful view as to this requirement.

In such circumstances, it cannot possibly be said that the cumulative effect of the breaches prejudices the efficiency of the services to be provided. The original justification offered for the remedial notices is simply no longer there. The very high threshold for termination as a last resort does not exist.

Issue 4: breach of requirement to enter into a GMS contract

Reg. 32 of the PMS Regs 2015 provides:

"(1) Where a contractor is providing essential services under the agreement and would like to enter into a general medical services contract by virtue of this

regulation, the contractor must give notice in writing to the Board to that effect at least three months before the date on which the contractor would like to enter into the general medical services contract.

(2) A notice given under paragraph (1) must—

> *(a) state that the contractor wants to terminate the agreement and the date on which the contractor would like the agreement to terminate, which must be at least three months after the date on which the notice was given;*
>
> *(b) subject to paragraph (3), give the names of the person or persons with whom the contractor wants the Board to enter into a general medical services contract; and*
>
> *(c) confirm that the person or persons so named meet the conditions set out in section 86 of the Act (persons eligible to enter into GMS contracts) and regulations 5 (conditions relating solely to general medical practitioners) and 6 (general condition relating to all contracts) of the General Medical Services Contracts Regulations or, where the contractor is not able so to confirm, provide the reason why it is not able to do so together with confirmation that the person or persons will, immediately prior to entering into the general medical services contract, meet those conditions.*

(3) A person's name may only be given in a notice referred to in paragraph (1) if that person is a party to the agreement.

(4) The Board must acknowledge receipt of the notice given under paragraph

> *(1) before the end of the period of seven days beginning with the date on which the Board received the notice.*

(5) Provided that the conditions set out in section 86 of the Act (persons eligible to enter into GMS contracts) and regulations 5 and 6 of the General Medical Services Contracts Regulations are met, the Board must enter into a general medical services contract with the person or persons named in the notice given under paragraph (1).

(6) In addition to the terms required by the Act and the General Medical Services Contracts Regulations, a general medical services contract entered into by virtue of this regulation must provide for—

> *(a) the general medical services contract to commence immediately after the termination of the agreement;*
>
> *(b) the names of the patients included in the contractor's list of patients immediately before the termination of the agreement to be included in the first list of patients to be prepared and maintained by the Board under paragraph 17 of Schedule 3 to the General Medical Services Contracts Regulations;*
>
> *(c) the same services to be provided under the general medical services contract as were provided under the agreement immediately before it was terminated unless the parties otherwise agree; and*
>
> *(d) the opt out of the provision of out of hours services referred to in paragraph (7) in accordance with the terms specified in Part 6 of the General Medical Services Contracts Regulations (opt outs: additional and out of hours services).*

(7) The out of hours services are the services which the contractor was providing under the agreement in accordance with regulation 22 immediately before its termination and which the general medical services contract continues to require the contractor to provide.

(8) An agreement is to terminate on the date stated in the notice given by the contractor under paragraph (1) unless a different date is agreed by the contractor and the Board or no general medical services contract is entered into by the Board by virtue of this regulation.

(9) Where there is a dispute as to whether or not a person satisfies the conditions set out in section 86 of the Act (persons eligible to enter into a GMS contract), or of regulations 5 and 6 of the General Medical Services Contracts Regulations, the contractor may appeal to the First-tier Tribunal2 under this regulation and the Board is to be the respondent.

(10) Any other dispute relating to this regulation is to be determined by the Secretary of State in accordance with regulation 9(2) and (3) of the General Medical Services Contracts Regulations.

(11) The parties to a dispute referred to the Secretary of State in accordance with paragraph (10) are the contractor and the Board."

On 29 February 2020, Tynemouth served notice that it wished to enter into a GMS contract. That notice complied with reg. 32 and set a date of termination as 29 May 2020. If the conditions of reg. 32 are met, it is an absolute obligation on the ICB to terminate the Agreement and put in place a new GMS contract. As part B Para 9.1.2 of the Primary Medical Care Guidance makes clear: "Subject to the contractor's eligibility to hold a GMS contract and the requirement to provide essential services, then there should be no variation in the application of this policy."

However, no steps whatsoever were taken by NCL to satisfy its obligation under reg. 32. NCL remains in continued breach of that regulation and, as compliance with reg. 32 must be an implied term of the Agreement for the reasons set out above, NCL is in breach of the Agreement.

TMP submits that NCL cannot terminate the Agreement in circumstances where that Agreement ought to have come to an end in accordance with the PMS Regs 2015 and a new GMS contract concluded instead.

Conclusion and appropriate outcome

TMP therefore submits that the appropriate outcome of the dispute is that the termination notice is set aside or withdrawn and considered of no effect as it was not served in accordance with clause. The Agreement is still in existence.

NCL should now comply with reg. 32 of the PMS Regs 2015 and take steps to conclude a GMS contract."

Representations

NHS England's representations

3.2 "1. This application for dispute resolution concerns the personal medical services agreement (the Agreement) between the 2nd Respondent, North Central London Integrated Care Board (the ICB), and the Applicant, Tynemouth Medical Practice (TMP). In particular, it concerns the termination notice served by the ICB dated 27 October 2022 (the Termination Notice).

2. These representations are submitted on behalf of the ICB, being the body that took the decision in question (via its Primary Care Commissioning Committee (PCCC)) and exercised the commissioner's contractual rights of termination under the Agreement. The ICB is the statutory successor to North Central London Clinical Commissioning Group (the CCG), which was abolished and replaced by the ICB on 1 July 2022 under the Health and Care Act 2022. For ease of reference, these representations refer to the ICB throughout, and such references should be treated as being to the CCG or the ICB as the context requires.

3. NHS England has been listed as the 1st Respondent by TMP and PCA. NHS England has had sight of these representations but makes no further representations. NHS England has arranged for its relevant functions (in relation to securing the provision of primary medical services under Part 4 of the National Health Service Act 2006) to be exercised by the ICB (in accordance with section 65Z5). Under section 65Z5(6), "[a]ny rights acquired, or liabilities (including liabilities in tort) incurred, in respect of the exercise by a body of any function by virtue of this section are enforceable by or against that body (and no other person)." Therefore, the ICB is the appropriate respondent to this appeal.

Documents

4. TMP's application consists of the following documents, which are referred to as follows:

a. A 14 page statement describing the nature and circumstances of the dispute (the Application).

b. A 992 page PDF bundle of enclosures to the Application titled "Enclosures to application to NHS Resolution". References to documents within this bundle use the format [A/Document Number/Page Number]. For example, the Agreement is located at [A/5/208-471].

c. A 2,155 page PDF bundle of documents that were embedded within the above bundle of enclosures. References to documents within this bundle use the format [B/Document Number/Page Number].

5. Within these representations, the ICB has sought to refer to documents within TMP's own bundles wherever possible. However, as these omit some relevant documents, the ICB encloses a further bundle of documents with these representations. Reference to documents within the ICB's bundle use the format [R/Document Number/Page Number].

Representations

6. TMP states within its Application that "the issues highlighted below are only in outline and are subject to full argument" (paragraph 35). For the reasons explained below, whereas the ICB has fully set out and explained its grounds for termination relied upon within the Termination Notice, TMP's allegations that the Termination Notice is invalid rely upon generalised allegations that are not yet properly particularised, fully explained or supported by evidence. This is particularly the case in respect of TMP's submissions that, contrary to the ICB's assessments, TMP had in fact complied with each Remedial Notice (issue 1, paragraph 45(b) of the Application) and that termination was procedurally unfair and unreasonable (issue 3, paragraph 47-48 of the Application).

7. The Termination Notice was served on 27 October 2022 and the application to the PCA was submitted on 26 January 2023. As is usual practice the PCA invited both parties to provide representations within 21 days. In correspondence with the PCA and the ICB, TMP has firstly requested a 90-day extension of time for submitting representations until 22 May 2023, and subsequently a further 14-day extension until 5 June 2023. TMP has, therefore, had over 7 months already to formulate its arguments

and evidence in respect of this appeal. In TMP's solicitors' most recent letter to the PCA of 15 May 2023, they referred to "a laborious process resulting in draft submissions of more than 30,000 words" and that they would "collate the documents to accompany our representations".

8. At the time of writing, in the absence of properly particularised submissions supported by evidence (in particular as to why the ICB's assessments of TMP's compliance with the Remedial Notices were allegedly wrong or the process was procedurally unfair or unreasonable), it is neither possible nor proportionate at this stage for the ICB to respond to TMP's generalised allegations regarding such matters. Therefore, within these representations, the ICB responds to matters raised within the Application insofar as it can at this stage, but fully reserves its right to respond to TMP's representations once received, including by filing further evidence. Upon receipt of the extensive submissions and further documentation referred to by TMP in its correspondence, the ICB intends to undertake an initial assessment of how much time it will need to consider and respond and seek an appropriate period of time to respond from the PCA.

The Agreement

9. There appears to be no dispute between the parties as to the form of the Agreement.

10. In its Application, TMP states that "The operative version of the agreement – and the one to which this dispute relates – is a version "varied" on 1 April 2018 and dated 1 April 2004" (paragraph 4) and "[t]he Agreement is modelled on the NHS England Standard Personal Medical Services Agreement 2016/17". This Agreement is located at [A/5/208-471].

11. Clause 78.1 [A/5/340] of the Agreement states:

"This Agreement constitutes the entire agreement between the parties with respect to its subject matter and supersedes any prior agreements, negotiations, promises, conditions or representations, whether written or oral, and the parties confirm that they did not enter into this Agreement on the basis of any representations that are not expressly incorporated into this Agreement. However, nothing in this Agreement purports to exclude liability on the part of either party for fraudulent misrepresentation."

Grounds of termination

12. The ICB addresses the issues raised by TMP individually below but it is helpful to firstly set out the grounds of termination relied upon by the ICB with reference to the documents within TMP's bundle.

13. The Termination Notice [A/24/981] systematically set out the ICB's grounds for terminating the Agreement.

14. The ICB's grounds for termination [A/24/982-984] are:

a. TMP has failed to comply with the 1st Remedial Notice [A/6/472], 2nd Remedial Notice [A/10/501] and 3rd Remedial Notice [A/15/635] (clause 64.4);

b. TMP has:

i. Repeated breaches that were the subject of the 1st and 2nd Remedial Notices; and

ii. Otherwise breached the PMS Agreement following receipt of the 1st and 2nd Remedial Notices; and

the cumulative effect of the breaches is such that to allow the Agreement to continue would prejudice the efficiency of the services to be provided under the Agreement (clause 64.6).

Failure to comply with 1st, 2nd and 3rd Remedial Notices (clause 64.4)

15. Clauses 64.1 – 64.4 of the Agreement [A/5/323] provide:

64.1 Where the Contractor's breach of this Agreement is not one to which clauses 60 to 63 apply and that breach is capable of remedy, the Board must, before taking any action it is otherwise entitled to take by virtue of this Agreement, give notice in Writing to the Contractor requiring the Contractor not to repeat the breach (a "Remedial Notice").

64.2 A Remedial Notice must specify:

64.2.1 details of the breach;

64.2.2 the steps that the Contractor must take to the satisfaction of the Board in order to remedy the breach; and

64.2.3 the period during which those steps must be taken ("the Remedial Notice Period").

64.3 The Remedial Notice Period shall, unless the Board is satisfied that a shorter period is necessary to:

64.3.1 protect the safety of the Contractor's Patients; or

64.3.2 protect itself from material financial loss, be no less than twenty eight (28) days from the date that Remedial Notice is given.

64.4 Where the Board is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the Remedial Notice Period, the Board may terminate this Agreement with effect from such date as the Board may specify in a further notice to the Contractor.

16. The 1st Remedial Notice [A/6/472] set out the details of breaches of the Agreement, the steps TMP was required to take to the ICB's satisfaction to remedy the breaches, and required such steps to be taken by 11 December 2018. As set out in the ICB's letter of 23 December 2019, TMP failed to take all such steps by 11 December 2018. [A/12/546]

17. The 2nd Remedial Notice [A/10/501] set out the details of breaches of the Agreement, the steps TMP was required to take to the ICB's satisfaction to remedy the breaches, and required such steps to be taken by 25 October 2019. As set out in the ICB's letter of 3 March 2020, TMP failed to take all such steps by 25 October 2019. [A/14/584]

18. The 3rd Remedial Notice [A/15/635] set out the details of breaches of the Agreement, the steps TMP was required to take to the ICB's satisfaction to remedy the breaches, and required such steps to be taken by 11 September 2020. As set out in the ICB's letter of 20 May 2021, TMP failed to take all such steps by 11 September 2020. [A/18/793]

19. Accordingly, grounds to terminate the PMS Agreement arose under clause 64.4 in respect of each of the 1st, 2nd and 3rd Remedial Notices, upon the expiry of the Remedial Notice Period in each case.

20. Within the Termination Notice, the ICB provided some examples to illustrate its concerns but referred to its full assessment of the practice's responses to the 1st, 2nd and 3rd Remedial Notices, as set out in its letters of 23 December 2019 [A/12/546], 3 March 2020 [A/14/584] and 20 May 2021 [A/18/793] respectively.

Repeated/further breaches (clause 64.6)

21. Clauses 64.6 – 64.7 of the Agreement [A/5/324] provide:

> *64.6 If, following a Breach Notice or a Remedial Notice, the Contractor:*
>
> *64.6.1 repeats the breach that was the subject of the Breach Notice or the Remedial Notice; or*
>
> *64.6.2 otherwise breaches this Agreement resulting in either a Remedial Notice or a further Breach Notice, the Board may give notice in Writing to the Contractor terminating this Agreement with effect from such date as the Board specifies in the notice.*
>
> *64.7 The Board may not exercise its right to terminate this Agreement under clause 64.6 unless the Board is satisfied that the cumulative effect of the breaches is such to allow this Agreement to continue would prejudice the efficiency of the services to be provided under this Agreement.*

22. The 2nd Remedial Notice [A/10/501] set out details of the breaches of the PMS Agreement that were either repeated breaches (i.e. repeated breaches that were the subject of the 1st Remedial Notice) or new breaches (i.e. new breaches that were not the subject of the 1st Remedial Notice).

23. The 3rd Remedial Notice [A/15/635] set out details of breaches of the PMS Agreement that were either repeated breaches (i.e. repeated breaches that were the subject of the 1st or 2nd Remedial Notice) or new breaches (i.e. new breaches that were not the subject of the 1st or 2nd Remedial Notice).

24. The ICB explained within the Termination Notice [A/24/983-984] that it was satisfied that that the cumulative effect of the repeated and further breaches was such that to allow the Agreement to continue would prejudice the efficiency of the services to be provided under the Agreement.

Reasonableness

25. TMP raises issues in relation to the reasonableness of the ICB's decision to serve the Termination Notice, particularly in relation to issues 2 and 3. These issues are addressed individually below but it is helpful to address this point generally first.

26. While the ICB considers it has acted reasonably in all respects, it submits that:

> a. The dispute before the PCA is of a purely contractual nature.
>
> b. Accordingly, the Termination Notice is valid so long as the ICB has correctly applied the contractual terms regarding termination within the Agreement.
>
> c. There is no contractual term, express or implied, or required to be included in the Agreement under the National Health Service (Personal Medical Services Agreements) Regulations 2015, that requires the ICB to act "reasonably" when exercising its rights under the Agreement, or that imports public law principles into the Agreement.

d. It is therefore an error of law by TMP to invoke public law arguments, or seek to imply a contractual obligation importing public law principles into the Agreement, and it would be an error of law for the PCA to determine the validity and effect of the Termination Notice on the basis of such public law arguments or principles.

27. The ICB's reasons for this position are as follows.

28. In the case of The King on the application of Sashi Shashikanth v NHS Litigation Authority, NHS Commissioning Board (aka NHS England) [2022] EWHC 2526 (Admin), Bourne J summarised the following relevant principles from the case law (at [10] and [136] respectively):

a. A primary care services agreement, such as the Agreement, takes effect as a normal commercial contract (applying Krebs v NHS Commissioning Board [2014] EWCA Civ 1540 and Tomkins v Knowsley PCT [2010] EWHC 1194 (QB)).

b. The parties to such a commercial contract, such as the Agreement, cannot rely on public law arguments or remedies to improve their contractual position, no matter how "public" or statutory the context to the dispute, including in relation to contractual termination procedures (applying R v East Berkshire Health Authority ex p Walsh [1985] QB 152, Hampshire CC v Supportways Community Services Ltd [2006] BLGR 836 and Krebs v NHS Commissioning Board [2014] EWCA Civ 1540).

29. Krebs is a Court of Appeal judgment concerning the termination of a general dental services contract by the commissioner for failing to comply with a remedial notice. In Krebs the general dental services contract contained the following terms [4]:

"10. In complying with this Contract, and in exercising its rights under the Contract, the PCT must act reasonably and in good faith and as a responsible public body required to discharge its functions under the Act.

