

ENGLAND AND WALES / JUDGMENT

Tomkins v Knowsley Primary Care Trust

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Neutral Citation Number: [2010] EWHC 1194 (QB) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION MANCHESTER DISTRICT REGISTRY Before : THE HON MR JUSTICE HICKINBOTTOM

- ----- Between: David Edward Tomkins
- and - Knowsley Primary Care Trust
- -----
- ----- Case No: 9MA90013 The Castle, Chester Date: 25 May 2010 Claimant
Defendant Simon Butler (instructed by Pannones LLP) for the Claimant David Lock
(instructed by Hill Dickinson LLP) for the Defendant Hearing dates: 27-29 April 2010
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Judgment

Mr Justice Hickinbottom :

Introduction

2. The Defendant (“the Trust”) is a statutory National Health Service Primary Care Trust (“PCT”), responsible for local healthcare, including the provision of primary dental services, in its area. The Claimant (“Mr Tomkins”) is a dental practitioner who has at all material times carried on business at Prescott House Dental Practice in Prescott, Merseyside, which is in the Trust’s area. In this claim, Mr Tomkins claims approximately £500,000 in respect of sums which, he contends, the Trust is liable to pay him under the General Dental Services Contract (“GDS Contract”) entered into by the parties in March 2006, for NHS dental services he has performed in the period since 1 April 2006. There is no dispute that Mr Tomkins has performed those services: but the Trust contends that it is not liable, contractually or otherwise, to pay him for having done so. General Dental Service Arrangements 3. 4. 5. 6. Since the inception of the National Health Service (“NHS”) in 1948, various statutory bodies have been responsible for commissioning NHS general dental services from dentists, who have provided those services as independent contractors. On 1 April 2006, there was a fundamental change in the way in which the statutory bodies fulfilled those commissioning obligations. Until that date, under the relevant contractual arrangements which had been in place since 1990, responsibility for commissioning largely fell upon the Department of

Health, and dentists were paid from central funds. Each patient wishing to procure such services had to register with a dentist - with the result that each dental practice had a formal list of registered patients, and dentists were paid for any work they performed for patients registered with them. The only limit on their earnings was a function of demand, and their own capacity to provide treatment. Under the new arrangements, responsibility for commissioning such services and dental budgets was devolved through Strategic Health Authorities ("SHAs") to PCTs, such as the Trust. In their turn, PCTs were required to contract for identified levels of dental activity with dentists who continued to provide NHS services. Patients were no longer required to register with a dentist, the focus changing from registered dental patients to dental activity. From 1 April 2006, a dentist could only be paid in respect of NHS primary dental services under a contract with the relevant PCT, in the form of either a GDS Contract (under which a dentist was required to provide a full range of primary dental services) or a Personal Dental Services Agreement (under which the services to be provided were restricted). The latter form of agreement is not relevant to this claim, and I need not say anything further about it. The main change in practice was that, under the new contracts, a dentist was capped in the amount of NHS work for which he could claim payment in any financial year. That was done by the contract having incorporated within it an "Annual Contract Value". If a dentist did less work than that value, then he would be paid for the amount of work that in fact he did: but, if he chose to do more work than that cap, then he would not recover payment from the PCT for that additional work. The contractual cap was therefore of vital importance to any dentist providing NHS services, because it effectively fixed his maximum income from NHS work for that financial year. 7. 8. 9. 10. Although the new arrangements were to be in the form of contracts between PCTs and dentists, the parties were not entirely free in the terms that they agreed, because all GDS Contracts were generally required to comply with both regulations and directions made by the Secretary of State under the National Service Act 1977, as amended by the Health and Social Care (Community Health and Standards) Act 2003 - in particular, the National Health Service (General Dental Services) Regulations 2005 (SI 2005 No 3361) ("the GDS Regulations"), Part 5 of which set out elements that were required to be included in a GDS Contract. However, despite those requirements, once a contract had been agreed between the PCT and a dentist, it took effect as an ordinary contract, enforceable as such. That is clear from Part 2 of the GDS Contract, "Relationship between the parties" (Clauses 6-13). Therefore, for example, in accordance with usual contractual principles, Clause 287 of the GDS Contract provided that: "... [N]o amendment or variation shall have effect unless it is in writing and signed by or on behalf of the PCT and the Contractor [i.e. the relevant dentist or dental practice]": although, by Clause 288, the PCT was able unilaterally to vary the contract, without the dentist's consent, where the PCT was reasonably satisfied that it was necessary to vary the contract so as to comply with the 1977 Act or any regulations or directions made under that Act. Despite the standard form nature of the contract, generally, the PCT and dentist would have to negotiate and agree the Annual Contract Value ("the Negotiated Annual Contract Value"), and also the work the dentist would provide in exchange for that value. That work was calculated in terms of "Units of Dental Activity" ("UDAs"), a

measurement of a course of treatment related to its complexity. Every dental treatment activity, from a simple examination to the most complex course of treatment, was banded and given a provision of 1 to 12 UDAs. For the agreed contract value, each dentist was required to provide a specific number of UDAs. The value and number of UDAs were matters for negotiation between the PCT and each dentist, in the light of the PCT's statutory responsibility to make provision of such services to the public and the budget it had for doing so. The new scheme contained transitional provisions to protect both the continuing service to patients, and the position and income of those dentists who were working in NHS practices prior to April 2006 under the previous scheme, set out in two documents: the General Dental Services Statement of Financial Entitlements ("the SFE", formally directions given by the Secretary of State under Sections 28N and 126(4) of the 1977 Act), and the General Dental Services and Personal Dental Services Transitional Order 2005 (SI 2005 No 3435) ("the Transitional Provisions Order"). This transitional scheme entitled an existing supplier of NHS dental services to a GDS Contract: but that transitional right was subject to a strict timetable, driven by the requirement that, after 1 April 2006, apart from arrangements under a Personal Dental Agreement (not relevant to this claim: see Paragraph 5 above), a dentist could only be paid for providing NHS primary dental services under a new GDS Contract. By virtue of Article 3 of the Transitional Provisions Order, subject to a right of appeal to the Secretary of State where a PCT failed to enter into a contract (which appeal in any event had to be made by 15 April 2006), a contract under the transitional provisions had to be entered into by 31 March 2006. No dentist who had previously provided NHS dental services was obliged to enter into a GDS Contract - and some (about 10%) chose not to do so - but, after 31 March 2006, if no contract had been concluded, then a dentist who had previously supplied NHS treatment (i) lost his protected right and was in the same position as any other dentist who sought to persuade a PCT to grant him a contract, and (ii) could not be paid for providing NHS general dental services. The SFE detailed the process by which the PCT would calculate the value of a GDS Contract under the transitional provisions, from data relating to the scale of fees, commitment payments and allowances in a test or baseline period of 1 October 2004 to 30 September 2005, subject to a number of adjustments for (e.g.) inflation ("the Calculated Annual Contract Value"). The sum so calculated would be a maximum income that would, under the transitional arrangements, be guaranteed to the dentist/dental practice for a period of 3 years. Article 10 of the Transitional Provisions Order set out how the number of UDAs required to be provided under a GDS Contract entered into under the transitional provisions would be calculated. The PCT was required to analyse the data it received from the Dental Practice Board in respect of care and treatment provided under the previous arrangements in the baseline period, categorising the work done in accordance with the relevant charges regulations and then using the conversion criteria set out in Part 1 of Schedule 2 to the GDS Regulations to calculate how many UDAs would be the equivalent of the work provided during that period (Article 10(2)). The number of UDAs required to be performed would be 95% of the number so calculated (Article 10(4)). A provider of NHS dental services prior to April 2006 was entitled to a GDS Contract with a contract value and UDAs required to be performed based upon the baseline period, and

calculated in accordance with the SFE and Article 10. However, it was recognised that a particular dentist may have had a case for an adjustment from the figure calculated from the baseline period practice data, and it was envisaged that there would be negotiations between the dentist and the PCT in respect of any adjustment sought: but any adjustment in fact made was a matter for the PCT in the exercise of its discretion. The Department of Health produced a number of factsheets in relation to “Implementing Local Commissioning for Primary Care Dentistry”. Factsheet 1: Agreeing Contracts with GDS Dentists dealt with these situations, which were described as “atypical earnings” (i.e. situations in which the earnings for the baseline period were not typical or reliable for future reference). Paragraph 6 and 7, under the heading “Key points”, said (emphasis in the original): 6. Atypical earnings: some dentists may make a case that they received atypical NHS earnings during the reference period and that they should receive a different contract value. Experience from PDS pilots suggests that in practice there are relatively few dentists with sufficiently atypical earnings in the reference period to warrant a contract adjustment, but PCTs will need to judge cases on their merits. Practice earnings may be atypical for a number of reasons and the adjustment needed may be up or down. Where you agree an adjustment in the contract value, you will also need to agree a corresponding adjustment (upwards or downwards) in the agreed level of [UDAs]. If you are considering a significant adjustment in contract value and UDAs, we recommend you discuss this with your SHA as it may affect the overall SHA planning assumptions. 7. For GDS dentists without full-year earnings during the reference period, it is up to the PCT and the dentist to agree an appropriate contract value and corresponding levels of activity. PCT budgets take into account the full-year costs of new contracts that opened during the reference period, together with the margin for the estimated effect of potential new GDS contract commitments after September 2005.” 15. 16. Paragraph 2.8 of the SFE specifically envisaged that “movement of associates during the baseline period” would be one factor that might taken into account when considering adjustment to reflect atypical earnings in that baseline period. Therefore, in summary, for a dentist who had provided NHS general dental services prior to the new arrangements, that dentist was entitled to a new contract the contract value of which was based upon his earnings in the baseline period: but he could seek an enhanced contract value on the basis that his earnings in that period were atypically low, for example because he took on an associate during the period. Whether the contract value was in fact enhanced was a matter for the discretion of the PCT, following discussions with the dentist. The New Arrangements in Knowsley 17. The implementation of the new arrangements involved significant work, and, given the imperative of having contracts signed by 1 April 2006, work done under considerable time pressure. Mr Kirk Benyon is the Primary Care Development Manager for the Trust, and as such he was involved with the commissioning of GDS Contracts for its area. Although the contracts were formally signed by a superior, he said he had actual authority for negotiating and agreeing the contracts, and certainly he had ostensible authority for doing so.

