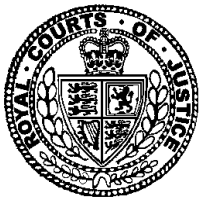

Neutral Citation Number: [2022] EWHC 2526 (Admin)

Case No: CO/3299/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2022

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

THE KING
On the application of

SASHI SHASHIKANTH — **Claimant**

- and -

(1) NHS LITIGATION AUTHORITY
(2) NHS COMMISSIONING BOARD (aka NHS ENGLAND) — **Defendants**

- -

David Lock KC and Admas Habteslasie (instructed by Weightmans) for the **Claimant**
Jonathan Auburn KC (instructed by Bevan Brittan) for the **2nd Defendant**
The **1st Defendant** was represented by DAC Beachcroft but did not participate in the oral hearing.

Hearing date: 28th-29th June 2022

- -

Approved Judgment

The Hon. Mr Justice Bourne:

Introduction and statutory background

1. The Claimant is a medical general practitioner ("GP") who operates two practices in the Hillingdon area, the West London Medical Centre and the Church Road Surgery, under contracts with the NHS. He applies for judicial review of decisions by the Second Defendant to terminate the contracts, and by the First Defendant, acting as contractual adjudicator under a dispute resolution process, to uphold that termination. Permission was granted on 1 December 2021 by Neil Cameron QC, sitting as a deputy judge of this Court.

2. There is a fundamental question of whether this dispute is amenable to judicial review at all. If it is not, this claim cannot succeed. If it is, it will turn on whether the decisions were unlawful. It is common ground that the focus should be on the decision of the First Defendant because, as a matter of contract, the parties agreed to be bound by the First Defendant's decision.

3. The Second Defendant is referred to generally as NHS England. In the relevant legislation as amended (and as in effect at the relevant time), it is referred to as "the Board". It has ultimate responsibility for the commissioning of primary care services. This responsibility is delegated to local Clinical Commissioning Groups ("CCGs") which, following the Health and Social Care Act 2012, are the successors in law to Primary Care Trusts. In the present case the acts of the Second Defendant were in fact carried out by NHS Hillingdon CCG ("the CCG"), which has since merged into the North-West London CCG.

4. CCGs commission primary medical services in their local areas by entering into arrangements with GP practices under a power contained in sections 84-86 of the National Health Service Act 2006 ("the Act"). Section 84 provides:

> "(1) The Board … may enter into a contract under which primary medical services are provided in accordance with the following provisions of this Part.
>
> (2) A contract under this section is called in this Act a "general medical services contract".
>
> (3) A general medical services contract may make such provision as may be agreed between the Board and the contractor or contractors in relation to—
>
> (a) the services to be provided under the contract,
> (b) remuneration under the contract, and
> (c) any other matters.
>
> … ".

5. This concept of a general medical services contract or "GMS contract" is to be distinguished from the related concept of an "NHS contract". The latter is an arrangement between health service bodies and is made under section 9 of the Act, whose provisions include the following:

> "(1) In this Act, an NHS contract is an arrangement under which one health service body ("the commissioner") arranges for the provision to it by another health service body ("the provider") of goods or services which it reasonably requires for the purposes of its functions.
> …
>
> (5) Whether or not an arrangement which constitutes an NHS contract would apart from this subsection be a contract in law, it must not be regarded for any purpose as giving rise to contractual rights or liabilities.
>
> (6) But if any dispute arises with respect to such an arrangement, either party may refer the matter to the Secretary of State for determination under this section.
> …
>
> (8) Where a reference is made to the Secretary of State under subsection (6) or (7), he may determine the matter himself or appoint a person to consider and determine it in accordance with regulations.
>
> (9) "The appropriate person" means the Secretary of State or the person appointed under subsection (8).
>
> (10) By the determination of a reference under subsection (7) the appropriate person may specify terms to be included in the proposed arrangement and may direct that it be proceeded with.
>
> (11) A determination of a reference under subsection (6) may contain such directions (including directions as to payment) as the appropriate person considers appropriate to resolve the matter in dispute.
>
> (12) The appropriate person may by the determination in relation to an NHS contract vary the terms of the arrangement or bring it to an end (but this does not affect the generality of the power of determination under subsection (6)).
>
> (13) Where an arrangement is so varied or brought to an end—
>
> (a) subject to paragraph (b), the variation or termination must be treated as being effected by agreement between the parties, and
>
> (b) the directions included in the determination by virtue of subsection (11) may contain such provisions as the appropriate person considers appropriate in order to give effect to the variation or to bring the arrangement to an end."

6. GMS contracts and NHS contracts are distinct concepts, not least because section 9 also contains a definition of "health service body" which includes "the Board", i.e. NHS England, but does not include GPs or GP practices.

7. However, regulation 10 of the National Health Service (General Medical Services Contracts) Regulations 2015 (SI 2015/1862, "the 2015 Regulations"), made under section 90(3) of the Act, provides:

> "(1) A person who proposes to enter into a contract with the Board (a "proposed contractor") may elect, by giving notice in writing to the Board prior to entering into the contract, to be regarded as a health service body for the purposes of section 9 of the Act (NHS contracts)."

8. The potentially confusing result is that GPs who enter into a GMS contract may elect to do so in either of two ways, with different legal consequences.

9. If they make an election under regulation 10, their "GMS contract" will also be an "NHS contract". Even more confusingly, an NHS contract is not really a contract, because section 9(5) of the Act provides that it does not create contractual rights or liabilities[1]. It therefore cannot be the subject of a private law court claim for breach of contract or specific performance: *Pitalia v NHS Commissioning Board* [2014] EWCA Civ 474, 138 BMLR 89 at [37] and [46].

10. If they do not make that election, their GMS contract will be what is described as a "non-NHS contract". This does create contractual rights and liabilities which can in principle be enforced by a private law court claim. As has been held in cases of contracts for dental services under provisions which are not materially distinguishable, it takes effect as a normal commercial contract: *Krebs v NHS Commissioning Board* [2014] EWCA Civ 1540 per Longmore LJ at [2], *Tomkins v Knowsley PCT* [2010] EWHC 1194 (QB) at [8].

11. Under section 89 of the Act, GMS contracts (of either kind) must contain such terms as may be prescribed by regulations. Terms relevant to the present case are prescribed by the 2015 Regulations, as amended by the National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2019 (SI 2019/1137, "the Amendment Regulations").

12. The 2015 Regulations also set out the dispute resolution procedure which applies to both types of contract. The relevant provisions of regulations 82-84 are the following:

> "82.—(1) Where a contract is not an NHS contract, any dispute arising out of or in connection with the contract, except matters dealt with under the complaints procedure under Part 11, may be referred for consideration and determination to the Secretary of State—
>
> (a) if it relates to a period when the contractor was treated as a health service body, by the contractor or the Board; or

[1] Where this judgment uses the word "contract" in this context, it is with that important proviso.

(b) in any other case, by the contractor or, if the contractor agrees in writing, by the Board.

(2) Where a dispute is referred to the Secretary of State under paragraph (1)—

(a) the procedure to be followed is the NHS dispute resolution procedure; and

(b) the parties are to be bound by any determination made by the adjudicator.

NHS dispute resolution procedure

83.—(1) The procedure specified in this regulation and in regulation 82 applies to a dispute arising out of, or in connection with, the contract which is referred to the Secretary of State in accordance with—

(a) section 9(6) of the Act (where the contract is an NHS contract); or

(b) regulation 82(1) (where the contract is not an NHS contract).

…

(3) Where a party wants to refer a dispute for determination under the procedure specified in this regulation, it must send to the Secretary of State a written request for dispute resolution which must include or be accompanied by—

(a) the names and addresses of the parties to the dispute;

(b) a copy of the contract; and

(c) a brief statement of the nature of, and circumstances giving rise to, the dispute.

(4) Where a party wants to refer a dispute, it must send a request under paragraph (3) to the Secretary of State before the end of the period of three years beginning with the date on which the matter giving rise to the dispute occurred or should reasonably have come to the attention of that party.

(5) Where the dispute relates to a contract which is not an NHS contract, the Secretary of State may—

(a) determine the dispute; or

(b) if the Secretary of State considers it appropriate, appoint one or more persons to consider and determine the dispute.

(6) Before reaching a decision about who should determine the dispute, either under paragraph (5) or section 9(6) of the Act, the Secretary of State must send a written request to the parties, before the end of the period of seven days beginning with the date on which the dispute was referred, inviting them to make any written representations that they would like to make about the matter under dispute before the end of a specified period.

(7) The Secretary of State must give to a party other than the one which referred the matter to dispute resolution a copy of any document by which the matter was referred to dispute resolution together with the notice under paragraph (6).

(8) The Secretary of State must—

(a) give a copy of any representations received from a party to the other party to the dispute;

and

(b) request in writing each party to whom a copy of the representations is given to make, within a specified period, any written observations which that party would like to make regarding those representations.

(9) If the Secretary of State decides to appoint a person or persons ("the adjudicator") to hear the dispute the Secretary of State must—

(a) inform the parties in writing of the name or names of the adjudicator whom the Secretary of State has appointed; and

(b) pass to the adjudicator any documents received from the parties under or by virtue of paragraph (3), (6) or (8).

(10) The Secretary of State must comply with the requirement in paragraph (9)—

(a) following receipt of any representations received from the parties; or

(b) if no such representations are received before the end of the period for making those representations specified in the request sent under paragraph (6) or (8), at the end of that period.

(11) The adjudicator may, for the purpose of assisting in the consideration of the subject matter of the dispute—

(a) invite representatives of the parties to appear before, and make oral representations to, the adjudicator either together or, with the agreement of the parties, separately;

(b) in advance of hearing any oral representations, provide the parties with a list of matters or questions that the adjudicator would like the parties to give special consideration to; or

(c) consult such other persons whose expertise the adjudicator considers is likely to assist in the consideration of the matter.

