Neutral Citation Number: [2023] EWHC 958 (KB)

Case No: QB-2022-001183

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2023

Before:

MASTER STEVENS

- -

Between:

Dr Angelica Khera (trading as the Family Dental Practice)	**Claimant**
- and -	
National Health Service Commissioning Board (also known as NHS England)	**Defendant**

- -
- -

Simon Butler (instructed by **Dr Angelica Khera**) for the **Claimant**
Carl Harrison (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing date :30th November 2022

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Approved Judgment

This judgment was handed down remotely at 10.00am on 26th April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER STEVENS

Master Stevens:

INTRODUCTION

1. This matter came before me to determine whether the court has jurisdiction to try the claim, and if not, to set aside the Claim Form. The claimant is a supplier of primary dental services in South Norwood, London trading under the name of the Family Dental Practice ("FDP"), and the defendant is the public commissioning board for such services. A dispute has arisen as to the correct level of remuneration to which the claimant was entitled under various contractual arrangements with the defendant.

2. Whilst not material to my decision I consider it helpful to understand the background to the problems which appear to have arisen as a result of the claimant entering an NHS England pilot scheme to trial a new way of delivering dentistry whereby each patient visiting the practice was required to undertake an oral health assessment. The claimant asserts that this process more or less doubled check-up times causing longer waiting lists and many patients elected to find other dentists in the locality. Upon exiting the pilot, the practice has encountered difficulty in rebuilding patient lists to their pre-pilot level, resulting in a fall in turnover against annual targets set, and prepaid by, the commissioning body. The claimant expresses a sense of injustice that she was assured she would not be disadvantaged by agreeing to participate in the pilot. The defendant maintains that it allowed a sufficient period of grace for the practice to rebuild before seeking any clawback, having waived any claim for two years after the pilot exit, and that it has a duty to the public purse not to forego recoupment indefinitely.

3. In September 2020 the defendant provided the claimant with two options regarding alleged contract breaches for non-performance in financial years ending 31st March for 2018/19 and 2019/2020; the recovery now being sought in respect thereof amounts to £807,857.97 plus interest. The claimant asserts that the reasons for non-performance (inability to secure sufficient patients to complete post-pilot contracted units of dental activity) were beyond her control, and furthermore, the retrospective nature of the request for clawback of monies paid means that she has acted to her detriment by continuing with the commissioning contract and incurring and discharging significant practice overheads. She maintains that she cannot afford to repay the sums sought, even if they are claimed validly, which is also contested.

4. The nub of the issue for me determine is whether this dispute can properly be resolved through court process or whether it should be conducted through the Primary Care Appeals Service ("PCA") to whom a referral has already been made by the defendant although that post-dated the issue (but not service) of these proceedings. The hearing bundle comprised over 1000 pages (not all numbered) including numerous authorities. Accordingly, judgment was reserved.

THE APPLICATION

5. The application has been made by the defendant under CPR 11(1) (a) for a declaration that the court does not have jurisdiction to try the claim, such that the claim form should be set aside pursuant to CPR 11(6) (a). In the alternative, the defendant seeks under CPR 11(1)(b) a declaration that the court should not exercise any jurisdiction

which it may have to try the claim and an order staying proceedings pursuant to CPR 11 (6) (d).

THE ISSUES

6. The parties had different lines of reasoning as to how I should resolve the question of jurisdiction. According to the defendant it was central to the dispute is the question as to whether or not the General Dental Services ("GDS") contract to which the parties were signatories, was an NHS or non-NHS contract at the time these proceedings were issued, whilst the claimant maintained that whilst the contract is still labelled as an NHS one it should not be as that position was waived by the defendant's conduct in earlier and unrelated proceedings between the parties. I considered that to resolve the matter requires an understanding of:

    a) The way in which a contract is designated an NHS or non-NHS one and the essential difference between the two types of contracts as it impacts choice of dispute resolution mechanisms.

    b) Whether the parties' prior participation in unrelated court proceedings in 2017 is relevant as to the status of the contract then as a non-NHS or an NHS one.

    c) Whether subsequent to judgment in the 2017 proceedings there have been any circumstances to alter the NHS/non-NHS status of the contract despite the GDS contract clauses prohibiting non-written variations or any form of waiver for reasons of contract, statute and public policy.

    d) There is what I believe to be a side-issue about whether some correspondence dated 19.11.22 between the parties, relating to this dispute, and which the defendant asserts was sent on a without prejudice basis to try and resolve matters, should be disclosed to me. That material has been redacted in the copy before me, and the question is whether it should be unredacted as it is said by the claimant to be relevant to the dispute. I said at the outset of the hearing I would hope to determine the central issues without reference to that material.

    e) Finally, if I decide the Court does have jurisdiction then I was invited not to exercise it and instead to stay the proceedings; but this point was conceded in oral submissions for the claimant.

