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

No. CO/4894/2018

Neutral Citation Number: [2019] EWHC 3291 (Admin)

Royal Courts of Justice

Friday, 8 November 2019

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

SSP HEALTH LIMITED

Applicant

- and -

NATIONAL HEALTH SERVICE LITIGATION AUTHORITY
(PRIMARY CARE APPEALS SERVICE)

Respondent

- and -

(1) NHS COMMISSIONING BOARD (NHS ENGLAND)
(2) THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Interested Parties

MR S. BUTLER (instructed by Acklam Bond Solicitors) appeared on behalf of the Applicant.

MR T. CROSS (instructed by the National Health Service) appeared on behalf of the Respondent.

MS S. WILKINSON (instructed by the Government Legal Department) appeared on behalf of the Second Interested Party.

J U D G M E N T

MRS JUSTICE COCKERILL:

1 This is a challenge to one facet of the decision of an NHS adjudicator dated 13 September 2019. The Adjudication was conducted under the NHS Dispute Resolution Procedure, the background to which will be dealt with in more detail below. Suffice to say it is an arrangement which is a substitute for a consideration by the Secretary of State for Health in relation to issues arising under agreements which have variously been described as contracts or arrangements made in respect of NHS services.

2 As the word "contract" is both contentious and significant in this case, where that one of the key issues is whether these agreements were contracts in law or what are known as NHS contracts (which are not contracts in law), I will generally use the word "Arrangement" during the course of this judgment.

3 In the Adjudication the main issue was whether certain Primary Care Trusts ("PCTs") had to pay significant sums of money to the Claimant under indemnity provisions in those Arrangements. The Adjudicator found in favour of the Claimant. She awarded a sum of £587,808; however, she did not award interest. The Claimant says that this decision not to award interest was wrong in law and seeks judicial review on that basis. The claim was brought by Judicial Review Claim form dated 6 December 2018.

4 The decision sought to be challenged was the Adjudicator's decision that the contracts were "*not contracts at law and therefore interest was not payable on damages awarded... for breach of contract*". By paragraph 3 of the Statement of Facts and Grounds, the Claimant asserts that "*it is entitled to claim either simple interest on the debt at the rate of 8.75 per cent...*".

5 The grounds are, firstly, the Adjudicator was wrong to conclude that she was not persuaded that the contracts were contracts at law and, secondly, the Adjudicator was wrong to conclude that interest is not payable under the contracts. At paragraph 61 of the Statement of

Facts and Grounds, the Claimant identifies the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act") as the basis for the rate sought.

6 The application for permission was refused on the papers. The application was then renewed to an oral permission hearing. At that hearing the Claimant was granted permission limited to Grounds 1 and 2 of the claim as pleaded in the Statements of Facts and Grounds. The Court ordered that the Claimant file and serve a skeleton argument for the application 21 days before the trial which was listed on 14 June 2019.

7 On the date for the service of the skeleton argument the Claimant applied for permission to substitute new Grounds. The new grounds sought to be raised are that:

> 1) The Respondent erred in law in concluding that an APMS contract could take effect as an NHS contract.
>
> > a) The Adjudicator therefore erred in failing to accept the Contracts were legally binding contracts.
> >
> > b) Each Contract thus contained an implied term as to interest as a result of the 1998 Act.
>
> 2) Even if the Contracts were NHS Contracts, the Respondent erred in law in failing to find that there is power to require interest to be paid and that interest therefore ought to be paid.
>
> 3) Even if the Contracts were NHS Contracts, the Adjudicator erred in failing to recognise that she had power under section 9(12) of the NHS Act to vary the terms of the Contracts by providing that the NHS should pay interest, and by failing to make a decision on interest.
>
> 4) The Respondent erred in law by failing to recognise that the Claimant's Article 1 Protocol 1 ("A1P1") rights were engaged.

The Statutory Background

8 These issues require a detailed consideration of the statutory background. The relevant section of the National Health Service Act is section 9. That provides:

> "(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.
>
> (2) Section 139(6) (NHS contracts and the provision of local pharmaceutical services under pilot schemes) makes further provision about acting as commissioner for the purposes of subsection (1).
>
> (3) Paragraph 15 of Schedule 4 (NHS trusts and NHS contracts) makes further provision about an NHS trust acting as provider for the purposes of subsection (1).
>
> (4) "Health service body" means any of the following—
>
> (za) the Board,
>
> (zb) a clinical commissioning group,
>
> (a) a Strategic Health Authority,
>
> (b) a Primary Care Trust,
>
> (c) an NHS trust,
>
> ….

(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.

(7) If, in the course of negotiations intending to lead to an arrangement which will be an NHS contract, it appears to a Health Service Body—

> (a) that the terms proposed by another Health Service Body are unfair by reason that the other is seeking to take advantage of its position as the only, or the only practicable, provider of the goods or services concerned or by reason of any other unequal bargaining position as between the prospective parties to the proposed arrangement, or
>
> (b) that for any other reason arising out of the relative bargaining position of the prospective parties any of the terms of the proposed arrangement cannot be agreed, that Health Service Body may refer the terms of the proposed arrangement 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."

9 This section is relevant at a number of points within the argument; first as to the adjudication itself. In the present case, in exercise of the powers conferred by section 9(8), the Secretary of State gave the National Health Service Litigation Authority (Primary Medical Services - Dispute Resolution) Directions 2017 ("the 2017 Directions"). By the 2017 Directions, the Secretary of State directed the Defendant, the National Health Service Litigation Authority ("NHSLA"), to exercise the Secretary of State's power to appoint an adjudicator in relation to the dispute between the parties.

10 The statutory authority for making contractual arrangements with providers of GP services started with the National Health Service (Primary Care) Act 1997 ("the 1997 Act"), which was described as "*an Act to provide for new arrangements in relation to the provision within the National Health Service of medical, dental, pharmaceutical and other services*". Section 16 of the 1997 Act gave specific statutory authority for the Secretary of State to grant an application by a contractor to become a Health Service Body ("HSB") as described in section 9(4) of the Act.

11 The application was required to "*specify the pilot scheme in relation to which it is made*" under section 16(3)(b). If the application was granted the person became an HSB for the purposes of section 4 of the 1990 Act as was provided in section .16(5). When contracting arrangements were extended from pilot arrangements to General Medical Services ("GMS") Contracts and Personal Medical Services ("PMS") Contracts, a different statutory form was adopted. Instead of providers "becoming" Health Service Bodies for the purposes of section .4 of the 1990 Act, PMS or GMS providers who elected to or became HSBs were to be "regarded as" Health Service Bodies. This change is shown in the statutory provisions concerning the power of the Secretary of State to make regulations relating to GMS or PMS contracts.