(12) Where the adjudicator consults another person under paragraph (11)(c), the adjudicator must—

(a) give notice in writing to the parties accordingly; and

(b) where the adjudicator considers that the interests of any party might be substantially affected by the result of the consultation, give to the parties such opportunity as the adjudicator considers reasonable in the circumstances to make observations on those results.

(13) In considering the matter, the adjudicator must have regard to—

(a) any written representations made in response to a request under paragraph (6), but only if they are made before the end of the specified period;

(b) any written observations made in response to a request under paragraph (8), but only if they are made before the end of the specified period;

(c) any oral representations made in response to an invitation under paragraph (11)(a);

(d) the results of any consultation under paragraph (11)(c); and

(e) any observations made in accordance with an opportunity given under paragraph (12).

(14) In this regulation, "specified period" means—

(a) such period as the Secretary of State specifies in the request being a period of not less than two or not more than four weeks beginning with the date on which the notice referred to is given; or

(b) such longer period as the Secretary of State may allow if the Secretary of State considers that there are good reasons for extending the period referred to in sub-paragraph (a) (even after that period has expired), and where the Secretary of State does so allow, a reference in this regulation to the specified period is to the period as so extended.

> (15) The adjudicator may determine the procedure which is to apply to the dispute resolution in such manner as the adjudicator considers appropriate in order to ensure the just, expeditious, economical and final determination of the dispute subject to—
>
> (a) the other provisions of this regulation;
>
> (b) regulation 84; and
>
> (c) any agreement between the parties.
>
> Determination of the dispute
>
> 84.—(1) The adjudicator's determination and the reasons for it must be recorded in writing and the adjudicator must give notice in writing of that determination (including the record of the reasons) to the parties.
>
> (2) Where a dispute in relation to a contract is referred for determination in accordance with regulation 82(1)—
>
> (a) section 9(12) and (13) of the Act apply in the same manner as those provisions apply to a dispute referred for determination in accordance with section 9(6) and (7) of the Act; and
>
> (b) section 9(5) of the Act applies to any dispute referred for determination in relation to a contract which is not an NHS contract as if it were referred for determination in accordance with section 9(6) of the Act."

13. So, disputes arising from NHS contracts, referred under section 9 of the Act, and disputes arising from non-NHS contracts, referred under the 2015 Regulations, are dealt with by the same procedure and with similar though not necessarily identical consequences.

The contracts in the present case

14. The Claimant in this case entered into two non-NHS contracts, i.e. he did not elect under regulation 10 to be treated as a health service body. Those contracts, dated 1 April 2004 (Church Road) and 15 August 2005 (West London Medical Centre) therefore created rights and liabilities enforceable in private law.

15. Each of the two contracts is contained in a document entitled "Standard General Medical Services Contract" and they are materially identical. For the avoidance of doubt, the terms discussed below are extracted from the West London Medical Centre Contract. As the title suggests, they are standard terms. Details specific to the

contractor, such as the details of the Claimant's practice in each case, are contained in schedules which I have not been shown.

16. Also, while the standard text which I have been shown contains the contract as originally enacted, I have also been shown a number of variation notices issued from time to time, but those variations are not reflected in the standard text. It appears to be common ground that references in the text to "the PCT" should now be read as referring to NHS England or to the CCG acting on its behalf.

17. More generally, I have proceeded on the assumption that references to superseded legislation should now be read as references to the equivalent provisions of the updated legislation. That in particular applies to the dispute resolution procedure. This was originally framed by reference to 2004 regulations which have since been replaced by the 2015 Regulations.

18. With that introduction, it is necessary to set out the relevant terms at some length:

> "Part 22
> COMPLIANCE WITH LEGISLATION AND GUIDANCE
>
> 499. The Contractor shall comply with all relevant legislation and have regard to all relevant guidance issued by the PCT, the relevant Strategic Health Authority or the Secretary of State.
> …
>
> Part 24
> DISPUTE RESOLUTION
> …
>
> Dispute resolution: non-NHS Contracts
>
> 521. Any dispute arising out of or in connection with the Contract, except matters dealt with under the complaints procedure set out in clauses 500 to 516 of this Contract, may be referred for consideration and determination to the Secretary of State, if:
>
> 521.1. the PCT so wishes and the Contractor has agreed in writing; or
>
> 521.2. the Contractor so wishes (even if the PCT does not agree).
>
> 522. In the case of a dispute referred to the Secretary of State under clause 521, the procedure to be followed is the NHS dispute resolution procedure, and the parties agree to be bound by a determination made by the adjudicator.
>
> NHS dispute resolution procedure
>
> 523. Subject to clause 524, the NHS dispute resolution procedure applies in the case of any dispute arising out of or in connection with the Contract which is referred to the Secretary of State in accordance with section 4(3) of clause 521

above, and the PCT and the Contractor shall participate in the NHS dispute resolution procedure as set out in paragraphs 101 and 102 of Schedule 6 to the [NHS (GMS Contracts) Regulations 2004].
…

525. 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-

525.1. the names and addresses of the parties to the dispute;

525.2. a copy of the Contract; and

525.3. a brief statement describing the nature and circumstances of the dispute.

526. Any party wishing to refer a dispute as mentioned in clause 523 must send the request under clause 525 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.

527. In clauses 518 to 526 "any dispute arising out of or in connection with the contract" includes any dispute arising out of or in connection with the termination of the contract.

528. Part 24 shall survive the expiry or termination of the Contract.

Part 25
VARIATION AND TERMINATION OF THE CONTRACT

Variation of the Contract: general

529. Subject to … this Part (variation and termination of the Contract), no amendment or variation shall have effect unless it is in writing and signed by or on behalf of the PCT and the Contractor.

530. … the PCT may vary the Contract without the Contractor's consent so as to comply with the Act, any regulations made pursuant to that Act, or any direction given by the Secretary of State pursuant to that Act where it-

530.1. is reasonably satisfied that it is necessary to vary the Contract in order so to comply; and

530.2. notifies the Contractor in writing of the wording of the proposed variation and the date upon which that variation is to take effect.

531. Where it is reasonably practicable to do so, the date that the proposed variation is to take effect shall be not less than 14 days after the date on which the notice under clause 530.2 is served on the Contractor.

…

Termination by the PCT: remedial notices and breach notices

566. Where the Contractor has breached the Contract … and the breach is capable of remedy, the PCT shall, before taking any action it is otherwise entitled to take by virtue of the Contract, serve a notice on the Contractor requiring it to remedy the breach ("remedial notice").

567. A remedial notice shall specify-

567.1. details of the breach;

567.2. the steps the Contractor must take to the satisfaction of the PCT in order to remedy the breach; and

567.3. the period during which the steps must be taken ("the notice period").

568. The notice period shall, unless the PCT is satisfied that a shorter period is necessary to protect the safety of the Contractor's patients or protect itself from material financial loss, be no less than 28 days from the date that notice is given.

569. Where the PCT is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the notice period, the PCT may terminate the Contract with effect from such date as the PCT may specify in a further notice to the Contractor.

570. Where the Contractor has breached the Contract other than as specified in clauses 552 to 565 and the breach is not capable of remedy, the PCT may serve notice on the Contractor requiring it not to repeat the breach ("breach notice").

571. If, following a breach notice or a remedial notice, the Contractor-

571.1. repeats the breach that was the subject of the breach notice or the remedial notice; or

571.2. otherwise breaches the Contract resulting in either a remedial notice or a further breach notice.

the PCT may serve notice on the Contractor terminating the Contract with effect from such date as may be specified in that notice.

572. The PCT shall not exercise its right to terminate the Contract under the previous clause unless it is satisfied that the cumulative effect of the breaches is such that it would be prejudicial to the efficiency of the services to be provided under the Contract to allow the Contract to continue.

> 573. If the Contractor is in breach of any obligation and a breach notice or a remedial notice in respect of that default has been given to the Contractor, the PCT may withhold or deduct monies which would otherwise be payable under the Contract in respect of that obligation which is the subject of the default."

19. The combined effect of the dispute resolution provisions in the contracts and in regulations 82-84 is that:

    i. whilst a contractor such as the Claimant can insist on referring the dispute for "consideration and determination", NHS England can instigate a referral only with the contractor's consent; and

    ii. in the event of referral, the parties agree to be bound by the adjudicator's determination.

20. The Amendment Regulations introduced a new term which was required to be included in GMS contracts, by inserting a new paragraph 15A into part 1 of schedule 3 to the 2015 Regulations ("paragraph 15A"):

> "Duty of co-operation: Primary Care Networks
>
> 15A.—(1) A contractor must comply with the requirements in sub-paragraph (2) where it is—
>
> (a) signed up to the Network Contract Directed Enhanced Service Scheme ("the Scheme"); or
>
> (b) not signed up to the Scheme but its registered patients or temporary residents, are provided with services under the Scheme ("the services") by a contractor which is a member of a primary care network.
>
> (2) The requirements specified in this sub-paragraph are that the contractor must—
>
> (a) co-operate, in so far as is reasonable, with any person responsible for the provision of the services;
>
> (b) comply in core hours with any reasonable request for information from such a person or from the Board relating to the provision of the services;
>
> (c) have due regard to the guidance published by the Board;
>
> (d) participate in primary care network meetings, in so far as is reasonable;
>
> (e) take reasonable steps to provide information to its registered patients about the services, including information on how to access the services and any changes to them; and

> (f) ensure that it has in place suitable arrangements to enable the sharing of data to support the delivery of the services, business administration and analysis activities.
>
> (3) For the purposes of this paragraph, "primary care network" means a network of contractors and other providers of services which has been approved by the Board, serving an identified geographical area with a minimum population of 30,000 people."

21. An important issue in the present case is whether or not the Claimant's contracts were varied so as to include the paragraph 15A term.

The facts of the present case

22. The dispute arises in the context of the NHS Long Term Plan which was published by NHS England on 7 January 2019. A key objective of the Long Term Plan is to create fully integrated, community-based healthcare. This required NHS England to establish a "Network Contract Direct Enhanced Services" scheme. The scheme involves GP practices working in Primary Care Networks ("PCNs") with local community professionals other than doctors to make a range of enhanced health services available to patients nationally, delivered by multi-disciplinary teams.

