Neutral Citation Number: [2024] EWCA Civ 1477

Case No: CA/2022/002300

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(ADMINISTRATIVE COURT)
THE HONOURABLE MR JUSTICE BOURNE
[2022] EWHC 2526 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 December 2024

Before:

LADY JUSTICE ASPLIN
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE LEWIS

- -

Between:

THE KING (on the application of SASHI SHASHIKANTH)	**Appellant**
- and -	
(1) NHS LITIGATION AUTHORITY **(2) NHS COMMISSIONING BOARD (also known as NHS ENGLAND)**	**Respondents**
- and -	
THE BRITISH MEDICAL ASSOCIATION	**Intervener**

- -
- -

Vikram Sachdeva KC, Admas Habteslasie and Jake Thorold (instructed by **Weightmans LLP**) for the **Appellant**
The First Respondent did not appear and were not represented.
Jonathan Auburn KC and Raphael Hogarth (instructed by **Bevan Brittan LLP** for the S**econd Respondent**
Jenni Richards KC (instructed by **Capital Law**) for the **Intervener.**

Hearing dates: 19 and 20 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the question of whether a decision of an adjudicator appointed by the Secretary of State to determine a dispute arising out of a contract governing the provision of primary medical services is amenable to judicial review.

2. In brief, the appellant, Dr Shashikanth, is a general practitioner. He entered into two contracts with the NHS Hillingdon Clinical Commissioning Group ("the CCG") for the delivery of primary medical services. The CCG terminated the contracts on the basis that the appellant was in breach of a contractual obligation to co-operate with a primary care network. Regulation 82 of the National Health Service (General Medical Services Contracts) Regulations 2015 ("the 2015 Regulations") provides that a dispute concerning a contract may be referred to the Secretary of State for consideration and determination. The appellant's contracts also provided that the appellant may refer a dispute to the Secretary of State. The appellant referred the dispute to the Secretary of State. An adjudicator appointed by the Secretary of State determined that the CCG was entitled to terminate the contracts on the basis that there had been a breach of an obligation to co-operate with a primary care network.

3. The appellant applied for judicial review of the notices of termination issued by the CCG and the determination of the adjudicator. Only the latter is the subject matter of this appeal. Bourne J. ("the judge") held that the adjudicator had erred in law in concluding that the appellant was in breach of a contractual obligation as the contracts had not been varied to include any obligation to co-operate with a primary care network. The judge held, however, that decisions of adjudicators were not amenable to judicial review. He considered that the appellant chose to refer the dispute for determination by an adjudicator appointed by the Secretary of State and that the "choice of that contractual mechanism did not introduce a public law element" such as would render the adjudicator's decision amenable to judicial review.

4. The appellant appeals on one ground, namely that the judge erred in concluding that the adjudicator's determination was not amenable to judicial review.

5. By a respondent's notice, the second respondent, the NHS Commissioning Board (now renamed NHS England) seeks to uphold the judge's order on additional grounds (a) relating to his decision that the matter was not amenable to judicial review and (b) asserting that the judge was wrong to conclude that the appellant's contracts had not been varied to include an obligation to co-operate with the primary care network, and was based on an error of law.

6. The first respondent, the NHS Litigation Authority, is a special health authority established by article 2 of the National Health Service Litigation Authority (Establishment and Constitution) Order 1995 ("the Order"). Its functions include meeting liabilities of health service bodies and carrying out "such other functions as the Secretary of State may direct" (see article 3 of the Order). The Secretary of State has directed that it exercises the functions under the regulations governing the dispute resolution process in issue in this appeal. In its acknowledgement of service dated 18 October 2021, it did not state whether it intended to contest, or to concede, the claim for judicial review and stated that it would leave the matter to the court to determine.

In an earlier letter dated 16 July 2021 responding to the letter before claim, it had stated that it did not dispute that the determination of the adjudicator was amenable to judicial review. That expression of view is not, of course, determinative of the issue on this appeal. The British Medical Association, which represents general practitioners, was granted permission to intervene and made written and oral submissions in support of the appellant.