7. Before examining the issues, I will summarise the chronology.

CHRONOLOGY

1 April 2006	FDP signs GDS and opted to be a health service body

27 April 2011	Contract variation such that the claimant became the sole provider in place of the previous partnership arrangement for FDP
1 August 2011	Dental Pilot Contract entered between the parties (underlying GDS contract remains in force)
7 May 2015	Meeting of parties concerning underperformance during the pilot and agreement not to seek any clawback of monies for financial years ending March 2016 and March 2017.
31 August 2015	Dental Pilot exit
28 June 2017	Claimant and others commence High Court proceedings against the defendant in respect of intermediate minor oral surgery services ("the IMOS proceedings")
10 August 2017	Defence filed in the IMOS proceedings without raising a jurisdiction challenge
7 December 2018	Judgment handed down in the IMOS proceedings
16 July 2019	Appeal judgment handed down in the IMOS proceedings
7 February 2020	Parties meet to discuss underperformance 2017/18 and 2018/19 (NB it is accepted that following the departure of the defendant's representative from NHS England in 2018 there were no more local discussions around non-performance for these years prior to this meeting)

16 September 2020	Defendant sent the claimant a letter outlining options concerning the dispute and stating if neither are acceptable the matter can be referred to the NHS Litigation Authority
4 October 2020	Claimant's legal representative's letter to Defendant asserts the GDS contract is a non-NHS contract and therefore the claimant cannot be forced to progress dispute resolution through the PCA and that she chooses court proceedings if no other resolution is possible
23 November 2020	Defendant's legal representative acknowledges letter of 4.10.20
4 December 2020	Second Breach Notice issued by defendant also stating if the dispute cannot be resolved it can be referred to the NHS dispute resolution procedure
15 December 2020	Claimant's legal representative's letter to Defendant's legal representative expressing concern as to whether defendant will terminate the GDS contract and/or withhold or deduct monies otherwise payable – noting the pressure on the practice already from Covid and seeking reassurances failing which injunctive court proceedings would be commenced
16 December 2020	Reply to letter of 15.12.20 – states "it is quite remarkable that your client is the one referring to the potential need for legal proceedings, and we are intrigued as to what your client's cause of action might be". (Page 207 of bundle) Second letter of the same date asserts that no interim injunctive relief is required and there is no legitimate basis to seek it, but that if the claimant persists with such a course they are instructed to deal and accept service. Also notes that they are prepared to mediate.
4 April 2022	Email from defendant to claimant referencing letter of 4.10.20 and considering next steps- requests basis of assertion that GDS contract was a non-NHS one. An undated (? 8.4.22) reply from the claimant states that the contract status was waived by the defendant's conduct in the earlier court proceedings between the parties and that the GDS non-waiver clause is unenforceable in respect of the doctrine of election so court proceedings will be required if the dispute cannot be resolved

8 April 2022	Proceedings issued protectively-it appears from the papers before me that the defendant was unaware prior to service
14 June 2022	Head of Primary Care Commissioning email to Claimant -without prejudice protection asserted by defendant over the contents which the claimant challenges
22 July 2022	Defendant refers dispute to PCA
26 July 2022	Claim served
28 July 2022 (labelled as October in error)	Claimant's legal representative's letter to defendant asserting belief of the claimant that the GDS was an NHS contract (by way of correction of previous letter of 4 October 2020) but asserting the status was waived by prior court proceedings between the parties concerning the same contract
19 August 2022	Defendant's legal representative's letter to NHSR stating as there has been no written variation of the GDS contract it remains an NHS contract
8 September 2022	Claimant requests defendant to vary contract into a non-NHS one (asserted by her to be a corrective step only in respect of prior failures by the defendant to amend)
13 October 2022	PCA letter accepting jurisdiction but noting as the claimant's letter to them was outside the requisite time limit, they have not taken their representations into account (page 271 of the bundle). They also note representations from the defendant that "the Court is likely to consider whether our client has waived the status of the GDS Contract as a NHS Contract" so a decision taken to place the NHS dispute resolution process is put on hold for 3 months
17 October 2022	Defendant challenges the reason for the variation request of 8 September – no further correspondence between the parties on the issue thereafter

THE NATURE OF THE CONTRACT BETWEEN THE PARTIES

(i) GENERAL DENTAL SERVICES CONTRACT

8. The key provisions in the written contract between the parties are not in contention, namely:

i) At Clause 14, it is stipulated, "The Contractor has elected to be regarded as a health service body for the purposes of section 4 of the 1990 Act. Accordingly **this Contract is an NHS Contract** (my emphasis added)".

ii) Clause 200 allows a deemed variation to contract if the Contractor sub-contracts some clinical services, to allow the sub-contractor to be added to the list of Contractor's premises, such that clause 287 does not apply.

