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12 August 2025

FILE REF: **SHA/ 26610 & SHA/ 26611**

COMMISSIONER: **NHS ENGLAND & HUMBER AND NORTH YORKSHIRE INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: **AISHWARYAM LIMITED**

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

RE: **TERMINATION OF CONTRACTS AT DENTAL SURGERY, 10 NEW ROAD, WALTHAM, DN37 0EN**

1 Outcome

1.1 I determine that both of the Termination Notices dated 1 November 2024 issued by the Commissioner were valid under both the relevant Contracts and Regulations, and as such, this application is found 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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RE: **TERMINATION OF CONTRACT AT DENTAL SURGERY, 10 NEW ROAD, WALTHAM, DN37 0EN**

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 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 determination on a preliminary matter dated 7 May 2025, 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 21 November 2024.

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 dated 21 November 2024 from the Contractor with application;

2.3.2 Email dated 9 December 2024 from the Contractor with enclosures;

2.3.3 Email dated 18 December 2024 from the Commissioner;

2.3.4 Email dated 22 December 2024 from the Contractor with enclosures;

2.3.5 A further email dated 22 December 2024 from the Contractor;

2.3.6 Email dated 2 January 2025 from the Contractor with enclosures;

2.3.7 Email dated 9 January 2025 from the Contractor with enclosure;

2.3.8 Email dated 23 May 2025 from the Commissioner with enclosures;

2.3.9 Email dated 28 May 2025 from the Commissioner with enclosures;

2.3.10 Email dated 13 June 2025 from the Commissioner with enclosure; and

2.3.11 Email dated 20 June 2025 from the Contractor.

3 PARTIES' SUBMISSIONS

The Contractor's application to NHS Resolution

3.1 "Subsequent to your [sic] notice of termination of contracts 1008740000 and 1918330001 sent to us on the 1st November 2024 by Mr Andrew Hobson stating that you have ''decided to terminate both of [our] contracts with 28 days' notice, with contracts therefore due to terminate on 29th November 2024'', please take this letter as my appeal of this decision.

3.2 Firstly, I want to make note of the absolute shock resulting from the notice. The decision of termination of contracts came without warning and caused us great confusion and upset. We love our NHS and we all were always proud to be part of the National Health Service ensuring that everyone in our community could access top-quality dental care.

3.3 Moreover, the decision of termination is absolutely unjustifiable. Our clinic did indeed face difficulties in meeting UDA targets after the pandemic as many dental practices did. However, we took notice of this and directly communicated with the NHS (and later the ICB) to create an arrangement that would work for everyone i.e. our clinic would be permitted to continue offering NHS dental services without facing clawback for the duration of the sale process, and only after completion of the sale, the NHS/ICB would take the owed amount from the purchase price. This way our local community would have dental services, our staff would continue to have steady employment, but the NHS/ICB would nonetheless end up receiving the amounts due. This agreement was concluded between our solicitor Mr Jonathan Stones and our Contract Manager Ms Leesa Rayton, and this was how the "financial issues" were circumvented. I enclose below 5 emails from correspondence relating to this matter.

3.4 To then start unexpectedly, without any notice, clawback of 100% funds against our clinic, in fact only then creating financial difficulties for the practice, breaking the agreement, and pretending this solution to our financial issues didn't exist is simply inexcusable. The ICB are 1) breaking their contractual promise, 2) pretending that we have not addressed the issue to utilise it as a weak justification to terminate our contracts and 3) as a public body, according to Public Law, the ICB are obliged to act reasonably and by terminating the contracts they are risking a loss for NHS England/ICB of more than 300k which will not be recoverable unless the novation of the contracts to the buyer is granted simultaneously with the taking over the Practice by the Buyer. Aishwaryam Limited was bought by a holding company, Family Dental Practice, which also holds a mortgage for the business at the bank. Therefore, by terminating the contracts, you will not be able to recover the funds, patients will lose access to an NHS dentist, staff could lose their jobs and the bank will not be able to recover the mortgage repayments. The ICB are acting unreasonably, harming themselves, NHS England, the local community and harming the bank.

3.5 Please be aware that we have collected signatures of patients supporting our request for reinstating the contracts (enclosed). On top of that, our MP, Mr Martin Vickers, has written a

letter of support which I attach to this appeal, as the ICB's actions are harming the local community.

3.6 I have sought advice from BDA and they are encouraging me to take action and not give up. We have been assigned a dedicated adviser at the BDA who is assisting us in this matter."