18. Mr Benyon said that the PCT had 19 dental practices in its area, including that of Mr Tomkins, and all were due to be transferred to new contracts in 2006. The implementation period was short, the negotiation period not starting until December
2005. It was hoped that contracts would be concluded by the end of February 2006, to ensure continuity of payments to dentists (Department of Health Factsheet 8: Understanding the Transitional Provisions Order, at Paragraph 2.6): but, in any event, it gave Mr Benyon and the relevant dentists only 3 months to negotiate the new contracts to agreed and signed form by the absolute deadline date of 31 March 2006. In fact, although negotiations started earlier, the draft standard form contract was not available and circulated to dentists until early March 2006. 19. The pressure upon Mr Benyon was increased by the fact that, generally, the new contractual arrangements were not popular with dentists, and it became clear that, in relation to contract values and UDAs, in many cases they would not be agreed before the effective date. Indeed, Mr Benyon said that those contractual values were not agreed with any of the dentists/dental practices in the Trust's area by 31 March 2006. 20. Disputes were not unexpected, and the scheme provided a dispute resolution procedure for any matters that remained unresolved. Dispute Resolution Procedure 21. 22. Part 7 of Schedule 3 to the GDS Regulations dealt with dispute resolution. GDS Contracts are "non-NHS contracts" (Regulation 2 of the GDS Regulations, Section 4(1) of the National Service and Community Care Act 1990, and Clause 14 of the GDS Contract). By Paragraph 54 of Schedule 3 to the GDS Regulations, where parties have a dispute "arising out of or in connection with" a non-NHS contract, then that dispute can be referred to the Secretary of State for Health for "consideration and determination", the determination being binding on both parties. 23. The procedure to be followed where a reference is made is set out in Paragraph 55. As relevant to this claim, that provides as follows: "(2) Any party wishing to refer a dispute... shall send to the Secretary of State a written request for dispute resolution which shall include or be accompanied by (a) the names and addresses of the parties to the dispute; (b) a copy of the contract; and a brief statement describing the nature and (c) circumstances of the dispute. (3) Any party wishing to refer a dispute... must send the request under sub-paragraph (2) within a period of three years beginning with the date on which the matter giving rise to the dispute happened or should reasonably have come to the attention of the party wishing to refer the dispute."
24. Where the parties are unable to agree on a particular term of the contract, Regulation 8 in Part 3 of the Schedule ("Regulation 8") sets out a dispute resolution procedure, under the heading, "Pre-Contract Dispute Resolution". Again insofar as relevant to this claim, Regulation 8 provides as follows: "(1) Subject to paragraph... (3), if, in the course of negotiations intending to lead to a contract, the prospective contracting parties are unable to agree on a particular term, of the contract, either party may refer the dispute to the Secretary of State to consider and determine the matter in accordance with the procedure provided in Paragraphs 55(2) and (3) of Schedule 3. ...

- (3) Before referring the dispute for consideration and determination under paragraph (1), both parties to the prospective contract must make every reasonable effort to communicate and cooperate with each other with a view to resolving it. ... In case of a dispute referred to the Secretary of State under (5) paragraph (1), the determination
- (a) may specify terms to be included in the proposed contract;
- (b) may require the [PCT] to proceed with the proposed contract, but may not require the proposed contractor to proceed with the proposed contract; and shall be binding upon the prospective parties to the (c) contract.” 25. 26. Regulation 8 sets out a procedure for the resolution of disputes which arise during the course of negotiations towards a contract, and it is envisaged in that regulation that any such disputes will be resolved by the procedure before a contract is concluded - hence the powers granted to the Secretary of State to specify terms that will be included in the proposed contract and to require the PCT (but not the proposed contractor) to proceed with the proposed contract. It gives the dentist the option of going through the dispute resolution procedure, and considering the result of it before committing himself to entering into a GDS Contract at all. Where there is a concluded contract when the dispute arose, Regulation 8 does not apply: the GDS Regulations envisage Paragraph 54 of Schedule 3 (referred to at Paragraph 22 above) applying - but, in those circumstances, the determination is binding on both parties. In respect of all those provisions, under Section 169(3) and the Family Health Services Appeal Authority (GDS and PDS Agreement Disputes) Directions 2005, the Secretary of State delegated his functions to a unit within the NHS Litigation Authority known as the Family Health Services Appeal Authority (“the Appeal Unit”). (The Appeal Unit was the relevant body at all times material to this claim: although it has subsequently been abolished, and its functions transferred to the First-tier Tribunal, by Articles 2 and 3 of the Transfer of Tribunal Functions Order 2010 (SI 2010 No 22)). 27. In respect of contracts that were the subject of the transitional scheme, dispute resolution was dealt with in Article 4(6) of the Transitional Provisions Order, which provided: “Where the contracting parties are unable to agree on a particular term of the [GDS] contract and the dispute is referred to the Secretary of State for determination in accordance with ... regulation 8(1) of the [GDS Regulations] (pre-contract disputes), the determination may if it made after the contract has been entered into (a) vary the terms of the contract; or (b) bring the contract to an end.” 28. That envisaged the possibility of the parties being unable to agree a particular term of the GDS Contract during the course of negotiations towards GDS Contract under the transitional provisions, and, given the imperative that such contracts had to be signed by 1 April 2006, contemplated the determination of any dispute in accordance with the Regulation 8 procedure, but after the contract had been concluded - hence the power to vary the terms of the contract or to bring the contract to an end. Such a power would be entirely unnecessary in relation to pre-contract disputes that were determined before the contract was entered into, as envisaged by the wording of Regulation 8 itself. 29. To complete the references to the relevant provisions, Article 4(7) of the Transitional Provisions Order provides: “Where a determination is made in accordance with paragraph (6), section 4(8)(a) and (b) of the 1990

Act shall apply in respect of the determination where the terms of the [GDS] contract is varied or brought to an end.” 30. That is a reference to National Health Service and Community Care Act 1990. Sections 7 and 8 of that Act concern “NHS contracts” (i.e. arrangements between two health service bodies, the definition of which excludes an individual dentist or dental practice: see Paragraph 22 above), and provide as follows: “(7) A determination of a reference under sub-section (3) above may contain such directions (including directions as to payment) as the Secretary of State... considers appropriate to resolve the matter in dispute; and it shall be the duty of the parties to the NHS contract in question to comply with any such directions.

- (8) Without prejudice to the generality of his powers on a reference under subsection (3) above, the Secretary of State... may by his determination in relation to an arrangement constituting an NHS contract vary the terms of the arrangement or bring it to an end; and where an arrangement is so varied or brought to an end (a) subject to paragraph (b) below, the variation or termination shall be treated as being effected by agreement between the parties; and (b) the directions included in the determination by virtue of subsection (7) above may contain such provisions as the secretary of State... considers appropriate in order satisfactorily to give effect to the variation or to bring the arrangement to an end.” So, where a determination under Article 4(6) terminates or varies the terms of a contract, that determination is treated as being effected by agreement between the parties. 31. Finally, as I have already indicated (Paragraphs 12 and following above), Article 10 of the Transitional Provisions Order set out how the number of UDAs a dentist was required to perform under the contract were to be calculated by reference to a baseline period (Article 10(2) and (4)). The article continued to provide: “(5) Where (a) data does not exist for the [baseline] period...; or (b) data does exist, but it is appropriate to adjust the data, the contractor and the [PCT] shall agree the number of [UDAs] to be provided.
- (6) Where the contractor and the [PCT] cannot agree the number of [UDAs] as provided for in paragraph (5), the [GDS] contract shall state this to be the case, and shall specify a number of [UDAs] which is determined by the [PCT].” 32. The procedure for resolving disputes in cases under the Transitional Provisions Order is succinctly summarised in Paragraph 22 of the Department of Health Factsheet 8: Understanding the [TPO]”: “22.1 Both parties to the prospective contract or agreement must make every reasonable effort to communicate and cooperate with each other with a view to resolving the dispute arising during the course of negotiations, before referring the dispute for determination under the dispute resolution procedure. 22.2 Where agreement cannot be reached, [SHAs] may wish to discuss with their PCTs whether it would be helpful to establish an intermediate local resolution process which could be invoked prior to referral to the disputes resolution procedure. This is a matter for local discussion and decision, but such a process might operate as set out in the flow chart annexed to this factsheet. 22.3 In rare cases where a disagreement cannot be resolved through the local process as outlined above, it will be open to practices or PCTs to invoke the NHS Resolution Procedure. 22.4 Where the contractor and PCT cannot agree the appropriate number of [UDAs]... for a contract, the [TPO] make provision for the PCT to determine the

