

10 November 2022

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FILE REF: SHA/24710

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DECISION MAKING BODY: NHS ENGLAND (FORMERLY THE NHS COMMISSIONING BOARD) AND NHS MID AND SOUTH ESSEX INTEGRATED CARE BOARD (FORMERLY IN THIS MATTER THURROCK CLINICAL COMMISSIONING GROUP) (“THE COMMISSIONER”)

THE APPLICANT: DR VIKRAM BHAT AND MRS GEETHA BHAT (“THE APPLICANT”)

DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE (GENERAL MEDICAL SERVICES CONTRACT) REGULATIONS 2015

RE: TERMINATION OF GMS CONTRACT

OUTCOME

1. The Applicant’s solicitors have not set out details of the basis on which they “appeal all purported termination notices served by and on behalf of NHS England” nor have they provided details of which breaches they admit (if any) or which breaches have been remedied and are disputed by them (together with evidence of the same). I note that local dispute resolution has not been concluded in this regard and I determine that this must be entered into by the parties and concluded by no later than 22 December 2022. In the event that the parties are unable to reach a conclusion of the dispute in relation to the purported termination notices, which I determine are of the implied, fixed term contract, then the parties may, in relation to this issue only, make a further application to NHS Resolution for resolution of the dispute between them.

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1. INTRODUCTION

- 1.1 The above Applicant referred the dispute in relation to its General Medical Services Contract for dispute resolution under the provisions of paragraph 83 of the National Health Service (General Medical Services Contracts) Regulations 2015 (the "Regulations").
- 1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on his behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2. APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By email dated 25 April 2022 the Applicant applied to NHS Resolution, for dispute resolution.
- 2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute:
 - 2.2.1 email from the Applicant's solicitors dated 25 April 2022 together with enclosures;
 - 2.2.2 email from the Commissioner dated 4 May 2022;
 - 2.2.3 email from the Applicant's solicitors dated 4 May 2022 together with enclosure;
 - 2.2.4 email from the Applicant's solicitors dated 9 May 2022 together with enclosure;
 - 2.2.5 email from the Applicant's solicitors dated 11 May 2022 together with enclosure;
 - 2.2.6 email from the Applicant's solicitors dated 13 May 2022 together with enclosures;

- 2.2.7 email from the Applicant's solicitors dated 30 May 2022 together with enclosure;
- 2.2.8 email from the Applicant's solicitors dated 8 June 2022 together with enclosure;
- 2.2.9 email from the Commissioner's solicitors dated 15 July 2022 together with enclosure;
- 2.2.10 second email from the Commissioner's solicitors dated 15 July 2022 together with enclosures;
- 2.2.11 third email from the Commissioner's solicitors dated 15 July 2022 together with enclosures;
- 2.2.12 email from the Applicant's solicitors dated 15 July together with enclosure;
- 2.2.13 email from the Commissioner's solicitors dated 5 August 2022 together with enclosures;
- 2.2.14 email from the Applicant's solicitors dated 12 August 2022 together with enclosures;
- 2.2.15 email from the Commissioner's solicitors dated 20 September 2022 together with enclosure;
- 2.2.16 email from the Applicant's solicitors dated 21 September 2022 together with enclosure;
- 2.2.17 email from the Applicant's solicitors dated 30 September 2022 together with enclosure;
- 2.2.18 confirmation of typographical error from the Applicant's solicitors dated 23 September 2022; and
- 2.2.19 letter from the Applicant's solicitors dated 11 October 2022.

3. CONSIDERATION

- 3.1 I have been provided with a copy of a NHS England Standard General Medical Services Contract 2017/18. I note that this Contract states at clause 3.1 that "The Contractor has elected to be regarded as a health service body for the purposes of section 9 of the 2006 Act. Accordingly, this Contract is an NHS contract." I note that the Contract includes "NHS England Midlands and East" as one party and there are no names populated in respect of the Contractor. It is undated and unsigned.
- 3.2 I have also been provided with a "Variation To General Medical Services Contract" between the NHS Commissioning Board (the Board) and Dr P J Patel and Partners which is dated 2 July 2014 and effective from 1 September 2014. It is signed by the Contractors only. The "Description" within the Variation states that "This variation amends the General Medical Services Contract in accordance with clause 460 and 460.1. the removal of a General Medical Practitioner. Dr PJ Patel. The practice will be known from this date as the Sai Medical Practice. This requires an amendment to Schedule 1 Part 2 and Schedule 2."
- 3.3 I have been provided with a copy of a letter dated 31 May 2016 from (and signed by) Dr V Bhat, Dr N Jagadish and Smita Patel to NHS England stating "This is inform you that Mrs Geetha Bhat has joined us as a non-clinical partner".