11. Clauses 9 and 10 above do not relieve either party from the requirement to comply with the express provisions of this Contract and the parties are subject to all such express provisions."

30. The Court of Appeal determined that "Dr Krebs was to be confined to his contractual (private law) remedies what ever they may be" and that "[i]f he cannot show any breach of contract by the defendant, that is the end of the matter" [39]. However, "if concepts familiar in public law are deliberately introduced into the contract as clause 10 of the present case does … I do not see that Dr Krebs can, or should, be prevented from arguing that the defendant acted unreasonably or otherwise than as a responsible public body." [34]

31. The Chancellor (Sir Terence Etherton) stated that: "if the defendant follows correctly the express provisions in the contract for terminating the contract where the contractor has breached the contract, the contract will come to an end in accordance with its terms regardless of any question of the reasonableness of the defendant's conduct in taking those steps." [45]. (This was obiter dictum because the Court of Appeal had found the commissioner had acted reasonably in any event so it was not necessary to decide the precise relationship between clauses 10 and 11 of the contract.)

32. Returning to the Agreement in this case, the Agreement does not contain identical or similar terms to those in Krebs. There is no term within the contract imposing contractual obligations to act reasonably, etc., importing public law obligations, or placing any other restrictions on the ICB's exercise of its rights under the Agreement.

33. TMP relies on Jones v NHS Commissioning Board [2017] EWHC 3457 (QB) to argue that "the NHS is subject to public law constraints when exercising its contractual powers in respect of NHS contracts". Jones concerned an application by a general medical services (GMS) contractor for an interlocutory injunction against the commissioner to restrain it from terminating its GMS contract while a referral to the NHS dispute resolution procedure was ongoing. In such circumstances the Soole J found "the claimants do have a properly arguable claim based on public law" [57] but "[i]f NHSE had indicated its willingness to stay its hand pending the outcome of the NHS disputes procedure on all these matters, I consider there would be no basis of claim." [59]

34. The particular circumstances in Jones plainly do not apply in the present dispute between TMP and the ICB; indeed if Soole J's analysis in Jones is applied to the present dispute, the outcome is that "there would be no basis of [a public law] claim". Therefore, Jones does not provide authority for the proposition that this dispute should be determined by reference to public law principles.

35. TMP also states:

> "It is recognised that those public law constraints include an implied duty of procedural fairness; an implied duty to act reasonably and proportionately, and an implied duty to exercise contractual discretions in a way that is not arbitrary, capricious and in breach of the contract: see generally R (Haffiz) v NHS Litigation Authority [2020] EWHC 3792 (Admin)."

36. This was what was actually stated by Stacey J in respect of such matters in Haffiz at [56]:

> "Both parties were agreed that clause 10 of the Contract expressly imported public law obligations into the Contract and that NHS England was subject to an implied obligation not to exercise a contractual discretion capriciously. Normal principles of contractual interpretation applied insofar as the contract was purely a matter of private contractual law."

37. Therefore, Haffiz, like Krebs, concerned a contract which included an express term importing public law obligations into the contract (see Haffiz at [56]) and this is not the case in respect of the Agreement. Haffiz does not say that the public law obligations were "implied" as suggested by TMP; they were expressly incorporated in writing within the contract. The only implied obligation referred to is an implied duty not to exercise a contractual discretion capriciously, and that is neither factually the case nor an allegation made by TMP here.

Issue 1: the Termination Notice relies on defective remedial notices and defective reasoning as to non-compliance with those remedial notices (paragraphs 44-46)

<u>Issue 1(a): the Remedial Notices did not properly spell out the actual detail of the breach of which parts of the Agreement, or what steps were required to comply with it (paragraph 45(a))</u>

38. Upon consideration of the actual wording of the Remedial Notices it becomes readily apparent that this allegation lacks any factual basis. The Remedial Notices systematically and comprehensively addressed all applicable requirements, including details of the breaches and steps required.

39. As set out in clause 64.2, the Remedial Notices must set out the details of the breach, the steps that the contractor must take to the satisfaction of the ICB in order to remedy the breach, and the period during which those steps must be taken. The 1st, 2nd and 3rd Remedial Notices addressed all of these requirements, as summarised in Table 1 below:

Table 1

Remedial Notice	**Details of the breach**	**Steps that the contractor must take**	**The period during which those steps must be taken**
1st Remedial Notice [A/6/472]	The clauses that TMP was in breach of were prominently and explicitly listed. [A/6/472-475] Under the heading "*Details of the Breach"* the ICB stated "*The table below provides the evidence of the clauses within the contract breached.*" [A/6/475] Each row of the table set out the relevant clause of the contract (column 1), the details of the breach including detailed commentary in relation to each breach (column 3) and reference to relevant pages of the CQC report (column 2) [A/6/475-481].	Each row of the table set out, in respect of each breach, the steps that TMP must take to the satisfaction of the ICB in order to remedy that breach (column 4). [A/6/475-481]	Under the heading "*Details of the Breach"* the ICB stated "*You are required to provide assurance that each clause breach can be remediated and submit a response by the deadline of 11th December 2018*" [A/6/475-481]. The deadline was also repeated at the top of each page of the table where the steps to be taken were set out. [A/6/475-481]
2nd Remedial Notice [A/10/501]	The clauses that TMP was in breach of were prominently and explicitly listed. [A/10/501-504] Under the heading *"Details of the Breach"* the ICB stated *"The table below provides the evidence of the clauses within the contract breached."* [A/10/504] Each row of the table set out the relevant clause of the contract (column 2), the details of the breach included detailed commentary in relation to each	Each row of the table set out, in respect of each breach, the steps that TMP must take to the satisfaction of the ICB in order to remedy that breach (column 5). [A/10/505-511]	Under the heading "*Details of the Breach"* the ICB stated "*You are required to provide assurance that each clause breached can be remediated and submit a response by the deadline of 25 October 2019*". [A/10/504] The deadline was also repeated at the top of each page of the table where the steps to be taken were set out. [A/10/505-511]

	breach (column 4) and reference to relevant pages of the CQC evidence table (column 3). [A/6/505-511]		
3rd Remedial Notice [A/15/635]	The clauses that TMP was in breach of were prominently and explicitly listed. [A/15/636] The evidence of breaches was set in a table titled "*Evidence table"* [A/15/650-705]. Each section of the table described the issue and then set out detailed evidence and reasons for the breach. For example, the first section [A/15/650] is titled "*Medical Management and Repeat Prescribing"* and set out in detail the evidence and reasons as to why TMP was in breach of its relevant obligations in this area.	The remedial notice required TMP to take the following steps: *"Please read through the document carefully specifically the evidence pages on 16 to 71, prior to responding to the remedial questions set on pages 4 to 15".* [A/15/636] Pages 4 to 14 comprised a table titled "*Remedial Actions – 3rd Remedial Notice"* and set out the steps to be taken by reference to the headings in the evidence table. [A/15/638-649] For example, the first section [A/15/638] is titled "*Medical Management and Repeat Dispensing"* and set out 33 steps TMP was required to take remedy the breach to the ICB's satisfaction.	The remedial notice stated: *"The deadline for response to the remedial questions set out on pages 4 to 15 is Friday 11 September 2020."* [A/15/637] The deadline was also repeated at the top of the table on page 4. [A/15/638]

40. TMP also says its allegation "was particularly acute in respect of the 3rd Remedial Notice, which, in TMP's submission, is not a proper remedial notice at all: its "remedial questions" are not "steps...to remedy the breach" under cl. 64.2 but rather simply questions."

41. Within the 3rd Remedial Notice, the ICB did take a different tack to that taken previously under the 1st and 2nd Remedial Notices, to seek to encourage TMP to remedy the breaches. This is neither surprising nor unreasonable given TMP's failure to comply with the 1st and 2nd Remedial Notices. However, TMP's submission that the ICB's approach meant that the 3rd Remedial Notice was not compliant with the applicable requirements for remedial notices is wrong:

a. The relevant requirement under clause 64.2.2 is to "specify … the steps that [TMP] must take to the satisfaction of [the ICB] in order to remedy the breach".

b. In this case the steps the ICB required TMP to take were to respond to the "remedial questions" set out in the table titled "remedial actions" (see Table 1 above for references) and these were clearly aimed at the ICB seeking to be satisfied the breaches were remedied. This is compliant with clause 64.2.2.

c. There is no basis (nor does TMP attempt to explain a basis) for the argument that a step required under a remedial notice cannot include responding to a question. The word "step" should be given its ordinary everyday meaning, namely a measure or action to deal with or achieve a particular thing, and this can plainly include responding to a question.

d. Furthermore, a remedial notice must set out the steps that the contractor must take to the satisfaction of the ICB in order to remedy the breach. This necessarily involves submitting responses and/or evidence that the relevant step has been taken. Posing a question to elicit that evidence is a compliant and reasonable approach.

e. In any event, many of the actions listed in the table were not, in fact, questions. For example, in relation to "Medicine Management and Repeat Prescribing", the ICB required TMP to carry out and submit results of audits (24, 25), to resubmit policies that were provided previously and found to be deficient (so requiring TMP to implement/update those policies) (19, 20, 26, 33), and submit evidence of changes made/steps taken to deal with the specific issues identified (so requiring TMP to deal with those issues) (9, 28). The ICB also required TMP to submit evidence of audits undertaken and tools systems, and processes in place to comply with relevant requirements (so requiring TMP to undertake those audits and put adequate systems, tools and processes in place) (10, 17, 11, 12, 15, 16, 21).

42. Notwithstanding the above, TMP's non-compliance with the 3rd Remedial Notice is only one of several grounds of termination relied upon by the ICB, and the ICB submits that, even if the 3rd Remedial Notice were found to be invalid, the Termination Notice remains valid so long as one or more of the grounds relied upon applies.

Issue 1(b): in respect of each Remedial Notice, TMP did comply with the actions specified, so far as it was possible to do so in circumstances (paragraph 45(b))

43. TMP asserts that it did comply with the actions specified within the Remedial Notices. In order to do so, it was necessary for TMP to take the required steps to remedy the breach by the end of the Remedial Notice Period stated. As clearly documented already, the ICB does not agree that TMP had done so:

a. The ICB's assessment of TMP's compliance with the 1st, 2nd and 3rd Remedial Notices is set out within the ICB's letters of 23 December 2019 [A/12/546], 3 March 2020 [A/14/584] and 20 May 2021 [A/18/793] (respectively); and

b. The ICB's further assessment of compliance with the 3rd Remedial Notice as part of the local dispute resolution process initiated by TMP, as set out in the ICB's letter of 16 March 2022. [A/22/876]

44. TMP alleges that the ICB "developed a practice of "moving the goal posts"" and that "rather than refer to the specific breaches in the remedial notice which had not been remedied, instead the ICB identified new allegations which had not actually formed part of the remedial notice to justify its conclusion of noncompliance." Again, as for issue 1(a), upon consideration of the actual wording of the ICB's assessment letters it becomes readily apparent that this allegation lacks any factual basis. The

assessments letters systematically and comprehensively addressed whether each Remedial Notice had been complied with, as summarised in Table 2 below:

Table 2

Assessment letter	**Assessment details**
Assessment of TMP's compliance with the 1st Remedial Notice (23 December 2019) [A/12/546]	This letter included a table title "*Assessment of the practices response to Remedial Notice 1 – dated 14 November 2019"*. [A/22/552-579]. This set out each remedial action within the 1st Remedial Notice (column 2), the ICB's overall assessment as to whether the action had or had not been met (column 4), and details of the underlying findings and reasons for this assessment (column 3). For ease of reference this included the reference number for each remedial action within the 1st Remedial Notice.
Assessment of TMP's compliance with the 2nd Remedial Notice (3 March 2020) [A/14/584]	The letter included a table titled "*Assessment – 2nd Remedial Notice dated 25 September 2019"*. This set out each remedial action within the 2nd Remedial Notice (column 2), the ICB's overall assessment as to whether the action had or had not met (column 4), and details of the underlying findings and reasons for this assessment (column 3). For ease of reference this included the reference number for each remedial action within the 2nd Remedial Notice.
Assessment of TMP's compliance with the 3rd Remedial Notice (20 May 2021)	The letter included a table titled "*Tynemouth – Assessment of the 3rd Remedial Notice"* [A/18/795-868]. This set out each remedial action within the 3rd Remedial Notice (using the reference number) (column 1 and 2), the ICB's overall assessment as to whether the action had or had not been met (column 3) and details of the underlying findings and reasons for this assessment (column 2).
Further assessment of TMP's compliance with the 3rd Remedial Notice following resubmission of evidence as part of the local dispute resolution process (16 March 2022) [A/22/876]	This letter included a table titled "*Appendix A – NCL CCG assessment of Tynemouth Road Practice resubmission received 23 July 2021 to the 3rd Remedial Notice actions not met".* [A/18/880-976] This set out each remedial action within the 3rd Remedial Notice (using the reference number) that had previously been assessed as not having been met (column 1), the ICB's overall assessment as to whether the action had or had not been met (column 3) and details of the underlying findings

	and reasons for this assessment (column 2).

45. TMP submits that, in any event, it did comply with the actions specified in each remedial notice so far as it was possible to do so. As described above, the Respondent has systematically and extensively set out its assessment of compliance with the remedial notices, and the details of the underlying findings and reasons for this assessment are already signposted within these Representations above, so are not repeated within these submissions. However, at this stage TMP has not provided any specific submissions or evidence to explain with any particularity why the ICB's assessment that TMP had not complied with the Remedial Notices (or any individual actions assessed as not met) was wrong. Indeed, TMP has not specified which specific findings it takes issue with. Therefore, the ICB fully reserves its right to respond to TMP's representations once received, including by filing further evidence (see paragraphs 6 to 8 above).

Issue 1(c): the ICB relied on data that was significantly out of date, providing assessments of TMP's responses an extremely long time after they had been submitted (paragraph 45(d))

46. TMP states that "In reaching its conclusions on non-compliance in respect of each remedial notice, the ICB relied on data that was significantly out of date, providing assessments of TMP's responses an extremely long time after they had been submitted."

47. This allegation is misconceived because:

a. To comply with each Remedial Notice, the steps set out within it "must be taken" within the Remedial Notice Period specified within the Remedial Notice (clause 64.2); and

b. The ground to terminate for non-compliance with a remedial notice arises where the ICB is satisfied TMP has not taken the required steps "by the end of the Remedial Notice Period" (clause 64.4).

48. Therefore, TMP's response to the Remedial Notice is to be assessed as at the expiry of the Remedial Notice Period.

49. The 1st Remedial Notice Period expired on 11 December 2018 and TMP submitted its response on 12 December 2018 (for the avoidance of doubt, the ICB does not take issue with it being submitted a day late). The 2nd Remedial Notice Period expired on 25 October 2019 and TMP submitted its response on 25 October 2019. The 3rd Remedial Notice Period expired on 11 September 2020 and TMP submitted its response on 11 September 2018. In each case, the information used by the ICB for its assessment was submitted by TMP on, or within one day of, the date on which the Remedial Notice Period expired. Therefore, this information was not "significantly out of date" but a contemporaneous record of the evidence TMP provided at the relevant time to demonstrate compliance with each Remedial Notice.

50. The ICB acknowledges that its decision to serve notices under the Agreement, whether the Remedial Notices or the Termination Notice itself, should be assessed by reference to the circumstances at the time. However, as set out above, they are not relevant to determining the factual question as to whether or not TMP complied with each Remedial Notice, because this is assessed by reference to the expiry of the Remedial Notice Period, not the date on which any later notices are given.

Issue 1(d): the termination notice does not specify at all which breaches actually formed part of the assessment of the termination (paragraph 45(d))

51. TMP states that: “The termination notice does not specify at all which breaches actually formed part of the assessment of the termination. A narrative is provided of a selection of allegations, but the notice also cross-refers to historic documents which had obviously at that point been superseded. It is procedurally improper not to set out all the breaches which it is said give rise to the right to terminate.”

52. These allegations are misconceived in numerous factual and legal respects.

53. Firstly, the contractual grounds for termination relied on by the ICB (clauses 64.4 and 64.6) do not require the ICB to specify anything more than they already do:

> a. The ground under clause 64.4 arises where there has been a failure to comply with a Remedial Notice; there is nothing within the Agreement requiring the ICB to allege new or additional breaches to those already specified within the Remedial Notice when exercising this right of termination. In any event, it could be said that the breach that gives rise to this ground of termination is TMP’s failure to comply with the Remedial Notice itself.
>
> b. Likewise, the ground under clause 64.6 arises where there have been repeated or further breaches following the issue of previous notices and there is a cumulative, prejudicial effect of the efficiency of services; those repeated/further breaches and a statement as to the cumulative, prejudicial effect were explicitly set out by the ICB.