number of units to be included in the contract or agreement, for this term to be marked “in dispute” and for the [Appeal Unit] to determine the matter. 22.5 In most cases the [Appeal Unit] will try to determine the matter on papers without setting up an oral hearing to ensure speedy and effective resolution of the dispute. 22.6 The determination is binding on the PCT but the contractor can decide whether to accept the arbitration or terminate the contract or agreement.” 33. The hope that disputes in the negotiations towards GDS Contracts under the transitional provisions would be rare proved to be ill-founded. When it was apparent that there would be many such disputes - and, indeed, many that would not be resolved prior to 1 April 2006 - discussions were held between the Department of Health and the British Dental Association (representing the dentists) (“the BDA”) that resulted in their joint production of a standard form document, headed “Standard General Dental Services Contract Supplementary Agreement Prior to Entering the Contract on an In-Dispute Basis”. Mr Benyon said that this was circulated by the Department of Health and BDA, to both PCTs and dentists. As adopted by the Trust (by inclusion of their own name in the relevant places), it read as follows: “WHEREAS A. The Knowsley Primary Care Trust and [a blank left for the name of the dentist] have entered into a General Dental Services contract on 1st April 2006 and B. The Knowsley Primary Care Trust and [a blank left for the name of the dentist] have been unable to reach agreement of certain parts of the contract. IT IS HEREBY AGREED: The clauses upon which agreement has not been reached 1. are: Clause [77] Units of Dental Activity to be provided Clause [blank left for insertion of other relevant clauses] 2. The Knowsley Primary Care Trust and [a blank left for the name of the dentist] shall submit the above named clauses to the Secretary of state for determination in accordance with the [National Health Service (General Dental Services Contracts) Regulations (SI 2005/3361), section 8] by 31st March 2006. Prior to determination in accordance with paragraph 2 3. (above) the contract shall operate as detailed therein. 4. The terms of any changes or alterations or additions to the contract necessary as a result of determination in accordance with paragraph 2 (above) shall be backdated to the start of the contract. 5. Nothing with in this supplementary agreement shall prevent the Knowsley Primary Care Trust and [a blank left for the name of the dentist] from mutually agreeing any changes to the contract.” I shall return to this form of supplementary agreement in due course. 34. The proper construction of the dispute resolution provisions is very much in issue in this claim. However, before considering the interpretations pressed upon me by each party and the other issues in the case, it will be helpful to deal with the facts, to which the provisions as properly construed must be applied. The Facts 35. 36. Under the proposed new arrangements, as I have described, the GDS Contract was essentially in standard form: and it was clear that most if not all disputes would be in relation to the values inserted into the contract for the Calculated Annual Contract Value and UDAs. Discussions in relation to those values started between Mr Benyon for the Trust and the dental practices in the Trust’s area in December 2005. On 19 or 20 December 2005, Mr Benyon and a colleague (Ms Sue Johnson) met Mr Tomkins to discuss the figures for his practice, 97% of which was NHS work. Mr Tomkins was concerned that the data for the baseline period was not a true reflection of his practice’s then-current and continuing work load and capacity, for two reasons, both 37. 38. 39. of

which related to his associate, Mr Uszama Zein. First, Mr Zein had started working for Mr Tomkins in February 2005, i.e. part-way through the baseline reference period. Over time, Mr Zein had built up his own practice, and Mr Tomkins was therefore concerned that the baseline period would not properly reflect the current and continuing work and capacity of Mr Zein within Mr Tomkins' practice as a whole. He therefore wanted the reference period for Mr Zein extended to March 2006. Second, he was concerned that administrative difficulties in the practice during the reference period had led to the data sent to the Dental Practice Board being inaccurate in respect of Mr Zein's work. Mr Tomkins was concerned that, as a result of these two factors, the data upon which the Trust was working did not properly reflect the historical work levels of his practice, or its on-going capacity: in other words the data were "atypical". He wished the Trust, in its discretion, to increase his GDS Contract value over the value that would be derived from the data for the baseline period themselves. At that December 2005 meeting, Mr Benyon gave no commitment to that - because, at least in part, of the budget that might be available - but he indicated he would consider it. On 10 February 2006, before Mr Benyon had returned to Mr Tomkins, Mr Tomkins wrote to the Trust setting out a "bid" for an increase in his contract value to take account of Mr Zein's "atypical earnings" during the baseline period. There was no response to that letter. As the date for implementation of the new contracts grew closer, the Trust learned that another dental practice at Cross Lane, Whiston, also within the Trust's area, was set to close. The Trust wished to maintain the levels of NHS dental care cover in its area, and so, on 2 March, Mr Benyon wrote to existing practices asking them to submit bids to provide additional activity to make up for the shortfall in dental commissioning that would otherwise arise as a result of the closure of this practice. On 8 March, he telephoned Mr Tomkins (whose practice was located quite close to Whiston), asking him specifically if he would take on this additional work. Mr Tomkins said that he could not readily do so because his practice was already very busy, but he would consider the proposal further and would try to formulate a plan under which, for additional funding, he could take on this new work. He duly did draw up such a plan - but, when he made his bid on 20 March, it was late, and so not initially considered. When told as much by Mr Ian Davies (the Trust's Deputy Chief Executive) that day (20 March), Mr Tomkins thought that that opportunity had been lost. In the event it was not; and I shall return to it shortly.

40. Mr Benyon had sent Mr Tomkins a copy of the proposed standard form GDS Contract (without any contract value and value for UDAs inserted) in early March. They met for the second time on 22 March 2006. 41. Although Mr Tomkins' memory of this second meeting was not perfect, he accepted that Mr Benyon (supported by the documents) was correct in recollecting that he (Mr Tomkins) signed a standard form GDS Contract at that meeting, with Clauses 7, 8, 77, 280 and 281, and the whole of Schedule 4, marked as "in dispute". Clause 77 and Schedule 4 set out the annual contract value and a value for UDAs. Clauses 7 and 8 concerned third party rights. Clauses 280 and 281 (written in similar terms to Paragraph 54 of Schedule 3 to the GDS Regulations: see Paragraph 22 above) concerned dispute resolution procedure. Mr Benyon did not sign, except as a witness to Mr Tomkins' own signature, but

took the contract away with him, with a view to it being signed by his superior. 42. There is no dispute that, at that meeting on 22 March, Mr Tomkins produced for the first time a supplementary agreement based upon the standard form agreed between the Department of Health and the BDA (referred to and quoted above: Paragraph 33), but with amendments that he had made with the assistance of his then solicitor, in the following form, but with the heading of the usual standard form (namely “Standard General Dental Services Contract Supplementary Agreement Prior to Entering the Contract on an In-Dispute Basis”):

“WHEREAS A. The Knowsley Primary Care Trust and David Tomkins have entered into a dental services contract (the contract) on 24th March 2006, and The Knowsley Primary Care Trust and David Tomkins have B. been unable to reach agreement of certain parts of the contract IT IS HEREBY AGREED: The clauses upon which agreement has not been reached 1. are: clause 7 clause 8 clause 77 clauses 280 & 281 Part 2 Part 2 Part 6 Part 21 Schedule 4 - the whole page is in dispute page 20 page 20 page 43 page 92 2. The Knowsley Primary Care Trust and David Tomkins shall continue to seek agreement as the wording and contents of the above named clauses. Prior to determination in accordance with paragraph 2 3. (above) the contract shall operate as detailed therein. 4. Upon resolution, the terms of any changes or alterations or additions to the contract necessary as a result of the determination in accordance with paragraph 2 (above) shall be backdated to the start of the agreement. Nothing within this supplementary agreement shall prevent 5. the Knowsley Primary Care Trust and David Tomkins from mutually agreeing any changes to the contract. The Knowsley Primary Care Trust shall, when calculating 6. payments due to David Tomkins in respect of Mr Zein’s work, include work done by Mr Zein after the ‘test period’ (which ended 31st September 2005) and shall include all Mr Zein’s work from then up to and including the 31st March 2006. 7. The Knowsley Primary Care Trust and David Tomkins agree that the contract shall be in accordance with the general agreement between the Secretary of State for Health and the British Dental Association, that there should be no loss of earnings for David Tomkins for 3 years provided that similar amounts of work are performed. In the event that the contract payments result in David Tomkins being paid less, the Knowsley Primary Care Trust shall make a top up payment to David Tomkins in an amount equal to the difference. The Knowsley Primary Care Trust and David Tomkins 8. agree that nothing in this agreement and contract shall affect David Tomkins’ superannuation rights and entitlements as presently exist (up to 1st April 2006), and that these shall continue unaffected by the agreement and contract. It is further agreed by the parties that there shall be no change in David Tomkins’ superannuation rights and entitlements without the prior written agreement of both parties. 6. In the event that the Knowsley Primary Care Trust and David Tomkins are unable to reach full agreement as to all the outstanding terms in paragraph 1 (above), then either party may terminate the agreement upon giving notice as required under the agreement.” For clarity, I should say that there were, as I have indicated, two paragraphs numbered “6”, to which in this judgment I shall refer as simply “the first paragraph 6” and “the second paragraph 6” respectively.