- 3.4 I have been provided with a second “Variation To General Medical Services Contract” between the NHS Commissioning Board and Dr V Bhat, Dr N Jagadish, Mrs S Patel and Mrs G Bhat which is dated 21 June 2016 and effective from 1 July 2016. It is signed by the Contractors only. The “Description” within the Variation states that:

“Notice of Variation to your General Medical Services Contract dated 17th September 2012.

We give you notice under paragraph 104(2) of Schedule 6 to the National Health Service (General Medical Services Contracts) Regulations 2004 (S.I. 2004/291) that the terms of your general medical services contract dated 17th September 2012 are varied as set out below with effect from the 1st July 2016. This variation amends the General Medical Services Contract in accordance with clause 460 and clause 460.2, the addition of Mrs G Bhat joining as a non-clinical partner on 1st July 2016. This requires an amendment to Schedule 1 and Schedule 2.”

- 3.5 I have been provided with a third “Variation To General Medical Services Contract” between the NHS Commissioning Board and Mrs S Patel, Dr V Bhat, Dr G Bhat and Dr N Jagadish which is dated 17 January 2017 and effective from 31 March 2017. It is signed by each of the parties between 7 February and 6 April 2017. The “Description” within the Variation states that “We give you notice under paragraph 104(2) of Schedule 6 to the National Health Service (General Medical Services Contracts) Regulations 2004 (S.I. 2004/291) that this variation amends the terms of the General Medical Services Contract between Sai Medical Centre and the NHS Commissioning Board dated 17 September 2012 (varied 17 January 2017) to in accordance with clause 460.2 reflect the removal of Dr Nirupa Jagadish with effect from 31 March 2017.” The Variation states that “The names of the Contractors at the effective date of signature of this contract variation are Mrs S Patel; Dr V Bhat; Mrs G Bhat.” Whilst it is not entirely clear when this variation came into effect, I am confident that it was in force by no later than 6 April 2017 and that the parties relevant to this dispute are Mrs S Patel, Dr V Bhat and Mrs G Bhat (together “the Contractor”).

- 3.6 I have not been provided with a copy of the 2012 contract, nor have I been provided with a copy of a signed 2017 contract.

- 3.7 The Applicant’s application for NHS dispute resolution, through their solicitors, states that:

“We act for [the Applicant’s] in their dispute with the NHS Commissioning Board (aka NHS England) arising out of the purported termination of their Contract by operation of law on unidentified date (See attached letters)

Our clients dispute the validity of the Commissioner’s position on the purported termination and the basis relied for this position.

We ask that you treat this letter as a formal application for dispute resolution of the various positions expressed in the attached letters notwithstanding their lack of clarity.”

- 3.8 The Applicant’s solicitors have provided representations and they state that their submissions “respond to the various assertions by the Respondent NHS Commissioning Board (“the Board”) that the GMS Contract has terminated and in response to the various termination notices served by and on behalf of the Respondent purporting to terminate the GMS Contract entered into between the Applicants and Respondent on 17 September 2012 (“the GMS Contract).”

- 3.9 This is an application for NHS dispute resolution by the Applicant. I have been provided with representations by the Applicant’s solicitors who state that they “respond to the various assertions by the [Commissioner.]” This is not an application for NHS dispute resolution by the Commissioner to which the Applicant can provide its position and respond to the assertions set out by the Commissioner. The Applicant, represented by

solicitors should have been very clearly aware that it must clearly articulate the dispute that it has applied in order for it to be determined. In my letter requesting representations I clearly detailed what may be provided. It is not acceptable that NHS Resolution is merely “respectfully invited to resolve the disputes referred to it in favour of the Applicants.”

