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18 October 2024

FILE REF: **SHA/26193**

DECISION MAKING BODY: **NHS ENGLAND & CHESHIRE AND MERSEYSIDE INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: **SMART DENTAL CARE LIMITED**

DISPUTE RESOLUTION: **NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES CONTRACTS) REGULATIONS 2005**

RE: **TERMINATION OF CONTRACT AT:**

(1) CHESTER DENTAL CLINIC, BELMONT HOUSE, 2 VOLUNTEER STREET, CHESTER, CH1 1RG
(2) ATLANTIC DENTAL PRACTICE, PICTON NEIGHBOURHOOD HEALTH CENTRE, EARLE ROAD, LIVERPOOL, L7 6HD
(3) SEFTON DENTAL CENTRE, STANLEY ROAD, BOOTLE, LIVERPOOL, CH45 0JR
(4) POULTON DENTAL PRACTICE, 42 POULTON ROAD, SEACOMBE, CH44 9PQ
(5) WALLASEY DENTAL STUDIO, 3 – 5 LISCARD WAY, CHERRY TREE SHOPPING CENTRE, WALLASEY, CH44 5TL

1 Outcome

1.1 I determine that both the Remedial Notices dated 1 March 2022 (and 2 August 2022), further Remedial Notices dated 23 December 2022 and the Termination Notices dated 29 August 2023, issued by the Commissioner, were all valid under both the relevant Contracts and the Regulations and, as such, I determine this application in favour of the Commissioner.

1.2 There are no disputes between the parties with regard to interest and I determine that no interest shall be payable in relation to this dispute.

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1 INTRODUCTION

1.1 The Contractor has referred the dispute in relation to its General Dental Services ("GDS") Contract for dispute resolution under the provisions of Paragraph 55 or Paragraph 54 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 (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 BACKGROUND

2.1 I provided a final determination on a preliminary matter dated 11 April 2024, in which I concluded that local dispute resolution had been exhausted and I would therefore proceed to consider the substantive application for dispute resolution. I indicated that the parties should provide their representations on the substantive matter as set out in the Contractor's original application for dispute resolution of 25 October 2023.

2.2 Each party was provided with a copy of the other party's further submissions and provided with the opportunity to make any final observations. All submissions received have been shared with all parties.

2.3 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:

2.3.1 Email of 25 October 2023 with enclosures from the Contractor;

2.3.2 Email of 6 June 2024 with enclosures from the Commissioner;

2.3.3 Email of 11 June 2024 with enclosures from the Contractor;

2.3.4 Email of 31 June 2024 with enclosures from the Commissioner;

2.3.5 Email of 31 July 2024 with enclosures from the Commissioner; and

2.3.6 Email of 2 August 2024 with enclosures from the Contractor.

3 PARTIES' SUBMISSIONS

The Contractor's application

3.1 "1. We act for the Contractors. Dr Ritu Dhariwal is the contractor in respect of the Chester, Atlantic, Poulton and Liscard Contracts. Care (Lancashire) Ltd is the contractor in respect of the Sefton Contract.

2. This letter constitutes the Contractors' written request for dispute resolution pursuant to section 9 of The National Health Service Act 2006 (the "Act") in respect of the Chester Contract and clause 280 of the Contracts and paragraph 54 of Schedule 3 to The National Health Service (General Dental Services Contracts) Regulations 2005 (the "Regulations") in respect of the Atlantic, Poulton, Liscard and Sefton Contracts.

3. The Contractors operate together under the 'Smart Dental Care' banner. The issues in dispute are common to each Contractor and the Contractors therefore wish to have their disputes determined together.

4. In accordance with clause 283 of the Contracts and paragraph 55(2) of Schedule 3 to the Regulations we hereby confirm the following:

5. The names and addresses of the parties to the dispute

5.1 Name: Dr Ritu Dhariwal and Care (Lancashire) Ltd (the "Contractors") Address: Smart Dental Care Limited, Unit 5, Ashbrook Office Park, Longstone Road, Manchester M22 5LB

5.2 Name: NHS Cheshire & Merseyside Integrated Care Board (the "Board") Address: NHS Cheshire and Merseyside, Regatta Place, Brunswick Business Park, Summers Road, Liverpool L3 4BL, england.cmdental@nhs.net

5.3 Name: National Health Service Commissioning Board aka NHS England ("NHS England") Address: Office for Cheshire, Merseyside, Lancashire and South Cumbria, Regatta Place, Brunswick Business Park, Summers Road, Liverpool L3 4BL. England.nwregional_director@nhs.net, england.contactus@nhs.net and NHSE.newproceedings@nhs.net

5.4 The Contractors are parties to the Contracts. The Board was established on 1st July 2022 and has since exercised NHS England's rights and performed its obligations under the Contracts. The Contractors do not know whether NHS England's rights and liabilities under the Contracts have been transferred to the Board (whether pursuant to section 14Z28 of the Act or otherwise). Accordingly, the Contractors have nominated both the Board and NHS England as parties to this dispute.

6. Contract

We enclose a copy of the Contracts.

7. Brief statement describing the nature and circumstances of the dispute

7.1 By letters dated 1st March 2022 (in respect of the Chester, Atlantic, Poulton and Liscard Contracts) and 2nd August 2022 (in respect of the Sefton Contract) the Board gave the Contractors remedial notices under clauses 25, 28, 41, 74, 74a, 75 and 76 of the Contracts (the "March/August 2022 Remedial Notices") alleging:

"no performers being made available at the practice to undertake NHS mandatory services during your contracted hours"

and required the Contractors to:

"*Commence delivery of the service, in full compliance with the Contract, from […] by […] 2022."*

7.2 By letters dated 23rd December 2022 the Board gave the Contractors remedial notices under clauses 75 and 78 of the Contracts (the "December 2023 Remedial Notices") alleging:

"no performers being made available at the practice to undertake NHS mandatory services during your contracted hours" and "In transmitting only […] UDAs to date as against the annual target of […] UDAs, your performance has therefore fallen well below the required contractual standard."

and required the Contractors to:

"with effect from 20th January 2023, to provide services as outlined at clauses 74 and 76 of the Contract and as summarised above.

We require you to provide these services during the core opening hours of the practice and for these services to be provided on site at […].

We require you to meet your annual target of […] UDAs in providing these services. This equates to an average of […] UDAs per month. By 20th January 2023 we require you to be meeting this monthly target and to continue to deliver at this level."

The December 2023 Remedial Notices also gave notice that the Board was withholding payments under clause 336 of the Contracts.

7.3 By letters dated 23rd June 2023 the Board gave the Contractors breach notices under clauses 329 and 330 of the Contracts (the "June 2023 Breach Notices") alleging that the Contractors had not complied with the March/August 2022 Remedial Notices and the December 2023 Remedial Notices:

"On 2 May 2023, an individual at the practice confirmed to a member of the dental commissioning team that a performer was not in place to deliver NHS care on […] during core opening hours"

7.4 By letters dated 29th August 2023 the Board gave the Contractors notice to terminate the Contracts on 26th September 2023 pursuant to clauses 315 to 335 of the Contracts and paragraphs 68 to 74 of Schedule 3 to the Regulations (the "Termination Notices"). By exchange of letters dated 19th September 2023, the Contractors and the Board agreed, through their respective solicitors, to suspend the Termination Notices by a period of 30 days, thereby postponing the termination of the Contracts to 26th October 2023 (the "Extension Agreement").

7.5 The Contractors deny that the Board is entitled to terminate the Contracts for the following reasons:

7.5.1 The Board did not follow the provisions of clauses 91 to 96 of the Contracts before seeking to withhold under clause 336 in respect of the December 2022 Remedial Notices. In such circumstances, the withholding cannot have been under clause 336, but was in fact a contract sanction under clause 342. Where the Board has already imposed a contract sanction in respect of a remedial or breach notice(s), it cannot rely upon that same notice as giving rise to grounds for termination later, as the Board did with the June 2023 Breach Notices. Put differently, having imposed a contract sanction, the Board then cannot rely on the same facts and matters as giving the right to terminate, as the Board had the choice of either of a contract sanction or termination as at December 2022 and chose the former. As such, the Termination Notices are invalid.

7.5.2 There is both a local and national shortage of dentists willing to work in the NHS, particularly in and around the Cheshire and Merseyside areas. The reasons are not only that there is a shortfall nationally in the number of dentists required to provide NHS dentistry, but that following the enforced covid restrictions limiting treatment, there is in fact a significantly higher need for complex treatments. As a result, it is even harder to recruit dentists willing to perform NHS dentistry in this area, as they are better remunerated by working in private or mixed NHS and private practices that have less dental need. The Contractors notified the Board of these recruitment difficulties on a number of occasions including, without limitation, letters dated 17th October 2022 and 17th January 2023. This correspondence constituted notification of a force majeure event in respect of recruitment difficulties, thereby being formal notification to the Board under clause 372.1 of the Contracts. It is not open to the Board to terminate the Contracts until the force majeure event has ceased. As matters stand, medium term recruitment efforts employed by the Contractors (delayed by the Board's failure to register performers in time) are now beginning to come to fruition, and so it is anticipated that full Contracts performance will begin from January 2024. In such circumstances, the Termination Notices are invalid and of no effect.

7.5.3 The Board has a duty of good faith to the Contractors in performing its obligations under the Contracts or, in the alternative, a duty to exercise the power of termination in good faith. It is the Contractors' position that service of the Termination Notices is wholly in breach of this duty good faith for the following reasons:

(a) It prevented the Contractors recruiting with the offer of golden handshakes as proposed on 17th October 2022. Considering that the Contractors' UDA rate are not as generous as other providers within the same areas, the Board failed to take into account the financial restrictions that the Contractors are under to recruit dentists;

(b) The Board has allowed the Contractors to undertake significant expense in recruitment from across the world, in the full knowledge that it would take some 1-3 years for these efforts to reach fruition. It is therefore wrong of the Board to issue the Termination Notices just when the recruitment efforts will begin bear fruit;

(c) Considering that other providers in the area are also facing significant shortfalls, but have not been served termination notices as has been confirmed by the Board, then it [sic] wrong for the Board to single out the Contractors as the Contracts to be terminated;

And

(d) It is submitted that the real purpose of the notice and the behaviour of the NHSE was to force the Contractors to rebase the Contracts to a lower level,

so as to allow the Board to distribute the monies to other providers. In such circumstances, service of the Termination Notices is not only in breach of the duty of good faith, but is also for an improper purpose.

7.5.4 In reliance on the factors listed in paragraph 7.5.3 above, the Board is in breach of its duty under clause 10 of the Contracts to act as a responsible public body required to discharge its functions under the Act. Put shortly, not only is the conduct in serving the Termination Notices in breach for the four factors set out in paragraph 7.5.3 above, but crucially: terminating the Contracts will not result in an increase in the delivery of NHS dental care in the areas served by the Contracts. The reason for this is that every practice in the area has difficulty with recruitment such that there is no spare capacity to provide the UDAs which the Contractors have been unable to provide to date.

7.5.5 The Contractors deny that the cumulative effect of the breaches relied upon by the Board was sufficient for the Board to consider that to allow the Contracts to continue would be prejudicial to the efficiency of the services to be provided under the Contracts as required by clause 335 of the Contracts and paragraph 73(7) of Schedule 3 to the Regulations.

7.6 The Contractors seek:

7.6.1 A declaration that the Termination Notices are invalid and of no legal effect and/or that that they were issued in breach of contract and/or that they were issued for an improper purpose and in breach of the duty of good faith;

7.6.2 Damages for wrongful termination of the Contracts.

7.7 The Contractors have complied with their local resolution obligations under clause 279 of the Contracts and paragraph 53 of Schedule 3 to the Regulations."

Representations

NHS England's representations

3.2 "**I. INTRODUCTION**

1. By a letter dated 25 October 2023 ("the Application"), Abrahams Dresden, the representative of Dr Ritu Dhariwal and Care (Lancashire) Ltd ("the Contractors") applied to NHS Resolution for dispute resolution under the provisions of §§54 or 55 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 ("the Regulations"). The dispute arises from the termination of General Dental Services contracts ("the Contracts") concerning the following practices ("the Practices"), which are operated by the Contractors:

(1) the Chester Dental Clinic, Chester, including the Blacon Dental Clinic, Blacon (the "Chester Practice");

(2) the Atlantic Dental Practice, Picton Neighbourhood Health Centre, Liverpool (the "Picton Practice");

(3) the Sefton Dental Centre, Liverpool (the "Sefton Practice");

(4) the Warren Drive Dental Practice, Wallasey (the "Warren Drive Practice"); and

(5) the Poulton Practice, Seacombe ("the Poulton Practice").

2. By §7.5 of the Application, the Contractors allege that the NHS Cheshire and Merseyside Integrated Care Board ("the Commissioner") wrongfully terminated the Contracts by issuing termination notices on 29 August 2023 ("the Termination Notices"). By §7.6 of the Application, the Contractors seek:

> (1) A declaration that the Termination Notices are invalid and of no legal effect and/or that that they were issued in breach of contract and/or that they were issued for an improper purpose and in breach of the duty of good faith; and
>
> (2) Damages for wrongful termination of the Contracts.

3. By these Representations, the Commissioner submits that the Contractors' Application should be dismissed in its entirety and the relief should be refused. The Application lacks any merit. In broad summary:

> (1) By the Contracts (as varied over time to replace the original contracting parties with the Contractors), the relevant primary care trust ("PCT") contracted for the provision of dental services by the Contractors to persons requiring those services. In respect of each of the Practices, the Contractors failed to meet their obligations to provide mandatory services under the Contracts. In particular, the Contractors failed to provide the number of units of dental activity ("UDAs") specified in each of the Contracts. Rather, the Contractors provided minimal, if any, UDAs in the financial years from 2020 onwards. In those circumstances, the Termination Notices were properly issued. As at the date of drafting these Representations, the deficit in funds owed to the Commissioner by the Contractors are approximately £1.6 million.
>
> (2) Contrary to §7.5.1 of the Application, the Commissioner was not bound to follow the provisions of cl.91-96 of the Contracts. The scheme established under cl.91-97 of the Contracts is irrelevant to the relief claimed by the Contractors. The Termination Notices were properly issued under the terms of Part 22 of the Contracts.
>
> (3) Contrary to §7.5.2 of the Application, the Contractors failed to discharge their formal obligation to notify of a force majeure event under cl.372 of the Contracts, in particular failing to do so "promptly". Moreover, the Contractors have not demonstrated either that a force majeure event of the type specified in the Contracts has arisen, or that the only effective cause of the Contractors' failure and/or delay in discharging their obligations under the Contracts lies outside the control of the "affected party". In substance, the Contractors are relying on cl.372 to seek to oblige the Commissioner to accept non-contractual performance of the Contractors' obligations under the Contract in order to overcome the effects of the alleged force majeure event. The Contractors' approach is fundamentally contrary to the recent Supreme Court judgment in MUR Shipping BV v RTI Ltd [2024] UKSC 18 ("MUR") and there is no basis to require the Commissioner to accept the Contractors' offer of non-contractual performance.
>
> (4) Contrary to §§7.5.3-4 of the Application, the Commissioner did not act contrary to its duty to "act reasonably and in good faith and as a responsible public body required to discharge its functions under the Act" under cl.10 of the Contracts. The Contractors err in conflating the duty to act in good faith under cl.10 with an obligation on the Commissioner not to enforce its contractual entitlements: that approach is contrary to the express terms and structure of the contractual scheme under the Contracts. Clause 11 of the Contracts expressly preserved the Commissioner's entitlement to require the Contractors "to comply with the express provisions of this Contract".
>
> (5) Contrary to §7.5.5 of the Application, the Commissioner lawfully exercised its right to terminate the Contracts under cl.334, having been satisfied that the cumulative effect of the Contractors' breaches of the Contracts were such that allowing the Contract to continue would be prejudicial to the efficiency of the dental services provided thereunder (see cl.335). Complaints made to the General Dental Council

("GDC") on 11 and 22 April 2024 regarding strikingly significant failings and patient safety concerns relating to the Contractors' Chester and Picton Practices demonstrate that the right to terminate the Contracts was rationally exercised.

4. For avoidance of doubt:

(1) In view of the close similarity of the Contracts, the Commissioner do not [sic] address each of the Contracts separately in these Representations. Quotations below are from the Contract in respect of the Warren Drive Practice.

(2) Paragraphs numbers refer to the Application, unless otherwise stated.

(3) References to "the Contractors" in these Representations are to either or both of them, as applicable.

5. These Representations are filed pursuant to §1.2 of the Outcome of the Preliminary Determination dated 11 April 2024. By the Preliminary Determination, Mr Jonathan Haley, Head of Appeals of NHS Resolution, determined that the parties had made "every reasonable effort to communicate and co-operate with each other with a view of resolving the dispute". The timetable specified at §1.2 of the Preliminary Determination has been extended by agreement.

II. THE SCHEME FOR DETERMINING THE APPLICATION

6. General dental services contracts are entered into and are regulated by the Regulations. In particular:

(1) The Regulations contain provisions relating to termination that must be incorporated into such contracts and were incorporated into the Contracts. NHS Resolution has issued a Guidance Note on "Termination of primary dental services contracts" dated 25 March 2021 ("the Guidance"), on which the Commissioner relies in these Representations.

(2) The statutory and regulatory scheme for resolving disputes in the context of general medical services contracts was described by Lang J in R (Bhat) v NHS Litigation Authority [2024] 4 WLR 33 at §§76-81. Like principles apply in context of general dental services contracts. In summary, the effect of these provisions is that contractual disputes arising in relation to NHS contracts cannot be litigated in the courts but must be referred to the Secretary of State for determination under the NHS dispute resolution procedure. There is no right of appeal from a determination of NHS Resolution.

III. THE CONTRACTS

7. The analysis of the Contracts below is divided into the following sections:

(1) General principles of contractual interpretation to be applied to the Contracts;

(2) The Contractors;

(3) Clause 10 of the Contracts (i.e. the good faith clause);

(4) Primary performance obligations under the Contracts, including in respect of UDA numbers and payment;

(5) Mid-year reviews;

(6) The Contractors' obligations relating to recruitment;

(7) Termination provisions under the Contracts;

(8) Contract sanctions; and

(9) Force majeure provisions.

(a) General principles of contractual interpretation

8. The Regulations prescribe the terms which the defendant is required to include in their contracts with contracting dentists. In cases of contracts for dental services under provisions of the National Health Service Act 2006, the Court of Appeal in Krebs v NHS Commissioning Board [2014] EWCA Civ 1540 at §2 held: "*The National Health Service (General Dental Services Contracts) Regulations 2005 prescribe the terms which the defendant is required to include in their contracts with contracting dentists. Once the contracts are signed, however, they take effect as normal commercial contracts*" (see also Tomkins v Knowsley Primary Care Trust [2010] EWHC 1194 (QB) at §8). An NHS dental contract is enforceable as an ordinary contract.

9. The starting point in contractual interpretation is the five principles distilled by Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 912H. These principles have been refined in later decisions, including FCA v Arch Insurance [2021] UKSC 1 at §47 (per Lords Hamblen and Leggatt), which provides that a contract "must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task."

10. In F&C Alternative Investments v Barthelemy (No 2) [2012] Ch 613 at §268, Sales J held: "…the parties to the contract are taken to contract on the footing that they wish the contract to be performed, and on an objective interpretation of their agreement have therefore impliedly agreed that they will not actively prevent performance".

11. Although the conduct of the parties subsequent to an agreement may be relied on to identify the terms of a contract where the contract is wholly or partly oral, there is a long standing principle of contractual interpretation that in the case of a written contract post contract conduct is irrelevant (and therefore inadmissible): see (1) Vasant (2) Khera (3) Kalsi v NHS Commissioning Board [2019] EWCA Civ 1245 at §30 and Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd [1970] AC 583 at 611.

(b) The Contractors

12. The Contractors trade as the "Smart Dental" group.

13. The Contracts were entered into with the relevant PCT. By way of variations, one or both of the Contractors came to be parties to the Contracts. The original contracting parties and the date of the variations by which the Contractors came to be parties to the Contracts are summarised below:

Contract	Original contracting parties	Variation/s
Chester Practice	Partnership contract with Adam Gittay, later only Hesham Ali and Saleem Asif.	3 September 2021: partnership contract with the First Contractor, Asif Saleem and Hesham Ali.
Picton Practice	Roger Hollins	1 October 2020: new partnership contract with the

		First Contractor and Roger Hollins (Atlantic Dental Practice)
Sefton Practice	1 April 2016: the Second Contractor	n/a
Warren Drive Practice	Partnership contract initially with Alexandra Furness, Richard Furness and the First Contractor	14 October 2019 (taking effect from 1 September 2019): the First Contractor alone.
Poulton Practice	Partnership contract initially with Mark Gibson (see Schedule 1), and later Mark Gibson and the First Contractor.	1 July 2019: the First Contractor alone.

(c) Clause 10 of the Contracts

14. At §§7.5.3-4 of the Application, the Contractors rely on cl.10 of the Contracts.

15. Clauses 9-11 of the Contracts provide as follows concerning the relationship between the PCT and the Contractors:

"9. In complying with this Contract, in exercising its rights under the Contract and in performing its obligations under the Contract, the Contractor must act reasonably and in good faith.

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."

16. As a matter of case-law, it is noted that, if contracts between the private parties require either party to act reasonably in any particular respect as when, for example, a contract gives a discretionary power to one of the parties to take some decision for the purposes of the contract, the courts have traditionally been reluctant to import principles of public law as a guide to construction. Rather, as identified in Krebs v NHS Commissioning Board (as successor body to Salford Primary Care Trust) [2014] EWCA Civ 1540 at §29 and Abu Dhabi National Tanker Co v Product Star Shipping Ltd [1993] 1 Lloyds Rep 397, 404:

> (1) The discretion be exercised honestly and in good faith.
>
> (2) Having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.

17. As to cl.10:

> (1) The obligation on the PCT under cl.10 to act "reasonably and in good faith" was mirrored in the language of cl.9, which required the Contractors to act "reasonably and in good faith."

(2) The obligation to act reasonably and in good faith does not cut across the bargain entered into by the PCT and the Contractors such as to relieve a contracting party from performance of, for example, its primary performance obligations under the contract. To the contrary, the obligations under cl.9 and 10 are to be construed consistently with the parties' bargain being given full effect.

(3) Importantly, both cl.9 and 10 are subject to cl.11. The effect of cl.11 is that the PCT was not precluded or otherwise restricted in relying on the termination provisions of Part 22 of the Contracts (see below). That is consistent with the general position as a matter of the law of contract that: "… the parties to the contract are taken to contract on the footing that they wish the contract to be performed …"(F&C Alternative Investments v Barthelemy (No 2) [2012] Ch 613 at §268).

(d) Primary performance obligations under the Contracts

18. By the Contracts, the relevant PCT contracted for the provisions of dental services by the Contractors for persons requiring those services. Inter alia:

(1) By cl.26, the Contractors were required to "provide mandatory services and additional services".

(2) By cl.41, the Contractors were required to "provide mandatory and additional services to a patient by providing that patient a course of treatment."

19. As to "mandatory services" generally:

(1) Part 8 of the Contracts addressed "Mandatory services". Part 8 of the Contracts gave effect to reg.14 of the Regulations, of which reg.14(3) requires a contractor to provide urgent treatment and certain other services "to meet the reasonable needs of its patients during normal surgery hours."

(2) "Mandatory services" were defined in cl.1 as "the services described in clauses 74 to 76".

(3) By cl.74, the Contractors were required to:

"… provide to its patients, during the period specified in clause 75, all proper and necessary dental care and treatment which includes—

74.1. the care which a dental practitioner usually undertakes for a patient and which the patient is willing to undergo;

74.2. treatment, including urgent treatment; and

74.3. where appropriate, the referral of the patient for advanced mandatory services, domiciliary services, sedation services or other relevant services provided under Part 1 of the Act."

(4) By cl.75, the Contractors were required to provide "urgent treatment" and "all other services described in clause 76" that "are necessary to meet the reasonable needs of its patients during normal surgery hours."

(5) "Normal surgery hours" were defined in cl.75, specifying various hours on each of Monday to Friday. For example, under the Warren Practice Contract:

"Monday 9:00-1:00 14:00-17:00

Tuesday 9:00-1:00 14:00-17:00

Wednesday 9:00-1:00 Closed

Thursday 9:00-1:00 14:00-17:00

Friday 9:00-1:00 14:00-16:00”

(6) Clause 76 specified particular forms of dental care and treatment falling within the scope of cl.74, with an express exclusion for “additional services”.

20. The Contractors’ obligation to provide a specific number of UDAs was specified in cl.77:

(1) The term “unit of dental activity” was defined with reference to “mandatory services” and “advanced mandatory services” as follows:

““unit of dental activity” means the unit of activity which is in this Contract used to—

(a) express the amount of, and

(b) measure in accordance with clauses 79 to 82 the provision of

mandatory services and advanced mandatory services provided under this Contract;”

(2) By cl.77, the Contractors were required to provide a specified number of “units of dental activity during each financial year”. For example, in the Warren Practice Contract, 8,407 UDAs were to be provided during each financial year. By footnote 22, that figure “represent[s] both services if the Contractor is contracted to provide both mandatory services and advanced mandatory services”.

(3) Clauses 79-82 addressed the measurement of the number of UDAs with reference to whether the dental activity constituted a “banded course of treatment” (to which Table A in cl.82 applied) or a “charge exempt course of treatment” (to which Table B in cl.82 applied).

21. The UDAs to be provided annually were initially specified in the Contracts as follows:

Contract	UDAs specified in cl.77
Chester Practice	6,590
Picton Practice	25,710 (and 150 sedation cases)
Sefton Practice	28,000
Warren Drive Practice	8,407
Poulton Practice	9,352

22. Payments under the Contracts were contingent on the performance of UDAs.

(1) By cl.239, the Commissioner was bound to make payments to the Contractors, subject to rights of set-off and clawback.

(2) Further to cl.239B: “*Payments to be made to the Contractor (and any relevant conditions to be met by the Contractor in relation to such payments) in respect of services where payments, or the amount of any such payments, are not specified in*

directions under section 17 or 28N of the Act, are set out in Schedule 4 to this Contract."

(3) In turn, Schedule 4 identified the "Yearly Gross Total Contract Value" with reference to the number of UDAs to be performed.

23. The Contractors are paid from public funds, which must be managed responsibly. In effect, the payment scheme under the Contracts operates by the Commissioner paying the Contractors one-twelfth of the sum specified in Schedule 4 to the Contracts each month, with provision for clawbacks at the end of each year in respect of UDAs not in fact delivered by the Contractors. In this way, a situation can arise (as has arisen in this dispute), whereby the Contractors take receipt of very significant payments under the Contracts despite having provided minimal, if any, UDAs in the financial years from 2020 onwards. As at the date of drafting these Representations, the deficit in funds owed to the Commissioner by the Contractors are approximately £1.6 million.

(e) Mid-year reviews

24. Clauses 87-100 concern "mid-year reviews".

25. Pursuant to cl.221-222, the Contractors were bound to send the PCT certain information specified in cl.222 upon completion of, inter alia, "a course of treatment in respect of mandatory or additional services". In turn, that information was to be used by the PCT, pursuant to cl.89, to "determine the number of units of dental activity that the Contractor has provided between 1st April and 30th September of that financial year".

26. Clause 91 expressly conferred a mere contractual power on the PCT – as indicated by the term "may" – to "notify the Contractor that it is concerned about the level of activity provided under the Contract in the first half of the financial year" (cl.91.1) and "require in that notification that the Contractor participate in a mid-year review of its performance in relation to the Contract with the PCT" (cl.91.2), if the PCT determined under cl.89 that "the Contractor has, between 1st April and 30th September, provided less than 30 per cent of the total number of units of dental activity that it is required to provide in that financial year" (see cl.90).

27. Even if the threshold of "less than 30 per cent of the total number of units of dental activity" were to be met, the PCT was not under an obligation to require the Contractors to participate in a mid-year review. In the event that the PCT did not require the Contractors to participate in a mid-year review, cl.92-100 were not engaged.

28. Clauses 92-100 were parasitic on the power in cl.91 being exercised. In particular:

(1) Clause 92 is expressly parasitic on cl.91: "*Where a mid-year review is required by the PCT pursuant to clause 91 …".*

(2) References to "the mid-year review" in cl.93-94, using the definite article, are to the review under cl.91.2.

(3) Clause 96 appears under the heading "*Action the PCT can take following a mid-year review*". In turn, cl.96 refers to both "the mid-year review" (being that in cl.91.2) and "the final record of that review" (being that in cl.93). Clause 96 provides:

> "*Where, following the mid-year review and the provision of the final record of that review to the Contractor, the PCT, having taken account of any evidence or reasons put forward by the Contractor at that review, nevertheless has serious concerns that the Contractor is unlikely to provide the number of units of dental activity that it is required to provide by the end of the financial year, the PCT shall be entitled to take either or both of the steps specified in clause 97."*

(4) As set out above, cl.96 confers a right on the PCT to take either or both of the steps specified in cl.97: to require the Contractor to comply with a written plan (cl.97.1), and/or to withhold monies payable under the Contract (cl.97.2).