23. On 1 April 2019 the Secretary of State for Health made the Primary Medical Services (Directed Enhanced Services) Direction 2019, requiring NHS England to establish the Network Contract to integrate care by the formation of new PCNs.

24. The policy is for all patients to have access to services offered by PCNs, whether or not their GP practice opts to join one. Guidance therefore states that whenever a GP practice is outside a PCN, the practice's list of patients will be added into the list of its local PCN, which will then take responsibility for providing the enhanced network services to those patients.

25. It was in pursuance of that policy that provision was made for GMS contracts to be varied to introduce a duty to cooperate with PCNs, by the introduction of paragraph 15A.

26. On 3 April 2019 the CCG wrote to the Claimant, asking whether he intended to join a PCN and pointing out, by reference to the published guidance, that if a practice did not join a PCN then its patients would need to be added to a local PCN's list.

27. The Claimant decided not to participate in his local PCN. His stated position has always been that he would prefer funding to be provided to enable his practices to provide the range of enhanced services directly.

28. On 28 May 2019 the CCG wrote to him again to point out that his two practices were the only GP practices in Hillingdon which were not part of a PCN, and requested a meeting to discuss how access to the DES Scheme could be ensured for his patients.

29. A meeting took place on 26 July 2019. The Claimant indicated that he was not willing to allow his patients to join the scheme or to share patient contact information so that they could be offered enhanced services by others. The CCG informed him that data sharing between practices in a PCN did not infringe data protection laws and that if he refused to allow the patients to be enrolled with a PCN by 1 October 2019, the CCG would consider him to be in breach of his contracts.

30. On 28 October 2019, the CCG wrote to the Claimant in the following terms:

> "**The National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2019**
>
> The Network Contract Direct Enhanced Services Directions (DES) were introduced 1st April 2019. Participation remains voluntary for all GP practices however it is a requirement that every patient in England will have equitable access to all the Network Contract DES services/activities, *regardless of whether or not their registered practice is participating* in the Network Contract DES. As you are not participating, Hillingdon CCG is required to develop appropriate local arrangements for your patients. To support commissioners in providing primary care services, The National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2019 were laid before Parliament on 18th July 2019 and came into force on 1st October 2019. I am writing to inform you how the new contractual requirement will affect your GMS contract; the relevant section is entitled ***Duty of co-operation: Primary Care Networks*** and states:
>
> [the text of paragraph 15A was quoted here]
>
> I hope that the above extract from The National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2019 is self-explanatory. Failure to comply with the regulations and not work [sic] with the nominated Primary Care Network to provide primary care services for your registered patients will be considered a breach of your GMS contract subject to approval by NHS Hillingdon Primary Care Board;
>
> "***3.1 Compliance with legislation and guidance***
> ***Clause 23 of the Contract provides:***
> *'the Contractor shall comply with all relevant legislation and have regard to all relevant guidance issued by the Board or the Secretary of State or Local Authorities in respect of the exercise of their functions under the 2006 Act'.*
>
> The nominated Primary Care Network is Long Lane and First Care Group; Clinical Director is Dr Ajay Birly – contact details are [details were set out here].
>
> If you have any issues with compliance please contact your Londonwide LMC [Local Medical Committee] for advice.
>
> If you have any queries about the contents of this letter, please contact the North West London Primary Care Team on [details set out here] ."

[emphasis in original]

31. That letter has assumed importance because the Second Defendant now contends that it had the effect of varying the contracts by inserting the paragraph 15A term into them.

32. On 3 January 2020, the PCN's Clinical Director, Dr Birly, wrote to the Claimant, advising him of the need for patients to be "offered the PCN DES services", inviting him to join the PCN and, if he did not want to join, requesting the names and contact details of patients. Those names and contact details are, collectively, the information or data which would be the subject of the ensuing debate ("the patient data").

33. The Claimant did not respond to Dr Birly, but on 6 January 2020 he emailed the Managing Director of the CCG, Caroline Morison, requesting that the CCG instead enter into a separate agreement with him to provide services to his patients under the Network Contract scheme himself. He added:

> "We have already made our position clear regarding PCNs that we don't intend to join any. I have been telling you for the last 4 years and will repeat – We are enthusiastic about offering more services to our patients if you give us the funding and opportunity. We will do this ourselves while protecting our patient data.
>
> Please don't communicate via third parties like below [a reference to Dr Birly's email]. I don't intend to respond either.
>
> GPC has landed us GPs in this difficult situation and I am copying this to BMA Chairman to see whether he could kindly look into ways of helping both of us.
>
> My duty of cooperation lies with NHS and not directors of companies."

34. On 9 January 2020 Ms Morison replied, reiterating that (as she believed) the Claimant was under a contractual duty to co-operate with the PCN and that a refusal would be considered as a breach of contract. There was no further substantive response from the Claimant.

35. On 11 February 2020 the CCG issued Remedial Notices ("RNs") under clauses 566-568 of the contract. These were headed "refusal to co-operate with Primary Care Network". They set out clauses 499 and 566. They stated that the Amendment Regulations had come into force on 1 October 2019 and that these "varied the contract", and set out paragraph 15A. The RNs summarised the previous correspondence and concluded:

> "The sequence of events and the evidence shows that as the responsible Contractor for [the practices], you made a decision not to co-operate with the PCN, contrary to paragraph 15A to schedule 3 of the GMS Regulations and in breach of the contract."

36. The RNs required the Claimant, by 10 March 2020, to co-operate and provide the PCN with the patient data, failing which the CCG would consider terminating the contracts.

37. The Claimant did not comply with the RNs. In the hope of avoiding termination, the CCG proposed that the dispute be referred to the First Defendant under the NHS Dispute Resolution Procedure and clauses 521-522 of the contract, but there was no agreement to this at that time. On 28 June 2020 the CCG sent the Claimant a draft data sharing agreement to consider. He responded the following day, stating that he would not sign it.

38. On 24 September 2020 the CCG issued contractual Termination Notices ("TNs") under clause 569 of the contracts in respect of both practices. These notices cited clause 499 and paragraph 15A, setting out the latter. They repeated that paragraph 15A had "varied the contract" and added that the CCG had written to the Claimant on 28 October 2019 "to inform you of the Amendment Regulations and the impact of those regulations on the Contract". Under "Grounds for Termination" the notices stated that "your refusal to co-operate with the PCN was in breach of clause 499 of the Contract and paragraph 15A, schedule 3 of the GMS Regulations". Notice was given that the contracts would terminate on 22 October 2020.

39. However, on the same date the CCG wrote to the Claimant, offering to rescind the TNs if he agreed to the disputes arising from the RNs being referred under the NHS dispute resolution procedure to the Primary Care Appeals Service ("PCAS"). The letter noted that he also had the option of appealing against the TNs by making his own referral to PCAS and that this would delay termination, pending a decision.

40. I note in passing that the CCG's issue of RNs and TNs was also based on another alleged breach of contract by the Claimant, concerning a refusal to register certain patients at one of the practices. That matter was subsequently resolved in his favour under the dispute resolution process (although there is in fact a continuing dispute about it) and is not relevant for the purposes of the present case. It seems that there are yet further matters on which the CCG and the Claimant are in dispute but these, too, are not relevant. I make no further reference to any of those matters.

41. Pending clarification of whether a joint appeal was possible, the Claimant notified PCAS that he wished to appeal against the TNs. In due course the case was referred to an adjudicator, Mr Jonathan Haley.

42. Some months passed while the adjudicator determined a preliminary issue of whether the parties had exhausted local resolution processes. On 10 March 2021 he decided that they had, and directed that they file written representations on the substantive issues.

43. On 29 April 2021 the Claimant put in lengthy written submissions, drafted by a barrister (not his present counsel) who is experienced in the specialist area of medical law. Under the heading "Relevant Statutory Provisions", these set out the text of paragraph 15A. It was then submitted that the CCG's decision was unreasonable and therefore unlawful for the following reasons:
    i. After Dr Birly's request for the patient data, the Claimant "was deeply concerned that he would be breaching data protection legislation" if he complied.

ii. The Claimant owed his patients a duty of confidentiality at common law and under ECHR Article 8.
iii. Section 251 of the NHS Act barred the disclosure of patients' names and contact details and could not be overridden by paragraph 15A, and paragraph 15A in any event did not authorise the CCG to obtain that information.
iv. The Data Protection Act 2018 and General Data Protection Regulation ("GDPR") required the Claimant to secure and protect patients' personal information.
v. So did the General Medical Council's guidance, "Good Practice in Handling Patient Information".
vi. The CCG should not have proceeded by way of the RNs and TNs but should have entered into a consultation. The case could and should be referred to the Local Medical Committee and/or to the Information Commissioner.
vii. Even if the adjudicator determined the legal issues against the Claimant, he had acted reasonably in raising them and termination should not take effect.
viii. It was also stated that the Claimant had asked his practices' Patient Participation Group about the data transfer issue and they had responded that they were not willing to have their confidential information disclosed to a PCN.

44. The Claimant did not contend that paragraph 15A had not been incorporated into the contracts, or that he was not under a contractual duty to co-operate, or that such a duty did not apply where DES services were not actually being provided to the patients. Those contentions have instead been made in this judicial review claim.

45. In respect of a duty to co-operate, the submissions contained this phrase referring to co-operation with the CCG rather than with the PCN:

> "There is no dispute between the parties that Dr Shashikanth is under a contractual obligation to cooperate with the CCG in respect of the enhanced services being offered to patients. These services are already available and being offered by Dr Shashikanth, if the patients so wish."

46. The Claimant also provided a witness statement in which he said that he had obtained detailed advice from a solicitor specialising in data protection, that this had outlined a number of objections to the data request and further that the patients' consent was required for any disclosure. He suggested that if the adjudicator resolved the issue against him, then he should be given a period of time in which to implement the determination rather than having his contracts terminated.

