23 May 2025

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FILE REF:	**SHA/26225, SHA/26226, AND SHA/26227**
DECISION MAKING BODY:	**NHS SOUTH WEST LONDON INTEGRATED CARE BOARD ("THE COMMISSIONER")**
GDS CONTRACTORS:	**DR MANNY VASANT & DR RONUK VASANT, M K VASANT & ASSOCIATES; DR SHANI KALSI, LANCASTER HOUSE DENTAL PRACTICE; DR ANGELICA KHERA, FAMILY DENTAL PRACTICE**
DISPUTE RESOLUTION:	**NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES CONTRACTS) REGULATIONS 2005**
RE:	**APPLICATION FOR DISPUTE RESOLUTION RE IMOS UPLIFTS**

1 Outcome

1.1 Having regard to all of the information provided by both parties, I determine that:

1.1.1 Any disputes relating to the years 2014/15, 2015/16, 2016/17, 2017/18, 2018/19 and 2019/20 are outside of the limitation period for referring a dispute; and

1.1.2 The Contractors were not entitled to annual payment uplifts for the provision of intermediate minor oral surgery services; and

1.1.3 No interest is due to the Contractors.

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RE: **APPLICATION FOR DISPUTE RESOLUTION RE IMOS UPLIFTS**

1 INTRODUCTION

1.1 The Contractors have referred the dispute in relation to its General Dental Services ("GDS") Contract for dispute resolution under the provisions of Paragraph 55 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 APPLICATION FOR DISPUTE RESOLUTION

2.1 By letters dated 29 May 2024 the Contractors applied to NHS Resolution for dispute resolution, stating:

"**INTRODUCTION**

I am instructed on behalf of Dr. Manny Vasant and Dr. Ronuk Vasant (M K Vasant & Associates), Dr. Shani Kalsi (Lancaster House Dental Practice), and Dr. Angelica Khera (Family Dental Practice) ("the Applicants). The dental practitioners provide primary dental services under General Dental Services Contracts ("the Contracts"). Copies of the Contracts are attached.

The Applicants wish to invoke the NHS Dispute Resolution Procedure in respect of a dispute which has arisen between the Applicants and NHS North East London Integrated Care Board ("the ICB").

The Applicants have exhausted local dispute resolution.

The adjudicator is invited to determine whether the ICB is under an obligation to apply annual uplifts to the IMOS services bring provided by the Applicants in accordance with the Review Body on Doctors' and Dentists' Remuneration (DDRB).

If annual uplifts are payable, then the Applicants in invite the adjudicator to award interest on the sums due and payable at the rate of 8% (*SSP Health Ltd v National Health Service Commissioning Board* [2020] EWCA Civ 1574, [2021] P.T.S.R. 958).

It is common ground between the parties that the Applicants were deemed to be providing IMOS services under the Contracts: *Vasant (t/a MK Vasant and Associates) v NHS Commissioning Board* [2018] EWHC 3002 (QB), and *NHS Commissioning Board v Vasant (t/a MK Vasant and Associates) and others* [2019] EWCA Civ 1245, [2020] 1 ALL E.R. (Comm) 799.

The ICB has agreed to discharge annual uplifts for financial years 2021/21 [sic], 2021/22, and 2022/23, but has failed to pay interest on the debt.

RELEVANT CORRESPONDENCE WITH THE ICB

On 10 October 2022, Mr. Andrew Biggadike, Regional Lead for Secondary, Community and Specialist Dentistry Contracts, confirmed in an email that NHS England would be looking at the figures. Mr. Biggadike informed the applicants to continue invoicing at the existing rates otherwise this would confuse retrospective calculations.

On 24 July 2023, the Applicants sent the following email to Mr. Biggadike:

"*I hope you are well.*

We last corresponded in March 2023 when you had processed the uplift for years 20/21,21/22 NS 22/23. We thank you for this.

However, whilst you had sent us an Excel sheet for the previous years, we are still waiting to hear from you regarding these long overdue missed uplifts. As we have previously written to you, our advice from Simon Butler (who represented us for the hearing) was that we should receive our missed payments of previous years also).

We appreciate that you are a very busy man, so we have patiently waited although some of our group have previously raised the issue. Could you please let us know where we stand…"

On 3 September 2023, Mr. Biggadike responded:

"*I will raise this issue with Jeremy Wallman this week.*

I do have some questions that I would appreciate you all answering in the meantime though.

- *What is the process for accepting external IMOS referrals at your individual practices? Specifically:*
    - *The home borough of the patient according to the GP registration*
    - *The band of treatment claimed.*
    - *The process of submitting FP17 details to the BSA for the treatment delivered.*
- *What is the process at your individual practices for the internal referral of a patient? Specifically:*
    - *The band of treatment claimed.*
    - *The process of submitting FP17 details to the BSA for the treatment delivered.*
- *Please could you provide the names and GDC registration numbers of the dentists delivering oral surgery at your individual practices*."

On 27 January 2024, the Legal Representative for the Applicants sent a letter to Mr. Biggadike requesting an update in respect of the retrospective payments.

On 19 February 2024, Mr. Biggadike sent an email to the Applicants confirming that he had been signed off work for much of January. Mr. Biggadike stated:

"*All IMOS invoices have now been paid and you should receive an advance payment by the end of this week, thank you for calculating the uplifted values as this saves me a job.*"

On 20 February 2024, Mr. Biggadike sent an email to the Applicants' Legal Representative confirming:

"*I think that Manny Vasant may have already made you aware, but I had* [Redacted by NHS Resolution]*. As you can imagine, this has caused quite a backlog, and our team is smaller than ever. I apologise for the delay this has caused in acknowledging your correspondence.*

Jeremy Wallman has been made aware of the matter and it has been shared with our legal team for advice, I hope to be able to respond within a couple of weeks."

The Applicants and/or the Legal Representative never received any further correspondence from Mr. Biggadike or the ICB.

For the reasons given above, the Applicants have been left with no other option but to refer the matter to NHS Dispute Resolution for determination.

THE RELEVANT TERMS

Relationship between the parties

Clause 10 provides:

"*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*."

Payment under the contract

Clause 239 provides:

"*The Board shall make payments to the Contractor under the Contract promptly and in accordance with both the terms of the Contract…*"

THE ISSUES FOR DETERMINATION

1) Whether the ICB is under an obligation to apply annual uplifts to the IMOS services bring provided by the Applicants.

2) If annual uplifts are payable, whether the Applicants are entitled to interest on the sums due and payable at the rate of 8%.

CONCLUSION

For the reasons given above, please accept this written request for dispute resolution on behalf of the Applicants."

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

2.2.1 A document entitled "Adjusted IMOS Payment values[67];

2.2.2 A letter dated 22 September 2022 to the Commissioner entitled "uplift letter sept 2022.pdf";

2.2.3 An email dated 31 July 2023, subject "IMOS uplift for previous years to 20/21. Resent 31st Aug 23";

2.2.4 An email chain dated 3 September 2023, subject "RE: IMOS uplift for previous years to 20/21. Resent on 24th August 2023";

2.2.5 An email chain dated 11 December 2023, subject "FW: DDRB uplift";

2.2.6 A document entitled "Adjusted IMOS payment values.dox"; and

2.2.7 An email chain dated 13 March 2023, subject "Re: Urgent: IMOS uplift".

3 PARTIES SUBMISSIONS

Representations

NHS England's representations

3.1 In an email dated 11 March 2025 Capsticks LLP, on behalf of the Commissioner, provided the following representations:

"Introduction

1. These submissions are made on behalf of NHS South West London Integrated Care Board ("the Commissioner").

2. In summary, the Commissioner's position on the issues in dispute is that:

2.1. The Applicants are not entitled to the DDRB uplift on fees for IMOS services for the years 2013/14 to 2019/20 as the Applicants are not entitled to such uplift on the terms of Appendix 1 of the IMOS Contract (incorporated into the GDS Contracts) and are also out of time to bring such a dispute;

2.2. The Applicants are not entitled to any further sums in addition to the increase applied by the Commissioner for 2020/21, 2021/22, 2022/23 and 2023/24;

2.3. The Applicants are not entitled to the DDRB uplift in subsequent years on the terms of Appendix 1 of the IMOS Contract;

2.4. In line with the conclusions above, no interest is payable to the Applicants.

2.5. The Commissioner reserves its position on the Applicants' compliance with their reporting and monitoring obligations as contained within Appendix 1 of the IMOS Contract.