iii) Clause 280 allows any dispute in respect of a non-NHS contract to be referred to the PCA if the contractor agrees to this i.e., this is optional.

iv) Clause 282 specifies that **the NHS dispute resolution procedure applies in the case of any dispute arising out of or in connection with the Contract** (my emphasis added) i.e., where the contract is an NHS one this is mandatory**.**

v) Part 22 contains provisions relating to variation and termination of contract and includes clauses 287- 362.

vi) Clause 287 provides that the contract remains an NHS one unless and until there is a variation in writing signed by both parties as also set out in The National Health Service (General Dental Services) Regulations 2005 ("GDS Regs 2005") at Schedule 3, paragraph 60.

vii) Clause 366 provides that "Subject to clause 200 and any variation made in accordance with Part 22, this Contract constitutes the entire agreement between the parties with respect to the subject matter".

viii) Clause 368 provides, "This Contract shall be governed by and construed in accordance with English law".

ix) Clause 369 provides that any proceedings to enforce the contract are the exclusive jurisdiction of the courts of England and Wales

x) Clause 371 provides that any failure to enforce any contract term "shall not operate as a waiver of them".

THE NATURE OF THE CONTRACT BETWEEN THE PARTIES

(ii) OTHER RELEVANT REGULATIONS AND STATUTES

9. Once again, the relevant GDS Regulations 2005 are not in contention, namely:

i) Regulation 9 (2) which provides that any changes in the individual partners comprising the practice which is the contracting body under the GDS contract, or the status of the contractor from that of a partnership to that of an individual dental practitioner the contractor will still be regarded as a health service body rather than a non-NHS contractor, unless there is written agreement signed by both parties to change the status (which has not occurred in this case).

ii) Regulation 9 (4) provides: "A contractor may at any time request the variation of the contract to include or remove provision from the contract that the contract is an NHS contract, and if he does so- (a) the Primary Care Trust shall agree to the variation; and (b) the procedure in paragraph 60 (1) of Schedule 3 shall apply (variation of a contract general)"

iii) Regulation 9 (5) provides; "Where pursuant to paragraph 9 (4), the Primary Care Trust agrees to a variation of the contract, the contractor shall- (a) be regarded, or subject to paragraph (7), cease to be regarded, as a health service body for the purpose of section 4 of the 1990 Act from the date that variation takes effect pursuant to paragraph 60 (1) of Schedule 3".

10. Furthermore, section 9 (5) of the National Health Service Act 2006 stipulates "Whether or not an arrangement which constitutes an NHS Contract would apart from this subsection be a contract in law, it must not be regarded for any purpose as giving rise to contractual rights or liabilities".

GENERAL SUBMISSIONS BY THE PARTIES REGARDING THEIR UNDERSTANDING OF THEIR CONTRACTUAL STATUS

Defendant's submissions

11. Many of the defendant's arguments majored on the express contractual terms which I have recited at paragraph 8 above, stipulating that an NHS contract had been entered into with the claimant's dental practice which had not been varied in writing as required by the contract, should the claimant have wished to proceed on a non-NHS basis after she took over the practice. The upshot of the failure to secure a written variation, they submitted, was that the contract remains an NHS one, and as such, disputes must be referred to the PCA for resolution, not the court. As the claimant, during later oral submissions, indicated that the express terms and written status of the contract are not disputed I will not elaborate further on those points advanced by the defendant. The claimant did not pursue in submissions, nor had she provided any substantive evidence, to support her earlier assertion in a witness statement prepared in connection with this application and dated 19th November 2022, that she had never elected personally to operate under an NHS contract and that there was a mutual understanding between the parties to that effect.

12. The remainder of the defendant's submissions addressed the only point, albeit a multi-faceted one, which the claimant maintained to try to defeat the assertion that the contract remains an NHS one. In summary form the claimant's submissions were directed to proving that, since June 2017, when she and others commenced separate court proceedings between the parties, allegedly seeking declarations under the same

GDS contract, and without jurisdictional challenge, the defendant had elected to waive the jurisdiction clause and should have issued a written variation to reflect that the contract was no longer an NHS one. The claimant went further to submit that it was not fatal that there had been no written variation because there had been a valid waiver. There were also consequential submissions concerning estoppel, res judicata and abuse of process, as the claimant asserted that the correct status of the GDS contract between the parties had already been established in 2017, but I will return to those later.

13. The defendant maintained that the prior court proceedings were in respect of a wholly unrelated matter and that the issue in that case revolved around what had been agreed between the parties in respect of providing additional oral surgery (IMOS) services; they said that the court was not asked to consider the status of the GDS contract.

14. Finally, the defendant argued that only one dentist's GDS contract was reviewed in the IMOS litigation, that of Dr Vasant, so any conclusions reached would not impact Dr Khera in any event, even though she was a party to the same proceedings.