(5) In the event that the PCT elects to exercise its right to withhold monies under cl.97.2:

a. The maximum sum that is permitted to be withheld under cl.97.2 is to be calculated pursuant to the description in cl.98.

b. The PCT "shall ensure that it pays the withheld monies to the Contractor as soon as possible following the end of the financial year" where the number of UDAs in cl.77 is met, or the failure to provide the number of UDAs amounts to less than 4% of the total number that ought to have been provided (see cl.100.2).

c. In the event that the UDA thresholds identified in cl.100 are not met by the Contractors (i.e. the Contractors do not provide the number of UDAs specified in cl.77 or at least 96% of the number of UDAs specified in cl.77), the obligation on the PCT to pay the withheld monies under cl.100 does not arise.

(f) The Contractors' obligations relating to recruitment

29. It is the responsibility of the Contractors to recruit appropriately competent "performers" to undertake dental services, and, in turn, the performers themselves also have a duty to follow the requisite standards set by the GDC. In order to regulate NHS dental services and understand who is entitled to carry out certain services, "performer numbers" and the "performer list" are therefore essential. Individuals who are qualified as dentists overseas cannot undertake NHS dental treatment in England unless they have a performer number. Further, NHS dental therapists are not permitted to undertake certain dental services.

30. Part 12 of the Contracts set out the relevant obligations relating to recruitment. When discharging the primary performance obligations under the Contracts, the Contractors were required to use suitably competent and registered "performers". In particular:

(1) Clause 178 provides:

"*178. A dental practitioner may perform dental services under the Contract provided-*

178.1. he is included in a dental performers list for a Primary Care Trust in England; and

178.2. his inclusion in that list is not subject to a suspension."

(2) Clause 184 provides:

"*184. The Contractor shall not employ or engage a dental practitioner to perform dental services under the Contract unless—*

184.1. that practitioner has provided it with the name and address of the Primary Care Trust on whose dental performers list he appears; and

184.2. the Contractor has checked that the practitioner meets the requirements in clause 178."

(3) Clause 186 provides:

"186. The Contractor shall not employ or engage a dental care professional to perform dental services unless—

186.1 prior to the coming into force of the first regulations made under section 36A(2) of the Dentists Act, the Contractor has checked that his name is on the role of the appropriate register established in accordance with the Dental Auxiliaries Regulations 1986; and

186.2 from the coming into force of the first Regulations under section 36A(2) of the Dentists Act, the Contractor has checked that—

186.2.1 his name is included in the register of dental care professionals, and

186.2.2 his registration in the register of dental care professionals is not subject to a suspension; and

186.3. it has taken reasonable steps to satisfy itself that he has the clinical experience and training necessary to enable him to properly perform dental services."

(4) Clause 192 provides:

"*192. Before employing or engaging any person to assist it in the provision of services under the Contract, the Contractor shall take reasonable care to satisfy itself that the person in question is both suitably qualified and competent to discharge the duties for which he is to be employed or engaged."*

31. Contrary to the provisions identified immediately above, the Contractors have used a dental therapist lacking a performer number to undertake contractual dental services in such a way as to give rise to serious patient complaints. The evidence of Mr [TK] details an investigation taking place at the Picton Practice in relation to one of the staff members, following a complaint by a patient. A report undertaken by Case Investigator, Dr Gill Shea BDA (VU Manc), PgC T&L, PgC DPA & QI and NHS England Dental Advisor, identified significant failings and patient safety concerns, including a dental therapist working beyond the scope of practice and failures relating to dental decay and disease.

(g) Termination provisions under the Contracts

32. Termination of the Contracts was governed by the terms of Part 22 of the Contracts (which governs "Variation and Termination of the Contract"). Part 22 of the Contracts materially repeats Schedule 3, Part 9, of the Regulations, as to which the following passages of the Guidance are noted:

(1) Paragraph 73 of Schedule 3 of the GDS Regulations states that where the contractor's breach of contract is not one to which paragraphs 70 to 72 of Schedule 3 apply and that breach is capable of remedy, the Commissioner must, before taking any action it is otherwise entitled to take, issue a remedial notice to the contractor requiring it to remedy the breach within the timescale set out in the remedial notice. As set out below, the Commissioner lawfully issued Remedial Notices in this case.

(2) Paragraph 73(4) of Schedule 3 provides a right to terminate the GDS contract where the Commissioner is satisfied that the contractor has not taken the required steps to remedy the breach by the end of the notice period. As set out below, the Commissioner relied on and exercised that right to terminate in this case.

(3) Paragraph 73(6) of Schedule 3 provides a further right of termination if, following the issue of a remedial notice, the contractor repeats the breach which is the subject of the remedial notice or otherwise breaches the contract resulting in a breach or a remedial notice. This right of termination can only be exercised if the Commissioner

is satisfied that the cumulative effect of the breaches is such that to allow the contract to continue would prejudice the efficiency of the services provided. The latter provision is contained in paragraph 73(7) of Schedule 3. As set out below, the Commissioner relied on and exercised that further right to terminate in this case and lawfully concluded that the efficiency of the services provided by the Contractors (to the extent that any relevant services were provided at all) would be prejudiced.

(4) Paragraph 77 of Schedule 3 provides that where the Commissioner exercises its right to terminate the contract pursuant to the above grounds, it must notify the contractor and specify the date on which the contract terminates. The date of termination must be not less than 28 days after the date of the termination notice unless a shorter period is necessary in order to protect the safety of the contractor's patients or to protect the Commissioner from material financial loss. As set out below, there is no dispute that the Commissioner lawfully notified the Contractors of the date of termination of the Contracts.

33. The provisions governing termination by the PCT commence at cl.315, providing that: "*the PCT may only terminate the Contract in accordance with this Part."*

34. Clauses 329-336 fall under the heading "Termination by the PCT: remedial notices and breach notices". The broad outline of those provisions is set out in paragraph 22 of the Guidance: "*Firstly, the commissioner must be sure that a contractor has either repeated a breach, that was the subject of a previous breach or remedial notice, or has otherwise breached the contract. Secondly, the commissioner must particularise these breaches clearly to the contractor in a breach/remedial notice. Thirdly, the commissioner must be satisfied that to allow the contract to continue would be prejudicial to the efficiency of the services provided under the contract."* Further:

(1) Clauses 329-332 concern breaches capable of remedy. For breaches capable of remedy, the PCT is obliged to serve a remedial notice in advance of "taking any action it is otherwise entitled to take by virtue of the Contract".

(2) Clause 333 concerns breaches not capable of remedy. For such breaches, the PCT has a discretion to serve a breach notice "requiring the Contractor not to repeat the breach".

(3) Clause 334 provides that notice to terminate may be served either if the same breach is repeated as is specified in a breach notice or remedial notice (cl.334.1), or other breaches occur resulting in a further remedial notice or a further breach notice (cl.3342):

> *"If, following a breach notice or a remedial notice, the Contractor—*
>
> *334.1. repeats the breach that was the subject of the breach notice or the remedial notice; or*
>
> *334.2. otherwise breaches the Contract resulting in either a remedial notice or a further breach notice,*
>
> *the PCT may serve notice on the Contractor terminating the Contract with effect from such date as may be specified in that notice."*

(4) The term "otherwise breaches" in cl.334.2 indicates that the breaches need not be the same as those originally specified, but cl.334.1 expressly contemplates that they might be.

(5) Clause 335 limits the circumstances in which the PCT is permitted to exercise its right to terminate the Contracts under cl.334 as follows:

"The PCT shall not exercise its right to terminate the Contract under clause 334 unless it is satisfied that the cumulative effect of the breaches is such that the PCT considers that to allow the Contract to continue would be prejudicial to the efficiency of the services to be provided under the Contract."

(6) Clause 336 provides: "*If the Contractor is in breach of any obligation and a breach notice or a remedial notice in respect of that breach has been given to the Contractor, the PCT may withhold or deduct monies which would otherwise be payable under the Contract in respect of that obligation which is the subject of the breach."*

a. The right to withhold or deduct monies is linked to the identified breach in the breach notice or remedial notice. The effect of cl.336 is that the PCT is permitted to make a deduction in the context of termination as well.

b. Reliance for the purposes of cl.336 on a breach identified in a remedial notice does not require there to be any difference in the identified breaches between those specified in a Remedial Notice and the ultimate Termination Notice. That being the case, there was no need for different grounds to be identified in the Termination Notices.

c. The right to withhold or deduct monies is described with reference to the identified breach in the breach notice or remedial notice. Whether the PCT proceeds to then terminate the Contract is not relevant to the power to make a deduction under cl.336.

35. The contractual scheme in Part 22 of the Contracts is distinct from, and not qualified by, Part 8 (concerning "mandatory services"), save that cl.83 in Part 8 limits the PCT's entitlement to take action for breach of cl.77, including termination of the Contracts, where cl.84 applies. When read together with cl.84, cl.83 therefore limits the PCT's entitlement to terminate the Contracts where:

(1) the failure to provide a sufficient number of UDAs amounts to 4 per cent or less of the total number of UDAs that ought to have been provided during a financial year (cl.84.1); and

(2) "*the Contractor agrees to provide the units it has failed to provide within such time period as the PCT specifies in writing, such period to consist of not less than 60 days"* (cl.84.2).

36. On the facts, this qualification of the PCT's rights under Part 22 set out in the paragraph immediately above does not arise because the Contractors failed to deliver 96% or more of the number of UDAs required in the Contracts (i.e. the condition in cl.84.1 was not met).

37. So far as is relevant, Part 8 does not qualify the PCT's entitlement to terminate under Part 22. In particular:

(1) The scheme governing mid-year reviews in cl.91-100 does not qualify the PCT's entitlement to terminate under Part 22.

(2) A fortiori, the contention that the PCT's reliance on cl.336 was precluded where "the Board did not follow the provisions of clauses 91 to 96 of the Contracts before seeking to withhold under clause 336 in respect of the December 2022 Remedial Notices" (see §7.5.1 of the Application) is wrong.

(h) Contract sanctions

38. At §7.5.1 of the Application, the Contractors seek to characterise the PCT as having imposed a contract sanction under cl.342 on account of allegedly having not "*follow[ed] the*

provisions of clauses 91 to 96 of the Contracts before seeking to withhold under clause 336 in respect of the December 2022 Remedial Notices. In such circumstances, the withholding cannot have been under clause 336, but was in fact a contract sanction under clause 342. Where the Board has already imposed a contract sanction in respect of a remedial or breach notice(s), it cannot rely upon that same notice as giving rise to grounds for termination later". By this argument, it is understood that the Contractors are arguing that, as a matter of contractual interpretation, when the Commissioner expressly relied upon cl.336 of the Contracts, it was not open to the Commissioner to have done so and that express reliance on cl.336 should instead be deemed to have been reliance on cl.342.

39. That argument lacks any merit. The contractual scheme governing contract sanctions was at cl.341-350 of the Contracts.

(1) The term "contract sanction" was defined in cl.341. Clause 341.3 includes "withholding or deducting monies otherwise payable under the Contract" in that definition.

(2) Clause 342 provided: "Where the PCT is entitled to terminate the Contract pursuant to clauses 322 to 328, 332, 334 … it may instead impose any of the contract sanctions if the PCT is reasonably satisfied that the contract sanction to be imposed is appropriate and proportionate to the circumstances giving rise to the PCT's entitlement to terminate the Contract." As such:

a. The imposition of a contract sanction is an alternative to termination of the Contracts only when the right to terminate arises under specific clauses of the Contract. Absent such a right to terminate arising, the PCT is not permitted to, nor could it be taken to have, imposed a sanction under cl.342.

b. As set out at paragraph 37 above, an alleged failure to follow the provisions of cl.91-96 had no relevance to the PCT's entitlement to terminate the Contracts under, amongst other provisions, cl.334 of the Contracts. Accordingly, an alleged failure to follow the provisions of cl.91-96 also has no relevance to the imposition of a contract sanction under cl.342.

(i) Force majeure provisions

40. The following principles of contract law apply to force majeure clauses:

(1) Force majeure clauses relieve a party from its obligation to perform under a contract on the occurrence of a specified event or state of affairs. Such clauses commonly provide, expressly or impliedly, that the clause cannot be relied upon if the effects of what would otherwise be a force majeure event could be avoided by the exercise of reasonable endeavours by the party affected. A force majeure clause will generally be interpreted (or a term will be implied to the same effect) as applicable only if the party invoking it can show that the force majeure event was beyond its reasonable control and could not be avoided by the taking of reasonable steps. MUR Shipping BV v RTI Ltd [2024] UKSC 18 ("MUR") at §26.

(2) Where the alleged triggering event arises because of one party's breach of contract, that party is unable to rely on the force majeure clause as to do so would allow that party to take advantage of its own wrong: Great Elephant Corp v Trafigura Beheer BV [2013] EWCA Civ 905 at §34. Further, in MUR at §36, Lords Burrows and Hamblen held:

"… the underlying reason why a force majeure clause is interpreted as applicable only if the party invoking it can show that the event or state of affairs was beyond its reasonable control, and could not be avoided by the taking of reasonable steps, is one of causation. A party is excused from

performance by a force majeure event where the failure to perform is caused thereby. ***It will not be so caused if the affected party can reasonably prevent the failure of performance. In such circumstances the cause of the failure to perform will be the affected party's inadequate response to the force majeure event rather than the event itself.****"* [Emphasis added]

(3) In Channel Island Ferries Ltd v Sealink UK Ltd [1998] 1 Lloyd's Rep 323, the Court of Appeal held that "a party must not only bring himself within the clause but must show that he has taken all reasonable steps to avoid its operation or mitigate its results". In MUR at §38, Lords Burrows and Hamblen held:

"… the relevant question is whether reasonable endeavours could have secured the continuation or resumption of contractual performance. It is reasonable steps towards that end with which the reasonable endeavours proviso is concerned. It is concerned with the steps which the affected party should have reasonably taken to enable the contract to continue to be performed. It is not concerned with the steps that could or should have been taken to secure some different, non-contractual, performance."

(4) A party may be confronted with an economically disadvantageous situation without a force majeure clause operating in their favour: Seadrill Ghana Operations v Tullow Ghana Ltd [2018] EWHC 1640 (Comm) at §§111-116. Rather, a force majeure clause can only be relied on where the person relying on the clause has taken, at the very least, reasonable steps to avoid or overcome the contingency: Bulman & Dickson v Fenwick & Co [1894] 1 QB 179. A clause, as here under the Contracts, might impose a more stringent standard than "reasonable steps".

(5) Questions of causation arising in the context of force majeure clauses are sensitive to the legal context in which they arise: see ENE Kos v Petroleo Brasileiro [2012] 2 AC 164 at §12 and §76.

(6) A party relying on a force majeure clause is not entitled to require the other contracting party to accept an offer of non-contractual performance in order to overcome the effects of the force majeure event: MUR at §102(i).

41. The force majeure provisions in the Contracts were not required by the Regulations. Force majeure is governed by cl.372-375 of Part 23 of the Contract.

42. Clause 372 provides:

"Neither party shall be responsible to the other for any failure or delay in performance of its obligations and duties under this Contract which is caused by circumstances or events beyond the reasonable control of a party. However, the affected party must promptly on the occurrence of such circumstances or events:

372.1. inform the other party in writing of such circumstances or events and of what obligation or duty they have delayed or prevented being performed; and

372.2. take all action within its power to comply with the terms of this Contract as fully and promptly as possible."

43. The ability of either the Contractors or the PCT to rely on cl.372 was therefore subject to various express conditions arising from the contractual language, which operate cumulatively:

(1) The first substantive condition: Reliance on cl.372 is only permitted when the failure or delay in performance of contractual obligations and duties was "*caused by circumstances or events beyond the reasonable control of a party".* Clause 373

provides clarification that: *"any actions or omissions of either party's personnel or any failures of either party's systems, procedures, premises or equipment shall not be deemed to be circumstances or events beyond the reasonable control of the relevant party for the purposes of this clause, unless the cause of failure was beyond reasonable control."* By cl.372, the only effective cause of a failure or delay in discharging obligations must be outside the control of the party relying on the clause.

(2) The second substantive condition: Reliance on cl.372 is only permitted if the affected party "*promptly*" takes "*all action within its power to comply with the terms of this Contract as fully and promptly as possible*" (cl.372.2). In substance, cl.372.2 operates at a higher threshold than a mere "reasonable steps" clause (i.e. to overcome the force majeure event by reasonable steps). The party relying on the force majeure clause is not permitted merely to take one reasonable course, but instead "*take all action*" it properly can. Clause 372.2 therefore has the effect that anything short of the prevention, impossibility or impracticability of performance of an obligation will not give rise to a lawful entitlement to rely on the force majeure provision because anything else will fall within the formulation "*take all action*".

(3) The formal condition: By cl.372.1, the affected party must notify the other party of a force majeure event (i) "*promptly*"; (ii) "*in writing*"; (iii) identifying the specific force majeure event (i.e. "such circumstances or events"); and (iv) identifying the specific contractual duties or obligations delayed or prevented from performance.

44. As to the substantive and formal conditions, the Policy Book for Primary Dental Services (April 2018) forms part of the factual matrix to the Contracts and informs the proper interpretation of cl.372. As to the Policy Book for Primary Dental Services:

(1) §17.5 of the Policy Book for Primary Dental Services identified the following as "*examples of events or circumstances where the claim for relief should not be considered*" (i.e. they could not amount to a force majeure event under the Contracts):

a. Refurbishment of premises: "*Claims in respect of interruption to service as a result of refurbishment or renovation will not be considered as relevant circumstances in which relief should be given for failure of contractual obligations*."

b. "*Long term sickness causing some incapacity disability, maternity, paternity, or adoption leave of a performer".* It is provided: "*It is expected that the Contractor will make necessary provision for the continuation of the service in the performer's absence."*

c. Adverse weather.

d. Planned events.

(2) Recruitment challenges are plainly of the class of events identified in §17.5 of the Policy Book for Primary Dental Services. Indeed, as with "*Long term sickness*", in the face of challenges in recruiting performers, the Contractors would be "*expected … [to] make necessary provision for the continuation of the service …"*

(3) It is noted that the Policy Book for Primary Dental Services provides for notification of force majeure events to take place within 5 working days. §17.2 provides:

"*The contractor is responsible for informing the Commissioner of any force majeure event promptly and no later than five working days of the occurrence of such circumstances or events as stipulated in Annex 8 4 and for lodging a claim for relief within the timescales specified within this document."*

(4) The term "*promptly*" in cl.372 of the Contracts ought to be interpreted consistently with the five working day limit expressed in the Policy Book for Primary Dental Services.

(5) §§17.2 and 17.10 of the Policy Book for Primary Dental Services further specified that the forms, including at Annex 86, were to be used when notifying of a force majeure event under cl.372, with evidence to be provided of the force majeure event and the impact it is said to have had on service provision. §§17.2 and 17.10 of the Policy Book for Primary Dental Services summarised the position as follows:

> *"In order to be considered for dental relief a contractor must have followed the correct procedure of notifying the Commissioner, which is detailed below, promptly and no later than five working days of the occurrence of the force majeure event, and must have submitted the claim form that is provided in Annex 86.*
>
> *…*
>
> *The template must be completed in full providing details of the force majeure event, the impact on service delivery, the period over which service was interrupted and the action taken to mitigate the impact of the event. The claim template must be accompanied with supporting evidence in order for the Commissioner to assess and award any relief."*

45. Clause 373 provides that: "Unless the affected party takes such steps, clause 42 shall not have the effect of absolving it from its obligations under this Contract". Accordingly, the Contracts expressly provide that the "affected party" cannot obtain the benefit of the force majeure provisions unless the three conditions identified at paragraph 43 above are satisfied.

46. The consequence of the force majeure clause is set out in cl.374, namely: "*If the affected party is delayed or prevented from performing its obligations and duties under the Contract for a continuous period of 3 months, then either party may terminate this Contract by notice in writing within such period as is reasonable in the circumstances (which shall be no shorter than 28 days)."* It follows that:

(1) The Contractors can only rely on the force majeure clause to seek the termination of the Contracts. It formed no part of the parties' contractual bargain that the Contractors were permitted to rely on an alleged force majeure event simply to resist the deductions and sanctions imposed by the Commissioner. The role of NHS Resolution is not to re-write the parties' bargain. Rather, Lord Toulson in Prime Sight Ltd v Lavarello [2014] AC 436 at §47 noted: "*Parties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them*."

(2) §7.5.2 of the Application incorrectly states: "*It is not open to the Board to terminate the Contracts until the force majeure event has ceased*." To the contrary, cl.374 permits termination of the Contracts at least 28 days after the provision of notice in writing if, by reason of a force majeure event lasting for three months, performance of contractual obligations is delayed or prevented. Clause 375 provides for an exception to the entitlement to terminate if the affected party is "*able to resume performance of its obligations and duties under the Contract within the period of notice specified in accordance with clause 374 above, or if the other party otherwise consents."*

(3) The Contractors' stance that *"[i]t is not open to the Board to terminate the Contracts until the force majeure event has ceased*" is incoherent as a matter of contract law. Subject to a force majeure event arising and the party relying on that event taking "*all action within its power to comply with the terms of this Contract as fully and promptly as possible*", the force majeure clause in the Contracts relieves the contracting party relying on the force majeure event from its obligation to perform the contract thereafter. In other words, the contract is terminated by reason of the force majeure

event, in contrast to the obligation to perform the contract merely being suspended. In those circumstances, there is no contractual logic to delaying the right to terminate until such time as the force majeure event has ceased. Indeed, it is readily conceivable that a force majeure event will outlast the term of a contract, in which circumstances the force majeure clause would be rendered nugatory as termination pursuant to its terms would be prevented prior to the term of the contract expiring in any event. Where, as here, the express terms of the force majeure clause do not impose any express delay on the Commissioner's ability to terminate the Contracts in the manner suggested at §7.5.2 of the Application, the error in the Contractors' stance is manifest.

IV. FACTUAL BACKGROUND

47. An Appendix containing written evidence and accompanying exhibits should be read alongside these Representations. The account of the factual background in these Representations is a summary of that evidence.

(a) The UDAs provided by the Contractors

48. In respect of each of the Practices, it cannot sensibly be disputed that the Contractors failed to meet their obligations to provide mandatory services under the Contracts. In particular, the Contractors failed to provide the specified number of UDAs. Minimal, if any, UDAs were provided in the financial years from 2020 onwards.

49. The following table compares the UDAs to have been provided by the Contractors pursuant to cl.77 of the Contracts with those in fact said to have been achieved, represented both as a raw figure and as a percentage:

Name	cl.77 UDAs	2021/22 UDAs achieved	*% of cl.77 UDAs achieved*	2022/23 UDAs achieved	*% of cl.77 UDAs achieved*	2023/24 UDAs achieved	*% of cl.77 UDA's achieved*
Chester Practice	17,775	7153.80	40.20%	3084.20	17%	7578.03	42.63%
Sefton Practice	24,000	3402.60	14.17%	2733.80	11.39%	14668.78	61.12%
Picton Practice	20,210	2054.20	10.16%	4245.00	21.00%	10559.32	52.25%
Warren Drive	8,407	473.40	5.63%	186.20	2.21%	1521.45	18.1%
Poulton Practice	9,352	3068.20	32.80%	994.80	10.63%	278.60	3.07%

50. In all cases, therefore:

(1) The Contractors have not, in any contract year from 2021/22 onwards, or in relation to any of the Contracts, met their UDA target.

(2) The Contractors have not, in any contract year from 2021/22 onwards, or in relation to any of the Contracts, met above 61.12% of their UDA target. In fact, in the vast majority of cases, compliance has been far lower than this figure.

(3) In any event, the figure of 52.25% in relation to the Picton Practice is currently understood to be greatly inflated. In relation to the Picton Practice, a substantial volume of dental work was undertaken by dental therapists, not "performers", in breach of the Contracts. Serious service issues and complaints have arisen from such dental work having been performed defectively, negligently, and/or not to a proper standard. In that context, the number of qualifying UDAs performed by the Contractors in accordance with the terms of the Contracts will be substantially lower than 60.81%.

(b) Remedial and breach notices

51. By reason of the matters set out below and described by Mr [TK], the Contractors were left in no doubt as to what was required of them to remedy their breaches of the Contracts: see the Guidance at §29 and Decision SHA/18367 et al (11 July 2016).

52. From August 2020 onwards, a series of Remedial Notices and Breach Notices were sent in respect of breaches of the GDS Contract for the Sefton Practice, after it was noted in August 2020 (and thereafter) that there were no services being delivered at the Practice whatsoever.

53. From March 2022 onwards, a series of Remedial Notices and Breach Notices were sent to the Contractors in respect of the breaches of the other GDS Contracts. In all instances, it was found that the Contractors (i) were underperforming in respect of the UDAs required under each of the Contracts and (ii) were also in breach of the contractual requirement to provide available dentists across a spread of all weekdays rather than on particular designated days of the week (or, indeed, in certain cases, rather than no provision at all).

54. The initial breaches related to the non-provision of services "*during normal surgery hours*" as per cl.75 of the contracts and the underperformance in respect of UDAs. However, once Remedial Notices were not complied with, such non-compliance with the Remedial Notices formed a separate basis of the Contractors' liability. By way of an example:

(1) The March 2022 Remedial Notice in respect of the Warren Drive Contract identified breaches of cl.25, 28, 41, 74 and 75 of the Warren Drive Contract arising from no performers being available at the Warren Drive Practice to undertake NHS mandatory services during contracted hours.

(2) The December 2022 Remedial Notice in respect of the Warren Drive Contract identified breaches of cl.77 of the Warren Drive Contract (as amended).

(3) The steps required to be taken by the Remedial Notices were to provide the services specified at cl.74 and 76 of the Warren Drive Contract (specifically to provide these services during the core opening hours of the Warren Drive Practice), and to meet the annual target of 8,407 UDAs (specifically by achieving an average of 700 UDAs per month which Warren Drive Practice was required to be achieving by 20 January 2023).

(4) Subsequently, the Breach Notice identified breaches in relation to failing to take the steps outlined in the Remedial Notices to remedy the breaches outlined therein. In particular: (i) in relation to providing services during core opening times, on 2 May 2023 an individual at the Warren Drive Practice confirmed to a member of the dental commissioning team that an NHS dentist was not available on Monday to Friday during core opening hours, and (ii) the Contractors failed to achieve an average of 700 UDAs per month by 20 January 2023.

55. A mid-year review meeting took place on 18 January 2024.

(1) In advance of that meeting, the Contractors provided a PowerPoint demonstration ("the Presentation"), a copy of which is exhibited [945 - 958]. The Contractors' own Presentation makes clear, inter alia, the substantial breach of the Contractors' obligation to achieve specific numbers of UDAs under the Contracts.

(2) The Presentation at p.4 provided: "*We are currently on track to achieve a 62.5% delivery rate based on our internal capacity. Additionally, we are actively conducting an ongoing recruitment drive to attract experienced NHS Dentists to our group*." Regardless of the facts that that statement both did not reflect the true factual position (see paragraph 49 above) and expressly relied upon UDAs continuing to be delivered by performers who were identified as having already left certain practices, even on the Contractors' best case, they expected to fall short of their obligation under cl.77 of the Contracts by 37.5%.

(3) That statement also demonstrates that the Contractors were themselves responsible for and regarded themselves as capable of remedying recruitment challenges. There was no suggestion at this stage that a force majeure event had arisen and the Contractors' conduct was plainly inconsistent with such an event having arisen.

(4) Insofar as the Presentation stated at p.3 "a significant upsurge in UDA delivery is anticipated in Wallasey", *that was expressly conditional on "the imminent approval of [AS]'s conditional performer number"*. [AS] is still not in situ, despite the Contractors having confirmed that his start date would be 15 October 2023.

(5) At p.13 of the Presentation, the Contractors addressed the Breach Notices, stating: "*Due to the increasing UDA activities in these practices, we would like to seek resolutions to end the breach notices."* In substance, the Contractors sought resolution in respect of non-contractual performance.

56. Further detail regarding the Contractors' failure to meet even a small fraction of their UDA obligation under cl.77 of the Contracts is set out in the "Smart Dental Mid-Year Review Meeting" minutes of 18 January 2024, a copy of which is exhibited [959 - 964].

57. Moreover, the Contractors' recruitment of "performers" has not taken place in accordance with its representations in the Presentation. As set out in the accompanying evidence:

(1) For the Chester Practice, the Contractors have provided four proposed names for staff who could perform services, of which two were therapists. One of the two dentists proposed is still not in situ for the performance of NHS dental services at the present time, despite it having been confirmed to the Commissioner that the individual ([HS]) would be in situ by 1 February 2024. [HS] presently is providing private dental services from the Chester Practice, in which context the complaint summarised at paragraph 73 below arose, namely that "… [HS] misled the patient in the practice suggesting that he was being treated as an NHS Patient."