3.7 [Documents enclosed:

3.7.1 Email from the Commissioner to the Contractor dated 20 September 2023;

3.7.2 Email from the Contractor's solicitor to the Commissioner dated 26 September 2023;

3.7.3 Email from the Contractor's solicitor to the Commissioner dated 16 October 2023;

3.7.4 Email from the Commissioner to the Contractor's solicitor dated 27 October 2023;

3.7.5 Email from the Commissioner to the Contractor's solicitor dated 27 February 2024;

3.7.6 Letter from Martin Vickers MP to the Commissioner dated 17 November 2024; and

3.7.7 Petition with signatures to "uphold the NHS Dental Contract for Waltham Surgery"].

Representations

NHS England's representations

3.8 "As per your preliminary determination of the 7th May 2025, where it was determined that "both parties have made every reasonable effort to communicate and co-operate with each other with a view to resolving the dispute and that the dispute is, therefore, suitable for referral for determination in accordance with the NHS dispute resolution procedure" please see the evidence below in relation to the above cases, of our ongoing correspondence with the contractor and their solicitor in respect of the issues associated with the termination of their NHS dental contracts 1008740000 and 1918330001.

3.9 In summary, the contractor has been significantly under-performing on their NHS dental contracts and is in debt to both NHS England and Humber and North Yorkshire ICB. Throughout 2023, we worked with the practice to recover the debts owed by supporting their requests for a novation of the contract which would enable a sale of the business. This selling/buying process has never concluded and in June 2024, it appears that another buyer was interested but again, the sale was not concluded. During this time, the contractor has continued to under-perform with regards to their contract delivery and has continued to build their debt with Humber and North Yorkshire ICB.

3.10 It is our view that Humber and North Yorkshire ICB has worked within its parameters as set out in the Policy Book for Primary Dental Services. In line with this dental policy, the ICB has worked with NHS BSA to review contract performance at both mid and year end. In line with national approaches, contractual under-performance has resulted in the issuing of Remedial Breaches and withholds on contract payments.

3.11 Prior to taking the decision to terminate the NHS dental contracts on 1 November 2024 (approximately 18 months since first engaging with the practice), Humber and North Yorkshire ICB did make every reasonable effort to communicate and co-operate with the contractor and solicitors in an attempt to reach an amicable solution to both the debt recovery and sale of the contractor's business.

3.12 In making arrangements to novate the contracts and to recover debts upon the sale of the business demonstrates our commitment to finding alternative solutions. However, due to the ongoing timeframe with no movement, further escalation of debts, the contractor becoming

unreasonable in their requests (e.g. demanding withholds be lifted, threatening to release names of staff and their contact details, threats of going into administration and job losses), and needing to ensure value for money of our dental contracts, we took the decision to terminate the contracts on the basis of the risk of further material financial loss.

3.13 In particular, the threat made on 29 October 2024 to move Aishwaryam Limited into administration if we did not pause debt recovery, on top of our previous concerns, led us to believe that the company was in an extremely fragile financial state, and we considered at this point we would be at risk of further material financial loss if we were to continue to contract with the company.

3.14 In line with the process for contract terminations, we notified the contractor of their right to lodge an appeal with yourselves at NHS Resolution.

3.15 It is our view that we have exhausted all reasonable solutions and had no option but to issue Termination Notices.

3.16 Whilst the appeal is under consideration, Humber and North Yorkshire ICB has not proceeded to terminate the contracts as we await the decision from NHS Resolution. As such, the practice is able to continue delivering NHS dental services during this time. We are also willing to work with them to secure a sale of the business and have supported the practice with preliminary checks on potential buyers during this time. We have written to the practice to confirm the situation. Further emails from the practice, in April 2025, do support our position that the practice continues to be at risk of bankruptcy and therefore the ICB is at risk of further material financial loss if we were to continue to contract with the provider.

3.17 Below is a timeline of events and the associated email correspondence.

3.18 To assist, I have included the Termination Notices as issued on 1 November 2024.

3.19 [Termination notices and timeline of correspondence with a date range from 26 April 2023 to 23 May 2025].

<u>The Contractor's representations</u>

3.20 "I am writing to you in regards [sic] to the preliminary determination for the cases with your reference SHA/ 26398 & SHA/ 26433 [sic]. I am quite shocked by the lack of a substantial decision taking into account that NHS Resolution has received all of the available information to date. My position remains unchanged.

3.21 Regarding point 4.7 - it remains my submission that the ICB did not participate in any dispute resolution since the issuing of the termination notice because they did not reply at all to my appeal to the notice (attached). No correspondence exists from the ICB to confirm such participation. If I am wrong and the ICB's position is that they did communicate with me following my appeal dated 21st November 2024, I would like to see this correspondence. It is my understanding that their participation in local resolution would involve their [sic] replying to my appeal, which they never did.

3.22 Regarding point 4.11 - as per earlier submissions, multiple sales were not concluded BECAUSE of the lack of cooperation from the ICB, their delays in replying or complete lack of replying. My solicitor attempted for a whole year to obtain formal confirmation of novation from them.

3.23 Regarding point 4.13 - in my opinion, delaying confirmation of novation for a year, is not a "reasonable effort" on the part of the Commissioner.