Claimant's submissions

15. Mr Butler for the claimant, and junior counsel in the IMOS proceedings, submitted in addition to the matters in paragraph 12 above, that in considering the prior litigation I should reflect on any decisions made by the relevant judges if they were a "necessary step" to the decision or a matter "which it was necessary to decide, and which was actually decided, as the groundwork to the decision", as per Lord Wilberforce in *Carl Zeiss Stifung v Rayner and Keeler Limited* (No 2) [1967] 1 AC 853.

16. He further submitted that I needed not only to study the prior judgments but also the pleadings and evidence and other material available to determine what issues were decided. He said that I needed to satisfy myself that the defendant had fair opportunity, or should have raised the jurisdictional issue, to be satisfied it was appropriate to hold that against them now. He made express reference to the Reply to Defence in the prior proceedings whereby the claimant asserted, "that the court has jurisdiction to make a declaration as to the existence of facts and the contractual rights of the Claimants". He said it was common to the parties, and by the defendant's pleadings and conduct in seeking directions leading to trial, that the defendant acknowledged that the GDS contract was a non-NHS contract. I was not taken directly to any specific finding of the trial or appellate judge in the skeleton argument, but I was directed orally to consider paragraphs 1, 8,10, 17,50 and 77, of the judgment of Murray J in particular.

PREVIOUS COURT PROCEEDINGS BETWEEN THE PARTIES - ARE THEY RELEVANT TO THE CONTRACTUAL STATUS AT THAT TIME

What were the central issues in the first instance decision?

17. In *(1) Vasant (2) Khera (3) Kalsi v NHS Commissioning Board [2018] EWHC 3002(QB),* ("Vasant"), the case was pleaded on the basis that the claimants were entitled to enforce provisions in their GDS contracts relating to IMOS services and payments, such that it was not possible for such IMOS arrangements to be terminated

by the defendant under the original IMOS contract, but only by a consensual variation in writing as required by the GDS contract.

18. The defendant maintained at paragraph 6(3) of its Amended Defence that the claimants had not provided the IMOS services under a GDS contract. At paragraph 18 they asserted, "The termination of the IMOS contracts by the giving of notice in the Defendant's letter dated 21 December 2016 was in accordance with the provisions of the IMOS contract, which governed the provision of IMOS services. It is denied that the Defendant was and is estopped from terminating the IMOS services contract and/or IMOS services."

19. In the Reply to Defence, responding to paragraph 3 of the Defence where it had been asserted that the claim should be struck out as disclosing no reasonable cause of action, the claimants maintained that they were entitled to "a declaration as to the existence of facts and the contractual rights of the Claimants". They contended at paragraph 6 that the IMOS services were being provided under the GDS contracts. At paragraph 23 it was asserted that "the Defendant is not entitled to vary the GDS Contracts without the consent of the Claimants" and at paragraph 24, clause 287 of the GDS contract was recited to the effect that no variation to contract could be effective unless in writing and signed by both parties.

20. Mr Justice Murray identified the main issue that he was required to determine at paragraph 7, "The issue in this case is what contractual arrangements apply to intermediate minor oral surgery ("IMOS" services, such as tooth extraction, provided by the claimants to the defendant"). It was common ground that all the claimant dental practitioners also held a GDS contract "on identical terms", to provide dental services as set out at paragraphs 4 and 5. At [8] Murray J stated, "Broadly and informally speaking, if I find that IMOS services are provided under the GDS Contract, the claimants win."

Factual background

21. In a similar way to the dental pilot scheme, which is part of the factual matrix in the dispute before me, the dispute surrounding the IMOS services had its origins in a commissioning experiment to improve dental services delivery; in the case of IMOS, the objective was to move patient care from a local hospital into the community to reduce hospital waiting times and cost. It was another pilot scheme, initially for 3 months in around March 2007, and then after a tendering process in around November 2007 for a 12-month period.

22. Contract documents were executed for each pilot and the services continued well beyond the 12-month fixed term. The latter contract had termination clauses, but the claimants asserted that following a 2009 variation, the GDS contract termination provisions applied. In the later dispute the defendant maintained the variation had been ineffective. The commissioning body had written to the claimant and the other providers on 7 April 2009 to say "You will shortly be receiving two copies of a GDS contract variation form ..this seems a far more sensible approach to me that [sic] re-signing the present IMOS contract. All governance arrangements now fall under the GDS contractual arrangements, rather than a contract that was originally intended for the PCT's dermatology service!".

23. In 2016, following changes to the commissioning body and a review of dental provision in south London, it was considered that the original procurement exercise for IMOS services had resulted in "fractured legal frameworks" which would be an obstacle to future commissioning activity and at [31] NHS England reached the conclusion that it was "highly unusual for IMOS services to fall within a GDS contract and, …. was not consistent with how these services should be procured".