(2) For the Picton Practice, the Contractors have proposed that six members of staff would provide services at the practice, of which all (bar one) were dentists. However, four of the five dentists mentioned ([MA], [MC], [WA] and [SF]) are not in situ at the present time, despite the Contractors having asserted that they would be in a position to provide services by 1 October 2023 or earlier.

(3) For the Sefton Practice, the Contractors have proposed that three dentists and two therapists would provide services at the practice. However, one of the dentists ([MG]) is not in situ at the present time, despite the Contractors suggesting a start date for that dentist of 20 August 2023.

(4) None of the three dentists proposed for the Warren Drive Practice ([EF], [MJ] or [MN]) are in situ, despite the Contractors suggesting that these individuals would have a start date of 1 September 2023, 4 September 2023 and 15 October 2023, respectively.

(5) As set out above, for the Poulton Practice, of the three names proposed by the Contractors (of which two were dentists), [AS], is still not in situ, despite the Contractors having confirmed that his start date would be 15 October 2023.

(c) Alleged force majeure notifications

58. At §7.5.2 of the Application, the Contractors contend that notification of a force majeure event was provided "on a number of occasions including, without limitation, letters dated 17th October 2022 and 17th January 2023".

59. For avoidance of doubt:

(1) Despite the Contractors' using the non-exhaustive formulation "on a number of occasions including, without limitation", the Commissioner is not aware of any other correspondence or notice which could be relied upon by the Contractors as lawful notification of a force majeure event.

(2) As set out below, not even the identified correspondence satisfies the contractual requirements for notification of a force majeure event.

(3) The identified correspondence also did not accord with the requirements in the Policy Book for Primary Dental Services for (i) prompt notification to take place within 5 working days of the alleged force majeure event or (ii) the use of specific forms annexed to the Policy Book to notify of the alleged force majeure event: see paragraph 44 above.

60. The Contractors' email dated 17 October 2022 set out a "Proposal to Deliver 100% of NHS contracted Activity – Merseyside Area". The focus of the document was not the notification of a force majeure event. Indeed, no mention of force majeure of any relevant provision of the Contracts was made by the Contractors. Rather, the letter proposed substantial reductions in the Contractors' obligation under the Contracts to deliver a certain number of UDAs in respect of each of the Contracts. Insofar as this document addressed what is now described as a force majeure event, it merely provided: "*Due to the national shortage of available NHS dentists in general and in particular dentists willing to perform NHS dentistry in the Merseyside area, the following contracts have struggled to deliver their contracted activity".*

61. On the same date, the Contractors wrote to a local Member of Parliament, Paula Barker (MP for Liverpool Wavertree), to raise concerns in relation to recruitment and the fact that "*as a company, we became aware of the shortage of dentists in particular to support NHS services in 2021 as many dentist (sic) left the service as COVID19 support from the NHS declined".* The email was sent following receipt of Remedial and Breach Notices referred to above. It demonstrates that the alleged recruitment challenges arose "in 2021" as a result of the coronavirus pandemic (i.e. a minimum of 10 months prior to 17 October 2022).

62. The following is noted regarding the letter dated 17 October 2022 relied upon at §7.5.2 of the Application:

(1) The first substantive condition under cl.372 was not met: see paragraph 43(1) above. Reliance on cl.372 is only permitted when the failure or delay in performance of contractual obligations and duties was *"caused by circumstances or events beyond the reasonable control of a party*". The stated causes of the failure to discharge the Contractors' obligations under cl.77 were identified as recruitment challenges arising from an alleged national shortage of available NHS dentists since 2021. The

Contractors were, at all times, responsible for recruitment at the Practices, including to ensure that there were a sufficient number of qualified "performers" available to discharge the Contractors' obligations to provide services under the Contracts. The Contractors' failure to recruit sufficiently to discharge its contractual obligations is a breach of its own making and not "circumstances or events beyond the reasonable control" of the Contractors.

(2) The second substantive condition under cl.372 was not met: see paragraph 43(2) above. The Contractors did not act to comply with cl.77 as fully and promptly as possible. To the contrary, the alleged recruitment challenges appear to have already been very longstanding by the date of the letter. The delayed recruitment processes are inconsistent with the Contractors having "take[n] all action".

(3) The formal condition was not met: see paragraph 43(3) above. By cl.372.1, the affected party must notify the other party of a force majeure event (i) "promptly"; (ii) "in writing"; (iii) identifying the specific force majeure event (i.e. "such circumstances or events"); and (iv) identifying the specific contractual duties or obligations delayed or prevented from performance. The letter was not issued promptly (in view of the alleged recruitment challenges having arisen in 2021) and did not adequately identify a contractually relevant force majeure event. Further, the specific contractual duties or obligations delayed or prevented from performance were not identified with any specificity. Moreover, the letter also did not accord with the requirements in the Policy Book for Primary Dental Services.

63. The letter dated 17 January 2023 provided:

"Response to remedial notice and notice of withholding payments dated 23rd December 2022.

Unfortunately, we are currently unable to comply with our contractual obligations with effect from the 20th of January 2023 in providing services as outlined in clauses 74 and 76.

We are currently unable to meet our annual UDA target of 8,407 or the monthly target of 700 UDA's due to a lack of NHS dentists currently working in the practice. As you know, we have acquired upgraded premises at Liscard Way in Wallasey which have been comprehensively fitted out. Unfortunately we had a delay associated with a leak on the roof and which the landlord was refusing to rectify. This has also caused internal damage. Fortunately, we have bypassed the dispute with the landlord and work is commencing today to rectify the issues. We already contracted with an NHS dentist that will start working at the practice as soon as the contractors complete their work – anticipated to be completed within 3-4 weeks – whilst efforts are in place to recruit additional dentist and/or contract with a Locum.

We are attempting to comply with the remedial notice, but, as you know, it is dependent on recruitment. Our Recruitment team is placing more emphasis in recruiting for this practice, and I hope that by the end of this month we will be contracted with new NHS dentists to start as soon as it is practicably possible. We will, of course, be updating the LAT accordingly during our next meeting.

Your letter states that we need to agree appropriate repayment plans, with deductions taken at £23,852 per month for 8.8 months or when the undelivered UDAs are re-claimed. Could a payment plan over a 14-month period be kindly extended until the UDA's are all reclaimed. This will further aid our recruitment effort and serve to maximize the likelihood of our being in position to be delivering 100% of our UDA contract sooner."

64. The following is noted regarding the letter dated 17 January 2023:

(1) The letter was confined to the Warren Drive Practice. Like correspondence was sent in respect of each of the Practices.

(2) The first substantive condition under cl.372 was not met. Reliance on cl.372 is only permitted when the failure or delay in performance of contractual obligations and duties was "caused by circumstances or events beyond the reasonable control of a party". The stated causes of the failure to discharge the Contractors' obligations under cl.77 were identified as "a lack of NHS dentists currently working in the practice" and "a delay associated with a leak on the roof". Put simply, the Contractors had failed to recruit in such a manner as to discharge their cl.77 obligation or to ensure maintenance works were undertaken timeously. Neither are "circumstances or events beyond the reasonable control" of the Contractors.

(3) The second substantive condition under cl.372 was not met. The Contractors did not promptly act to comply with cl.77 as fully and promptly as possible. To the contrary, the letter describes an open-ended and speculative attempt to "further align us to soon be delivering 100% of our contracted UDAs." The delayed recruitment processes are inconsistent with the Contractors having "take[n] all action", as is required in cl.372.

(4) The formal condition was not met. As set out above, by cl.372.1, the affected party must notify the other party of a force majeure event (i) "promptly"; (ii) "in writing"; (iii) identifying the specific force majeure event (i.e. "such circumstances or events"); and (iv) identifying the specific contractual duties or obligations delayed or prevented from performance. The letter was not issued promptly and did not adequately identify a contractually relevant force majeure event. Further, the specific contractual duties or obligations delayed or prevented from performance were not identified with any specificity. Moreover, the letter also did not accord with the requirements in the Policy Book for Primary Dental Services.

(d) Termination Notices and termination

65. Termination Notices were issued in relation to each of the Contracts on 29 August 2023.The Termination Notices were based on standard wording on each occasion.

(1) The Termination Notices set out that the Contracts were being terminated for material breach, including by way of failing to provide general dentistry services in the relevant location during core opening hours and at the required UDA value, and failing to take required steps as stipulated in the Remedial Notices in breach of cl.330 to remedy such breaches.

(2) For example, in relation to the Warren Drive Practice, at the time of the Termination Notice: (i) no dentists were in situ at the Warren Drive Practice, (ii) the percentage of UDA performance achieved since 1 April 2023 (as at 18 August 2023) was at only 5.2% of the contractual requirements, and (iii) only inadequate assurances had been provided to the Commissioner as to ongoing UDA performance. The breaches identified had therefore not been remedied.

(3) Sanctions were applied pursuant to cl. 336 of the Contracts in 2023 (and earlier in relation to the Sefton Practice) to minimise the Commissioner's losses. Notwithstanding, the deficit in funds owed to the Commissioner are approximately £1.6 million at the date of drafting.

(4) The PCT properly relied on cl.336, not cl.342. The Contractors' contention in prior correspondence that an express reference to cl.336 should be taken to have been a mistaken reference to cl.342 lacked any clear basis. That being the case, there was no need for different grounds to be identified in the notice of termination. The prior contention is not repeated in the Application and is addressed in these Representation protectively only.

(5) The Termination Notices provided for the Contracts to terminate on 26 September 2023.

66. Responses were received from the Contractors on 16 September 2023, threatening injunctive proceedings for all contracts save for the Chester Practice Contract.

67. On 19 September 2023, the Termination Notices were suspended until 19 October to permit local resolution.

68. Information was presented to the Commissioner regarding potential recruitment options on 13 October 2023.

69. The Termination Notices took effect on 26 October 2023. As at the date of termination, none of the five contracts were operating on the basis of dentists being available 5 days per week.

(e) The Preliminary Determination

70. The Application was made on 25 October 2023.

71. The Preliminary Determination was issued on 11 April 2024, pursuant to which these Representations are filed.

(f) Referrals to the General Dental Council

72. During the period of the dispute outlined above, complaints have been made to the GDC about the service provided to patients by those trading as "Smart Dental". Those complaints were dated 11 and 22 April 2024 and concern the Chester and the Picton Practices.

73. The complaints demonstrate that the efficiency of the services to be provided under the Contracts (see cl.335) were significantly compromised by the cumulative effect of the notified breaches of the Contracts by the Contractors. By way of example, in April 2024, a complaint to the GDC was made concerning the Chester Practice. In broad terms, the Commissioner identified a concern that "*… patients are being misled into believing that they are receiving NHS Care. The website is unclear and it would appear that in the practices that patients are not clear as to the basis they are being seen*." The Summary of Concern provided as follows:

> *"1. A patient has complained to the ICB regarding confusion on the basis that he was being treated at the practice. He presumed that he was being treated as an NHS Patient. However, it transpired that he was in fact a private patient and being treated by a dentist who was not on the NHS Dental Performers List*
>
> *2. The treating dentist, [HS] misled the patient in the practice suggesting that he was being treated as an NHS Patient. He stated that his UL6 required a surgical extraction and that wasn't available on the NHS in the practice but only on referral to a Tier 2 service. However, he could surgically extract the tooth at an increased cost. That would be the same dentist, he was stating that he wasn't prepared to undertake the extraction on the NHS.*
>
> *3. The patient emailed the Practice to try and understand the Treatment Plan he was asked to sign as it did not correspond to his understanding of the NHS Dental Charges, he presumed this was all covered on a Band 2 NHS Patient charge.*
>
> *4. As part of the written response, the Practice Manager responded continuing to suggest that he was being treated as an NHS Patient and that the extraction could only be offered "independently."*

5. It was only when the ICB intervened to clarify the situation for the patient that it became apparent that this was not an NHS Course of Treatment, and that the patient was in fact being treated privately.

6. As part of the initial response, Smart Dental Care provided clinical records that fail to document the required details of an examination, the discussion had and fall below the required standard. This was provided by the Groups Operation Manager who candidly states that "there is no explanation of the proposed private treatment or mention of an NHS referral".

7. The patient has written to the ICB stating that he was "clear, on every occasion, that I was an NHS patient …… At no point was it stated, or implied, that my initial consultation or ongoing care would be as a private patient, and I do not believe there could have been any doubt at any of the above steps that I considered myself to be attending as an NHS patient, which was never questioned." They charged him a fee that was the same cost as an NHS Band 1 Charge.

8. The patient has asked the ICB to take this concern forward to both the GDC and ICB. The patient has given the ICB permission to share his details with both regulators and is happy to make a statement that records his experience and dissatisfaction. We have enclosed the email chain.

9. The patient had been suffering with toothache for a number of days. Given the situation with Smart Dental Care and that fact that they wanted the patient to pay an independent fee of £150 on top of the pseudo band 1 charge, the ICB arranged for him to attend another practice the following day to provide the extraction. This was completed non surgically for a Band 1 Charge. The patient contacted the ICB to give his thanks to that practice.

10. The patient has stated that he believes that within Smart Dental Care there is " systemic and fraudulent misrepresentation at play".

11. A review of the Smart Dental Website demonstrates that there is a fee system for Independent Patients that mirrors the NHS Charge Band System. The website suggests that the Independent system works in the same way as the NHS Dental Contract and suggests that if you are not clear as a patient, you can ask the Dentist to explain. For this patient, the explanation suggested that he was being treated as an NHS patient and muddied the waters further rather than clarify issues."

74. The evidence of Mr [TK] further details an investigation taking place at the Picton Practice in relation to one of the staff members, following a complaint by a patient. A report undertaken by Case Investigator, Dr Gill Shea BDA (VU Manc), PgC T&L, PgC DPA & QI and NHS England Dental Advisor, identified significant failings and patient safety concerns, including a dental therapist working beyond the scope of practice and failures relating to dental decay and disease. In particular, the investigation report identified:

(1) Failure to take appropriate radiographs to diagnose decay;

(2) Failure to diagnose dental decay clinically and radiographically;

(3) Failure to provide an adequate standard of dental care – patients may have untreated dental decay left after the fillings received;

(4) Failure to obtain written consent and provide NHS Dental Treatment Plans;

(5) Failure to diagnose and treat gum disease appropriately;

(6) Prescribing “prescription only” medicines without a Patient Group Direction in place (including local anaesthetic and antibiotics);

(7) Working beyond the scope of practice of a dental therapist; and

(8) Clinical records that fail to meet the required standards.

75. The above matter has been reported to the GDC in view of the severity of the issues raised.

V. RESPONSE TO THE APPLICATION

76. The Application lacks merit and should be dismissed. In light of the factual and legal background set out above, each of the submissions at §§7.5.1-7.5.5 of the Application is plainly hopeless.

(a) As to the Contractors’ account of the facts in the Application

77. The Contractors’ account of the factual background to the Application from §7.1 is partial and unrepresentative, not least by reason of selective quotation from contemporaneous documents and generalised statements which are unsupported by any reference to contemporaneous evidence at all. NHS Resolution is invited to exercise great caution in adopting any part of that account.

78. The Contractors’ partial and unrepresentative account of the factual background to the Application also falls to be considered in the context of the Contractors having made representations as to their expectations and intentions, which have not then been given effect. The most striking examples of such representations concern the Contractors’ stated intention to recruit named “performers”. As is set out at paragraph 57 above, the Contractors have substantially failed to undertake their intended recruitment. Further, the Contractors’ presentations about how UDAs would come to be delivered were similarly substantially overstated and have been demonstrated to be inaccurate: compare paragraphs 49 and 55 above.

79. In contrast, the contemporaneous record supports the Commissioner’s submissions. Further, the evidence of Mr [TK] (which accompanies these submissions) is detailed, highly persuasive and supported by a statement of truth. NHS Resolution is invited to prefer the factual account of the Commissioner in those circumstances.

(b) As to §7.5.1 of the Application

80. At §7.5.1 of the Application, the Contractors’ argument that “the Termination Notices are invalid” is comprised of the following limbs, each of which lacks any merit:

(1) Limb 1: the Contractors contend that the Commissioner’s alleged failure to follow the provisions of cl.91-96 of the Contracts gave rise to a contract sanction under cl.342.

(2) Limb 2: “having imposed a contract sanction, the Board then cannot rely on the same facts and matters as giving the right to terminate”.

81. There are three independent bases for rejecting Limb 1:

(1) Limb 1 demonstrates a fundamental misunderstanding of how the Contracts operate. The Termination Notices were properly issued under the terms of Part 22 of the Contracts. The scheme governing mid-year reviews in cl.91-100 does not qualify the PCT’s entitlement to terminate under Part 22. The scheme established under cl.91-97 of the Contracts is therefore irrelevant to the relief claimed by the Contractors.

Paragraphs 35-37 above are repeated. §7.5.1 of the Application therefore falls to be rejected as being inconsistent with the proper interpretation of the Contracts.

(2) The provisions of the Contracts relating to mid-year reviews are explained at paragraphs 24-28 above. The Contractors have not provided any particulars in support of the bare assertion that "*The Board did not follow the provisions of clauses 91 to 96 of the Contracts…"* NHS Resolution should reject this unparticularised assertion. Given that this unparticularised assertion is critical to the Contractors' chain of logic under §7.5.1 of the Application, it follows that §7.5.1 of the Application must fall away if the unparticularised assertion is rejected.

(3) The Contractors' argument entails an unjustified leap in contending that, as a matter of contractual interpretation, when the Commissioner expressly relied upon cl.336 of the Contracts, it was not open to the Commissioner to have done so and that that express reliance on cl.336 should instead be deemed to have been reliance on cl.342. The Contractors' argument lacks any merit. The imposition of a contract sanction is an alternative to termination of the Contracts. Given that an alleged failure to follow the provisions of cl.91-96 has no relevance to the entitlement to terminate the Contracts under, amongst other provisions, cl.334, an alleged failure to follow the provisions of cl.91-96 also has no relevance to the imposition of a contract sanction under cl.342. Paragraphs 38-39 above are repeated.

82. As to Limb 2:

(1) Limb 2 proceeds on the express basis that the Commissioner imposed a contract sanction. However, as set out above, there is no basis for that assertion, which is fundamentally flawed as a matter of fact and law. Given that the Commissioner did not impose a contract sanction, Limb 2 falls away.

(2) In any event, the Contractors' assertion that "the Board then cannot rely on the same facts and matters as giving the right to terminate" misunderstands Part 22 of the Contracts. As set out at paragraphs 32-34 above, cl.334 provides that notice to terminate may be served either if the same breach is repeated as is specified in a breach notice or remedial notice (cl.334.1), or other breaches occur resulting in a further remedial notice or a further breach notice (cl.334.2). The term "otherwise breaches" in cl.334.2 indicates that the breaches need not be the same as those originally specified, but cl.334.1 expressly contemplates that they might be.

83. In light of the aforesaid, §7.5.1 of the Application should be dismissed.

(c) As to §7.5.2 of the Application

84. By §7.5.2 of the Application, the Contractors advance an argument relying on the force majeure provisions of the Contracts, alleging:

(1) Limb 1: "following the enforced covid restrictions … it is even harder to recruit dentists willing to perform NHS dentistry in this area". In turn, it is alleged that "these recruitment difficulties" constituted a force majeure event under the Contracts.

(2) Limb 2: Notification of the alleged force majeure event was said to have been provided on 17 October 2022 and 17 January 2023.

(3) Limb 3: "… medium term recruitment efforts employed by the Contractors (delayed by the Board's failure to register performers in time) are now beginning to come to fruition, and so it is anticipated that full Contracts performance will begin from January 2024."

(4) Limb 4: “It is not open to the Board to terminate the Contracts until the force majeure event has ceased.”

85. The Contractors’ reliance on the force majeure provisions of the Contracts is fundamentally flawed. In summary:

(1) Both the detailed analysis of the force majeure provisions of the Contracts and associated case-law at paragraphs 40-46 above and the account of the facts bearing on the alleged force majeure notifications at paragraphs 58-64 are repeated.

(2) The Contractors failed to discharge their obligation to notify of a force majeure event under cl.372 of the Contracts.

(3) In any event, the Contractors have not demonstrated either that a force majeure event of the type specified in the Contracts has arisen, or that the only effective cause of the Contractors’ failure and/or delay in discharging its obligations under the Contracts lies outside the control of the “affected party”.

86. As to Limbs 1 and 3:

(1) A force majeure event under cl.372 must have been “caused by circumstances or events beyond the reasonable control of a party”. Clause 373 provides clarification that: “any actions or omissions of either party’s personnel or any failures of either party’s systems, procedures, premises or equipment shall not be deemed to be circumstances or events beyond the reasonable control of the relevant party for the purposes of this clause, unless the cause of failure was beyond reasonable control.” Further, §14.7 of the Policy Book for Primary Dental Services demonstrates that staff recruitment challenges of the class of events that will not constitute a force majeure event.

(2) The Contractors’ submissions under Limbs 1 and 3 are directly contradictory. Under Limb 1, the Contractors rely on “these recruitment difficulties” (which are said to have arisen as long ago as the Coronavirus pandemic) as an event beyond their reasonable control; however, under Limb 3, it is asserted that “medium term recruitment efforts employed by the Contractors” are anticipated to lead to full contractual performance. On the clear terms of cl.372 and 373, “these recruitment difficulties” do not satisfy the definition of a force majeure event.

(3) By Limb 3, the Contractors are representing that there is a prospect of their proper contractual performance in the future. However, it is implicit that the Contractors accept that they are currently in breach of their obligations to provide mandatory services under the Contracts, including by having failed to delivery [sic] the number of UDAs specified in cl.77. In substance, the Contractors are relying on cl.372 to seek to oblige the Commissioner to accept non-contractual performance of the Contractors’ obligations under the Contract in order to overcome the effects of the alleged force majeure event. The Contractors’ approach is fundamentally contrary to the recent Supreme Court judgment in MUR, in which the Supreme Court rejected the argument that a reasonable endeavours provision in a force majeure clause compelled a party in the position of the Commissioner to accept the Contractors’ offer of non-contractual performance.

(4) As a matter of fact, NHS Resolution should exercise great scepticism as to the assertion that “it is anticipated that full Contracts performance will begin from January 2024” in any event. The history of the Contractors’ statements regarding recruitment is that such statements of future intention have not borne out in reality. In particular, paragraph 57 above is repeated.

87. Limb 2 lacks any proper basis. By cl.372.1, the affected party must notify the other party of a force majeure event (i) "promptly"; (ii) "in writing"; (iii) identifying the specific force majeure event (i.e. "such circumstances or events"); and (iv) identifying the specific contractual duties or obligations delayed or prevented from performance. The alleged notifications of a force majeure event did not meet the contractual requirements in the formal condition of cl.372. The first alleged notification was at least in excess of 10 months after the alleged recruitment challenges arising, which cannot be described on any proper basis as "prompt" notification. Paragraphs 43(3), 44(3)-(5), and 58-64 above are repeated.

88. Limb 4 is not based on a proper interpretation of cl.374 of the Contracts: see paragraph 46 above. There is no basis in the contractual terms agreed by the parties for the exercise of the Commissioner's right to terminate the Contracts to be precluded until after the conclusion of the force majeure event. Rather, cl.374 permits termination of the Contracts at least 28 days after the provision of notice in writing if, by reason of a force majeure event lasting for three months, performance of contractual obligations is delayed or prevented.

89. Further, the Contractors can only rely on the force majeure clause to seek the termination of the Contracts. It formed no part of the parties' contractual bargain that the Contractors were permitted to rely on an alleged force majeure event simply to resist the deductions and sanctions imposed by the Commissioner. The Contractors' submissions under §7.5.2 relying on the force majeure provisions of the Contracts are therefore inconsistent with §7.5.1, in which it is asserted that Contracts should not be terminated.

90. In light of the aforesaid, §7.5.2 of the Application should be dismissed.

(d) As to §§7.5.3-4 of the Application

91. §7.5.3 of the Application asserts that: "The Board has a duty of good faith to the Contractors in performing its obligations under the Contracts". The relevance of this point to the Application is not explained. The Commissioner reserves all rights to address this point, if it comes to be particularised in due course.

92. Instead, it is the argument presented "in the alternative" that forms the substance of §7.5.3 of the Application, namely: that the Commissioner has "a duty to exercise the power of termination in good faith" and allegedly failed to do so. That duty was said to have been breached on account of: (i) the Commissioner's refusal of the offer of golden handshakes; (ii) "allow[ing] the Contractors to undertake significant expense in recruitment from across the world"; (iii) discriminatory treatment in "singl[ing] out the Contractors as the Contracts to be terminated"; and (iv) the Termination Notices were served "for an improper purpose". §7.5.4 is expressly parasitic on §7.5.3 (as is clear from the opening term "in reliance on the factors listed in paragraph 7.5.3 above").

93. The Commissioner did not act contrary to its duty to "act reasonably and in good faith and as a responsible public body required to discharge its functions under the Act" under cl.10 of the Contracts. Contrary to §§7.5.3-4 of the Application:

> (1) The Contractors' argument under cl.10 misunderstands the good faith clause under the Contracts. The Contractors err in conflating the duty to act in good faith under cl.10 with an obligation on the Commissioner not to enforce its contractual entitlements: that approach is contrary to the express terms and structure of the contractual scheme under the Contracts. Clause 11 of the Contracts expressly preserved the Commissioner's entitlement to require the Contractors "to comply with the express provisions of this Contract". Paragraphs 14-17 above concerning the proper interpretation of cl.10 are repeated.
>
> (2) As to the "golden handshakes" argument:

a. As set out at paragraphs 29-31 above, it was the responsibility of the Contractors to recruit appropriately competent "performers" to undertake dental services, and, in turn, the duty of the performers themselves also have a duty to follow the requisite standards set by the GDC. At §7.5.3(a), the Contractors seek to pass responsibility for their failure to meet their obligation to recruit appropriately competent "performers" to the Commissioner. There is no basis for them to do so.

b. Part 14 of the Contracts provided that payments were to be made for dental services to be rendered by the Contractors under the Contracts, subject to deductions in the event of non-performance: see paragraphs 22-23 above. The Contractors had no entitlement to any greater sum than that due for the contracted dental services. In particular, the Contractors were not entitled to additional sums because, as a matter of their own employment practices, they had elected to pay new recruits an inflated sum at the outset of their employment.

c. Moreover, the Contractors' proposal to introduce golden handshakes amounted to an attempt to re-write the terms of their contractual and commercial bargain with the Commissioner. Its purpose was to release funds so that the Contractors would have greater commercial incentives to offer to new recruits. The Contractors' proposal presented to the Commissioner on 13 October 2023 [937 - 944] in relation to recruitment made this clear when stating:

"*A possible solution would be to request a proportion of the contract to be taken out of UDA management and be available to spend on recruitment or retention. This would enable golden handshakes or uplifted UDA, or even non-UDA activity to provide an enhanced working position…"*

d. At no point did cl.10 of the Contracts mandate that the Commissioner must accept re-written contractual and commercial terms. It is at odds with established case-law to regard a good faith obligation as requiring the Commissioner to accept non-contractual performance. As Lord Toulson in Prime Sight Ltd v Lavarello [2014] AC 436 at §47 noted: "Parties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them."

(3) The Contractors' submission that the Commissioner "allowed the Contractors to undertake significant expense in recruitment … [such that it is] wrong of the Board to issue the Termination Notices just when the recruitment efforts will begin bear fruit" errs in fact and law.

a. There is no compelling evidence that "the recruitment efforts will begin bear fruit". To the contrary, paragraph 57 above is repeated. NHS Resolution should exercise great scepticism as to the Contractors' assertions in this regard.

b. The description of the Commissioner having "allowed the Contractors to undertake significant expense in recruitment" makes no sense in the context of the Contracts having imposed an obligation on the Contractors to undertake recruitment themselves. If that recruitment proved to be less commercially advantageous for the Contractors than they had initially hoped for, no breach of cl.10 by the Commissioner thereby resulted. Rather, the Contractors simply entered into a less favourable commercial bargain than they had initially hoped for: i.e. it was an inherent risk under the Contracts.

c. In any event, there is no contractual basis for precluding the Commissioner's reliance on its rights to terminate the Contracts in the context

of the continued and extensive breaches of the Contractors' primary performance obligations under the Contracts. The Commissioner was not obliged to refrain from terminating the Contracts simply because the Contractors raised the prospect of future recruitment of dental practitioners, in circumstances in which there have been serious and long-lasting failures by the Contractors to undertake such recruitment historically. It is a regrettable feature of the Contractors' conduct that they have repeatedly made representations as to future recruitment which have not come to pass.