54. TMP is entitled to challenge the validity of Termination Notice and the ICB’s underlying assessments and judgements in this respect, but its allegations that the required information / grounds were not addressed within the relevant notices has no factual basis.

55. Secondly, under this paragraph (but also a common theme throughout its Application) TMP focuses upon the covering narrative and/or examples within the notice and then concludes that these are vague or inadequate. These arguments are logically flawed because it is made explicitly clear that the additional narrative/examples are to explain and illustrate, but every alleged breach, remedial action, assessment of compliance with the same and reasons are systematically tabulated within the documentation (see Table 1 and Table 2 above). Indeed, if the narratives/examples complained about were entirely omitted, the Remedial and Termination Notices would remain valid in light of the full and detailed information provided.

56. Thirdly – and in any event – to any extent that it was necessary to set out details of breaches when serving the Termination Notice, the ICB had done so. As explained above, the Termination Notice carefully cross-references the Remedial Notices and assessments of TMP’s compliance with the same, which collectively set out which actions have been assessed as not met and which breaches those actions related to. The relevant breaches are all set out within the documentation. In particular, the final assessment of TMP’s compliance with the 3rd Remedial Notice following resubmission of evidence as part of the local dispute resolution process was communicated on 16 March 2022 [A/22/876], which explicitly stated which actions the ICB remained satisfied were and were not met at that point, and the relevant clauses in breach in respect of such unmet actions are set out in the 3rd Remedial Notice.

<u>Issue 2: termination in breach of requirements of procedural fairness and altogether unreasonable (paragraphs 47-48)</u>

57. TMP states that: “Further, in light of the defects in the process giving rise to the remedial notices and termination notice, the termination was in breach of the requirements of procedural unfairness and altogether unreasonable and perverse.”

58. The ICB relies on its overall submission above that TMP is confined to its contractual remedies and upon proper construction of the Agreement unreasonableness, procedural unfairness and any other public law arguments raised by TMP are irrelevant to the determination of this dispute. Nonetheless, such arguments are wrong in any event.

59. To the extent that TMP suggests that the alleged contractual defects alleged under issue 1 automatically lead to a finding that the process was procedurally unfair, unreasonable and perverse, the Respondent primarily submits that there were no such defects (see above).

60. To the extent that TMP expands slightly on this ground in paragraph 48, it simply repeats the allegations under issue 1, which have already been addressed above and, for the reasons given, are untrue.

61. TMP states "it was not possible for TMP to have any reasonable understanding of what allegations of breach were actually being made against it and maintained against it, and of what steps were actually required to be taken to remedy the breaches, or of when it is said that they had failed to comply with those allegations" and that "The remedial notices and termination notice are marked by vagueness and obscurity". As described above, the alleged breaches, steps required to be taken, and assessment of compliance with the same, were systematically set out in writing by the Respondent in tabulated format. Furthermore, within every Remedial Notice and the Termination Notice itself the ICB invited TMP to contact it to discuss the matter, no fewer than three such meetings have taken place between the parties to discuss the issues, and the parties have also recently been through a local dispute resolution process which TMP acknowledges has been exhausted (paragraph 3). TMP also had support and representation from the Londonwide Local Medical Committees. The ICB submits that it was perfectly possible for TMP to understand all relevant matters from the documentation provided by the ICB but, if TMP had any difficulty in this respect, TMP could have sought clarification where necessary at many junctures prior to this appeal.

62. TMP states "The goalposts have shifted at every juncture, to the point where, in the final analysis to trace through the history of the allegations from the termination notice back to the 1st Remedial Notice is impossible." There has been no shifting of goalposts. The requirements on TMP, and the ICB's assessment of compliance with these and the reasons, are systematically and comprehensively documented and tabulated (see above).

<u>Issue 3: the cumulative effect of the breaches is not such that to allow the Agreement to continue would prejudice the efficiency of the services to be provided under the Agreement (paragraphs 49- 51)</u>

63. Clause 64.7 provides that "The Board may not exercise its right to terminate this Agreement under clause 64.6 unless the Board is satisfied that the cumulative effect of the breaches is such to allow this Agreement to continue would prejudice the efficiency of the services to be provided under this Agreement".

64. Clause 64.7 only applies to clause 64.6 and has no application to other grounds of termination relied on by the ICB in this case, specifically termination under clause 64.4 for failure to comply with the 1st, 2nd and 3rd Remedial Notices. This is plain from the wording but was also confirmed by Stacey J in Haffiz at [65]. Therefore, issue 3 is not determinative of the dispute, only of the ground of termination under clause 64.6.

65. In essence, clause 64.7 prohibits the ICB from exercising its right to terminate under clause 64.6 unless specified conditions are met. The ICB submits that they were met.

66. Firstly, it is the ICB that must be "satisfied" on this point, and the ICB clearly was; the Termination Notice explains [A/24/983-984]:

> The ICB is so satisfied in light of the history of this matter, the numerous and wide spread breaches, and the failure to implement and sustain the necessary improvements to comply with the PMS Agreement. They have a detrimental impact upon the availability, quality and safety of the services that the practice is commissioned to provide out of NHS resources. The practice continues to fall seriously short of meeting the service standards required under the PMS Agreement despite the substantial time and opportunities afforded to remedy the breaches. This amounts to a serious prejudice to the efficiency of the services under the PMS Agreement that will continue unless the PMS Agreement is terminated.

67. The ICB submits that that is the end of the matter.

68. However, TMP states that this was "in all the circumstances an unreasonable conclusion" (paragraph 50). The ICB relies on its overall submission above that unreasonableness, procedural unfairness and any other public law arguments raised by TMP are irrelevant to the determination of this contractual dispute. Nonetheless, it was in any event a reasonable conclusion, for the reasons already set out within the Termination Notice and given the context and history of the matter.

69. The sole argument made by TMP is that at the time of the Termination Notice the CQC had, on 11 March 2022, inspected TMP's practice and on 3 May 2022, assessed the practice as "Good" overall. TMP argues that this, in turn, means "it cannot possibly be said that the cumulative effect of the breaches prejudices the efficiency of the services to be provided", that "the justification offered for the remedial notices is simply no longer there", and "the threshold for termination as a last resort does not exist" (paragraph 51).

70. It is not the case that a "Good" overall rating by the CQC means that the ICB "cannot possibly" terminate the Agreement under clause 64.6, as suggested by TMP. The CQC is concerned with whether registered providers are meeting the fundamental standards of care under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The CQC describes these standards of care as "the standards below which your care must never fall" (https://www.cqc.org.uk/aboutus/fundamental-standards). It is wrong to equate these basic regulatory requirements with the far more extensive obligations under the Agreement, or the efficiency of the services commissioned and provided under it. Furthermore, it would unlawfully fetter the ICB's discretion to restrict its power to exercise a right to terminate a contract in such circumstances.

71. Beyond this, TMP has not explained why it considers that the ICB's assessment is otherwise wrong, so as for issue 2, it is neither possible nor proportionate at this stage to respond to this generalised allegation. Therefore, the ICB fully reserves its right to respond to TMP's representations once received, including by filing further evidence (see paragraphs 6 to 8 above).

<u>Issue 4: breach of requirement to enter into a GMS contract</u>

72. TMP asserts that, by an email and enclosed letter dated 29 February 2020 [A/13/580], it served notice under Regulation 32 of the National Health Service (Personal Medical Services Agreements) Regulations 2015, exercising its right to terminate the Agreement and enter into a GMS contract, and that the ICB took "no steps whatsoever" were taken by the ICB in response. This is untrue and TMP has omitted relevant facts and documentation regarding this matter.

73. Firstly, it is wrong to suggest that the ICB took "no steps whatsoever":

> a. The ICB has records indicating that it replied to the email on 2 March 2020. Unfortunately a copy of this email cannot be located but enquiries with the ICB's IT team are ongoing and it will be provided to TMP and the PCA if it can be retrieved.

b. 29 May 2020 was the date on which TMP had specified that it wished to enter into a GMS contract. This date passed without the Agreement being terminated or a GMS Contract being entered into. It appears neither TMP nor the ICB progressed discussions in the meantime, despite the need for both parties to enter into discussions with one another to negotiate and agree the terms of the GMS contract and then enter into the same.

c. On 11 August 2020, the ICB acknowledged delays due to the COVID-19 pandemic, and stated in an email to TMP [R/1/2]:

> "In the interim you also submitted a request earlier this year to revert your PMS agreement to a GMS contract. Can you confirm whether you wish this still to be considered. If yes we will commence the assessment of your request to prepare for the NCL Primary Care Commissioning Committee (PCCC) to consider."

d. On 14 August 2020, the ICB stated in a further email to TMP [R/2/4]:

> "As per my email below can you confirm whether you still wish your request to convert your PMS agreement to a GMS contract to still be considered, if yes we will commence the assessment and refer this to the NCL Primary Care Commissioning Committee."

e. On 24 May 2021, TMP stated in an email "For the purpose of preparation, I would also be grateful if you could inform us of the outcome of our request to add my Partner, Dr Adesanoye, to the contract" (i.e. the Agreement). [R/3/7] This request to add a partner to the Agreement, which requires the written agreement of the parties, is not the subject matter of the dispute so no further details are set out here. For present purposes, the key point is that this request to add a partner was inconsistent with what had been requested under the email and letter of 29 February 2020, which stated "Dr Christiana Aride is the sole medical practitioner who will enter into the new GMS contract on behalf of Tynemouth Practice on 29th May 2020" [A/13/582].

f. Between 29 February 2020 and 11 June 2021, TMP did not respond to the ICB's enquiries regarding the status of the request for a GMS contract, or otherwise follow it up, a period of over 15 months. The ICB had reasonably concluded that the request to revert to a GMS contract had been abandoned.

g. However, on 11 June 2021, TMP stated by email "I did not send you another email after my original request that I wanted to change my mind Therefore [sic] of course I stand by my original request" [R/4/9]. This was confirmed by TMP in a meeting between the ICB and TMP on 14 June 2021. The minutes recorded that the issue of the reversion to GMS was raised by the LMC Representative at the meeting. [R/5/11]

74. In light of the above, the ICB had reasonably concluded that TMP's request to revert to GMS had been abandoned well before 11 June 2021, both in light of the contradictory request to add a partner to the Agreement and the passage of time and expiry of the original date upon which TMP had said it wished to enter into a GMS contract, with no response to the ICB's multiple attempts to confirm TMP's intentions. TMP sought to revive that request on 11 June 2021 but did not give a Regulation 32 notice, and this was required because:

a. TMP had ostensibly abandoned the original letter of 29 February 2020;

b. The original letter specified Dr Aride as the sole contract holder which was no longer TMP's expressly stated intention; and

c. A new date for the Agreement to terminate and the GMS contract to be entered into needed to be stated, as the original date specified had long since expired.

75. Secondly, as TMP now seeks to enforce its letter of 29 February 2020 as a valid notice under Regulation 32, it is necessary to consider whether TMP had in fact taken the necessary steps under Regulation 32. Upon consideration of the email and enclosed letter of 29 February 2020, they do not constitute a valid Regulation 32 notice because:

a. Under Regulation 32(1), "the contractor must give notice in writing to the Board to that effect at least three months before the date on which the contractor would like to enter into the general medical services contract".

b. Under Regulation 32(2)(a), such a notice "must … state that the contractor wants to terminate the agreement and the date on which the contractor would like the agreement to terminate, which must be at least three months after the date on which the notice was given".

c. The email and letter of 29 February was sent at 21:13 on a Saturday, so outside of Core Hours as defined in the Agreement. Accordingly, in accordance with the notice provisions at clause 84.3.3 of the Agreement [A/5/344], it was deemed to have been served on the following Working Day, namely Monday 2 March 2020.

d. The letter of 29 February 2020 stated the practice wished to terminate the Agreement and enter into a GMS contract from 29 May 2020. This is less than three months after the date on which the notice was given (2 March 2020).

76. Thirdly, it is now too late for TMP to exercise its right under Regulation 32, because the Agreement has already been terminated by the ICB and only continues by virtue of TMP's application for dispute resolution.

77. Schedule 2, paragraph 65 of the National Health Service (Personal Medical Services Agreements) Regulations 2015 deal with termination where the NHS dispute resolution procedure has been initiated. Paragraphs 65(3)-(4) state:

(3) Where—

(a) sub-paragraph (1) applies but the exceptions in sub-paragraph (2) do not apply; and

(b) the contractor invokes the NHS dispute resolution procedure before the end of the notice period referred to in sub-paragraph (1) and gives notice in writing to the Board that it has done so,

the agreement does not terminate at the end of the notice period but instead only terminates in the circumstances described in sub-paragraph (4).

(4) The circumstances described in this sub-paragraph for the termination of the agreement are if and when—

(a) there has been a final determination of the dispute under the NHS dispute resolution procedure (or by a court) and that determination permits the Board to terminate the agreement; or

(b) the contractor ceases to pursue the NHS dispute resolution procedure, whichever is the sooner.

78. Therefore, the Agreement will only terminate where there has been a final determination of this dispute by the PCA permitting termination, or TMP withdraws this dispute. A notice by TMP under Regulation 32 at this time – which is required to specify a date on which the Agreement is terminate and the GMS contract is to commence – would not be effective. Reading these provisions together, Regulation 32 does not permit a contractor to evade termination in circumstances where a valid Termination Notice has been given and upheld under the NHS dispute resolution procedure.

79. For the avoidance of doubt, the ICB has advised TMP of this position previously. A meeting took place between the ICB and TMP on 17 May 2022, the minutes of which record the following discussion [R/6/28]:

> Dr CA [Dr Aride, GP Provider, TMP]: I sent a letter to you Vanessa, about reverting from PMS to GMS and I did not receive any response from you apart from the initial response when you sent me in an email that do I really want to progress or not. I did reply to you to say that of course I did not change my mind. However, there was still no response about that email.
>
> VP [Vanessa Piper, Assistant Director, Primary Care, ICB]: I can look over the correspondence and respond to that separately. The request now, though, would not come into effect because the decision had already been taken in September of last year to proceed to terminate. I can go over the chronology and the timeline of that, and just to confirm when the decisions were being taken at primary Care Commissioning Committee.
>
> Dr CA: I sent the application and the email about reverting from PMS to GMS before any conversation about termination.

80. This appears to have been accepted by TMP at the time, who stated in the same meeting [R/6/28]:

GC [Gabriella Calimandri, Practice Manager, TMP]: The only contractual issue pending is the request to add Dr Adesonoye on to the agreement. This was made before the decision to terminate. This has never be processed.

Conclusion

81. For the reasons set out above, the ICB invites the PCA to determine that the ICB is permitted to terminate the Agreement and that the Termination Notice is valid and effective."

The Contractor's representations

"1. These are the submissions of Tynemouth Medical Practice ("TMP") in its application for dispute resolution under the Primary Care Appeals process at NHS Resolution in respect of a termination notice served on 27 October 2022 on Tynemouth by North Central London Primary Care Commissioning Committee ("NCL PCCC") on behalf of NHS England and the North Central London Integrated Care Board ("NCL ICB") which was due to take effect on 27 January 2023. Subject to it being withdrawn or set aside, the termination notice will have the effect of terminating TMP's Personal Medical Services agreement with NHS England.

2. TMP applied for dispute resolution under s.9 of the National Health Service Act 2006 ("NHSA 2006"), reg. 76 of the National Health Service (Personal Medical Services Agreements) Regulations 2015 ("PMS Regs 2015") and cl. 70 and Sch. 6 of the agreement with NHS England on 26 January 2023.

3. TMP submits that NCL ICB was not entitled to serve the termination notice and that the termination notice was unlawful. NCL ICB should withdraw the termination notice,

or the termination notice should be set aside, and NCL ICB should now move to put in place a GMS contract.

4. In summary, TMP argues:

(a) the termination notice was unlawful in relying on the third remedial notice which was not a proper "remedial notice" as it did not comply with cl. 64.2;

(b) the termination notice was unlawful in that TMP had taken steps to remedy the breach as identified in the purported remedial notices;

(c) the termination notice was made in breach of the requirements of procedural fairness and was altogether unreasonable;

(d) the cumulative effect of the breaches is not such that to allow the contract to continue would prejudice the efficiency of the services to be provided under the contract under cl. 64.6; and

(e) the termination notice was served while NCL PCCC was in breach of the requirement to enter into a GMS contract with TMP.

5. These submissions should be read alongside three appendices which provide detailed narratives of the three thematic areas relied on by NCL ICB in its termination notice: safeguarding; medication reviews and management; and cold chain management.