12 That Regulation making power concluded at section 90(3) of the NHS Act in relation to GMS contracts:

> "Regulations may make provision for a person or persons entering into a general medical services contract to be regarded as a Health Service Body for any purposes of section 9 in circumstances where he or they so elect."

13 Regulation 10 of the National Health Service (General Medical Services Contracts) Regulations 2004 (SI 2004/291) ("the GMS Regulations") then provided:

"(1) Where a proposed contractor elects in a written notice served on the Primary Care Trust at any time prior to the contract being entered into to be regarded as a Health Service Body for the purposes of section 4 of the 1990 Act, it shall be so regarded from the date on which the contract is entered into.

(2) If, pursuant to paragraph (1) or (5), a contractor is to be regarded as a Health Service Body, that fact shall not affect the nature of, or any rights or liabilities arising under, any other contract with a Health Service Body entered into by a contractor before the date on which the contractor is to be so regarded.

(3) Where a contract is made with an individual medical practitioner or two or more persons practising in partnership, and that individual, or that partnership is to be regarded as a Health Service Body in accordance with paragraph (1) or (5), the contractor shall, subject to paragraph (4), continue to be regarded as a Health Service Body for the purposes of section 4 of the 1990 Act for as long as that contract continues irrespective of any change in—

(a) the partners comprising the partnership;

(b) the status of the contractor from that of an individual medical practitioner to that of a partnership; or

(c) the status of the contractor from that of a partnership to that of an individual medical practitioner.

(4) A contractor may at any time request in writing a variation of the contract to include provision in or remove provision from the contract that the contract is an NHS contract, and if it does so—

(a) the Primary Care Trust shall agree to the variation; and

(b) the procedure in paragraph 104(1) of Schedule 6 shall apply.

(5) If, pursuant to paragraph. (4), the Primary Care Trust agrees to the variation to the contract, the contractor shall—

(a) be regarded; or

(b) subject to paragraph (7), cease to be regarded, as a Health Service Body for the purposes of section 4 of the 1990 Act from the date that variation is to take effect pursuant to paragraph 104(1) of Schedule 6.

(6) Subject to paragraph (7), a contractor shall cease to be a Health Service Body for the purposes of s. 4 of the 1990 Act if the contract terminates.

(7) Where a contractor ceases to be a Health Service Body pursuant to—

(a) paragraph (5) or (6), it shall continue to be regarded as a Health Service Body for the purposes of being a party to any other NHS contract entered into after it became a Health Service Body but before the date on which the contractor ceased to be a Health Service Body (for which purpose it ceases to be such a body on the termination of that NHS contract);

(b) paragraph (5), it shall, if it or the Primary Care Trust has referred any matter to the NHS dispute resolution procedure before it ceases to be a Health Service Body, be bound by the determination of the Adjudicator as if the dispute had been referred pursuant to paragraph. 100 of Schedule 6;

(c) paragraph (6), it shall continue to be regarded as a Health Service Body for the purposes of the NHS dispute resolution procedure where that procedure has been commenced—

(i) before the termination of the contract, or

(ii) after the termination of the contract, whether in connection with or arising out of the termination of the contract or otherwise, for which purposes it ceases to be such a body on the conclusion of that procedure."

14 In relation to PMS contracts, the Act at section 94(3) provided:

"The regulations may, in particular...

(g) provide for parties to section 92 arrangements to be treated in such circumstances and to such extent as may be prescribed as health service bodies for the purposes of section 9".

The regulations. in question were the National Health Service (Personal Medical Services Agreements) Regulations (SI 2004/627) ("the PMS Regulations").

15 Regulation 9 of the PMS Regulations provided:

"Health service body status

9.—(1) A contractor shall be regarded as a health service body for the purposes of section 4 of the 1990 Act from the date that it makes an agreement unless—

(a)in the case of an agreement with a single individual or qualifying body, that individual or body; or

(b)in the case of any other agreement, any of the proposed parties to the agreement (other than the relevant body),

objects in a written notice served on the relevant body at any time prior to the agreement being made.

(2) Where a contractor is to be regarded as a health service body for the purposes of section 4 of the 1990 Act pursuant to paragraph (1), any change in the parties comprising the contractor shall not affect the health service body status of the contractor.

(3) If, pursuant to paragraph (1) or (4) a contractor is to be regarded as a health service body, that fact shall not affect the nature of, or any rights or liabilities arising under, any other agreement or contract with a health service body entered into by that contractor before the date on which the contractor is to be so regarded.

(4) A contractor may at any time request a variation of the agreement to include provision or remove provision from the agreement that the agreement is an NHS contract, and if it does so—

(a)the relevant body shall agree to the variation; and

(b)the procedure in paragraph 98(1) of Schedule 5 shall apply.

(5) If, pursuant to paragraph (4), the relevant body agrees to the variation of the agreement so as to remove provision from the agreement that the agreement is an NHS contract, the contractor shall, subject to paragraph (7), cease to be regarded as a health service body for the purposes of section 4 of the 1990 Act from the date that variation is to take effect.

(6) If, pursuant to paragraph (4), the relevant body agrees to the variation of the agreement so as to include a provision in the agreement that the agreement is an NHS contract, the contractor shall be regarded as a health service body for the purposes of section 4 of the 1990 Act from the date that the variation takes effect.

(7) Subject to paragraph (8), a party or parties who were to be regarded as a health service body pursuant to paragraph (1) or (4), as the case may be, shall cease to be a health service body for the purposes of section 4 of the 1990 Act if the agreement terminates.

(8) Where a contractor ceases to be a health service body pursuant to—

(a)paragraph (5) or (7), it shall continue to be regarded as a health service body for the purposes of being a party to any other NHS contracts entered into after it became a health service body but before the date on which it ceased to be a health service body (for which purpose it ceases to be such a body on the termination of that NHS contract);

(b)paragraph (5), it shall, if it or the relevant body has referred any matter to the NHS dispute resolution procedure before it ceases to be a health service body, be bound by the determination of the adjudicator as if the dispute had been referred pursuant to paragraph 94 of Schedule 5; or

(c)paragraph (7), it shall continue to be regarded as a health service body for the purposes of the NHS dispute resolution procedure where that procedure has been commenced—

(i)before the termination of the agreement, or

(ii)after the termination of the agreement, whether in connection with or arising out of the termination of the agreement or otherwise, until the conclusion of that procedure."