- 3.10 I have been provided with clear, referenced and paginated representations by the Commissioner’s solicitors. I have also been provided with observations on each of the parties representations by the other parties’ solicitors.
- 3.11 In their observations, the Applicant’s solicitors provide a list of “The immediate questions for the PCA in this dispute to determine are:
- (a) What are the relevant provisions of the GMS Contract and the contract Regulations regarding the termination of the GMS Contract generally
 - (b) Whether the dissolution of the partnership is a condition for termination of the contract
 - (c) The commissioner asserts that the contract was terminated by operation of the law, what law is relied on and is the alleged law a provision of the contract or contract Regulation.
 - (d) Whether the PCA is bound by the opinion of Soole J in the case of Jones v Commissioning Board [2017] EWHC 3457 (QB).
 - (e) Whether there is an “Implied Contract” as between the parties, how was the implied contract created and what are the terms of that implied Contract.
 - (f) Whether there is a fixed term contract as between the parties, how was the fixed term contract created and what are the terms of that fixed term contract
 - (g) If the original GMS Contract subsists, whether there are any breaches of the terms of the contract of such that can be relied on by the commissioner as the basis for serving a termination notice
 - (h) Whether a terminated Implied Contract can be extended unilateral by one contracting party.
 - (i) Whether Request for Information are fundamental terms of Contract or “innominate terms” that breaches of which go to the root of the Contract.”
- 3.12 I do not intend to respond to general questions and queries regarding the Contract.
- 3.13 The Applicant’s solicitors confirm that “The Partnership trading as SAI Medical Centre provides general medical services in the Tilbury area of Essex under the GMS Contract. At the date of the last variation, the Partnership had 3 members namely, Dr Vikram Bhat, Mrs Geetha Bhat and Mrs Smruti Patel and the GMS Contract was stated to be made with the Partnership as it is from time to time constituted and shall continue to subsist notwithstanding the retirement, death or expulsion of any one or more partners.”
- 3.14 By letter dated 8 November 2021, the Applicant’s solicitors served on Mrs Patel, a notice of the dissolution of the partnership at will which was formed on 1 April 2017.
- 3.15 It is clear that the Commissioner considers “the GMS Contract to have terminated by operation of law on dissolution of the partnership. An implied interim GMS contract is now in place, which was due to expire on 31 May 2022.”

- 3.16 The Applicant disputes the Commissioner's position and has provided various comments on this which I have considered in detail. I note the Applicant's solicitor's comments below:

"It is, of course, commonplace for the composition of a GP partnership to change over time, for example, through new partners joining, retirement or, as in the present case, as a result of dispute between the partners. It would be surprising, and highly inconvenient, if any change to the identity of GP partners automatically brought an end to the contractual arrangements between the relevant practice and NHSE, requiring NHSE to start afresh with a tender process for a new contract. Or indeed if any such change required the remaining members of the partnership to invoke Clause 26.3.1 – 26.3.2, in order to convert the contract to one with only one of them (and then, presumably, add the other partners to the contract using the mechanism in clause 26.2.

Sensibly, therefore, the legislation governing contracts with GPs makes specific provision for such contracts to continue notwithstanding a change in a partnership. Regulation 15 of the National Health Service (General Medical Services Contracts) Regulations (SI 2015/1862, "the Contracts Regulations") provides:

15. Contracts with individuals practising in partnership

Where a contract is with two or more individuals practising in partnership—

(a) the contract is to be treated as made with the partnership as it is from time to time constituted, and the contract must make specific provision to this effect; and

(b) the terms of the contract must require the contractor to ensure that any person who becomes a partner in the partnership after the contract has come into force is automatically bound by the contract whether by virtue of a partnership deed or otherwise.

The contract in the present case made the provision required by reg. 15. The named contractor is "a partnership under the name of Dr Patel and Partners carrying on business at the Sai Medical Centre and the contract goes on to state:

The Contract is made with the partnership as it is from time to time constituted and shall continue to subsist notwithstanding:

(1) the retirement, death or expulsion of any one or more partners; and/or

(2) the addition of any one or more partners."