47. On 24 May 2021 the CCG's solicitors filed a detailed response in which they made the following points:
i. The Claimant had only now articulated his case.
ii. The CCG had followed the contractual procedures correctly and had acted reasonably.
iii. It "appears to be agreed that the Contractor was under a contractual obligation (per clause 499 of the Contracts), to comply with the requirements of the GMS Regulations, including paragraph 15A of schedule 3". They also noted the

Claimant's acceptance of a duty to co-operate with the CCG but pointed out that they were relying on a duty to co-operate with the PCN.

iv. Paragraph 15A placed an obligation on him to put in place a suitable data sharing arrangement. That being so, the adjudicator did not need to rule on his legal objections to data sharing.

v. Without prejudice to that position, they acknowledged that the data protection legislation was applicable, and indeed that the relevant data would include "special category data" relating to healthcare. The Second Defendant has since resiled from the latter point, relying on the fact that the only information sought is names and contact details.

vi. The patient data nevertheless could lawfully be shared with the PCN under article 6(1)(c) and/or article 6(1)(e) of the GDPR, and special category data could lawfully be shared under article 9(2)(h).

vii. Consent was unlikely to be the correct basis for sharing these data.

viii. Implied consent could however override a common law duty of confidence, having regard to the Practices' Privacy Notices which made clear that patients information would be shared with other NHS bodies.

ix. Similarly, GMC guidance acknowledged that data could be shared where it was reasonable to infer that patients agreed.

x. The CCG had consulted with the Londonwide LMC before making its decision.

48. No hearing was convened, and the adjudicator considered the case on the papers.

49. By a determination dated 24 June 2021, the adjudicator decided that NHS England was entitled to terminate the contracts on the basis of failure to co-operate with the PCN. In particular:

i. Having noted the CCG's reference to articles 6(1)(c), 6(1)(e) and 9(2)(h) of the GDPR, he was "satisfied that consent is not the only legitimate basis that the Contractor could have relied on in order to co-operate with Long Lane PCN and provide it with the information it required".

ii. The Claimant "could have obtained legal advice" about the basis for sharing data.

iii. The adjudicator did not consider "that it is open to me to comment or make any determination with regard to the legality of paragraph 15A of Schedule 3 of the Regulations, in particular as to whether it is incompatible with the data protection or other legislation or whether its effect is such that it would place the Contractor in breach of data protection or other legislation".

iv. Since the Claimant had received advice that the draft data sharing agreement was deficient in some ways, the adjudicator expected him to "go a step further and instruct a solicitor (if he so wished) to amend the data sharing agreement provided by the commissioner or to draft a data sharing agreement that would enable him to comply with paragraph 15A".

v. The adjudicator considered that he had "not been presented with enough evidence to conclude that each patient has objected to their data being shared with Long Lane PCN" and therefore that "the Contractor has the patients' implied consent to share their data with Long Lane PCN for the relevant purpose", having regard to the privacy notices.

vi. For these reasons (and others which are not material to this challenge) the Second Defendant was entitled to issue the RNs and the TNs on the basis of the Claimant's failure to co-operate with the PCN.

50. The Claimant now contends that the adjudicator's decision and the underlying termination decision were wrong and unlawful on three grounds:
    i. Although this point was not taken before the adjudicator, there was no contractual obligation on the Claimant to co-operate with the PCN. Paragraph 15A did not vary the contract. A variation to insert the new term could be effected only by consent or by service of a notice, neither of which occurred.
    ii. Although this point too was not taken before the adjudicator, paragraph 15A (even if effective to vary the contract) did not apply on the facts. It applies only if either the contractor (i.e. the Claimant) is signed up to the DES scheme (which he was not) or his patients "are provided with services" under that scheme. His patients were not being provided with any such services, not least because the Claimant did not provide their details to make that possible.
    iii. It was unlawful to require the Claimant to comply with the RNs, because doing so would breach his data protection obligations and his duty to preserve the confidentiality of his patients' data.

51. The First Defendant, having regard to the approach normally taken by tribunals and similar bodies when subject to judicial review challenge, submitted summary grounds limited to explaining the reasons for the determination but has otherwise not taken an active part in this litigation.

52. This claim has therefore essentially been defended by the Second Defendant, which denies that there is any merit in any of the three grounds. But the Second Defendant's prior and more fundamental argument is that, whether or not the adjudicator made any error, his decision and the Second Defendant's prior decision are not amenable to judicial review and therefore this Court has no power to interfere.

Was there an error of law in the adjudicator's decision?

53. In my judgment, the adjudicator proceeded on the mistaken basis that paragraph 15A created an immediately effective requirement of co-operation and that the Claimant's failure to comply with it placed him in breach of clause 499.

54. That much, indeed, is not in dispute. Jonathan Auburn KC, representing the Second Defendant, accepts that the Amendment Regulations do not, themselves, have the effect of varying a GMS contract and that the contract will not be varied unless and until a notice of variation is served under clauses 529-531, quoted above.

55. Mr Auburn nevertheless argues that this made no practical difference because the contract was varied so as to incorporate paragraph 15A. This, he contends, was the effect of the letter of 28 October 2019, referred to at paragraph 30 above. That letter told the Claimant that the Amendment Regulations had come into force on 1 October 2019 and informed him of paragraph 15A, introducing it with the words "I am writing to inform you how the new contractual requirement will affect your GMS contract",

and stated that "failure to comply with the regulations" would be considered a breach of the contract.

56. David Lock KC, representing the Claimant, submits that that letter failed to comply with the requirements in clauses 530 and 531 to give a written notice of variation setting out a date for the variation to take effect that was not less than 14 days after the date of the letter, it having been reasonably practicable to do so.

57. I was shown examples of notices of variation which NHS England has served on the Claimant in the past. In contrast with the letter of 28 October 2019, these were formal notices which set out new numbered contract terms and identified an effective variation date at least 14 days in the future.

58. In response, Mr Auburn submitted that (1) giving notice of 14 days was not reasonably practicable because of the importance of offering the range of services to patients as soon as possible, (2) the failure to give 14 days made no difference because the Claimant was given no sanction for non-compliance until long after that time, (3) the effect of a notice which did not give 14 days was nevertheless to effect the variation after 14 days and/or (4) the Claimant did not, at any material time, make any objection about lack of notice or deny the variation.

59. In my judgment, the letter of 28 October 2019 was not effective to vary the contract. Although it informed the Claimant that he was contractually obliged to comply with paragraph 15A, it did not set out a contract term but instead, mistakenly, stated that paragraph 15A itself had contractual effect. It indicated that the requirement applied from 1 October 2019, i.e. a date before the date of the letter. That was not in accordance with the parties' contractual rights and obligations in respect of variations. It would not have been reasonable, in my judgment, to expect the Claimant to assume that the letter would have effect as a variation notice (as Mr Auburn suggested) from an unspecified date 14 days after service of the notice.

60. In fairness to the adjudicator, it must be emphasized that this objection was not raised and he was not invited to consider or decide this question. Nevertheless, the conclusion is inescapable that the adjudicator's decision was based on an error of law.

61. I do not agree that the second alleged error of law was made. Indeed, if the contract was not varied, the question is academic. But if paragraph 15A did acquire contractual effect, I do not consider that a contractor whose failure to co-operate prevented his patients from being provided with the wider services could escape liability by contending that the obligation to co-operate did not bite unless and until the patients were "provided with services". That construction would be directly contrary to the obvious policy intent of the Amendment Regulations and of the new contractual term itself. It seems to me that "provided" should be given a wider meaning, connoting merely that there were services which patients were entitled to access.

62. It is not necessary to decide whether the adjudicator made the third alleged error of law.

63. As Mr Lock said, the question of whether compliance with the RNs would have infringed any duty of confidentiality owed by the Claimant to his patients, or their data

protection rights, is not straightforward. The adjudicator declined to decide at least one aspect of that question, namely the compatibility of paragraph 15A with data protection rights. He decided the question of whether patients did or did not consent to the sharing of their data only by concluding that the Claimant had not produced enough evidence to show that they did not. He declined to consider in detail a further argument about the effect of section 251 of the Act on this issue.

64. Meanwhile, these issues were addressed fairly briefly before me. That is not a criticism of either party but reflects the wide scope of the arguments and the quantity of the material which were covered during the hearing. It seems to me that potential constraints on GPs' co-operation with PCNs are potentially a matter of public importance. Since deciding that issue is not necessary for determination of the claim before me, it is better to leave it for decision in a case where it can be fully explored.

Amenability to judicial review

The parties' submissions

65. The Second Defendant takes, in effect, a preliminary point that the claim raises only issues of private law and does not raise any issue of public law which can be resolved by judicial review.

66. The First Defendant in its summary grounds notes that contention, observes that it has in the past faced judicial review claims, and does not align itself with the Second Defendant's position but leaves the question for the Court to decide.

67. Mr Auburn submits that when a public body is party to an agreement governed by the private law of contract, such as either of the Claimant's two contracts, a decision by that body to terminate the contract cannot be challenged by judicial review on grounds such as rationality or error of law. Mr Auburn however accepts that the decision could be subject to judicial review on grounds of fraud or bad faith.

68. In support of that submission Mr Auburn explains that these contracts were so-called "non-NHS contracts". They were entered into under section 84 of the Act but not under section 9. The Claimant made no election under regulation 10 of the 2015 Regulations. Therefore the contracts did not fall within section 9(5) of the Act, and therefore they created contractual rights and liabilities.

69. It follows, Mr Auburn says, and this much appears to be common ground, that when a contractual dispute arises in such a case, a contractor such as the Claimant has the option of suing on the contract in the ordinary courts in the same way as any party to any other contract.

70. However, the contracts contain clause 521. That clause gave the Claimant the option of referring a dispute to the Secretary of State, in which case the NHS dispute resolution procedure was to apply. By clause 522, the parties in that event agreed to be bound by the determination of the adjudicator.