3.24 Regarding point 4.14 - the reason why the Appeal was first sent to NHS Resolutions [sic] was simply due to misreading the Termination letter and the instructions for Appeal amidst the

stress caused by the whole situation. In addition, I contacted NHS Resolutions [sic] because the BDA recommended that I do so. However, if your stance is that local dispute resolution was exhausted then it was right of me to have contacted you when I did.

3.25 Regarding point 4.15 - again, there was no movement in the sale BECAUSE of the lack of cooperation from the ICB which eventually caused the buyers to withdraw (see all correspondence sent to you on [sic].

3.26 Please consider all of my previous correspondence with yourselves as my representations on the substantive matter. I attach all of my correspondence sent to you for your convenience.

3.27 Finally, I wish to make you aware that I have already began the process of liquidating Aishwaryam Limited as the Termination Notice destroyed the company by making it insolvent and taking away all of its funds therefore making it unable to continue providing NHS care to patients."

Parties' observations on the representations received

NHS England's observations

3.28 "In relation to the above cases, I thank you for sharing the representations received from the other party. Please accept this letter as our observations and rebuttal of the details shared. Specifically, we refer to the enclosures:

3.28.1 Letter/email of 28th May, to NHS Resolution, in response to the preliminary findings

3.28.2 Details as set out in the supporting evidence

3.29 The other party maintains that Humber and North Yorkshire Integrated Care Board (ICB) did not respond to their appeal in November 2023. Our records show that this 'appeal' relates to the return of the signed Declaration of Receipt of Termination Notices in respect of contracts 1008740000 and 1918330001 and their intention to appeal (see Appendix A). In line with the process for contract terminations, at the time of issuing the Termination Notices, we notified the contractor of their right to lodge an appeal with yourselves at NHS Resolution and it is our view that any correspondence outlining their request to lodge an appeal will have been sent directly to NHS Resolution. Upon receiving the Declaration of Receipt, no further action was taken by the ICB as any correspondence relating to the appeal would be facilitated through NHS Resolution.

3.30 Further, the other party maintains that the ICB did not respond promptly to requests regarding the potential sale of the business. Throughout 2023, we had been engaged in ongoing correspondence with the practice and their solicitors for over 18 months regarding their contract performance, recovery of debt and sale of the business. Throughout this time, we did respond to requests and our initial evidence submitted outlines the timeliness of our responses. More recently, when we were advised on 8 March 2025 that there was another potential purchaser, we confirmed with the provider that we would undertake due diligence checks. This was communicated with them via email on 13 March 2025 (4 working days later) where we also asked a clarifying question regarding their intention to deliver dental services in Humber and North Yorkshire or in Lincolnshire (see Appendix B). We did not receive a response.

3.31 We can also confirm that the ICB has aimed to act in the best interest of patients and to ensure that its funds are used appropriately for the delivery of dental services, in line with Regulations. Due to escalating concerns following the threat made by the other party on 29 October 2024 to move Aishwaryam Limited into administration if the ICB did not pause debt recovery, on top of our previous concerns and lack of updates regarding the sale of the practice, we believed that the company was in an extremely fragile financial state. We considered that we would be at risk of further material financial loss if we were to continue to contract with the company

and as such, felt the best decision in the public interest was to issue Termination Notices. We do recognise the impact of this decision on the practice and its staff, however the ICB does have a duty to act in the wider public interest and we could not continue to fund a poor performing practice which was not fulfilling its contract to offer dental services to the population, whilst risking further material financial loss.

3.32 Finally, to clarify, the other party sets out that they believe the Termination Notices issued on 1 November 2024 by the ICB had no legal standing. This is based on a letter from Mr Matthew Groom, Interim Regional Director of Commissioning and Transformation at NHS England, which sets out that the commissioning of dental contracts was delegated to ICBs from 1 April 2023 (see Appendix C). It is clear, however, that the other party has misunderstood the situation and Mr Groom's letter aims to set out that it is indeed the ICB which is now responsible for contracting and commissioning of dental provision. On that basis, the Termination Notices issued by the ICB, as the party with delegated responsibility, are in fact, legally binding.

3.33 We are sorry that Mr Pekacki, Director for and on behalf of Aishwaryam Limited, feels that cooperation with the Area Team/Commissioning/ICB has been very difficult. Throughout this situation, there appears to be a level of confusion from the other party and in an attempt to clarify matters, the ICB wrote to Aishwaryam Limited on 3 February 2025 (see Appendix D). This letter set out that the ICB is the responsible party for dental commissioning and clearly set out that matters pertaining to the appeal should be directed to NHS Resolution, with contracting matters including the sale of the business, to be directed to the ICB. This letter aimed to clarify the situation and was not the ICB's response to re-instate the terminated contracts as these contracts do, and always have, remained active whilst the appeal is being considered".

<u>The Contractor's observations</u>

3.34 "In relation to the document titled ''DMB reps combined 23 05 25'' for cases SHA 26398 and 26433 [sic], please see my observations below.