Background

6. The full background is set out in TMP's application which is not repeated here.

Contractual provisions

7. The Agreement provides a detailed set of provisions for termination. Clause 64 provides:

> *64.1 Where the Contractor breach of this Agreement is not one to which clauses 60 to 63 apply and that breach is capable of remedy, the Board must, before taking any action it is otherwise entitled to take by virtue of this Agreement, give notice in Writing to the Contractor requiring the Contractor not to repeat the breach (a "Remedial Notice").*
>
> *64.2 A Remedial Notice must specify:*
>
> > *64.2.1 details of the breach;*
> >
> > *64.2.2 the steps that the Contractor must take to the satisfaction of the Board in order to remedy the breach; and*
> >
> > *64.2.3 the period during which those steps must be taken ("the Remedial Notice Period"*
>
> *64.3 The Remedial Notice Period shall, unless the Board is satisfied that a shorter period is necessary to:*
>
> > *64.3.1 protect the safety of the Contractor's Patients; or*
> >
> > *64.3.2 protect itself from material financial loss, be no less than twenty eight (28) days from the date that Remedial Notice is given.*

64.4 Where the Board is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the Remedial Notice Period, the Board may terminate this Agreement with effect from such date as the Board may specify in a further notice to the Contractor.

64.5 Where a Contractor breach of this Agreement is not one to which any of clauses 60 to 63 apply, and the breach is not capable of remedy, the Board may give notice in Writing to the Contractor requiring the Contractor not to repeat the breach (a "Breach Notice")

64.6 If, following a Breach Notice or a Remedial Notice, the Contractor:

64.6.1 repeats the breach that was the subject of the Breach Notice or the Remedial Notice; or

64.6.2 otherwise breaches this Agreement resulting in either a Remedial Notice or a further Breach Notice, the Board may give notice in Writing to the Contractor terminating this Agreement with effect from such date as the Board specifies in the notice.

64.7 The Board may not exercise its right to terminate this Agreement under clause 64.6 unless the Board is satisfied that the cumulative effect of the breaches is such to allow this Agreement to continue would prejudice the efficiency of the services to be provided under this Agreement.

64.8 If the Contractor is in breach of any obligation under this Agreement and a Breach Notice and a Remedial Notice in respect of that default giving rise to the breach has been given to the Contractor, the Board may withhold or deduct monies which would otherwise be payable under this Agreement in respect of that obligation which is the subject of the default.

8. Where the Board is entitled to terminate under cls. 64.4 and 64.6, it must, in the termination notice, specify a date on which the Agreement is to terminate which is at least 28 days after the date on which the Board gives notice: cl. 68.1. By cl. 68.3, where a party invokes the NHS Dispute Resolution Procedure before the end of that notice period and gives notice that it has done so, then the Agreement does not terminate at the end of the notice period but instead only in the circumstances set out in cl. 68.4.

9. Cl. 68.4 provides that the Agreement terminates if and when there has been a final determination of the dispute under Schedule 6 (or by a court) and that determination permits the Board to terminate this Agreement; or the Contractor ceases to pursue the NHS Dispute, whichever is the sooner.

10. Cl. 70 and Schedule 6 set out the dispute resolution procedure.

<u>The termination</u>

11. On 27 October 2022, Ms Piper sent the termination notice to TMP, with a termination date of 27 January 2023. Alongside the termination notice she also sent a summary of NCL PCCC's consideration of the matter.

12. NCL PCCC purported to terminate the Agreement on the following grounds:

1. The practice has failed to comply with the 1st, 2nd and 3rd Remedial Notices (clause 64.4);

2. The practice has:

a. Repeated breaches that were the subject of the 1st and 2nd Remedial Notices; and

b. Otherwise breached the PMS Agreement following receipt of the 1st and 2nd Remedial Notices;

and the cumulative effect of the breaches is such that to allow the PMS Agreement to continue would prejudice the efficiency of the services to be provided under the PMS Agreement (clause 64.6).

13. In respect of cl. 64.4, the termination notice does not set out in detail where it alleges that the 1st, 2nd and 3rd Remedial Notices were not complied with. It simply refers back to the letters of 23 December 2019, 3 March 2020 and 20 May 2021.

14. In respect of cl. 64.6, it is asserted that:

(a) the 2nd Remedial Notice "sets out details of the breaches of the PMS Agreement that were either repeated breaches (i.e. repeated breaches that were the subject of the 1st Remedial Notice) or new breaches (i.e. new breaches that were not the subject of the 1st Remedial Notice)."

(b) the 3rd Remedial Notice "set out details of breaches of the PMS Agreement that were either repeated breaches (i.e. repeated breaches that were the subject of the 1st or 2nd Remedial Notice) or new breaches (i.e. new breaches that were not the subject of the 1st or 2nd Remedial Notice)."

15. This, it is said, gave rise to its entitlement to terminate under cl 64.6.

16. The letter goes on to provide a narrative of a selection of alleged breaches. This is prefaced with the following paragraph "examples below have been provided which detail the specific continuation of concerns that have been listed in the the ICBs (formally NCL ICB) assessments of the practice's response to the 1st , 2nd and 3d remedial notices issued and the practices response as part of your dispute. The concerns below are not the full list of patient safety concerns identified and the ICB ask's that you refer to the ICB's assessment documents for all the notices issued." The termination notice does not, however, specify the complete series of breaches which NCL PCCC is relying on. This narrative is the only part of the document which sets out an explanation of the alleged breaches, even though it is expressly said not to be "the full list".

Appeal grounds

<u>General approach to be taken by NHS Resolution</u>

17. The Agreement is an NHS contract under s.9 NHSA 2006 in that it is a PMS contract and so an NHS contract by default, and neither party objected to this status prior to its conclusion: reg. 9(1) PMS Regs 2015. Further, the parties have confirmed that TMP is a health service body and that this Agreement has "NHS contract" status under cl. 2.1. The consequences of this are that the Agreement does not create any contractual rights or liabilities: s.9(5). It therefore cannot be the subject of a claim for breach of contract in private law: Pitalia v NHS Commissioning Board [2014] EWCA Civ 474 at §37 and §46.

18. Decisions made in relation to the Agreement, and determinations by the adjudicator in respect of the Agreement are, however, amenable to claims for judicial review: see most recently R (Shashikanth) v NHS Litigation Authority [2022] EWHC 2526 (Admin) at §150.

19. However, TMP could not at this stage bring a claim for judicial review against the termination, as TMP has an alternative remedy available to it, namely the NHS dispute resolution procedure under the Agreement and in pursuance of s.9 NHSA 2006 and regs. 76-77 PMS Regs 2015, which TMP has engaged.

20. It is in that context that Primary Care Appeals has to consider the present dispute. This is not a claim like in other cases in which ultimately the adjudicator is having to determine pure contractual liabilities. The NHS is subject to an overlay of public law constraint on its discretion to exercise any right of termination it may have under the Agreement.

21. That the NHS is subject to public law constraints when exercising its contractual powers in respect of NHS contracts was also confirmed in Jones v NHS Commissioning Board [2017] EWHC 3457 (QB) at §§57-59. It is recognised that those public law constraints include an implied duty of procedural fairness; an implied duty to act reasonably and proportionately, and an implied duty to exercise contractual discretions in a way that is not arbitrary, capricious and in breach of the contract: see generally R (Haffiz) v NHS Litigation Authority [2020] EWHC 3792 (Admin). This must also include an implied duty to comply with the NHSA 2006, the PMS Regs and the applicable guidance.

22. As to that, the Primary Medical Care Policy and Guidance Manual (PGM) (v4) (February 2022) ("Primary Medical Care Guidance") states at Part C, para 1.1.2:

> *"1.1.2 Given that any decision to issue a Breach or Remedial Notice, apply sanctions or terminate a contract or agreement can be challenged by the contractor under appeal, it is essential that the Commissioner follows, and can demonstrate that it has followed, due process in investigating, communicating and implementing actions in this respect and that the Commissioner has acted fairly and reasonably throughout."*

23. Para 1.3.10 goes on to provide:

> *1.3.10 A Remedial Notice must specify:*
>
> *details of the breach, which led to the Remedial Notice being issued and any evidence gathered in respect of the breach;*
>
> *the steps the contractor must take in order to remedy the breach to the Commissioner's satisfaction;*
>
> *the period in which the steps must be taken;*
>
> *any arrangements for reviewing the matter to ensure that the requirements of the Remedial Notice have been met; and*
>
> *the actions that the Commissioner shall take if the contractor fails to satisfactorily remedy the breach.*

24. In respect of termination, para 1.6.3 states "The Commissioner must consider all relevant information available and decide on the appropriate course of action and whether the contract should be terminated." Factors that are listed include, at para 1.6.9, the "PMS to GMS" provisions. Para 1.6.12 also refers to the General duties "NHS England has a number of statutory duties relating to the exercise of its functions including reducing health inequalities and public involvement. The Commissioner must ensure that its actions in terminating a contract and any consequential actions ensure compliance with these duties." Para 1.7.49 states that "NHS England's general duties may be triggered by termination in these circumstances."

<u>Ground 1: the Termination Notice was unlawful in relying on the third remedial notice which was not a proper "remedial notice" as it did not comply with cl. 64.2</u>

25. Entitlement to terminate under cl. 64.4 depends on:

(a) the Board having served a remedial notice which complies with cl. 64.1 and cl. 64.2; and

(b) that the Contractor has not taken the required steps to remedy the breach.

26. NCL ICB relies on the three remedial notices in its Termination Notice. The third remedial notice did not comply with clause 64.2 and thus the entitlement to terminate under cl. 64.4 did not arise. The remedial notice did not specify properly the "details of the breach" as required by cl. 64.2.1. The remedial notices did not properly specify "the steps that the Contractor must take to the satisfaction of the Board in order to remedy the breach" as required by cl. 64.2.2.

27. This is set out in detail in the three appendices. In particular, the 3rd Remedial Notice sets out "remedial questions" but these are not "steps...to remedy the breach" under cl. 64.2 but rather are simply questions.

28. TMP thus submits that no termination notice could properly be served on the basis of this remedial notice. The decision to terminate was unlawful.

Ground 2: the Termination Notice was unlawful in that TMP had taken steps to remedy the breach as identified in the purported remedial notices

29. Further and without prejudice to TMP's primary position which is that the third remedial notice was not a proper remedial notice at all, in respect of each remedial notice, it did comply with the actions specified, so far as it was possible to do so in circumstances where the actions were specified, within the time for compliance.

30. Compliance with each remedial notice is explained in detail in the three appendices focusing on the three thematic areas identified by NCL PCCC. Those appendices must be read in full as they are an integral part of this submission. The following broad points are made:

(a) First, the focus of NHS Primary Care Appeals must be on whether or not TMP substantively complied with the "remedial action" specified in the remedial notice. The entitlement to terminate under cl. 64.4 is triggered only where the "required steps to remedy the breach by the end of the Remedial Notice Period" have not been taken. That must refer to cl. 64.2.3 and thus the remedial actions specified in the notice.

(b) Second, compliance with the remedial action must also be considered against the fact that NCL PCCC requested only, in respect of the first two remedial notices, that assurance is provided that the clause breached can be remediated, not that it will be remediated. See e.g.

i. 1st remedial notice: "You are required to provide assurance that each clause breached can be remediated and submit a response by the deadline of 11th December 2018"

ii. 2nd remedial notice: "You are required to provide assurance that each clause breached can be remediated and submit a response by the deadline of 25 October 2019."

(c) Third, compliance must be substantive compliance. On a proper interpretation of the legislation and the contract, it cannot be envisaged that de minimis breaches, or breaches of terms that are not fundamental, would be sufficient to ground a termination. This would reflect the widely established principle in contract law that not every breach gives rise to an entitlement to terminate. There is nothing in the legislation or contract to suggest that this principle was sought to be displaced by the contractual arrangements.

(d) Fourth, therefore, for NHS Primary Care Appeals, the question it must ask for itself is whether the remedial action was complied with in time. NCL PCCC's assessment of TMP's response may be relevant to that analysis but it is only evidence rather than the starting point for the analysis. NCL PCCC's assessment is further subject to the same public law overlay as set out above.

(e) Fifth, NCL PCCC's assessments as to TMP's compliance are manifestly defective:

i. In reaching its conclusions on non-compliance in respect of each remedial notice, the ICB relied on data that was significantly out of date, providing assessments of TMP's responses an extremely long time after they had been submitted.

ii. The appendices demonstrate numerous areas in which NCL PCCC has found TMP to be in continued breach because it had "moved the goal posts" of what was required by the remedial notices. See e.g. Appendix 1, paras 19.1.3, 19.3.2, 34.1, 45.10.2, 45.13.2, 51.2.6, 51.3.2, 51.5.3 and 51.7.2; Appendix 2, paras 20.2, 21.2, 22.2, 38.1.4, 38.2.4, 38.3.4, 38.5.2, 51.6.2, 51.10.2, 51.11.2, 51.19.2, 51.31.3, 57.1.2, 57.3.2, 57.5.2, 57.8.4, 57.10.2, 57.12.2, 57.14.2 and 57.16.2; Appendix 3, paras 16.1.1, 16.2.1, 16.3.1, 39 and 41.

iii. The appendices demonstrate there are numerous areas in which NCL PCCC has simply misunderstood the position or made basic factual errors. See e.g. Appendix 1, para 34.2.2; Appendix 2, paras 23.2, 51.12.2 and 57.7.3; Appendix 3, paras 16.1.2, 16.2.1, 16.3.5, 29.1.1, 29.1.2 and 42.1.1.

iv. The appendices demonstrate numerous areas in which NCL PCCC has ignored explanations or material provided by TMP. See e.g. Appendix 1, paras 34.1.1.3.1-3, 34.1.1.6.1-2, 34.1.2.5.1-2, 45.1.2, 45.1.4, 45.2.2, 45.4.1, 45.8.1.1, 45.9.2 and 51.10.3; Appendix 2, paras 38.3.2, 51.5.2, 51.16.2, 51.28.3, 51.33.2, 57.2.2, 57.6.2, 57.11.4, 57.13.2 and 57.15.3; Appendix 3, paras 16.4.1, 16.5.1 and 38.

v. The appendices demonstrate numerous areas in which NCL PCCC gave improper or irrelevant reasons or reasons stretching to absurdity for finding that a remedial notice had not been complied with. See e.g. Appendix 1, paras 34.3.2, 45.7.4, 45.13.5 and 51.5.1.2; Appendix 2, paras 51.4.2, 51.9.3, 51.15.2 and 51.29.2; Appendix 3, para 42.2.1.

vi. The appendices demonstrate numerous areas in which NCL PCCC has misrepresented the extent of the non-compliance by referring back to areas in which it had already accepted TMP's position. See e.g. Appendix 1, paras 37 and 51.4.2; Appendix 2, para 41; Appendix 3, para 40.

<u>Ground 3: termination in breach of requirements of procedural fairness and altogether unreasonable</u>

31. Further, in light of the defects in the process giving rise to the remedial notices and Termination Notice, the termination was in breach of the requirements of procedural unfairness and altogether unreasonable and perverse.

32. In R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531, 560, Lord Mustill summarised the basic principles of procedural fairness:

"(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the

circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

33. In R (Citizens UK) v SSHD [2018] 4 WLR 123, Singh LJ noted at §75 and §81 that the question of whether there has been procedural fairness or not is an objective question for the court to decide for itself. The question is not whether the decision-maker has acted reasonably. NHS Primary Care Appeals must, in this context, put itself in the place of the court and decide for itself whether or not there has been procedural fairness.

34. The following contextual factors are important:

(a) First, TMP had a long-standing contractual relationship with NCL's primary care contracting team. GP services have been provided on the premises since approximately 1996 and the PMS agreement pilot commenced on 1 October 2002. This is therefore a "forfeiture" case in the classification of situations breaching natural justice identified in McInnes v Onslow Fane [1978] 1 WLR 1520, 1529, in that an existing right or position has been taken away. Thus "the demands of fairness are likely to be somewhat higher": R (Moseley) v Haringey LBC [2014] 1 WLR 3947 at §26.

(b) Second, the primary impetus for all the remedial notices had been the initial findings of the CQC and the demotion to an overall rating of Inadequate. Each of the breaches alleged in the first remedial notice expressly and exclusively relied upon matters arising from the September 2018 CQC report (B6 – B11). NCL PCCC had not made its own investigations. The notice was entirely dependent upon the CQC report, which NCL PCCC treated as its evidence. Amongst other things, it was alleged that the September 2018 CQC report "provided evidence to Commissioners that there was absence of procedures within the practice to monitor and measure risk in line with guidance" (B6). By the time of the termination notice, however, the CQC had instead given TMP an overall rating of Good. Indeed, as things stand, TMP continues to hold a Good CQC rating. It has taken significant steps to overhaul its processes. The practice continues to provide good quality care to its approximately 10,000 patients. The up-to-date position is crucial for reaching a lawful view as to this requirement.