(4) As to the Contractors' different treatment argument:

a. There is no evidence provided by the Contractors of their different treatment to other providers in the area. No other providers are identified in the Application, let alone explaining how their position can be said to be equivalent to that of the Contractors.

b. Moreover, there is no contractual restriction on the Commissioner's right to terminate the Contracts arising from the relative treatment of different providers in the area. The Commissioner was permitted to exercise its discretion to terminate the Contracts, even if it elected not to terminate other contracts with other providers.

c. Indeed, even as a matter of public law, such an argument is hopeless (absent irrationality, which the Contractors do not come close to establishing): R (Gallaher) v Competition and Markets Authority [2019] AC 96 at §§24 and 50. Rather, the factual background above demonstrates there to have been compelling grounds to terminate the Contracts, which have only increased in the context of the recent and serious service complaints to the GDC.

(5) The Contractors identify no evidential basis for the serious allegation of an "improper purpose" to "force the Contractors to rebase the Contracts to a lower level". That unfounded allegation should have formed no part of the Application and should be withdrawn. Limiting losses under the failing Contracts through their termination does not amount to an improper purpose.

94. The Contractors' argument at §7.5.4 collapses into the following proposition: "… every practice in the area has difficulty with recruitment such that there is no spare capacity to provide the UDAs which the Contractors have been unable to provide to date".

(1) In substance, the Contractors are thereby relying on their own breach of the Contracts as a reason for the Commissioner not being permitted to terminate the Contracts. It is trite law that a contracting party is not permitted to take advantage of its own wrong: Great Elephant Corp v Trafigura Beheer BV [2013] EWCA Civ 905 at §34.

(2) Moreover, §7.5.4 of the Application again demonstrates a fundamental inconsistency at the heart of the Contractors' case. The Contractors both rely on the lack of available staff for recruitment to seek to justify their breaches of the Contracts, while asserting that the Commissioner is unable to terminate the Contracts because such recruitment challenges can be resolved imminently. The Contractors cannot have it both ways.

95. In light of the aforesaid, §§7.5.3-4 of the Application should be dismissed.

(e) As to §7.5.5 of the Application

96. Contrary to §7.5.5 of the Application, the Commissioner lawfully exercised its right to terminate the Contracts under cl.334. The cumulative effect of the Contractors' breaches of

the Contracts were such that allowing the Contract to continue would be prejudicial to the efficiency of the dental services provided thereunder (see cl.335).

97. Paragraph 34 above is repeated with regard to the relationship of cl.335 to the other provisions of Part 22 of the Contracts. Clause 335 confers a broad discretion on the Commissioner to consider whether allowing the Contracts to continue would be prejudicial to the efficiency of the dental services provided thereunder. NHS Resolution should be slow to intervene, save in clear cases of that discretion being exercised arbitrarily, capriciously or unreasonably.

98. The Contractors have not come close to demonstrate that the discretion was exercised arbitrarily, capriciously or unreasonably. The contention that the cumulative effect of the Contractors' breaches has not be prejudicial to the efficiency of the dental services provided by the Contractors is hopeless. In particular, the facts suggest that the exercise of the Commissioner's discretion was rational and properly in accordance with a clear and strikingly concerning factual picture:

> (1) Paragraphs 48-50 above are repeated. The Contractors have not, in any contract year from 2021/22 onwards, or in relation to any of the Contracts, met their UDA target. Indeed, the Contractors have provided minimal UDAs for those years in each of the Practices. In real terms, that means that the Practices do not provide dental services to local residents and the efficiency of dental services is substantially prejudiced.
>
> (2) Paragraphs 72-75 above are repeated. The complaints made to the GDC about the service provided to patients by those trading as "Smart Dental" constitutes very clear evidence of prejudice to the efficiency of the services to be provided by the Contractors. Amongst other things, the complaints identify the use of dental therapists operating beyond their permitted scope of practice in a manner that gives rise to serious patient safety concerns. This includes inappropriate prescription of medicines and local anaesthetics and failures to diagnose dental decay and gum disease. The significance of these failure for the patients concerned must not be underestimated or trivialised. Despite the significant patient harm flowing from the matters giving rise to the complaints to the GDC described at paragraphs 72-75 above, it is understood that the Contractors have nevertheless sought to count the work of dental therapists towards the UDA target under cl.77.

99. Taken together, the matters identified above demonstrate that the Commissioner lawfully concluded that the cumulative effect of the breaches by the Contractors was such that "*to allow the Contract to continue would be prejudicial to the efficiency of the services to be provided under the Contract*".

VI. RESPONSE TO RELIEF SOUGHT

100. The Contractors seek: (i) a declaration that the Termination Notices are invalid and of no legal effect and/or that that they were issued in breach of contract and/or that they were issued for an improper purpose and in breach of the duty of good faith; and (ii) damages for wrongful termination of the Contracts. For the reasons set out above, there is no basis for such relief. The Termination Notices were validly issued and no entitlement to damages arises.

101. NHS Resolution is invited to declare that the Contracts were validly terminated.

102. The deficit in funds owed to the Commissioner by the Contractors are approximately £1.6 million. The Commissioner does not seek damages in respect of that sum through the current dispute resolution process. However, the Commissioner reserves all rights to seek to recover damages in the future and in such a manner as it sees fit.

VII. CONCLUSION

103. As set out at paragraphs 72-74 above, significant failings and patient safety concerns continue to arise from the Contractors' defective performance of the Contracts. Substantial sums of public money are yet to be re-paid to the Commissioner by the Contractors, despite their fundamental (and largely undisputed) breaches of terms of the Contracts. Contracts were validly terminated.

104. The Commissioner submits that the Contractors' Application should be dismissed in its entirety and the relief should be refused for the reasons set out above and in light of the accompanying evidence. NHS Resolution should find that the Contracts were validly terminated."

The Contractor's representations

3.3 "1. These submissions are prepared on behalf of the Applicants (also referred to as the "Contractors") as challenge to the decisions of the Respondent (also referred to as the "Board") to terminate the following NHS general dental services ("GDS") contracts (the "Contracts"):

No. 1000960000 Sefton Dental Care Investment Centre ("Sefton")

No. 1696330001 Chester Dental Clinic ("Chester")

No. 9079950002 Atlantic Dental Practice ("Atlantic")

No. 7452350001 42 Poulton Road ("Poulton")

No. 1387110001 3-5 Liscard Way ("Liscard") (formerly 12 Warren Dr & 42 Poulton Rd)

2. The challenge in these proceedings encompasses both contract and public law principles. The Applicants' position, in summary, is that:

(a) The Respondent allowed and permitted the Applicants to invest significant sums in a recruitment process (including internationally) to allow for the recruitment of dentists to deliver the GDS services in circumstances of severe difficulties for all NHS contractors for the recruitment of NHS dental associates. The Applicants understood that the Respondent would allow time for this recruitment process to complete and deliver fully before seeking to terminate the Contracts. To terminate therefore, would be in breach of the Respondent's promise;

(b) The circumstances of the difficulty in recruiting NHS dental associates is a force majeure event in itself, which was effectively notified to the Respondent;

(c) The Respondent is in breach of clause 10 of the Contracts such that the termination notices are in [sic] invalid by reason of this breach; and

(d) The Respondent's decision to terminate the Contracts is irrational, or unfair, as there are other practices who at the relevant time, were performing worse than the Contractors or underperforming their GDS contracts yet the Respondent took no action to terminate their contracts per responses to FOI requests made by the Applicants [pp549-574 and 575-587].

Pertinent Background

3. The Applicants hold the Contracts with the Board. The issues arise between the parties due to underperformance of the Contracts since 2021.

4. As has been raised consistently with the Respondent by the Applicants, there is both a local and national shortage of dentists willing to work in the NHS, particularly in and around the Cheshire and Merseyside areas. The reasons are not only that there is a shortfall nationally in the number of dentists required to provide NHS dentistry, but that following the enforced covid restrictions limiting treatment, there is in fact a significantly higher need for complex treatments. As a result, it is even harder to recruit dentists willing to perform NHS dentistry in this area, as they are better remunerated by working in mixed NHS and private practices that have less dental need.

5. As stated, these were raised with the Board at the outset, in relation to the issues faced by the Applicants.

6. A remedial plan was prepared in October 2022, concentrating on recruitment. This was following remedial breach notices served. However, the Respondent did not approve the Applicants' proposal to give "golden handshakes" to attract dentists to the area, seeking instead to reduce the contract value of the Contacts instead. The decision to not allow "golden handshakes" is all the more surprising when the recent plan released by the NHS [Footnote: Faster, simpler and fairer: our plan to recover and reform NHS dentistry - GOV.UK (www.gov.uk)] indicates that it will consider these as a targeted methods:

> *We are committed to increasing the availability of NHS dentistry in all areas with low provision but know that recruitment and retention is difficult in certain parts of the country. To support practices in areas where recruitment is particularly challenging, we will launch a new 'golden hello' scheme. We will implement schemes working with ICBs that are struggling to recover their activity levels and would significantly benefit. A 'golden hello' of £20,000 will be offered per dentist for up to 240 dentists. Payments will be phased over 3 years, requiring a commitment from the dentist to stay in that area delivering NHS work for at least 3 years. We will decide on locations in the coming months, and we will review the effectiveness of this scheme before considering whether to extend the scheme in the future.*

7. Further to paragraph 6 above, the Applicants had also sought for the low UDA rate to be increased to allow for better investment and higher rates for possible associates, but the Respondent refused to consider this. This again is surprising, as the recent guidance referred to in paragraph 6 above confirms that uplifts for UDA rates can be considered by ICBs:

> *It can be harder for dentists to sustain their NHS work where the rates paid for each UDA are lowest. Having introduced a minimum UDA rate of £23 in 2022, we will now go further and raise the rate to £28. This will mean that almost 1,000 contracts will see an uplift to their UDA rate this year, supporting them and making treatment of NHS patients more sustainable. We have also developed guidance to support local commissioning by ICBs, including how they can consider addressing UDA rates locally to support better delivery of dental care for patients.*

The Respondent did in fact uplift UDA rates for 16 other contractors in 2022-23 and 3 in 2023-24 (to 12th December 2023) per responses to FOI requests made by the Applicants [pp573-574].

8. The matters set out in paragraphs 6 and 7 above, the Applicants submit:

> (a) Were detrimental at that stage to recruiting the dentists required to fulfil the Contracts; and
>
> (b) Are evidence that the Respondent's desire and aim to debase the Contracts to a lower level of UDAs, rather than to work with the Applicants to deliver much needed dental services in high needs areas.

9. The difficulties faced by the Applicants are supported by the evidence from Mr Eddie Crouch, Chair of the British Dental Association [pp589], who sets out the issues clearly and concisely in the recent letter, stating amongst other matters:

> *The BDA campaigned for a minimum UDA value of £35 to be included in the recovery plan. We believed this would be far more realistic in coping with the high needs patient practices are seeing post pandemic and the significant rises in running costs of dental practices, with the BDA estimating that staff costs alone had risen 15% in the past year. For the last decade the level of DDRB uplifts to contracts has made it increasingly difficult to sustain NHS provision.*
>
> *…*
>
> *The effect of these funding problems is that practices are finding it extremely difficult to recruit and retain staff to provide NHS contractual delivery. This is more prominent in areas where the demographic of the practice is one of high needs patients, with the lack of ability to cross subsidise via private provision.*
>
> *…*
>
> *The workforce issue is clearly recognised by the Government who have recently introduced consultations on allowing easier passage for overseas dentists to join the workforce and another for tying new graduates to the NHS. Both of these the BDA believe are reactions to the reduction of dentists willing to provide NHS care when more significant changes should be made. The measures proposed by Government will not be rapid solutions to the workforce issue as the GDC will take some time to develop any scheme of provisional registration and tie in of new graduates will not be possible with the existing cohort currently undergoing undergraduate training.*

10. As per clause 10 of each of the Contracts:

> *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.*

The Board not only had a duty under the National Health Service Act 2006 [Footnote: the Contract refers to the "the Act" which is defined as the NHS Act 1977, but this has been superseded by the NHS Act 2006] to secure and deliver dental services, but it also had a duty of good faith to the Applicants in how it operated and made decisions under the Contracts. The complaints raised by the Applicants are therefore substantial and show that the Board has:

> (a) Breached the duty of good faith to the Applicants to try to work together to assist the Applicants to deliver UDAs in high needs areas; and/or
>
> (b) Breached the duty to act reasonably to the Applicants in making decision pursuant to, and in respect of, the Contracts.

11. Unsurprisingly, the position had not improved by December 2022 due to the recruitment issues and the Respondent then served further remedial breach notices which:

> (a) Set out the breach being in respect of underperformance in the delivery of UDAs; and
>
> (b) Also applied a contract sanction under clause 336 for this underperformance, seeking to withhold a substantial proportion of the monthly payments. This is discussed further below.

12. On 17th January 2023 (the "17th January Letter") [pp135-144], the Applicants wrote to the Respondent clearly setting out the recruitment issues and that they would not be in a position to perform the Contracts until their recruitment processes had completed.

13. Further to paragraph 11 above, it is a key element in this dispute that the Applicants have undertaken significant recruitment efforts, as follows:

(a) Short Term recruitment:

The Applicants not only held a number of advertisements in the BDJ for the recruitment of dentists, but they also operated a referral scheme whereby professionals who referred other staff to the area would receive a gratuity payment. In addition, locum agencies were contracted to provide locum dentists as required, albeit this latter element is prohibitively expensive and is not a long-term solution;

(b) Medium Term Recruitment:

The Applicants also undertook recruitment exercises in Europe (e.g. Valencia and Prague), with the intention of recruiting dentists to be able to be registered under the mentor scheme and obtain their performer numbers within 9-12 months of being recruited; and

(c) Long Term Recruitment:

In addition to seeking recruitment in Europe, the Applicants also then sought registrants from outside of Europe, e.g. India and Sri Lanka. These dentists would be required to pass the ORE exam and obtain Performer numbers.

These recruitment efforts were at significant expense to the Applicants, and at all material times, the Respondent was kept informed of the efforts being taken to recruit staff to fill the shortfall and perform these Contracts. It is said that this is a key element, as the Respondent acquiesced and allowed the Applicants to undertake these efforts with:

(d) Full knowledge of the expense to the Client of undertaking this recruitment; and

(e) Full knowledge that it would take at least between 1 to 3 years for the Medium and Long Term recruitment to take effect to perform the Contracts in full.

14. Whilst the parties remained in discussions subsequent to 17th January 2023, the Applicants were met with a number of requests to provide clarity as to how many recruited dentists had been registered as being able to perform NHS work (i.e. Performer numbers or as Mentees). However, and as raised consistently by the Applicants in weekly meetings with the Board, the NHS were taking an inordinate length of time to register dentists either with Performer numbers or as mentees [e.g. p1-3, 169, 179, 387, 528]. Suffice to say, it is wrong for any authority to both criticise the lack of recruitment within a short period of time whilst at the same time failing to have any system in place to register staff within that same period of time, as referred to further below.

15. The Board served termination notices for each of the Contracts on 29th August 2023.

<u>Recent Performance</u>

16. In terms of the recent performance, it can be seen that matters have improved now that the recruitment processes instigated have been allowed to develop. The recent performance of the Contracts in the last quarter (2024-2025 Q1 to 17th May 2024) are as follows:

Practice	Contract UDAs	UDAs performed per Compass	% performed against year-to-date target
Chester	17,775	2017.29	84.3%
Poulton Road	9,352	1001	79.5%
Warren Drive	8,407	810.33	71.6%
Sefton	24,000	3204.4	99.2%
Atlantic	20,210	1052.80	38.7%

16. It can therefore be seen that the picture is much improved, and these are now practices where the required UDAs are finally being delivered. Atlantic is at 38.70% delivery due to the suspension of a therapist over scope of practice, who is being replaced by a new dentist.

17. Furthermore, and in order to show the Respondent that the termination of these Contracts are not commensurate with the Respondent's duties under the 2006 Act, the Applicants have undertaken extensive surveys from patients [see separate bundle]. Of the 499 patients who responded electronically:

1. 87% of patients said they received an Excellent, Fair or Good service at the dental practices

2. 40% of patients or a member of their family had a disability

3. 47% of patients or an immediate member of their family claimed benefits

4. 56% of patients live within 2 miles of the practices

5. 91% of patients would access urgent dental care from their GP, A&E hospital or NHS111 help line.

These are practices run by the Applicants that are now properly delivering care to patients with high needs, and the survey shows that patients are supportive of the care that is being delivered.

18. This Tribunal is invited to find that by continuing to rely on the effect of the termination notices, the Respondent is not acting in line with its duties to secure dental services under the 2006 Act [Footnote: as per section 99(1) of the 2006 Act: (1) The Board must, to the extent that it considers necessary to meet all reasonable requirements, exercise its powers so as to secure the provision of primary dental services throughout England]. This is because, if the Contracts are terminated, not only will care be lost, but the Board has failed to set out which other practices in the area have spare capacity in order to deliver these services.

Submissions on Termination Notices being invalid

19. Unusually in this matter, the Applicants have rights both in Public Law and under each of the Contracts to argue that the termination notices are incorrect and are of no legal effect, such that none of the Contracts should determine. Whilst the Respondent may rely on the case of Tomkins v Knowsley Primary Care Trust [2010] EWHC 1194, as support for the proposition of there being only contractual rights, this has to be dependant upon the issue in dispute. In this case, the decision itself to terminate the Contracts, and the decision to continue asserting the termination, are clearly matters to which public law remedies are available, especially when one considers clause 10 as set out above.

Submissions under Contractual Principles

Failure to follow clauses 91 to 96 of the Contracts in order to terminate

20. Firstly, the Board did not follow the clear of provisions clauses 91 to 96 before seeking to withhold under clause 336 [sic]. It is a trite law that where a contract provides for a detailed mechanism to be followed before a contract sanction is followed, the failure to follow that contract sanction would be a breach. In such circumstances, the withholding pursuant to the each [sic] withholding notice cannot have been under clause 336, but was in fact a contract sanction under clause 342. Where the Board has already imposed a contract sanction in respect of a remedial or breach notice(s), it cannot rely upon that same notice as giving rise to grounds for termination later, as the Board has elected the remedial course of action over rather than the termination clause [sic]. As such, the termination notices are invalid as the Board cannot rely upon the previous breaches referred to in the first two remedial notices.

The Contractors gave an effective force majeure notice

21. Secondly, and further to the above, the 17th January Letter was notification of a force majeure event in respect of recruitment difficulties, thereby being formal notification to the Board under clause 372.1 of the Contracts. As set out in the background above, considering that recruitment was the sole difficulty of performance of the Contracts and that this was an issue in respect of which the Board had been kept fully informed throughout, including the recruitment efforts being undertaken, then it is not open to the Board to issue a termination notice until the force majeure event has ceased. As matters stand, the recruitment efforts (delayed by the Board's failure to register performers in time which this Tribunal must take into account to the detriment of the Respondent) are now beginning to come to fruition, and the recent activity is positive as set out above. In such circumstances, the termination notices are invalid and of no effect.

Breach of clause 10 of the Contracts

22. Before turning to the submissions under clause 10, the Board's obligations have to be examined in the context of GDS contracts. GDS contracts are, as this Tribunal will be aware, non-time limited contracts (unlike for example, PDS agreements) regulated by The National Health Service (General Dental Services Contracts) Regulations 2005 ("the Regulations") which proscribed the mandatory terms upon which NHS dental services were to be provided. There was therefore little commercial negotiation between the Contractors and the Board as to the terms of these contracts. In addition, the other parts of the relevant background are that:

> (a) There are a set number of contracts for each area issued by the NHS commissioners, such that a new dental entrant cannot simply "set-up" and attract NHS patients, as they would not be remunerated for the same. There is therefore, the Applicants would argue, a significant amount of co-operation required between the Board and the Contractors in order to deliver NHS dental services;
>
> (b) Furthermore, aside from the annual increase in the UDA rate mandated by the NHS, any substantial increase in UDA value or the number of UDAs to be performed is at the discretion of the Board only; and
>
> (c) The Board has the power and right, under the Contracts, and this is not in dispute and occurred in this case, to ask for clawback if the relevant UDAs have not been performed, thereby protecting the funds advanced by the NHS if dental services have not been performed.

23. Against that background, this Tribunal as asked to consider that clause 10, as a matter of interpretation, should be construed as follows [sic]: In complying with the Contracts and in exercising its rights under the Contracts, the Board has the following obligations:

(a) It must act reasonably to the Applicants who have Contracts and are attempting to deliver dental services under such contracts ("the Reasonableness Obligation");

(b) It must act in good faith. In order to discern the extent of the duty of good faith, this Tribunal is asked to consider:

(i) The comments of Beatson L.J. in Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (Trading As Medirest) at paragraphs 150-151:

150. The recent decision in Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB), decided since the judge's decision, was relied on by Mr Howe QC. In that case, Leggatt J gave extensive consideration to the question of implying a duty of good faith into a contract. His discussion emphasised that "what good faith requires is sensitive to context", that the test of good faith is objective in the sense that it depends on whether, in the particular context, the conduct would be regarded as commercially unacceptable by reasonable and honest people, and that its content "is established through a process of construction of the contract": see paragraphs [141], [144] and [147]. See also paragraph [154]. Those considerations are also relevant to the interpretation of an express obligation to act in good faith.

151. The scope of the obligation to co-operate in good faith in clause 3.5 must be assessed in the light of the provisions of that clause, the other provisions of the contract, and its overall context. As to the first of these factors, I respectfully agree with Jackson LJ (at paragraphs [106] – [108]) that the content of the obligations to co-operate in good faith is to be determined by reference to the two purposes specified in the clause. Those purposes are the efficient transmission of information and instructions and enabling the Trust or any beneficiary to derive the full benefit of the contract. The judge had regard to those purposes, stated (see paragraph [27]) that the second one was "crucial", and (see paragraph [34]) regarded those purposes as "broad". He also had regard to the third of the factors and accepted (see paragraph [27]) that the scope of the duty to co-operate takes its content from "the circumstances and the nature of the contract concerned".

(ii) Jackson L.J. thoroughly reviewed the authorities regarding the duty of good faith in a contractual context (albeit between freely contracting parties) in The Matter Of Compound Photonics Group Limited at paragraphs 147 onwards, concluding at paragraph 197:

Secondly, the particular concept of a requirement to have regard to the interests of the other contracting party has largely been developed and applied in cases concerning business decisions by one party which are capable of adversely affecting, or even depriving the other party of, the commercial benefit expected to be enjoyed by that other party under their contract (e.g. Burger King, Overlook, Berkeley and CPC Group). It is far from obvious how or why the same approach is automatically to be applied in the context of voting by shareholders at general meetings of a limited company.

It is submitted that these paragraphs are the relevant paragraphs for this Tribunal, as Jackson L.J. then further considers the interpretation of good faith in the context of a shareholders' agreement, which is not the context here. This Tribunal should have regard in particular to the following paragraphs:

(A) Paragraph 169, whereby the following Judgement of Morgan J was cited with approval (emphasis added):

[Counsel for the defendant] did not suggest that these statements by French J. (and the material referred to by the learned judge) were not a useful attempt to describe the concept of "good faith". Nor did [he] refer me to any English authority, or any other authority, which adopted a different approach. In these circumstances, based on the material that has been put before me, I feel I am able to construe [the utmost good faith clause] as ***imposing on the defendants a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the first claimant.***

(B) Paragraph 183, whereby in relation to a contract governed by New South Wales law, it was held that the party with the discretion ("Burger King") had an implied duty of good faith and *was required to exercise its discretion to approve or reject new franchises "in good faith and reasonably", and could not do so for an extraneous purpose so as to "thwart" the franchisee's ability to develop its business*.

It is therefore submitted that the meaning of the duty of good faith is not only to act honestly, but as the Board can deprive the Applicants of the full and/or substantial benefit of the contract by: termination; and by clawback, the duty of good faith would extend to ("the Good Faith Issues"):

(C) Honestly considering requests from the Applicants to uplift the UDA rate;

(D) Honestly considering requests from the Applicants for assistance in the delivery of services; and

(E) When considering exercising its powers under the Contract, to use such powers in an honest and fair way not only to the Applicants, but across all GDS contractors performing in the Board's area. It is submitted this must be the case, as the Contract by clause 243 mandates that the Applicants are to make treatment decisions regarding the delivery of care without regard to their financial interests. In doing so, it must be right that the Applicants can expect a significant degree of honesty and integrity in steps taken by the Board when it seeks to undertake actions which deprive the Applicants of the benefit of the Contracts.

(c) It must act as responsible public body required to discharge its functions under the Act, suggesting that it must use its powers in a reasonable manner so as properly procure, and manage, the delivery of primary dental services within the Board's area ("Reasonable Public Body Issue").

24. Whilst paragraph 22 above sets out the general background, and before turning to the specific submissions, the further specific background to this matter is as follows, as shown by the Freedom of Information requests:

(a) As per [551-553 and 559-567], the Board has not sought to terminate any other GDS contract in the area in save for the Contracts held by the Applicants;

(b) As per [560], 3 providers "resigned" or "handed back" their GDS contracts;

(c) Based on [564-567 and 580-587], the Applicants have undertaken an analysis of underperforming GDS contractors in the area, and has concluded that: *it appears*

where we have a complete dataset, that 52% of dental UDA contracts i.e. 141 contracts out of 271 contracts have underperformed by more than 10% against their stated UDAs.

If Smart contracts were the only ones to be terminated then it can not be on the grounds of underperformance alone as by this token another 52% of contracts would also be subject to termina on as well [sic]*.*

Therefore, not only is there wide-ranging underperformance in the area across all contractors, but the Board has a case to answer as to why only the Applicants' contracts were sought to be terminated;

(d) Further to the preceding point, it is clear that there are 157 (out of 318) underperforming contracts in the area [570-572].

(e) In addition, an analysis of the use of the clawback mechanism in [570-572] by the Applicants shows as follows:

As you can read of the 318 contracts providing NHS dentistry in C&M, 157 contracts underperformed with 878070 UDAs clawed back from practices worth £26.7M for 2022/23 and NONE of this money being clawed from practice from last year is being recommission as new activity in the current year proving the point that the NHS is using the device of clawback to recover cash that it does not intend to spend on dental services [sic]*. Furthermore of the 157 practices that underperformed last year, NO other practices are having their contracts terminated proving the point that for some reason, Smart are being made an example of unfairly.*

(f) Finally, it is clear that the Board has increased the UDA rates of some contractors in the area, as per [573], in that: 1 was increased in year 21/22; 16 were increased in year 22/23; and 3 were increased in year 23/24. The justification from the Board is set out at [574].

25. Furthermore, as set out in the attached letter of Mr Eddie Crouch [pp589], it is submitted that this Tribunal can consider that there is wider issue with the recruitment and retention of dental associates in this area (due in part to there being little to no private work to cross-subsidise the low NHS UDA rate), and this is a factor which the Board should have taken into account when considering the requests of the Applicants.

26. Turning now, to the submissions on the issues identified in relation to clause 10 above:

<u>The Reasonableness Obligation</u>

(a) On the basis of the matters set out in paragraphs 24 and 25 above, it is submitted that the termination notices are invalid as the Board has not behaved reasonably towards the Applicants by reason of the following:

(i) It has failed to consider reasonable requests to increase the UDA rates to allow for the retention or recruitment of dental associates, which it is now apparent it has done for other contractors, against a background where they failed to recommission some £26.7million of services that were clawed back;

(ii) It has unreasonably failed to consider decreasing the overall UDA allocation for each of the Contracts when it has become clear that there is a region-wide difficulty in performing these contracts (52% of contracts underperforming at least 10%);

(iii) It prevented the Applicants recruiting with the offer of golden handshakes as proposed in October 2022. Considering that the Applicants' UDA rate is not as

generous as providers within the same area, the Board failed to take into account the financial restrictions that the Applicants are under to recruit dentists;

(iv) It has failed to set out or justify why only the 5 Contracts held by the Applicants were suitable for termination when considering the vast number of underperforming contracts. This particular aspect will be for the Board to justify and the Applicants would reserve a right of reply including in respect of any statistical or evidential justification provided;

(v) Considering that the Board was undertaking clawback from the Applicants, and that the Applicants have invested significantly in recruitment, the Board has behaved unfairly in later then terminating the Contracts;

(vi) Further to (iv) immediately above, or in the alternative, the key point for the Board to show is that by terminating these Contracts at the relevant time, there was another provider who could have undertaken the UDAs that would have been available by reason of the loss of the Contracts. In the Applicants' submissions this was plainly not the case as:

(A) There was still under performance of contracts across the region; and

(B) This is all the more stark when it is considered that the Board had failed to recommission circa £26.7million of services, i.e. that demand should have been higher and there be less underperformance as there were less UDAs across the entire area.