24. At [32] the NHS England representative wrote to the providers stating "As part of the preparation for the procurement, a programme of decommissioning of contracts with legacy arrangements has been undertaken. NHS England (London Region) will cease to commission the current IMOS service currently provided under the auspices of your GDS contract. The vehicle for enacting this change will be by means of a contract variation.". New arrangements meant that IMOS services contracts would not be granted in perpetuity but instead just for a fixed term. The providers declined to sign off the changes, relying on variation provisions in the GDS contract and GDS Regulations whereby any variation must be agreed by all. They cited investment and recruitment costs already incurred to properly provide the IMOS services, in reliance upon the earlier contractual arrangements, as some of the practical reasons for not agreeing to the variation.

25. Part of the evidence put forward by the commissioning body stated, at [37], "the contractual mechanism by which you presently provide IMOS services is captured by a combination of your General Dental Services ("GDS") contract and a separate agreement. In order to enable you to provide IMOS services, your GDS contract has previously been varied at clause 168…Whilst we acknowledge that we cannot vary clause 168 of your GDS contract without your agreement, we can vary the terms on which the IMOS service is delivered…in accordance with the IMOS Contract we attach a termination notice".

26. In response to the termination notices the providers commenced litigation on 28 June 2017 but only 3 of the IMOS service providers were parties, the 4th one believing he was obliged to resolve any dispute by making a referral to the NHS Litigation Authority. One unusual feature of the litigation was that the commissioning officer at the time the IMOS contracts were negotiated in 2007-2009 appeared as a witness for the claimants and stated, at [50] "it was agreed with the Providers that the IMOS services should be provided permanently under the governance of the GDS contracts."

27. The defendant placed reliance upon the so-called "entire agreement" clause in the GDS contract, at clause 366, and clause 287, the so-called "no oral modification" clause to maintain that the variation agreement had been "wholly inadequate" to bring the IMOS services within the GDS contract, and therefore make them incapable of termination save with agreement of the providers. Part of their submissions related to the ongoing compliance of the providers in respect of the operative terms of the IMOS contract, for example, as regards payments against invoices submitted monthly which is contrary to usual GDS contract processes. Another submission related to uncertainty of the variation such that it was insufficiently clear to be operative.

The first instance decision

28. At [53] to [56] Murray J reviewed the GDS contract and noted that the main differences with the IMOS contract were that the latter specified accounting, reporting

and referral arrangements for the additional services. At [64 viii)] he noted that dispute resolution mechanics were provided for at clauses 279-286 of the GDS contract without making comment upon that. No separate dispute resolution clauses were noted from the IMOS contract in the judgment but there was no consideration whatsoever as to whether the court was in fact correctly seized of jurisdiction to determine the dispute.

29. Murray J held at [89] that the variation agreement did comply with clause 287 of the GDS contract and was effective i.e., it was signed by the parties and the terms were written. He further held at [90] that following the variation the parties' conduct had been "business as usual" for payment, invoicing, triage and referrals but in "all other respects of [sic] the arrangement would be governed by the GDS contract". He noted at [95] that the defendant had not identified any contractual conflict which might have led him to a different conclusion.

My determination as to whether the 2017 proceedings were relevant to the NHS/non-NHS status of the contract and therefore whether the court has jurisdiction over the current dispute between the parties.

30. My overwhelming impression from reading the judgment and the pleadings is that these prior proceedings did not set out to examine, nor did they conclude whether the claimants' GDS contracts were NHS contracts such that they should never have been litigated before the court. There was an examination of the GDS contracts but not clause 14, the NHS/non-NHS status clause. I also conclude that the lack of any jurisdiction challenge by the defendant at that time is not determinative of the application before me, in the way contended for by the claimant. I will now set out my reasons for reaching that view.

No examination of NHS/non-NHS status of the GDS contract

31. I set out at paragraph 6 above that a GDS contract can be an NHS or non-NHS one and the impact of that on the correct choice of dispute resolution forum. At paragraph 8 (i) I referenced from my bundle, clause 14 of the standard GDS contract where the NHS/non-NHS status of the contract is recorded in the claimant's contract. Murray J's judgment did not examine the claimant's contract and did not record what clause 14 said in the contract which he did examine. I am aware that clause 14 in the claimant's GDS contract states it is an NHS contract but there were no recorded submissions before Murray J on that clause for any provider. There was also no discussion, in Murray J's judgment about the claimants' assertion in their Reply to Defence that they were entitled to a declaration concerning their contractual rights, in terms of whether they had any such rights as a matter of public law and policy. Whilst I was taken to case law by the defendant, *Pitalia and another v The National Health Service Commissioning Board* [2014] EWCA Civ 474, where the Court of Appeal emphasised that an NHS contract must not be regarded as giving rise to enforceable contractual rights "for any purpose", there was simply no reference to this principle in Murray J's judgment. I therefore cannot conclude he made any findings on the point. Whilst the claimant maintained that the fact of the GDS contract (irrespective of its NHS/non-NHS status) and an alleged breach of it formed part of the subject matter of the judgment, and that it was a "necessary step" in the judge's decision-making that does