(c) Third, since the September 2018 CQC report was issued, Ms Calimandri has been appointed to manage the practice. The situation was recognised to improve as she is an experienced practice manager. The circumstances giving rise to the initial concern of NCL have moved on significantly.

35. Each of the following instances of unfairness alone would be sufficient to find that the termination notice was served unlawfully. When considered cumulatively the case is overwhelmingly against NCL ICB.

(a) First, the Termination Notice does not specify at all which breaches actually formed part of the assessment of the termination. A narrative is provided of a selection of allegations, but the notice also cross-refers to historic documents which had obviously at that point been superseded. It is procedurally improper not to set out all the breaches which it is said give rise to the right to terminate. It is a cardinal principle of fairness that an individual has a right to be given sufficient information to enable proper representations: see e.g.

> i. R (King) v Secretary of State for Justice [2016] AC 384 at §100 per Lord Reed "right to make representations is largely valueless unless he knows the substance of the case being advanced in sufficient detail to enable him to respond. He must therefore normally be informed of the substance of the matters on the basis of which the authority of the [decision-maker] is sought";
>
> ii. Kanda v Government of Malaya [1962] AC 322, 327 per Lord Denning "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him."
>
> iii. Ridge v Baldwin [1964] AC 40, 113: "the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet"
>
> iv. R v SSHD, ex p Doody [1994] 1 AC 531, 560: "Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer".

It is notable that on several occasions TMP asked NCL PCCC to provide clarity as to the actions required and no answer was forthcoming, giving rise to further unfairness and prejudice: see e.g. Appendix 2, paras 57.7.2 and 57.9.2.

(b) Second, NCL PCCC's assessment of the breach of remedial notices, as set out above, consistently relies on new allegations and criticisms which were not actually part of the original remedial notice. An extension of the well-established principle requiring sufficient information to be given is that a breach of fairness will be found where an individual has been informed of only one allegation although there are two, or where a person is found guilty of an offence from the one with which they were actually charged: see De Smith's para 7-050 and the cases cited therein That same principle applies here: NCL PCCC is not permitted to change the goalposts of its concerns after it has given notice of what they are.

(c) Third, as set out in TMP's application, there has been very significant delay in (a) serving remedial notices; (b) considering remedial actions; and (c) serving the termination notice. It is well-established that delay can itself amount to procedural unfairness: see e.g. Durity v AG of Trinidad and Tobago [2008] UKPC 59 at §29 "the principles of natural justice demand that particular attention must be paid to the need for fairness" which "includes having the allegation investigated promptly and determined as quickly as possible" In this case, TMP has been severely prejudiced by the significant delays:

> i. First, the delays have impacted on the ability of TMP to respond to the notices. A .zip file providing evidence of clinical training provided in TMP's response to NCL PCCC's assessment of compliance with the 3rd remedial notice could not be opened and so was not assessed

(Appendix 1, para 51.2.1). The assessment took place almost 8 months after the information had been provided by TMP. Clearly, if the assessment had been carried out promptly, there would have been an opportunity for NCL PCCC to provide a different version of the file.

ii. Second, the delays have significantly impacted on the ability of the practice to stabilise and, subsequently, to fully progress. It has been arduous to plan long term developments whilst the survival of the practice remained in doubt. More particularly, the uncertainty around the practice has made it harder to recruit clinical staff in an already difficult market where staff have their pick of practices. While there are salaried GPs in line for partnerships, until the pending issues are resolved that prevents that process from going forward. The practice has been criticised by NCL PCCC for being a single-handed practitioner practice but the delays have exacerbated those difficulties.

iii. Third, the delays have had significant financial implications for the practice, including to overcome the difficulty in recruiting GPs, as this has resulted in increased locum costs and recruitment agencies costs.

iv. Fourth, delays have had a significant and material effect on the wellbeing of staff members, causing unnecessary stress and ultimately affecting retention.

(d) Fourth, put shortly, it was not possible for TMP to have any reasonable understanding of what allegations of breach were actually being made against it and maintained against it, and of what steps were actually required to be taken to remedy the breaches, or of when it is said that they had failed to comply with those allegations. The remedial notices and termination notice are marked by vagueness and obscurity. The goalposts have shifted at every juncture, to the point where, in the final analysis to trace through the history of the allegations from the termination notice back to the 1st remedial notice has proved an almost impossible labyrinthine task.

(e) Fifth, in light of the above, a fair-minded and informed observer would be bound to conclude that there was a real possibility that NCL PCCC had predetermined the outcome of this process. Subtle insinuations have been made since the first meeting in this process in October 2018 that TMP must merge with another practice. Since that point in time, at every stage since TMP tried to remediate the issues, they have been faced with new allegations which never featured in the original remedial notice. It would appear that at each stage the goalposts have shifted such that they have been frustrated from ever actually addressing the issues NCL PCCC have raised. While TMP is not alleging any bad faith, it does allege that NCL PCCC have pre-determined the outcome of this process and closed its mind to the progress the practice has made. As was said in R (Electronic Collar Manufacturers Association) v Secretary of State for Environment, Food and Rural Affairs [2019] EWHC 2813 (Admin) at §140, “a decision may be impugned on the grounds of an appearance of predetermination” where the court considers that “a fair-minded and informed observer would think that the evidence gives rise to real possibility or risk that the decision-maker had pre-determined the matter, in the sense of closing his mind to the merits of the issue to be decided”.

<u>Ground 4: the cumulative effect of the breaches is not such that to allow the contract to continue would prejudice the efficiency of the services to be provided under the contract under cl. 64.6</u>

36. In order to terminate under cl. 64.6, the Board must be satisfied that “the cumulative effect of the breaches is such to allow this Agreement to continue would prejudice the efficiency of the services to be provided under this Agreement”.

37. This was in all the circumstances an unreasonable conclusion. As set out above, the initial impetus (and evidence relied upon) for the notices has disappeared, namely the concerns of the CQC (which have been resolved to the satisfaction of the CQC and ignored by NCL PCCC). Similarly, the practice is now under new management.

38. The practice continues to provide efficient and good clinical services. It has been given the maximum number points on 16 out of the 21 in the clinical domain within the QoF with high achievement on the remaining domains. The adaptability of its services has been demonstrated over the past three years when fronting the challenges of the pandemic, maintaining a safe team and environment, with high clinical performance.

39. In such circumstances – and given the notable absence of any clearly identified concerns beyond those in the notices – it cannot possibly be said that the cumulative effect of the breaches prejudices the efficiency of the services to be provided. The original justification offered for the remedial notices is simply no longer there. The very high threshold for termination as a last resort does not exist.

Ground 5: breach of requirement to enter into a GMS contract

40. Reg. 32 of the PMS Regs 2015 provides:

"(1) Where a contractor is providing essential services under the agreement and would like to enter into a general medical services contract by virtue of this regulation, the contractor must give notice in writing to the Board to that effect at least three months before the date on which the contractor would like to enter into the general medical services contract.

(2) A notice given under paragraph (1) must—

> *(a) state that the contractor wants to terminate the agreement and the date on which the contractor would like the agreement to terminate, which must be at least three months after the date on which the notice was given;*
>
> *(b) subject to paragraph (3), give the names of the person or persons with whom the contractor wants the Board to enter into a general medical services contract; and*
>
> *(c) confirm that the person or persons so named meet the conditions set out in section 86 of the Act (persons eligible to enter into GMS contracts) and regulations 5 (conditions relating solely to general medical practitioners) and 6 (general condition relating to all contracts) of the General Medical Services Contracts Regulations or, where the contractor is not able so to confirm, provide the reason why it is not able to do so together with confirmation that the person or persons will, immediately prior to entering into the general medical services contract, meet those conditions.*

(3) A person's name may only be given in a notice referred to in paragraph (1) if that person is a party to the agreement.

(4) The Board must acknowledge receipt of the notice given under paragraph (1) before the end of the period of seven days beginning with the date on which the Board received the notice.

(5) Provided that the conditions set out in section 86 of the Act (persons eligible to enter into GMS contracts) and regulations 5 and 6 of the General Medical Services Contracts Regulations are met, the Board must enter into a general medical services contract with the person or persons named in the notice given under paragraph (1).

(6) In addition to the terms required by the Act and the General Medical Services Contracts Regulations, a general medical services contract entered into by virtue of this regulation must provide for—

> *(a) the general medical services contract to commence immediately after the termination of the agreement;*
>
> *(b) the names of the patients included in the contractor's list of patients immediately before the termination of the agreement to be included in the first list of patients to be prepared and maintained by the Board under paragraph 17 of Schedule 3 to the General Medical Services Contracts Regulations;*
>
> *(c) the same services to be provided under the general medical services contract as were provided under the agreement immediately before it was terminated unless the parties otherwise agree; and*
>
> *(d) the opt out of the provision of out of hours services referred to in paragraph (7) in accordance with the terms specified in Part 6 of the General Medical Services Contracts Regulations (opt outs: additional and out of hours services).*

(7) The out of hours services are the services which the contractor was providing under the agreement in accordance with regulation 22 immediately before its termination and which the general medical services contract continues to require the contractor to provide.

(8) An agreement is to terminate on the date stated in the notice given by the contractor under paragraph (1) unless a different date is agreed by the contractor and the Board or no general medical services contract is entered into by the Board by virtue of this regulation.

(9) Where there is a dispute as to whether or not a person satisfies the conditions set out in section 86 of the Act (persons eligible to enter into a GMS contract), or of regulations 5 and 6 of the General Medical Services Contracts Regulations, the contractor may appeal to the First-tier Tribunal under this regulation and the Board is to be the respondent.

(10) Any other dispute relating to this regulation is to be determined by the Secretary of State in accordance with regulation 9(2) and (3) of the General Medical Services Contracts Regulations.

(11) The parties to a dispute referred to the Secretary of State in accordance with paragraph (10) are the contractor and the Board.

41. On 29 February 2020, TMP served notice that it wished to enter into a GMS contract. That notice complied with reg. 32 and set a date of termination as 29 May 2020. If the conditions of reg. 32 are met, it is an absolute obligation on the ICB to terminate the Agreement and put in place a new GMS contract. As part B Para 9.1.2 of the Primary Medical Care Guidance makes clear: “Subject to the contractor's eligibility to hold a GMS contract and the requirement to provide essential services, then there should be no variation in the application of this policy.”

42. However, no steps whatsoever were taken by NCL to satisfy its obligation under reg. 32. NCL remains in continued breach of that regulation and, as compliance with reg. 32 must be an implied term of the Agreement for the reasons set out above, NCL is in breach of the Agreement.

43. NCL cannot terminate the Agreement in circumstances where that Agreement ought to have come to an end in accordance with the PMS Regs 2015 and a new GMS contract concluded instead.

Conclusion and appropriate outcome

44. For all the reasons set out above, the Termination Notice was unlawful. It should be set aside or withdrawn and considered of no effect. The Agreement is still in existence.

45. NCL should now comply with reg. 32 of the PMS Regs 2015 and take steps to conclude a GMS contract."

Observations

NHS England's observations

3.3 "1. These observations are submitted on behalf of the 2nd Respondent, North Central London Integrated Care Board (the ICB). As requested by the PCA, they are restricted to rebuttal of the representations of the Applicant, Tynemouth Medical Practice (TMP), dated 5 June 2023.

2. The ICB has already submitted representations dated 5 June 2023 and therefore does not repeat the content of those representations where they already address the issues raised in TMP's representations. The absence of a response to an issue raised in TMP's representations within these observations should not be taken as acceptance of that allegation, but rather confirmation that the ICB considers it has already set outs its position sufficiently through its earlier representations and the contemporaneous notices/correspondence referred to within.

Documents

3. Despite having previously submitted two bundles with its application, to which the ICB referred to in its previous representations, TMP has now submitted 7 bundles labelled A to G which incorporate the same information but are ordered and numbered differently.

4. Within these observations, the ICB refers to the Applicant's new bundles in the format [Bundle Letter/Document Number/Page Number]. For example, the Agreement is located at [A/2/174-434].

5. The references in the ICB's original representations remain to the original bundles submitted by TMP. If it would assist the PCA, the ICB can resubmit those representations with the references updated to refer to the new bundles submitted by TMP (but with no changes to the substantive contents of those representations).

Grounds / issues

6. Similarly, TMP's application originally referred to four issues, numbered issues 1, 2, 3 and 4, but TMP's observations now refer to five grounds, numbered grounds 1, 2, 3, 4 and 5.

7. Again, within these observations, the ICB refers to the newly formulated grounds 1 - 5, however the ICB's original representations refer the original issues 1 - 4.

8. In general, it appears that:

a. Issue 1 is now grounds 1 and 2;

b. Issue 2 is now ground 3;

c. Issue 3 is now as ground 4; and

d. Issue 4 is now ground 5.

Ground 1: the Termination Notice was unlawful in relying on the third remedial notice which was not a proper "remedial notice" as it did not comply with cl. 64.2

9. In respect of ground 1, the ICB relies on its earlier representations and the contemporaneous notices/correspondence referred to within, and has no further observations.

Ground 2: the Termination Notice was unlawful in that TMP had taken steps to remedy the breach as identified in the purported remedial notices

10. In respect of ground 2, the ICB relies on its earlier representations and the contemporaneous notices/correspondence referred to within, but also makes the following observations on TMP's representations.

11. TMP relies on five "broad points" set out at paragraph 30 of its representations, along with three detailed appendices each focusing upon a different thematic area: Appendix 1: Safeguarding, Appendix 2: Medical Reviews and Management, and Appendix 3: Cold Chain Management. These broad points and the appendices are addressed in turn below.

Broad points

12. The ICB relies on its earlier representations, and the contemporaneous notices/correspondence referred to within, in respect of the first, second and fourth broad points, found at paragraph 30 (a), (b) and (d) of TMP's representations (respectively).

13. In respect of the third broad point, found at paragraph 30(c), the ICB rejects TMP's submission that "it cannot be envisaged that de minimis breaches, or breaches of terms that are not fundamental, would be sufficient to ground a termination". TMP's submission is wrong and without factual or legal basis for the following reasons:

a. TMP claims this submission is supported by "a proper interpretation of the legislation and the contract" but offers no further explanation. There is no authority for this proposition within either the express terms of the Agreement itself or the legislation that governs it, namely the National Health Service (Personal Medical Services Agreements) Regulations 2015. The Agreement takes effect takes effect as a normal commercial contract and should be interpreted accordingly (see paragraph 28 of the ICB's earlier representations).

b. TMP also claims the existence of a "widely established principle in contract law that not every breach gives rise to an entitlement to terminate" and that "There is nothing in the legislation or contract to suggest that this principle was sought to be displaced by the contractual arrangements." TMP provides no authority for this principle or how it overrides the express terms of the Agreement and the Regulations.

c. The Agreement includes a prescriptive and detailed set of express terms – which comply with the Regulations – which set out a variety of scenarios in which one or both of the parties have a right to serve notice to terminate the Agreement. These include scenarios where the breaches are more serious (e.g. clause 62 – "Termination by the Board for a Serious Breach" [A/2/288]) but also where there is no requirement to establish a breach at all (e.g. clause 58.1 – "Termination by Serving Notice" [A/2/280]). These examples are both mandatory terms required by schedule 2, paragraphs 55 and 59 respectively of the Regulations. In respect of the latter, the effect of this provision (to allow termination by a party for convenience, without proving breach) was confirmed

and found to be lawful by the High Court in Flasz v Havering Primary Care Trust [2011] EWHC 1487 (Admin).

d. It may be TMP is referring to the common law right to terminate a contract for repudiatory breach. If so, this does not assist TMP as the ICB has relied solely upon its express contractual rights of termination set out within the Agreement.

14. In respect of the fifth broad point, found at paragraph 30(e), the ICB relies on its earlier representations, and the contemporaneous notices/correspondence referred to within. However, TMP's allegation that the ICB's assessments as to TMP's compliance with the Remedial Notices are "manifestly defective" are dealt with in context within the specific responses set out within the tables appended to these observations (see below).

Appendices

15. As set out above, TMP has provided three detailed appendices each focusing upon a different thematic area: Appendix 1: Safeguarding, Appendix 2: Medical Reviews and Management, and Appendix 3: Cold Chain Management. These set out specific and detailed submissions made by TMP in its representations for the first time, whereas its application had previously only consisted of generalised allegations that had not been particularised, explained or supported by evidence.

16. The appendices primarily seek to demonstrate that the ICB's assessment under clause 64.4 (i.e. that TMP had not taken the required steps to remedy the breach by the end of the Remedial Notice Period) was incorrect.