The Parties

3. Dr Manny Vasant & Dr Ronuk Vasant (t/a M K Vasant & Associates); Dr Shani Kalsi (t/a Lancaster House Dental Practice) and Dr Angelica Khera (t/a Family Dental Practice) ("the Applicants") are general dental practitioners operating under General Dental Services contracts (the "GDS Contracts"). For the purposes of these submissions reference to 'Applicants' will be a reference to the trading/practice names, so as to include the relevant partners at the relevant time.

4. The Commissioner is responsible for the commissioning of primary dental services following delegation from the NHSE on 1 April 2023.

Procedural Background

5. A letter dated 28 January 2024 was sent by the Applicants' Legal Counsel - Mr Simon Butler – to the Commissioner, stating that the Applicants were providing Intermediate

Minor Oral Surgery (IMOS) services under their respective GDS Contracts and that pursuant to the recommendations of the Review Body on Doctors' and Dentists' Remuneration (DDRD), annual uplifts should have been applied by the Commissioner to the fees for those IMOS services. The letter claimed that the Applicants had not received annual uplifts since the financial year ending 2012/13 save for the years 2020/21, 2021/22 and 2022/23 (as is noted below, uplifts have now also been applied by the Commissioner to the fees for 2023/24) and that the Applicants were entitled to receive the annual uplifts along with interest at the rate of 8% under the Late Payment of Commercial Debts (Interest) Act 1998.

6. Unfortunately, due [*Redacted by NHS Resolution*] of Mr Andrew Biggadike - the Regional Lead for Secondary, Community and Specialist Dentistry Contract - during the months of December 2023 and January 2024, and other matters, there was a significant backlog of dental matters to be dealt with. Mr Biggadike explained this to Mr Butler in an email dated 20 February 2024.

7. On 29 May 2024, the Applicants referred the dispute to Primary Care Appeals. The Applicants sought the determination of:

   a) Whether the ICB was under an obligation to apply annual uplifts to the IMOS services being provided by the Applicants; and

   b) If annual uplifts were payable, whether the Applicants were entitled to interest on the sums due at the rate of 8%.

8. On 4 February 2025, Primary Care Appeals wrote to both parties and, following a request from the Commissioner, the date for filing submissions was extended to 11 March 2025.

Factual Background

IMOS Contracts and GDS Contract Variations

9. In November 2007, Croydon Primary Care Trust ("Croydon PCT") - NHSE's predecessor in relation to the relevant contractual arrangements - selected the Applicants to participate in a 12-month pilot scheme for the provision of IMOS services. The main objective of the pilot scheme was to reduce the waiting lists/costs for hospital treatment, as providing IMOS treatments in a primary care setting was less expensive. The contract ran for a fixed period of 12 months and the terms of the IMOS services were set out in the IMOS Contract. A copy of the IMOS Contract between Croydon PCT and M K Vasant and Associates (which we understand is on the same terms as the IMOS contracts with the other two applicants) is at (SAB/2). The IMOS Contract detailed, amongst other matters, the payment terms. The Applicants were entitled to a fee of £150 per patient on completion of an IMOS treatment; £10 for periapical radiographs; £30 for orthopantomographs and £200 for triage. The Applicants were required to submit invoices and supporting activity reports to Croydon PCT on a monthly basis.

10. In April 2009, the Applicants were sent GDS contract variations by Croydon PCT which stated that the IMOS services were to be provided as advanced mandatory services under the Applicants' GDS Contracts. The Applicants signed the contract variations in April 2009 (SAB/21).

11. In July 2013, Croydon PCT informed the Applicants of an increase in fees for the IMOS treatments. The fee for an IMOS treatment was increased to £170 and the triage session to £300.

12. In April 2013, NHSE became the statutory successor to Croydon PCT and in 2016, NHSE started a procurement process for IMOS services across London; the objective

of which was to ensure value for money and a consistent contractual framework for the IMOS services. In order to create consistency across IMOS providers, NHSE attempted to terminate the IMOS contracts with the Applicants and gave notice in accordance with the terms of the IMOS contracts.

13. The termination was disputed by the Applicants who claimed that under the GDS Contract (which had incorporated the IMOS services contract), the Applicants had the right to provide the IMOS services indefinitely. That dispute was determined in the Courts.

First Instance and Court of Appeal Decisions

14. In 2018, the Court at first instance held that the contract variations had the effect of bringing the provisions of the IMOS services within the GDS Contract (notwithstanding the entire agreement and No Oral Modification ('NOM') clauses contained in the GDS contracts) such that the termination provisions of the GDS contract applied, not the IMOS service contract (Manjul Vasant (trading as MK Vasant & Associates) v NHS Commissioning Board [2018] EWHC 3002 (QB) at SAB/24). In 2019, the Court of Appeal upheld the termination aspect of the High Court's decision and determined that Appendix 1 of the IMOS Contracts was incorporated in the GDS Contract as this defined the "IMOS service" that was being provided as an advanced mandatory service (NHS Commissioning Board v Dr Vasant and others [2019] EWCA Civ 1245 at (SAB/45), in particular paragraphs 49, 50 and 53).

Relevant Payment Terms for IMOS Services Following the Courts' Judgments

15. Although the High Court held that the IMOS services were governed by the GDS Contract (following the contract variation), it also held that in terms of the 'practical operation' of the IMOS services, the terms of the IMOS contract (rather than the GDS Contract) would apply (i.e. it would be "business as usual" in relation to the practical operation of the services). It was held that:

"*90. NHSE's objection that the VAF (contract variation) fails for uncertainty because it does not spell out in sufficient detail the contractual arrangements that apply from the time of entry into the VAF is not sustainable, in my view, on the facts of this case. It is clear from the contemporaneous correspondence to which I have already referred, from the evidence of the Providers and Mr Butcher (as corroborated by his contemporaneous emails) and from the conduct of the parties subsequent to entry into the VAF that it would be "business as usual" (in Mr Patel's words) as far as the practical operation of the IMOS services were concerned (in other words, as to payment, invoicing and the triage and referral process) but that all other aspects of the arrangement would be governed by the GDS Contract, including, for example, as to clinical governance, quality assurance, insurance, complaints, dispute resolution and, critically for this case, termination*".

16. The Court of Appeal went on to clarify and confirm the extent and scope of the IMOS contract that applied/had been incorporated into the GDS Contract:

"*50. It is not entirely clear to me whether the judge was going beyond Appendix 1 in saying that "payment, invoicing and the triage and referral process" would be governed by some of the substantive clauses of the IMOS contract. If that is what he meant, then I respectfully disagree.* ***But in fact, Appendix 1 to the IMOS contract does mention these matters. Under the heading "Costs" the Appendix states that the PCT will negotiate with the providers a "fee per patient" and a "sessional rate" for oral surgeons and triage.*** [Emphasis added by Commissioner] *If, therefore, the judge was confining himself to Appendix 1 then I would agree with him. The critical point for this appeal, however, is that the description of the IMOS service in Appendix 1 does not incorporate the termination provisions contained in the IMOS contract.*

17. The Court of Appeal therefore confirmed that only Appendix 1 of the IMOS contract was incorporated into the GDS Contract.

18. As the Court of Appeal identified, at Appendix 1 of the IMOS Contract, the section entitled 'Costs' states:

    a) *Each provider will be paid on a fee-per patient basis. The PCT will negotiate this with the preferred providers.*

    b) *A sessional rate will be paid to the oral surgeons for the triage provided at Windsor House (with the support of the PCT's CST). The PCT will negotiate this with the preferred providers.*

19. It is submitted that the parties and Primary Care Appeals should follow the ruling of the Court of Appeal in this matter.