- 3.17 I accept the Applicant's solicitors comment that "It is, of course, commonplace for the composition of a GP partnership to change over time, for example, through new partners joining, retirement or, as in the present case, as a result of dispute between the partners." I also accept their comment that "It would be surprising, and highly inconvenient, if any change to the identity of GP partners automatically brought an end to the contractual arrangements between the relevant practice and NHSE, requiring NHSE to start afresh with a tender process for a new contract" where there is agreement between the contractor parties that the new partner is to join the partnership, where there is agreement that a partner is to retire or that there is a dispute between the contractor parties and one (or more) of them is/has been expelled from the partnership in accordance with a partnership deed. Indeed, the Regulations and the Contracts provide that "The Contract is made with the partnership as it is from time to time constituted and shall continue to subsist notwithstanding: (1) the **retirement, death or expulsion** of any one or more partners; and/or (2) the **addition** of any one or more partners" (my emphasis). I accept that these determinations of the partnership may be "technical dissolution" as referenced by each of the parties to this dispute. This dispute does not relate to the retirement, death or addition of a partner. I note that the

partnership was a partnership at will. No majority of the partners can expel any partner in a partnership at will unless a power to do so has been conferred by express agreement between the partners. I have not been highlighted to and/or provided with evidence that such an express power exists in relation to the partnership relevant to this dispute.

- 3.18 I do not accept the Applicant's solicitors position that the Contract continues with Dr Bhat and Mrs Bhat following the dissolution and termination of the partnership between Dr Bhat, Mrs Bhat and Mrs Patel. Whilst I accept that the partnership had continued previously, where partners had retired from or been added to the partnership, this position is distinct from those previous circumstances. This is made clear by the absence of a Variation (or simple signed notification from the contractor parties to the Commissioner), clearly establishing the agreement of Mrs Patel to retire from the partnership. I accept that a retirement from a partnership at will, will determine the partnership and would result in a new partnership between the new partners, a technical dissolution. There is instead a Notice of Dissolution of Partnership which states that the Applicants give Mrs Patel "notice and affirmation of the Dissolution and Termination of our Partnership At Will trading as SAI Medical Centre..."
- 3.19 The Applicant's solicitors state in their letter dated 21 September 2022 that "Yes, you are correct that there were three Partners and contractors to the GMS Contract prior to the dissolution of the Partnership. In or about February 2019 and prior to the service of the dissolution of the Partnership, the third Partner, Mrs Smruti Patel abandoned the partnership and stopped attending to the business of the partnership. In the circumstance, our clients were entitled to conclude that Mrs Patel's conduct amounted to **[un]willingness** (my emphasis) to continue in the partnership. Furthermore, the notice of dissolution was served on her Solicitors, and she did not challenge the dissolution. Our position is that her failure to challenge the dissolution notice amount to an implied consent for the business of the partnership to continue without her participation." The Applicant's solicitors have confirmed that there was a typographical error in the letter and that "willingness" should have stated "unwillingness" as emphasised by me above.
- 3.20 The Applicant's solicitors have not made it clear to me how they assert that an abandonment or unwillingness to continue in the partnership would determine the partnership without a dissolution of the partnership at will. I have not been highlighted to or provided with any evidence that Mrs Patel sought to determine the partnership by retirement from the partnership at will. My attention has not been drawn to partnership law which permits the expulsion of a partner in these circumstances.
- 3.21 As the Applicant's solicitors have highlighted "it is commonplace for the composition of a GP partnership to change over time, for example, through new partners joining, retirement or, as in the present case, as a result of dispute between the partners." I am aware that partnership disputes will occur between partners and these are private matters for the partners themselves to resolve. These are not matters which will be referred for NHS dispute resolution as they are inter-Contractor disputes. These disputes may result in dissolution of the partnership (I particularly note again the position on no majority being able to expel a partner in a partnership at will) and it may also be commonplace that a number of previous partners consider that they should be able to continue the Contract with NHS England. There is no provision for "splitting" a primary medical services contract in these situations, for example, where a partnership is dissolved and each of the previous partners wishes to be awarded a new Contract by the Commissioner. Instead, there is a provision at Clause 26.3.1 of the Contract which provides that:

"Subject to clause 26.3.3, where the Contractor consists of two or more persons practising in partnership, and that partnership is terminated or dissolved, the Contract may only continue with one of the former partners if that partner is:

- (a) nominated in accordance with clause 26.3.2; and

(b) a medical practitioner who satisfies the condition in regulation 5(1)(a) of the Regulations,

and only if the requirements in clause 26.3.2 are met.”