THE STATUTORY FRAMEWORK

Duties of the Secretary of State and NHS England

7. Section 1 of the National Health Service Act 2006 ("the 2006 Act") imposes a duty on the Secretary of State to continue the promotion in England of a comprehensive health service and to exercise the functions conferred by the 2006 Act so as to secure that services are provided. The Secretary of State may arrange for, or direct that, any of the Secretary of State's public health functions be exercised by one of more relevant bodies including NHS England: see sections 7A and 7B of the 2006 Act. Section 1H of the 2006 Act provides for there to be a body corporate which is now known as NHS England. It, too, is under a duty to promote a comprehensive health service.

General Medical Services

8. Part 4 of the 2006 Act provides for NHS England to enter into arrangements with general practitioners for the provision of primary medical services. We were told that local commissioning groups carried out the function of entering into arrangements. Section 84 of the 2006 Act provides:

> "(1) NHS England 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 NHS England 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."

9. Subject to the provisions on NHS contracts discussed below, a general medical services contract is a contract which gives rise to private law rights capable of enforcement in civil proceedings. Section 89 provides that such a contract must contain such provisions as may be prescribed. Regulation 32 of the 2015 Regulations provides that:

> "(1) Subject to paragraph (2), a contract must also contain provisions which are equivalent in their effect to the provisions

> set out in Parts 6 to 14 of, and Schedules 1 to 3 to, these Regulations, unless the contract is of a type or nature to which a particular provision does not apply.
>
> (2) The requirement in paragraph (1) does not apply to the provisions specified in—
>
> (a) regulation 83(5) to (15);
>
> (b) regulation 84; and
>
> (c) paragraphs 41(5) to (9) and 42(5) to (17) of Schedule 3,
>
> which are to have effect in relation to the matters set out in those provisions."

10. Schedule 3 to the 2015 Regulations was amended by the addition of paragraph 15A which provides as follows:

> "Duty of co-operation: Primary Care Networks
>
> (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."

11. As a result, existing general medical services contracts had to be varied so that they included a contractual provision equivalent to the duty to co-operate set out in paragraph 15A. One of the issues in this case is whether the CCG did vary the general medical services contracts it had made with the appellant so as to include provision which was equivalent to that set out in paragraph 15A.

NHS Contracts

12. The 2006 Act also provides for other forms of arrangements, referred to as NHS contracts. These are arrangements between health service bodies whereby one health service body arranges for the provision of goods and services by another health body. Although described as NHS contracts, these arrangements do not give rise to any contractual rights or liabilities. General practitioners are not health service bodies for the purposes of section 9 and general medical services contracts made under section 84 of the Act would not generally be NHS contracts. However, a general practitioner may elect to be regarded as a health service body so that his contract may be treated as an NHS contract. The material provisions of section 9 are as follows:

> "**9 NHS contracts**
>
> (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).
>
> …..
>
> (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.

…..

> (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."

13. Regulation 10 of the 2015 Regulations provides that:

> **"10.— Health service body status: election**
>
> (1) A person who proposes to enter into a contract with NHS England (a "proposed contractor") may elect, by giving notice in writing to NHS England 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).
>
> (2) An election made by a proposed contractor under paragraph (1) has effect from the date on which the contract is entered into."

Dispute Resolution

14. Part 12 of the 2015 Regulations deals with dispute resolution. It provides for certain disputes to be referred to the Secretary of State for consideration and determination. Disputes about an NHS contract may be referred to the Secretary of State under section 9(6) of the 2006 Act. Disputes about non-NHS contracts (such as the general medical services contract in issue in this appeal) may also be referred to the Secretary of State. Regulation 82 of the 2015 Regulations provides that:

> "(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
>
> (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."

15. Regulations 83 and 84 set out in detail the procedural steps to be taken by the decision-maker, and the parties, for the resolution of disputes referred to the Secretary of State. They provide so far as material:

> **"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.

…..

(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).

…..

(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).

…..

(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."

16. Regulation 85 provides that "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".

THE FACTUAL BACKGROUND

The Contracts

17. The facts are set out fully in the judgment of the judge. The following are the material facts for the purposes of this appeal and are largely taken from the judgment below. The appellant entered into two general medical services contracts relating to two properties. One, dated 1 April 2004, related to premises at Church Road and the second, dated 15 August 2004, related to premises at West London Medical Centre. The contracts were not NHS contracts, that is, the appellant did not elect to be treated as a health service body and the contracts did not fall within the definition of NHS contracts set out in section 9 of the 2006 Act. As non-NHS contracts, they gave rise to contractual rights and liabilities and were capable of being enforced in legal proceedings in the civil courts.