No Obligation on Commissioner to Pay Annual Uplifts or Interest Following Courts' Decisions

20. In light of the First Instance and Court of Appeal's decisions, the payment terms of the IMOS services are governed by Appendix 1 of the IMOS Contracts, namely, on a fee per patient basis, to be determined following negotiation between the parties. The payment provisions of the GDS Contracts (and therefore the DDRB annual uplifts) do not therefore apply to the fees for IMOS services.

21. On the basis that the Applicants are not entitled to annual uplifts automatically by reference to the DDRB annual uplift or otherwise, the Applicants' claim for interest must also fail.

Limitation

22. Notwithstanding the reasons above, the Applicants' claims for DDRB uplifts are denied due to limitation issues. Pursuant to clause 284 of the Applicants' GDS Contract any party wishing to refer a dispute to the NHS Dispute Resolution Procedure must send its request '*within a period of three years beginning with the date on which the matter giving rise to the dispute happened or should reasonably have come to the attention of the party wishing to refer the dispute*'. (A copy of the GDS Contract between Croydon PCT and Manjul Vasant, which is on substantially the same terms as the other applicants is at (SAB/58).

23. If the relevant date is considered to be the end of the financial year in which the uplifts would have been applied, the claims for years 2013/14 to 2019/20 (and also 2020/21) inclusive plus any interest will be time barred, the Applicants' application having been made after April 2024.

24. Alternatively, the Court of Appeal's decision of 16 July 2019 confirmed the incorporation of the IMOS contracts into the GDS Contracts. This was the date that the Applicants should reasonably have become aware of 'the matter giving rise to the dispute', i.e. the basis of their application for the DDRB to apply. The claim for uplifts should therefore have been referred to the NHS Dispute Resolution Procedure by 16 July 2022. It was not. Consequently all of the Applicants' claims for uplifts plus interest are time barred pursuant to clause 284.

Payment of Uplifts for 2020/21, 2021/222022/23 and 2023/24

25. In around March 2023, the Commissioner decided to give an uplift to the Applicants' fees for IMOS services for the years 2020/21, 2021/22 and 2022/23. An uplift for 2023/24 has also been subsequently applied by the Commissioner. The

Commissioner increased the fees for these years noting that the fees for the Applicants' IMOS services had not been increased since 2013. Such increase was in line with the terms of Appendix 1 and does not entitle the Applicants to DDRB uplifts in those, previous or subsequent financial years as claimed. These payment do not affect the Commissioner's position that the DDRB annual uplifts did not apply to the IMOS services and that the terms of Appendix 1 apply, as found by the Court of Appeal. It should be noted that even prior to the uplift in the Applicants' fees, the Applicants' fees for the IMOS services were higher (and remain higher) than those paid to other contractors providing IMOS services following the procurement process in 2018. Any further increases to the Applicants' fees for the IMOS services will be subject to negotiations in accordance with Appendix 1 of the IMOS contract, as incorporated into the GDS Contracts."

Conclusion

26. The Commissioner invites Primary Care Appeals to determine that the Commissioner is not under an obligation to apply annual DDRB uplifts or interest to the fees for the IMOS services, for the following reasons:

26.1. The first instance and Court of Appeal's decisions, as outlined above confirm that Appendix 1 of the IMOS contract is incorporated into the Applicants' GDS Contracts. Accordingly, the payment provisions contained within Appendix 1 of the IMOS contract (rather than the payment terms of the GDS Contract) apply. The Applicants are therefore not entitled to the annual DDRB uplifts.

26.2. The Applicants' claims are time-barred in accordance with clause 284 of the GDS Contract. Alternatively, any claims for uplifts prior to May 2021 are time-barred.

26.3. The Commissioner applied uplifts to fees for 2020/21, 2021/22, 2022/23 and 2023/24; to the extent that it is sought, the Applicants have no right to interest in relation to those years.

26.4. Since the Commissioner is not under an obligation to apply annual uplifts, there is no obligation to pay interest as claimed by the Applicants."

The Contractors' representations

3.2 In an email dated 10 March 2025 Simon Butler, on behalf of the Applicant, provided representations. I note that these were made by way of witness statements, with one being provided for each of the practices, rather than a singular statement. Due to this I have reproduced each of the witness statements below, and treated them collectively as the Contractors' representations:

"WITNESS STATEMENT OF DR RONUK VASANT

I, RONUK VASANT, of [*Redacted by NHS Resolution*], make this witness statement in support of the application to NHS Resolution for dispute resolution.

1. GDS Contract

Payment under the contract

1. The Defendant is under a contractual obligation to make payments under the contract promptly.

Dispute resolution

2. The applicants are required to refer a dispute to the adjudicator within a period of three years beginning with the date on which the matter giving rise to the dispute happened or should reasonably have come to the attention of the party wishing to refer the dispute.

3. The matter giving rise to the dispute did not happen until April 2023.

4. In March 2023, Mr. Andrew Biggadike agreed that we were entitled to receive uplifts under the contract. We received lump sum payments to account for the missing uplifts for the financial years 2020/21, 2021/22 and 2022/23, but failed to receive uplifts from April 2014/15, 2015/16, 2016/17, 2017/18, 2018/19.

5. We have also failed to receive uplifts for financial years 2023/24 and 2024/25.

IMOS Services – annual uplifts

6. Appendix 1 to the IMOS Agreement provides a mechanism for the Respondent to negotiate the fees with the preferred providers. This mechanism for this is provided under the heading 'Costs'. I have attached as "**Exhibit RV-1**" a copy of the IMOS Agreement and appendix.

7. Those holding NHS contracts receive an annual uplift to their contract value. For 2024/25 this will be 4.64%. This annual uplift incorporates two distinct elements of an uplift to pay and an uplift in respect of the costs of delivering care.

8. The IMOS services are being provided under the contract as a service to NHS patients. We are entitled to an appropriate annual uplift with regard to the costs of delivering care. These cost increases cannot be left unfunded and to be borne by the practices.

9. However, the General Dental Services Statement of Financial Entitlements 2013 provides that the Secretary of State will determine the annual uplifts commencing on 1 April 2013.

10. It is intended that at the start of each financial year the contract value will be amended so as to include a percentage increase.

11. We are of the view that the IMOS services provided under the same contract should also be the subject of annual contract value adjustment. The percentage agreed by the parties, or determined by the Secretary of State, should commence at the start of each financial year.

12. The Respondent has implemented the following annual uplifts in March 2023:

Financial year	Uplift %
2020/21	2.50
2021/22	2.22
2022/23	4.47

13. The contract requires the Respondent to act reasonably and in good faith and as a responsible public body required to discharge its functions.

14. The Respondent has agreed that we are entitled to annual uplifts. I attach as "**Exhibit RV-2**" the emails confirming the entitlement to the uplifts.

15. The Respondent has refused to apply uplifts for financial years 2014/15, 2015/16, 2016/17, 2017/18, 2018/19 and 2019/20

16. We have also failed to receive uplifts for financial years 2023/24 and 2024/25.

17. Where a public body, such as the Respondent, has agreed that we were entitled to annual uplifts under the contract, it was unreasonable for the Respondent to limit the application of the uplifts for certain years.

2. Interest

18. We have been providing services at our own expense. The failure to apply and pay the annual uplifts has caused the applicants financial loss and additional expense.

19. In the circumstances, the Respondent should be required to pay interest on the sums due and payable under the contract (*SSP Health Ltd v National Health Service Commissioning Board* [2020] EWCA Civ 1574).

20. We have been kept out of money to which we were rightfully entitled.

21. The Court of Appeal held that if a party to a dispute has been kept out of their money, it is prima facie appropriate that the resolution of that dispute should include provision to reflect and compensate the party for that fact.

22. A non-NHS contractor would be entitled to claim 8% above the Bank of England base rate in accordance with the provisions contained in The Late Payment of Commercial Debts (Interest) Act 1998, which adds an implied term in business-to-business contracts.

23. We fail to understand why NHS contractors should be treated differently to non-NHS contractors.

24. The Adjudicator is invited to award interest on the debt at 8% above the Bank of England base rate, or at such rate as the Adjudicator considers to be reasonable and appropriate.

3. Limitation

25. As set out above, the dispute only happened on or around March 2023 when the Respondent agreed that we were entitled to annual uplifts for previous financial years but decided that the uplifts would only be implemented for three financial years.