not persuade me as the claimant would have wished on the point of res judicata, estoppel and/or abuse of process. Counsel for the claimant had also drawn my attention to case law setting out that an admission (i.e. to the jurisdiction) can have the same effect as if the issue was decided by the court under the principle of res judicata (in *Baxendale Walker v APL Management Ltd* [2018] EWHC 543 (Ch)), but I also do not believe that assists the claimant here for reasons I will expand upon later in my judgment at paragraphs 33/34 and 39(iii) .

32. There was a reference at paragraph 44 of the judgment to a fourth provider who had joined with the three claimants in issuing a letter before action but thereafter "took the view that he was obliged to resolve any dispute with NHS England by making a referral to the NHS Litigation Authority" but there was no judicial consideration of that aspect, nor any recorded submissions in the judgment. It is unknown whether his GDS contract was identical to the other three providers in respect of clause 14. The termination notices were said to be in identical terms to each provider, but they were said to be issued under the IMOS contract. It is recorded at [43] that the defendant had referenced the right of the providers to invoke the NHS dispute resolution process within 28 days, but I am aware that of itself is inconclusive. Under a non-NHS GDS contract there is indeed an option under clause 280 to refer disputes to the NHS disputes resolution procedure-it is just not mandated as with an NHS contract. The defendant's mention of the possibility of a referral suggests to me that either the defendant did not believe they were bound to refer the dispute themselves (the position under a non-NHS contract), or they were not wishing to do so at that point, which could be the case in an NHS or non-NHS contract as plainly they were hoping for resolution. I note the reference to 28 days does not appear in the GDS contract at all, only a reference to a referral within 3 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" as at clause 284. It is possible the 28-day reference was simply to mirror the length of the notice period purportedly given under the IMOS contract. The defendant's whole Defence was built around an assumption that it was the IMOS contract which they were operating under. I consider that to be the most likely explanation for the mention of a 28-day referral for ADR without insistence upon it.

Lack of jurisdiction challenge taken by the defendant

33. I now turn to explain why I consider the lack of jurisdiction challenge at the material time is not decisive as to the NHS/non-NHS status of the contract. The central foundation for the Defence was that the IMOS contract was effectively stand-alone and the GDS contract was not material to the dispute. It would therefore have been surprising if the defendant had taken a jurisdictional point as that would have undermined their starting point which was that the dispute was all about the IMOS contract, and GDS terms had not been incorporated. Furthermore CPR 11(4) makes plain that any such challenge must be raised within 14 days after filing an Acknowledgment of Service, so whatever material may have come to light afterwards the court was by then already seized of jurisdiction.

34. To conclude on the 2017 proceedings, my reading of them is that the contractual rights under the microscope were those in the IMOS contract and whether they had been subsumed within standard GDS terms. The battleground was IMOS v GDS

termination clauses and the NHS/non-NHS contractual position was not once mentioned in the 62-page judgment.

35. The first instance decision, in addressing which contract terms prevailed, also considered how a GDS contract could be varied. That is material to the next issue I must consider, but as the case progressed to the Court of Appeal which disagreed with Murray J on this aspect my focus now is on what Lewison LJ held was the correct way to go about a variation. For completeness' sake I note that the Court of Appeal in its judgment never once mentioned clause 14 or the NHS/non-NHS distinction between the types of GDS contract or any jurisdictional points so I do not need to revisit that aspect.

WHETHER SUBSEQUENT TO JUDGMENT IN THE 2017 PROCEEDINGS THERE HAVE BEEN ANY CIRCUMSTANCES TO ALTER THE NHS/NON-NHS STATUS OF THE GDS CONTRACT

The appeal- *NHS Commissioning Board and Dr Manjul Vasant, Dr Angelica Khera, Dr Gursharan* [2019] EWCA civ 1245

36. Lewison LJ delivering the lead judgment upheld the overall decision at first instance that the contractual arrangements between the parties had been validly varied but adopted very different reasoning to Murray J as to how the variation became effective. He rejected the notion that, as a matter of construction, it was correct to rely on contemporaneous correspondence to incorporate contractual terms, or indeed to rely on oral evidence which he said at [29] was no more "than the expression of subjective intention which again is irrelevant and therefore inadmissible in interpreting a written contract" and finally at [30] that "in the case of a written contract post-contract conduct is irrelevant".