3.35 I do not agree with the suggestion of Ms Leadbetter that there was an ''ongoing timeframe with no movement'' in regards to [sic] the sale and repayment of the debt. As mentioned in my initial submissions the ''no movement'' situation was the result of the ICB's constant delays in responding or not responding at all. Had the ICB given us a clear confirmation of novation in writing we would have concluded the sale a long time ago but they never provided such formal written promise which ended up angering the buyer who then withdrew.

3.36 As for the ICB's belief that the company was in a ''an extremely fragile financial state'' and that there would be a ''risk of further financial loss if [the ICB] were to continue to contract with the company'', time and time again both I and the practice manager and the company's solicitor made it very clear to the ICB that there was a solution to the ongoing debt which would have resulted in the ICB received [sic] its money and the practice continuing to provide NHS dental services under new ownership. We also, time and time again, pointed out that the repeated delays and lack of response from their side was compromising the sale. Therefore, while I cannot argue that the company was in debt, I do not agree that the termination of both contracts was a reasonable solution on their part especially since it was agreed in writing by the company's solicitor that the debt would be repaid in full on completion as long as the ICB cooperate and provide a formal confirmation of novation (which they never did).

3.37 In regards to [sic] the ICB reinstating the contracts while the appeal is underway, they know very well that delivering activity under the contracts is impossible while they are recovering debts because the company cannot pay its staff, the rent and its bills if it is not receiving any monthly payments from the NHS.

3.38 I wish to point out that in Annex 52 you can read that on the 9th February 2024 Mr Stones was again asking the ICB for a formal confirmation of novation which by that time still, nearly a year after initial contact, was not produced by the ICB.

3.39 Lastly, the way in which the contracts were suddenly terminated ruined the second sale because after articles started to appear in the media outlets, who were alerted by patients, the bank providing financing to the buyer found out about the termination and pulled out from the transaction immediately."

4 CONSIDERATION

4.1 This determination should be read alongside my previous determination dated 7 May 2025 (SHA/ 26398 and SHA/ 26433) which considered the question of whether every reasonable effort had been made to resolve the dispute. In light of this determination, I shall have no further regard to the question of whether local dispute resolution was engaged with, as I have already finally determined that issue.

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

4.3 As part of this consideration of the application for NHS dispute resolution, I required an up-to-date version of the contract(s) in dispute containing all variations agreed since the contract was signed. I note that I was provided with a copy of two contracts (1918330001 and 1008740000) (the "**Contracts**") and the Commissioner confirmed that:

4.3.1 *"As they were temporary UDAs they had a second contract number attached to it (1008740000) and it was issued as a variation against both contract numbers. They were then made permanent on that additional number. The main contract (1918330001) is attached."*

4.4 The Contracts and variation notices provided have not been disputed by either party.

4.5 I note that the application for NHS dispute resolution seeks to challenge the Commissioner's decision to terminate the Contracts (the "**Termination Notices**") by letters dated 1 November 2024, in respect of Dental Surgery, 10 New Road, Waltham, DN37 0EN.

4.6 The Termination Notices state that the reason for the termination is in accordance with clause 328 of the Contracts. This provides that:

" 328. The Board may serve notice in writing on the Contractor terminating the Contract forthwith or with effect from such date as may be specified in the notice if:-

328.2 the Contractor's financial situation is such that the Board considers that the Board is at risk of material financial loss."

4.7 I note that, having had regard to the Contracts provided and agreed by the parties, the language indicated in the Termination Notices does exist within the Contracts, alongside the sub-heading provided, however the clause reference is incorrect. Within the Contracts provided the correct clause reference would be clause 308, rather than 328. I note that neither party has commented on this point, nor contested that this clause existed within the relevant Contracts. As such I do not consider that this error is material to the dispute at hand and make mention of it only for the sake of clarity and completeness.

4.8 As I noted in the determination on a preliminary matter, the Contractor challenged the validity of the Termination Notices as a result of a letter from NHS England – North East & Yorkshire to the Contractor dated 8 January 2025. I note that no further statements have been made by the Contractor on this point. The Commissioner has stated that it is indeed responsible for contracting and commissioning of dental provision and therefore it is the correct entity to issue

the Termination Notices, which are consequently legally binding. I consider this to be the correct understanding of the situation based on the information provided by the parties and that this does not constitute a reason to render the Termination Notices invalid.

4.9 Alongside the Termination Notices, a letter was sent to the Contractor dated 1 November 2024 which explained that termination would be forthcoming and would be due to the risk of material financial loss to the Commissioner. I note that, as per its application, the Contractor has made out several reasons why it considers the decision to terminate the Contracts to be incorrect. I will address each of these in turn.