71. So Mr Auburn submits, and this again appears to be common ground, that when the adjudicator made his decision, both parties ceased to have the option of suing in the ordinary courts to resolve their contractual dispute. He emphasizes that that occurred by

choice of the Claimant because he elected (1) to enter a non-NHS contract rather than an NHS contract and then (2) to refer the dispute to the resolution process.

72. By contrast, Mr Auburn submits, and this too is common ground, if a GP elects under regulation 10 to make an NHS contract, neither party can litigate any ensuing dispute in the ordinary courts (because the agreement does not create contractual rights or liabilities) but the GP could challenge a decision such as a termination decision by judicial review.

73. Mr Auburn contends that the non-availability of judicial review in a contract dispute (absent fraud or bad faith) is clear from a line of decided cases which include claims arising from agreements with NHS bodies:

    i. In *Hampshire CC v Supportways Community Services Ltd* [2006] BLGR 836 ("*Supportways*") the Court of Appeal ruled that challenges to the termination of a contractual relationship are only amenable to judicial review where a sufficient "public" element exists, and this requires an allegation of fraud, improper motive or similar. Only in such cases do the grounds of challenge inject a sufficiently "public" element into what is otherwise a private law dispute.

    ii. In *Krebs v NHS Commissioning Board* [2014] EWCA Civ 1540 (on appeal from [2014] Med LR 70) ("*Krebs*"), a dentist and NHS England entered into a non-NHS contract, the terms of which were prescribed by Dental Services Contract Regulations similar to the 2015 Regulations for GPs. NHS England terminated the dentist's contract. The dentist sought to pursue public law remedies. The Court of Appeal, applying *Supportways*, held that he should be confined to his contractual private law remedies.

    iii. *R (Haffiz) v NHSLA & NHS England* [2020] EWHC 3792 (Admin) ("*Haffiz*") concerned a non-NHS contract between a GP and NHS England with terms reflecting the 2015 Regulations. The GP elected to have a dispute determined by the NHSLA. He then sought judicial review of the adjudicator's decision. The amenability issue was fully argued. Stacey J found that the GP's case failed on the facts and it was therefore not strictly necessary to decide the amenability issue, but explained that if it had been necessary, she would have held that judicial review was not available because the contractual issues were issues of private law, not public law.

74. Although Cranston J appeared to take a different view in *R (Hussain) v SSHD* [2011] Med. LR 75 ("*Hussain*"), Mr Auburn submits that that was not a clear ruling to the effect that such a case is amenable to judicial review and, in any event, Cranston J's judgment made no reference to *Supportways*, the distinction between NHS contracts and non-NHS contracts or the underlying principles. It was also not concerned (as *Supportways* was) with termination of a contract, but with a pre-contract issue as to which type of contract the Claimant was entitled to be offered. To the extent that it established any general principle, he submits, it was wrongly decided.

75. Nor, says Mr Auburn, can the Claimant rely on *SSP Health Limited v NHSLA & others* [2020] EWCA Civ 1574 ("*SSP Health*"). Judicial review was permitted in that case because it arose from an NHS contract which did not create private law rights and liabilities, not a non-NHS contract as in the present case.

76. Mr Lock takes the contrary position. He begins by emphasizing the public services context. The termination decisions in this case have a direct effect on the delivery of public services to patients. The First Defendant, he submits, was undertaking the public function of deciding disputes about the ways in which NHS Services are provided. Accordingly Mr Lock invites me to follow the decision in *Hussain* which was based on the public law nature of the adjudication process. He submits that it cannot be right that an adjudicator carrying out a statutory function delegated by the Secretary of State is not amenable to judicial review. He points to cases in other contexts where delegated decision makers have been judicially reviewed, such as *McClaren v Home Office* [1990] ICR 824, *R v Civil Service Appeal Board ex p Bruce* [1988] ICR 649 and *R v Civil Service Appeal Board ex p Cunningham* [1992] ICR 816.

77. In his oral submissions, Mr Lock contended that Mr Auburn's position elides the two questions of (1) amenability to judicial review and (2) the scope of any judicial review. Citing *R v East Berkshire Health Authority ex p Walsh* [1984] ICR 743, he argues that the courts take a flexible approach to the interface between public and private law, focusing on a correct choice of judicial remedies rather than shutting Claimants out for technical reasons. So, Mr Lock submits, the Claimant in *Supportways* sued in the Administrative Court because he sought public law remedies (which the ordinary courts cannot grant) and private law remedies. The court, he says, adjudicated on the private law issues and then simply decided that the claim in public law did not add anything.

78. Mr Lock contends that the cases establish only that public law remedies cannot be used to impose constraints on the exercise of parties' contractual rights which are additional to the constraints arising in private law. Here, he says, the Claimant is not attempting to do that. Rather the Claimant invites this Court to find that he was not in breach of contract, just as he would in a private law action. He does so by judicial review because he has no other route to the Court.

79. Moreover, he adds, this case differs from *Supportways* and *Krebs* because the focus is on the decision of the adjudicator rather than the decision of a contracting party. In *Supportways*, he argues, the lawfulness of the actions of the parties to a private law contract to deliver public services was determined by a court, whereas in the present case the parties elected to use the dispute resolution process and therefore to have such rights as arose from that process including, he submits, the right to judicial review.

80. Mr Lock points to other cases such as *R (Shepherd) v NHS Commissioning Board* [2018] EWCA Civ 2849, where the Court entertained a judicial review of a payment mechanism contained in a draft NHS contract for care providers. Reliance on *Shepherd*, however, was not developed in oral submissions and, the NHS context apart, it has no significant similarity with the present case.

81. Mr Lock also contends that the fact that a judicial review claim proceeded to determination and then to appeal stage in *SSP Health* demonstrates that the First

Defendant's decisions are amenable to judicial review, and submits that it would be strange if that were true of some of its decisions but not others.

82. As to that last point, Mr Lock points out that regulation 84(2)(b), quoted above, applies section 9(5) of the Act "to any dispute referred for determination in relation to a contract which is not an NHS contract as if it were referred for determination in accordance with section 9(6) of the Act" i.e. as if it were an NHS contract. That, Mr Lock submits, contradicts the Second Defendant's position that an adjudicator's determination has different consequences in cases of NHS contracts (determination generally subject to judicial review) and non-NHS contracts (determination not so subject save for fraud or bad faith).

83. Mr Lock invites me not to follow *Haffiz* because the relevant parts of Stacey J's judgment were *obiter* and because no reference was made either to *Hussein* or to regulation 84(2)(b) of the 2015 Regulations. He also notes that Stacey J, at what was a rolled-up hearing, granted permission for the judicial review despite the view which she had expressed.

84. In his reply submissions on the second day of the hearing before me, Mr Lock also sought to take a new point. He submits that even if I am not persuaded by his other arguments, a ruling by this Court that judicial review is unavailable and there is therefore no route of legal challenge to the adjudicator's decision (absent fraud or bad faith) would infringe ECHR Article 6 and/or Article 14. He would also have relied on Article 1 of the First Protocol but accepts that binding authority stands in his way, at least before this Court.

85. I made an order permitting the Claimant to make a written application to amend his case to rely on this new argument, with provision for the Second Defendant to respond.

86. The written application was sent to the Court one day late but the Second Defendant has not objected on that ground.

87. By the application the Claimant seeks to contend:

> "Further and in the alternative, in a case where the permission threshold was otherwise met, it would be unlawful for the High Court, as a public body, to refuse the Claimant permission to challenge the decision of the NHSLA by way of judicial review because the High Court would be acting in breach of the Claimant's convention rights under article 6 and/or article 1 of protocol 1 of the ECHR (alone or in combination with article 14 ECHR) in categorising decisions of the NHSLA as decisions which are not amenable to a judicial review challenge to the extent that the challenge is to the NHSLA's interpretation of the applicable law of the contract or is otherwise outside the narrow grounds identified by the Privy Council in *Mercury Ltd v Electricity Corporation* [1994] 1 WLR 521."

88. In his application, Mr Lock apologises for the fact that this argument was raised at such a late stage but urges the Court to deal with it because otherwise, the question of whether an adjudicator's decision of this kind is amenable to judicial review will be decided on an incomplete basis and also because the Court's own duty to respect

parties' ECHR rights is engaged. He argues that the issue is one of pure law and is of wider public importance and that, applying the overriding objective, it would be proportionate to permit the amendment and for the issue to be decided on the basis of written submissions.

89. In the supporting argument, Mr Lock contends that this issue arose when Mr Auburn, pressed by me, accepted that his client was arguing that the Court had no power to review and correct decisions by two NHS bodies which were made on the basis of fundamental errors of law and which would deprive a GP of his contract and force a change of GP on thousands of patients.

90. In his written response to that application, Mr Auburn invites me to refuse permission to amend. He says that the application has not been made promptly, coming almost a year after the Second Defendant first set out its position on amenability in pre-action correspondence. The delay, he says, prejudiced his client, although he does not give details of that prejudice. Mr Auburn also points out that the First Defendant decided to take a passive role in this litigation long before Mr Lock's application and therefore is at risk of unfairness if the point is determined without its input. Part of the issue concerns the question of whether the First Defendant is a decision maker of sufficient independence to comply with Article 6, and Mr Auburn contends that it would be particularly unfair to decide that point without the First Defendant's evidence and submissions.

91. I now deal with the application for permission to amend before deciding the question of amenability to judicial review.

Decision on the application for permission to amend

92. CPR 54PD, paragraphs 11.1 to 11.4 provide that an amendment adding a new ground for judicial review may be made on application, which must be made promptly with a draft of the amended grounds and supporting evidence explaining the need for the proposed amendment and any delay in making the application, and that CPR 17.1 and 17.2 will apply for the purpose of determining the application.

93. There have been many cases discussing the principles which the Courts should apply when deciding under Part 17 whether to permit an amendment. Often cited is *Swain Mason v Mills & Reeve* [2011] EWCA Civ 14, [2011] 1 WLR 2735 where Lloyd LJ at [72] said that such a decision is always a question of striking a balance, and that "a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court". See also the summary of the relevant principles by Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38], and her analysis which demonstrates that the apparent strength or weakness of the amended case may be an important consideration.