26. We have therefore referred the dispute within a period of three years beginning with the date on which the matter giving rise to the dispute happened. The dispute between the parties arises from the decision to restrict the uplift to three financial years.

27. We are challenging the reasonableness of the decision to limit and restrict the uplifts for three financial years, when the Respondent had agreed to consider all relevant financial years. The Respondent has agreed that uplifts should have been applied from 2013 onwards but has then failed to give reasons for failing to apply the uplifts.

28. We elected to be regarded as a health service body. Accordingly, the contract is not an NHS contract. This means that the six year limitation period for claims in contract (Section 5, Limitation Act 1980) is inapplicable. There is no limitation period for NHS contracts.

29. We were not in a position to pursue the matter with the Respondent until the Court of Appeal had handed down the judgment in *NHS Commissioning Board v (1) Dr Manful Vasant (2) Dr Angelica Khera (3) Dr Gursharan Kalsi* [2019] EWCA Civ 1245.

30. We are challenging the decision of the Respondent to limit the uplifts to three years when there is no limitation period in the contract and Section 5 of the Limitation Act 1980 is inapplicable.

31. Furthermore, the entitlement to interest on the debt only arose in March 2022 when the Respondent agreed that it was indebted to the applicants.

4. Conclusion

32. The Respondent was invited to determine the applicants' entitlement to annual uplifts for the IMOS services following judgment of the Court of Appeal. The Respondent agreed that the applicants were entitled to annual uplifts from 2013 onwards. The Respondent has only applied uplifts for a period of three years when there is no limitation period in the contract.

33. The dispute resolution procedure does not create a limitation period for the recovery of money. It creates a requirement to request dispute resolution within a period of three years beginning with the date on which the matter giving rise to the dispute happened. The date on which the dispute happened is March 2023, when the Respondent notified the applicants that they would be limiting the entitlement to uplifts to a period of three years (20/21, 21/22 and 22/23).

34. We are challenging the decision to limit the entitlement without any reasons being given by the Respondent.

35. We do not believe that the Respondent has acted reasonably or in good faith.

Statement of Truth

I believe that the facts in this witness statement are true.

WITNESS STATEMENT OF DR ANGELICA KHERA

I, ANGELICA KHERA, of [*Redacted by NHS Resolution*], make this witness statement in support of the application to NHS Resolution for dispute resolution.

1. I have read the witness of Dr. Ronuk Vasant dated 24 February 2025 and adopt the content concerning the GDS Contract, IMOS Services, Interest, Limitation and Conclusion.

2. We have taken all reasonable steps to resolve the dispute with the Respondent. The Respondent has agreed that we are entitled to annual uplifts for the IMOS Services. This is common ground between the parties.

3. On 13 March 2023, Mr. Biggadike sent an email with an attachment confirming "these figures" are to form a DDRB uplift. I have attached a copy of the document.

4. I was of the view that local dispute resolution had been exhausted following confirmation from Mr. Biggadike that the applicants were entitled to receive uplifts for the IMOS Services. Mr. Biggadike has applied the uplifts for certain years even though it was agreed during the local dispute resolution that uplifts were applicable for all financial years. The Respondent has failed to pay the appropriate uplifts for the financial years 2014/15 to 2019/20. I wish to emphasise that Mr. Biggadike agreed to pay uplifts for the years prior to 2020/21 and has failed to do so.

5. NHS Resolution has afforded the Respondent ample opportunity to respond to the applications. The Respondent failed to do so.

6. Following receipt of the recent directions, Mr. Biggadike confirmed that he would be instructing solicitors to respond to the applications. We have not received correspondence from Mr. Biggadike or appointed solicitors.

7. The adjudicator is invited to determine the entitled to annual uplifts for the IMOS Services under the GDA Contracts. This issue is of importance to the applicants, otherwise there will remain a dispute between the parties, in relation to the entitlement to annual uplifts for the IMOS Services, which the applicants will have no choice but to keep referring for dispute resolution.

8. The High Court and the Court of Appeal have determined that the IMOS Services are being provided under the GDS Contracts. The GDS Contracts are entitled to annual uplifts. Following the decisions in the High Court and the Court of Appeal the parties corresponded on the issue with success. Mr. Biggadike confirmed that we are entitled to annual uplifts. However, Mr. Biggadike has only applied the uplifts for financial years 2020/21 to 2023/24 even though the contractual limitation period is six years.

9. Mr. Biggadike also agreed that the future uplifts should increase in line with the annual GDs Contract uplift.

10. It is hoped that the Respondent will act reasonably and in good faith in upholding the agreement to apply annual uplifts to the IMOS Services. We have provided the IMOS Services in accordance with the contractual obligations. We have invested a considerable amount of time and money to ensure the patients receive the services. Inflation and increased costs over the last few years has increased the cost of providing the services. It is hoped that the Respondent will honour the agreement and apply the uplifts to all the outstanding financial years, otherwise the Respondent has received the benefit of the services without paying for the true cost of providing the services.

11. We would like to have this matter brought to a satisfactory conclusion to enable the dental practices to invest in the dental services.

Statement of Truth

I believe that the facts in this witness statement are true.

WITNESS STATEMENT OF DR SHANI KALSI

I, SHANI KALSI, of [*Redacted by NHS Resolution*], make this witness statement in support of the application to NHS Resolution for dispute resolution.

1. I have read the witness of Dr. Ronuk Vasant dated 24 February 2025 and adopt the content concerning the GDS Contract, IMOS Services, Interest, Limitation and Conclusion.

2. We have taken all reasonable steps to resolve the dispute with the Respondent. The Respondent has agreed that we are entitled to annual uplifts for the IMOS Services. This is common ground between the parties.

3. It would be helpful if the adjudicator could make a determination concerning future uplifts, otherwise the parties will have no choice but to keep referring disputes to dispute resolution.

4. We have failed to receive uplifts for financial years 2023/24 and 2024/25, even though Mr. Biggadike has assured us that we are entitled to annual uplifts.

5. We have provided the IMOS Services in accordance with the terms of the GDS Contract. We would suffer serious financial hardship if the Respondent is not required to account for the uplifts for financial years 2014/15 to 2019/20 and 2023/24 to 2024/25.

6. NHS Resolution will have noted that the Respondent has failed to engage with and respond to the applications, even though the Respondent has been granted extensions of time.

7. We have still not received correspondence from the Respondent following the last directions.

8. We would like to have this matter brought to a satisfactory conclusion to enable the dental practices to invest in the dental services.

Statement of Truth

I believe that the facts in this witness statement are true."

Observations

NHS England's observations

3.3 In an email of 31 March 2025 Capsticks LLP, on behalf of the Commissioner, provided the following by way of observations:

1. "These Observations are made on behalf of the Commissioner on the evidence provided by the Applicants on 10 March 2025. Where an observation is not provided on a representation, that is not an admission regarding such representation.

2. These Observations adopt the defined terms used in the Commissioner's Submissions.

Witness Statement of Dr Ronuk Vasant ("Dr Vasant")

3. Paragraphs 1 and 2 are admitted.

4. The Commissioner denies the statement at paragraph 3, namely that the matter giving rise to the dispute '*did not happen until April 2023*'. The matter(s) giving rise to this dispute are the annual DDRB uplifts for 2013/14 to 2019/20. (We note that Dr Vasant's Witness Statement claims uplifts for the years 2014/15 to 2018/19 however Mr Simon Butler's letter of 28 January 2024 refers to '*the annual uplifts since the financial year ending 2012/13* (i.e. from 2013/14*), save for the years 2020/21, 2021/22, and 2022/23'*. The Applicants' application to the PCA dated 29 May 2024 does not specify the years for which the uplift is sought. Despite the Applicants' lack of clarity on the years for which the uplift is being sought, the Commissioner will base its observations on the widest span of years; 2013/14 to 2019/20.

5. Noting the alternative interpretation below, the Commissioner would be prepared to accept that the relevant date for calculating by when a matter should be referred for dispute resolution, for each financial year is the end of the financial year (i.e. 31 March) in which the uplifts would have been applied.