Factual Background

16 The Claimant, an experienced provider of medical services, entered into 22 Arrangements in respect of that number of troubled primary care practices. For the purposes of this claim there is no material difference between any of the 22 Arrangements which were later considered by the Adjudicator. Each was dated 1 April 2013. An example Arrangement, which I have seen, between Liverpool Primary Care Trust and the Claimant, in respect of rooms at Breeze Hill Neighbourhood Health Centre, was an agreement between the parties that the Arrangements were "*alternative provider medical services*" ("APMS") Contracts. APMS contracts are one of the routes by which NHS Commissioners may make provision for the delivery of primary medical services to patients. The other routes are PMS Contracts and GMS Contracts.

17 At the material time, the Claimant was party to other unrelated PMS Contracts in which it had elected to be treated as an HSB. Each of the 22 Arrangements contained the following terms:

"2.1) The provider is a Health Service Body for the purposes of section 9 of the Act. Accordingly, this Agreement is an NHS contract…

62.1) All negotiations and proceedings connected with any dispute, claim or settlement arising out of or relating to this Agreement ("Dispute") shall... follow the Dispute Resolution Procedure...

68.1) Subject to Clause 62, all disputes and claims arising out of, relating to or in connection with this Agreement, shall be subject to the exclusive jurisdiction of the English courts..."

18 At the time of entering into the Arrangements and (at all times until the application to substitute the New Grounds), both parties considered that, as stated in Clause 2.1, the Claimant was an HSB and that the contract was an NHS contract. The Arrangements made provision in each case requiring the PCTs to pay the Claimant particular sums known as additional payments during a specified period. What is relevant for present purposes is that the dispute which arose related to the length of that period.

19 A number of disputes were then referred by the Claimant. It made its reference under the Dispute Resolution Procedure referred to in the Arrangements. Each set of representations were directed to the Defendant. The Adjudicator then considered the disputes and agreed with the Claimant's argument as to the period for which payments were to be made and awarded it a total of £587,808.

20 The Adjudicator's relevant findings on interest was as follows (paragraphs. 7.41 to 7.45):

> "7.41 I note that in addition … the Contractor is also claiming interest at the rate of 6% on the total sum of the Additional Payments across the 20 contracts, with the total interest claimed being £148,698.18. The Contractor had not provided a calculation or the sum for the interest claimed under this Contract.
>
> 7.42 I note that the Contractor had not submitted the basis for its entitlement to interest or the basis of the rate of the interest charge.
>
> 7.43 I note that the Contract is silent in relation to entitlement to interest in the event of late payment of any sums due under the Contract. There is no contractual right for the Contractor to claim interest.
>
> 7.44 Clause 2.1 of the Contract states that "The Provider is a Health Service Body for the purposes of Section 9 of the Act. Accordingly this

> is an NHS Contract". I am not persuaded that this is a contract at law and that interest is payable.
>
> 7.45 I do not determine that interest is payable as claimed by the Contractor."

The First Ground: The Short Answer

21 The first ground (as amended) is that the Adjudicator erred in concluding that an APMS Contract could take effect as an NHS Contract and in failing to accept the Contracts were legally binding contracts. The first ground can be answered briefly without dealing with the substance. The answer is that it is not open to the Claimant to challenge the Adjudicator's decision on this basis, and permission on this ground is refused.

22 There are a number of strands to this. The issue was first raised by way of attempted amendment extremely late. No permission for Judicial Review, or indeed permission to amend, has been given in respect of this ground. The Decision was dated 19 September 2018. No good reason is given for the lateness of the application. It appears, and it was effectively conceded, that the Claimant's legal team for the substantive hearing simply took a very different view from that which had previously been taken and took that view more or less at the door of the court in May of this year. That is not a good reason for the lateness of a challenge, particularly in the context of the tight time limit for the commencement of Judicial Review proceedings and the authorities which are very clear as to the importance of the promptness of the bringing of Judicial Review proceedings.

23 Further, this is a point which was never made to the Adjudicator. On the contrary, the matter was referred to her expressly on the basis that the Arrangements were NHS Contracts. All submissions made to her were advanced on that basis.

24 This was a matter which the Interested Parties submit, and I accept, went to the jurisdiction of the Adjudicator. Although the arrangements made provision for reference to the Adjudicator,

> 1) It was common ground that the arrangement could not confer jurisdiction on the Adjudicator.
>
> 2) The relevant provision within the Arrangement was itself predicated on the assumption that the Arrangement was an NHS Contract. It therefore did not purport to bestow jurisdiction on the Adjudicator,

Nor could the reference in the Arrangements to sub section 101 and 102 of the GMS Regulations bridge the gap, because that reference was one to the process and not to the applicability of the process. That was covered at section 100.

25 As for the Regulations, they do make provision for contractors under GMS Contracts and PMS Contracts to be enabled to choose to refer a dispute under a contract at law to the Adjudicator. However, there is no similar provision in the APMS Directions. The residual jurisdiction provision is at section 9(6) of the Act; this only permits NHS Contracts to refer to the Adjudicator. This position that there is no such jurisdiction in relation to APMS Directions is somewhat further clarified, as Mrs Wilkinson pointed out by paragraph5(f) of the AMPS Directions 2010 which indicates that an APMS contract, which is not an NHS Contract must specify the procedures which are to apply in the event of a contractual dispute; thereby indicating that the NHS Dispute resolution procedure does not apply.

26 If a point which went to jurisdiction was to be raised it should have been done at the time. In the context of Court jurisdiction, this would plainly constitute a waiver of the right to challenge the jurisdiction or a submission to jurisdiction and would remove from a party the ability to dispute the jurisdiction exercised, see for example, *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA Civ 226. It might potentially also give rise to a

Henderson v Henderson estoppel argument, although in the context this was not relied upon by the Interested Parties. However, in the context of a public law challenge, it plainly engages the kinds of issues as to good administration which are relevant to the question of permission.

27 Further, if the point were right then the Adjudicator had no jurisdiction to determine the dispute which the Claimant itself referred to it, including the substantive claim. It would mean that the Adjudicator's award to the Claimant of the £587,808 was unlawful and that sum was recoverable by the First Interested Party. Yet, that sum has been paid and accepted by the Claimant. Bearing in mind all these factors, in the circumstances, even if it were open to the Claimant to dispute the point now, it could not do so when it continues to approbate reprobate at one of the same time. In all the circumstances, I therefore refuse permission on this ground.

28 However, in any event for the reasons which I shall go on to give in the latter portion of the judgment, that ground would in any event have failed.

Ground 1

29 At the heart of this ground is the question of "Health Service Body", or HSB, as defined by the section 9 of the Act. It is accepted that:

a) an APMS Contract is an arrangement under which a Primary Care Trust arranges for the provision of NHS primary care services by the Claimant; and

b) the Primary Care Trusts who contracted with the Claimant were health service bodies within the meaning of section 9(4).

Hence, if the Claimant was itself a "Health Service Body" the Arrangement took effect as an NHS Contract. If the Claimant was not a "Health Service Body" the Arrangement could not be an NHS Contract even if it claimed to be so as it plainly did.