94. In the present case the application was made at the last possible moment.

95. The explanation for the delay is unsatisfactory. I do not accept that the amendment was necessitated by anything said in oral submissions. The nature of the Defendants' case was entirely clear long before the hearing. The new argument has the appearance of a point which, simply, was not previously appreciated.

96. No party has suggested that it would be proportionate to adjourn the case for a further hearing. It seems to be common ground that if the amendment is permitted, the issue should be determined on the basis of the written submissions.

97. However, I do not agree that the human rights issue is entirely an issue of pure law.

98. Where a person's civil rights are in issue, Article 6 requires (among other things) "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Mr Lock's central submission on Article 6 states:

> "Neither the NHSLA nor NHSE are in law '*independent*' of the Secretary of State and, absent judicial oversight, are not sufficiently independent to be able to fulfil adjudicatory roles under article 6. They both undertake functions on behalf of the Secretary of State, both spend money allocated by the Secretary of State and act in ways that are substantially influenced by (or under legal mandate or direction from the Secretary of State. Hence, in making a decision concerning a GMS contract, the NHSLA (as a Special Health Authority under the direction of the Secretary of State) is making decisions on contracts which are ultimately funded by the Secretary of State and to discharge duties for which the Secretary of State is legally and politically accountable (see s1 of the NHS Act). It follows that in its role as an adjudicator, the NHSLA cannot, without more, satisfy the condition in article 6 of being '*an independent and impartial tribunal established by law*'".

99. I agree with Mr Auburn's observation that the First Defendant has not had any opportunity to address the question of its independence. That question necessitates a multi-factorial inquiry covering fact as well as law. This can be seen from *Bryan v United Kingdom* [1996] 21 EHRR 342 where, considering the independence of the Planning Inspectorate regime, the ECtHR said at [37]:

> "In order to establish whether a body can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."

100. Those features have not been effectively explored in evidence before me. I am therefore not in a position to determine, on the basis of the written submissions before me, the question raised in the passage quoted from Mr Lock's submissions in the preceding paragraph.

101. It is then necessary to consider the merits of the other legal arguments raised by the proposed amendment.

102. Mr Auburn argues that even if the adjudicator was not sufficiently independent (which is not accepted), the Claimant in the present case waived his Article 6 rights by

consenting to have a binding determination of the matter by the adjudicator rather than suing on the contracts. He relies on *Stretford v Football Association* [2007] EWCA Civ 238.

103. In *Stretford* a contract between a football agent and the FA contained an arbitration clause. The FA began disciplinary proceedings against the agent. The agent brought a court claim under CPR part 8 seeking declarations about the lawfulness of the disciplinary proceedings and the rules on which the disciplinary charges were based. The FA made an application under section 9 of the Arbitration Act 1996, which provides for proceedings in respect of a matter which under an agreement is to be referred to arbitration to be stayed. The Court considered whether such a stay would deprive the agent of his Article 6 rights. It noted that the Act contains provisions to ensure a fair arbitral hearing by an impartial tribunal, but that these do not cover some requirements of Article 6 (public hearing and judgment, independent tribunal members, tribunal established by law), though there was no reason to doubt impartiality or independence in the case in question. The arbitral tribunal was not "established by law" and the hearing would not be in public. The Court, having regard to the relevant jurisprudence of the ECtHR, decided at [43]-[51] that the inclusion of the arbitration clause in the contract meant that the parties had waived their rights to rely on those requirements of Article 6. Such a waiver would be found where the inclusion of the arbitration agreement was voluntary, even if it was a standard term, and where the agreement did not run counter to any important public interest.

104. The Court in *Stretford* also considered whether <u>all</u> Article 6 rights can be waived, even the right to an impartial decision maker. It noted that the latter right was held to be waived on the facts of *Suovaniemi v Finland* (Application No 31737/96, 23 February 1999), where a legally represented party approved the appointment of an arbitrator despite known doubts about his objective impartiality. In considering a question of that kind, any safeguards under the national law (such as the Arbitration Act 1996, which requires arbitrators to be impartial and to act fairly, and which gives a limited power of appeal under section 69) would be an important factor.

105. I have not heard any argument on whether the dispute resolution process in this case involved an arbitration under the Arbitration Act 1996 or whether a challenge under that Act would have been possible. In pre-action correspondence on 2 July 2021, the Claimant's solicitors claimed that such a challenge could be made and that the 28 day deadline for it would expire on 22 July. In their response on 16 July 2021, NHS England's solicitors argued that the criteria for a challenge under section 69 were not met and also noted, without advancing any argument on the question, that the Claimant had not explained why he considered the dispute resolution process to be an arbitral proceeding. That debate does not seem to have gone any further. I am not able to decide whether the procedural safeguards of the 1996 Act are or were available in this case.

106. *Stretford* is authority for the proposition that parties can waive Article 6 rights by a choice made in or under a contract to follow a process which is not Article 6 compliant. The question of whether there has been such a waiver turns on the factual and legal nature of the relevant agreement or process.

107. In my judgment, the case for waiver is clearly stronger than it was in *Stretford*. There, the relevant voluntary act was the signing of a contract which contained the arbitration clause. Once that was done, the clause could be (and was) used to compel the taking of the arbitration route and to bar the route to a court. In the present case, whether or not the inclusion of the dispute resolution process in the contract was in any sense voluntary, the use of it was wholly voluntary. It was the Claimant's unilateral act to invoke that process and not to sue in contract. That, it seems to me, was a waiver of any Article 6 rights which were not safeguarded by that process. I do not consider that any important public interest weighs against that conclusion, having regard to the public interest in disputes being resolved by binding dispute resolution rather than litigation.

108. To Mr Lock's alternative argument under ECHR Article 14, Mr Auburn offers the short answer that even if, which is not accepted, the holder of a non-NHS contract rather than an NHS contract thereby has an "other status" for Article 14 purposes, the differential treatment of allowing one but not the other to challenge a decision by judicial review is objectively justified by the fact that those without recourse to judicial review can have recourse to the ordinary courts by suing in contract.

109. I agree with Mr Auburn's analysis on Article 14. Like the waiver argument, it rests on the fact if judicial review is unavailable, that is because of choices freely made by the Claimant. A lack of public law rights for the holder of a non-NHS contract is balanced by the availability of private law rights in contract and in my judgment would not infringe Article 14.

110. As there are clear and convincing answers to Mr Lock's points on both Article 6 and Article 14, I can accede to the parties' application to decide the human rights issue on the basis of their written submissions. In those circumstances I will permit Mr Lock's amendment despite the lateness of the application, the lack of a satisfactory explanation for the delay and the lack of clear merit in his proposed arguments.

111. If I had instead decided that the human rights issue could not be resolved without further investigation, I would have refused permission to amend. Given the factors I have just mentioned and a lack of apparent merit in the new arguments, it would not have been reasonable or proportionate to adjourn the case for a further hearing. That may explain why neither side proposed taking that course.

Amenability to judicial review: discussion

112. For the reasons already set out, this question can be approached on the assumption that the Claimant would, if the claim proceeded, establish that the adjudicator made one or more errors of law.

113. The relevant case law begins with *R v East Berkshire Health Authority ex p Walsh* [1985] QB 152. There a nurse employed by a health authority under a contract which incorporated a collective agreement on service conditions had been dismissed. He brought a judicial review claim seeking for the decision to be quashed, claiming that the dismissing officer had no power to dismiss him and that there had been procedural unfairness. The Court of Appeal dismissed the claim. Lord Donaldson MR said at 162:

> "The remedy of judicial review is only available where an issue of 'public law' is involved, but, as Lord Wilberforce pointed out in Davy v. Spelthorne Borough Council [1984] A.C. 262 , 276, the expressions 'public law' and 'private law' are recent immigrants and, whilst convenient for descriptive purposes, must be used with caution, since English law traditionally fastens not so much upon principles as upon remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circularity or levitation by traction applied to shoe-strings, since the remedy of certiorari might well be available if the health authority is in breach of a 'public law' obligation, but would not be if it is only in breach of a 'private law' obligation."

114. Lord Donaldson held at page 165 that the existence of a statutory requirement for nurses' terms of employment to be subject to collective bargaining did not make this a "public law" case. The Defendant had complied with the statutory requirement. The complaint was about its performance of the contract and had no public law element "which could give rise to any entitlement to administrative law remedies".

115. May LJ agreed. At page 170 he quoted the decision of the judge who had allowed the claim at first instance, which has echoes of the reasoning on behalf of the Claimant in the present case:

> "The public may have no interest in the relationship between servant and master in an 'ordinary' case, but where the servant holds office in a great public service, the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them."

116. To this, May LJ said:

> "If … the judge was saying … that where a servant is employed by a great public service a 'public law' element is involved because such an employment is not a pure question of contract – 'the public are concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them' - then I think that he was stating the test in far too wide terms. … if the judge's statement is taken in its ordinary meaning it would follow that every nurse employed by a health authority is entitled to judicial review of his or her dismissal. Indeed, if one carries the argument to its logical conclusion, any employee of any substantial public body could do so as well. So wide an extension of the procedure would clearly involve a misuse of the provisions of R.S.C., Ord. 53."

117. Next comes the decision of the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 1 WLR 521 ("*Mercury Energy*"). When energy supply was privatised in New Zealand, responsibility for the generation and transmission of bulk electricity to the whole country was transferred from the Government to the Defendant, which was designated a "state enterprise". It distributed power to local supply authorities. The claim was brought by Mercury, a company

which distributed such power to users in one region. The Defendant supplied electricity to Mercury pursuant to a series of contracts. It gave notice to determine the contracts. Mercury claimed that the notice was given in breach of contract and in breach of statutory duty, was an abuse of monopoly and was vitiated by administrative impropriety. The New Zealand Court of Appeal struck out all heads of claim other than the contractual ones. Dismissing an appeal to the Privy Council, Lord Templeman said:

> "A state enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate. The defendant carries on its business in the interests of the public. Decisions made in the public interest by the defendant, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships take the view that in these circumstances the decisions of the defendant are amenable in principle to judicial review both under the Act of 1972 as amended and under the common law.
>
> It does not follow that the plaintiff is entitled to proceed with its claim for judicial review in the present case. Judicial review involves interference by the court with a decision made by a person or body empowered by Parliament or the governing law to reach that decision in the public interest. A litigant may only invoke interference by the court with such a decision if the litigant pleads plausible allegations which, if substantiated at the trial, will demonstrate that the decision was not reached in accordance with law."