6. The relevant date claimed by Dr Vasant (April 2023) is the date (he claims) the *dispute* arose, not the date on which *the matter* giving rise to the dispute happened. A dispute must be referred within three years of the matter giving rise to the dispute.

7. Given that the relevant dates are the end of each financial year claimed and that the Applicants' referral of the dispute was made after April 2024, the claims for years 2013/14 to 2019/20 inclusive, plus any interest are all time barred.

8. In the alternative, the matter giving rise to the dispute occurred and/or the Applicants should reasonably have become aware of the matter giving rise to the dispute, on 16 July 2019 – the date of the Court of Appeal's judgment in *NHS Commissioning Board v (1) Dr Manjul Vasant (2) Dr Angelica Khera (3) Dr Gursharan Kalsi* [2019] EWCA Civ 1245.

9. By Dr Vasant's own admission at paragraph 29:-

   '(The Applicants) were not in a position to pursue the matter with the (Commissioner) until the Court of Appeal had handed down the judgment....'

   This confirms that the Applicants should have been in a position to pursue the matter from 16 July 2019 onwards. Accordingly, the Applicants' claim for uplifts should have been referred by 16 July 2022. It was not. As a result, all of the Applicants' claims for uplifts plus interest are time barred.

10. As to paragraph 4, it is denied that Mr Andrew Biggadike agreed, in March 2023 or at any point, that the Applicants were entitled to receive uplifts for the IMOS fees. The Commissioner was asked by the Applicants for DDRB uplifts in September 2022. The Commissioner understood that whilst the IMOS services sat within the mandatory services GDS Contract, they were not subject to all of the terms within the GDS Contract (i.e. the Applicants did not submit FP17 forms; payment for services was to be based on invoices; payment is not monthly against projected annual targets) and as such the DDRB uplifts (that applied to the 'normal'/non-IMOS payments within a GDS Contract) did not apply. In addition to this, the Commissioner was aware that the only previous increase to the Applicants' IMOS fees had taken place in 2013, and this was unrelated to DDRB uplifts. On this basis, Mr Biggadike did not confirm an entitlement to DDRB uplifts, at any point.

11. It is admitted that the Commissioner paid the Applicants lump sum payments for the financial years 2020/21, 2021/22 and 2022/23 in March 2023. However, these payments were not made on the basis that the Applicants were entitled to the DDRB uplifts for the IMOS Services, rather, the Commissioner was conscious that the IMOS fees had not been increased since 2013 whilst the costs of delivering dental services had increased. Applying uplifts for these year was considered to be a fair and reasonable response to the Applicants' request for uplifts.

12. In terms of calculating the increased fees for the years 2020/21 to 2022/23, the Commissioner decided that it would do so using, as a reference point, previous DDRB uplift percentages as the practicable multiplier. The previous years' DDRB uplifts (from 2012/13 onwards) were used as there was no other apparent basis on which to negotiate a revised fee (once the Commissioner decided it would apply an uplift, which it was not bound to do). This method of calculation is shown in the document attached to Mr Biggadike's email of 13 March 2023 sent at 09:06, entitled '*Adjusted BMOS payment values – Copy*' (as exhibited to Dr Vasant's Witness Statement). The historic values were calculated to enable the calculation of the values for 2020/21 to 2022/23, not because it was agreed that these historic values were payable. This is confirmed in the fact that the covering email sent by Mr Biggadike did not mention applying an increase to years prior to 2020/21. By contrast, Mr Biggadike subsequently emailed each individual provider on 19 March 2023 with individual spreadsheets containing breakdowns for their specific invoices and details of payments specifically for the

previous three years, with the uplifts applied. These spreadsheets were not shared with the group due to the sensitive nature of the financial information, but the covering email sent to Dr Sanjeev Verma is appended to Dr Kher's [sic] Witness Statement (and is identical to the email sent to the other two providers). These emails specifically state:

"*Attached is a spreadsheet of the payments to the contract for the previous three years and the uplifts applied*".

-there is no mention of applying uplifts for the years prior to the financial year 2020/2021 as this was not what the Commissioner had intended or agreed to do (or was required to do).

13. As the request for an increase in fees was made by the Applicants in September 2022 and the Commissioner's decision to increase the fees was made in the financial year 2022/23, the Commissioner decided to backdate the fee increase by a year - to the financial year 2020/21 - as a gesture of good will. At no point did the Commissioner agree to historic increases - by DDRB uplifts or otherwise. Similarly, there was no agreement to apply DDRB uplifts going forward.

14. As to paragraph 5, the Commissioner refutes the assertion that the Applicants have not received uplifts for the financial year 2023/24. Following the payment of uplifts for 2020/21-2022/23, the Commissioner agreed to apply the uplifts for 2023/24. This was processed through the payment system on 29 July 2024. Again, the Commissioner was not required to make such uplift.

15. Paragraphs 6 and 7 are agreed, on the basis that in paragraph 7 the uplift does not apply to fees for IMOS Services.

16. Paragraph 8 is denied. Although the IMOS Services are being provided under the GDS Contract, the provisions at Appendix 1 of the IMOS Contract apply to the costs/payment of the IMOS fees, as was determined by the Court of Appeal in *NHS Commissioning Board v (1) Dr Manjul Vasant (2) Dr Angelica Khera (3) Dr Gursharan Kalsi*. As detailed at paragraphs 15-21 of the Commissioner's Submissions, although the Courts held that the IMOS services were governed by the GDS Contract (following the contract variation), they found that in terms of the 'practical operation' of the IMOS services, the terms of the IMOS contract (rather than the GDS Contract) applied. Therefore in relation to costs and payment of fees, Appendix 1 of the IMOS (which provides for the Applicants to be paid on a fee-per patient basis with fees to be negotiated between the Commissioner and the Applicants) and not the GDS Contract (which contains an entitlement to DDRB uplifts) applies.

17. As to paragraph 8, if the DDRB uplift did apply to IMOS Services, which is denied, other obligations of the GDS Contract, such as submission of FP17s or monthly payment of sums would apply. The Court of Appeal held that Appendix 1 of the IMOS Contract as incorporated into the GDS Contract governs the relevant terms. The Applicants cannot, in effect, pick and choose which terms they wish to apply for their advantage.

18. As to paragraph 12, the Commissioner agrees that uplifts for the years 2020/21 to 2022/23 were implemented as detailed. Additionally, increases for 2023/24 were applied with an uplift of 5.13%. It should be noted that for the year 2024/25, the Applicants have continued to use (and the Commissioner continued to pay) the fee values for 2023/24. No DDBR uplift or equivalent for this year has been applied (and the Commissioner is not required to apply it).

19. As to paragraph 14, as per above, the Commissioner denies that it has agreed the Applicants are entitled to annual uplifts. The emails attached to Dr Vasant's Witness Statement do not contain any evidence that the Commissioner agreed to uplifts for

the financial years 2013/14 to 2019/20. This is because no such agreement was reached.

20. The Commissioner agreed that the IMOS fees would be adjusted and increases backdated to the financial year 2020/21. The Commissioner did not consider it appropriate to backdate the fee increase any further, firstly because the Applicants had not approached the Commissioner prior to this date and secondly because the Commissioner was aware that the Applicants were already being paid a higher rate than the procured IMOS services.

21. As to paragraph 18, the Commissioner cannot comment on the financial position of the Applicants. The Applicants are put to proof on the claim that they have been providing the (IMOS) Services at their own expense. As noted above, the increase agreed by the Commissioner means that IMOS Services under these contracts are paid more than those separately procured.

22. As to paragraphs 19 to 24 and in relation to the Applicants' claim for interest, since the Commissioner denies the Applicants' claim for DDRB uplifts, the claim for interest – on any basis – is denied.

23. As to paragraphs 25 to 27 and in relation to limitation, we repeat paragraphs 4-9 above.

24. As to paragraph 28, it is not accepted that no limitation period applies. The GDS Contract and Regulations are clear that a dispute under the NHS Dispute Resolution Services must be brought within three years of the matter giving rise to the dispute.

25. As to paragraph 35, it is denied that the Commissioner has not acted reasonably or in good faith. The uplifts for the years 2020/21 to 2023/24 were an attempt by the Commissioner to agree and apply a fair uplift in light of the increased costs of providing dental services.