4.10 As I explained in the determination on a preliminary matter, the central issue of this matter is the failure of the Contractor to deliver the required units of dental activity ("UDA") under the Contracts for several years. I have been provided with a timeline of events by the Commissioner that I consider summarises the major events which have taken place since 26 April 2023. I consider the key points to be as follows:

4.10.1 On 1 April 2023, the Commissioner took on delegated commissioning responsibility for primary dental services;

4.10.2 On 26 April 2023, the Contractor first made contact regarding the sale of their practice to offset an estimated clawback of £180,000.00;

4.10.3 On 23 May 2023, the Contractor indicated that the transfer would take place via novation rather than the mechanism proposed by the Commissioner;

4.10.4 On 28 June 2023, the Contractor explained the proposed process for enacting the simultaneous transfer and payment of the outstanding financial recovery amounts. This involved the novation of the Contracts to the buyer alongside an undertaking to transfer the money from the purchase of funds by means of a same day transfer. In order to do so it was agreed that the year end process be completed first to establish the exact amount to be paid;

4.10.5 On 4 August 2023, the total financial recovery for both the Contracts was made available, totalling £174,142.92. An undertaking to make the payment was offered by the Contractor's solicitors on the day of the sale or in 5 days if the sale did not occur. The email from the Contractor's solicitors stated the sale would proceed no later than 31 December 2023 and asking that no recoupment be made;

4.10.6 On 8 August 2023, this amount was updated to include a third contract owned by the Contractor, making the total £193,347.30 and an amended undertaking was issued by the Contractor's solicitors;

4.10.7 On 14 August 2023, the Commissioner alerted the Contractor to the fact that the financial recovery was owed to NHS England, rather than the Commissioner, and as such NHS England would need to agree to the payment being made via a lump sum alongside the sale, instead of the Commissioner;

4.10.8 On 18 August 2023, the Contractor's solicitors stated that it would not respond directly to NHS England's solicitors and instead would provide responses to the Commissioner for onward transmission;

4.10.9 On 20 September 2023, the Commissioner confirmed that deductions due to underperformance on the Contracts in 2022/2023 had been placed on hold due to the proposed sale;

4.10.10 On 27 October 2023, the Commissioner confirmed that a letter had been drafted regarding novation and financial recovery and would be provided as soon as possible;

4.10.11 On 14 November 2023, the Commissioner updated the Contractor that the wording was being agreed between its solicitors and NHS England's;

4.10.12 On 20 December 2023, an update was requested from the Contractor's solicitors regarding if completion was on track and requesting confirmation of the sale agreement or funding flows;

4.10.13 On 25 January 2024, the Contractor's solicitors responded but did not directly address the questions raised in the Commissioner's email. A further email was sent from the Commissioner's solicitors requesting additional information from the Contractor;

4.10.14 On 9 February 2024, the Contractor's solicitors responded requesting a copy of the undertaking for review. It was alleged that failure to supply these documents had resulted in the solicitors being unable to finalise papers or complete due diligence. Additionally, due to the landlord's solicitor falling ill there had been a failure to provide documentation relating to a new lease required by the buyer’s solicitors which had created an additional delay;

4.10.15 On 11 April 2024, the letter of undertaking and novation was provided to the Contractor's solicitors with a request for an update on the position of the transaction and anticipated completion;

4.10.16 On 12 June 2024, the Contractor's solicitors indicated that the Contractor was now changing the buyer to a different individual and requested a letter confirming that novation to the new individual was possible;

4.10.17 On 28 June 2024, the Commissioner confirmed that it was content with there being a new buyer provided that the buyer had the funds to meet the liability. The Contractor's solicitors were asked to provide details of the new buyer, progress of the sale and the proposed completion date;

4.10.18 On 30 July 2024, the Contractor was contacted by the NHS BSA regarding their under-delivery of UDAs in relation to all three Contracts. This new total being £151,207.15. These letters indicated that recovery would commence on 1 October 2024 and that contact should be made within 28 days if any details were incorrect;

4.10.19 On 5 August 2024, the Commissioner wrote to the Contractor's solicitors requesting an update and stating that it needed to be informed if it was to put the 2023/2024 year end debt on hold;

4.10.20 On 9 September 2024, the Commissioner's solicitors wrote to the Contractor's solicitors asking for an update;

4.10.21 On 27 October 2024, the Contractor wrote to the Commissioner regarding the fact that recovery had taken place in line with the letters of 30 July 2024. The email mentioned that the Contractor did not have sufficient funds to pay staff and meant the practice would close the next week with administration commencing immediately. The letter also stated that if the financial recovery payment was not refunded that the Contractor would cease NHS operation on 1 November 2024.

4.10.22 Between 27 October 2024 and 1 November 2024, two more emails were sent by the Contractor with a third coming from the Contractor's solicitors. These repeated requests for financial recovery to be ceased and/or returned. It also stated that the sale was still proceeding and that it was intended that the sale would be used to repay debts for both 2022/2023 and 2023/2024. The Contractor also repeated that administration was a possibility, and the final email of 1 November 2024 stated that the bankruptcy process would be started by the Contractor's solicitors that day. Following this notification, the email stating that termination would occur was sent by the Commissioner.