- 3.22 There are also provisions on dissolution because one of the partners has died.
- 3.23 Clause 26.3.1 provides for the partners to agree that the Contract may continue with one of the former partners, subject to the conditions set out. This ensures that, where there is a dissolution of the partnership, the Contract may continue. This is an entirely sensible provision which creates certainty for the contractor parties on the position that must be adopted before they seek to dissolve and terminate a partnership, as is the case in this dispute. This also ensures that the Commissioner has been provided with a clear position document as to who all of the contractor parties intend the Contract to continue with. Absent such a provision, the Commissioner may be left with contractor parties in dispute over who is to continue to provide the services which cannot be right and places the delivery of medical services at risk.
- 3.24 I am not satisfied that there may be an implied nomination of the Contract to continue with one of the Partners. The notice must be signed by each of the partners and given prior to the dissolution of the partnership. This has not occurred in this dispute.
- 3.25 As set out by the Commissioner’s solicitors, I accept the position that the GMS Contract has “terminated by operation of law on the dissolution of the partnership.” I accept that “The scenario in this case is different in nature to a technical dissolution. It is not the case that a partner has joined or retired by consent, for example in accordance with the terms of a functioning partnership agreement. Mrs Patel has effectively been expelled from the Partnership by the process of a dissolution (as acknowledged by the Applicants), and this amounts to a general dissolution. In these circumstances, the Contract provides that it may only continue if one GP partner is nominated by all partners in writing. There is no inconsistency with the Regulations. Indeed, there are understandable justifications for this, for example, a Commissioner should be fully informed of the identity of the contractor, in the well regulated field of provision of primary medical services to patients, and to avoid an intra-partnership dispute creating uncertainty and having the potential to prejudice the delivery of services to patients.”
- 3.26 I am satisfied that the Contract may subsist until it is terminated in accordance with its terms or by the operation of law. The termination arises from s32(c) of the Partnership Act 1980. As there is no longer a partnership (the Contract is to be treated as made with the partnership in accordance with Regulation 15 of the Regulations), the Commissioner cannot hold the contract with the entity which does not exist.
- 3.27 It is of note that the Commissioner sets out its view on this point to the Applicant prior to the dissolution occurring. The Applicant was therefore on notice of the Commissioner’s position.
- 3.28 Whilst I have noted the comments of the parties in relation to the opinion of Soole J in the case of Jones v Commissioning Board [2017] EWHC 3457 (QB) I am not satisfied that the comments referred to are binding in relation to this application for NHS dispute resolution. I note that the decision was in relation to an injunction and Soole J would not have heard a full argument on these facts.
- 3.29 The Applicant’s solicitors have provided me with a copy of their letter serving the notice of dissolution of the partnership at will which was formed on 1 April 2017. This letter is dated 8 November 2021. The notice however states that:
- “This dissolution took effect on 07 August 2019, the date in which you brought the claim for possession of the property at [address provided] contrary to your duty of good faith, and in blatant denial that the practice has an existing Lease of the premises, which enjoyed security of tenure pursuant to the Landlord and Tenant Act 1954.

In addition to being in breach of your duty of good faith, you have also by your conduct abandoned the partnership and acted in ways which makes it clear that you no longer wish to continue to be a member of the partnership. Accordingly, we have affirmed and accepted your conduct as indicated.