Witness Statement of Dr Angelica Khera

26. On the basis that Dr Khera adopts the statement of Dr Vasant in relation to the GDS Contract, IMOS Services, Interest, Limitation and Conclusion, the observations above are repeated.

27. As to paragraphs 3, it is denied that on 13 March 2023, Mr Biggadike sent an email with an attachment confirming "these figures" are to form a DDRB uplift. The email of this date timed 16:08 states:

> "*These figures are form [sic] a DDRB uplift calculator I created so there shouldn't be any problem with them, but please do check*"

We note that at paragraph 3, Dr Khera states that she attaches a copy of the document sent with Mr Biggadike's email of 13 March 2023. No such document is attached. If the document is referred to is the document entitled 'Adjusted IMOS payment values – Copy' (as exhibited to Dr Vasant's Witness Statement), please see the Commissioner's observations at paragraph 12 above; there is no commitment to apply an uplift for earlier years.

28. As to paragraph 4, it is denied that Mr Biggadike confirmed that the Applicants were entitled to receive uplifts during the local dispute resolution process. As per above, this confirmation has not been provided at any point.

29. As to paragraph 8, see paragraph 16 above.

30. As to paragraph 9, it is denied that Mr Biggadike agreed that future uplifts should increase in line with annual GDS Contract uplift.

31. As to paragraph 10, Dr Khera is put to proof on the claim that the Commissioner has received the benefit of the (IMOS) Services without paying for the true cost of providing the services.

Witness Statement of Dr Shani Kalsi ("Dr Kalsi")

32. On the basis that Dr Kalsi adopts the statement of Dr Vasant in relation to the content concerning the GDS Contract, IMOS Services, Interest, Limitation and Conclusion, the observations above are repeated.

33. As to paragraph 5, Dr Kalsi is put to proof on the claim that the Applicants would suffer serious financial hardship if the Commissioner is not required to account for the uplifts for the financial years 2014/15 to 2019/20."

The Contractors' observations

3.4 The Contractors did not make any observations on the Commissioner's representations.

4 CONSIDERATION

4.1 I note that on 12 November 2024 NHS Resolution contacted both parties and indicated that if the Commissioner could not provide written assurance that local dispute resolution would commence before 25 November 2024 then NHS Resolution would accept that local dispute resolution had been exhausted, on the basis that there had been no engagement by the Commissioner over the past 5 months. I further note that by 26 November 2024 no further information had been provided. NHS Resolution therefore wrote to both parties confirming that local dispute resolution had been exhausted, on the basis of lack of engagement and that it would thus proceed to consider the application for dispute resolution.

4.2 I note that, following this, neither party has disputed that local dispute resolution has been exhausted, and therefore I will proceed to consider the substantive application for dispute resolution as set out in the Contractors' email of 29 May 2024.

4.3 Since 1 April 2023, Integrated Care Boards have taken on delegated responsibility for the commissioning of primary dental services.

4.4 As part of this consideration of the application for NHS dispute resolution, I required an up-to-date version of the GDS Contract in dispute, containing all variations agreed since the GDS Contract was signed. This was provided and has not been disputed by the Commissioner. I have also been provided with a copy of the IMOS Contract, dated 1 December 2007, (the "IMOS Contract") elements of which, as per *NHS Commissioning Board v Dr Vasant and others* [2019] EWCA Civ 1245, have been incorporated into the GDS Contract.

4.5 I note that, based on the submissions of the parties, the dispute can be broken down into three key elements. Firstly, when "*the matter giving rise to the dispute happened or should reasonably have come to the attention of the party wishing to refer the dispute*" for the purposes of clause 284 of the GDS Contract. I note that, as per said clause, the Contractors only had 3 years from that date to refer a dispute. The parties have disputed what event this clause relates to, and as such which elements of the dispute are within time. I consider that if the matter giving rise to the dispute is out of time for referral then dispute resolution in relation to said matter will not be available to the Contractors.

4.6 Secondly, the parties are in dispute as to whether the Contractors were entitled to an annual uplift to the payments made in relation to the IMOS services, in line with the Review Body on Doctor's and Dentists' Remuneration ("DDRB") annual figure. I note that the application does not specify for what years the Contractors are applying for uplifts in, only whether they are

entitled to them. However, in their Representations, the Contractors refer to the years 2014/15, 2015/16, 2016/17, 2017/18 and 2018/19. I further note that the Commissioner did agree to provide uplifts for 2020/21, 2021/22 and 2022/23, and used the DDRB as the basis for these.

4.7 Thirdly, the parties are in dispute as to whether the Contractors were entitled to receive interest in relation to any uplift payments, which the Contractors have requested be payable at the rate of 8%. I note that the application appears to request interest only for the years that the Commissioner had already agreed to provide uplifts for. I consider it unclear if interest is being requested for all the years since 2014, or only those payments already made.

4.8 I will consider each of these issues sequentially, as the conclusion from each issue impacts the next. To explain, if I consider that the claims are out of time, then I may not consider if there is an entitlement to an uplift, or interest. If there are any issues that fall outside of these three broad categories, I will consider them at the end of this consideration.

When the matter giving rise to the dispute occurred

4.9 I note that both parties have provided clear statements in relation to this issue. The key wording from the GDS Contract is set out in clause 284:

"*Any party wishing to refer a dispute as mentioned in clause 283 must send the request under clause 283 within a period of three years beginning with the date on which the matter giving rise to the dispute happened or should reasonably have come to the attention of the party wishing to refer the dispute.*"

4.10 I therefore consider the essential question to be which of the events involved in the dispute should be considered as the one which gave rise to it. I note that there are several put forward by both parties which could be considered this date. As an initial point, I consider it necessary to determine if the request for uplifts should be taken as a single combined event or if each years' uplift should be considered as a separate matter.

4.11 I note that the Contractors have stated that, under the General Dental Services Statement of Financial Entitlement 2013 (the "Statement"), they were entitled to an annual contract value adjustment, due to providing NHS services. I note that this statement provides that each year the Secretary of State can determine an annual up-rated percentage applied to the contract value. I have specific regard to the phrase "*annual*", and "*start of each financially year*".

4.12 I consider that this language is not consistent with the idea that multiple years of uplifts can be combined into a single decision. I am of the opinion that, if the Statement did apply, then each year an uplift could and/or should have been applied. I also consider that this is does not support there being a singular decision to which this dispute relates.

4.13 As such, I am inclined to agree with the Commissioner's logic that each years' uplift should be considered its own "matter", for the purposes of Clause 284.

4.14 Further, I note that the wording of Clause 284 does not mention the word "decision" but simply the "matter". Consequently, whilst the Commissioner made a decision regarding the Contractors' request for an uplift in April 2023 it is difficult to understand how this could be considered as the "matter" giving rise to the dispute.

4.15 I note that, if no decision was taken with regard to whether an uplift should apply by the Commissioner, and the lack of any uplift was due to the fact that the Commissioner simply did not consider it, then there would be the possibility that the "matter" was the decision in April 2023. However, I note that Clause 284 also mentions the date when the matter should have come to the attention of the Contractor. It is clear that the Contractors were aware of the issue in order to make the request. The Contractors' suggestion, therefore, that the decision by the Commissioner is equitable to the matter, for the purposes of Clause 284, would be seemly at odds with the wording of that very clause. Each year payments were made under the IMOS

Contract, and each year that no uplifts were applied, then by the Contractors logic, this was the point the decision was taken, or at least should have come to their attention.

4.16 In this understanding whether an active or passive decision was taken is irrelevant, as the matter giving rise to the dispute is the lack of an uplift, a decision which was then upheld by the Commissioner in April 2023. I note that if uplifts had been applied, and were then rescinded, the matter would have arisen when that decision was taken. However, the Contractors were not deprived of anything by the Commissioner's decision in April 2023, the existing status quo was simply upheld. Thus, it must be properly understood that the matter in dispute was the failure to apply the uplifts in for the years 2014/15, 2015/16, 2016/17, 2017/18 and 2018/19, separately.