4.11 I note that the Contractor has relied upon two issues to support its case, the first being with the Termination Notices and the second relates to the fact that financial recovery was initiated. Based on the Contractor's representations, I consider that these two issues are clearly intertwined. I will start by looking at the question of financial recovery.

4.12 The Contractor has made several references to the fact that the Commissioner broke an agreement and/or promise. In relation to this, the Contractor indicates that it had an arrangement with the Commissioner that it would not face financial recovery while the sale was in progress and would only be required to pay once the sale completed. The Contractor indicates that this is confirmed by the emails provided.

4.13 I note that, in the email of 20 September 2023, it states only that deductions for2022/2023 have been placed on hold due to the sale. I note that whilst the Contractor's solicitors provided specific wording for agreement between the parties, I cannot see any email that confirmed the Commissioner agreed to those exact terms. Instead, there is only the email which I have had regard to. The Contractor has stated that it instructed solicitors regarding the 2023/2024 financial recovery due to undelivered UDAs. However, I have not been made aware of any correspondence with the Commissioner to that effect.

4.14 Further to this, I note that the 2022/2023 financial recovery was owed to NHS England, whereas the 2023/2024 financial recovery would have been owed to the Commissioner. I also note that these sums were wholly independent of each other. As such any agreement not to seek financial recovery would have to be very specific if it were to cover both sums.

4.15 Having regard to all the correspondence, I do not consider, and have not been provided with, any overt statement by the Commissioner that it would put all financial recovery on hold indefinitely for as long as it took for the Contractor to successfully sell. Instead, I consider that a very specific agreement was put in place which only covered the 2022/2023 financial recovery which were owed to NHS England and only extended until 31 December 2023.

4.16 Having regard to the timeline above, when the end of year letter was issued in 2023, the Contractor's solicitors were immediately in contact with the Commissioner confirming that the financial recovery was to be put on hold, and the terms under which this would be agreed. However, when the Contractor was sent correspondence by the NHS BSA regarding the potential 2023/2024 financial recovery there was no response to either the Commissioner or the NHS BSA.

4.17 I note that the Commissioner attempted to contact the Contractor directly prior to financial recovery commencing, twice, in addition to the NHS BSA correspondence. Therefore, the Contractor was given ample opportunity to request that financial recovery did not proceed. I specifically make reference to the NHS BSA correspondence which indicated a 28 day window for a response, which was not accorded with.

4.18 A particularly pertinent point I consider is the Commissioner's email of 5 August 2024, wherein an offer to extend the hold period was made. However, this email went unanswered.

4.19 In these circumstances, I consider it clear that there was no promise or agreement not to seek clawback in relation to the 2023/2024 underdelivered UDAs.

4.20 The next question is that of reasonableness. As both parties have alluded to, these discussions have been ongoing for a significant period of time. In relation to whether the financial recoveries themselves were reasonable I have already found that there was no promise in relation to them. The next question, therefore, is whether the Commissioner should have put them on hold on its own volition.

4.21 I note that the Contractor had not indicated that these outstanding amounts would also be paid from the sale. As such, I conclude that the Commissioner was not in a position to simply assume that to be the situation. I note that the arrangement for the payment was via an

undertaking by the Contractor's solicitors who were to pay the debt owed to NHS England, with the Commissioner agreeing to the novation of the Contracts. Whilst I have not been provided with copies of the letter sent to the Contractor, I consider that it would have only included terms which related to the payment to NHS England, not the Commissioner. If it was intended that payment would also be made to the Commissioner, I consider that this would have required significant amendments to any undertaking and further delays to the process. I have not been provided with any correspondence that this situation was anticipated, intended, or put forward by either the Contractor or the Contractor's solicitors.

4.22 Further to this point, I note that, at this stage in the ongoing negotiations/ correspondence surrounding the sale, there had been a period of silence from the Contractor. There was no outstanding action with either NHS England or the Commissioner and, instead, both parties were awaiting confirmation from the Contractor of next steps in relation to the sale proceeding. I consider that the 12 June 2024 email from the Contractor's solicitors is especially confusing as to what was happening. In addition, the questions asked therein were responded to within 16 days, but there does not appear to have been any progress in the sale as a result.

4.23 In these circumstances, I consider it unclear what the position of the sale was. Additionally, the Commissioner could not simply assume that these payments would be made from the sale, especially given the significant amendments this would have required to the currently drafted documentation. In this situation, I would consider it entirely reasonable to assume that, with no correspondence to the contrary, no other mechanism for repayment, and no guarantee the sale was even proceeding, the Contractor had accepted the letter from the NHS BSA and that financial recovery was to commence on 1 October 2024.