43. Mr Tomkins recalled that, as with the GDS Contract, he signed this document at that meeting, but Mr Benyon did not do so - rather taking it away for consideration and signature. He thought that Mr Benyon had returned with it signed at a later meeting (on 27 or 28 March). However, Mr Benyon said that he had signed it at the meeting with Mr Tomkins on 22 March - and I accept that he did so. I make that finding partly on the basis that the document is signed on behalf of the Trust by Mr Benyon (and not a superior, such as Mr Davies), and his signature (like Mr Tomkins') is dated "22/03/06": but also, having heard them both give evidence, I am satisfied that Mr Benyon's recollection of what happened that day in terms of signing documents is correct. 44. There was also a difference between Mr Tomkins and Mr Benyon over the circumstances in which the supplementary agreement document came to be signed that day. Mr Tomkins said that Mr Benyon and he discussed the issue of Mr Zein's atypical earnings that day and Mr Benyon had, as a matter of principle, accepted that data for Mr Zein should be considered for the period to March 2006 and not just for the baseline period. That, he said, was reflected in the first Paragraph 6 in the document. What remained to be agreed was how those data were to be reflected in the contract value, the data not at that stage being available. Mr Benyon's recollection was different. He said that he did not agree, even in principle, to the reference period for Mr Zein's work activity to be extended beyond September 2005. He signed the document on the misunderstanding that it was in the Department of Health/BDA standard form. He had authority to sign such a standard agreement: and, indeed, he said that such an agreement had been entered into in respect of every one of the other 18 or so dentists/dental practices in the Trust's area. He gave evidence that, when it was specifically pointed out to him for the first time in October or November 2006 that he had signed a document agreeing to take into account Mr Zein's work to March 2006, he was surprised and "felt 45. 46. 47. 48. 49. sick" because of the potential consequences of such an agreement. However, compelling as that evidence might have been, given the disparity in accounts, the Trust conceded before me that it is irrelevant whether Mr Benyon realised or not that the terms in the agreement conceded the extension of the reference period for Mr Zein, because the Trust are bound by the concession in any event (see, e.g., Mr Lock's Skeleton Argument, Paragraph 25). Although it has subsequently been overtaken by the finding of the Appeal Unit (see Paragraph 61 below), I consider that concession properly made. There were, therefore, some differences in the respective recollections of Mr Tomkins and Mr Benyon as to what happened at the 22 March 2006 meeting. However, there was no dispute at all in their evidence as to what, in substance, they intended and agreed that day, namely the following. First, they each intended to enter into legal relations in the form of a binding contract. It was of course vital to each that they did so. Without a GDS Contract, the Trust could not pay Mr Tomkins for any NHS dental services he provided after 31 March 2006: that was obviously in Mr Tomkins' interests, but it was of course important that the Trust had the appropriate power to make payments they have in fact made. Both Mr Tomkins and Mr Benyon gave clear and firm evidence that, on 22 March, they intended to enter into legal relations in the form of a contract for NHS dental services from 1 April 2006. Mr Tomkins' intention so to do is evidenced by, amongst other things, his signing the form of contract (as witnessed by Mr

Benyon), and sending Mr Benyon away believing that the Trust would also sign in the form he had agreed with Mr Benyon. Second, the evidence of Mr Tomkins and Mr Benyon was also common as to what they had agreed. Only the contract value (and consequent value for UDAs) was in issue: and, in respect of that, they had agreed everything except that element of the contract value attributable to Mr Zein because of the two issues that Mr Tomkins had raised at the December 2005 meeting, namely the issues about the missing data from the reference period and the extension of the reference period for Mr Zein beyond September 2005. There were no other issues between them. Third, they each considered that those outstanding issues could be determined - and agreed they should be determined - by a dispute resolution procedure, involving a reference to a Local Arbitration Panel and then, if necessary, a reference to the Appeal Unit under regulation 8. They each believed that that dispute resolution method was appropriate and available as a mechanism for resolving those open matters, within the context of the binding contract that they were entering into: and they intended that that mechanism should be used to resolve those issues. They each considered that that was the effect of the supplementary agreement they had each signed, believing that the identified issues concerning Mr Zein's work bore upon the specific terms of the GDS identified in the supplementary agreement as being consequently "in dispute". The wording of the supplementary agreement may not have been ideal in relation to that common intention and agreement: but neither Mr Tomkins nor Mr Benyon were in doubt as to what they had in fact agreed. Therefore, by the close of the 22 March meeting, Mr Tomkins and Mr Benyon on behalf of the Trust considered that they had a binding agreement. In relation to the provision of NHS general dental services from 1 April 2006, other than those issues involving Mr Zein's work, there were no issues between them: and they had agreed a mechanism for determining those outstanding issues if they could not be resolved by agreement. That was the common evidence of Mr Tomkins and Mr Benyon; and, by the end of the trial, what had been intended and agreed at the 22 March 2006 meeting was not in issue. As 50. 51. 52. Mr Lock said in closing, the defence to this claim was not by then put on the basis that the intention of the parties was not common. That that was not the final contractual position results from developments in relation to the Cross Lane Practice. Mr Benyon had hoped that one of the in-time bids for the additional contract value in respect of that practice's work would be acceptable - but, unfortunately, when on 27 March he visited the dental practice which he had thought would be able to take over the work, he found that their facilities were not adequate. Therefore, that same day he visited Mr Tomkins to ask him if would be prepared to take on the work, in line with his (late) bid. Mr Tomkins said that he would. Mr Benyon offered him £100,000 additional contract value, in addition to the value that was Mr Tomkins' right under the transitional provisions: and Mr Benyon agreed. In his evidence (both in his 10 November 2009 Statement at Paragraph 15, and in his oral evidence before me), Mr Benyon readily accepted that, on 27 March, there was an offer and acceptance in relation to the Cross Lane Practice work. That binding agreement was in any event firmly evidenced in the documents (e.g. the Trust's acknowledgment that there had been an agreement in their letters to Mr Tomkins of 27 June and 21 December 2006). The Cross Lane Practice work could have resulted in an entirely separate contract - it was a new

commission, and was not part of the work for which Mr Tomkins had a right to a GDS Contract under the transitional provisions - but Mr Benyon decided to add that agreed value to the contract to which Mr Tomkins was entitled for his own pre-April 2006 practice under the transitional provisions, a course to which Mr Tomkins agreed. As a result, on 27 March, Mr Benyon went away and prepared a new form of GDS Contract between the trust and Mr Tomkins, with new figures in it. He returned with that new document the following day, when he met Mr Tomkins again. The new aggregate figures were set out in Schedule 4 to the contract, but helpfully broken down in a side letter written by Mr Benyon, dated 28 March 2006. That makes clear that the additional contract value in respect of the Cross Lane Practice work would be £100,000 (with a requirement for an additional 4,869 UDAs), and the aggregate contract value would be £437,960 (with a requirement to perform an aggregate 22,159 UDAs). The aggregate contract value (and consequent UDAs) in the contract was composed of three elements, (i) an element representing Mr Tomkins own earnings for the baseline period, (ii) an element representing Mr Zein's earnings for the baseline period (but not enhanced by reference to either the missing data or the extended period to March 2006), and (iii) an element representing an addition in respect of the Cross Lane work. Both Mr Tomkins and Mr Benyon were clear, and of the same mind: the only issues between them as at 28 March 2006 when they each signed the GDS Contract form concerned the enhancement of the element representing Mr Zein's earnings as a result of the missing data and/or the extension of the reference period. Mr Benyon in his evidence not only confirmed that - in his oral evidence, he said in terms that there was no misunderstanding - but also that there was no question of the element representing the Cross Lane Practice work being dependent in any way on the outcome of the dispute in relation to Mr Zein's element. Indeed, that was specifically confirmed in Mr Benyon's letter of 28 March, in which he said: "As discussed on Monday 27 March this does not effect (sic) the disputed issue of Mr Zein's atypical earnings for the baseline year used form (sic) the new contract process. 53. 54. 55. 56. I trust the above is satisfactory and I will forward you a copy of the new signed contract in due course" As at 28 March 2006, the two parties remained ad idem in agreeing that the only issues between them related to Mr Zein's missing data and atypical earnings, and that those issues could and would be determined by a reference to the Appeal Unit under Regulation 8, if necessary. As Mr Lock submitted in closing, both parties thought that that was the effect of the GDS Contract and supplementary agreement that they had signed - which they both intended and believed had continuing effect after 28 March. Mr Tomkins signed the new GDS Contract at the meeting on 28 March on that basis, and Mr Benyon took that contract away with him for signature, also on that basis. Mr Davies signed the contract on behalf of the Trust later that day. In relation to that agreement they had reached, each party acted upon it. With regard to the Cross Lane Practice work, on 5 April 2006, Mr Benyon sent a letter to all of the patients formerly registered there to say that the Trust had "successfully negotiated an agreement to maintain access to NHS dental services for local residents", that provision being secured at the Prescott House Dental Practice (i.e. Mr Tomkins' practice) - and asking them to contact that practice. With regard to the elements in respect of which there was no open issue, Mr Tomkins performed general dental services under the