17. The ICB does not repeat its individual assessments here, which are set out within the contemporaneous correspondence, and summarised (with full references) within the ICB's representations (see Tables 1 and 2 within those representations). The ICB primarily relies on those original assessments however now sets out its observations on TMP's specific and detailed representations. The ICB has not responded to every submission made by TMP; where this is the case it should not be taken as acceptance of that allegation, but rather confirmation that the ICB considers it has already set outs its position sufficiently through its earlier representations and the contemporaneous notices/correspondence referred to within.

18. The way in which TMP has set out representations submissions within each Appendix has made it more difficult to track TMP's representations against the remedial steps and assessments previously set out by the ICB in the contemporaneous notices and correspondence. To assist in this exercise, the ICB has prepared a table for each Remedial Notice, made up of the following columns (from left to right):

a. Remedial Action – as set out within each Remedial Notice (including original numbering);

b. Original Assessment (Met/Not Met) – as assessed by the ICB and set out in the corresponding assessment letters of 23 December 2019, 3 March 2020 and 20 May 2021 (respectively); and

c. LDR Assessment (Met/Not Met/Not Reviewed) – as assessed by the ICB as part of the Local Dispute Resolution (LDR) process initiated by TMP, as set out in the ICB's letter of 16 March 2022;

d. Appellant's Combined Representations dated 5 June 2023 – the extract of the relevant submissions that apply to the remedial action in question, taken from the appendices appended to TMP's representations; and

e. ICB Response – the ICB's response to TMB's submissions.

19. Please note that the first four columns all simply reproduce information that is already available, but in a format that maps TMP's representations to the original Remedial Notices, individual actions and ICB assessment letters. The final column sets out the ICB's response to TMP's submissions for the purpose of these observations.

20. The responses set out in the appended tables should be considered individually by the PCA and are not repeated here. However, the following overall observations are made:

a. Overall, and as set out in the appended tables, the ICB has not changed its position in respect of its assessment of TMP's compliance with the Remedial Notices.

b. Across the three Remedial Notices, there are 48 remedial actions that the ICB originally assessed as Not Met (and, where applicable, upheld this assessment following the LDR process) in respect of which TMP has made no representations. 18 of these unmet remedial actions without submissions from TMP were under the 3rd Remedial Notice and specifically reviewed as part of the LDR process.

c. TMP are fully aware that the ICB relies upon all of these unmet remedial actions as grounds for termination. This is clear from the Termination Notice itself. However, in any event, TMP was subsequently explicitly informed of, and evidently understood, this:

i. On 9 February 2023, TMP's solicitors wrote to the ICB as follows:

"As identified in our client's application (§34), the Notice includes a preface indicating that the Notice does not specify the complete series of breaches relied upon by NCL ICB and that matters addressed in the Notice is expressly said not to be "the full list". We consider that clarification is necessary because the position adopted by NCL ICB will have a material impact on the nature and extent of the work and time that is required by the parties in preparing their respective representations and will need to be taken into consideration by NHS Resolution when providing procedural directions. Thus, we invite you to clarify the position of NCL ICB at this stage."

ii. The ICB's solicitors responded on 24 February 2023 as follows:

"The ICB relies upon the termination notice and prior contractual notices (and matters and documents referred to therein) to the fullest possible extent in support of its decision to terminate the PMS agreement. We do not agree with your assertion that the termination notice "includes a preface indicating that the Notice does not specify the complete series of breaches relied upon by NCL ICB and that matters addressed in the Notice is expressly said not to be "the full list"". The clauses of the PMS agreement which our client considers your client to be in breach of, and the grounds for termination, are set out within the termination notice. While the ICB gave examples of concerns within the termination notice, and stated that these were "not the full list of patient safety concerns identified", the ICB specifically stated "the ICB ask's that you refer to the ICB's assessment documents for all the notices issued."

iii. This predicated TMP's request for substantial extensions of time, including that requested in its solicitors' letter of 2 March 2023, which states:

"The notice also cross-refers to a panoply of historic documents and allegations. In inter partes correspondence, the respondent has confirmed that it intends to rely on all those historic documents and allegations as justifying its decision."

We enclose copies of this correspondence by way of an updated version of the bundle originally submitted with the ICB's earlier representations.

d. TMP repeatedly alleges that, when the ICB was assessing TMP's compliance with the Remedial Notices, by noting concerns about the information provided by TMP the ICB was making new allegations and/or the ICB had "moved the goalposts". It is neither fair nor appropriate to criticise the ICB for identifying legitimate concerns arising from the practice's submissions which may impact the quality and/or safety of services provided to patients. Furthermore:

i. The Remedial Notices explicitly set out the underlying breaches of clauses of the Agreement and required TMP to remedy those breaches. However, in TMP's representations, TMP frequently seeks to present the remedial actions under the Remedial Notices as no more than requests for information with which it could comply simply by providing any information, regardless of the content or substance of that information or whether it is sufficient to demonstrate (to the ICB's satisfaction) that the remedial action is substantively complete and that the breach is remedied.

ii. Under clause 64.2.2 of the Agreement, the Remedial Notice must specify "the steps that the Contractor must take to the satisfaction of the Board in order to remedy the breach", and under clause 64.4, the right to terminate arises where the ICB "is satisfied that the Contractor has not taken the required step to remedy the breach by the end of the Remedial Notice Period". Thus the purpose of the ICB's assessment whether TMP has taken those steps to its satisfaction to remedy the underlying breaches referred to within the Remedial Notices.

iii. In any event, the ICB identifying concerns does not render its assessment of compliance with previous remedial actions invalid.

iv. Furthermore, such concerns did also form the basis of future allegations in the future Remedial and/or Termination Notices, which is precisely how TMP argues the ICB should have dealt with such concerns.

e. TMP repeatedly refers to events that took place, or information that was submitted, after the end of the Remedial Notice Period in respect of each Remedial Action. The timing of the assessment of compliance with Remedial Notices, for the purpose of clause 64.4, is at the end of the Remedial Notice Period (see paragraphs 46 – 50 of the ICB's earlier representations).

f. In the event that the PCA finds one or more of the ICB's assessments was incorrect (whether in full or in part), the ICB submits that this does not affect the validity of any other assessments or the relevant Remedial or Termination Notice as a whole (so long other valid grounds for those notices remain). The ICB relies on Clause 83.1 (Severance) of the Agreement [A/2/309] and submits that the same principles should apply to any finding by the PCA of invalidity in respect of part of any Remedial or Termination Notice relied upon by the ICB.

<u>Ground 3: termination in breach of requirements of procedural fairness and altogether unreasonable</u>

21. In respect of ground 3, the ICB relies on its earlier representations, and the contemporaneous notices/correspondence referred to within, but makes some observations on the new allegations of delay (amounting to procedural unfairness) and predetermination which were not set out within TMP's original application.

22. The ICB has already set out its position that the dispute before the PCA is of a purely contractual nature and that TMP cannot rely on public law arguments or remedies to improve its contractual position, no matter how "public" or statutory the context to the dispute, including in relation to contractual termination procedures (see paragraph 26 onwards of the ICB's earlier representations).

23. The ICB has already acknowledged the existence of delays and apologised for these (e.g. [C/2/7, C/7/25 C/7/26, C/9/33]). As demonstrated by TMP requiring over 7 months to formulate its arguments and evidence in respect of this appeal (see paragraph 7 of the ICB's earlier representations), these matters can take considerable time to consider. In relation to the overall timescales, while the history of this matter spans several years, the ICB should not be criticised for repeatedly attempting to remedy the breaches under the 1st, 2nd and 3rd Remedial Notices, as well as undertaking the LDR process, prior to proceeding to termination and the NHS dispute resolution process. TMP describes the delays as having "significantly impacted on the ability of the practice to stabilise and, subsequently, to fully progress" and corresponding impacts on finances, recruitment and retention (paragraph 35(c) of TMP's representations), but each Remedial Notice was in fact an opportunity to implement such improvements that it did not take. TMP has not provided any evidence of the alleged impacts described.

24. However, the existence of and reasons for any delays are not relevant to the determination of this dispute. The Agreement expressly addresses the implications of any alleged delay by or against either party. Clause 80 states [A/2/306]:

"The failure or delay by either party to enforce any one or more of the terms or conditions of this Agreement shall not operate as a waiver of them, or of the right at any time subsequently to enforce all terms and conditions of this Agreement. Any waiver of any breach of this Agreement shall be in Writing."

25. There has been no waiver by the ICB of its right to exercise its rights under the Agreement. The ICB is entitled to rely upon the full history of breaches and notices as grounds to terminate the Agreement; indeed the full history is important context to its decision to terminate the Agreement, as set out within the Termination Notice itself.

26. In respect of TMP's allegation of predetermination, this is not supported by any cogent evidence of the sort that would be necessary to lead a fair-minded observer to conclude there is a real possibility of pre-determination. At its highest TMP has referred to "[s]ubtle insinuations". However, to indulge TMP's speculation as to such matters, one might alternatively suggest that had the ICB (including its decision-making committees and predecessor CCG) decided to the terminate the contract from the outset in 2018, it might have proceeded to termination much sooner and not attempted to secure improvements through the 2nd and 3rd Remedial Notice that followed. It is noteworthy that the ICB did changes its assessment of some Remedial Actions from "Not Met" to "Met" as part of the Local Dispute Resolution procedure. It is also noteworthy that the decisions in question which led to the issue of contractual notices have been taken by committees established by the ICB (and previously the CCG). These committees were constituted of a variety of voting members (including GPs, other clinicians and lay members) with the involvement of a variety of non-voting members and invited representatives (including community members, Local Medical Committee representatives, Health and Wellbeing Board representatives and Healthwatch representatives) whose identities have changed over time. In the circumstances, without specific evidence suggesting pre-determination, a fair-minded observer would conclude that the possibility of predetermination is low in the circumstances.

Ground 4: the cumulative effect of the breaches is not such that to allow the contract to continue would prejudice the efficiency of the services to be provided under the contract under cl. 64.6

27. In respect of ground 4, the ICB relies on its earlier representations, and the contemporaneous notices/correspondence referred to within, and has no further observations.

Ground 5: the cumulative effect of the breaches is not such that to allow the contract to continue would prejudice the efficiency of the services to be provided under the contract under cl. 64.6

28. In respect of ground 5, the ICB relies on its earlier representations, and the contemporaneous notices/correspondence referred to within, and has no further observations.

Conclusion

29. For the reasons set out above and within the ICB's earlier representations, the ICB invites the PCA to determine that the ICB is permitted to terminate the Agreement and that the Termination Notice is valid and effective."

The Contractor's observations

3.4 "1. These are the reply submissions of Tynemouth Medical Practice ("TMP") to the representations of the North Central London Integrated Care Board ("NCL ICB") dated 5 June 2023.

2. TMP is disappointed that NCL ICB, as a public authority which one would hope seeks to act responsibly, reasonably, fairly and in the public interest, has not, in light of TMP's serious and careful submissions, decided to withdraw the termination notice and re-engage with the practice with a view to reaching an amicable solution going forward. Instead, NCL ICB has doubled down on its termination notice and, further, sought to argue that it is not bound by basic duties of fairness and reasonableness.

3. Consequently, TMP reiterates its primary contention that the termination notice was unlawful.

4. These submissions are joined by two appendices which form a central part of the submission. This document will not rehearse the submissions made in TMP's earlier documents or respond to every single point in NCL ICB's submissions: it considers that its primary case has been properly set out in its previous two submissions. The fact, therefore, that a point in NCL ICB's representations is not addressed here should not be taken as acceptance of it.

5. The first, Appendix A, is a letter dated 10 October 2023 produced by Gabriella Calimandri, Practice Manager at TMP, which provides information about how the Practice has developed over the past five years and about its current operating practices. It is vital that Primary Care Appeals reads this in full. It provides the most up-to-date information about the practice and how it continues to work well to serve the interests of its patients. As Ms Calimandri says, "During the last five years we have worked tirelessly to address adequately each of the concerned identified by the CQC [and NCL ICB]. During that time, each of the practice's systems, policies and procedures have been reviewed, updated and re-implemented. The CQC has recognised the dramatic improvements achieved by the practice, and following an inspection in March 2022 re-rated the practice with an overall rating Good". Ms Calimandri's letter, and the CQC inspection, demonstrate the sheer irrationality of NCL ICB's position in continuing to rely on breach notices served over five years ago. The reality of the matter is that – irrespective of whether or not those breach notices were entitled – the practice is providing a high quality and good service in support of its

patients. Those patients would not be served well by the termination of TMP's agreement.

6. The second Appendix provides a detailed factual response to the remaining thematic areas which it is now clear NCL ICB continues to rely on (see paragraph 20 of its submissions) notwithstanding that TMP maintains its position that this is not permissible given they were not listed in the termination notice. It should be read alongside the other detailed narratives provided by TMP addressing the thematic areas which are identified in the termination notice.

Approach to the contract

NHS contracts vs non-NHS contracts

7. At paragraphs 25-37 NCL ICB contends that no public law principles are applicable to NCL ICB's termination of the contract. These submissions are fundamentally misconceived and risk drawing Primary Care Appeals into making an error of law. At their heart, NCL ICB's submissions misunderstand the crucial difference between an NHS contract and a non-NHS contract.

8. GP contracts can be divided into two different legal categories – an NHS contract and a non-NHS contract – pursuant to the operation of section 9(5)-(6) NHSA 2006 which provides:

"(5) Whether or not an arrangement which constitutes an NHS contract would apart from this subsection be a contract in law, it must not be regarded for any purpose as giving rise to contractual rights or liabilities.

(6) But if any dispute arises with respect to such an arrangement, either party may refer the matter to the Secretary of State for determination under this section."

9. An NHS contract is not in legal reality a contract at all. It does not give rise to contractual rights or liabilities. Breaches of the contract cannot be enforced through the civil courts, as the Court of Appeal put it in Pitalia v NHS Commissioning Board [2014] EWCA Civ 474 at §5:

"5. The importance of the question of whether the arrangements between the Pitalias and the CLPCT were or were not an "NHS contract" is that, if they constituted an NHS contract, section 9(5) of the NHSA 2006 provides that an NHS contract "must not be regarded for any purpose as giving rise to contractual rights or liabilities". An NHS contract cannot, therefore, be sued upon in the courts."

10. That case was not a public law case or claim for judicial review: it was an attempt to enforce an NHS contract through a private law action. Having found the agreement in that case was an NHS contract, the Court of Appeal went on to say "If that is right, the Pitalias had no legally enforceable contractual rights against the CLPCT ... In the circumstances, the Pitalias cannot, in my judgment, have any right to relief against the CLPCT and the claim ought to be struck out" (at §37).

11. Indeed, as was put in R (Shashikanth) v NHS Litigation Authority [2022] EWHC 2526 (Admin) at §9, an NHS contract "is not really a contract". By contrast, a non-NHS contract "does create contractual rights and liabilities which can in principle be enforced by a private law court claim. As has been held in cases of contracts for dental services under provisions which are not materially distinguishable, it takes effect as a normal commercial contract" (Shashikanth at §10). [Primary Care Appeals ought also to be aware that the Claimant in Shashikanth was granted permission to appeal by the Court of Appeal and an appeal is listed for late February 2024, although this appeal is unlikely to have any implications for the legal principles in the present appeal.]

12. The claim in Shashikanth concerned a claim for judicial review of a decision to terminate the contract and of the decision of Primary Care Appeals to uphold the termination. The agreements at issue were non-NHS contracts and "therefore created rights and liabilities enforceable in private law" (at §14).

13. It was precisely for this reason that the High Court found that the termination decision was not amenable to judicial review: as the contract gave rise to contractual liability, the appropriate route was to bring a private law action in the civil courts.

14. NCL ICB has relied on §136 of Shashikanth but it is important to read that paragraph with §135 and in full:

"135. It therefore appears that the present case is the first in which (1) a challenge is mounted to decisions of both NHS England and the adjudicator, (2) the challenge arises from a non-NHS contract, (3) the issue of amenability to judicial review is "live" in the sense that at least one substantive ground has merit, subject to amenability, and (4) reference has been made to all of the previous cases which appear to be relevant.

136. In my judgment, the line of cases consisting of Walsh, Mercury Energy , Supportways and Krebs make it entirely clear that parties to a contract cannot rely on public law arguments or remedies to improve their contractual position, no matter how "public" or statutory the context to the dispute. Those cases thus make clear that when one party invokes a contractual termination procedure, if the other party wishes to show that termination was not in accordance with the contract, that must be done (if not by any contractual mechanism as in the present case) by private law action and not by judicial review. The cases recognise the possibility that judicial review might yet lie to challenge a termination that was fraudulent or in bad faith, but that is not this case" (emphasis added).