(vii) The net effect of the failure to: either increase the UDA rate; decrease the number of UDAs required to be performed per contract; failing to allow "golden handshakes" to be given; and/or allowing the Applicants to undertake a comprehensive national and international recruitment process at some expensive [sic], was that the Applicants were not give [sic] a fair or reasonable opportunity to complete the delivery of the Contracts.

<u>The Good Faith Issues</u>

(b) As to what constitutes a breach of this duty, Jackson L.J. stated at paragraph 241 of Photonics, having reviewed the authorities on the proposition that a breach of good faith can only be by dishonest conduct from paragraph 213, of:

In my judgment, therefore, the authorities do not support the proposition that a contractual duty of good faith can only be breached by conduct that is dishonest according to the explanation of that concept in Royal Brunei and Ivey. Depending on the contractual context, a duty of good faith may be breached by conduct taken in bad faith. This could include conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest. I therefore reject the Investors' argument that a finding of dishonesty was a pre-requisite for a finding of breach of clause 4.2 of the 2013 SHA.

It is therefore submitted that the conduct of the Board need not be to the extent of "bad faith" or "dishonest" in order to breach the good faith duty, rather *conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest* would be sufficient.

(c) On this basis, the matters set out in paragraph 26(a) above are repeated, each individually or taken together are a breach of the duty to act honestly and with the delivery of primary dental services in mind.

(d) In particular and without limiting the submissions in (c) immediately above, the fact that there are wide ranging issues in the area with the delivery of services across 52% of providers and that some whilst some other providers have been given increased UDA rates due to recruitment issues, it appears commercially unacceptable to disallow the Applicants any help, and then terminate only the Applicants' contracts. There appears to be a significant discrepancy in the treatment of providers across the region, with the Applicants being singled out.

(e) Furthermore, considering that the recruitment process has now borne fruit with the Applicants significantly delivering across the majority of the Contracts as set out above, it is commercially unacceptable for the Board to insist on the validity of termination notices, in circumstances where the Board have not shown that:

(i) They intend to recommission these UDAs across other providers; and

(ii) That the providers can indeed deliver extra UDAs.

The suspicion of the Applicants is that the Board is seeking to simply clawback the monies without any intention to deliver UDAs (as shown by the failure to recommission the circa £26.7million previously). This alone would be a further breach of the duty of good faith.

Reasonable Public Body Issue

27. On this issue, the matters in (a) to (e) above are repeated as breaches by the Respondent.

Breach of the Board's promise to not terminate

28. The matters set out in the background at paragraphs 3 to 15 above, culminating in the 17th January Letter [pp135-144], and continuing thereon by the number of requests as to the recruitment efforts, as well as the continued investment by the Applicants in the recruitment (against a backdrop of significant clawback), amounts to a promise by the Respondent to not enforce their strict contractual right to terminate, under the principles of promissory estoppel. To succeed on this head, the Applicants need to show:

(a) A promise which is clear or unequivocal, which may be implied.

The Applicants submit, that, as per Hughes v Metropolitan Railway Co [Footnote: (1877) 2 App. Cas. 439, there being no express promise to not enforce the Landlord's strict rights but could be inferred from the communications between the parties], the effect of the communications prior to 17th January 2023, or the 17th January Letter itself, or the continued requests from the Board thereafter amounted to an effective promise or representation to the Applicants that the strict termination rights would not be enforced;

(b) There needs to be reliance by the Applicants

It is submitted that the Applicants clearly relied on this implied/express promise, as it has clearly invested significant sums in recruitment and continued to do so up until to date, in order to ensure there were dental associates to ultimately perform the services;

(c) It would inequitable to allow the Respondent to now enforce the termination notice [sic].

This is clearly satisfied, as having invested significant funds and substantially recruited the required dental associates, it would be unfair on the Applicants to now be deprived of the benefit of the Contracts.

Paragraph 7.5.5 of the dispute resolution referral notice

29. In light of the above matters set out, this point can be taken shortly. The Board's position is that it relies on the termination notices being valid as to allow the Contracts to continue would be prejudicial to the efficiency of the services to be provided under the Contracts as required by clause 335 of the Contracts and paragraph 73(7) of Schedule 3 to the Regulations.

30. However, on the facts above, this cannot be correct, as it is incumbent on the Board to show that there were other providers who would be able to deliver the services if these Contracts were terminated. The evidence and the FOI obtained plainly show this was not the case, and so the delivery of services has not been prejudiced. Further on this point, the Tribunal should also consider whether in fact the reason why the Respondent terminated, or whether it was in fact because it wanted to simply stop commissioning the UDAs provided for in the Contracts (as it did with the £26.7million referred to above). The Tribunal should also consider that, in circumstances where there is significant clawback as services are unable to be delivered, there is little financial loss to the Respondent, as those monies have not been "lost".

Public Law Remedies

31. As the Board will be aware, the Applicants will have to show that the Contracts are amenable to judicial review in order to pursue a Public Law Remedy. The Applicants considers that these Contracts are amenable to judicial review for the following simple reasons [Footnote: see, for example R. (on the application of Bevan & Clarke LLP) v Neath Port Talbot CBC [2012] EWHC 236 (Admin) where a decision to set the fees was determined to be amenable to judicial review]:

(a) The Public Body concerned is the Board, which is a body of very significant public importance;

(b) The services delivered under the Contracts are for the provision of NHS dentistry, being of clear public importance;

(c) The terms of the Contracts have been mandated by statute as per the Regulations and 2006 Act; and

(d) As set out by clause 10 of the Contracts, the Board must consider the 2006 Act in exercising its rights under the Contracts.

32. The remedy sought by the Applicants is that the termination notices are quashed, on the basis of the following:

(a) The decision to terminate the Contracts is irrational; and

(b) That the Board has created a legitimate expectation that the Contracts would not be terminated pending sufficient time for recruitment efforts undertaken to take effect.

Decision is irrational

33. The matters set out above are repeated and relied on. In circumstances where the Board has allowed a provider to undertaken significant expenditure and effort to perform a contract, and where the Board has failed to assist by registering performers in time, it is wholly irrational to then seek to terminate the Contracts when those recruitment efforts are beginning to take effect. This is especially so as the Board:

(a) Has already prevented recruitment by way of preventing golden handshakes for recruitment as their purpose is to rebase the contracts at a lower level;

(b) Has imposed a contract sanction for the breaches in December 2022;

(c) Is not affected detrimentally as it is retaining funds on an ongoing basis pursuant to the sanction imposed; and

(d) Has, in the Applicants' view, terminated the Contracts for an improper purpose, namely that the Applicants did not accept the rebasing of the Contracts to a lower level.

Legitimate Expectation

34. Again, to avoid repetition and as is clear from the above, the Board has by the following conduct represented to the Applicants that the Contracts would not be terminated pending allowing the recruitment efforts to take effect [sic]

(a) By allowing the Applicants to undertake significant effort and expense in undertaking Short, Medium and Long term recruitment;

(b) By imposing a contract sanction in December 2022, the Board represented that those breaches had been ameliorated.

35. This conduct created a legitimate expectation that the recruitment efforts will be allowed to complete or at the very least, until the Medium Term Recruitment efforts had taken effect, i.e. dentists recruited from the EU had begun work as mentees so as to perform the Contracts.

Remedies Sought

36. As will be clear from the above, the remedies that are sought are:

(a) Pursuant to Contractual rights:

(i) A declaration that the termination notices are invalid and of no legal effect and/or that that they were issued in breach of contract and/or that they were issued for an improper purpose and in breach of the duty of good faith; or

(ii) Damages for wrongful termination of contract. A schedule of loss will be provided in due course, but it will be substantial and contain the following:

(A) Loss of earnings for a significant length of time as Contracts are not time limited; and

(B) The loss of goodwill attributable to the Contracts.

(b) Pursuant to Public Law remedies, a quashing of each of the termination notices."

Observations

NHS England's observations

3.4 "**I. INTRODUCTION**

1. By a letter dated 25 October 2023 ("the Application"), Abrahams Dresden, the representative of Dr Ritu Dhariwal and Care (Lancashire) Ltd ("the Contractors") applied to NHS Resolution for dispute resolution under the provisions of §§54 or 55 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 ("the Regulations"). The dispute arises from the termination of General Dental Services contracts ("the Contracts")

2. On 6 June 2024, the Commissioner filed its Representations ("the Representations") and factual evidence, namely the witness statement of [TK] ("the [TK] W/S"). On 11 June 2024, the Contractors filed their Submissions ("the Con Submissions"), accompanied by the Witness Statement of Mr [SS] ("the [SS] W/S").

3. These Further Representations of the Commissioner ("the Further Representations") are in response to the Con Submissions. The Further Representations are accompanied by additional evidence: the second witness statement of [TK] ("the Second [TK] W/S"). The abbreviations and definitions in the Commissioner's Representations are adopted herein.

4. In summary, the Commissioner repeats and relies upon the Representations and the [TK] W/S. For the reasons set out in those documents and in these Further Representations, it is plain that the Con Submissions lack merit and should be rejected. In broad summary:

(1) The Contractors' reliance on public law principles at Con Submissions §§31-35 is misplaced. This narrow contractual dispute turns on the proper scope and application of the terms of the Contracts. It is well-established that judicial review is not the appropriate forum to litigate contractual disputes, even where a contracting party is a public body. Public law principles do not regulate the proper scope and application of the terms of the Contracts.

(2) It is conspicuous that the Contractors cannot point to any contemporaneous evidence to support the assertion that "the Respondent would allow time for this recruitment process to complete and deliver fully before seeking to terminate the Contracts" (Con Submissions §2(a)). Accordingly, it is denied that termination of the Contracts "would be in breach of the Respondent's promise" (Con Submissions §2(a)). Indeed, the Con Submissions make no further mention of "the Respondent's promise", despite its presentation at §2 as central to the case being advanced by the Contractors.

(3) The Contractors' case on force majeure fails because: (i) "the difficulty in recruiting NHS dental associates" is not a force majeure event under the Contracts; (ii) contrary to cl.372, the Contractors did not "take all action within its power to comply with the terms of this Contract as fully and promptly as possible"; and (iii) in any event, the formal notification requirements in respect of a force majeure event under cl.372 were not satisfied by the Contractors. The Con Submissions are conspicuously lacking in dates, despite the strict temporal requirements under the Contracts.

(4) The allegation of breach of cl.10 of the Contracts lacks any merit. The Contractors' argument under cl.10 misunderstands the good faith clause under the Contracts. The Contractors err in conflating the duty to act in good faith under cl.10 with an obligation on the Commissioner not to enforce its contractual entitlements: that approach is contrary to the express terms and structure of the contractual scheme under the Contracts.

(5) The allegation that the Termination Notices were "irrational, or unfair, as there are other practices who at the relevant time, were performing worse than the Contractors or underperforming their GDS contract" also lacks any merit. The Termination Notices set out that the Contracts were being terminated for material breach, including by way of failing to provide general dentistry services in the relevant location during core opening hours and at the required UDA value, and failing to take required steps as stipulated in the Remedial Notices in breach of cl.330 to remedy such breaches. The Con Submissions disregard completely the Contractors' freestanding breach of the contractual requirement to provide available dentists across a spread of all weekdays, on which the Commissioner relied when terminating the Contracts. Moreover, the Contractors' allegation lacks any proper factual foundation and, in any event, the Commissioner was permitted to exercise its discretion to terminate the Contracts, even if it elected not to terminate other contracts with other providers.

II. FACTUAL BACKGROUND (Con Submissions §§3-17)

5. The Commissioner's summary of the factual background to the dispute is at Representations §§47-75 and the [TK] W/S. Those passages are adopted in response to the Con Submissions §§3-17 to avoid repetition. The following points are included for emphasis.

6. Contrary to Con Submissions §3, the contractual dispute between the Contractors and the Commissioner do not arise "*due to underperformance of the Contracts since 2021*" alone. That is a partial mischaracterisation of the content of the Remedial Notices, Breach Notices and Termination Notices in issue.

> (1) As set out at Representations §53, from March 2022 onwards, a series of Remedial Notices and Breach Notices were sent to the Contractors in respect of the breaches of the Contracts (save that the Remedial and Breach Notices for the Sefton Practice were sent from August 2020). In all instances, it was found that the Contractors (i) were underperforming in respect of the UDAs required under each of the Contracts and, separately, (ii) were also in breach of the contractual requirement to provide available dentists across a spread of all weekdays rather than on particular designated days of the week (or, indeed, in certain cases, rather than no provision at all).
>
> (2) The Con Submissions ignore the Contractors' free-standing breach of the contractual requirement to provide available dentists across a spread of all weekdays. The Contractors have no answer to that free-standing breach, which was later relied upon in the Termination Notices. Termination on that basis is not directly challenged in this dispute. The Commissioner therefore cannot be said to have unlawfully terminated the Contracts in reliance on that breach.

7. The implication of Con Submissions §4 is that the Practices do not operate as mixed NHS and private practices. However, as detailed in the Second [TK] W/S, the Practices operate as mixed NHS and private practices. Indeed, the referrals to the GDC set out at Representations §73 concern patients at the Chester Practice, who were misled that they were receiving NHS care subject to NHS dental charges, when in fact private care was provided.

8. The alleged notification of the Commissioner of unspecified matters "*at the outset*" in Con Submissions §5 is not understood. The term "*the outset*" is not defined and no particulars are provided to explain what time period is being referred to. If the Contractors are seeking to suggest that a force majeure event was notified promptly, that argument is hopeless. Con Submissions §4 states expressly that reliance is placed on "*the enforced Covid restrictions*" of 2020, whereas the earliest alleged notification (which was in any event defective) was on 17 January 2023 (see Con Submissions §12). On no sensible basis could that timeline be described as prompt notification.

9. Con Submissions §6 concerns "*golden handshakes*":

> (1) Paragraph 93(2) of the Representations are repeated. The Contractors' proposal to introduce golden handshakes amounted to an attempt to re-write the terms of their contractual and commercial bargain with the Commissioner. The Commissioner was not obliged to accept re-written contractual and commercial terms.
>
> (2) Con Submissions §6 proceeds on the assumption that the Commissioner was somehow responsible for the recruitment and remuneration of dental practitioners by the Contractors. However, that assumption is fundamentally flawed: see Representations §§29-31. Recruitment and remuneration were the sole responsibility of the Contractors.
>
> (3) Further, the Contractors at Con Submissions §§6-7 appear to rely on the content of a policy paper published on 7 February 2024, namely "*Faster, simpler and fairer:*

our plan to recover and reform NHS dentistry", in support of their contention that the Termination Notices issued almost six months prior, on 23 August 2023, were invalid. Upon appreciating the chronology, it is plain that a later policy document which describes a broad intention to "*decide on locations in the coming months*" of the "*up to 240 dentists*" only, who might receive a "*golden hello*", cannot properly be relied upon to call into question the prior conduct of the Commissioner. In any event, as is explained by the Second [TK] W/S, the proposal was only implemented in 2024/25, with only 2% of dental practices in the whole of Cheshire and Merseyside eligible. The Contractors have failed to demonstrate their eligibility (although, even if they were to, it would be irrelevant).

(4) Similarly, the reference at Con Submissions §7 to raising the minimum UDA rate of £23, that was in force from 2022, to £28 after February 2024 is irrelevant.

a. First, the UDA rates for each of the Contracts already is above £28. Indeed, some are 34% above the minimum UDA rate: see Second [TK] W/S. Con Submissions §7 and Mr [SS]'s Witness Statement at §7 are misleading to the extent that they suggest otherwise [Footnote: Although the present tense is used at [SS] W/S §7, footnote 1 of the [SS] W/S clarifies that the UDA rates set out in the table are "as at 2021-22". The Termination Notices were dated 29 August 2023]. The UDA rates are as follows:

Practice	Annual Contract Value	Clause 77 UDAs	UDA rate
Sefton	£757,669.65	24,000	£31.57
Chester	£551,966.50	17,775	£31.05
Atlantic Picton	£630,638.91	20,210	£31.20
Poulton Road	£350,656.21	9352	£37.50
Warren Drive	£315,210.59	8407	£37.49

b. The link drawn by the Contractors between the UDA rate and their failure to discharge their obligations to deliver UDAs under cl.77 of the Contracts does not bear scrutiny. Although [SS] W/S §9(c) emphasises the UDA rate for Ventre & Ventre Ltd being £35.00, the Commissioner notes that that rate is materially lower than the UDA rate for Poulton Road and Warren Drive Practices (see above). The percentage of UDAs achieved in the Poulton Road and Warren Drive Practices was, however, 18.1% and 3.07% respectively. The suggestion at [SS] W/S §10 that the Commissioner ought to have offered higher UDA rates to facilitate the Contractors' performance of their obligations under the Contracts is without a proper factual basis.

c. Secondly, the Contractors have again sought to rely on a policy document dating many months after the Termination Notices to impugn the lawfulness of those Termination Notices. That argument is anachronistic and should be dismissed.

(5) The two arguments identified immediately above appear to apply with greater force to the quotation from the undated "*to whom it may concern*" message of Mr Eddie Crouch at Con Submissions §9. That message responds to a request – which has not been provided – "*to provide a summary of the current issues facing dental practices*

and the implications for contract delivery." Given the message is undated, the term "*currently*" cannot be placed in proper context.

10. As to Con Submissions §8:

(1) Con Submissions §8 advance the unfounded and outrageous allegation that the Commissioner had a "*desire and aim to debase the Contracts to a lower level of UDAs*". This allegation is repeated in substance at Con Submissions §§33(a), 33(d) and 36(a)(i). There is no evidential support for this allegation of impropriety and it should never have been included in the Con Submissions. It is denied robustly: the Commissioner has no "*desire*" as alleged by the Contractors. The allegation at Con Submissions §§8, 33(a), 33(d) and 36(a)(i) should now be withdrawn.

(2) Further, the Contractors simply ignore the fact that they had failed to have NHS dentists available during core hours, which was a separate breach, additional to the defective performance of the UDA obligation in cl.77. The Contractors have not shown that they were in a position "*to deliver much needed dental services in high needs areas*". Rather, their recruitment challenges were a matter of their own making and not the responsibility of the Commissioner.

11. At Con Submissions §11, the Contractors assert that the Commissioner "*applied a contract sanction under clause 336 for this underperformance …*" The characterisation of cl.336 as containing a "*contract sanction*" is incorrect. As explained at Representations §§32-37, cl.336 permitted the PCT to withhold or deduct monies otherwise payable. The contractual scheme for "contract sanctions" was set out from cl.341-350 and was distinct: see Representations §§38-39.

12. Con Submissions §§12-14 concern the Contractors' recruitment efforts and the content of their letter dated 17 January 2023 (as to which see Representations §§63-64). The following is noted:

(1) Despite the Contractors' relying on the 17 January 2023 Letter as allegedly discharging the requirement for "*prompt*" notification of a force majeure event for the purposes of cl.372.1, it is striking that Con Submissions are silent as to when the "recruitment issues" were encountered and when the Contractors took the steps described in Con Submissions §13. The requirement of promptness was clearly not met where the alleged recruitment challenges arose as a result of the Covid pandemic in 2020.

(2) The steps taken by the Contractors to recruit staff demonstrates plainly that recruitment was a matter under the control of the Contractors, both as a matter of fact and under the Contracts. There is no proper basis for passing on responsibility for the ineffective recruitment strategy of the Contractors to the Commissioner.

(3) Moreover, matters under the control of the Contractors are incapable of being a force majeure event: see Representations §43(1).

(4) In any event, the recruitment efforts were manifestly inadequate. For several years, the Contractors failed to discharge their obligations under cl.77 of the Contracts in respect of UDAs and were in breach of the contractual requirement to provide available dentists across a spread of all weekdays. The recruitment efforts did not address those breaches in a timely fashion or at all. Indeed, Con Submissions §13 draws attention to the inadequacy of the Contractors' efforts, not their fruits:

a. Con Submissions §13(a) refers to an unspecified "*number of advertisements*", without identifying the dates on which they were issued.

b. Con Submissions §13(a) refers to "*locum dentists*", only to dismiss the use of locum staff as "*prohibitively expensive and … not a long-term solution*".

c. Con Submissions §13(b) refers to "*recruitment exercises in Europe*" without identifying the dates on which they were undertaken. Moreover, the Contractors' merely describe an "*intention of recruiting dentists*", not that they in fact did so. Representations §57 sets out the remarkably poor history of recruitment by the Contractors.

d. Con Submissions §13(c) refers to recruitment efforts "*from outside of Europe*" of individuals who lacked "*performer numbers*". As set out at Representations §§29-31, it is the responsibility of the Contractors to recruit appropriately competent "*performers*" to undertake dental services, and, in turn, the performers themselves also have a duty to follow the requisite standards set by the GDC. Individuals who are qualified as dentists overseas cannot undertake NHS dental treatment in England unless they have a performer number. In those circumstances, the "*long-term recruitment*" efforts described at Con Submissions §13(c) were plainly inadequate to address the immediate and long-lasting breaches identified in the Remedial and Breach Notices.

e. At Con Submissions §13(e), the Contractors assert that "*it would take at least between 1 and 3 years for the Medium and Long Term recruitment to take effect to perform the Contracts in full*." However, around 18 months has passed since the Contractors sent the 17 January 2023 Letter and the breaches identified in the Remedial and Breaches Notices have persisted.

13. At Con Submissions §14, the Contractors allege that the Commissioner failed *"to have any system in place to register staff within that same period of time …*" such that it, the Contractors allege, should be unable to criticise the lack of recruitment "*within a short period of time*". That allegation lacks a proper basis.

(1) The Commissioner does not control the process for overseas dentists to obtain performer numbers. Primary Care Support England controls that process. The Contractors' criticism of the Commissioner is unfounded, accordingly.

(2) The "*Short Term recruitment*" described at Con Submissions §13(a) did not entail the recruitment of unregistered overseas dentists. Rather, the Contractors' strategy appears to have been limited to "*a number of advertisements*", a "*referral scheme*", and the use of "*locum agencies*", which the Contractors rejected for financial reasons. The alleged lack of a system to register overseas dentists with performer numbers therefore cannot be said to be the cause of the failure of the short term recruitment strategy of the Contractors.

14. Great caution should be exercised when considering the figures at Con Submissions §16, including for the following reasons:

(1) The Contractors have only provided the UDAs achieved in the first quarter of 2024 (ending 17 May 2024). Those figures post-date the Termination Notices dated 29 August 2023 by a minimum of six months.

(2) The single quarter figures are not a representative sample of the Contractors' failure to discharge its obligations under cl.77 for a number of years. The figures for prior years are at Representations §49 and repeated below. They demonstrate a repeated and long-lasting pattern of non-compliance with cl.77:

Name	cl.77 UDAs	2021/22 UDAs achieved	*% of cl. 77 UDAs achieved*	2022/23 UDAs achieved	*% of cl. 77 UDAs achieved*	2023/24 UDAs achieved	*% of cl. 77 UDAs achieved*
Chester Practice	17,775	7153.80	*40.20%*	3084.20	*17%*	7578.03	*42.63%*
Picton Practice	20,210	3402.60	*14.17%*	2733.80	*11.39%*	14668.78	*61.12%*
Sefton Practice	24,000	2054.20	*10.16%*	4245.00	*21.00%*	10559.32	*52.25%*
Warren Drive	8,407	473.40	*5.63%*	186.20	*2.21%*	1521.45	*18.1%*
Poulton Practice	9,352	3068.20	*32.80%*	994.80	*10.63%*	278.60	*3.07%*

(3) In any event, the figure provided at Con Submissions §16 do not demonstrate compliance with cl.77. For each of the Practices, even on the Contractors' unrepresentative data, the Contractors remain in breach of cl.77. Con Submissions §16 is incorrect to suggest that "*the required UDAs are finally being delivered*".

15. At Con Submissions §17, the Contractors refer to some recent surveys of patients ("the Surveys").

(1) Those surveys having been drafted in leading terms and apparently to elicit fear on the part of participants: e.g. "*SAVE YOUR NHS DENTAL PRACTICE*" and "*This will mean that YOU or your FAMILY will NOT be able to receive NHS dental treatment at this practice. We believe that terminating this NHS dental service will have a massive impact on the local community*." The surveys appear to call into question the Contractors' reasonableness and so compliance with cl.9 of the Contracts.

(2) In any event, the Surveys are irrelevant to the dispute. The fact that certain of the Contractors' patients are concerned about the closure of certain practices does not preclude the Commissioner from lawfully terminating the Contracts.

III. ALLEGED PUBLIC LAW REMEDIES (Con Submissions §§19, 31-35)

16. At Con Submissions §19, the Contractors assert, without any reasoned explanation, that they have "*rights both in Public Law and under each of the Contracts to argue that the termination notices are incorrect and are of no legal effect*". Con Submissions §31 are to like effect.

17. The contention that the Contractors have public law rights extending beyond their contractual rights under the Contracts is incorrect. In particular:

(1) In Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd [1994] 1 WLR 521 at 529B, Lord Templeman held:

"It does not seem to me likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith."

(2) In Hampshire County Council v Supportways Community Services [2006] EWCA Civ 1035, Neuberger LJ (as he then was) held at §35:

"… the mere fact that the party alleged to be in breach of contract is a public body plainly cannot, on its own, transform what would otherwise be a private law claim into a public law claim … where the claim is fundamentally contractual in nature, and involves no allegation of fraud or improper motive or the like against the public body, it would, at least in the absence of very unusual circumstances, be right, as a matter of principle, to limit a Claimant to private law remedies."

(3) In Krebs v NHS Commissioning Board (as successor body to Salford Primary Care Trust) [2014] EWCA Civ 1540, Longmore LJ held at §33:

"There is, of course, a considerable body of authority … to the effect that it is impermissible for the parties to private law contracts made with public bodies to proceed by way of judicial review in order to improve their contractual claim."

(4) In R (Haffiz) v NHS Litigation Authority [2020] EWHC 3792 (Admin) at §74, Stacey J considered the question of whether a decision by NHS England to terminate an NHS general medical services contract was amenable to judicial review. She held that it was not at §74.

(5) As observed at Representations §16:

"… if contracts between the private parties require either party to act reasonably in any particular respect as when, for example, a contract gives a discretionary power to one of the parties to take some decision for the purposes of the contract, the courts have traditionally been reluctant to import principles of public law as a guide to construction. Rather, as identified in Krebs v NHS Commissioning Board (as successor body to Salford Primary Care Trust) [2014] EWCA Civ 1540 at §29 and Abu Dhabi National Tanker Co v Product Star Shipping Ltd [1993] 1 Lloyds Rep 397, 404"

18. As is clear from Con Submissions §32, the remedies sought by the Contractors are for an otherwise lawful termination of the Contracts to be declared irrational and quashed on public law principles only. Put simply, this is a quintessential example of public law principles being used to improve the Contractors' contractual position in the very manner deprecated repeatedly by the Court of Appeal.

19. In any event, the contention at Con Submissions §33 that the Termination Notices are irrational should be rejected. In particular:

(1) The unfounded assertion that the Commissioner acted "*for an improper purpose*" and "*to rebase the contracts at a lower level*" should be withdrawn. There is no evidential support for this allegation of impropriety (see Con Submissions §§33(a) and 33(d)) and it should never have been included in the Con Submissions.

(2) The characterisation of the Commissioner's conduct in December 2022 as the imposition of a contract sanction at Con Submissions §33(b) is plainly wrong. Paragraph 11 above is repeated.

(3) The suggestion that the Commissioner acted irrationally by terminating the Contracts pursuant to an express right to do so, rather than confining himself to relying on the clawback provisions of the Contracts which would have extended the very longlasting period of defective performance of the Contracts by the Contractors (see Con Submissions §33(c)), is untenable. In circumstances in which the Contracts could lawfully be terminated pursuant to an express right, it was rational for the

Commissioner to have elected not to rely on the clawback provisions of the Contracts alone.

20. Further, the legitimate expectation case advanced at Con Submissions §§34-35 is without merit. The Contractors assert at Con Submissions §35 that they had a legitimate expectation that "*the recruitment efforts will be allowed to complete or at the very least, until the Medium Term Recruitment efforts had taken effect …"* The Contractors have failed to establish the basic requirements for an actionable substantive legitimate expectation.

(1) The requirements to establish a substantive legitimate expectation were recently summarised by Heather Williams J in R (Donald) v Secretary of State for the Home Department [2024] EWHC 1492 (Admin) at §§108-116, including as follows:

"*108. As explained by Laws LJ in R (Bhatt Murphy) v The Independent Assessor [2008] EWCA Civ 755 ("Bhatt Murphy") at para 32: "a substantive legitimate expectation arises where the Court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it". He went on to indicate that it "plainly cannot apply to every case where a public authority operates a policy over an appreciable period" and that it engages "a much more rigorous standard" that will be adjudged by the Court's own view of what fairness requires (para 35).*

109. The expectation must be based on a representation that is clear, unambiguous, and devoid of any relevant qualification: R v Inland Revenue Commissioners ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 at 1570B. The test is an objective one. The question is how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made: Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32, [2012] AC 1 ("Paponette") at para 30. It is important to have regard to the context in which the statement is made: R (Sargeant) v First Minister of Wales [2019] EWHC 739 (Admin), [2019] 4 WLR 64 ("Sargeant") at para 65. The onus of establishing that a sufficiently clear and unambiguous promise or undertaking was made is on the party claiming it: Re Finucane's application for judicial review (Northern Ireland) [2019] UKSC 7, [2019] 3 All ER 191 ("Finucane") at para 64.