30 The question is whether as the Claimant says section 9(4) of the Act is binary. It submits that the background to the section dictates that it is. It refers in particular to section 4 of the National Health Service and Community Care Act 1990, which is the statutory predecessor to section 9 of the NHS Act. The 1990 Act set out the division between commissioners of NHS services and some providers of NHS services.

31 It submits that the purpose of section 4 was to regulate the arrangements between these public bodies. Thus, section 4 ensured that such arrangements did not constitute legal contracts and if there was a dispute between an NHS body commissioner and an NHS body provider, that dispute was adjudicated by the Secretary of State.

32 It submits that the bodies that were within section 9(4) were expressly limited. No general power was given for a contracting party to elect to become an HSB even if the contract was for NHS services and this must be taken to have been intentionally done in circumstances where providers of NHS primary care services, (traditionally operated by individual doctors or partnerships and now by medical companies), are commonly not (and never have been) public bodies and thus were outside section 9(4).

33 As for the GMS Regulations, the result, the Claimant says, is that an "election" means that the contractor elects to be regarded as an HSB but for the purposes of that particular contract only. The statutory power to make an election to be treated as an NHS contractor and thus be treated as a body which comes within section 9, even though the provider of GP services is not in fact a person listed in section 9(4), cannot be construed as having any effect which is wider than the purpose for which that person is so to be regarded, namely entering into a GMS Contract.

34 The Claimant argues that a similar approach falls to be applied to the PMS-deeming provision. Each process, it says, was effectively ringfenced. The Claimant then submits that there was no statutory provision which permitted APMS Contracts to take effect as NHS

Contracts, thus there was no statutory scheme which allowed APMS contractors to elect to treat an arrangement as an NHS Contract.

35 Further, the statutory scheme provided the GP practices had the legal right to decide if they wanted to be parties to an NHS GMS Contract or to be parties to a legally binding GMS or PMS Contract. It was not part of the statutory scheme that a GP practice could be forced to become an NHS contractor. The Claimant says that the Secretary of State had no *vires* to permit or to require an APMS Contract to be set up as an NHS Contract.

Discussion

36 As I have made clear, this argument does not arise since I have refused permission on this Ground. But, had it arisen, I would have decided this point against the Claimant. Attractively as the matter was put, ultimately I found more persuasive the arguments on construction advanced in tandem by Ms Morris QC for the First Interested Party and Ms Wilkinson for the Second Interest Party.

37 As the statutory background makes clear, there are a number of different routes through which a person may be treated as an HSB. One is by being a body identified in section 9(4) of the 2006 Act. It is common ground that the claimant was not such a body. It was common ground that it is not necessary for the contractor to be a body specifically identified in that section. A contractor's status as a Health Service Body may arise by operation of another legislative provision. Again, it was common ground that a contractor entering into a PMS Contract or a contractor entering into a GMS Contract, although not within section 9(4) and not a public body, is or may be treated as an HSB. The cautious expression used here is witting.

38 The two sets of rules for some reason use slightly different wordings. So, under the GMS Regulations, the phrase used is "*it shall be so regarded*", and the basis on which this comes about is that if there is an election before or at the time of the relevant arrangement being

entered into. Meanwhile, under the PMS Regulations the phrase is "*shall be regarded as*" and "*the way in which it arises is unless the entity object by written notice*". Whether parties part company is what that means if a PMS or GMS contractor enters also into APMS Arrangement. This is significant because at the time it entered into the Arrangements the Claimant was a PMS contractor (and it either was or had previously also been a GMS contractor).

39 On its face, the effect of Regulation 9(1) of the PMS Regulations was that absent objection in the form and at the time required, a contractor making a PMS Agreement was to be regarded as a Health Service Body for the purposes of section 9 of the Act from the date it made the agreement. That wording naturally reads as producing the result that the HSB status is for future arrangements also.

40 By itself, of course, this would not be enough, but there were in my judgment a number of other *indicia* within the regulations which provided a clear route to the construction for which the Interest Parties contended.

41 In particular:

> 1) There was a distinction drawn between the position as regards past contracts and the position as to future contracts. While under Regulation 9(3) becoming an HSB via a PMS Contract was specifically provided not to affect past contracts, no such provision was made for future contracts and there was similar provision in the GMS Regulations.
>
> 2) Not only was there no saving for future contracts there was actually a provision via Regulation 9(8)(a), or in the GMS Regulations 10(7)(a), that where a party cease to be a Health Service Body on the termination of the relevant PMS or GMS Agreement it was to "*continue to be regarded as a Health Service Body for the purposes of being a party to any other NHS Contracts entered into after it became a*

Health Service Body up before the date on which it ceased to be a Health Service Body (for which purposes it ceases to be such a body of the termination of that NHS contract)".

3) This provided perhaps the clearest indication for the status of one arrangement could "leach" into other later arrangements. That forward and backward-looking dichotomy then dovetailed neatly with the fact that both relevant sections of the Regulations are headed "Health Service Body Status". Status is something which is naturally more cohesive with an ongoing state of affairs than a provision of a particular contract or arrangement.

4) Also consistent with this is the fact that under the PMS Regulations, the wording of 9(1) is that the party shall "*be regarded as a Health Service Body for the purposes of [section 9 of the NHS] Act*". This strongly suggests a wider purpose than one for the specific contract in question.

5) To put it another way, looking at it from the other side, the *indicia* which one would expect if the provisions were intended to refer to a single contract only were lacking so there was no, "*for the purposes of this contract*", (an obvious drafting formula which might be expected, particularly when wording defining the purposes for which the deeming operates was included so the question of purposes could be seen to have been considered and dealt with and had plainly not been overlooked).

6) There is also an indication via paragraph5(F) of the APMS Regulations that APMS Contracts may or may not be NHS Contracts. If it were not possible for them to be NHS Contracts, it would make no sense to specify "*in the case of a contract which is not an NHS Contract*".

42 Accordingly, and contrary to the Claimant's case, the PMS Regulations and indeed the GMS Regulations provided a means for a contractor to have the status of an HSB, not merely for

the purposes of a specific PMS or GMS agreement (the entering into of which had the effect of its becoming regarded as such a body) but generally from the date of making such an agreement "*for the purposes of [section 9 of the 2006]"*.

43 As a result, in the present case, the Claimant was an HSB when it entered into the arrangements and consequently those arrangements were, as they said, NHS Contracts. On this basis, the arguments as to *vires* to which much attention in the skeleton was devoted simply do not arise. The question is not one as to whether the Secretary of State has *vires* to create the status within APMS Contracts, but what the consequence is of existing legislation, which it is clear the Secretary of State had *vires* to make.