agreement they had reached, and the Trust paid him for those services. Again in line with that which they had agreed, with regard to those matters remaining open (i.e. the issues of Mr Zein's atypical earnings), Mr Benyon telephoned Mr Tomkins at the end of May 2006 to say that the Trust would not pay any additional money for those earnings, confirmed in the Trust's letter to Mr Tomkins dated 5 June 2006 which said: "If this outcome is not satisfactory to yourself the next step to take is to appeal the decision with the Local Arbitration Panel at Cheshire and Merseyside Strategic Health Authority. Following this the matter can be referred to the Litigation Authority [i.e. the Appeal Unit] if the outcome is still unsatisfactory. This appeal should be lodged in writing to the [Trust] and this will then be forwarded to the Strategic Health Authority." The outcome was far from satisfactory for Mr Tomkins, and consequently on 11 July 2006 he wrote to the Trust indicating that he wished to appeal. That appeal (to the Local Arbitration Panel) was duly made. Although Mr Tomkins was not entirely satisfied with the opportunity he had to make representations to the Panel, in the light of the further appeal, he now makes no complaint about the Panel's determination of which he was formally informed in a letter from the Trust dated 21 December 2006. The Panel rejected Mr Tomkins' case in relation to both issues he raised with it (the missing data and the appropriate reference period for Mr Zein), but it discovered that an uplift percentage figure used in the workings of the calculation was incorrect - a value of 1.225% had been used instead of 1.233% - and the Panel consequently required the Trust to recalculate the gross contract value and hence UDAs for the Prescott House Dental Practice. That gave rise to a small increase in both (to £340,297 and 17,585 UDAs). The Trust's letter confirmed that: "The additional funding of £100,000 allocated to your practice will obviously be included with your contract as agreed previously with you": The gross contract value was accordingly calculated at £440,297 and the UDAs at 22,454. Those increases as a result of the Panel's determination are not in issue before me. 57. The Trust's letter of 21 December 2006, again reflecting the dispute resolution procedure that had been agreed, went on to say: "... [I]f you feel this is still incorrect and that Knowsley PCT has still acted inappropriately you are still able to appeal to the NHS Litigation Authority. Should you wish to appeal further would you please direct this to [the Appeal Unit].

58. Mr Tomkins did remain dissatisfied with the position with regard to Mr Zein's atypical earnings and therefore, on 27 November 2006 (by when he knew that he had in fact been unsuccessful before the Local Arbitration Panel), he lodged an appeal with the Appeal Unit in which he asked the Unit to determine the two issues that remained extant, namely whether, in assessing the work undertaken by Mr Zein beyond that shown by the collected data for the period October 2004 to September 2005, the Trust was required to take into account (i) the missing data and (ii) Mr Zein's work for the period to 31 March 2006. To that application, he attached the supplementary agreement of 22 March 2006. 59. The Trust submitted representations to the Appeal Unit on 21 December 2006 which, amongst other things, confirmed that Mr Benyon's letter of 28 March 2008 was intended to confirm that the Trust: "...were willing to follow the process set up for any disputes. As Mr Tomkins was disputing atypical earnings it was appropriate to go through this process to assure Mr

Tomkins that all guidance and legislation had been followed". Mr Tomkins responded to those submissions on 4 January 2007.

60. Mr Paul Burns, a Chief Officer, sent out his determination on behalf of the Appeal Unit on 25 January 2007. From that document, the following are noteworthy: (i) (ii) The Appeal Unit understood that they were being asked to determine issues under Regulation 8. That is clear from the reference to Regulation 8 in Paragraph 1.1 of the determination. Although headed "Pre-Contract Dispute", the determination refers to Mr Tomkins as "the contractor" and also to a particular determination that there should be "no amendment to the contract" (Paragraph 3.5). It is clear from the face of the document that the Appeal Unit understood that there was an existing contract between the Trust and Mr Tomkins, and they were being asked to determine discrete outstanding issues in relation to contract value. In any event, it is clear that they understood that there was an existing contract between the Trust and Mr Tomkins from their letter to Mr Tomkins dated 28 November 2006, in which they ask for a copy of that contract. (iii) The Appeal Unit well understood the nature of the issues referred to them - i.e. the extent to which the contract value should reflect atypical earnings of Mr Zein because of either (i) missing data and/or (ii) the fact that he commenced work during the course of the baseline period. The issues are set out in Paragraph 2.3. 61. In respect of those issues, the Appeal Unit found that Mr Tomkins lost the first, but succeeded on the second. In relation to the missing data issue, Mr Burns said (Paragraph 3.5): "I determine that no amendment to the contract in this regard" In relation to the relevant period of Mr Zein's work, he said (Paragraph 3.7): "Although the wording [of the supplementary agreement] is ambiguous, it appears that the [Trust] and the contractor have agreed to have regard to data, to 3 March 2006 for the named dentist, which would have the effect of enhancing the contract value and number of [UDAs] above that which is calculated in accordance with the regulations and the GDS SFE. Given this has been agreed by both parties, I determine that this is binding upon them." He went on to say (at Paragraph 3.8) that: "... The contractor has provided figures for the period until 31 March 2006, which I determine the [Trust] shall confirm or otherwise and recalculate the contract value and the number of [UDAs] the contractor is required to provide having regard to the Regulations and the GDS SFE and the signed and dated supplementary agreement reached between the parties. Clearly it would be wrong for the contractor to receive a contract value greater than a one-year period, therefore the contract value and activity, shall be based on the 12-month period that provides for the highest value, and therefore this shall be treated as equivalent to a [Calculated Annual Contract Value]".
62. Mr Tomkins did not pursue the missing data issue, which the Appeal Unit determined conclusively against him. 63. Following legal advice, the Trust responded to this determination on 22 March 2007, when Ms Anita Marsland (the Trust's Chief Executive) wrote to Mr Tomkins. That letter indicated that the Trust considered the determination was binding on both itself and Mr Tomkins, by virtue of Clause 281 of the GDS Contract. The letter said: "[The Appeal Unit] has determined that the Supplementary Agreement signed by you and the [Trust] on 22 March 2007 (sic) is binding and that accordingly the [Trust] must

recalculate the value and activity attributable to Mr Zein based upon a revised test period. In accordance with the determination the [Trust] has duly recalculated Mr Zein's activity and value and in doing so has used the period 1 April 2005 to 31 March 2006 as the 'test period'. This equates to an additional £127,459 increase upon your original Calculated Annual Contract value ('CACV') of £350,505 with a revised total of £477,965 (please note all figures are quoted at 2006/07 prices and therefore include the 3% inflationary increase). The correlated increase in [UDAs] equates to an additional 1,229 UDA." 64. So far, so good. Mr Tomkins had succeeded on the issue concerning the reference period for Mr Zein's earnings: the Appeal Unit had required the Trust to recalculate those earnings in relation to the extended period: and the Trust had done so, with the effect of increasing the contract value by some £127,000. 65. However, the letter continued: "As has previously been explained to you, the [Trust] does not have the additional funding and/or need for additional activity to warrant or support an increase in your contract value and UDA based upon Mr Zein's atypical earnings in addition to the 4,869 UDA commissioned from you in March 2006. The [Trust] has therefore decided to off-set the additional activity attributable to Mr Zein, as detailed above, against the extra 4,869 UDA commissioned from you in March 2006. This decision is supported by paragraph 3.9 of the [Appeal Unit's] determination. Accordingly I can confirm that although your [Calculated Annual Contract Value] has been increased to £477,965, the [Trust] no longer wishes to commission any additional UDA from you for 2006/07. Therefore your revised gross contract value for 2006/07 is £477,965 and the total contracted number of UDA is 23,374. A meeting to discuss the implementation of this will be arranged upon your acceptance of the revised contract offer..... The [Trust] is satisfied that it has correctly and properly complied with the determination and that accordingly there is no need for you to take any enforcement action.... I hope that this letter clarifies the position and brings an end to this dispute..." 66. Paragraph 3.9 of the Appeal Unit's determination of 25 January 2007, which (the Trust considered) gave its stance support said this: "The [Trust] states that 'during the period of negotiation for the new GDS Contract a practice in the [local] area decided they wished to close for personal reasons. From this £100,000 was reallocated to [the contractor's] practice and appropriate adjustment to UDAs was made'. I accept that the recalculation at 3.8 above may lead` to the [Trust] assessing whether this additional amount and adjustment to the UDAs remains justified as a separate commissioning decision. [H]owever this is a commissioning decision of the [Trust]. I do not have the power to state how the [Trust] must exercise its commissioning abilities." 67. The Trust therefore set off against the £127,000-odd it appeared to accept that it was bound to grant to Mr Tomkins, the £100,000 it had agreed to grant him in March 2006 in respect of the Close Lane Practice work. The net advantage to Mr Tomkins, in terms of contract value, was £27,459. 68. In these proceedings, Mr Tomkins claims the £100,000 per year (as increased from time- to-time by inflation) that that letter denied him. The Parties' Contentions 69. The case made by Mr Simon Butler on behalf of Mr Tomkins was simple. On 28 March 2006, the Trust and Mr Tomkins entered into a contract. Whilst there remained an outstanding issue between them - namely the contract value that should properly be attributable to Mr Zein given that (i) some data concerning that work was missing, and (ii) he commenced work