110. At paras 43 – 46 in Bhatt Murphy, Laws LJ discussed the kind of representation that was capable of giving rise to a substantive legitimate expectation. He considered that, "it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuation is assured" (para 43)

…

114. … if a sufficiently clear and unambiguous representation of a substantive benefit is established, the question that the Court should ask is whether the decision-maker's proposed action would be so unfair as to amount to an abuse of power: Bhatt Murphy at para 42."

(2) The Contractors have failed to identify "*a representation that is clear, unambiguous, and devoid of any relevant qualification*".

a. To the contrary, the representation asserted upon at Con Submissions §35 is expressly ambiguous, being either that "*the recruitment efforts will be allowed to complete*" or "*until the Medium Term Recruitment efforts had taken effect …*" The fact that the Contractors' own case is that the alleged representation is ambiguous means that a legitimate expectation cannot be established.

b. Moreover, any representation would have been impliedly qualified by the rights and obligations under the Contracts, which regulated the Contractors relationship with the Commissioner. It follows that any representation would have been qualified by the Commissioner's entitlement to terminate the Contracts further to the express right to terminate therein.

(3) Further, even if a relevant representation could be identified (quod non), the Commissioner's termination of the Contracts further to an express contractual right to terminate either cannot properly be described as "*so unfair as to amount to an abuse of power*" or permits the Commissioner justifiably to frustrate the legitimate expectation.

21. Taken in the round, the Contractors' public law case is without merit including because: (i) public law principles and remedies do not apply to the determination of what is a quintessential private law dispute; (ii) the case alleging irrationality is without any proper foundation and ought not to have been brought; and (iii) the basic elements of a legitimate expectation claim are not made out by the Contractors.

IV. RESPONSE TO "SUBMISSIONS UNDER CONTRACTUAL PRINCIPLES" (Con Submissions §§20-30)

(a) §§7.5.1-2 of the Application: alleged contract sanction and force majeure event

22. Con Submissions §§20-21 repeat, without material development, §§7.5.1 (concerning an alleged "contract sanction") and 7.5.2 (alleging force majeure) of the Application respectively. Those submissions should be rejected. Representations §§80-90 are repeated.

(b) §§7.5.3-4 of the Application: good faith clause

23. Con Submissions §§22-27 allege breach of cl.10 of the Contracts. Those submissions lack any merit. Representations §§14-17 and 91-95 are repeated.

i. Allegedly relevant background

24. At Con Submissions §§22(a)-(c), the Contractors identify three "*parts of the relevant background*". Their importance has been overstated:

(1) The Contractors took over the Practices, when they had already been established: see Second [TK] W/S. The reference to "*set-up*" by a "*new dental entrant*" at Con Submissions §22(a) concerns a situation which did not arise on the facts.

(2) As set out at paragraph 9(4), the link drawn by the Contractors between the UDA rate and the discharge of their obligations to deliver UDAs under cl.77 of the Contracts does not bear scrutiny. The UDA rates for each of the Contracts already is above £28. Indeed, some are 34% above the minimum UDA rate. Con Submissions §22(b) is simply a complaint that the bargain that the Contractors entered into was not more profitable for them. It is irrelevant to the dispute.

(3) At Con Submissions §§22(c), 26(a)(v), 26(e) and 30, the Contractors place considerable emphasis on the clawback arrangements described at Representations §§22-23.

a. The substance of the Contractors' argument appears to be that the good faith provision in cl.10 mandated the Commissioner only to rely on its express clawback rights and precluded it from exercising its express right of termination under the Contracts. On a proper construction of the Contracts, there is no basis for finding that the Commissioner was precluded from reliance on an express contractual entitlement.

b. Termination of the Contracts was governed by the terms of Part 22 of the Contracts (which governs "*Variation and Termination of the Contract*"). Part 22 of the Contracts materially repeats Schedule 3, Part 9, of the Regulations. Neither Part 22 of the Contracts nor Schedule 3, Part 9, of the Regulations limits the Commissioner's entitlement to terminate the Contracts by reference to the payment provisions in cl.239, 239B or Schedule 4 of the Contracts. The Contractors have read in a restriction which is neither express nor implied.

c. Moreover, the suggestion of the Contractors that the Commissioner is not prejudiced by reason of the clawback provisions is clearly wrong as a matter of fact [Footnote: See e.g. at Con Submissions §30, where the Contractors allege "*there is little financial loss to the Respondent, as those monies have not been 'lost'*.". The Contractors are paid from public funds, which must be managed responsibly. The payment scheme under the Contracts operates by the Commissioner paying the Contractors one-twelfth of the sum specified in Schedule 4 to the Contracts each month, with provision for clawbacks at the end of each year in respect of UDAs not in fact delivered by the Contractors. In this way, a situation can arise (as has arisen in this dispute), whereby the Contractors take receipt of very significant payments under the Contracts despite having provided minimal, if any, UDAs in the financial years from 2020 onwards. As at the date of drafting the Representations, the deficit in funds owed to the Commissioner by the Contractors are approximately £1.6 million: see [TK] W/S §43. With a deficit of that scale, the responsible management of public funds permitted the Commissioner to terminate the Contracts, rather than continue the substantial payment and clawback arrangements for a considerable further period.

d. The clawback provisions (i) provide the Contractors with a cash windfall representing a pre-payment for contractual services that they have in fact failed to perform, and (ii) deprive the Commissioner of the benefit of that very considerable cash sum in the interim. In the event of the Contractors' bankruptcy or insolvency respectively, the substantial cash sum held by the Contractors would be at risk.

ii. Case-law cited by the Contractors

25. Clause 10 of the Contracts falls to be interpreted in accordance with conventional principles of contractual interpretation: see Representations §§8-11. The proper interpretation of cl.10 is addressed at Representations §§14-17 and 91-95. Consistent with those submissions, the Commissioner notes that, in Re Compound Photonics Group Ltd [2022] EWCA Civ 1371 ("Compound Photonics") at §243, Snowden LJ held:

*"I accept the argument that apart from the "core" duty of honesty and (**depending on the context**) a duty not to engage in conduct that could be characterised as bad faith, any further requirements of an express duty of good faith must be capable of being derived as a matter of interpretation or implication from the other terms of the contract **in issue in the particular case**."* [Emphasis added]

26. The Contractors rely on Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 200 ("Compass") as authority for the "*Good Faith Issues*" asserted at Con Submissions §§23(b)(ii)(C)-(E), namely that cl.10 extends to (i) "Honestly considering requests from the Applicants to uplift the UDA rate"; (ii) *"Honestly considering requests from the Applicants for assistance in the delivery of services"; and (iii) "When considering exercising its powers under the Contract, to use such powers in an honest and fair way not only to the Applicants, but across all GDS contractors performing in the Board's area*".

27. Compass is not authority for that interpretation of cl.10 of the Contracts.

(1) Unlike in cl.10 which qualifies or reinforces the parties' obligations and rights in all situations of "*complying with this Contract*", the clause in issue in Compass was specifically focused on only two purposes: the efficient transmission of information and instructions, and enabling the trust to derive the full benefit of the contract (see §§106-108 and 151). The clause in issue was therefore drafted materially differently to cl.10.

(2) The finding in Compass that the Claimant was not entitled to terminate the contract turned on the facts. On the facts, the trust's breach of the contract in awarding an excessive number of service failure points did not amount to a material breach and the claimant was therefore not entitled to terminate the contract. No similar situation arises in this case. The Termination Notices were lawfully and properly issued under the terms of the Contracts.

28. Nevertheless, in support of the Commissioner's representations, Jackson LJ at §§114-116 and Beatson LJ at §152 properly emphasised "*the role of the other provisions of the contract in ascertaining the meaning*" of the good faith clause in issue in Compass. The Representations at §§14-46 engaged in that very process. Strikingly, the Con Submissions are almost entirely silent on other provisions of the Contracts than cl.10. The Contractors fundamentally err in their approach to the proper interpretation of cl.10 accordingly.

29. The only other case cited by the Contractors in relation to cl.10 is Compound Photonics at Con Submissions §22(b)(ii) [Footnote: Although the Con Submissions §§22(b) and 26 refer to the judgment as being of "Jackson LJ", that is incorrect. The judgment of the Court of Appeal was of Snowden LJ]. Again, this authority does not support the Contractors' interpretation of cl.10.

(1) Compound Photonics concerned a shareholder dispute, in the course of which the majority shareholders asserted that a good faith clause should not have been interpreted to mean that they were unable to remove two named minority shareholders. The company's articles of association and shareholders' agreement included an obligation on the shareholders to act in good faith in dealings with other shareholders and the company. The majority shareholders' arguments succeeded before the Court of Appeal.

(2) Notably, the Court of Appeal held at §151: "*Whilst the concepts and ideas advanced in other cases might well be useful analytical tools in the process of interpretation of a particular contract, in my view* ***it is not appropriate simply to apply them in a formulaic way in every case, irrespective of the context and the other terms of the agreement in issue***." [Emphasis added] However, despite recognising the context of Compound Photonics being a shareholder dispute concerning a different contractual provision to cl.10, the Contractors go on "*simply to apply [Compound Photonics] in a formulaic way*". A further example of that approach is at Con Submissions §26(b). That is not appropriate.

(3) A particular example of the Contractors' error is to rely at Con Submissions §§22(b)(ii)(A)-(B) on passages from cases quoted in Compound Photonics. The Contractors rely on those passages as establishing general rules as to the interpretation of good faith clauses in every case. However, the Court of Appeal found the opposite: as quoted above, Snowden LJ held that, beyond the "*modest*" (§240) "*core*" duty of honesty and a duty not to engage in conduct in bad faith, each good faith clause fell to be interpreted separately and in light of the other provisions of the contracts (§243). The Contractors have made no effort to undertake that proper process of interpretation in this dispute.

30. In any event, the Contractors lack any proper basis to allege dishonesty in the Commissioner's conduct in respect of "*the UDA rate*", "*delivery of services*", or when exercising powers under the Contracts generally: c.f. Con Submissions §§23(b)(ii)(C)-(E) and 26(b)-(e). In effect, the Contractors are asserting that cl.10 imposed an obligation on the

Commissioner to re-write material terms of the Contracts and not to exercise its rights thereunder. That assertion is without merit: *"… the parties to the contract are taken to contract on the footing that they wish the contract to be performed …*"(F&C Alternative Investments v Barthelemy (No 2) [2012] Ch 613 at §268).

31. If the Contractors were correct, cl.10 would impose an obligation on the Commissioner to re-write key terms of the Contracts in the event of non-performance by the Contractors rather than terminate the Contracts pursuant to an express entitlement to do so. That would render the Contracts, in substance, unenforceable agreements to agree: see Walford v Miles [1992] 2 AC 128. In Walford v Miles, the House of Lords at p.138 clarified that a duty to negotiate different contractual terms in good faith – which is how the Contractors allege cl.10 should be construed – was "*unworkable in practice*", "*lacks the necessary certainty*" and was unenforceable as a "*bare agreement to negotiate*." Given that the Contracts follow a standard template and reflect the content of the Regulations, a finding that the Contracts were unenforceable agreements to agree by reason of the Contractors' favoured interpretation of cl.10 would have very significant implications and it would doubtless come as an enormous surprise to all those who understood themselves to have entered into enforceable contractual relationships for the provision of dental services to discover that they were unenforceable. That problem falls away if the Contractors' unduly strained construction of cl.10 is rejected.

32. At Con Submissions §23(c), the Contractors allege that the Commissioner as bound by "*Reasonable Public Body Issue*".

(1) No contractual provision is cited in support of that assertion.

(2) Similarly, no case-law is cited in support of that assertion.

(3) In any event, a "*responsible public body*" is properly permitted to terminate the Contracts, where their express terms permit termination, a fortiori where, as here, the Contractors were in breach of the contractual requirement to provide available dentists across a spread of all weekdays, they have failed to provide the specified number of UDAs from 2020 onwards, and a very substantial deficit has built up.

(4) At Con Submissions §27, no specific breaches of the "*Reasonable Public Body Issue*" are identified. The "*Reasonable Public Body Issue*" appears to have been included as a makeweight and is not addressed further.

iii. Alleged breaches

33. At Con Submissions §26(a), the Contractors allege that "*the termination notices are invalid as the Board has not behaved reasonably towards the Applicants*", relying on Con Submissions §§24-25. The allegation of breach of cl.10 should be rejected. Representations §§91-95 are repeated. In particular:

(1) Con Submissions §§26(a)(i)-(ii) are complaints that the Commissioner did not re-write the Contracts. At no point did cl.10 of the Contracts mandate that the Commissioner must accept re-written contractual and commercial terms. It is at odds with established case-law to regard a good faith obligation as requiring the Commissioner to accept non-contractual performance. As Lord Toulson in Prime Sight Ltd v Lavarello [2014] AC 436 at §47 noted: "*Parties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them*."

(2) Con Submissions §26(a)(iii) is denied for the reasons at Representations §93(2).

(3) Insofar as the Contractors additionally complaint about the UDA rates, that complaint lacks any proper basis: see paragraph 9(4) above.

(4) Contrary to Con Submissions §26(a)(iv), the reasons for termination of the Contracts were clearly and unambiguously set out in the Termination Notices: see Representations §§65-69. Of the breaches relied upon by the Commissioner, the Contractors simply ignore their breach of the contractual requirement to provide available dentists across a spread of all weekdays, which was a free-standing basis for termination.

(5) The Commissioner was not precluded from terminating the Contracts simply because other providers were also in breach. The perverse effects of such an argument barely need an explanation: the Commissioner would be fundamentally hamstrung in its operation of dental contracts if termination had to be synchronised across all providers, not least where different contractual terms (e.g. the number of UDAs to be delivered) have been agreed with providers and different facts underlying the termination decision in each case.

(6) The bald assertion at Con Submissions §26(a)(vi) - which is said to flow from Con Submissions §26(a)(iv) and is repeated at §30 - that the Commissioner is bound to "*show … that … there was another provider who could have undertaken the UDAs*" should be rejected. The Contractors have not identified any obligation in the Contracts or otherwise to that effect.

(7) Moreover, by this argument:

a. The Contractors are relying on their own breach of the Contracts (as well as breaches by other providers) as a reason for the Commissioner not being permitted to terminate the Contracts. It is trite law that a contracting party is not permitted to take advantage of its own wrong: Great Elephant Corp v Trafigura Beheer BV [2013] EWCA Civ 905 at §34.

b. Clause 10 does not mandate that the Commissioner was obliged to accept noncontractual performance: see MUR Shipping BV v RTI Ltd [2024] UKSC 18 at §102(i). To the contrary, the Commissioner was permitted to terminate the Contracts following the Contractors' breaches.

(8) At Con Submissions §26(a)(v), the Contractors rely on the clawback provisions as having the effect that the Commissioner was precluded reasonably from terminating the Contracts. That argument should be rejected. Paragraph 24(3) above is repeated.

(9) Contrary to Con Submissions §26(a)(vii) and for the reasons above, the Commissioner was not obliged to offer the Contractors any greater opportunity to "*complete the delivery of the Contracts*".

34. The alleged breaches of the "*Good Faith Issues*" at Con Submissions §26(b)-(e) are also denied. In particular:

(1) The Contractors' reliance on Compound Photonics at Con Submissions §26(b) is misplaced for the reasons set out above.

(2) Con Submissions §26(c) relies on §26(a). For the reasons set out above, the alleged breaches at Con Submissions §26(a) are denied.

(3) None of the matters alleged in Con Submissions §26(d) demonstrate a lack of good faith on the part of the Commissioner. The Contractors do not dispute that they were in breach of the primary performance obligations under the Contracts for an extended period. In those circumstances, the Remedial Notices, Breach Notices and, ultimately, the Termination Notices were lawfully issued.

(4) Although the Contractors appear anxious not to suggest at Con Submissions §26(b) that bad faith or dishonesty is being positively alleged [Footnote: perhaps because issues of professional conduct arise when unfounded allegations of dishonesty are advanced], the substance of Con Submissions §26(e) is an allegation of bad faith. There is no evidential support for the "*suspicion*" described in Con Submissions §26(e) that "*the Board is seeking to simply clawback the monies without any intention to deliver UDAs*". This unfounded suspicion should never have been included in the Con Submissions. It is denied robustly. The allegation should now be withdrawn.

(5) In any event, the submission that the Contractors' "recruitment process has now borne fruit" is not correct. Even on the Contractors' partial data (see paragraph 14 above), the Contractors' obligation under cl.77 has not yet been discharged. Moreover, any arguments about recent recruitment do not address the Contractors' breach of the contractual requirement to provide available dentists across a spread of all weekdays, which was a free-standing basis for termination. To that breach, the Contractors have no answer.

(c) Promissory estoppel: Con Submissions §28

35. For the first time in this dispute, the Contractors seek to rely on the doctrine of promissory estoppel to resist termination of the Contracts at Con Submissions §28. The Contractors' novel submission should be rejected.

36. The elements of a promissory estoppel were recently summarised in Magee v Crocker [2024] EWHC 1723 (Ch) at §§300-302:

"*i) The alleged representation of the party that is sought to be estopped was a representation of fact;*

ii) The precise representation relied upon was in fact made;

iii) The case which the party is to be estopped from making contradicts in substance his original representation;

iv) The representation was made with the intention (actual or as reasonably understood) and the actual result of inducing the party asserting the estoppel to alter his position on the faith thereof to his detriment; and

v) The representation was made by the party to be estopped, or by some person for whose representations he is deemed in law responsible, and was made to the party asserting the estoppel, or to some person in right of whom he claims.

…

302. A key aspect of promissory estoppel is that the representation or assurance in question must be shown to be intended to create legal relations in circumstances in which, to the knowledge of the person making the same, it was going to be acted upon by the person to who it was made - Central London Property Trust Ltd v High Trees Ltd [1947] KB 130 , per Denning J at 134. "

37. At Con Submissions §§28(a)-(c), the Appellants have not identified, a fortiori proven, all the elements to establish a promissory estoppel.

(1) The alleged representation is not identified with any precision. The promissory estoppel submission can be rejected on that basis alone. Case-law emphasises the importance of a clear and unequivocal representation.

(2) To the extent that the Contractors' case can be understood, it appears to be that the mid-year review undertaken by the Commissioner to ascertain the extent of the Contractors' non-performance is being treated by the Contractors as a representation that the Contracts would not be terminated. That submission lacks any proper evidential foundation. Certainly, it is denied that the mid-year review process was undertaken by the Commissioner "*with the intention (actual or as reasonably understood) and the actual result of inducing the party asserting the estoppel to alter his position on the faith thereof to his detriment*". Rather, the mid-year review process was duly undertaken pursuant to the terms of the Contracts.

(3) Alternatively, it appears that the questions posed by the Commissioner regarding the Contractors' unsuccessful recruitment efforts are being relied upon by the Contractors as the relevant representations. Again, there is no factual support for that position. In circumstances in which the Contractors (i) had failed to discharge their obligations under cl.77 of the Contracts in respect of UDAs, (ii) were in breach of the contractual requirement to provide available dentists across a spread of all weekdays, and (iii) were the subject of referrals to the GDC (see Representations §§72-75), the Commissioner's questions about when more performers would be available cannot sensibly be understood as giving rise to a representation that the Contracts would not be terminated.

(4) The Contractors have not sought to address the Commissioner's intention at all and there is nothing in their evidence that comes close to establishing that the Commissioner intended the Contractors to alter their position.

(5) In any event, the asserted reliance on the alleged representations does not bear scrutiny. The Contractors were bound at all times to recruit staff properly and in accordance with the Contracts: see Representations §§29-31. Their recruitment efforts cannot therefore be attributed to reliance on alleged representations by the Commissioner but instead were in furtherance of the obligations they had assumed under the Contracts. Put another way, if the Contractors had failed to make efforts to recruit staff, there was no prospect of them discharging their primary performance obligations under the Contracts.

(6) In view of the above, the suggestion that it would be "inequitable to allow the Respondent to now enforce the termination notice" at Con Submissions §28(c) is unsustainable. The Commissioner was properly permitted to rely on its contractual right to terminate.

38. Further, in Kim v Chasewood Park Residents Ltd [2013] EWCA Civ 239, the Court of Appeal held at §41: "*The generally accepted view is that promissory estoppel is usually only suspensory and that the representor may resile from his promise on reasonable notice unless it would be unconscionable for him to do so*." That principle is not mentioned by the Contractors in the Con Submissions. On the facts, even if the Contractors were in a position to establish that a relevant estoppel had arisen (which is denied), the service of the Termination Notices in accordance with the reasonable notice provisions in the Contract (and later extended by agreement) constituted the Commissioner resiling from any alleged promises made not to terminate the Contracts. In those circumstances, the alleged promissory estoppel is of no assistance to the Contractors.

(d) §7.5.5 of the Application: cl.335 of the Contracts

39. At Con Submissions §30, the Contractors assert that it "*cannot be correct*" that "*to allow the Contract to continue would be prejudicial to the efficiency of the services to be provided under the Contract*" (see cl.335). Save for a unparticularised reference to "*the evidence*" at Con Submissions §30, the bases of the Contractors' assertion appear to be:

(1) An inaccurate description of the evidential burden on the Commissioner which is unsupported by the Contracts (namely, "*it is incumbent on the Board to show that*

there were other providers who would be able to deliver the services if these Contracts were terminated"), as to which see paragraph 33(6) above.

(2) The outrageous and unfounded allegation that the Commissioner *"wanted to simply stop commissioning the UDAs provided for in the Contracts*", as to which see paragraph 10 above.

(3) The existence of clawback provisions, as to which see paragraph 24(3) above. (4) Reference to the responses to requests made under the Freedom of Information Act 2000 ("FOIA").

40. As the former three bases are addressed above, it is necessary only to address the FOIA requests:

(1) Reliance is placed on the FOIA requests in support of the unmeritorious contention that "*it is incumbent on the Board to show that there were other providers who would be able to deliver the services if these Contracts were terminated*". No such obligation arose. As such, the FOIA requests are irrelevant to the dispute.

(2) In any event:

a. The FOIA requests relied upon by the Contractors did not ask about the redistribution of UDAs among existing providers following a review of local providers pending termination. Such redistribution has been extensive, with a number of local providers actively seeking additional UDA activity. Rather, the FOIA requests, so far as is relevant, were materially differently worded: at, for example, p.571 of the Contractors' Bundle, the Contractors asked about "*The total number and value in monetary terms of NEW UDA/UOAs activity commissioned by the Cheshire and Merseyside ICB during the course of the current financial year 2023/24 and the locations of the new activity commissioned as of the 8th of September 2023?"* In view of the redistributions identified immediately above, the extent to which new activity was "*commissioned*" – i.e. the focus of the FOIA requests - is a red herring and does not reflect the full factual picture.

b. The responses to the FOIA requests demonstrate the lack of basis for the allegation at Con Submissions §8 that the Commissioner had a "*desire and aim to debase the Contracts to a lower level of UDAs*". The total number of NHS dental contracts managed by Cheshire and Merseyside ICB "*excluding community dental contracts or dental contracts situated in Prisons as of the end of the financial year 2022/23 i.e. 31st March 2023*" was identified as "*318*" (Contractors' Bundle p.570). The proportion of NHS dental contracts which had the UDA rate adjusted was de minimis or tiny. Contractors' Bundle p.573 provides: *"During the 2021/22 financial year there was 1 contract that had the UDA rate adjusted. During the 2022/23 financial year there were 16 contracts that had the UDA rate adjusted. During the 2023/24 financial year (to date) there have been 3 contracts that had the UDA rate adjusted."* The reasons for those adjustments were provided at Contractors' Bundle p.574. The response to the FOIA requests demonstrate that UDA levels were adjusted upwards, not downwards: "*the reasons for adjustments in UDA rates between 2021/22 and 2023/24 were … to bring lower UDA contract values in line with other contracts in the local area*." [Footnote: The Contractors have accepted this at Con Submissions §7: "*The Respondent did in fact uplift UDA rates for 16 other contractors in 2022-23 and 3 in 2023-24 (to 12th December 2023) per responses to FOI requests made by the Applicants*"] Those statistics demonstrate the Contractors' allegation to be unfounded. Paragraph 9(4) above is repeated.

c. Further, it is noted that a number of the FOIA requests concerned information, in respect of which the public authorities in question relied on the exemption in s.43 FOIA concerning trade secrets and prejudice to commercial interests. Such reliance was maintained on internal reviews (see e.g. p.561 of the Contractors' Bundle). Reliance on such exemptions plainly limits the weight that can be placed on the responses to the FOIA requests.

d. To the extent that reliance is also placed on the FOIA requests at Con Submissions §24, the Second [TK] W/S explains that: "*the Contractors incorrectly suggest that their position should be compared to all other underperforming providers in the area, when in fact the nature of their breaches (i.e. the lack of coverage across core hours) mean that a comparison with that large group is not appropriate*". When the manner of the Contractors' breach of the Contracts is considered, the allegation of discriminatory treatment is shown to be unsustainable.

41. In any event, Representations §§73 and 96-99 are repeated. The Commissioner lawfully concluded that the cumulative effect of the breaches by the Contractors was such that "*to allow the Contract to continue would be prejudicial to the efficiency of the services to be provided under the Contract*".

V. REMEDIES (Con Submissions §36)

42. In view of the matters above, the Contractors have no entitlement to the remedies sought at Con Submissions §36. Representations §§100-102 are repeated."

The Contractor's observations

3.5 "1. This document has two sections:

(a) The first section responds to the witness statement of Mr [TK] served by the Respondent, in part reliant upon the further witness statement of Mr [SS] ("SS2") on behalf of the Applicants served with this document; and

(b) The second section summarises the submissions in response to the Representations settled by Counsel for the Respondent, Mr [SK].

Observations on Evidence of Mr [TK]

Corroborative Evidence for the Applicants' Initial Submissions

2. As the Tribunal will be aware, the Applicants have filed their initial submissions dated 11th June 2024 (hereinafter "the AIS"). The AIS set out the position of the Applicants, including the relief sought and the evidential and legal basis for such relief.

3. Within the evidence of Mr [TK], the following matters are substantially corroborative, in the Applicants' submission, of the AIS:

(a) At the beginning of paragraph 11 of his statement, he states:

During the COVID-19 pandemic, many providers reported that the slower pace of work during Covid (due predominantly to increased infection control measures, which reduced the volume of patients that could be seen, and limits on types of procedures) gave rise to performers moving from NHS to private care. There is also a lack of enthusiasm for working on the GDS contract and reform is taking much longer than expected…

This is directly corroborative of paragraphs 4 and 9 of the AIS, in that:

(i) The Respondent confirms and acknowledges that there was less dental work completed in Covid, both in terms of the number of patients seen and the types of procedures undertaken; and

(ii) The phrase "lack of enthusiasm for working on the GDS Contract" would be suggestive of recruitment difficulties. Put differently, it is submitted that the Respondent has deliberately kept this phrase vague, as it does not wish to accept there are recruitment difficulties (see Mr [TK]'s paragraph 53, attempting to deny any recruitment difficulties), as were it to admit to this issue, then it has significantly difficulties in showing this Tribunal that termination of any GDS Contract would have resulted in the delivery of UDAs elsewhere. The Applicants would remind the Tribunal of the submission at paragraph 24(c) of the AIS, that 52% of contracts were underperforming by more than 10% in this area across all contractors, as well as paragraph 9 of the AIS referencing the evidence of Mr [C] confirming recruitment difficulties.

4. This corroboration is key to understanding the underlying complaints of the Applicants, in the view of the Applicants, in that it underpins the following decisions for the Tribunal:

(a) Have the Applicants shown, on the balance of probabilities, that there was a substantial recruitment issue to this area for associate dentists?

(b) If there were recruitment difficulties in this area, what is the Respondent's argument that the efficiency of services was prejudiced, as it needs to provide strong evidence that the termination of the Contracts with the Applicants would have resulted in the UDAs being performed elsewhere;

(c) Further or in the alternative to paragraph 4(b) above, has the Respondent shown that it had any intention to recommission the dental services, or deliver them elsewhere in the area, in light of the failure to recommission services to the value of the £26.7million which it had previously clawed back (see paragraph 24(e) of the AIS); and

(d) Upon what basis, or what is the justification, in light of the large underperformance across 52% of all dental contractors in the area, to seek to terminate only the Applicants' Contracts, and not any other contractor? The Respondent is required to properly justify that decision.