44 This conclusion is reached independently of the consideration of the wording of the Arrangement and the Claimant's actions. However, it is interesting at this point to note that both are in perfect accord with this conclusion. The parties in a formal document recorded that it was an NHS Contract and then the Claimant invoked the dispute resolution process which was only relevant if the contract was an NHS Contract.

45 One point which the Claimant raised to counter this approach was that, if the First Interested Party's submission was right then what is described as "fresh elections" as to the contractor status would be meaningless for subsequent contracts because a contractor which it elected to be a "Health Service Body" for one contract was fixed with that status until elected to change it under that same contract. The argument was that this was a consequence which was nonsensical or absurd and that this absurdity drove a conclusion that the Claimant's argument was to be preferred.

46 However, the problem with this is that there is no absurdity or issue with the consequence of this construction. It may be the case that a contractor which has acquired the status of a Health Service Body via the PMS or GMS Regulations will fall to be regarded as such when entering into future contracts unless that status is brought to an end, which is possible either before or after a future contract is entered into in accordance with the terms of the relevant

Regulations. That does not seem to be problematic. The possibility of election still has a use for first contractors or for contractors after a contract has been terminated.

47 On the other hand, there seems in practical terms to be much to be said for an approach where a contractor can broadly be categorised as being an HSB or not rather than subject to a knitting patent of different statuses. In any event, I conclude clearly that, had the matter arisen, the Interested Party's argument on this ground was to be preferred.

The Second Ground

48 The Claimant's second ground is straightforward. It is that, since the law of the contract was the law of England and Wales, the Adjudicator was required to apply the law of England and Wales in any dispute about the contractual rights of the parties and did not do so because she failed to award interest. The primary error identified is that the Adjudicator concluded she had no power to award interest because there was no provision for interest in the contract.

49 The secondary errors identified are:

1) Failure to apply the 1998 Act; and

2) Failure to apply common law/equitable/restitutionary principles to produce an award of interest.

I am not persuaded by these arguments which I conclude rest on a number of false premises.

The Primary Error: No Power

50 The first false premise is that the arbitrator's conclusion on interest was one which rested on a decision that she had no power to award interest. That is not, in my judgment, a fair reading of the Adjudication. It was common ground as between the Claimant and the Interested Parties that the Adjudicator, in fact and in law, had power to award interest. While it may be said to appear from the Defendant's submissions (written by solicitors for

the Defendant and not by the Adjudicator) that the Defendant's position is that it does not have power to order interest in relation to an NHS Contract, that was a position which was set out at a later stage in the documents in this Judicial Review. It does not appear to have been the view of the Adjudicator.

51 From her reasons which I have set out above, I conclude that she took the view that such interest was capable of being awarded even though she was dealing with an NHS Contract and not a contract at law. Her decision does not say, (as it would do if she considered that she had no such power), that the question did not arise because she had no power. What she did was to look at the submission made, which appears to have been a bold submission for six per cent interest with no calculation or basis underpinning it. She concluded she was not prepared to award interest in those circumstances.

52 That is an entirely appropriate exercise of her discretion. It involved no error of law or principle. It does not come within a country mile of being amenable to an unreasonableness challenge (none was ever posited). This approach is perfectly reflected in the reasoning of the Adjudicator which runs in essence thus:

1) The claim was a large claim (nearly £150,000) unsupported by either a calculation or a breakdown by contract.

2) No explanation was given of the basis for:

a) the alleged entitlement interest, or

b) the basis of the rate of the interest charge.

3) The Adjudicator cannot fill the gap in this case by the obvious means of scrutinising the contract. Any claim for interest appears not to be contractual.

4) Given Clause 2.1 of the Contract, there is a question as to how interest would arise. (That is a question not answered by the submissions. The case now made for the basis of interest was not put to the Adjudicator).

5) Result: request to interest not granted. The Adjudicator does not say that she determines the interest could not arise under this arrangement.

53 I note that the difficulty which confronts the Claimant in regard to this ground is actually apparent in the original iteration of the grounds which were that the Adjudicator was wrong to conclude that she was not persuaded that the contracts were contracts of law and the Adjudicator was wrong to conclude that interest is not payable under the contracts. While not fully acknowledging the exercise performed by the Adjudicator, this iteration shows that the Claimant has at least one point appreciated that the exercise was not as simple as concluding that there was no power to award interest. In the circumstances, I conclude that the Claimant's claim Ground 2 must fail.

54 Ground 3 was not pursued orally at the hearing and seemed to be entirely parasitic on Ground 2. The Claimant therefore also fails on this Ground.

Interest

55 However, before turning to Ground 4, I will deal with the substance of the submissions made as to interest, given in particular that the Defendant has indicated in its Detailed Grounds that guidance on this point would be welcomed and there is plainly scope for this issue to arise again.

56 So far as the point concerning the 1998 Act is concerned, a major problem is that, for the reasons already given, the contract was not a contract at law. If the contract were not an NHS Contract but was a contract at law, plainly this Act could be relevant. Indeed, there seem to be no real suggestion that it would not apply. Here, I note the provisions of section

.2(2), 2(3) and 2(7). Specifically, section 2(7) makes it plain that the Act can apply in the context of the activities of a government department.

57 However, this was, as I have found, an NHS contract. The result is that the contract is one in name only and gives rise to no contractual rights or liabilities. This is clear from *NHS England v Bargain Dentist.com* [2014] EWHC 1944 and *Pitalia v NHS Commissioning Board* [2014] EWCA Civ 474.

58 By reason of sub section 9(11) and 9(12) of the Act, the function of the Adjudicator in respect of section 9 "arrangements" is not the same as that of a Court determining a claim for breach of contract. The Adjudicator considers the arrangements and the arguments of the parties and has power to make such directions as she considers "appropriate" to resolve the matter in dispute. She is thereby given a broad discretion as to how to approach the matter. What she cannot do however is to regard the arrangements as giving rise to contractual rights or liabilities because she is prohibited from doing that by section 9(5).

59 Anticipating this issue, Mr Lock QC submitted that the 1998 Act could still apply. The ingenious argument deployed was the 1998 Act focuses on obligations as the means to create the right to interest and that the breach of an obligation can, under the NHS adjudication procedure, then create a debt which can be enforced in the Courts.

60 However, this argument is doomed to failure. The 1998 Act is all about contractual debts. This is clear from section 1 which states:

> "It is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest subject to and in accordance with this Part."

61 The means of creating the right to interest is thus via a term implied into a contract; which is just what the NHS Contract is not. The debt has to be a debt created by a contract and hence

by a contractual obligation. Secondly, there is the definition of "qualifying debt" at section 3:

> "A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a "qualifying debt" for the purposes of this Act, unless (when created) the whole of the debt is prevented from carrying statutory interest by this section."