mid-way through the baseline period - the parties had agreed a mechanism for determining that issue if it could not be resolved by agreement, ultimately by a reference to the Appeal Panel under Regulation 8. Consequently, that issue being outstanding did not render the contract ineffective for uncertainty or otherwise. Until the issue was resolved, the parties agreed that Mr Tomkins would be paid in accordance with the figures set out in the GDS Contract they had signed: but, after the issue had been determined, the figures for the contract value and UDAs would be re-valued retrospectively to 1 April 2006, if the determination so required. The contractual mechanism has been duly operated and has determined the outstanding issues: and, in accordance with the agreement of the parties, the contract value and the UDA value have been recalculated by the Trust accordingly. That recalculation is not in issue. The contract has operated properly: and the Trust cannot unilaterally vary the contract by depriving Mr Tomkins of £100,000 for the period from 1 April 2006 to date, in the manner that they it purported to do its Chief Executive's letter of 22 March 2007. By that deprivation, the Trust is in breach of contract. 70. The Trust sought to defend the claim on the following grounds, into which all of Mr Lock's submissions can be placed. Some of these grounds failed to survive the trial, but I include them all for the sake of completeness. (i) (ii) (iii) The parties lacked the necessary intention to enter into a contract ("the Contractual Intention Issue"). The parties failed to agree an essential term of the contract, such that the contract is void for uncertainty ("the Uncertainty Issue"). The form of GDS Contract the parties signed on 28 March 2006 had an entire contract clause, which excludes the admissibility of any evidence to contradict the contract value and value for UDAs set out in Clause 77 of and Schedule 4 to that contract. Any variation to the contract in terms of those values must be by way of agreement: and the Trust does not agree (nor has it ever agreed) to increase the contract value and UDAs to include both the Cross Lane Practice £100,000 and the value attributable to Mr Zein's atypical earnings as determined by the Appeal Unit ("the Entire Agreement Clause Issue"). (iv) Whatever the parties' intentions and wishes, the Appeal Unit had no jurisdiction to deal with the dispute that Mr Tomkins purported to refer to it ("the Jurisdiction Issue"). (v) (vi) Even if the Appeal Unit had that jurisdiction, then the Unit's determination, properly construed, allowed the Trust to set off the £100,000 attributable to the Cross Lane Practice work against the additional value attributable to Mr Zein's atypical earnings ("the Construction Issue"). Even if the Trust is contractually liable to pay Mr Tomkins the sums he claims, it is under a duty to break even, and would be in breach of that duty if it were to pay him the sums he claims now. In those circumstances, they are entitled unilaterally to vary the contract ("the Unilateral Variation Issue") I shall deal with these grounds in turn. The Contractual Intention Issue 71. This is one of the grounds of defence that failed to survive the trial. Mr Lock conceded during his closing that, on the evidence, on 28 March 2006 both parties intended to create legal relations in the form of a contract. That concession was properly made.

72. Mr Benyon was clear that he intended to enter into a binding contract on 28 March 2006. The Trust did not suggest prior to these proceedings - even after the Appeal Unit's determination - that there was never a contract between itself and Mr Tomkins, for example on the ground

of a lack of intention on his part to enter into such a contract. The Trust could only have paid the sums it has paid to Mr Tomkins since 1 April 2006 under such a contract. 73. In the Trust's pleadings, it is suggested that, by keeping the contract value and value for UDAs in issue, Mr Tomkins marked a lack of intention to enter into legal relations with the Trust (e.g. Defence and Counterclaim, Paragraph 68(a)): and, during the course of the trial, Mr Lock suggested that Mr Tomkins may not have had such an intention because he had taken out the reference to dispute resolution under Regulation 8 from the supplementary agreement, and wished to have a contract for the future that was binding on the Trust but not upon himself. However, none of that exhibits a lack of intent to enter into a formal binding contract. Both parties intended to enter into a contract, leaving the only open issues between them determinable by a mechanism they had also agreed. The Uncertainty Issue 74. 75. 76. 77. This ground too failed to survive the trial. In closing, Mr Lock rightly conceded that all terms of the agreement between the parties were clear and, on the evidence of Mr Tomkins and Mr Benyon, undisputed. In his Skeleton Argument (at Paragraph 54), Mr Lock relied upon the fact that, in the supplementary agreement of 22 March 2006 drafted by Mr Tomkins, he had removed the reference to Regulation 8 which appeared in the standard form agreed between the Department of Health and the BDA. That, he suggested, showed that Mr Tomkins did not agree to the Regulation 8 mechanism for determining the outstanding issues between the parties. Without such a mechanism, it was submitted, the contract would be void for uncertainty. However, that submission did not survive the evidence. Mr Tomkins said that he took out the overt reference to Regulation 8 from the supplementary agreement, because he had hoped that the Trust and he would be able to agree the contract value without the need for a reference - but, as he said, nothing in that document excluded a reference under Regulation 8: and the evidence of both him and Mr Benyon was that they each intended that mechanism to be used to determine the issues, if necessary. One further ground of defence can conveniently be dealt with here. Paragraph 70 of the Defence and Counterclaim relies upon the second Paragraph 6 of the supplementary agreement dated 22 March 2006 (set out in Paragraph 42 above), i.e. that because the parties never agreed "all the outstanding terms" then it is open to the Trust to terminate the GDS Contract, as it has purported now to do. However, Mr Tomkins and the Trust did agree all relevant terms, and agreed a mechanism for determining the contract value and UDAs - in the light of the only outstanding issue concerning Mr Zein's atypical earnings. Whatever the wording of the second Paragraph 6 might have been, it is common ground that neither party intended or agreed that the Trust could terminate the entire GDS Contract if and simply because they did not agree that value, or were not satisfied with any determination of the Appeal Unit. The Entire Agreement Clause Issue 78. Clause 366 of the GDS Contract signed by the parties on 28 March 2006 provides: 79. 80. 81. "... [T]his contract constitutes the entire agreement between the parties with respect to its subject matter." By Clause 367, the contract is also specified to supercede "any prior agreements, negotiations, promises, conditions or representations, whether written or oral...". I have found that the supplementary agreement dated 22 March 2006 was signed prior to that GDS Contract: it was signed by both parties on 22 March 2006, whereas the GDS Contract was signed the following

week, on 28 March (see Paragraph 43 above). Mr Lock submitted that, where an agreement has been reduced to writing, “verbal evidence is not allowed to be given... so as to add to or subtract from, or in any manner to vary or qualify the written contract” (Skeleton Argument, Paragraph 39). That is a quotation from *Goss v Lord Nugent* (1833) 5 B & Ad 58 at page 64; and it neatly expresses the parol evidence rule. As a result of that rule, Mr Lock submitted that, given the terms of the entire agreement clause to which each party signed up on 28 March 2006, in considering the contract value, the court could not look beyond the words of Clause 77 and Schedule 4 in that written document, as subsequently varied by agreement of the parties from time to time. Mr Tomkins could not (he said) refer to any subsequent agreement between the two parties that entitled Mr Tomkins to the contract value he claims. The fact that Clause 366 is standard or “boilerplate” does not detract from its force (*Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] EWCA Civ 58). I am afraid I find that submission misconceived. The parol evidence rule does not apply if it is shown that the parties did not intend the written document to set out the entire agreement between the parties, because a written document cannot prove its own completeness and accuracy (*Harris v Rickett* (1859) 4 H & N 1: see also *Corbin, The Parol Evidence Rule* (1944) 53 Yale LJ 603, 630 as cited by Goode, *Commercial Law*, 3rd Edition at page 92). As a matter of general principle, whether there is a binding contract between parties and, if so, the terms upon which it is made depends upon what they have agreed: and, in doing so, “The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties” (*J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078 at page 1983). All therefore depends upon the intention of the parties, as of course manifest. The primary source of the parties’ intentions will usually be the language of any written document in which they have chosen to express themselves. Where there is an entire agreement clause in a written contract, that will usually be taken as the parties expressing a clear intention that the document contains all the terms of their agreement. However, that is not always the case. It may be that there is compelling evidence that the parties actually intended some additional term to have contractual effect. The court will give effect to that additional term if it is persuaded that that term truly expressed the intention of the parties. As Moore-Bick LJ said of entire agreement clauses in *Ravannevi* (at [25]): “There may be circumstances, of course, in which the court can be satisfied that a clause of that kind, although apparently couched in language wide enough to encompass the particular matter on which one or other party seeks to rely, was not intended by the parties to operate in the way in which its terms would suggest, but any such conclusion must be borne out by the particular circumstances of the case.” 82. As I have indicated, in the case before me, there is no dispute as to the intention of the parties, or what they agreed. Despite the terms of Clause 366, neither party suggested that the written contract they each signed on 28 March 2006 set out their complete agreement. The parol evidence rule therefore has no application to exclude evidence from outside that document as to what the parties’ intention was. In the event, the evidence as to that is uncontentious. Neither intended the contract value and value given for UDAs in Clause 77 and Schedule 4 to be the last word: they both intended that the issue of Mr Zein’s historical

work (and its effect on the contract value) be agreed, or determined by (if necessary) a reference under Regulation 8 to the Appeal Unit, and for that to be reflected in those contractual values, retrospectively if appropriate. In those circumstances, the submission that this uncontroversial common intention was overridden by the words of the written agreement, despite the valiant efforts of Mr Lock, took matters into land more redolent of Alice than of commercial contracts, the principles of which are clear. The Trust's submission patently runs contrary to those principles. 83. For those reasons, Clause 366 does not prevent this court looking at the parties' intention when they signed the GDS Contract on 28 March 2006. As I have said, by the end of the trial, Mr Lock did not suggest that that intention was unclear or other than mutual - nor, on the evidence, could he. The Jurisdiction Issue 84. As I have said (Paragraph 69 above), the Claimant's claim, put simply, is that on 28 March 2006 the parties agreed a GDS Contract in all its terms, except those relating to the contract value (and hence the UDAs to be performed) which was itself dependent upon how Mr Zein's historical work was to be taken into account in that contract value, which was in issue between the parties: but the parties had agreed a mechanism as to how that issue was to be ultimately determined, namely by reference to the Appeal Unit under Regulation 8.