15. Thus the reason why the decision in that case was not amenable to judicial review was because the contract at issue gave rise to rights enforceable by private law action. That was the correct route for enforcing the contract – not a claim for judicial review. That principle simply is inapplicable to an NHS contract which does not give rise to a right enforceable by private law action. The contract holder of an NHS contract cannot sue on the contract. The only route available to them is to appeal the decision or to bring a claim for judicial review. In practice they must appeal the decision first because if they fail to do so and proceed immediately to a claim for judicial review the High Court is likely to find that they have failed to exhaust an alternative remedy available to them: see the Administrative Court Judicial Review Guide 2023, paragraph 6.3.3.

16. The importance of the availability of contractual remedies is also summarised at §150:

"*150. None of this means that decisions of the First Defendant are necessarily immune to legal challenge. The parties in this case may have had rights under the Arbitration Act 1996, but that has not been explored. So far as judicial review is concerned, the obstacle is not the nature of the First Defendant as a decision making body, but the nature of the dispute. The First Defendant is subject to judicial review of its decisions if they arise from an "NHS contract" which cannot be enforced in private law. Even in a case arising from a non- NHS contract, it seems that judicial review would ultimately be available in a case of fraud or bad faith. But otherwise, in my judgment, judicial review was not an available remedy for the Claimant's contractual complaint."*

17. NCL ICB's position in this case appears to be in total conflict with the position of NHSE in Shashikanth which was to accept (at §75) that judicial review is permitted in respect of NHS contracts, relying on R (SSP Health Ltd) v NHSLA [2021] PTSR 958 in which the amenability to judicial review of a decision in respect of an NHS contract was not disputed by the court.

18. Similarly, Krebs v NHS Commissioning Board [2014] EWCA Civ 1540, relied on by NCL ICB, concerned a non-NHS contract: as the Court of Appeal explained at paragraph 2, “Once the contracts are signed, however, they take effect as normal commercial contracts”.

19. It is not in dispute that the Agreement the subject of this appeal is an NHS contract and therefore, under s.9(5) NHS 2006, does not create contractual rights or liabilities. But the NCL ICB’s submissions on this point totally ignore the fundamental distinction between NHS and non-NHS contracts and make no attempt to draw it to the attention of Primary Care Appeals.

20. The perverse outcome of NCL ICB’s submission is that TMP would be left with neither a claim in contract nor a claim in judicial review against its termination. It would simply have no judicial remedy available to it. That would offend basic principles of the rule of law and, it is submitted, be in breach of Article 6 ECHR, which requires that, in the determination of a civil right or obligation, everyone is entitled to a hearing by an independent and impartial tribunal established by law. NHS Primary Care Appeals could not in law satisfy this function: both it and NHS England are not independent of the Secretary of State for Health and Social Care and, absent judicial oversight, are not sufficiently independent to be able to fulfil adjudicatory roles under Article 6. Both NHS Primary Care Appeals and NHS England undertake functions on behalf of the Secretary of State, spend money allocated by the Secretary of State and act in ways that are substantially influenced by or under legal mandate or direction from the Secretary of State. Hence, in making a decision concerning a GP contract, NHS Primary Care Appeals is making decisions on contracts which are ultimately funded by the Secretary of State and to discharge duties for which the Secretary of State is legally and politically accountable (see s.1 of the NHS Act). [This was an argument raised in the Shashikanth litigation but which could not be pursued because of a procedural objection, namely that it had been raised too late on the last day of the hearing. In any event, the argument in Shashikanth would apply with even greater force in the present case because in Shashikanth there was at least a contractual remedy available: here there is none.]

Applicability of public law principles

21. For the above reasons, and for those set out at paragraphs 17 to 24 of TMP’s appeal submissions, the decision of NCL ICB to terminate the contract is one that is amenable to judicial review. A decision of Primary Care Appeals in respect of that termination would also be amenable to judicial review.

22. In those circumstances, there is no doubt that public law principles are imported into the decision to terminate the contract. It has been widely recognised for decades that no discretionary power that is amenable to judicial review, even a very wide power, is unfettered: see e.g. R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme [2001] 2 AC 349, 381B. The power of NCL ICB to terminate the contract, being a decision amenable to judicial review, is similarly a power that is subject to constraint in accordance with ordinary public law principles. Those principles include the principles of natural justice and procedural fairness and the duty to act reasonably.

23. In circumstances where a decision could be quashed on the basis that it offended a principle of public law, then it is clear that the contract – to the extent an NHS contract imports ordinary contract law principles – must also include an implied term that the parties will comply with their public duties in accordance with the principles set out M&S plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742. This question would not ordinarily arise because very few contracts with public law authorities are amenable to judicial review, but the specific circumstances of the NHS contract invite this conclusion. [And so consequently the differences between a duty to exercise a contractual discretion reasonably is a separate question and the duty to act

reasonably under Wednesbury do not arise in this context: cf Warwickshire College v Malvern Hills District Council [2023] EWHC 2008 (Ch) at §49.]

24. NCL ICB's submissions in respect of Jones v NHS Commissioning Board [2017] EWHC 3457 (QB) confuse the remedies available on an application for judicial review (including interim relief) and the powers of Primary Care Appeals: the point being made there is that Primary Care Appeals would not have a power available to it to grant in interim injunction.

25. NCL ICB also suggests that because the Agreement the subject of this appeal did not include an express term importing public law obligations in the contract, then R (Haffiz) v NHS Litigation Authority [2020] EWHC 3792 (Admin) does not support the inclusion of an implied term. But Haffiz concerned a non-NHS contract, and so the argument that public law terms are implied by virtue of the amenability of the contract to judicial review could not arise: see §78, where Steyn J states that the decision was not amenable to judicial review. At §39, Steyn J refers to the decision of Jonathan Haley, Head of Operations, Primary Care Appeals, who made the determination in respect of the appeal the subject of that claim. As Steyn J records "he references NHS England's assertion that the Contract is not an 'NHS contract' pursuant to s.9 of the 2006 Act and therefore the public law principles of fairness and reasonableness do not apply to disputes under the Contract". Thus it appeared in that case NHSE implicitly accepted that an NHS contract does carry public law principles of fairness and reasonableness.

Response on ground 1

26. TMP's primary case on this is set out at paragraphs 25-28 of its submissions.

27. NCL ICB has sought to defend the 3rd remedial notice's practice of setting out remedial questions rather than "steps...to remedy the breach" as required under cl. 64.2. At paragraph 41(c) it is suggested that responding to a question is a "step to remedy the breach". The focus of NCL ICB's submissions is on the fact that a question is a "step". But that is to stop the analysis short. What is required is that the step must be such as to remedy the breach. It is not to provide information to NCL ICB to determine whether or not there has been a breach: that should come earlier. NCL ICB must have already determined there is a breach and the purpose of the step is to remedy the breach. Providing information to NCL ICB cannot remedy the breach.

28. NCL ICB's position therefore rests on a misunderstanding of what is required by the contract. The 3rd remedial notice is not compliant with the contract and so the termination notice is also not valid.

29. At paragraph 42, NCL ICB appears to argue that even if the 3rd remedial notice is defective, this can somehow be "severed" from the validity of the termination notice. That is a staggering suggestion: it is inviting Primary Care Appeals to terminate the contract on the basis of remedial notices which, on their own terms, are dramatically out of date. That is also not a fair reading of the termination notice. The termination notice is simply invalid without the 3rd remedial notice. This submission should be rejected.

Response on ground 2

30. The detailed narrative setting out how TMP had remedied the breaches is set out in the appendices to TMP's submissions and the second appendix to these reply submissions. They are not repeated here. Nothing in NCL ICB's submission undermines those submissions.

Response on ground 3

31. NCL ICB's response at paragraph 49 ignores the importance of the information relied on being out of date: the core point here is about fairness, as set out in detail in TMP's submissions at paragraph 35(c) and the application. No attempt has been made to grapple with that submission in their response.

32. NCL ICB at paragraph 55 also suggests that the narratives/examples included in its notices could be entirely omitted and the notices would still be valid. For the reasons set out above in relation to the termination notice, Primary Care Appeals should not be drawn into this attempt to sever the parts of the notices which are unhelpful to NCL ICB. The notices must be read in their entirety: it is not possible to carve them up in this way. To do so is fundamentally unfair and not an ordinary and realistic reading of the notices.

33. At paragraph 61, a suggestion is made that it was "perfectly possible for TMP to understand all relevant matters from the documentation provided by the ICB". For the reasons already set out, this was false. TMP's submissions explain in great detail how difficult it was to engage with NCL ICB as to what was required.

Response on ground 4

34. At paragraph 66, NCL ICB submits that in order to terminate the contract under clause 64.7 it need only be "satisfied" that the cumulative effect of the breaches is such as to allow this Agreement to continue would prejudice the efficiency of the services to be provided under it. It appears to be suggested that NCL ICB is the absolute and sole arbiter of this: once it is satisfied, that is the end of the matter. For the reasons set out above in relation to the applicability of public law principles, that is clearly wrong. But even if this were an ordinary contract, there would be an implied term that in order to exercise this contractual discretion it must act reasonably. NCL ICB cannot arrogate to itself absolute power in the way it has attempted to do so. It is a public authority which must behave responsibly.

35. To the extent NCL ICB's reasoning rests on reliance on breaches in the remedial/termination notices, then this is defective for the reasons outlined. No allegations outside those notices are made or evidenced.

36. In any event, for the reasons set out in TMP's submissions and in the letter provided by Ms Calimandri, NCL ICB's conclusion as to this was irrational.

Response on issue 4

37. NCL ICB's submission misses the crucial point that the obligation under reg. 32(5) PMS Regs 2015 is a mandatory one: once notice is given in writing in accordance with reg. 32(1)-(2), then NCL ICB must enter into a GMS contract. NCL ICB cannot unilaterally decide that a request had been abandoned. There is no scope for such a practice in the regulations.

38. NCL ICB's case rests on an unevidenced assertion that it replied to TMP's email on 2 March 2020 (see para 73(a)). Primary Care Appeals should not proceed on the basis of this assertion: if the email cannot be found, it must be assumed it was never sent. TMP has no record of such an email. This is particularly the case where NCL ICB has not actually provided evidence of the records which are said to indicate that a reply was sent. Primary Care Appeals has to deal with the evidence that is actually before it.

39. NCL ICB also dispute that the notice served on 29 February 2020 was a valid notice. NCL ICB relies on the service provisions in clause 84, but clause 84.1 is clear that those only apply to notices "required or authorised by this Agreement". That is not what this notice is: this is a notice given outside the Agreement under the PMS Regulations 2015.

40. In any event, clause 84.3 provides that a notice sent under clause 84.1 which is not in accordance with clause 84.3 is not invalid if the person receiving it elects in writing to treat it as valid. Given that NCL ICB's primary case is that it did engage with TMP's case, it clearly did elect in writing to treat the notice as valid. The clause 84.3 argument is a distraction and goes no where.

Conclusion and appropriate outcome

41. For all the reasons set out above and in TMP's other submissions, the Termination Notice was unlawful. It should be set aside or withdrawn and considered of no effect. The Agreement is still in existence.

42. NCL should now comply with reg. 32 of the PMS Regs 2015 and take steps to conclude a GMS contract."

4 CONSIDERATION

4.1 From the information before me, I am of the view that local dispute resolution has been exhausted following which the Contractor has referred the matter in dispute to NHS Resolution. There is no dispute between the parties that local dispute resolution has not been entered into and therefore I will proceed to consider the matters before me.

4.2 As part of this consideration of the application for NHS dispute resolution, I required an up-to-date version of the contract in dispute containing all variations agreed since the contract was signed. This was provided by the Contractor and has not been disputed by the Commissioner. I have therefore assumed that the contract between the parties reflects the provisions of the relevant Regulations in force at the relevant time and proceed to determine this dispute on that basis.

4.3 It is undisputed between the parties, that GP services have been provided on the premises of Tynemouth Medical Practice since approximately 1996, and there is a Personal Medical Services Agreement ("the Agreement") in place between the parties.

4.4 It is the Contractor's position that the Termination Notice relies on defective remedial notices and defective reasoning as to non-compliance with those remedial notices and that the Termination Notice was unlawful in relying on the third remedial notice which was not a proper "remedial notice" as it did not comply with Clause 64 of the Agreement.

Clause 64.2

4.5 Clause 64.2 states that:

"*A Remedial Notice must specify:*
64.2.1 details of the breach;
64.2.2 the steps that the Contractor must take to the satisfaction of the Board in order to remedy the breach; and
64.2.3 the period during which those steps must be taken ("the Remedial Notice Period")."

4.6 I have reviewed the papers provided to me which contains copies of the Remedial Notices referenced and significant commentary on these by each of the parties. I have considered the position of each of the parties.

4.7 I note that in the 1st Remedial Notice, dated 13 November 2018, the Commissioner identified the Agreement clauses which had been breached by the Contractor. The Commissioner also included a table which set out the relevant provision of the Agreement, details of the breach and the remedial actions required by the Contractor by the deadline of 11 December 2018. The Commissioner also provided page

references to a CQC report which identified breaches. I am satisfied that the 1st Remedial Notice satisfied the requirements of Clause 64.2.

4.8 In the 2nd Remedial Notice, dated 25 September 2019, the Commissioner identified the Agreement clauses which had been breached by the Contractor. The Commissioner also included a table which set out the relevant provision of the Agreement, details of the breach and the remedial actions required by the Contractor by the deadline of 25 October 2019. Again, the Commissioner also provided page references to the CQC report which identified breaches. I am satisfied that the 2nd Remedial Notice satisfied the requirements of Clause 64.2.

4.9 In the 3rd Remedial Notice, dated 11 August 2020, the Commissioner identified the Agreement clauses which had been breached by the Contractor. I note that the format applied in the 1st and 2nd notices was not adopted in the 3rd Remedial Notice. Instead, the Commissioner included a table which set out the remedial actions required by 11 September 2020 and an evidence table which sets out the details of where the Contractor failed to remediate the actions set out in the 1st and 2nd Remedial Notices, including a repeat of the concerns in the CQC Report, dated 18 October 2019. Whilst there is a requirement for the Commissioner to comply with Clause 64.2, there is no requirement for the Commissioner to serve the notice on the Contractor in a particular format. I am content that the requirements of Clause 64.2 have been met.

Clause 64.4

4.10 Clause 64.4 states that:

"*Where the Board is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the Remedial Notice Period, the Board may terminate this Agreement with effect from such date as the Board may specify in a further notice to the Contractor*."

4.11 It is the Contractor's position that "*the termination notice does not specify at all which breaches actually formed part of the assessment of the termination. A narrative is provided of a selection of allegations, but the notice also cross-refers to historic documents which had obviously at that point been superseded*." I have noted that the Termination Notice states the relevant sections of the Agreement which the Contractor remained in breach of on page 2 of the Termination Notice.

4.12 It is the Commissioner's position that the 1st Remedial Notice set out the details of breaches of the Agreement, the steps the Contractor was required to take to remedy the breaches, and required such steps to be taken by 11 December 2018. As set out in the ICB's letter of 23 December 2019, the Contractor failed to take all such steps by 11 December 2018. The 2nd Remedial Notice set out the details of breaches of the Agreement, the steps the Contractor was required to take to remedy the breaches, and required such steps to be taken by 25 October 2019. As set out in the ICB's letter of 3 March 2020, the Contractor failed to take all such steps by 25 October 2019. The 3rd Remedial Notice set out the details of breaches of the Agreement, the steps the Contractor was required to take to remedy the breaches, and required such steps to be taken by 11 September 2020. As set out in the ICB's letter of 20 May 2021, the Contractor failed to take all such steps by 11 September 2020.

4.13 The Termination Notice states, in respect of Safeguarding for example, where the Contractor did not satisfy the evidence requirements for each of the 1st, 2nd and 3rd Remedial Notices. The Termination Notice states that, in relation to the 1st Remedial Notice, the Contractor failed to provide evidence that policies were reviewed and monitored for staff employed. In the 2nd Remedial Notice, the Commissioner noted that in relation to the Children and Young People Safeguarding Policy and the Adults Safeguarding Policy, there was no reference or guidance for staff for key areas of the policies. The Children and Young People Safeguarding Policy made references to a

Chaperone but there was no further guidance for staff on who the Chaperone Lead was in the practice. For the Adults Safeguarding Policy, there was no reference in the policy to the importance of DBS checks for staff or guidance for staff if there was an adverse DBS check and what steps should be taken. In the 3rd Remedial Notice, the Commissioner noted that the Contractor had revised its Safeguarding Policy and submitted a combined policy titled Safeguarding for all Vulnerable Groups and a Domestic Abuse Policy. However, there was no Chaperone Lead listed in the policy and the process for DBS checks was not included in the Domestic Abuse Policy.