37. At [35] Lewison LJ noted, "It is common ground that there is a contract in place between the dentists and NHS England: either the GDS contract (as varied) or the IMOS contract. The question is which contract?". He went on to accept that the entire agreement clause (clause 366) is "subject to any variations made under Part 22 of the GDS contract", such that where a variation has been made in accordance with the formalities set out in clause 287, the subsequent clause takes precedence over the one prior to amendment. He then went on to study the precise variation which the parties had approved. He ruled that post-variation, due to clause 366, the contract terms are a combination of the GDS contract itself and what was contained in the variation agreement. At [39] he held, "In my judgment the combination of clause 366 and 287, taken together, evince a clear purpose of ensuring that all the terms of the bargain are to be found in the combination of the original GDS contract and any written variation compliant with clause 287".

38. Lewison LJ considered the argument that the variation was uncertain and particularly the phrase "advanced mandatory service in the form of Intermediate Minor Oral Surgery". Lewison LJ held that it was permissible to look at extrinsic evidence to "explain the meaning of unconventional expressions in a contract" and preferred that approach over the defendant's submissions that the provisions in the variation agreement had been void for uncertainty or incompleteness. He therefore held at [53] that the variation agreement had "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". Interestingly, the judgment relied wholly upon basic principles of contract law and did not seek to rely on any statutory or regulatory regime to bolster any of the conclusions.

39. As I have set out previously it is the claimant's case that participation in prior proceedings demonstrated an election by the defendant to treat the GDS contract as a non-NHS one such that the parties are thereafter free to litigate all their GDS contract disputes. Furthermore, the claimant sought to persuade me that the issue is now res judicata, the GDS contract having been a subject of litigation previously. As I have decided that the defendant was not waiving any rights by submitting to jurisdiction in *Vasant* as their focus was on the separate IMOS contract, and nor did the trial judge even consider jurisdictional issues or the public law/private law nature of the underlying contract or make any finding that the GDS contract was a non-NHS one, that aspect not being considered at all, it follows, that absent a subsequent agreed contract variation in accordance with clause 287, the governing GDS contract remains and should be treated as an NHS one. This is because:

(i) The claimant's GDS contract clearly states that to be the case at clause 14.

(ii) Despite earlier assertions in the claimant's witness statement dated 19th November 2022 (at paragraphs 2 and 3) that she never elected to be regarded as a health service body under an NHS contract and that was a common understanding of the parties that was, to my mind, quite sensibly not pursued at the hearing. It simply does not fit with the requirements of the GDS contract for contract variations to be in writing and signed (i.e., the very point she sought to rely upon successfully in the *Vasant* case). Also, in *Vasant* on appeal Lewison LJ concluded that subjective intentions and post-contract conduct are irrelevant to interpreting a written contract. I consider myself bound by that decision.

(iii) In oral submissions, counsel for the claimant accepted that there had been no written variation of the contract in accordance with the express terms of the contract, his arguments relying upon assertions that the 2017 litigation had concerned a GDS contract, and which proceeded to a final judgment in the context of a lack of jurisdictional challenge. This he submitted amounted to (i) a waiver of its NHS status by the parties (as had been set out in the claimant's email to the defendant dated 4th April 2022) and (ii) estopped the defendant from raising jurisdictional challenges now, (iii) that the matter is res judicata and (iv) it is an abuse of process to try to raise it now. As I have concluded that it is impossible to rely upon any conduct to alter the GDS contract, particularly following the judgment of Lewison LJ in *Vasant*, I am unable to accept those submissions.

WHETHER COMMUNICATIONS BETWEEN THE PARTIES POST-VASANT COULD BE MATERIAL TO DETERMINING THEIR RIGHT TO LITIGATE DISPUTES

40. For completeness' sake I will briefly return to matters which I set out at paragraph 6(d) about a further dispute between the parties over some redacted correspondence passing between them dated 14th June 2022 which the defendant stated was issued on a without prejudice basis to try and resolve matters. The claimant interpreted the

question of the correspondence being "without prejudice" as one where the defendant was trying to assert legal professional privilege. The claimant asserted this was a nonsense unless the GDS contract is in fact a non-NHS one such that litigation is the appropriate way forward and that the avoidance of litigation must have been the dominant purpose in disallowing the communication to be considered as open correspondence.

41. I believe the lead judgment of Lewison LJ makes it plain that extrinsic evidence can be used as an aid to interpretation of a written contract only where "unconventional expressions" have been used (as set out at paragraph 38 above), which is not the case here i.e., the fact of the without prejudice correspondence cannot be used to imply a change in status of the GDS contract to a non-NHS one. Also, as the leading text, *Foskett on Compromise* 9th edition makes plain in chapter 19, "The "without prejudice" rule is a rule governing the admissibility of evidence. It is separate from, and independent of the rules relating to legal professional privilege." I have therefore considered that the contested status of the correspondence is not material or instructive to my resolution of the issue in this application.