85. Mr Lock conceded that, on the evidence, both parties intended to agree to that mechanism being used to determine the only issue between them, and both believed it to be an appropriate and lawful mechanism. They both proceeded to use that mechanism. However, he submitted that they were wrong in that mutual belief, because the Appeal Unit had no jurisdiction - no power - to determine that issue. As the mechanism for the resolution of such a vital issue as the contract value failed to be effective, then the agreement as a whole was and is ineffective. The contract is void for uncertainty. 86. 87. He submitted that the mechanism was bad for a number of reasons. I will deal with the main ground of defence first (Paragraphs 87-102), and will then deal with his other submissions (Paragraphs 103-108). The parties intended the resolution of the issue to be by way of reference under Regulation 8: and Mr Tomkins referred the issue, and the Appeal Unit accepted the issue, under Regulation 8. However, the appeal reference was not made until November 2006 - months after the parties had entered into the GDS Contract on 28 March 2006 - and, Mr Lock submitted, on the true construction of Regulation 8, a dispute could only be referred to the Appeal Unit before a contract is concluded. Because the Appeal Unit is a creature of statute, it could only have jurisdiction in matters that were lawfully referred to it: the parties could not confer onto it jurisdiction that it had not been given by statute. 88. In support of that contention, Mr Lock emphasised that, under Article 4(6), the reference to the Appeal Unit must be made "in accordance with... Regulation 8" - not "using the procedure of Regulation 8", or the like - in other words, he submitted, the reference had to comply with any and all conditions and the requirements of Regulation 8, and particularly Regulation 8(1). By way of reminder, that provides as follows: Subject to paragraph... (3), if, "(1) in the course of negotiations intending to lead to a contract, the prospective contracting parties are unable to agree on a particular term, of the contract, either party may refer the dispute to the Secretary of State to consider and determine the matter in accordance with the procedure

provided in paragraphs 55(2) and (3) of Schedule 3” (emphasis added). 89. He submitted that, on the ordinary and unambiguous meaning of the emphasised words, it was a condition of a reference under Regulation 8 that the reference was made in the pre-contract phase and not in a post-contract dispute. Mr Lock relied heavily upon the wording of the regulation itself, but he submitted that construction was supported by the following: (i) The title to Regulation 8, “Pre-contract disputes”. (ii) The reference in Regulation 8(1) to “the prospective contracting parties”: and those references in Regulation 8(5) to “proposed contract”, “proposed contractor” and “proposed parties”. (iii) The absence of any reference in Regulation 8 to the Appeal Unit having any power to vary the contract which power, he submitted, they would need if they were to resolve a dispute after the contract had been entered into. (iv) If the parties had indeed concluded a contract, then any dispute would be “arising out of or in connection with the contract”, and that dispute could be referred to the Appeal Unit under Paragraph 54 of Schedule 3 to the GDS Regulations (see Paragraph 22 above). However, the determination on any such reference would be binding on both parties: unlike a reference under Regulation 8 which is only binding on the relevant PCT (see Paragraph 25 above). To seek to extend Regulation 8 in this way is unfair, and cuts across the scheme of the regulations under which a post-contract dispute determination is binding on both parties.

- (v) Mr Lock submitted that his construction was at least consistent with the standard form supplementary agreement negotiated between the Department of Health and the BDA (see Paragraph 33 above), which provided for the standard GDS Contract to be signed on 1 April 2006 but for the relevant dispute to be referred by 31 March 2006. 90. I do not accept the construction for which Mr Lock contends, for the following reasons. 91. 92. 93. 94. First, contrary to his primary submission, on an ordinary reading of Regulation 8, the phrase “in the course of negotiations intending to lead to a contract” refers, not to “either party may refer the dispute to [the Appeal Unit]”, but to “the prospective parties are unable to agree on a particular term of the contract”. It is that disagreement that must occur in the course of the negotiations, before the contract is entered into - not the reference. Second, the Regulation 8 procedure suggests that disputes where there may be an extant contract were envisaged. Regulation 8 requires reference to the Appeal Unit “in accordance with the procedure provided for in paragraphs 55(2) [of Schedule 3]...”, which requires the provision of “a copy of the contract” (see Paragraph 23 above). However, it must of course be recognised that Regulation 8 is focused on circumstances in which a dispute arises during the course of negotiations, which the Regulation 8 procedure envisages will be referred and determined prior to the contract being entered into. In respect of disputes that arise during negotiations towards a GDS Contract under the transitional provisions, Article 4(6) uses the Regulation 8 as an already existing procedure - but, clearly, that procedure (and the wording of Regulation 8 itself) is not applicable to references of transitional contract disputes under Article 4(6) in every element, without some adaption to those different circumstances. Article 4(6) clearly envisages that a determination of a reference may be after the contract has been entered into: Mr Lock accepted that, in those circumstances, the consequences of

a reference, at least, may be different. That is why the suggestion that the absence of a power to vary the contract in Regulation 8 supports Mr Lock's construction, insofar as it was relied upon, is patently bad. Mr Lock accepted that, where the parties could not agree a particular term of a contract that the PCT was bound to enter into under the transitional provisions, Article 4(6) of the Transitional Provisions Order enabled the dispute to be referred to the Appeal Unit under Regulation 8. Article 4(6) made clear that the determination of the dispute might be after the contract had been entered into - hence the power in that provision granted to the Appeal Unit to vary the terms of the contract or to bring the contract to an end. As I have indicated, Mr Lock conceded that the determination of a referred dispute may be after a contract had been entered into (although he submitted that the reference had to be before that time): and he therefore accepted that the consequences of references of transitional contract disputes in accordance with Regulation 8 but under Article 4(6) inevitably may be different from the consequences of references of disputes where there was no contract at all. Hence the added powers (to vary or bring a contract to an end) granted to the Appeal Unit by Article 4(6). For that reason, his reliance on the terms "proposed contract" etc in Regulation 8 was undermined. Particularly, the references relied upon in Regulation 8(5) are in respect of the determination, not the reference of the dispute. Third, it is trite law that a contractual agreement does not fail if there are outstanding points between the parties, if the agreement provides that those points should be determined by a procedure such as a dispute resolution procedure. In its context, where Article 4(6) and Regulation 8 refer to the contracting parties being unable to agree on "a particular term of the [GDS] contract", that is not restricted to the pre-contractual. The phrase is broad enough to include circumstances in which parties are unable to agree (e.g.) the contract value or UDAs to be performed, but are required to enter into a contract by 1 April 2006 by the transitional provisions. The procedure for resolving disputes is clearly intended to cover disputes of issues that a concluded contract leaves open. 95. 96. 97. 98. 99. Given the imperative for entering into a formal contract under the transitional provisions, those circumstances are, in some substantive ways, more akin to a pre- (as opposed to a post-) contract. Whilst this is not a matter for me, one can certainly understand the provisions allowing a dentist an opportunity to bow out from his contractual obligations if he does not wish to provide NHS dental services on the basis as determined by the Appeal Unit. One can understand why Article 4(6) and Regulation 8 give him, in these circumstances, an opportunity to make an informed choice. Therefore, although, where an dispute is not referred prior to the GDS Contract being entered into there may be a power under Paragraph 54 of Schedule 3 (and Clauses 287 and following of the standard form GDS Contract) to make a reference to the Appeal Unit under the post-contract provisions - that does not rationally exclude the power for a dental service provider to make a reference under Regulation 8. Fourth, Mr Lock accepted that the Appeal Unit would have had jurisdiction if a reference had been made to it before 28 March 2006. Indeed, on Mr Lock's submission those are the only circumstances in which it would have had jurisdiction in this case. Whilst of course this is a matter of jurisdiction, and not convenience, it seems to me highly unlikely that it was the intention of these provisions to require such a tight timetable

for a reference, given the short period allowed for implementation in any event. The procedural provisions and guidance required the parties to seek to agree before they entered into the dispute resolution procedure at all, and that procedure began with a reference to the Local Arbitration Panel before the Appeal Unit (see Paragraph 22 of the Department of Health Factsheet 8: Understanding the [TPO], quoted at Paragraph 32 above). Given that the draft contract was not available until the beginning of March 2006, and most of the substantive negotiations seem to have begun only a couple of weeks before the 31 March deadline, to require a reference to the Appeal Unit by 31 March 2006 appears a very unlikely intention as well as an impractical one. It is no answer for Mr Lock to say that there would still be a dispute resolution procedure available, under Paragraph 54 of Schedule 3 and/or under the express provisions of the GDS Contract itself for the reasons given in the previous paragraph. Under those provisions the procedure would be binding on both parties. This factor and that referred to in the last paragraph are mutually supportive in being contrary to the construction suggested by Mr Lock. It is also perhaps noteworthy that the Appeal Unit did not raise any possible issue of its own jurisdiction - despite the fact that it must have had many such references as in this case - and the Trust did not raise any such issue until well after the Appeal Unit had made an arguably adverse finding against it. Nor, fifth, do I consider that Mr Lock can gain much comfort or support from the standard form Department of Health/BDA supplementary agreement (set out in Paragraph 33 above). The reference to the two parties entering into a GDS Contract "on" 1 April 2006, could be construed as "with effect from" 1 April 2006: and, although Paragraph 2 refers to 31 March 2006 in the future tense, recital A refers to 1 April 2006 is in the past tense. Sixth and finally, Mr Lock said that any other construction of Regulation 8 other than his would leave uncertainty for many years, the time for making a reference under Regulation 8 being 3 years: but that is not the case - because Article 4(6) requires the disputed issue to arise (and necessarily be identified) in the course of negotiations, i.e. before the GDS Contract is entered into.