<u>Matters in dispute</u>

5. On a number of points, it is submitted, the evidence of Mr [TK] is unsatisfactory, as follows:

(a) His understanding of the range of scope of dental therapists does not appear to be up to date, as per SS2 at paragraphs 5-7, namely:

(i) A dental therapist can claim NHS treatments using their Personal ID being an initiative was launched by NHS England on 11th January 2023;

(ii) Mr [TK] has failed to set out the background to Patient Group Directives ("PGDs") and has failed to explain why one not been issued when the issuing of such a direction would have assisted with the delivery of services when recruitment is difficult; and

(iii) More recent legislation (as per paragraph 6 of SS2 and pages 35-36 of the exhibit) (which was widely consulted before implementation and so presumably within Mr [TK]'s knowledge) has now largely superseded the need of a PGD for a suitably trained dental therapist to use local anaesthetics in the course of NHS treatments.

(b) Further to paragraph 3(a) above, and paragraph 11 of Mr [TK]'s statement, he suggests:

Having said that, there appears to be some change recently which would be due to the cost of living and costs of private care such that some dentists are returning to NHS care. Most providers who are struggling have contacted the dental team to reduce their contracted activity non-recurrently, but this seems to have reduced in the last 12 months

This is wholly unsatisfactory, as it is devoid of any satisfactory or quantative underlying evidence to prove that "some dentists are returning to NHS care". Again, it is submitted that whilst the Respondent wishes to deny any difficulty in recruitment, this phraseology directly contradicts such denial, as dentists cannot be returning to NHS care if they have not left in the first place. The Tribunal is invited to place no weight on this assertion, until better and tangible evidence is provided to rebut the evidence provided by the Applicants.

(c) At paragraphs 12 to 15 of SS2, a robust response is provided to paragraph 17 of Mr [TK]'s statement in which he seeks to indicate that there have been issues with delivery since 2021-22, such response indicating:

> (i) Picton and Sefton were UDCs in 2021-22 and were therefore not subject to contracted UDA activity. It is therefore misleading to rely on these figures in the manner that Mr [TK] seeks to do so;
>
> (ii) The current reconciliations (pages 65-72 of the exhibit to SS2), show delivery for Picton at 100% and Sefton at 79%;

(d) Mr [TK]'s evidence at paragraph 19 appears to be materially wrong, for the reasons set out in SS2 at paragraph 16, i.e. no UDA claims have been processed under the name of the therapist, and so will not be removed as claims.

(e) Contrary to Mr [TK]'s assertion at paragraph 21, no local dispute resolution process was formally undertaken or followed until 13th October 2023, after the service of the termination notices, as per paragraph 17 of SS2. The summary and unsatisfactory nature of this meeting is set out at paragraphs 19 to 24 of SS2, it being indicated that there was no real attempt by the Respondent to resolve matters.

(f) At paragraph 23 of his statement, Mr [TK] complains that the proposals provided by the Applicants failed to identify properly the professional status of the individual clinicians proposed, but this is rebutted in SS2 at paragraphs 19 and 26 to 29, detailing to the wealth of information provided, including performer and GDC numbers.

(g) Again, Mr [TK]'s complaints at paragraphs 25 and 26 are clearly rebutted by SS2 at paragraph 32.

(h) It is also noteworthy, as per SS2 at paragraph 33, that there appeared to be little interest from the Respondent, to acknowledge the improving position with the delivery of the Contracts on 18th January 2024 at the mid-year review.

(i) The matters at paragraph 34(a) of Mr [TK]'s statement are clearly rebutted by SS2 at paragraph 35.

(j) At paragraphs 40 to 46, Mr [TK] seeks to paint a picture of large and increasing deficits owed to the Respondent, and appears to be suggesting that there are risks of such amounts not being repaid. This is plainly incorrect, and bordering on misleading if this is what is being suggested, as set out by SS2 at paragraphs 36 to 39, namely:

(i) The normal procedure is for clawbacks to be re-paid in the 3-6months following notification;

(ii) All clawbacks for 2022-23 have been repaid;

(iii) Debts of: £57,566.72 for Sefton; and £21,616.33 for Warren Drive, arise because contract performance has improved such that the debts represent patient charges received exceeding the amount due to the practice, rather than underperformance. Again, it is submitted that this is a point that should have been made clear by Mr [TK], rather than attempting to portray it as a situation where there is continual underperformance without improvement. It is difficult to see where the prejudice is to the Respondent if the improving situation by the Applicants means that greater money is being returned to the Respondent due to increased patients charges.

(k) At paragraphs 47 to 53, Mr [TK] asserts that the Applicants did not follow the correct procedure by notifying the force majeure event promptly. This is rebutted by SS2 at paragraphs 40 to 41.

(l) At paragraphs 54 to 57, Mr [TK] relies heavily on reported concerns in relation to a dental therapist and much is made of a GDC investigation. However, this Tribunal should be very cautious before relying the same, for the reasons espoused at paragraph 42 of SS2, namely:

(i) The concerns relate solely to a single patient complaint;

(ii) The allegations are denied, forcefully, by the clinician concerned;

(iii.) The investigations are ongoing and there has been no conclusions reached;

(iv.) Mr [TK] himself is involved in the investigation; and

(v.) The therapist concerned has her own registration and insurance.

It is therefore submitted, it is difficult for this Tribunal to rely on unsubstantiated conclusions, which are elevated to factual findings (wrongly in the Applicants' submission) in the summary submissions at paragraph 3(5) of the Representations of the Respondent, as a reason to determine that the Respondent has behaved lawfully.

Reply to the Respondent's Submissions

6. The factual concerns and rebuttals set out above, in relation to the Respondent's evidence, if found favour of the Applicants, would determine the referral in favour of the Applicants.

7. That being said, the Applicant observe and reply as set out below.

8. The case of MUR Shipping BV v RTI Ltd [2024] UKSC 18 is not of general application in this case, as it can be distinguished by reason of that case having a force majeure clause which was operative only if the entity relying on it had also satisfied a requirement that it could not undertake "reasonable endeavours" to overcome the issue. Such a requirement is not present in the force majeure clause in these GDS Contracts. In any event, the Applicants have undertaken intense, expensive and significant efforts to overcome the recruitment difficulties faced in this area.

9. The Respondent's reliance on R (Bhat) v NHS Litigation Authority [2024] 4 WLR 33 is also misplaced, as that case concerned a GMS Contract which was an "NHS Contract", being a specific term whereby the party to a GMS (or GDS) contract elects to be a "health service

body", see paragraph 77 of Bhat. If the party elects to be a health service body, then it does not have contractual rights as observed at paragraph 78 of Bhat. In this case, other than in relation to the Chester Contract, the Applicants have not elected to be health service bodies, such that these Contracts (other than the Chester Contract) are not NHS Contracts, and so this case is not of any application to the instant dispute.

10. The case of Krebs v NHS Commissioning Board [2014] EWCA Civ 1540 did not determine that the interaction between clauses 10 and 11 of the GDS contract was that clause 10 was such that no public law remedies were available. Rather Longmore L.J. at paragraphs 25 to 24 considered the position, observing (emphasis added):

32. In this respect, therefore, I differ from the judge who seems to have thought that as a matter of private law "reasonableness" (even in the Wednesbury sense) did not come into the equation as a result of clause 11 of the contract. That way of looking at the matter would effectively negate clause 10 which cannot, in my view, be right. ***Clause 11 can mitigate the consequences of clause 10 (as I have already said) but cannot entitle a court to treat clause 10 as a dead letter.***

…

34. The existence of this body of authority is not relevant, however, if concepts familiar in public law are deliberately introduced into the contract as clause 10 of the present case does. In the present case 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. The question is whether the defendant has so acted in fact.

The Respondent's reliance on this case is support for the proposition that only contractual law principles are applicable to the exclusion of public law principles, to the exclusion of clause 10, is incorrect. Rather, the Applicants submit that whilst for a number of issues arising under GDS contracts, the issues would normally fall to be decided under contractual principles, the matters raised in the AIS do in fact raise public law issues under clause 10 in this case, including but not limited to:

> (i) Whether it was reasonable behaviour by the Respondent to decide to terminate only the Applicants' Contracts, comprising only 5 out of 149 failing contracts in the area?
>
> (ii) Whether it behaved reasonably in allowing and permitting the Applicants to undertake extensive recruitment exercises to alleviate the issues with the recruitment, and then seeking to terminate before these recruitment exercises were allowed to complete?

11. The reliance on case authorities relating to post-contractual conduct are not understood, as the Applicants do not rely on the same for varying the terms of the Contracts. However, that being said, it should not be lost on this Tribunal that the reliance on strict contractual rights is torpedoed by the substantial intervention during the Covid pandemic in GDS contacts to allow for UDCs and to allow for payments to continue under all GDS contracts in the United Kingdom without strict reliance on each contract's UDA targets, such mandates being issued centrally from the government. That fact alone indicates that elements of these GDS contracts are subject to public law principles. The submission on this point is further reinforced by paragraph 44 of the Respondent's Submissions, as they rely on policy guidance to support the interpretation of the termination provisions; This can only be the case if public law principles are "in play" in this case.

12. Paragraph 31 of the Respondent's submissions is denied for the reasons set out in Paragraphs 5(a), 5(e) and 5(l) above.

13. Within paragraphs 40 to 45, the Respondent refers to numerous clauses on force majeure, in essence, to argue that a party cannot rely on its own failing, or fail to take reasonable steps to mitigate an issue, in order to rely on a force majeure clause. Whilst this may be correct, it is plainly not the situation in this instance. The submissions on this point by the Respondent are all reliant solely on Mr [TK]'s assertion at paragraph 53 of his statement that there are no recruitment difficulties. Considering the wealth of evidence presented by the Applicants on this issue, and on the submissions above regarding Mr [TK]'s inconsistencies in his evidence on this point and the lack of any quantitative evidence to confirm the same, and indeed, the fact that 52% of contracts in the area were more than 10% below the activity required, it is difficult to see how it can be factually said that the failure to recruit was the fault of the Applicants such that they are not entitled to rely on the force majeure clause.

14. Further to paragraph 13 above, it is also submitted that the extensive recruitment exercises undertaken, set out in the AIS, more than satisfy any alleged requirement to take reasonable steps. The requirements of clause 372 are satisfied, with notification being on either:

(a) 24th May 2022; or

(b) 17th October 2022; or

(c) 17th January 2023.

15. Further to paragraphs 13 and 14 above, what is clear, it is submitted, from the Applicants' evidence, is that the difficulty in recruitment being a reason for underperformance was a matter that was constantly and consistently imparted to the Respondent.

16. Paragraph 46 of the Respondent's submissions is simply wrong for the following reasons:

(a) Clause 373 expressly states *Unless the affected party takes such steps, clause 42 shall not have the effect of absolving it from its obligations under this Contract*, i.e. indicating that if such steps are taken, then the affected party will be absolved of the obligations under the contract;

(b) Clause 374 states that either party may terminate the contract after 3 months. Pausing here, as a matter of interpretation, if the requirements are satisfied then the affected party is absolved of its obligations under the contract and may terminate if it wishes to. Paragraph 46(1) is therefore denied;

(c) In terms of stating that it cannot be terminated until the force majeure has ended, if the Respondent is reliant on this reason to terminate, it must serve a notice setting out that it is due to the force majeure event continuing for 3 month and provide a period of notice for the application of clause 375. As the Respondent has not relied on this reason to terminate (i.e. a force majeure event lasting 3 months), it cannot do so now.

17. Much is made by the Respondent in reliance on MUR as being support for the proposition that the Respondent did not have to accept non-performance. However, the issue for NHS Dispute Resolution to resolve, is that the Respondent willingly accepted significant underperformance from 144 other contractors in the area without issuing termination notices. As posed repeatedly, what is the justification for issuing such termination notices only in relation to the Applicants and not to any other contractor?

18. In terms of the argument at Paragraph 17 above, the Respondent relies on R (Gallaher) v Competition and Markets Authority [2019] AC 96. However, the Applicants do not rely on a general principle of fairness in posing the question but rather on:

(a) The facts of the contractual duties of the good faith to the Applicants as set out in the AIS;

(b) The fact that the contract makes express reference to the Respondent behaving reasonably and as a responsible body seeking to procure dental services under the 2006 NHS Act (clause 10 not requiring Wednesbury unreasonableness as per the observation of Longmore L.J. referred to in Krebs above).

Under these principles: the Respondent's decision was in breach of either of these principles; and further, in circumstances where 144 contracts were underperforming, it was irrational to only seek to terminate the Applicants' 5 contracts.

19. In the circumstances therefore, this Tribunal is asked to carefully consider the points set out in the AIS and this document, as well as the extensive evidence provided, to determine matters in favour of the Applicants."

4 CONSIDERATION

4.1 As part of this consideration of the application for NHS dispute resolution, I required an up-to-date version of the Contracts in dispute containing all variations agreed since the Contract was signed. This was provided and has not been disputed by the Commissioner. I note that this dispute is in relation to several practices, Chester Dental Clinic ("Chester"), Atlantic Dental Practice (referred to also as Picton) ("Atlantic"), Sefton Dental Centre ("Sefton"), Warren Drive Dental Practice/Wallasey Dental Studio ("Warren Drive") and Poulton Dental Practice ("Poulton")(collectively "the Practices"). Each is under a materially similar General Dental Services contract, however, for the sake of transparency where I have provided quotes from the Contracts, these are extracts from the Chester Contract. I note that this dispute is in relation to the Termination Notices, dated 29 August 2023, issued by the Commissioner in relation to all of the Practices.

4.2 The parties have provided detailed representations and observations alongside several thousand pages of information in relation to this dispute. I consider it necessary to take a logical and methodical approach to making this determination. For that reason I shall first consider each of the Notices before moving on to consider the Contractor's reasoning for dispute, as set out in its application, representations and observations, taking into account the information and responses provided by the Commissioner as I do so. I have broken down these lines of reasoning into the subheadings below. As each of the grounds for termination, notices and Contracts are the same for each of the aforementioned Practices, I shall deal with them collectively, so far as possible.

First Remedial Notices (dated 1 March and 2 August 2022)

4.3 I have been provided with copies of the first Remedial Notices issued by the Commissioner, which are those of 1 March 2022 (2 August 2022 for Sefton). These state that the Contractor is in breach of clauses 25, 28, 41, 74, 74a, 75 and 76 of the relevant Contract. Extracts of the relevant clauses were provided by the Commissioner to the Contractor, and it was explained that the reason for this breach was the alleged failure by the Contractor to have performers available at the Practices to undertake the mandatory services, set out in the aforementioned clauses, during the contracted hours. The Notices state that the Contractor must remedy the alleged breaches by 1 April 2022 (30 August 2022 for Sefton). Remediation would be achieved by complying with the Contract and ensuring delivery of the services.

4.4 I note that, under clause 330 of the Contracts, a Remedial Notice must provide the details of the breach, the steps to be taken to remedy the breach and the period during which those steps must be taken, which must not be less than 28 days. I note that the validity of the Notices themselves has not been challenged by the Contractor and, given their compliance with clause 330, I consider them valid.

Second Remedial Notices dated 23 December 2022

4.5 I have also been provided copies of the second Remedial Notices issued by the Commissioner, dated 23 December 2022. I note that these provide for the same breach referred to in the first Remedial Notices, as at paragraph 4.3, citing clauses 41, 74, 75 and 76 due to the Contractor's failure to provide the necessary services. In addition these Remedial Notices also refer to the Units of Dental Activity (UDA) requirement in each Contract not being provided. The required UDA total is provided alongside the amount transmitted by the Contractor. The Notices state that both of these issues must be remedied by 20 January 2023. Similarly to the first Remedial Notices, the validity of the second Remedial Notices have not been challenged by the Contractor, and consequently I consider them valid.

4.6 These Remedial Notices also set out that sanctions will be applied with effect from 23 January 2023 pursuant to clause 336, which provides:

> "*If the Contractor is in breach of any obligation and a breach notice or a remedial notice in respect of that breach has been given to the Contractor, the Board may withhold or deduct monies which would otherwise be payable under the Contract in respect of that obligation which is the subject of the breach.*"

The Notices then go on to detail the amount of money to be deducted and the reasoning why.

4.7 I note that the Contractor has contested the validity of these sanctions at paragraph 7.5.1 of its application and at paragraphs 11 and 20 of its submissions. The validity of the sanctions is challenged on the basis that the Commissioner failed to comply with clauses 91 to 96 of the relevant Contract before seeking to withhold money under clause 336. I note that, clauses 91 to 96 relate to (as described in the section heading) mid-year reviews. Clause 91, is stated by the Commissioner to provide for a discretionary power by which the Commissioner may require the Contractor to participate in a mid-year review. I consider that this reading is correct, and that it does not place an obligation on the Commissioner to carry out a mid-year review, only that it "*may*" do so, as per the Contracts. I note that the Contractor has not provided any explanation or evidence to suggest that the carrying out of a mid-year review is required by the Commissioner.

4.8 I also note the Commissioner's statement that clauses 92-100 are "*parasitic on the power in clause 91 being exercised*". I consider this to be the proper interpretation of the relationship between clauses 91 and 92-100. Therefore, I determine that where there has been no mid-year review, then clauses 92-100 do not apply.

4.9 Further to this, I note that, as agreed between the parties, the only mid-year review took place in January 2024. As such, at the time of the second Remedial Notices (December 2022) there had been no mid-year review. For that reason, as I have established at paragraph 4.8, clauses 91-100 could not apply and I determine that the Commissioner did not need to follow them at that time. The Contractor has not stated any other reason why clauses 91-96 would have applied at the time of the second Remedial Notices.

4.10 Finally, in relation to this point I note that the Contractor has not explained why the use of clause 336 in the second Remedial Notices would be predicated on the following of clauses 91-96. As such I determine that the Commissioner's decision to withhold monies under clause 336, as part of the second Remedial Notices, was validly made.

Breach Notices

4.11 I have also been provided with copies of the Breach Notices, dated 23 June 2023. These indicate that the Contractor is in breach of clauses 329 and 330, due to its failure to remedy the breach set out in the Remedial Notices. However, I note that these clauses do not contain any obligations on the Contractor. I consider that they merely provide the ability to the Commissioner to issue remedial notices, and then what the remedial notices must contain, respectively. This was not specifically raised by the Contractor in the correspondence leading to the Termination Notices. There is not a contractual obligation to comply with remedial notices in such a way as to give rise to a breach notice. It is unclear why the Commissioner

chose to issue a Breach Notice in these circumstances. The right to terminate the contracts had already arisen under clause 332, and in consequence a further Breach Notice was not necessary.

4.12 I note that the validity of the Breach Notices has not been challenged by the Contractor. However, I note that the two breaches set out in the Breach Notice were the same as those I have described at paragraph 4.5. I consider that these breaches cannot be suitable for both breach and remedial notices, as they relate to ongoing failures to provide services, which were capable of remedy at any time. As per clause 333 of the Contracts a breach notice can only be issued where the breach is not capable of remedy. I consider the Commissioner, as per its previous remedial notices, had already stated and accepted that these breaches were capable of remedy. I therefore must conclude these breaches cannot have been suitable for a breach notice.

4.13 I consider that clause 332 sets out a specific consequence for non-compliance with a remedial notice:

"*Where the PCT is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the notice period, the PCT may terminate the Contract with effect from such date as the PCT may specify in a further notice to the Contractor.*"

This is clearly the termination of the relevant contract. I also note that both a breach and remedial notice carry the same weight, in that they both lead to the Commissioner acquiring a right to terminate the contract. For these reasons I do not consider that it makes sense for a breach notice to be issued following a remedial notice.

4.14 I do not consider the Breach Notices dated 23 June 2023 to be valid for the purpose of this dispute. As such, any reliance on the breach notices by the Commissioner shall be disregarded.

Termination Notices

4.15 I have been provided with copies of the Termination Notices for each of the Practices. These are dated 29 August 2023. I note that for each Termination Notice the same grounds for termination are identified, which are Schedule 3, Part 9 paragraphs 68-74 of the Regulations and clauses 315-335 of the relevant Contract. The Termination Notices go on to reference the failure to comply with the Remedial Notices dated 1 March 2022 (2 August 2022 for Sefton) and 23 December 2022, and Breach Notices dated 23 June 2023, as being the basis for termination.

4.16 I note that, as I have referred to, as remedial notices were issued, the Commissioner would also have been entitled to issue a termination notice pursuant to clause 332 of the Contracts. Whilst reliance on this clause, has not been expressly stated, I note that the Termination Notices do state "*If that breach is not remedied to our satisfaction, we are permitted to terminate the Contract*." I also note that the Termination Notices state that the Remedial Notices have not been complied with and that the Contractor has been made aware of this fact. Whilst I do not consider the Breach Notices dated 23 June 2023 to be valid breach notices for the purposes of the Contracts/Regulations, they do provide a clear indication to the Contractor that they have not complied with the Remedial Notices.

4.17 I do not consider that the failure by the Commissioner to specifically cite clause 332, in circumstances where the right was clearly articulated, the clause/regulatory reference was covered by the range of clauses cited as giving rise to the right to terminate, and the point has not been disputed by the Contractor, should be fatal to the Commissioner terminating in reliance on that clause. I consider that the Commissioner had the right to terminate the Contracts under clause 332 (paragraph 73(4) of Schedule 3 part 9 of the Regulations).

4.18 I do also note that the Termination Notices specifically refer to clause 334 of the relevant Contracts, which states:

"*334. If, following a breach notice or a remedial notice, the Contractor—*

334.1. repeats the breach that was the subject of the breach notice or the remedial notice; or

334.2. otherwise breaches the Contract resulting in either a remedial notice or a further breach notice,

the PCT may serve notice on the Contractor terminating the Contract with effect from such date as may be specified in that notice."

4.19 The right to terminate under clause 334, unlike 332, is subject to clause 335, which states:

"The PCT shall not exercise its right to terminate the Contract under clause 334 unless it is satisfied that the cumulative effect of the breaches is such that the PCT considers that to allow the Contract to continue would be prejudicial to the efficiency of the services to be provided under the Contract."

I note that the Contractor continued to fail to meet its UDA targets, which is not disputed by either party. The Commissioner has also stated that the Contractor was not providing the services under clause 75 of the Contract, though this has been contested by the Contractor which I shall consider below at 4.86 to 4.88. If the breach that was the subject of the Remedial Notices has or may have been repeated, the Commissioner may have been entitled to terminate the Contracts either under clause 332, as I have considered above; this right existed due to the two Remedial Notices having not been complied with, or clause 334 (provided the test in clause 335 was met).

4.20 I will now consider the reasons raised by the Contractor as to why the termination and/or the Termination Notices were not valid.

The Commissioner had already applied a sanction

4.21 The Contractor has stated at paragraph 7.5.1 of its application, and at paragraph 20 of its representations, that the Commissioner was not entitled to issue a termination notice in relation to the Breach/Remedial Notices due to it already applying a contract sanction under clause 342. I note that clause 342 provides that:

"*Where the PCT is entitled to terminate the Contract pursuant to clauses 322 to 328, 332, 334 or 337 to 340, it may instead impose any of the contract sanctions if the PCT is reasonably satisfied that the contract sanction to be imposed is appropriate and proportionate to the circumstances giving rise to the PCT's entitlement to terminate the Contract*."

I therefore consider that, if the Commissioner had applied a contract sanction under clause 342, it would not also be entitled to terminate the contracts. This is due to clause 342 stating "*instead*" which I conclude means that they are mutually exclusive remedies, and where one is pursued the other cannot be.

4.22 The Contractor has stated that the reason why it has concluded that a contract sanction has been applied is due to the fact that the Commissioner had not followed the provisions of clauses 91 to 96 prior to issuing the second Remedial Notices. The Contractor then states that this means the Commissioner could not be relying on clause 336 for the withholding of monies payable under the Contracts and must, instead, therefore, be relying on clause 342. I note that the Contractor has not cited any contractual or regulatory reason as to the relationship between clauses 91-96 and clause 336 or 342. I also note that the Contractor has not explained why clauses 91-96 applied.

4.23 The Commissioner has addressed this at paragraphs 65 and 81 of its representations. I note that the second Remedial Notices expressly refer to the sanctions being applied under clause 336 and that no mention of clause 342 is made in the Commissioner's correspondence. The Commissioner has stated that it properly relied on clause 336 and that there is no basis for this being a mistaken reference to clause 342, and that the assertion of the Commissioner not following the provisions of clauses 91-96 is not particularised.

4.24 As I have considered at paragraph 4.10, the second Remedial Notices properly referred to clause 336. As such, I do not consider that I can substitute this for a reference to clause 342. I also consider that the Commissioner's assertion regarding the lack of particularisation is correct, as I am unable to understand the logic as to why the Commissioner should be considered as relying on clause 342 in the face of overt statements to the contrary. I also note that clause 342 is dependent on the Commissioner having existing rights of termination. A remedial notice which provides for a date by which the breach must be remedied could not, in of itself, be a cause for termination. The right would only occur at the end of that period, as per clause 332. Therefore, I consider that it would not be possible for the Commissioner to apply a sanction under clause 336 at the same time as issuing a remedial notice under clause 329, before the termination right had arisen.

4.25 I do not consider that any contract sanctions were made under clause 342 by the Commissioner and that its right to termination of the Contracts had not been willingly substituted for financial sanctions.

4.26 I also note that clause 334 provides for a right of termination where a previous breach or remedial notice had been and that breach is repeated, as I have cited above. Therefore, as stated by the Commissioner at paragraph 82 of its representations, even if the sanction had been applied instead of a termination right, then the termination notices may still have been valid under clause 334 if the breaches were repeated, as alleged. As such, I do not consider that the Termination Notices are invalid or excluded by reason of contract sanctions being applied under clause 342.

Force Majeure

4.27 The Contractor states at paragraph 7.5.2 of its application and paragraph 21 of its representations that the "*local and national shortage of dentists*" constitutes a force majeure event, which was notified to the Commissioner, in accordance with clause 372.1 on 17 October 2022 and 17 January 2023. The Contractor's observations also suggest that correspondence from 24 May 2022 may constitute said notification.

4.28 The Contractor states that it was not open to the Commissioner to terminate the Contract in circumstances where the force majeure event continued. Therefore, the Contractor indicates that the Termination Notices are invalid.

4.29 I will start by considering the wording of the force majeure clauses provided in the Contracts, which state:

> "*372. Neither party shall be responsible to the other for any failure or delay in performance of its obligations and duties under this Contract which is caused by circumstances or events beyond the reasonable control of a party. However, the affected party must promptly on the occurrence of such circumstances or events:*
>
> *372.1. inform the other party in writing of such circumstances or events and of what obligation or duty they have delayed or prevented being performed; and*
>
> *372.2. take all action within its power to comply with the terms of this Contract as fully and promptly as possible.*

373. Unless the affected party takes such steps, clause 372 shall not have the effect of absolving it from its obligations under this Contract. For the avoidance of doubt, any actions or omissions of either party's personnel or any failures of either party's systems, procedures, premises or equipment shall not be deemed to be circumstances or events beyond the reasonable control of the relevant party for the purposes of this clause, unless the cause of failure was beyond reasonable control.

374. If the affected party is delayed or prevented from performing its obligations and duties under the Contract for a continuous period of 3 months, then either party may terminate this Contract by notice in writing within such period as is reasonable in the circumstances (which shall be no shorter than 28 days)."

I consider that, were a force majeure event to occur then, as per clause 372, the Contractor would not have been responsible for the failure in performance of its obligations. In such circumstances, it would not be appropriate for the Commissioner to have issued the Remedial and Termination Notices that it had. I will therefore consider if a force majeure event had occurred and if the process under these clauses were followed.

4.30 I note the Contractor's statements regarding the unavailability of termination of the Contracts to the Commissioner, while the force majeure event continued. I also note the Commissioner's representations, at paragraph 46, regarding this point. The Commissioner has stated that this is incorrect as a matter of contract law. I note that clause 374 expressly provides for a right of termination after 3 months of a continuing force majeure event. Therefore, I consider that termination rights would be available to the Commissioner had a force majeure event occurred. I note that, as per the Contractor's statements, by the time of the Termination Notices the alleged force majeure event had been running for at least 1 year and 3 months, based off the notification being 24 May 2022. As such, I consider the Contractor's statement that it would not be open to the Commissioner to terminate the Contracts until the alleged force majeure event had ceased to be at the very least inaccurate. Whilst the Contracts could not have been terminated in relation to remedial or breach notices, I consider that a wholly separate right of termination would have arisen.

4.31 Before considering the nature of the alleged force majeure event I note that the first requirement of clause 373 is that the steps in clause 372 must have been taken by the affected party. This, in particular, states that the other party, i.e. the Commissioner, should have been informed. I will consider this point first, because if the event was not properly notified then it is irrelevant whether it constituted a force majeure, as per clause 373.