42. During submissions I was also taken to the PCA letter dated 13th October 2022 accepting notification of the claim and agreeing jurisdiction to conduct dispute resolution. Having read the letter in full I do not consider it to be instructive in respect of my determination of the correct contractual route for dispute resolution between the parties. Whilst the PCA did indeed assert that it had jurisdiction to resolve matters, it had not received submissions from the claimant within the deadline it had set for submissions to be made. Therefore, at the point of issuing the letter it simply relied upon the defendant's submissions and the fact there was no written contract variation notice on file, so according to clause 14 of the GDS contract it remained an NHS contract such that there were no private law contractual rights or remedies under it. The PCA also agreed to put the referral on hold pending the outcome of the court's determination.

43. Finally, on the subject of inter-partes correspondence, there was initially some debate concerning the claimant's letter to the defendant dated 8th September 2022 requesting a variation to contract to formally record that it is now a non-NHS one. Happily, it is now common ground between the parties that this was only sent to try and set the record straight going forwards and could not be relied upon to interpret any prior contractual status.

CONCLUSIONS

44. Until such time as there is a written variation to the claimant's GDS contract signed by both parties, it remains an NHS one. In the previous High Court proceedings between the parties in 2017 it would have been surprising if the defendant had mounted a jurisdictional challenge, as their whole Defence centred on their dispute being unconnected with the GDS contract. Given that stance I do not consider that their lack of jurisdictional challenge was significant or relevant to current issues. But even if I am wrong on that the Court of Appeal has provided binding authority in two decisions (*Vasant and Pitalia*) which have guided me to the view that (a) post-contract conduct is irrelevant to effect a variation of this GDS contract and (b) whilst there is no such proper variation and clause 14 continues to state this is an NHS contract the parties have no enforceable rights under that contract before the courts.

45. The binding nature of the Court of Appeal authorities has been uppermost and determinative of this application in my mind, but for the sake of completeness I would repeat my conclusion expressed at paragraph 31 that the judge at first instance when examining the various contracts and terms existing between the parties in a lengthy judgment, never once mentioned its NHS or non-NHS status so it played no part in his decision-making. Whilst the judge ultimately did consider some aspects of the GDS contract alongside the IMOS one, and long after the time by which a jurisdictional challenge needed to be raised under CPR 11, those considerations were unrelated to jurisdiction upon which the judge had received no submissions, so I do not consider the challenge in the present dispute is attempting to re-open decided issues. Further, as stated above, the Court of Appeal authority in *Vasant* is clear that the conduct of the parties (such as any failure to previously mount a jurisdictional challenge), whatever the subject-matter of the earlier proceedings, is incapable of effecting a change to, or waiver of any terms of this contract which includes terms specifying the appropriate dispute resolution procedures. It has therefore not been necessary for me to consider the detailed submissions made relating to the doctrines of res judicata, cause of action estoppel, issue estoppel nor indeed abuse of process because I have concluded that the status of the governing GDS contract between the parties, as it relates to the presence or absence of contractual rights enforceable through the courts, was not changed by the outcome of, or participation in, the prior litigation between the parties.

46. It might be considered a little surprising that the claimant having fought to rely on a written variation agreement to her GDS contract to succeed in her own prior claim against the defendant in 2017, in this claim sought to persuade that the written variation requirement should now be displaced to rely instead on beliefs and conduct as evidence of waiver. However, I note that Murray J showed some sympathy to the claimant at paragraph 98 of his judgment recognising that dentists are not lawyers. In any event, as I have set out above, by the time of the hearing itself her submissions focussed solely on the issues before the courts in 2017/18, the lack of jurisdictional challenge and whether the court made decisions about the GDS contract in those earlier proceedings.

47. Ultimately the Court of Appeal has made it plain in *Pitalia and another v. The National Health Service Commissioning Board* [2014] EWCA Civ 474 that an NHS contract must not be regarded as giving rise to enforceable rights before the courts "for any purpose". This is an important principle of public policy which the courts have been keen to uphold when disputes expressly concerning that issue have been brought before them. The mechanism to become a non-NHS provider is very straightforward as set out at paragraph 8(vi) above and affirmed by the Court of Appeal in the *Vasant* case which I examined at paragraphs 36-38. Now that the parties have the court's decision it should be possible for the defendant to sign off the variation request sent by the claimant on 8th September 2022 if that is what she still wishes, so that arrangements between them can proceed on a non-NHS basis going forwards, but that will not affect resolution of this historic dispute.

48. Accordingly, I conclude that the court does not have jurisdiction to try this claim and the claim form should accordingly be set aside. The parties can continue to work to resolve their current disagreement over performance issues through the statutory PCA process.