In the alternative, and for the same reasons as above, we serve this notice of dissolution which is effective immediately on the date inscribed below being 05 November 2021”

- 3.30 I note the Applicant’s solicitors comment that “Mrs Patel stopped attending the surgery from about mid-2019 and instructed her solicitors to issue proceedings to recover the entire surgery premises on the basis that the practice was owing rent... It is respectfully submitted that such conduct is not consistent with intention to continue in the partnership.”
- 3.31 I also note the Applicant’s solicitors comment that “It is submitted that the Applicants are entitled to treat Mrs Patel’s voluntary departure from the partnership without notice as constituting a repudiatory breach capable of dissolving the partnership as such conduct conveys the intention not to continue to be bound by the rules of the partnership.”
- 3.32 The Applicant’s solicitors go on to state that “It is also notable that when a notice of dissolution was served on Mrs Patel, she did not bring any claim in the High Court challenging the dissolution or seeking an alternative remedy. Furthermore, Mrs Patel received all correspondence from the Commissioners and did not challenge the purported dissolution of the partnership by the Applicants. The Applicants submit that the silence by Mrs Patel and her failure to challenge the dissolution notice or respond to the Commissioner’s correspondences amount to her consent for the contract to continue with the Applicants should and if her consent is required. In the circumstance that Mrs Patel had not objected in any way to the contract continuing with the Applicants, it would be wrong for the commissioner to assume that she did not consent to the contract continuing with the Applicants.”
- 3.33 I note that there is a dispute between the Contractor parties as regards the property arrangements and that there has been Court involvement in these matters. I shall not comment further in this regard.
- 3.34 The Applicant’s solicitors have not persuaded me that the dissolution of the partnership took effect on 7 August 2019. It is also unclear how the dissolution could have occurred on 5 November 2021, prior to the service of the notice of dissolution. I note that section 32(c) of the Partnership Act 1890 permits “Subject to any agreement between the partners, a partnership is dissolved – (c) if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.” I would, on this basis, expect the notice to have effect from no earlier than the date that it was served on Mrs Patel.
- 3.35 I am satisfied that an implied contract has been in place since the dissolution and termination of the partnership and the termination of the Contract. The implied contract is a fixed term GMS Contract to 31 March 2022, as the Commissioner indicated in their letter dated 13 December 2021 and which states:

“For the avoidance of any doubt, should the partnership have dissolved and the GMS Contract have terminated, any continued delivery of services at the practices and/or any payment made by the commissioner shall not constitute agreement to the GMS Contract continuing or waive any of its rights. If the GMS Contract has terminated and/or to the extent that any implied or other GMS Contract may arise or have arisen it shall be on the basis of a fixed term GMS Contract (following termination of a contract) to 31 March 2022. All payments made by the commissioner in relation to services provided at the practices shall be strictly subject to this condition.”

- 3.36 It is evident that the Applicant has continued to provide services following 31 March 2022 and on 25 April 2022 they applied for NHS dispute resolution. By email and letter dated 9 May 2022, the Applicant confirmed that they also wished the termination notice dated 14 April 2022 to be included in the application for NHS dispute resolution.
- 3.37 It is clear that the Commissioner has sought to terminate the arrangements between the parties and has taken steps to ensure that the notices cover the two alternatives of the Contract or the implied contract being in force at the point of service of the termination notice.
- 3.38 I note the Commissioner's comment that "The Applicants have said in their referral to PCA that they dispute termination of the Contract for the reasons set out in correspondence. While the Applicant has disputed that the Contract terminated on dissolution of the partnership, it has not disputed the breaches set out in the notices in correspondence with the Commissioner, its solicitors or in its referral to dispute resolution. If the Applicants seek to dispute these breaches in their submissions in this appeal, the Commissioner will respond."
- 3.39 The Applicant's solicitors have not set out details of the basis on which they "appeal all purported termination notices served by and on behalf of NHS England" nor have they provided details of which breaches they admit (if any) or which breaches have been remedied and are disputed by them (together with evidence of the same). I note that local dispute resolution has not been concluded in this regard and I determine that this must be entered into by the parties and concluded by no later than 22 December 2022. In the event that the parties are unable to reach a conclusion of the dispute in relation to the purported termination notices, which I determine are of the implied, fixed term contract, then the parties may, in relation to this issue only, make a further application to NHS Resolution for resolution of the dispute between them.

**Head of Appeals
NHS Resolution**