118. Lord Templeman went on to set out the parameters of judicial review by reference to *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155 at 1173, *R v. Independent Television Commission, Ex parte TSW Broadcasting Ltd*, The Times, 30 March 1992 and *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223 at 228–230. He then rejected the claim on the facts, finding that the pleadings did not identify anything to show that the Defendant was acting irrationally or in bad faith or for improper or ulterior motives, before continuing at 529:

> "It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith … Industrial disputes over prices and other related matters can only be solved by industry or by government interference and not by judicial interference in the absence of a breach of the law.
> …
> The causes of action based on breach of statutory duty, abuse of a monopoly position and administrative impropriety are only relevant if the causes of action based on contract are rejected. If the causes of action based on contract are rejected, the other causes of action will only constitute attempts to obtain, by the declaration sought, specific performance of a non-existing contract. The exploitation and extension of remedies such as judicial review beyond their proper sphere should not be encouraged."

119. Twelve years later, the Court of Appeal decided *Supportways*. The case arose after responsibility for providing many support and welfare services was transferred from

central government to local government. Under the new statutory scheme, local authorities contracted with service providers for the provision of housing-related services to individuals. The provider was paid by the local authority out of funds from a central government grant. Supportways was a provider whose contract was terminated by the local authority. This occurred under a contractual mechanism, following a review which found that the provider's prices were too high and following refusals by it to enter a new contract on different terms. Supportways contended that the review was not a proper review under the terms of the contract and therefore that termination was not available. It brought proceedings in the Administrative Court seeking a quashing order and other orders by way of judicial review. In the alternative, it asked the Court for the private law remedies of a declaration and an order for specific performance.

120. Overruling the decision at first instance, Neuberger LJ cited the above passages from *Mercury Energy* and said:

> "35. In my judgment, the basis of the Company's case was not in public law, but only in private law. The Company's complaint was that the Council had failed to comply with the Agreement, and the Company accordingly was seeking to enforce the Council's compliance. Subject to being contradicted by a closer analysis of the principles or by binding authority, such a complaint and such enforcement would appear to me respectively to involve a private law claim and a private law remedy, both of which are contractually based, albeit with common law and equitable aspects."

and:

> "42. However, it cannot be right that a claimant suing a public body for breach of contract, who is dissatisfied with the remedy afforded him by private law, should be able to invoke public law simply because of his dissatisfaction, understandable though it may be. If he could do so, it would place a party who contracts with a public body in an unjustifiably more privileged position than a party who contracts with anyone else, and a public body in an unjustifiably less favourable position than any other contracting party.
>
> 43. Equally importantly, it appears to me that it would be wrong in principle for a person who would otherwise be limited to a private law claim should be entitled to base his claim in public law merely because private law does not afford him a sufficiently attractive remedy. It is one thing to say that, because a contracting party is a public body, its actions are, in principle, susceptible to judicial review. It is quite another to say that, because a contracting party is a public body, the types of relief which may be available against it under a contract should include public law remedies, even where the basis of the claim is purely contractual in nature."

121. Agreeing, Mummery LJ said:

> "59. … The action of the Council in conducting the support services review was not amenable to judicial review, because there was no sufficient nexus between the conduct of the review and the public law powers of the Council to make this a

> judicial review case. The required public law element of unlawful use of power was missing from the support services review. The substance of the dispute between the Council and the Company was about the expiration of the Agreement after the Council had conducted the support services review under clause 11."

and:

> "60. … although the grounds for the judicial review application use public law language of a 'decision' taken by the Council on cost−effectiveness matters in the review, of taking account of irrelevant considerations and failing to have regard to have regard to relevant considerations and of procedural unfairness in the review process, this terminology does not alter the substance of the dispute as to whether or not the Agreement had come to an end in accordance with its terms. That turns on the provision of the Agreement that that the Agreement comes to an end at the expiration of 12 months from the review. Termination of the Agreement turned on the operation of the contract according to agreed terms, not on the exercise of a statutory or common law public law power of the council which was amenable to judicial review.
>
> 61. … it cannot be right in principle for a party to a contract with a public authority to have recourse to public law remedies simply on the ground the private law remedies, such as specific performance, are not available after the relevant contractual obligations have expired, or because they are too vague and uncertain to be specifically enforceable by the court, or because alternative private law remedies, such as damages for breach of contract, are inadequate. The relevant remedies are those available in private law for breach of contract."

122. As Mr Auburn pointed out, the context of *Supportways*, involving the provision of housing support services to the public, was no less "public" than that of the present case.

123. The next case in time is *Hussain*, decided in 2011. It was a challenge by judicial review to decisions by the NHSLA as adjudicator, rejecting contentions by four dentists that the PCT (represented in that case by Mr Lock) should make payments to them for work done by other dentists as their employees or assistants. The dentists had individually signed contracts for general dental services, but the essence of the dispute was about whether the PCT should enter into new contracts which would cover the work of the other dentists as well. The disputes were referred to the adjudicator under regulation 8 of the National Health Service (General Dental Services Contracts) Regulations 2005, which provided:

> "8.— Pre-contract disputes
>
> (1) Subject to paragraphs (2) and (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 for in paragraphs 55(2) and (3) of Schedule 3.

> (2) Paragraph (1) does not apply in the case where both parties to the prospective contract are health service bodies (in which case section 4(4) of the 1990 Act (NHS contracts) applies).
>
> (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 co-operate with each other with a view to resolving it.
>
> (4) Disputes referred to the Secretary of State in accordance with paragraph (1), or section 4(4) of the 1990 Act, shall be considered and determined in accordance with the provisions of paragraphs 55(4) to 55(13) and 56(1) of Schedule 3, and paragraph (5) (where it applies) of this regulation.
>
> (5) In the case of a dispute referred to the Secretary of State under paragraph (1), the determination—
>
> (a) may specify terms to be included in the proposed contract;
>
> (b) may require the Board to proceed with the proposed contract, but may not require the proposed contractor to proceed with the proposed contract; and
>
> (c) shall be binding upon the prospective parties to the contract."

124. It does not appear that the issue between the parties could be resolved by application of private law as they had not yet concluded the relevant contract. They were instead participating in a statutory pre-contractual process.

125. Before proceeding to decide the challenge and to set aside the adjudicator's decision for error of law, Cranston J said:

> "47. It is convenient at this point to dispose of two points raised by the PCT, the interested party in these proceedings. The first is that judicial review is not available to the claimants. In their contract the claimants agreed, pursuant to regulation 8(5) (c) of the GDS Contract Regulations, that a determination of a dispute referred to the Secretary of State 'shall be binding upon the prospective parties to the contract': see also clause 281. Where parties to a contract agree that their disputes will be determined outside the courts by an alternative dispute resolution procedure, Mr Lock for the PCT submits, the court should uphold the results of a third party adjudication unless a party seeks to set aside the determination under the limited grounds provided for within the Arbitration Act 1996: see Mustill & Boyd, *The Law and Practice of Arbitration in England* (London, 1989), 41; *David Wilson Homes Ltd v Survey Services Ltd & Anor* [2001] EWCA Civ 34. It therefore follows that, once the claimants agreed to refer their dispute to the Secretary of State, they were bound by the outcome of the determination. Their only way to challenge such a finding, if it were treated as an arbitration rather than an expert determination, would be to use the limited powers to seek to persuade the court to intervene under the Arbitration Act 1996.

> 48. The submission that I should decline relief to the claimants in judicial review, and oblige them to proceed on the more restrictive grounds for an appeal under the Arbitration Act 1996, was not one advanced by Mr Coppel QC for the Secretary of State. Coming from a public body, the argument that somehow a term compulsorily imposed in a standard form contract between it and other parties should exclude those parties from accessing the public law remedies they would otherwise have is distinctly unattractive. In any event, it is in my judgment wrong. In entering the contract and acting under contractual provisions mandated by the regulations, the PCT as a public body is obliged to act consistently with public law principles.
>
> 49. Further, the process of adjudication which arises under regulation 8 of the GDS Contract Regulations, and compulsorily incorporated in a contract, is a public law process. As with any statutory tribunal an adjudicator appointed by the Secretary of State under paragraph 55 of Schedule 3 exercises public law functions and is subject to judicial review for error of law."

126. In the present case, Mr Lock relies on that decision for the proposition that the relevant decisions of the adjudicator are amenable to judicial review.

127. The next case was *Krebs*, decided at first instance in 2013. The context was closer to that of the present case. As I have said, it arose from the termination by NHS England of a dentist's non-NHS contract. However, there was no adjudicator's decision and the challenge was only directed against NHS England. NHS England was represented by Mr Lock QC. There was no dispute that the Claimant could sue in private law, i.e. in contract. He sought to rely on public law rights as well, contending that the termination decision was unlawful and could be quashed because it was not proportionate. His private law claim failed, Turner J ruling that the termination decision was legally effective to terminate the contract. As to public law, Turner J ruled that any remedies arose solely out of his contract with NHS England and not out of any public duty imposed on it. He held that the case was indistinguishable from *Supportways*, and that there was no allegation of fraud or improper motive or other very unusual circumstances which would render it inappropriate to limit the Claimant to private law remedies, and that if his remedies went beyond those available in private law, it would place him in an unjustifiably more privileged position than a party who had contracted with a private health provider, and it would also place the Defendant in an unjustifiably less favourable position than any other contracting party.