4.24 Given this, I will now turn to the question of termination. The Contractor has stated that the termination was "unjustifiable". I note that the Contractor has not fully explained exactly which element of the decision was unjustifiable but I consider that it is likely that the sum total of the reasons put forward by the Contractor are to be taken as rendering the termination unjustifiable.

4.25 The Contractor has made several statements regarding the situation. The first element I note is that the Contractor contends that the delays in sale were the fault of the Commissioner, therefore it directly contributed to the circumstances which resulted in the termination. I note that the Commissioner states that every effort was undertaken to communicate and collaborate with the Contractor and their solicitors to resolve the issues related to debt recovery and the sale of the Contractor's business. I have provided a timeline of correspondence above, partly due to this specific issue. I note that there was a significant delay wherein the Commissioner and NHS England sought to agree the wording for the novation and undertaking. However, I note that this period was exacerbated by the fact that the Contractor's solicitor did not respond to some key questions and requests for information, especially from 20 December 2023 onwards.

4.26 I am mindful that the Contractor was asking for a novel agreement, which required a very specific payment and contractual mechanism. In addition to this the involvement of NHS England only started in August 2023. I note that the Contractor has contended that the confirmation of a novation in writing was not provided; however, it is unclear what precise element this is referring to. The timeline notes that the letter was provided on 11 April 2024. Additionally, an email on 28 June 2024 confirmed that NHS England were content with the novation to proceed with the new buyer, provided certain information was provided.

4.27 Based on these emails I must conclude that the letter and assurances were forthcoming, if delayed, in direct contradiction to the Contractor’s statements. I note that there were still four months between the letter being sent and financial recovery being sought during which the sale could have proceeded. However, I am unclear as to what the status of the sale and who the buyer was during this period and why no action was taken by the Contractor, as the correspondence all indicates that this letter was the main reason for the sale not completing. I consider that if this document was the key reason, then the email containing it should have

produced a response from the Contractor and a swift procession to sale. Instead, it appears that a different buyer was approached, further stalling the process.

4.28 I have not been referred to any emails wherein the Commissioner or NHS England were made aware that the sale would collapse if a response was not forthcoming by a specific date. I note that as of February 2024 it appeared that the delays were frustrating but no mention of them being fatal to the transaction was referred to. Further to this it appeared that at that point in time three sale options existed and none were in jeopardy, including the original buyer proceeding with the transaction. Therefore, if the delay did cause the sales to fall through, very little attempt was made by the Contractor to alert the Commissioner to this situation or to utilise this fact to incentivise the hastening of the process.

4.29 Given these factors, I consider that both parties contributed to the delay in the sale. I am mindful that engaging the buyer, their solicitors, the Commissioner, its solicitors, NHS England, its solicitors, the landlord and their solicitors in a novel and complex contractual structure was always likely to require significant time, effort and co-operation. I am of the view that more could have been done by both parties, with information being more quickly forthcoming. I note that the Contractor's solicitors also refused to directly engage with NHS England, which undoubtedly further contributed to the delay. Finally, I consider that by not informing the Commissioner of the potential jeopardy of the sale, the Commissioner cannot be held at fault if said sale collapsed as it was not given sufficient information to intervene or act accordingly. Taking all of these factors into account, I do not consider that the lack of sale can be solely or directly attributed to the Commissioner.

4.30 The next issue raised by the Contractor is that the termination of the agreement would not result in the repayment of the amounts owed to NHS England and/or the Commissioner. I note that the Commissioner has stated that it took the termination decision in the best interest of patients and to ensure that funds were used appropriately. In addition, it highlights the threats of administration, indicating that the company appeared to be in a fragile financial state. I note that the Commissioner thus concluded that there was a risk of material financial loss if termination was not pursued.

4.31 In considering this issue I first return to the question of the financial recoveries. I note that, as per the Contractor's correspondence these recoveries specifically caused the financial stability of its business to decline. I have already noted that the instigation of the financial recoveries was reasonable. The Contractor has not explained why it was unaware of the recoveries until 27 October 2024 once they had already taken place, and I consider this somewhat odd given the alleged financial fragility of their business and the repeated correspondence on this point once they occurred. Beyond this, at the point contact was made with the Commissioner an initial recovery had already been taken and, as per the Commissioner’s approach, it was now too late to halt the November recovery, being only a few days before it was due to occur. As such the Commissioner was unable to do anything about the recovery.

4.32 The Contractor's correspondence makes it extremely clear that if the recovery were to occur, the business would cease to be financially viable. Since the Commissioner was unable to prevent the recovery for November 2024, then it was the inevitable conclusion that the business would cease to be solvent. I consequently return to the wording of clause 308 of the Contracts, which states that they may be terminated if the Commissioner was at risk of material financial loss. Given that the Contractor had made it extremely clear that it was going to go insolvent and so very little financial recovery would be available, as repeated in its observations, I consider that this represented a clear risk of material financial loss.