4.32 I note that the Commissioner, at paragraph 59 of its representations, has indicated that the Policy Book for Primary Dental Services (the "Policy Book") provides further clarity as to the requirements for notification, and states at paragraph 44 that it forms part of the "*factual matrix*" to the Contracts. This has not been disputed by the Contractor and, as such, I shall regard the notification requirements provided therein. I shall consider each of the three pieces of correspondence stated by the Contractor to be the source of the force majeure notification.

4.33 As a starting point, and as stated by the Commissioner, I note that the Policy Book provides for a specific template for use in the case of a force majeure notification. This is described as Annex 86, and though I note that the Annex has not been provided to me by the Commissioner, a copy is available to me (online through the Commissioner's website). I will therefore consider the requirements of both the template and the Policy Book, and any compliance by the Contractor.

4.34 Firstly, I will consider the alleged notification dated 24 May 2022, as provided by the Contractor. As I have stated above, and is agreed between the parties, the first Remedial Notice was dated 1 March 2022. I therefore consider that this pre-dates this alleged notification by almost 3 months (excluding Sefton). The Contracts make it clear that the notification of the force majeure event must be provided "*promptly*". I concur with the Commissioner's statement at paragraph 44(4) of its representations that this is further clarified by the position in the Policy Book which defines "*promptly*" as no later than five working days, following the occurrence of

the event. I note that the actual date of the occurrence of the event is not specified in this alleged notification.

4.35 The Contractor's email of 17 October 2022 makes some references to the event being brought about by "*COVID*" and mentions the period of 2021 to 2022. There is also reference to Chester staff leaving shortly after its acquisition, which would significantly pre-date the alleged notification. As such, I do not consider that this notification was brought about "*promptly*". I consider that this email may have been generated as a response to the issuing of the first Remedial Notices, by which point the consequence of any alleged event had been felt, but logically indicates that its occurrence was at some point prior.

4.36 I note that the wording in the Contracts state that the notification must be made promptly on the occurrence of the circumstances or event. If the Contractor was wholly unaware of the issues, it would have been made aware by the issuing of the first Remedial Notices, and as such the force majeure could have been notified within 5 days of receipt of the notices, which it was not. This is particularly noticeable for Sefton where no force majeure notification was provided until October 2022, despite the Remedial Notice being issued on 2 August 2022, and the Remedial Notices in regard to the Contractor's other premises alerting it to the issue.

4.37 In relation to the form of the notification and the rest of the content I note that upon visual inspection of the email, the template format has not been used. However, I will still consider if the relevant information has been provided therein. Firstly, as I have noted above, the date of the event in question is not specified. Secondly, the relevant contract numbers, description of event, and potential number of UDA/UDOs that could be under-performed have not been provided. I also note that the email itself does not identify the email as a "*force majeure notice*" but instead goes on to detail the fact that a force majeure event has occurred sometime in the past. I note that the email does suggest that some recruitment is being undertaken, however it does not identify this as being the actions taken to mitigate the loss of service. As such, the necessary information required by the Policy Book has not been provided.

4.38 I have also had regard to the Contractor's observations, at paragraph 14 in relation to the Commissioner's reference to the notification requirements. This states that the requirements in clause 372 are met by either of the three aforementioned notifications. I also note that the provided witness statement addresses the question of promptness at paragraph 40 and 41. The explanation provided by the Contractor is such that, discussions were held in 2021 whereby the Commissioner was made aware of recruitment difficulties. However, having regard to these discussions this does not constitute a notification in writing as required by clause 372, and so cannot be a force majeure notification for the purposes of the Contracts. I also note that there is no indication that these recruitment difficulties were specified as being a force majeure event at that time.

4.39 The second line of reasoning, as stated by the Contractor, is that the UDA targets were reintroduced between 1 January 2021 and 1 April 2022. As such, the Contractor states that the difficulties caused by the recruitment crises became "*more acute*". However, each of these increases was notified to the Contractor in advance. Further to this, the force majeure notification is not concerned with when the impact of the force majeure would transpire but when the actual event occurred. I consider it unlikely that the Contractor was completely unaware of a local and national shortage of dentists at the point where the first remedial notices were issued, based on its other statements. I also note that this does not explain why it took the Contractor over 3 months to then notify the Commissioner that a force majeure event had occurred at some point in the past.

4.40 As I have already considered above, the wording in the Contracts makes it clear that a force majeure notification is prospective and reactionary i.e. an event has occurred and this will be the consequences to the contractor. I consider the requirement of promptness would be rendered wholly meaningless if a Contractor could make the notification at any point once the event had occurred, especially if this is in an attempt to invalidate a remedial notice. I consider that if the Commissioner had become aware of the issue in March 2022, then so should have

the Contractor and consequently any notification which post dates these notices cannot have been made in accordance with the Contract.

4.41 The Contractor has stated that, the force majeure event is "*a local and national shortage of dentists willing to work in the NHS, particularly in and around the Cheshire and Merseyside areas*". The Contractor has also maintained that this event has been the same force majeure since its commencement. Consequently, if the two later notifications are in relation to the same event, where there has already been a failure to notify, I do not consider it possible that these later notifications remedy the issue of them being issued "*promptly*". Thus, due to the requirement in clause 372 of the notification to be prompt, I do not consider it appropriate to consider the later alleged notification of 17 October 2022 or 17 January 2023 in any detail.

4.42 I, therefore, must, consider that the alleged force majeure event was improperly notified for the purposes of clause 372 due to the Contractor's failure to utilise the format and information required by the Policy Book, and to provide notification promptly following the occurrence of the event or circumstance. In consequence of this, as per clause 373, the Contractor may not rely on the alleged force majeure event to absolve it from its obligations under the Contracts. Based on this finding, I do not consider it necessary to consider if the recruitment issues constituted a force majeure event, or whether all actions within its power were taken by the Contractor to remedy the issue, due to the Contractor's failure to properly notify the Commissioner.

4.43 On the basis of the reasoning set out above, I do not consider that the Termination Notices should be rendered void on the basis of force majeure.

The Duty of Good Faith

4.44 The Contractor sets out at paragraph 7.5.3 of its application that the Termination Notices have been served in breach of the duty at clause 10 of the Contracts. This provides:

> "*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.*"

The reasons for this are set out at paragraphs 7.5.3 and 7.5.4 of the Contractor's application and are further expanded upon in its representations and observations. I have broken these down further into the subheadings below, in order to ensure that each is properly dealt with.

Golden Handshakes and increased UDA rates

4.45 The Contractor has stated that the Commissioner prevented the Contractor from offering "golden handshakes" or higher UDA rates to potential staff. It reasons that this contributed to the Contractor's inability to recruit. It then provides that a policy paper from 7 February 2024, cited by the Contractor's representations, now considers golden handshakes as a targeted recruitment method and mentions raising the minimum UDA rate.

4.46 The parties agree that a remedial plan, presented to the Commissioner on 17 October 2022 did contain a proposal by the Contractor to utilise golden handshakes or an uplifted UDA rate as part of its recruitment strategy intended to remedy the first Remedial Notices. I note that the second Remedial Notices state, in response to this plan that the Commissioner does "*not consider this to be financially or practically appropriate*".

4.47 I have had regard to the wording of the Contractor's plan of 17 October 2022 and note that in order to fund these two ideas the Contractor requested that the value of the Contracts for each premises remain the same but that the UDA required under the Contract be reduced by 26%.

4.48 I note that the Contractor has not explained what element of good faith obliged the Commissioner to accept this offer. The Commissioner has stated that this would have required them to "*accept re-written contractual and commercial terms*".

4.49 As an initial point, I consider the fact that a policy paper from 7 February 2024, which indicates golden handshake may be offered and is being provided at a national level, is wholly irrelevant to a termination notice from 29 August 2023. I note that the Commissioner has stated that a later policy document should not be used to call into question a decision taken prior to its publication. I am inclined to agree with this reasoning. I also note that this policy does not involve reducing the UDA rates for practices involved in order to fund the scheme, instead the funding comes from a separate source. Where the policy does discuss increasing UDA rates, it is separate to this. I note that the policy increases the UDA rate to £28, the Commissioner has stated that the UDA rates for all of the Practices was already higher than this amount and this is not disputed by the Contractor. As such, I consider the policy wholly separate and not indicative of any bad faith by the Commissioner.

4.50 I note the Commissioner's statements regarding the fact that good faith does not mean that it was obliged to re-negotiate the Contract in order to aid the Contractor. I consider that, as a matter of principle, the Commissioner may consider and reject an uplift in UDA rates, and still not be in breach of the provisions of good faith or reasonableness, dependent on the reasoning behind the decision. I note that at paragraph 26(b) of its submissions the Contractor states that a decision which is commercially unacceptable to reasonable and honest people would be sufficient to breach clause 10. However, it does not go on to explain why these decisions would be commercially unacceptable. I consider that the adherence to contractual terms, would be generally commercially acceptable. The acceptance of a reduced service at the same price would, conversely, appear to be, in ordinary circumstances, commercially unacceptable.

4.51 I note that the Contractor has not explained why not approving these two possible remedies should result in the termination being unreasonable or in bad faith. I note there is some suggestion that contributing to a situation which leads to the breach would be unfair. However, I consider that not approving these two changes to the Contract to the benefit of the Contractor is not the same as contributing to the breaches. I note that the Commissioner has not actively worsened the Contractor's situation but merely maintained the contractual situation to which the Contractor consented when it signed the relevant Contract. I thus concur with the Commissioner's statement that this amounts to "*a complaint that the bargain that the Contractors entered into was not more profitable*."

4.52 I also note the Commissioner's statement at 9(4)(b) of its observations. This explains that within the Contractor's Practices there was a discrepancy between the relative UDA rates, with two practices on significantly higher rates. However, as per the Commissioner's observations, these practices were also not delivering the necessary UDAs. I consider that this contradicts the Contractor's premise that a higher UDA rate would have resolved their recruitment issue, whilst supporting the logic of the Commissioner that this approach was not appropriate.

4.53 I note that, aside from the policy which post dates the decision, there has been no evidence provided that the decision not to accord with the Contractor's wishes was made in anything but good faith as per the reasoning I have quoted above. I note that the Contractor has stated that these actions were detrimental in recruiting dentists, however, as I have considered, that, in itself, would not make the decision unreasonable or bad faith, and is not necessarily true. I note that the Contractor has hypothesised that an increase in UDAs or a golden handshake would have resolved the recruitment issues, but has not actually evidenced this point. I consider that the Commissioner must weigh several different considerations when deciding the best course of action, it is not obliged, in any way, to accord with every request that may improve a Contractor's position, otherwise its own position would be completely undermined.

4.54 Thus, in the absence of any evidence to the contrary, and noting the lack of substantive reasoning provided by the Contractor, I consider that the refusal of the golden handshake and

uplifted UDA rates, in these circumstances, does not equate to a breach of clause 10 of the Contracts.

Allowing Significant Expense in Recruitment

4.55 The Contractor has stated that the Commissioner has "*allowed*" the Contractor to undertake significant expense in recruitment. Therefore, terminating the Contracts at this point, before the recruitment has come to fruition, "*would be wrong*". I note that this argument is essentially repeated in different forms by the Contractor. At paragraph 28 of the Contractor's representations it is described as a breach of a promise not to terminate, resulting in promissory estoppel and at paragraph 34 it is described as a legitimate expectation. Both of these are tied to the obligations under clause 10 of the Contracts. I consider that all of these lines of reasoning relate to the same essential core premise stated by the Contractor – that the Commissioner, allegedly, allowed the Contractor to expend significant amounts in recruitment only to then terminate the contracts.

4.56 I note that at paragraph 13 of the Contractor's representations they state that the Commissioner knew, not only that the recruitment efforts would be of expense to the Contractor, but that it would take 1 to 3 years to take effect. At paragraph 28 the Contractor states that this knowledge, combined with the significant clawback and making continued requests regarding the recruitment efforts amounted to a promise not to terminate.

4.57 Similarly at paragraphs 34 and 35 the Contractor states that the allowing of the recruitment effort and expense amounted to a legitimate expectation. Here the Contractor also references the contract sanctions made in December 2022 and that this indicated termination would not be pursued. As I have considered above, already, I do not consider that any suggestion was made to the Contractor that the sanctions were being made under clause 342. Therefore, as an initial point, I do not consider that any representation was made to the Contractor that the breaches had been ameliorated.

4.58 In relation to both of these points, I note the Commissioner's representations. In relation to legitimate expectation the Commissioner has cited *R (Donald) v Secretary of State for the Home Department [2024] EWHC 1492 (Admin)*. I note that this case establishes that a legitimate expectation must be "*clear, unambiguous, and devoid of any relevant qualification."* I note that the Commissioner has stated that the Contractor has failed to identify such a representation and that where the Contractor has cited it, the language is inconsistent. Upon reviewing the Contractor's submissions, it does not consistently identify a clear, unqualified, creation of expectation.

4.59 In relation to the promissory estoppel the Commissioner relies on *Magee v Crocker [2024] EWHC 1723 (Ch)*. This similarly sets out that there was a "*precise representation*". Again, the Commissioner has stated the lack of any representation being identified. I determine, upon reviewing all of the communications provided by both parties, that there is no precise representation therein and the Contractor has not identified one.

4.60 I consider that the facts and circumstances of this application for NHS dispute resolution on the whole must be considered in relation to both of these reasons set out by the Contractor, as the evidence they seek to rely on is the entirety of the actions taken by the Commissioner. Firstly, I note that the statement above that the Contractor was "*allowed*", was stated by the Commissioner to make "*no sense in the context of the Contracts*". I consider that the Contractor was obliged to plan for recruitment in order to perform the Contracts. In order to operate a successful business any contractor would need to plan for short term, medium and long term recruitment. Consequently, I consider that they were not "*allowed*" to plan for recruitment but obliged to.

4.61 I also note that the Commissioner has stated that any expectation would have explicitly been subject to the Contract. Further to this, it has stated that promissory estoppel is still subject to cancellation, unless it would be unconscionable. I consider that the fact that remedial and breach notices were issued by the Commissioner, each mentioning termination, should have

made it clear to the Contractor that termination was being contemplated by the Commissioner. These notices also directly contradict any suggestion of its being "*allowed*" to continue to recruit, since it was made aware that termination was a possibility. I also consider that it is inconsistent with the idea that any promise or representation could reasonably have been inferred by the Contractor.

4.62 In relation to the clear promise or expectation, I note that, as per the Commissioner's observations, no evidence of any specific promise or cause of action was identified as suggesting that the Contractor would be allowed to continue its recruitment efforts indefinitely. Consequently, I consider that neither line of reasoning can be maintained by the Contractor based on the evidence provided and the facts of the dispute. Therefore, I do not consider that the continued recruitment efforts by the Contractor was "*allowed*" by the Commissioner in such a way as to constitute bad faith or an unreasonable course of action, or that there was a clear enough representation by the Commissioner to give rise to either a legitimate expectation or promissory estoppel.

The Treatment of other Contractors

4.63 I note that the Contractor has provided Freedom of Information Act ("FOIA") request responses in order to demonstrate that it was treated differently to other contractors. This line of reasoning is applied in relation to Commissioner's refusal to increase UDA rates, to seek clawback and to terminate the Contracts. This is set out at paragraph 2 of the Contractors representations but also stated at paragraphs 7, 24, 26, and 30. I note that this comparison has been raised in relation to a number of different lines of reasoning put forward by the Contractor but is always in relation to the question of good faith or unreasonableness.

4.64 The Commissioner has stated in its representations that there is no contractual restriction which would restrict its right to terminate based on the relative treatment of different providers, as it is permitted to exercise discretion in this regard. It also states that no other provider is in an equivalent position to that of the Contractor. I also note that in its observations note is made of the fact that the failure to provide UDAs represented only one of the breaches identified in the remedial notices, there was also the failure to provide services during core hours. I note that the Contractor specifically stated "*If Smart contracts were the only ones to be terminated then it can not be on the grounds of underperformance alone*". I consider that the termination was not on the grounds of underperformance alone, as set out in the Remedial Notices.

4.65 I note that the Contractor states that I must decide if the Commissioner accepted under performance from 144 contractors, then what is the justification for only terminating the Contractors. However, I consider that this line of reasoning is reductive of the actual issues in this dispute, and ignores the individual circumstances at each of the 144 contractors.

4.66 I consider that the Commissioner has a wide discretion in relation to each contractor. I note that the Contractor's FOIA responses do not provide enough detail to consider if there are comparable circumstances at other premises or to critique the reasoning of the Commissioner as to why comparable actions have not been taken. I note that it may be possible for a contractor to have provided sufficient detail in their recruitment plans to avoid termination or remedial notices, however the Contractor is not in a position to provide such granular information. I consider that the mere fact that other contracts have not been terminated is not enough to establish that the Commissioner was acting unreasonably or unfairly.

4.67 I contemplate that, if the Contractor’s logic was upheld, then the individual circumstances of each Contractor would be irrelevant to a decision to terminate. It follows that this is more likely to result in unreasonable or unfair decisions than accepting that each contractor's situation should be considered on its own merit. Where it were the case that a directly comparable situation was evidenced by the Contractor then it may be possible that different treatment of identical situations would be unfair. However, I do not consider this to have been demonstrated to be the case here. As such, I also do not consider that the FOIA responses demonstrate any unreasonable or unfair decision by the Commissioner.

The Real Purpose of the Commissioner was to force rebase of the Contracts

4.68 I note that this allegation has been stated multiple times by the Contractor, with the Commissioner's purported aim being to redistribute the monies to other providers. Where this is the case I consider that it could constitute unfair or unreasonable decision making. I note that reference to this motivation has been made in the Contractor's representations at paragraph 30 and 33.

4.69 I note that the Commissioner has stated that this allegation is unfounded at paragraph 93(5) of its representations, this is repeated at paragraph 19 of its observations. I note that the reason stated by the Commissioner for this is that there is a total lack of evidence to support the allegation.

4.70 I consider that the Contractor has stated that it is its view that this is the purpose of the Commissioner's actions but has not provided any factual evidence to support this understanding. Given the nature of these allegations, I consider that they are required to be supported, explained and evidenced in order to be properly made out. As such, I dismiss this line of reasoning, and shall not take it into consideration at any part of this dispute.

Clause 11

4.71 As a general point of consideration in relation to clause 10 I note the Commissioner's representations at paragraph 93. The Commissioner states that the Contractor has conflated a duty to act in good faith with an obligation not to enforce its contractual entitlements. This is in consequence of the wording of clause 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*."

I consider that this line of reasoning presented by the Commissioner demonstrates issues with most of the previously mentioned sub-headings in this section. Where the Commissioner has refused to re-negotiate the Contract, the Contractor was bound by the original terms to which they agreed, as per clause 11. The fact of termination requires factual evidence to support it being unfair or unreasonable, otherwise the Commissioner was entitled to do so, where a breach has occurred, as per clause 11. I note the reference to *Krebs v NHS Commissioning Board [2014]* which was made by both parties. I consider that this illustrates that clause 11 should be considered in regards to the operation of clause 10 and may mitigate the consequences of it. I consider this to be the case here, whereby the Commissioner is enforcing or relying on contractual obligations this does not inherently make its decision unfair or unreasonable. Consequently, there must be a demonstration of unfairness or unreasonableness in the actual termination. I also, therefore, consider that clause 10 does not obligate the Commissioner to simply accept non-contractual performance as clause 11 expressly states that both parties must perform their contractual obligations.

Termination will not result in increased delivery

4.72 The Contractor states at paragraph 7.5.4 of its application that the termination of the Contract will not increase the delivery of NHS dental care in the area. It provides that this is due to the fact that all practices in the area are having difficulty with recruitment. It also relates this argument to clause 10 of the Contracts i.e. the Commissioner's obligation to act as a responsible public body. At paragraph 18 of its representations the Contractor states that this is not acting in lines with the Commissioner's duties under s99(1) of NHS Act 2006. This requires that NHS England must secure the provision of primary dental services throughout England.

4.73 The Commissioner has stated that to argue this line of reasoning would be to rely on their own breach as a reason why the Commissioner is not permitted to terminate. I consider this line of reasoning correct. The Contractor is essentially saying that their breaches would occur

regardless so termination is not available. I also note the Commissioner's statement that the argument directly contradicts the Contractor's statements elsewhere that the breach will shortly be remedied. I consider that this is correct, if the Contractor believes it can remedy the breach, then this situation is capable of being resolved, and consequently a different contractor must be able to achieve a similar outcome in the same position.

4.74 In relation to the responsible public body reasoning, I note that the Contractor has not set out why the Commissioner has not acted as such in any detail, other than the paragraph I have provided. I do not consider these reasons provide a sufficient basis to invalidate the Termination Notices.

Other Reasons Raised by the Contractor

4.75 I note that there are other less detailed reasons mentioned in either the Contractor's representations or observations. I will address those here. Firstly, the Contractor has stated at paragraph 26(a)(vii) of its representations that the Contractor was not given a fair or reasonable opportunity to complete delivery of the Contracts. The Commissioner has stated that there was no obligation to offer the Contractor any greater opportunity to do so. I consider that the requirement in clause 10 would suggest that a reasonable opportunity to remedy a breach be provided, however, having regard to clause 11, what is reasonable in terms of timescale must be read in light of the 28 days specified in clause 331. I note that the Contractor had several opportunities to remedy the situation, or accept a lower number of required UDAs for the premises. However, it chose not to do so or failed to provide the necessary evidence. I also note that the Contractor has not cited any contractual or regulatory reason which obliged the Commissioner to extend the period by which it was given to remedy the situation. As per clause 11, the Contractor was obliged to comply with the terms of the Contract and it did not do so. Other than not being given its requested decreased UDA obligations for the same remuneration, it is unclear what was unfair or unreasonable about the 546 days it was provided with, from the first Remedial Notice to the Termination Notice, to resolve the breach.

4.76 I note the Contractor's statement at paragraph 26(a)(v) of their representations that the undertaking of clawback means that termination was unfair. I consider that this reasoning does not accord with the express provisions of clause 336, which allows clawback as well as termination, rather than one or the other. I note the Commissioner's reliance on *MUR Shipping BV v RTI Ltd [2024] UKSC 18* ("MUR"). The Contractor has stated that MUR can be distinguished on the basis that the contract in that case had a requirement that the party could not undertake "*reasonable endeavours*" to overcome the issue and that the Contracts in this dispute have no such clause. However, I note that the Policy Book expressly states:

"*A force majeure event is one which is caused by circumstances beyond the reasonable control of either the Commissioner or the contractor that could not have been avoided or mitigated with reasonable care and where the event has had a material effect on the fulfilment of the contract.*"

As such, I do not consider that the Contractor's statement regarding this distinction to be correct. Therefore, I consider that the Commissioner is entitled to rely on the judgment in MUR, and the fact that it was not required to accept non-contractual performance and was permitted to terminate the Contract, even where clawback was applied.

4.77 At paragraph 14 of the Contractor's representations they state that it was taking an "inordinate length of time to register dentists" and that it would be wrong for the Commissioner to criticise recruitment whilst there is no system in place to register staff quickly. The Commissioner has stated that it does not control the process by which overseas dentists obtain performer numbers. It also states that short term recruitment was not reliant on overseas dentists, as per the Contractor's representation at paragraph 13. Consequently I consider this line of reasoning as lacking any basis, and do not consider that it contributes to any unfairness or unreasonableness.

4.78 The Contractor provided at paragraph 17 of their representations evidence of a survey carried out on their patients. I note that the Commissioner has pointed out that the heading of this survey was "*Save your NHS Dental practice*" which it claimed could “elicit fear on the part of participants”. I consider that the wording of the survey could be construed as misleading, as there is no evidence that the NHS services will not be recommissioned or of what the impact on the local community will be.

4.79 The Contractor states that "*87% of patients said they received an Excellent, Fair or Good service at the dental practices*" alongside other quotes based on the survey. I note that this is intended to demonstrate a failure of the Commissioner to comply with its aforementioned duties under the 2006 Act. In relation to the quote, I have reviewed the surveys and have noticed a discrepancy. The surveys provided by the Contractor do not have an option for "*fair*", instead the options are Excellent, Good, Satisfactory or Poor. The provided pie chart indicates that the remaining 13% stated "*Satisfactory*". I, therefore, consider that for the "*fair*" option, the actual response was "*poor*". Therefore, it appears that 24% of respondents stated that the service was less than good. I also note that several surveys do not have a response regarding quality of service, which is not represented in the Contractor's figures. Further to this, the majority of the pie chart representations of answers provided are incorrect.

4.80 The Contractor has not explained how these surveys relate to the Commissioner's obligations under the 2006 Act, and I consider that, due to the errors I cannot attribute them any weight in this determination.

Denial of the Cumulative Effect of the Breach

4.81 The final reason set out in the Contractor's application is that the cumulative effect of the breaches are not such as to prejudice the efficiency of the services provided under the Contracts, at paragraph 7.5.5 of its application. The Commissioner has stated that the cumulative effect would be prejudicial and that clause 335 accords a broad discretion to the Commissioner. I consider that reading of clause 335 is correct and that compelling arguments and evidence would need to be provided to dispel this assertion.

4.82 At paragraph 30 of its representations the Contractor states that the Commissioner must provide evidence that other providers who would be able to deliver the services, otherwise there is no prejudice. The Contractor supports this with the aforementioned FOIA responses. It also raises that the clawback has meant that the Commissioner has suffered "*little financial loss*".

4.83 I note that the Commissioner has stated that there is no contractual obligation to demonstrate that there is another provider who could have undertaken the UDAs. I have considered the clauses of the Contract and agree with this statement. I consider that the prejudice to the services is created by the actions of the Contractor, not by the fact that a different contractor could perform the Contract better. I consider it would be very difficult to definitively prove that a new contractor would perform better, and would require considerable time and resources. I also note that the Contracts state regard should be had to the "*cumulative effect of the breaches*" and whether this is prejudicial to the services to be provided under the Contract. It does not state that it is prejudicial to the services provided to the community, but rather under the specific Contract. If a new contractor were to be brought in, this would be a wholly separate contract. Consequently, I do not consider that the lack of evidence provided by the Commissioner regarding any other potential contractor prevents it from relying on clause 335.

4.84 I note that I have already considered the FOIA responses and the clawback reasoning in prior paragraphs and so shall not repeat this. However, in conclusion, I do not consider that any evidence has been provided to support the suggestion that the cumulative breaches would not prejudice the services under the Contract. I, therefore, consider that the Termination Notices could have been validly brought under clause 335.

Grounds for termination

4.85 I note that the Contractor has not disputed that it was, as of 17 May 2024 still not performing 100% of its target UDAs at any of its locations. I consider that it generally states that performance has improved, but not that it is no longer in breach. Therefore, I consider that the breach of the requirement under clause 77 to deliver the annual UDA total was, and continued to be breached by the Contractor.

4.86 I note that the Contractor's application, representations and observations do not dispute the breach of clause 75 in relation to providing dental services. However, in its observations the Contractor provided a witness statement that does dispute this. The witness statement and evidence provides that the Commissioner was informed on 6 July 2023 that NHS dentists were available during core hours. I have had regard to these letters, and note that they assert this to be the case without providing evidence to substantiate this claim. I consider suitable evidence would be staff rotas or UDA submissions detailing the availability of NHS dentists. I note that in the document provided by the Contractor, on 14 October 2023, which detailed the recruitment plans, several practices do not have a dentist with a performer number listed for every day of the week. This document post dates the Termination Notice by two months. Having regard to the documents available to the Commissioner at the date of termination, and the evidence cited in the Termination Notices, I consider that the Contractor has not provided evidence that at the time of termination each of its premises had the Contract level of services during core hours.

4.87 As a penultimate point, I have had regard to the Contractor's observations insofar as they relate to the witness statement provided by the Commissioner as part of its representations. I have not sought to rely on any of the information which was contested by the Contractor, but otherwise consider that the disputed points do not materially alter the conclusions I have reached above. I have cited the Contractor's observations, where relevant, but do not consider it necessary to expressly analyse each provision where it does not contribute to the reasons why the termination should be held as invalid. In particular I have not looked at the issues raised about whether dental therapists could or could not provide NHS treatment (paragraph 5(a)) or the General Dental Council investigation into performance at Picton (paragraph 5(l)) as I consider these two issues to be beyond the scope of the current application for dispute resolution. These are matters for the regulator.

4.88 I consider, in light of my preceding analysis that the Commissioner could validly terminate the Contracts in accordance with either clause 334 or 332 on 26 September 2023, following the issuance of the termination notices dated 29 August 2023.

5 DECISION

5.1 I determine that both the Remedial Notices dated 1 March 2022 (and 2 August 2022), further Remedial Notices dated 23 December 2022 and the Termination Notices dated 29 August 2023, issued by the Commissioner, were all valid under both the relevant Contracts and the Regulations and, as such, I determine this application in favour of the Commissioner.

5.2 There are no disputes between the parties with regard to interest and I determine that no interest shall be payable in relation to this dispute.

Head of Appeals
NHS Resolution