4.17 Further, if the contention is that only once the decision was taken then it came to the attention of the Contractors, I consider that this cannot be the case. Each year that the financial uplifts were applied to other payments but the IMOS Contract payments remained the same, the Contractors should have noted that no uplift had been made. Thus, it is difficult to understand why it only came to their attention 2022.

4.18 I note that the alternative reason set out by the Contractors is that the matter being referred for dispute resolution is the decision by the Commissioner to restrict the uplift for only three years. I consider that this construction establishes the decision in April 2023 is to be understood as not one of upholding the existing status but a failure to provide uplifts for a longer period of time.

4.19 I note that the Contractors have worded this issue as being in regard to the reasonableness of the Commissioner's decision to do so. I note that this is not the same as the matters raised in the initial application for dispute resolution, which queried the Commissioner's obligation to apply the uplifts, not the decision to limit the uplifts it did provide. I consider that this re-framing of the issue makes it appear as if the decision taken in 2023 was, in-fact, the matter in dispute. However, I note that the central question is essentially the same, whether the Commissioner was obliged to apply the uplifts to previous years. I note that the Contractors have not provided any other line of additional reasoning which would suggest that the decision was unreasonable, beyond the assertion that they were entitled to the uplifts. As such, the central matter for the dispute is still whether the Contractors were entitled to uplifts, the issue of which should have been apparent each year, as I have already considered.

4.20 Finally, I note the Contractors' comments that they could not raise the issue with the Commissioner until the judgment in *NHS Commissioning Board v (1) Dr Manjul Vasant (2) Dr Angelica Khera (3) Dr Gursharan Kalsi* [2019] EWCA Civ 1245 had been handed down. I note that this represents a possible alternative point at which the matter giving rise to the dispute reasonably came to the attention of the Contractors. The Commissioner has made a similar statement. I consider that there is strong logic to this conclusion, given that only once the Court case confirmed that the underlying contractual arrangements were not terminated by notice on 3 November 2016 could any request for an uplift for that and the following years be made.

4.21 However, I note that the Contractors have asked for uplifts for the year 2014/2015. I consider that at the point the termination notices were sent to the Contractors this financial year had already come to an end. As such, an uplift could have been requested, and, even if the following years contractual arrangements were terminated, then this one would still have already been performed in full.

4.22 Regardless, if I consider that the decision of the Court of Appeal was the point at which the matter should have come to the attention of the Contractors, as they and the Commissioner have both suggested, this would still result in the three year period ending on 16 July 2022, as stated by the Commissioner. I note that the Contractors stated it was not in a position to pursue the matter until the judgment had been made, however I note that, as per the emails I have been provided, the Contractors only made contact with the Commissioner on 22 September 2022. It is unclear why, if the Court's judgment was when the matter should have

come to the attention of the Contractors, they then waited three years and two months to make any request regarding it to the Commissioner.

4.23 On this basis, I consider that the decision taken by the Commissioner was not the matter giving rise to the dispute for the purpose of Clause 284. Having regard to the possible points at which the lack of any uplift should have come to the attention of the Contractors I consider that they either should have realised by the end of the relevant financial year, or, the latest point being when the judgment in *NHS Commissioning Board v (1) Dr Manjul Vasant (2) Dr Angelica Khera (3) Dr Gursharan Kalsi* [2019] was made. As such, I conclude that, being as generous to the Contractors as possible I can only make a determination in relation to dispute resolution for the years 2020/21, 2021/22, 2022/23, 2023/24 and 2024/25. With regard to the dispute as to whether the decision to limit the uplift to only three years was reasonable, whilst I believe this is simply a rephrasing of the central question, I have made specific comments on this issue below for the sake of completeness.

Entitlement to the uplifts

4.24 I note that there is a dispute between the parties as to whether the uplifts made by the Commissioner in March 2023 were done on the basis of an entitlement to uplifts under the Contract, or under the terms of the IMOS Contract. I will now consider whether the Contractors were indeed entitled to these uplifts, or not.

4.25 I note that the Contractors central contention is that payments under the IMOS Contract should be governed by the same terms as their GDS Contract generally. As I have had regard under the Statement, there is an uplift to the annual value of the Contractors GDS Contract based on the DDRB. I note that the judgment *NHS Commissioning Board v (1) Dr Manjul Vasant (2) Dr Angelica Khera (3) Dr Gursharan Kalsi* [2019] determined that the IMOS services were a further service provided under the GDS contract. I note that in their application the Contractors have phrased this as the IMOS services being provided under the GDS Contract.

4.26 Conversely, I note that the Commissioner has stated that the Courts determined that there was more of a hybrid of the two agreements, with the GDS terms applying only to elements of the service.

4.27 I have considered the language in *NHS Commissioning Board v (1) Dr Manjul Vasant (2) Dr Angelica Khera (3) Dr Gursharan Kalsi* [2019] carefully in order to determine which is the correct analysis. I consider, of most relevance, the following extract:

"53. Accordingly, I would hold that clause 287 was satisfied by the VAF. It validly amended the GDS contract so as to provide that the IMOS service was a further service within Part 10 of that contract. The meaning of the phrase may be (and is) explained by Appendix 1 to the IMOS contract; but no other part of the IMOS contract has been incorporated into the GDS contract."

4.28 Having regard to the dispute which lead to the Court judgments, I note that a key issue which LJ Lewison identified was that if the phrase "IMOS Services" was properly incorporated into the GDS Contract by way of variation then the question became what meaning to attach to those words, as they are not defined in the GDS Contract. At [49] he identifies that Clause 17 of the IMOS Contract explains what this phrase means, and that this is as defined in Appendix 1, of said contract. I consider that this reasoning must be wholly correct, it provides a clear source of a definition and was signed by both parties. In order for the GDS Contract to have been amended, as was decided, then the phrase must be capable of being given meaning, and the judgment goes so far as to identify what this is. I note that in the actual judgment of the Court of Appeal reference is made to the fact that price would be agreed by negotiation.

4.29 I note that the Commissioner has contended that the Contractors are, in effect, picking and choosing which terms of the IMOS Contract apply, to their advantage. I consider that there is some truth to this statement, on the basis of the Commissioner's contention that the payment mechanisms for the IMOS Contact, which both parties have hereto been according with, are

noticeably different to those under the GDS Contract. Whist I shall not repeat the entirety of the differences, a noticeable one is that the Contractors are not paid monthly. I consider that, therefore, the Contractors are suggesting that most of the payment provisions of Appendix 1 of the IMOS Contract would apply, but not the one which is detrimental to the Contractors.

4.30 The only other conclusion must be that the Contractors are suggesting that it was the intention of the parties to incorporate all of Appendix 1 of the IMOS Contract, except for the negotiation of price, which was instead to be referred to the principles in the GDS Contract. This would appear to be at odds with the actual actions of the parties as it had not been the case for nearly 10 years at the point the Contractors sought to raise this issue. If this were the case, then I would have expected the Commissioner to be applying the uplifts from the variation date, which there is no evidence of being the case, or there being some written agreement to that effect given how specific and abnormal such a position would be.

4.31 I am mindful that the Contractors have not provided observations, by way of which it may have sought to explain how only some of the GDS payment provisions and some of the IMOS Contract payments apply, or how this situation could be understood by reference to the principles of contract law. However, it has not done so. I consider that a central tenant of the decision of the Court of Appeal was that "IMOS Services", in the amended contracts, must be understood as if Clause 17 of the IMOS Contract had been properly included in the GDS Contract by way of variation. I thus conclude that, in consequence, and in agreement with the reasoning of LJ Lewison, that the entirety of Appendix 1 is effectively appended and incorporated into the Contractors' GDS Contract.

4.32 Having reached this conclusion, I consider that payment for the IMOS services, must be via the process set out in Appendix 1, which is, as per *NHS Commissioning Board v (1) Dr Manjul Vasant (2) Dr Angelica Khera (3) Dr Gursharan Kalsi* [2019], and paragraphs 1 and 2 under the heading Costs of the IMOS Contracts, based on negotiations with the Commissioner and is devoid of any mention of entitlement to uplifts, annual or otherwise. I also consider that the Contractors, as the Commissioner has correctly stated, cannot simply pick between both the GDS Contract terms and the IMOS Contract terms where to do so would provide them the most favourable outcome. I must, therefore, conclude that the Contractors were not, by virtue of their GDS Contract, entitled to uplifts.