4.33 Further to this point, as I have noted above, the Contractor had not given any assurances that the amounts owed to the Commissioner was to be paid from the proceeds of the sale. As of August 2024, the Contractor's outstanding amounts owed to both NHS England and the Commissioner totalled £344,554.45. I note that the value of the sale of the business had not been disclosed, nor the amounts owed by the Contractor to other entities. The Contractor has mentioned that it had a mortgage over the property. In August 2023, a breakdown of liabilities

was requested, however the Contractor's solicitors instead gave an undertaking to pay the full financial recovery from the sale proceeds. Reviewing this information, it is wholly unclear if the Contractor would have been in a position to pay the entire amount once the additional undelivered UDAs had been included.

4.34 Of more importance, however, is that there was no undertaking or agreement that it would pay off the new financial recovery amounts from the proceeds of sale. I note that this has never been expressly agreed between the parties. As such, if the sale did proceed after July 2024 the Commissioner would not have been able to enforce any agreement that the proceeds be used to pay for the financial recovery.

4.35 Given the lack of any assurances regarding this additional amount, and the impending insolvency of the business this would all appear to represent a significant risk of material financial loss. I note in particular an email from the Contractor which states that only £30,000 would be recoverable if the company went into administration, appearing to confirm this risk. The Contractor also admitted in its observations that it was in debt.

4.36 I also note that the proposed sale had been ongoing for some 18 months, but the actual status of the sale was entirely unclear, with it not being obvious with what business it was now being conducted or the terms under which it would proceed. I am mindful that the Commissioner could not sustain the situation forever, with the Contractor continuing to accrue further debt and seemingly making no attempt to improve its business to deliver the required UDAs. I consider that, in the knowledge that the business would be sold, it was in fact incentivising the Contractor not to make improvements, as there was no reason to do so.

4.37 In this scenario, with hundreds of thousands of public money at stake, with no clear timetable for completion of the sale, a business that appeared extremely financially fragile and 18 months of no change, termination was necessary to secure the financial interests of the Commissioner and the public, even if it risked the other outstanding amounts. I am mindful that the Contractor was utilising claims of insolvency, asset sales, and publication of staff information in order to move the Commissioner into changing its course of action. I do not consider this aided in the co-operation between the parties.

4.38 In addition, I am mindful that the Contractor has stated that the termination jeopardised a sale that was in progress due to the termination becoming public knowledge. However, I note the news articles provided and cited by the Contractor became public knowledge because the Contractor posted about the termination on social media. Therefore, had it not gone public with the information, the sale may have proceeded.

4.39 I also note that the Contractor has erred in its construction of the termination. As per clause 354 of the Contracts, if the termination is referred to NHS dispute resolution then the termination will only take place where there has been a determination of the dispute. As per the Termination Notices, the Contracts were not due to terminate until 29 November 2024, however, as the dispute was referred on 21 November 2024, termination did not take place. Consequently, any assertion of the Contracts being re-instated or terminated is incorrect, as they will only terminate once this determination takes place.

4.40 Had the Contractor not publicised information which was not wholly correct, and/or explained the situation to the potential buyer it is possible that this situation may have been avoided. Therefore, I do not consider any claims regarding this element to be viable.

4.41 Finally, I note the continued elements regarding the Contractor's inability to pay staff, rent or bills without its NHS payments. In this regard, I note that the NHS BSA's letters were very clear about the criteria which would result in 100% recovery from the Contractor. The Contractor did not respond to these letters. The financial recovery mechanisms are a contractual one which the Contractor agreed to. It did not deliver its UDAs and so the Commissioner was entitled to recover the amounts owed. Over the course of the 18 months, the Contractor had continued to be paid for work it was ostensibly not delivering. I do not

consider it unfair that, as a result of its own actions, and its lack of engagement at key stages, money was recovered from the Contractor.

4.42 Finally, I note that the Commissioner should have been aware of the Contractor's continued under-delivery of UDAs prior to the end of year letter in July 2024. As such it could have been in contact with the Contractor regarding this and had a mechanism for repayment agreed in advance. However, I do not consider that this was a requirement on the Commissioner or that this in anyway makes the termination invalid. I do not consider that allowing the accrual of a £344,554.45 outstanding amount was in the public interest. More should have been done to reduce this figure or expedite the sale to ensure that public money was protected.

4.43 In consequence of this, having regard to the facts of the matter, I consider that the financial recovery of the amounts in October 2024 and November 2024 was justified, permitted and not in breach of any promises made to the Contractor. Furthermore, based on the statements made by the Contractor regarding its financial state, the size of the outstanding amounts, and the lack of any evidence that a sale was likely, termination was justified due to the risk of material financial loss.

5 DECISION

5.1 I determine that both of the Termination Notices dated 1 November 2024 issued by the Commissioner were valid under both the relevant Contracts and Regulations, and as such, this application is found 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