128. The Court of Appeal decided *Krebs* in December 2014. It focused on a clause of the parties' contract which required NHS England to act "act "reasonably and in good faith and as a responsible public body". Longmore LJ (with whom Etherton C and Kitchin LJ agreed) noted, by reference to *R v East Berkshire Health Authority ex p Walsh* that "it is impermissible for parties to private law contracts made with public bodies to proceed by way of judicial review in order to improve their contractual claim" but considered that that line of authority was not directly relevant because the concept of reasonableness was introduced by the contractual clause. However, citing *Mercury Energy* and *Supportways*, it was right for the Claimant "to be confined to his

contractual (private law) remedies whatever they may be". The contractual claim failed on the facts because NHS England had acted reasonably.

129. Although Mr Lock was involved in both *Hussain* and *Krebs*, no reference is made to *Hussain* in either of the *Krebs* judgments.

130. *Haffiz* was decided at a rolled-up hearing in December 2020 by Stacey J. As I have said, it concerned a non-NHS contract between a GP and NHS England where the Claimant challenged a termination notice issued by NHS England and a decision by the NHSLA upholding the notice following referral, at his choice, to the arbitrator. The facts, therefore, are on all fours with those of the present case. The Claimant sought judicial review of both decisions on grounds of error of law, procedural unfairness and a contention that the termination decision was arbitrary, capricious, and in breach of the express and/or implied terms of contract and disproportionate. NHS England contended that neither decision was amenable to judicial review.

131. The amenability issue was fully argued, but there is no reference in the judgment to *Hussain*.

132. Mr Auburn, representing the Defendants in *Haffiz* as in the present case, relied on *Walsh* and *Krebs* for the proposition that the decisions were not amenable to judicial review. Counsel for the Claimant relied on the "public element" of the case, and distinguished the adjudicator from a private arbitrator determining a contractual dispute because the PCAS was a statutory process for resolving disputes between GMS contract holders in the manner of an appeal. He pointed out that the adjudication process was the same whether in the case of an NHS or non-NHS contract. He relied on *Shah v NHSLA and South East Essex PCT & Anor* [2010] EWHC 2575 (Admin), a judgment of Silber J on an interim relief application where similar arguments arose. Silber J considered it unnecessary to decide the point at an interim hearing, but thought it "at least arguable that the decisions under challenge are subject to public law scrutiny". Counsel also relied on *SSP Health*, which arose from an "NHS contract" that did not create private law rights and where all parties agreed that the decisions were amenable to judicial review.

133. Dealing first with the substantive issues in the case, Stacey J ruled that the grounds of challenge were not made out. It was accordingly "not strictly necessary" for her to decide the issue of amenability, but she nevertheless set out her decision that the claim was not amenable to judicial review. The claim arose only in private law "by dint of the Contract being a 'non-NHS' contract as per the unbroken line of cases from *Walsh* through to *Krebs*". The Claimant had chosen a private law contractual relationship instead of an "NHS contract". He also chose to use the adjudication procedure and to be bound by the outcome. The challenge "was not brought on grounds of fraud or improper motive or the like, but was on the construction or interpretation of the contractual provisions". *Krebs* was decided on "materially identical facts". There was no direct authority on the position of the adjudicator but the same reasoning would apply to its decision as to that of NHS England.

134. Stacey J therefore dismissed the claim, though she granted permission for grounds 1 and 2 which she considered to be arguable on the facts. I take that to reflect her

conclusion that the submissions on the merits, amenability aside, had been arguable. Mr Lock contends that this weakens the effect of *Haffiz* in relation to amenability but I do not agree, because Stacey J's ruling on amenability is entirely unequivocal.

135. It therefore appears that the present case is the first in which (1) a challenge is mounted to decisions of both NHS England and the adjudicator, (2) the challenge arises from a non-NHS contract, (3) the issue of amenability to judicial review is "live" in the sense that at least one substantive ground has merit, subject to amenability, and (4) reference has been made to all of the previous cases which appear to be relevant.

136. In my judgment, the line of cases consisting of *Walsh*, *Mercury Energy*, *Supportways* and *Krebs* make it entirely clear that parties to a contract cannot rely on public law arguments or remedies to improve their contractual position, no matter how "public" or statutory the context to the dispute. Those cases thus make clear that when one party invokes a contractual termination procedure, if the other party wishes to show that termination was not in accordance with the contract, that must be done (if not by any contractual mechanism as in the present case) by private law action and not by judicial review. The cases recognise the possibility that judicial review might yet lie to challenge a termination that was fraudulent or in bad faith, but that is not this case.

137. These cases in my judgment are not in any way inconsistent with *McClaren v Home Office*, *R v Civil Service Appeal Board ex p Bruce* or *R v Civil Service Appeal Board ex p Cunningham* on which Mr Lock relied.

138. *Bruce* and *Cunningham* were challenges to decisions of the CSAB made after the termination of the Claimants' employment. The CSAB was established under a Code for civil servants, set up under the Civil Service Order in Council. For classes of civil servant without the statutory right to make a claim to the Industrial Tribunal (as it then was) for unfair dismissal, it provided remedies of a very similar kind. The Claimants were not claiming to enforce contractual rights.

139. *McClaren v Home Office* was an employment dispute about a prison officer's terms and conditions. He brought a contractual claim and the Home Office sought to have it struck out on the basis that there was no contract and that he could only have sought relief by way of judicial review. The Court of Appeal decided that there was arguably a contract and the claim should not be struck out. Woolf LJ (as he then was) said at page 836 that, whilst it would normally be inappropriate to litigate employment disputes by judicial review:

> "There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariably will have if the employer is the Crown, and it

> is not domestic or wholly informal, its proceedings and determination can be an appropriate subject for judicial review."

140. Woolf LJ was not deciding that a specific Claimant could have recourse to judicial review, but was merely contrasting a judicially reviewable situation with the case before him. As an example of such a situation he cited *Bruce*. This passage concerned cases not concerning contractual rights, and specifically employment claims which are typically litigated in a judicial tribunal giving rise to appeal rights or other rights of challenge. Even in that context, Woolf LJ made only the qualified observation that such decisions "can be an appropriate subject for judicial review".

141. It does not appear that *Mercury Energy* and *Supportways* were brought to the attention of Cranston J in *Hussain*. Those cases contradict his very broad proposition that "in entering the contract and acting under contractual provisions mandated by the regulations, the PCT as a public body is obliged to act consistently with public law principles". Also, while Cranston J did not accept that "a term compulsorily imposed in a standard form contract between it and other parties should exclude those parties from accessing the public law remedies they would otherwise have", this assumed that, absent the dispute resolution clause, the parties would have public law rights. *Mercury Energy*, *Supportways* and the later decisions in *Krebs* show that assumption to be incorrect.

142. Meanwhile, Cranston J's conclusion that the adjudication in *Hussain* was a "public law process" like that of "any statutory tribunal" must be read in its context, i.e. of an adjudication of a pre-contractual dispute in which neither party had any rights in private law. It is not of direct assistance on the present question which concerns the resolution of contractual disputes by a contractual mechanism.

143. I therefore do not consider that reference to *Hussain* could have materially changed the analysis of Stacey J in *Haffiz*. I agree with that analysis for the following reasons.

144. As I have said, *Mercury Energy*, *Supportways* and *Krebs* (the latter on facts very similar to those of the present case) establish that a public or statutory context does not mean that the private law rights of a contractor such as the Claimant are supplemented by rights in public law. Applying those cases, it is clear that the decision of the Second Defendant to issue the TNs could not be challenged by way of judicial review, at least in the absence of fraud or bad faith. The Claimant could of course have sued on his contract. That is the starting point for considering the position of the First Defendant.

145. The First Defendant came into the case because of the Claimant's very important choice to invoke the dispute resolution procedure rather than suing on his contract. There was no compulsion to have the dispute decided in that way. In my judgment, his choice of that contractual mechanism did not introduce a public law element or carry this case outside the principle stated in *Krebs* and the earlier cases.

146. Nor am I persuaded that regulation 84(2)(b) is inconsistent with this analysis.

147. Regulation 84(2)(b) is a slightly odd provision. It states that where, as in this case, a dispute arising from a non-NHS contract is referred, section 9(5) applies to that dispute.

Section 9(5) provides that, whether or not the relevant contract would otherwise be a contract in law, it "must not be regarded for any purpose as giving rise to contractual rights or liabilities". There is a mismatch between the reference in the regulation to a "dispute" and the reference in the subsection to a "contract". Nevertheless, the provisions in combination appear to mean that the adjudication of the dispute will not "give rise to contractual rights or liabilities". In other words, the adjudicator's decision cannot be enforced by suing in contract.

148. It may follow that the adjudicator's decision can be enforced by way of judicial review. So if, for example, the adjudicator directed NHS England to make a payment and NHS England failed to do so, an application for judicial review of NHS England's failure might lie because there would be no contractual means of enforcement.

149. But it does not follow that the adjudicator's decision can be challenged by judicial review. Regulation 84(2)(b) does not support any such suggestion by barring any contractual method of challenging that decision, because there was no such contractual method in the first place.

150. None of this means that decisions of the First Defendant are necessarily immune to legal challenge. The parties in this case may have had rights under the Arbitration Act 1996, but that has not been explored. So far as judicial review is concerned, the obstacle is not the nature of the First Defendant as a decision making body, but the nature of the dispute. The First Defendant is subject to judicial review of its decisions if they arise from an "NHS contract" which cannot be enforced in private law. Even in a case arising from a non-NHS contract, it seems that judicial review would ultimately be available in a case of fraud or bad faith. But otherwise, in my judgment, judicial review was not an available remedy for the Claimant's contractual complaint. And, for the reasons I have explained above, the Court's ruling to that effect is not a breach of the Claimant's Convention rights under article 6 and/or article 14 of the ECHR.

Conclusion

151. In the absence of a decision which is amenable to judicial review on the grounds advanced by the Claimant, the claim is dismissed.