4.14 The Termination Notice also details the outcome of the local dispute procedure - Practice challenge against the 3rd Remedial Notice (15 March 2022). In relation to Safeguarding, the Commissioner notes that the Contractor's resubmitted evidence did not show "*recognised training for the lead GP to ensure they have the relevant skills to act as a Chaperone, to guide and supervise other members of staff in the practice. The practice in response to the 3rd Remedial Notice had submitted a training log for Chaperone training for the administration team only. None of the GPs had attended training or were listed as Chaperones in the practice. Although a GP lead had been identified in the resubmitted policy by the practice there was no other GP Chaperone listed who could provide cover*."

4.15 In addition to Safeguarding, the Termination Notice also demonstrates where a breach was identified in each of the Remedial Notices and how the Contractor failed to remedy these breaches in respect of Medication reviews and management, and Cold Chain management. In all three of the concerns listed in the Termination Notice, the Commissioner sets out where the breach was identified in each of the three Remedial Notices and the information which the Contractor failed to provide in order to remedy these breaches. The Commissioner also sets out how the Contractor's challenge against the 3rd Remedial Notice, dated 15 March 2022, fails to remedy the breaches. I am satisfied that the requirements of Clause 64.4 are met.

Clause 64.6

4.16 Clause 64.6 states that:

"*If, following a Breach Notice or a Remedial Notice, the Contractor:*
64.6.1 repeats the breach that was the subject of the Breach Notice or the Remedial Notice; or
64.6.2 otherwise breaches this Agreement resulting in either a Remedial Notice or a further Breach Notice,
the Board may give notice in Writing to the Contractor terminating this Agreement with effect from such date as the Board specifies in the notice."

4.17 It is the Commissioner's position that the Termination Notice provides a narrative of a selection of alleged breaches. The Contractor has stated that "*within the Termination Notice, the ICB provided some examples to illustrate its concerns but referred to its full assessment of the practice's responses to the 1st, 2nd and 3rd Remedial Notices, as set out in its letters of 23 December 2019 [A/12/546], 3 March 2020 [A/14/584] and 20 May 2021 [A/18/793] respectively*." It appears therefore that the Contractor's position is that the Termination Notice did not set out which breaches had not been remedied and referenced the Remedial Notices to exemplify where the Commissioner had previously notified the Contractor of these breaches and demonstrated which of these previous breaches remained outstanding.

4.18 I have considered how the Commissioner met its obligations under Clause 64.4 above and I consider that this also demonstrates the Commissioner's compliance with Clause 64.6 as it sets out how the Commissioner demonstrated that the Contractor breached the Agreement resulting in two further Remedial Notices, following the initial Remedial Notice.

Clause 64.7

4.19 Clause 64.7 states that:

"*The Board may not exercise its right to terminate this Agreement under clause 64.6 unless the Board is satisfied that the cumulative effect of the breaches is such to allow this Agreement to continue would prejudice the efficiency of the services to be provided under this Agreement*."

4.20 I understand that on 22 April 2021 the Commissioner alone met to discuss the 3rd Remedial Notice and whether there were grounds to terminate the Agreement. On 14 June 2021 the Commissioner and the Contractor met to discuss the 3rd Remedial Notice and the possibility that the Agreement may be terminated following the outcome of the meeting between the Commissioner alone on 16 June 2021. The Commissioner met on 16 June 2021 and confirmed that the Agreement should be terminated.

4.21 I understand that on 16 June 2021 the Contractor wrote to the Commissioner disputing their decision to refuse the Contractor an opportunity to address issues arising from the responses regarding the 3rd Remedial Notice. The Contractor asked the Commissioner to refrain from making any decision in respect of the outcome of the 3rd Remedial Notice until the Contractor could respond to the issues raised. I have not been provided with a copy of this document, however, it is referred to in the Contractor's letter, dated 23 July 2021.

4.22 On 18 June 2021 the Commissioner wrote to the Contractor's legal representative, informing them "*that the PCCC's decision was to proceed with its decision, and its decision was that the contract should be terminated*." However, the Commissioner stated that "*the CCG notes that you have formally notified the CCG that your client wishes to dispute the decision. Accordingly, we will not implement the decision (i.e. serve notice to terminate) at this time to allow for local dispute resolution.*"

4.23 By way of a letter, dated 23 July 2021, the Contractor sought for the Commissioner to retract its decision to terminate the Agreement. Between October 2021 and February 2022 the Commissioner considered and assessed the Contractor's letter of 23 July 2021. 9 months later, on 16 March 2022, the Commissioner informed the Contractor that the Commissioner had met on 17 February 2022 and had decided to proceed with the termination. In the letter, dated 16 March 2022, the Commissioner stated that "*the case and full assessment was referred again to the North Central London (NCL) Primary Care Commissioning meeting on 17 February 2022. Committee members noted again their decision to proceed to terminate the PMS agreement, but to not issue the termination notice to allow the local dispute process to commence. Committee members noted the detail of the practices response and the concerns identified within the CCGs assessment (pages 5 to 101). The PCCC members were in agreement that there remains grounds to proceed to terminate the PMS agreement dated 1 April 2004 (varied 18 April 2018)."* It is of note that the Commissioner did not serve the Termination Notice at this point.

4.24 In May 2022, the CQC provided the Contractor with an updated report which rated the practice as "Good". During a meeting on 17 May 2022 the Commissioner stated that though the local dispute resolution process had concluded in February 2022 as the 3rd Remedial Notice had not been met, the outcome of the CQC report would be shared with the Commissioner's Committee members. The Commissioner met again on 18 October 2022 to consider the matter and confirmed its decision to proceed to terminate the Agreement. The Termination Notice letter was sent to the Contractor on 27 October 2022 with a termination date of 27 January 2023. The letter acknowledges the length of time taken to serve the Termination Notice and states "*the practice continues to fall seriously short of meeting the service standards required under the PMS Agreement despite the substantial time and opportunities afforded to remedy the breaches*." The letter goes on to say "*The practice's failure to comply with the Remedial Notices in a comprehensive or timely manner, and the repeated/new breaches since contractual action was initated,* [sic] *demonstrates a lack of capability to secure and sustain*

necessary improvements to deliver safe and compliant services, despite years of engagement over such issues."

4.25 I have considered the timeline between when the Contractor was first made aware of the Commissioner's decision to terminate the contract (14 June 2021) and the Termination Notice being served (27 October 2022) which is a period of 16 months. I note that between 14 June 2021 and 16 March 2022 the parties were undergoing local dispute resolution, however, there remained 7 months between the Commissioner's confirmation to proceed with the termination on 16 March 2022 and the Termination Notice on 27 October 2022.

4.26 The 3rd Remedial Notice states that the Commissioner is "*most concerned that this long standing systemic failure in the practice increases an accumulation of risk to patients who are registered with the practice*". Further, the Termination Notice states that the Commissioner was "*concerned regarding the quality of services delivered to patients and level of risk in the practice*". It is unclear, why, if the Commissioner had such patient safety concerns, it took 7 months after the conclusion of local dispute resolution to confirm the termination of the Agreement and until 27 October 2022 to send the Termination Notice letter.

4.27 I note that the Commissioner did consider the CQC report of May 2022 within this 7 month timeframe, however, the Termination Notice states that "*the PCCC members met on 18 October 2022 and considered the change in the Care Quality Commission rating, but deemed that the ICB had prolonged substantial evidence that the practice continued to operate in breach of the PMS agreement, and were concerned regarding the quality of services delivered to patients and level of risk in the practice. Therefore the PCCC members requested that the ICB continue to proceed with the termination of your PMS agreement*." I am not aware that further breach/remedial notices were served during the period between the decision to serve the Termination Notice and it being served, which prior to the Termination Notice being served, would have very clearly demonstrated the position of the Commissioner that further actions had to be undertaken by the Contractor.

4.28 I note that the Contractor's position is that "*the primary impetus for all the remedial notices had been the initial findings of the CQC and the demotion to an overall rating of Inadequate. Each of the breaches alleged in the first remedial notice expressly and exclusively relied upon matters arising from the September 2018 CQC report (B6 – B11). NCL PCCC had not made its own investigations. The notice was entirely dependent upon the CQC report, which NCL PCCC treated as its evidence. Amongst other things, it was alleged that the September 2018 CQC report "provided evidence to Commissioners that there was absence of procedures within the practice to monitor and measure risk in line with guidance" (B6). By the time of the termination notice, however, the CQC had instead given TMP an overall rating of Good. Indeed, as things stand, TMP continues to hold a Good CQC rating. It has taken significant steps to overhaul its processes. The practice continues to provide good quality care to its approximately 10,000 patients*."

4.29 I am not persuaded that the Commissioner's actions to confirm the termination of the Agreement aligns with the requirements of Clause 64.7 of the Agreement, that the cumulative effect of the breaches is such that to allow the Agreement to continue would prejudice the efficiency of the services to be provided under the contract. I am not satisfied that the Commissioner has sufficiently explained the cumulative effect of the breaches is such that to allow the Agreement to continue would prejudice the efficiency of the services to be provided under this Agreement in the context of the very long delays that have occurred in the timeline of the decisions and notices, although, I do note that some regard was had to the delays and is set out in the papers provided. I determine that the Termination Notice dated 27 October 2022 was valid on the grounds of Clause 64.4 but was invalid on the grounds of Clause 64.6 as it did not meet the requirements of Clause 64.7 of the Agreement when considered against the timeline.

Termination was unfair and unreasonable

4.30 It is the Contractor's position that the termination was "*in breach of the requirements of procedural unfairness and altogether unreasonable and perverse*" and the Contractor has made various points in relation to procedural fairness and reasonableness. I have not considered these further.

4.31 The Contractor alleges that "*subtle insinuations*" have been made since the first meeting in October 2018 that they must merge with another practice. Since that point in time, the Contractor states they have been faced with new allegations which never featured in the original Remedial Notice. This has led the Contractor to feel that the Commissioner pre-determined the outcome of this process and closed its mind to the progress the practice has made. I note that no evidence has been provided of these insinuations. The Commissioner has refuted this allegation, stating that the decisions which led to the issue of Remedial Notices have been taken by committees established by the ICB which were constituted of a variety of voting members (including GPs, other clinicians and lay members) with the involvement of a variety of non-voting members and invited representatives (including community members, Local Medical Committee representatives, Health and Wellbeing Board representatives and Healthwatch representatives) whose identities have changed over time. As there is no evidence to suggest any outcomes have been pre-determined, I have not considered this point further.

GMS Contract

4.32 The Parties agree that on 29 February 2020, the Contractor served notice via email that it wished to enter into a GMS Contract. It is the Contractor's position that the notice complied with Regulation 32 of the Regulations and set out a termination date for the Agreement and start date for the new GMS Contract as 29 May 2020. It is the Contractor's position that the Commissioner did not take any steps to satisfy its obligation under Regulation 32. The Contractor has stated that the Agreement should not have been terminated as it should have instead come to an end in accordance with Regulation 32 of the Regulations 2015 and a GMS Contract should have been entered into instead.

4.33 I note that the date of 29 May 2020 has long now passed and neither party progressed discussions regarding entering into the GMS Contract. The Commissioner contacted the Contractor on 11 August 2020 and on 14 August 2020 to confirm whether it wanted to go ahead with the GMS Contract. I note that the Commissioner's email of 14 August 2020 stated "*As per my email below can you confirm whether you still wish your request to convert your PMS agreement to a GMS contract to still be considered, if yes we will commence the assessment and refer this to the NCL Primary Care Commissioning Committee*". A response was received from the Contractor on 11 June 2021 (15 months after the Contractor's original request) to confirm that they did want to go ahead with the new GMS Contract.

4.34 Though the Commissioner stated that they would commence the assessment for the GMS Contract on 14 August 2020, following receipt of the Contractor's confirmation, I have not been provided with any evidence that this assessment has taken place and so I have considered whether a GMS Contract should be in place following the Contractor's request.

4.35 Regulation 32 of the Regulations states that:

32.—(1) Where a contractor is providing essential services under the agreement and would like to enter into a general medical services contract by virtue of this regulation, the contractor must give notice in writing to the Board to that effect at least three months before the date on which the contractor would like to enter into the general medical services contract.

(2) A notice given under paragraph (1) must—

a) state that the contractor wants to terminate the agreement and the date on which the contractor would like the agreement to terminate, which must be at least three months after the date on which the notice was given;
b) subject to paragraph (3), give the names of the person or persons with whom the contractor wants the Board to enter into a general medical services contract; and
c) confirm that the person or persons so named meet the conditions set out in section 86 of the Act (persons eligible to enter into GMS contracts) and regulations 5 (conditions relating solely to general medical practitioners) and 6 (general condition relating to all contracts) of the General Medical Services Contracts Regulations or, where the contractor is not able so to confirm, provide the reason why it is not able to do so together with confirmation that the person or persons will, immediately prior to entering into the general medical services contract, meet those conditions

4.36 The Contractor's letter of 29 February 2020 does state that the Contractor wishes to terminate the Agreement and so this first element of Regulation 32(2)(a) is satisfied.

4.37 It is the Commissioner's case that the Contractor's request to enter into the GMS Contract on 29 February 2020 was invalid under Regulation 32 as the email and letter of 29 February 2020 was sent at 21:13 on a Saturday, which is outside of Core Hours (as defined in the Agreement). In accordance with the notice provisions at Clause 84.3.3 of the Agreement, the request was deemed to have been served on the following Working Day, on Monday 2 March 2020. It appears to be the Commissioner's position that, had the Contractor's notice stated that the Agreement would terminate and a GMS Contract would take its place on 2 June 2020, then this would have been a valid notice and a new GMS Contract would have been entered into.

4.38 Regulation 32(1) states that the Contractor must give notice in writing "*at least three months before the date on which the contractor would like to enter into the general medical services contract*". The Contractor did comply with the notice provisions as set out in the Regulations but not in line with the service of notice requirements which are set out at Clause 84.3.3 of the Agreement.

4.39 Dr Aride was the name provided in the notice to be the sole medical practitioner who will enter into the GMS Contract. Dr Aride is also the listed Contractor on the Agreement, and so Regulation 32(2)(b) is satisfied.

4.40 In relation to the final criteria under Regulation 32(2)(c), the letter of 29 February 2020 states that "*Dr Aride meets the conditions… set in Section 86 of the Health and Social Care Act 2012*". This is not confirmation that the person(s) named meets the conditions set out in section 86 of the NHS Act as the wrong act has been referred to. The letter does, however, confirm that Dr Aride meets the conditions set out in Regulations 5 and 6 of The National Health Service (General Medical Services Contracts) Regulations 2015. I believe the Contractor may have made an error in their letter as section 86 of the NHS Act was amended by paragraph 32 of Schedule 4 to the Health and Social Care Act 2012. The amendment was minor as the words "*A Primary Care Trust*" was substituted for "*The Board*". However, the conditions are still set out in section 86 of the NHS Act. Although the reference to the relevant act is incorrect in the Contractor's letter, the intention to confirm that the conditions in section 86 of the NHS Act are met, remains. I note that the Commissioner has not disputed this point that the conditions are met or provided any evidence that this has been queried. I consider that the Contractor has satisfied this final criteria.

4.41 Under Regulation 32(4) of the Regulations, the Commissioner must acknowledge receipt of the notice before the end of the period of seven days beginning with the date on which the notice was received. The Commissioner confirmed that they have records

indicating that it replied to the Contractor's email on 2 March 2020 but that a copy of this email cannot be located. This position is not agreed by the Contractor.

4.42 Under Regulation 32(5) of the Regulations, provided that the required conditions are met, the Commissioner must enter into a GMS Contract.

4.43 There are a number of complicating factors in relation to this Regulation 32 notice as I have detailed above, which are further confused by no GMS Contract being issued and the Commissioner's emails of 11 and 14 August 2020 asking whether the Contractor still wished for their request for a GMS contract to be considered.

4.44 The Contractor clearly seeks a GMS Contract, and its notice was served significantly more than three months ago. I determine that, as long as the Contractor meets the conditions at Regulation 32(2)(c) the Commissioner must enter into the GMS Contract. I determine that this must be done with effect from 21 days from the date of this determination to allow for the parties to confirm that the conditions are met.

5 DECISION

5.1 I determine that the Termination Notice dated 27 October 2022 was valid on the grounds of Clause 64.4 and was invalid on the grounds of Clause 64.6 as it did not meet the requirements of Clause 64.7 of the Agreement when considered against the timeline which has been set out to me.

5.2 I determine that, as long as the Contractor meets the conditions at Regulation 32(2)(c) the Commissioner must enter into the GMS Contract. I determine that this must be done with effect from 21 days from the date of this determination to allow for the parties to confirm that the conditions are met.

6 INTEREST

6.1 I note that the Agreement was not terminated and that the Contractor has continued to deliver services throughout the period of the dispute.

6.2 There are no disputes between the parties as regards interest and I determine that no interest shall be payable in relation to this dispute.

Head of Appeals
NHS Resolution