4.33 It is unclear to me whether the Contractors are alleging that the basis of the obligation to apply uplifts is due to the underlying GDS Contract or on the basis that the Commissioner agreed to do so, or both. Therefore, I consider a secondary line of reasoning put forward by the Contractors is that the Commissioner had accepted their position to be the case. I note that this is disputed by the Commissioner. Having regard to the email chains provided by both parties I cannot see any unequivocal statement whereby the Commissioner states that the Contractors were entitled to these uplifts. I can see the Commissioner agreeing to uplifts for specified years, and I can see that these were based on the DDRB. However, the Commissioner's observations clearly state that this was used as the source as there was no other apparent basis on which to negotiate a revised fee.

4.34 I consider that simply using the DDRB uplifts as a basis for the increase is not the same as saying that there was an entitlement to those uplifts. I consider that, for there to be such an agreement, it would need to be a clear and unambiguous statement to that effect. I consider that such a statement would need to have been made in such a way to declare that not only were the Contractors now entitled to an uplift, but always had been, and always would be, and that such an uplift would be applied to all years of the IMOS Contract, and going forward. I have not been provided evidence that any such statement was made. As such, I consider that any agreement to pay was part of the negotiations, as envisaged by the IMOS Contacts Appendix 1, and that the fact that DDRB amounts were used, was simply the outcome of said negotiations.

4.35 I note that the Contractors have not referred to any specific contractual clauses or regulatory references which mean that Appendix 1 payments were to be increased. I also note that, whilst

the Contractors have asserted that it is the entirety of the GDS Contract that is uplifted each year, they have not provided by any clear reference which supports this statement.

4.36 I note that Clause 239 of the GDS Contract states that payments are made in accordance with both the terms of the Contract and any Secretary of State directions. Consequently, I consider that, for IMOS payments, it is the terms of the IMOS Contract which govern them, and consequently, payments are to be increased via negotiation, not automatic uplift. I must therefore conclude that the Contractors were not entitled to uplifts, and that any uplift provided was done in consequence of negotiation, rather than obligation.

4.37 I note that the Contractors have suggested that providing uplifts for three years was unreasonable, though the only clear basis for alleging this appears to be that they were entitled to them. As I have established, there was no such obligation. The Commissioner has stated that the value of the IMOS Contract was already higher than other similar contracts. I also note that, in the absence of obligations to provide uplifts for previous years, then the retrospective uplifts the Commissioner has applied was done of its own volition. I note that the Commissioner has stated that applying the uplifts it did was an attempt to agree to a fair uplift and has stated that doing it retrospectively was a gesture of "good will". I am inclined to agree with this statement.

4.38 I also note that the Contractors have then stated that where the Commissioner agreed to annual uplifts it would be unreasonable to then limit them. I have not been provided any evidence to support that there was an agreement between the parties that an uplift would be applied for all years post 2013. I note that the correspondence I have been provided with shows the Contractors requesting such consideration, but I have not been made aware of any email in which the Commissioner clearly communicate that this position had been accepted, or that they were intending to make such payments. I note that the Commissioner has, in fact, stated the opposite to be true in its observations – that no such agreement was in place. I consider that, to be unreasonable, there would need to be a clear, unambiguous statement agreeing it that was then renegaded upon, or a written agreement to vary the IMOS Contract.

4.39 I note that whilst the emails provided indicate the Commissioner agreeing to an uplift, it was not agreed what this meant, or what its limitations would be. I note that in an email dated 12 March 2023 the Contractors appear to be aware of this fact as they state that they had not been provided "any details of how you will be apply the uplifts". Therefore, any suggestion that there was an agreement by the Commissioner appears to be based on an inference by the Contractors, not any direct communication. I do not consider that this lack of clear communication is sufficient for me to concur with the Contractors that there was an "agreement" by the Commissioner.

4.40 In the absence of any specific facts or evidence establishing why only applying three years was unreasonable, and that the issuing of retrospective uplifts and payments is an optional action, then I do not consider limiting any uplift to be unreasonable.

Interest

4.41 Finally, I must consider interest. The Contractors had bid me to have regard to the case of *SSP Health Ltd v National Health Service Commissioning Board* [2020] EWCA Civ 1574 as the basis for the Commissioner being required to pay interest. I note that this case does not provide a general right for the Contractors to claim interest under the GDS contract, but instead establishes that I may award interest as part of a decision where I have decided that it would be appropriate to do so. As is expressly stated, there is no obligation to award interest, however, there is the power to do so. The equivalent power, as regard to this particular dispute resolution matter, I believe is included in paragraph 55(13) of Schedule 3 of the Regulations.

4.42 Consequently, when the Commissioner decided to provide uplifts for the years 2020/21, 2021/22 and 2022/23 the case law does not provide any basis for it to also have been compelled to award interest, at that time, as the case law applies to NHS Resolution, not the Commissioner, but also it is not a compulsion to apply interest. Similarly, if I were to have

decided that the Contractors were entitled to an uplift for those years, I would not have been obligated to have awarded interest. Instead, I would have had the ability to do so, if I felt it appropriate.

4.43 I feel that this is important to set out, as the Contractors' statements could be read as them being entitled to interest on the uplifts by virtue of the cited case law, which is plainly not the case. Secondarily, I note that the application for dispute resolution suggests that there could be interest due on the uplifts for the years 2020/21, 2021/22, and 2022/23. I note that these payments were made, so the dispute would be as regard to the basis of those payments being made. In the case law cited by the Contractors, the adjudicator awarded payment, and therefore the question was if interest was due on said payment. I consider it wholly different where payment has been made, but it is the question of the basis of said payment that is in dispute. I consider that the question needing to be resolved would have been if the Commissioner was obliged to apply interest rather than NHS Resolution.

4.44 To that end, I note that the Contractors have not provided any basis under which they were owed interest. They were in fact paid an uplift for those years, so the dispute cannot be that they are due payment for those years, and neither party is disputing that they have in fact been paid. I note that for the other years, had I determined that payment was owed, then I would be in a position to award interest, however, as I have not determined that there is any amount due to Contractors, there is no basis upon which to award interest.

4.45 Further, I have also determined that the Contractors were not, in fact owed any payments. Therefore, in relation to the determination as to the basis under which payments were made to the Contractors, I have concluded that it was the IMOS Contract Appendix 1 negotiation requirements, not the GDS Contract. As such, the Commissioner was not making the uplifts in consequence of any obligation to pay, but as the outcome of negotiations between the parties.

4.46 Having regard to *SSP Health Ltd v National Health Service Commissioning Board* [2020] EWCA Civ 1574 I note that the discussions around when interest might be awarded, was considered in the judgment. One of the key elements was where a claimant was kept out of money which it ought to have been paid. As the Contractors are not owed any money, from the Commissioner, there is equally no basis for awarding interest.

4.47 Taking all of these elements into consideration, I consider that the Contractors are not owed interest on either the payments made or not made.

Other Considerations

4.48 I note that the Contractors appear to dispute whether an uplift was provided for 2023/24. However, the Commissioner has stated in its observations that an uplift was agreed to be paid and that the payment proceeded on 29 July 2024. I thus consider it unclear if any uplift was or was not agreed. On the basis of the Commissioner's statements that an uplift was applied and the lack of any observations to the contrary, I make no further determination as regard to the year 2023/24.

4.49 Moving forward, to the year 2024/25, I consider that, as the uplift is not mandatory then any agreement to do so will need to be made via negotiation between the parties, as I have already stated.

5 DECISION

5.1 Having regard to all of the information provided by both parties, I determine that:

5.1.1 Any disputes relating to the years 2014/15, 2015/16, 2016/17, 2017/18, 2018/19 and 2019/20 are outside of the limitation period for referring a dispute; and

5.1.2 The Contractors were not entitled to annual payment uplifts for the provision of intermediate minor oral surgery services.

5.1.3 No interest is due to the Contractors.

Head of Appeals
NHS Resolution