62 Again, it is quite clear that the debt arises by reason of a contractual obligation which again is what the NHS Contract does not create. Any debt which does arise from the odd hybrid that is an NHS Contract is created not by the arrangement but by an adjudicative process. It is that which produces a right which is then in turn enforceable in Court. I would add, though, it was not argued that, even if there had been the potential for any such right to arise, it seems questionable whether it could in this case have survived given the terms of section 3(3), which provide:

> "A debt does not carry (and shall be treated as never having carried) statutory interest if or to the extent that a right to demand interest on it, which exists by virtue of any rule of law, is exercised."

63 This provision appears to be designed to disapply the Act if another form of interest at law is sought. Since interest was sought originally on another basis, there would seem in this case at least arguably to have been an election under this section not to invoke the 1998 Act and to bar the interest. But, as I have said, the point does not arise because, as I have already found, the 1998 Act cannot apply in these circumstances.

64 That leaves the possibility of interest on some other basis. The Supreme Court Act and the County Courts Act plainly did not apply. There would however be the possibility of interest to be awarded on an equitable basis if applicable. I conclude that interest could be awarded

on this basis and indeed the contrary was not urged by either of the Interested Parties. However, I would note here that where one is outside the realm of contractual or statutory regimes which fix an interest rate, interest falls generally to be awarded on the basis of the principle that it is to compensate a party for being kept out of its money.

65 In *Carasco v Johnson* [2018] EWCA Civ 87, having reviewed the authorities, including *Tate and Lyle v Greater London Council* [1983] WLR 149, the Court of Appeal summarised the principles as follows at paragraph.17:

> "The guidance to be derived from these cases includes the following:
>
> (1) Interest is awarded to compensate claimant's for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.
>
> (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.
>
> (3) In relation to commercial claimant's the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.
>
> (4) In relation to personal injury claimant's the general presumption will be that the appropriate rate of interest is the investment rate.

> (5) Many claimant's will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

66 On that basis, where a party seeks to recover more than base rate by way of interest, it appears to be generally incumbent upon it to put forward material to justify the rate and the period of interest sought. In Court, one would expect to see some evidence on these points leading to a conclusion that a particular uplift from a particular relevant base rate was the applicable rate.

Ground 4: A1P1

67 This final ground can likewise be speedily dismissed. It is predicated on the assumption that there has been a failure to put in place a power to award interest. Since it is common ground that there is a power to award interest whether or not this was an NHS Contract, the premise on which this point becomes relevant does not arise. In any event, although I do not need to and I am not deciding this point on the hypothesis that it did arise, there seems to be considerable hurdles against any such argument in circumstances where:

> 1) As there was no contract there was no right and there could not be said to be "money due" to found a claim for interest.
>
> 2) The facts of the cases relied on are very different. In *Stran Greek Refineries and Stratis Andreadis v Greece* (1995) 19 ECHR 293, the Applicants had been granted an arbitration award which legislation thereafter rendered invalid and unenforceable. Accordingly, the question of "possession" was quite clear. Similarly, in *Aktas v Turkey* (2002) 34 EHRR 39, there was no question about the possession. The possession in question was land which was expropriated.

68 So, as I have indicated, there seem to me to be difficulties, but the point does not arise. In conclusion, for the reasons which I have given, the claim is dismissed.

MR CROSS: My Lady, NHS England and, I am sure, all the parties, is very grateful to your Ladyship to speed with which you have been able to produce the judgment. My Lady, NHS England has an application for its costs.

MRS JUSTICE COCKERILL: Yes.

MR CROSS: I apprehend that Miss Wilkinson may have an application for her costs and I understand that Mr Butler resists, I think, both of our applications in principle. Would it be in order for me to address your Ladyship first on that issue, the issue of costs in principle?

Three points we make: first of all, we are the successful party. We won on all grounds and there is no good reason for the Claimant not to be ordered to pay our costs as a departure from the general rule. Secondly, your Ladyship knows well that, relevant of course to your exercise of discretion of cost is the conduct of the parties under the express terms of Rule 44.2(4A) and, to any extent necessary, we say the conduct of the Claimant in this litigation serves only to support our application.

Very briefly, to resume that into three subpoints if I can put them briefly. First of all, one had a very significant change of attack by the Claimant in the sense that the original grounds on which permission was limitedly to the granted were effectively eschewed. Secondly, not merely a change of grounds case but a wholesale reversal of the position, as your Ladyship has indicated in the judgment, taken by the Claimant, not just in comparison with that before the Adjudicator, but from at least as long ago as 2013 which is when the APMS Arrangements are entered into.

Thirdly the timing, the third point, the timing of the way in which the *volte face* presented itself, surely, we submit, is to be deprecated by the Court. It was, as your Ladyship knows, on the day its skeleton was due for the hearing as originally listed, but the Claimant simply presented us with their new claim, remarkably suggesting in the first instance that this could be dealt with at that hearing before Mr Justice Knowles accepted our objection to that course. That is not the way that Judicial Review, we submit, should be conducted. That was the second point.

The final point on costs in principle for us is that the circumstances of this case, in that the costs we are trying to recover are of course public funds, taxpayer funds, which this litigation would otherwise divert from the NHS including, of course, patients and, naturally

my Lady, the amount of money, i.e. the interest, being sought by this claim required our client to take it extremely seriously, not least because of the importance of protecting those funds.

So, my Lady, for those three reasons, we apply for our costs in principle.

MRS JUSTICE COCKERILL: Thank you. Yes, Ms Wilkinson.

MS WILKINSON: Yes, my Lady. I have two points on costs in principle and four points on the conduct of the Claimant. The two points on principle are as follows. Firstly, we are in a slightly different position to Mr Cross's client. We are not standing in the shoes of the defendant; we are an interested party in the more normal sense. Your Ladyship will be aware that you of course have jurisdiction to award costs - Administrative Court Guide paragraph23.6.1, internal paragraph134.

The Secretary of State only sought to be joined to the claim because of the *vires* attack on the 2010 Directions. That attack created an issue that was of considerably wider significance than just the payment of interest on the claimant's debts under the arrangements. If those directions or any part of them had been struck down, one section of NHS contracting capability would have been thrown into disarray and the issue of whether the contractors under APMS contracts were indeed HSBs or not would have had to have been examined for all contracts in question. So, it was entirely appropriate for the Secretary of State to seek to be joined to the claim once that issue had arisen.