100. Article 4(6) is in truth a modest procedural provision. It merely invoked the existing Regulation 8 procedure, designed for GDS pre-contractual disputes where both reference and determination would be concluded before any contract was entered into, as a procedure for resolving disputes which arose pre-contractually, but in the somewhat different circumstances of the transitional arrangements. 101. 102. 103. 104. 105. 106. 107. In short, I do not see any reason why the wording of Regulation 8 - read discretely, or in its full proper context - prohibits the Appeal Unit from considering disputes which have arisen and been identified in the course of negotiations before a transitional GDS Contract is entered into, but which have not been referred to the Appeal Unit before that contract is signed. Once identified, a PCT can of course itself make a reference to the Appeal Unit; but, in any event, as the pro-tem values upon which the dentist will be paid will be set on the basis that the PCT will be successful on any issue, it would always be in the dentist's interests to make an early reference in any event. For those reasons I do not consider that a reference to the Appeal Unit under Article 4(6) and Regulation 8 has to be made prior to any contract being

entered into. I can deal with Mr Lock's other submissions in relation to the jurisdiction of the Appeal Unit shortly. First, he submitted that the Appeal Unit was unable to determine issues, but only had a power to specify the contractual terms. He relied upon the wording of Regulation 8(5) (quoted in Paragraph 24 above), which gave power to the Appeal Unit to "specify the terms to be included in the proposed contract": and Article 4(6) which gave the Unit the power to vary a contract or bring it to an end. I find this submission unconvincing. Regulation 8(5) and Article 4(6) merely gave the Appeal Unit powers of disposition. They are not exclusive. Article 4(6) enabled any "dispute" to be referred to the Unit. The Appeal Unit itself in this case clearly did not feel at all constrained in determining the issues that were referred to it by Mr Tomkins. The scheme does not impose any such constraint upon them. Second, Mr Lock submitted that, under Article 10(6) of the Transitional Provisions Order (quoted in Paragraph 31 above), where a contractor and PCT are unable to agree upon the number of UDAs, "the GDS shall state this to be the case, and shall specify a number of [UDAs] which is determined by the [PCT]". Mr Lock submitted that, in this case, the 28 March 2006 contract did not either state that this value was in dispute: it did of course specify the number of UDAs the Trust had determined should be provided, subject to adjustment as a result of the mechanism it had agreed for dealing with the issue of the atypicality of Mr Zein's earnings on the baseline period data. The 22 March 2006 version of the contract did specify that the value was in dispute. Mr Tomkins thought that the 28 March version replicated the former except that it included the Cross Lane Practice work adjustment to both contract value and UDAs. It was the intention of the parties that it did so. Both parties intended and agreed that the UDA value would be changed to reflect the Appeal Unit determination of the Mr Zein issue, if appropriate. 108. In those circumstances, the 28 March 2006 GDS Contract could be rectified to reflect the parties' mutual intention. However, in this case, I do not consider that necessary - because I do not consider that, in the circumstances of this case, given the absence of any significant factual dispute as between the parties, any breach of Article 10(6) can be relied upon by the PCT to deny the effectiveness or validity of the contract, or of the Appeal Unit's determination. The Construction Issue

109. Mr Benyon said that, if Paragraph 3.9 of the Appeal Unit's determination (which is set out at Paragraph 66 above) had not been included - if the document had ended with Paragraph 3.8 - the Trust would have considered themselves bound to have paid Mr Tomkins the amount that derived from that determination without any deduction in respect of the Cross Lane Practice £100,000. That very frank admission - "We would have been bound to comply - perhaps reflects more than anything upon the merits of the grounds of defence I have already covered. The admission is itself reflected in the documents, e.g. in the Trust's letter to Mr Tomkins of 18 April 2007 in which the Trust expressed themselves satisfied that they had fully and properly complied with the determination. At that stage, it seems that they thought they were bound to comply because of the contractual provisions (Clause 281), rather than the provisions of Regulation 8: but Mr Benyon was under no such misapprehension as to the source of the Trust's obligation to comply when he gave his

evidence. In his closing, Mr Lock too accepted that, if Paragraph 3.9 had not been included, the Trust would have considered itself bound by the determination and would not have reduced the contract value by £100,000 as they purported to do.

110. However, he submitted that Paragraph 3.9 formed part of the Appeal Unit's determination. The Appeal Unit was entitled to vary the contract by requiring or enabling the Trust to reduce the contract value by the Cross Lane Practice £100,000. In Paragraph 3.9, he contended that the Appeal Unit had determined that the Trust retained a discretion as to whether to rescind its 'offer' of £100,000 additional contract value for Cross Lane. The Trust had acted upon that determination, and denied Mr Tomkins the £100,000 per year accordingly.
111. Again, I am afraid I do not consider that this submission has merit. 112. 113. First, it is clear that the Appeal Unit made no determination in Paragraph 3.9 at all. The £100,000 in respect of the Cross Lane Practice work was not in issue between the parties, and not an issue referred to the Appeal Unit for determination. In any event, there is no purported determination: where Mr Burns on behalf of the Unit made a determination - in relation to an issue that was before it - he did so specifically, in express terms, using in every instance the phrase, "I determine..." (see Paragraph 61 above). Second, the Appeal Unit appears to have been under the impression that the Trust had not contractually bound itself to grant Mr Tomkins an additional £100,000 contract value in respect of the Cross Lane Practice work. That impression appears to have been gathered from the Trust's representations to the Unit. However, as can be seen from the above, that impression was false. Mr Benyon accepted - readily and frankly - that, not only have the Trust offered Mr Tomkins the additional £100,000, but also he had accepted it. That was part of their contractually binding agreement of 28 March 2006. The Unilateral Variation Issue 114. Section 230(1) of the National Health Service Act 2006 provides that: "Each [PCT] must ensure that the use of its resources in a financial year does not exceed the amount specified for it in relation to that year by the Secretary of State."
115. Mr Lock submitted that the Trust had not reserved any money from previous years in respect of this claim - it had spent all of its budgeted allocation for all of the years 2006- 7 to 2009-10. In these circumstances, to pay Mr Tomkins in respect of this claim - even if he would otherwise be entitled - would be a breach of its statutory duty to "break even" and keep to budget. In these circumstances, he submitted, the Trust was entitled unilaterally to vary the GDS Contract - to avoid paying Mr Tomkins for work that he had done under the contract - under Clause 288 (see Paragraph 8 above). 116. That submission was unattractive - but, worse for the purposes of this claim, it is of no legal merit. If the Trust has to pay Mr Tomkins as a result of this claim, then that payment will be made in this financial year. There is no evidence before me that the Trust has no money to pay Mr Tomkins this year. Indeed, the evidence of Mr Benyon was that, but for Paragraph 3.9 of the Appeal Unit's determination, the Trust would have paid him the full amount he now claims. I accept that, as a result of this claim, if the Trust has not made a reserve in respect of it, that may mean

that other services that would otherwise be performed may have to be curtailed. However, if that were the case, that would not of course be Mr Tomkins' fault. Conclusion on Liability 117. The defences raised by the Trust throughout this claim have been many and various. Some have been ingenious. Certainly no possible defence has been overlooked: and nothing I say in this judgment is an adverse reflection upon Mr Lock and those instructing him, who have made every valiant effort for their client, the Trust.

118. However, on the evidence - which, in substance, was uncontentious - on 28 March 2006, the Trust and Mr Tomkins came to a legally binding and effective agreement, agreeing all terms except those that were dependent upon the issue of Mr Zein's atypical earnings for the baseline period used in the calculation of the annual contract value under the transitional provisions I have described. They agreed a mechanism for determining that issue, ultimately by reference to the Appeal Unit. That reference was duly made, and the issue determined. That determination was binding upon the Trust. Of course, one has sympathy with a public body such as the Trust, who are required to work within tight financial constraints. However, despite the best efforts of their legal team, the Trust has been unable to persuade me that it has any ground for failing to comply with its contractual obligations to Mr Tomkins. It agreed to pay him £100,000 additional contract value in respect of the Cross Lane Practice work. That was a contractual term agreed between them. In failing to pay him, the Trust is in breach of contract.
119. On liability, I shall enter judgment for the Claimant accordingly. Quantum
120. As I understand it, quantum is agreed in the sum of £482,428.12 to 29 April 2010: but that figure will need to be updated to the date of this judgment. 121. In addition, Mr Tomkins is entitled to interest. I have before me no evidence in relation to interest and Mr Tomkins' personal circumstances - for example, any interest paid by him on actual borrowings. This was a commercial contract, and it seems to me that there is nothing before me to displace a usual commercial rate of base rate plus one per cent. During the relevant period, that would equate to a rate of between over 6% and 2%. In all of the circumstances, I shall award a rate of 4% over the entire period. That will do justice in this case. 122. I trust that the parties will be able to calculate and agree the judgment sum on that basis. 30

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