But, as to the Claimant's conduct once it had arisen, the attack on *vires* was, we say, unfocused; it did not specify whether it was an attack on the Directions as a whole or just on Direction 5 itself (see Amended Statement of Facts and Grounds, paragraph10(A)). It was not clearly pleaded in another sense because the appropriate declaration was not sought as a remedy which would at least have allowed the Secretary of State to pin down the focus of challenge to the Directions as a whole to one direction, or indeed to one particular aspect of the enabling power.

Thirdly, it was of course, late and that arising on 23 May 2019 in the amendment application when, as a pure issue of law, it was clearly available as a ground of challenge from the inception of the claim.

Fourthly, the amended claim was not served on the Secretary of State by the Claimant on 23 May though clearly of direct significance to him. But it was not served on the Secretary of State until by order of the Court on 5 June 2019, tab 20 of the hearing bundle after prompting from the Defendant, who had written to the Administrative Court office on 30

May, tab 18, pointing out that there was clearly an issue for the Secretary of State here that ought to be addressed. Again, the Secretary of State then complied with all the Orders made by the Court directing it to participate if it so desired.

We only addressed *vires* in our Detailed Grounds and submissions and we only occupied 20 minutes of your time on Tuesday. The sum we claim is modest. We have given our statement of costs to the claimant and the interested party. I can hand one up. We would seek our costs to be summarily assessed, if awarded, if not agreed. Thank you.

MRS JUSTICE COCKERILL: Thank you very much. Yes.

MR BUTLER: First of all, can I just, before I turn to both applications, turn to the general issue in this case. My Lady has identified that, at the time of the determination for the Adjudicator, there was an issue as to whether interest was payable? I appreciate your Ladyship's observations about those who make representations on behalf of the Adjudicator, but they do act as lawyers for the Adjudicator. The submissions made in the document are absolutely clear there is no power at all to award interest and the document also goes on to assert, at paragraph.5.2, the court considers that it does, and can, award interest in the matter of an adjudication then they would order that the matter should be remitted to them to consider it afresh because that is what they believed to be the position.

I appreciate your Ladyship's decision, I am not in any way-- it has been very helpful because your Ladyship indicated that the NHS Litigation Authority, for which I do a considerable amount of work, needed guidance on this issue and invited the Court-- You very, very helpfully, and I can assure you, it is going to help dentists and doctors who have these disputes, who do not want to Court, to save money through that process. So, something has come out of the proceedings to assist the NHSLA and I just put it that way. It is of assistance to the NHSLA. It is most definitely of assistance to the Secretary of State to understand that position and commissioning boards.

In those circumstances, I just invite you to take that into account as a factor because there has been some benefit to the NHSLA and to the parties in these proceedings from your Ladyship's judgment, particularly in respect of interest. Putting that aside, having heard my learned friend's submissions, I do have to accept, in principle, that because the amendments and the *vires* issue my learned friend for the Secretary of State was brought into the proceeds. I cannot argue against that at all and I do not. The schedule prepared is modest in my respectful submission. I was surprised at the modesty of it. But, for Judicial Review, it is a modest schedule. I do accept that.

But can I turn to my learned friend for the First Interested Party? It was for the Secretary of State to argue the *vires* is issued because it was an attack on that, and my learned friend's very thorough and detailed skeleton argument addresses that on behalf of the Secretary of State. The First Interested Party really stepped into the shoes to look at the interest argument because, of course, they are the paying party in these proceedings. It is not just this case; they have a wider interest as the NHS Commission Board and all contracts they enter into as to whether or not, where there is a dispute, a party is entitled to interest.

In those circumstances, insofar as it is unusual to award two interested parties costs, particularly where a Defendant has defended it (not in person but in writing - and your Ladyship has given that guidance), if you are to award any costs against the First Interested Party, it should be limited to the extent that you have not agreed with all of their arguments clearly because of the guidance you've given in respect of the right of the NHS to later award interest on an extant(?) basis. I appreciate in equity one has to look at the reasons for awarding it (whether it is just, principal) and how long one has been kept out of it to any detriment, but you have made that finding.

Therefore we find ourselves in a position that, had the NHSLA lawyers not submitted the contrary in their submissions, but had agreed there was power to do so and therefore upon that power we do not need to be here because we will revisit it-- In my respectful submission, I am not sure we would have been here. Those instructing me were liaising with the Secretary of State in respect to the second defendant, the lawyers, because they appoint the Adjudicator, and they were quite adamant that they had no power. That is in correspondence. It is a factor in this case in why we find ourselves here. Therefore, I can see the attraction in the first interested party seeking its costs, but they are seeking costs which are staggering. I do not know if your Lady ship has seen----

MRS JUSTICE COCKERILL: I have not seen the schedule. I know it was sent through but----

MR BUTLER: Well, in respect of the Second Interested Party, when I say it is modest in my experience in these proceedings, and the work that is clearly got into it on behalf of my learned friend and her instructing solicitor is £13,920, I was shocked. Now, I do not know if that is correct - and I raise it out of deference to my learned friend because there is no fee for the hearing for her; only a fee for the advice and draft. Does that include (inaudible)----

MRS JUSTICE COCKERILL: It is a public service.

MR BUTLER: Yes, it is incredibly modest.

MRS JUSTICE COCKERILL: Yes.

MR BUTLER: So far as those costs are concerned. But, in respect to the First Interested Party, I was not sure if I had read the correct documents at first----

MRS JUSTICE COCKERILL: You are selling this quite high and do bear in mind I sit in the Commercial Court so it will take a lot to shock me.

MR BUTLER: I appreciate that, my Lady, but the sum being claimed in total is £88,263. Now, for Judicial Review, I appreciate myself appearing in this Court, that is for a one-day hearing. No witnesses have been called. Pure submissions. It is akin to an application to determine a right to interest. It is a significant sum of money for these kinds of proceedings, for a one-day hearing in respect of a very narrow point.

MRS JUSTICE COCKERILL: Yes.

MR BUTLER: Which your Ladyship has dealt with a very well, and when I look at the schedule, and I do not know if your Ladyship is going to summarily assess it even in principle because my learned friend invites you to do so----

MRS JUSTICE COCKERILL: I certainly would be minded to.

MR BUTLER: In which case, may I invite----

MRS JUSTICE COCKERILL: Why don't you hand it up to me so I can have a look at it?

MR BUTLER: If I just take you to the page.4, these are the profit costs of the solicitor instructed by the NHS Commissioning Board. I make the following observations if your Ladyship is going to take a broad brush approach as to reasonableness and proportionality. I am not too concerned about the initial sums on communications with the parties, but if you look at communication with counsel alone, there are 23 hours being claimed. Bearing in mind they were brought in, acknowledged service and counsel prepared the skeleton on the point of law, this is not the kind of Judicial Review with volumes of material.

So, if you look at communication with counsel again underneath that in planning, preparing, draft and reviewing, the solicitors are claiming 99.40 hours' work. If you look at the bundle which was prepared by the Claimant, again I am not seeking to demean the first interested party's involvement, they filed an acknowledgement of service. One expects grounds of resistance drafted by counsel. There are no witness statements prepared by them and it is the skeleton argument on counsel attending. All the documents are prepared by the Claimant. So I would invite you to take that into account.

If you turn over the page to page5, there is a doubling of costs here between junior and leader where my learned friend-- I make the following observations. Of course, he has

prepared for and advised and he has incurred costs, and again, those have been incurred. I do not question the £7,450. I do take issue, thereafter, having advised and prepared an advice for the NHS Commissioning Board, that there are then telephone conferences in the sum of £4,850. To discuss what, in my respectful submission?

There is then work on the grounds and that has been billed at £5,550. His brief fee for this hearing (which, again, I do not challenge) and the fee for attending today, which is modest-- If you then turn to leading counsel, bearing in mind junior counsel has drafted the detailed grounds, advised the solicitor, leading counsel then seeks to claim a further sum for advice, a further sum for settling grounds, a sum for drafting a skeleton argument (which under the Rules is supposed to be included in counsel's brief fee - is not a separate fee), work for counsel attending court-- Therefore, again, I would invite you just take those observations into account.

I know that court's approach is to look at it broadly and what is reasonable and proportionate. But, it is a staggering figure for a one-day hearing on what I considered to be, putting aside the *vires* issue which my learned friend for the Secretary of State has addressed her mind to, a straightforward issue as to entitlement to interest, in my respectful submission, which your Ladyship has, very gratefully, identified does exist and it is awarded in equity if that is to be the case. The defendant has made their written submissions, and there was an order by the High Court in Manchester that there would be no cost between the Defendant and the Claimant because it is a public body and therefore that was an arrangement and an agreement reached.

So, my Lady, in principle if you are minded to award the First Interested Party's costs, then, bearing in mind the benefit of this judgment to all parties and NHS Commissioning Boards and the NHSLA, which you very helpfully provided, has never existed at all-- This has been an issue between the parties for some time. I would just invite to take those facts into account and the observations I have made. It is never comfortable to have to make observations about schedules, of leading counsel, junior counsel, but I do make them in the sense that this case is a one-day hearing.

MRS JUSTICE COCKERILL: Yes. Thank you very much.

MR CROSS: My Lady, on the question of costs in principle, which was all I was originally seeking to address to you on, the fact that your judgment, as it respectfully does, assists the Litigation Authority does nothing to change our success in defending this claim or provide reason for departing from the general rule. Secondly, my learned friend, I think said that you

had not in your judgment agreed with all of our arguments. So far as we are concerned, you did. Thirdly, in relation to the points that have been made on summary assessment, can I just make three general points and three detailed points?

The three general points are that there was a proportionate use of lawyers by my client in this case, that the solicitor and the work was done almost entirely by one associate and one partner, On the counsel side on one hand, of course, both a QC and junior mirroring precisely the choice of the Claimant to bring in a QC. It was when they did that and changed the claim to boot, at the stage they did, that Ms Morris was instructed and not before.

Secondly, we have throughout this litigation, as you have reflected in your judgment, been dealing with changing arguments at every turn. So, for example, the case has involved, exceptionally for judicial review, having to produce two separate sets of detailed grounds of resistance, one by me in the first instance and then one after Ms Morris's instruction jointly. Inevitably, there has been an overlap in that sense between mine and her role.

Thirdly, it was very important that NHS England dealt with this claim, if I can put it like this properly, and took it seriously - firstly, because of the money; the amount of interest which was in reality sought through this claim. This is actually pleaded on the face of the original statement of facts (and we can turn to that if we need to on page23 of the bundle). It was a little over quarter of a million pounds (£257,000 or thereabouts) and the costs are in proportion I respectfully submit to that. But secondly, that aside, given the potential for - indeed in the result - the fact that there is some wider implication for, as a result of the judgment, particularly APMS Contracts in their operation; so those are the three general points.

On points of detail, the solicitor profit costs are thoroughly in proportion, in our submission, to the claim for the reason I have just given. That includes the work on document costs of £16,000, quite reasonable my submission. My friend asked, on my fees, £5000 for me to have tele-conferences, for what? The answer is to discuss and advise both on our response to the claim in the narrow legal sense and in light of the wider implications of the claim, and does not challenge my brief fee.

So far as I am at liberty to, or can sensibly, address you on the fees of my leader, they are consistently in proportion with the fees of everything else. For those reasons, we do respectfully agree that it would be appropriate, if your Ladyship is minded, to summarily assess the costs for the obvious reason that this litigation should now, we say be, brought to an end. Thank you.

MRS JUSTICE COCKERILL:

69 Thank you very much. I am grateful for the submissions which have been put together so clearly in the short period of time available without any pre-knowledge of what I was going to say. I am going to award costs to both of the Interested Parties. There was not really any great struggle against the Second Interested Party's costs either as to principle or as to amount and they will be allowed in full.

70 So far as the costs of the First Interested Party are concerned, it seems to me that this is absolutely a case where there has been effectively 100 per cent success. This is also a case where, although there may have been some fringe benefit from the way that the case eventually presented itself, the litigation history is one which does fall within the category where, even if there might have been less than 100 per cent success, the court would have been looking with disfavour at the way that the matter was brought forward by the Claimant in the sense of the shifting sands of the argument. Not only is there the extremely late amendment - and one which was brought at a time to cause effectively maximum inconvenience to the litigation trajectory of this case when the Administrative Court guide is perfectly clear about the need to be prompt if you are going to amend and so forth - there was then the fact that the amended case was not clear, as Ms Wilkinson has submitted, in relation to her costs. It gave rise therefore not just to the need to look at the matter again in at a much broader sense, but to the Second Interested Party coming in and to a whole range of issues which might not otherwise have opened up and which have turned out in the end to be somewhat tangential.

71 Then, we get to the hearing. The way the matter was put forward was, again, somewhat different to the way that it was put even in the skeleton argument. So, in all of those circumstances, I do not think there ought to be any allowance for fringe benefits and the first interested party should have their costs subject to summary assessment.

72 When it comes to the summary assessment, I bear in mind that, because of the conduct of the litigation, the costs of the First Interested Party will be much higher than they would otherwise have been because, for example, such facts needing to deal with two sets of detailed grounds and so forth and the important issues which have been raised. I bear in mind that, in some respects, one can isolate individual things like brief fees for this hearing and the hourly rates used by the solicitors. There does not seem to be any great concern. However, it does look a bit toppish to me in terms of total and I am going to take it down to £60,000.

_____

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Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

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