18. Each of the two contracts was contained in a document entitled "Standard General Medical Services Contract" and they were materially identical. The terms discussed below are taken from the contract relating to the West London Medical Centre. The references are to the predecessor to the 2015 Regulations but it was not suggested that there are any material differences between those regulations and the 2015 Regulations.

The Material Terms

19. The contracts set out the obligations of the parties. They include the following obligation:

> "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."

20. Part 24 of the contracts is headed "Dispute Resolution" and contains the following clauses (the reference to the PCT is to the Primary Care Trust whose functions were at the material time discharged by the CCG). So far as material to this appeal, the contracts provide that:

> "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 ."

21. There are further procedural provisions dealing with the referral of the dispute to the Secretary of State which reflect the provisions which are now contained in Part 4 of the 2015 Regulations.

22. Part 25 of the contracts deals with variations. The material clauses provide:

> "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."

23. There are also provisions governing the termination of each contract:

> "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."

Primary Care Networks

24. In 2019, NHS England published its NHS Long Term Plan which provided for the creation of what were described as fully integrated, community-based health facilities. That involved NHS England establishing primary care networks with professionals, other than doctors, with a view to making a range of health services available to patients. General practitioners could join a primary care network but if they opted not to do so it seems that the aim was to create a means whereby that general practitioner could be required to co-operate with the primary care network and provide information to it so that patients could access the services provided. It was for that reason, it seems, that Schedule 3 to the 2015 Regulations was amended by the insertion of paragraph 15A. Regulation 32 would require a contract to be varied to include provisions equivalent to the duty to co-operate described in paragraph 15A.

The Appellant's Position in Relation to Primary Care Networks

25. The appellant decided not to participate in his local primary care network. His position was that he would prefer funding to be provided to his practices to enable those practices to provide the services directly. There was correspondence and a meeting between representatives of the CCG and the appellant. He indicated that he was not prepared to provide contact details of his patients with the primary care network. Concerns were raised as to the compatibility of providing data with the law governing data protection and confidential information.

26. On 28 October 2019, the CCG wrote to the appellant 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 set out 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 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 …".

27. The second respondent has taken the position in these proceedings that that letter amounted to a variation of the appellant's contracts.

28. There was subsequent correspondence between the CCG and the appellant. On 11 February 2020, the CCG issued remedial notices under clauses 566 to 588 of the contracts. These were headed "refusal to co-operate with Primary Care Networks". They stated that the regulations amending the 2015 Regulations and inserting paragraph 15A into Schedule 3 had come into effect on 1 October 2019 and these had varied the appellant's contract. The remedial notices required the appellant, by 16 March 2020, to co-operate and provide the primary care network with the relevant patient data, failing which the CCG would consider terminating the contracts. The appellant did not comply.

29. On 24 September 2020 the CCG issued contractual Termination Notices under clause 569 of the contracts in respect of both practices. These notices cited clause 499 and paragraph 15A, setting out the latter. They stated that paragraph 15A of Schedule 3 had "varied the contract" and added that the CCG had written to the appellant 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.

The Referral

30. By e-mail dated 1 October 2020, the appellant referred a dispute to the Secretary of State. The text of his e-mail stated:

> "Further to our telephone call today, I am writing to appeal the termination notice.
>
> CCG has said that we could make an appeal jointly however you have mentioned that this is unheard of and that normally one party appeals.
>
> Church Road Surgery has PCN breach.
>
> West London MC has PCN and refusal to register bulk patient's breach.

> I wish to submit an appeal. I had to submit this appeal because of deadline given to me by Hillingdon CCG.
>
> Further representations will follow once my solicitor communicates with solicitor from NHSE. We are seeking clarification what a joint appeal means."

31. Further written representations dated 26 April 2021 were submitted by the appellant. They were drafted by counsel on his behalf. Paragraph 1 stated that this "is a contractual dispute" between the appellant and the CCG. At paragraph 84, the submissions state that there is no dispute between the parties that the appellant "is under a contractual obligation to cooperate with the CCG in respect of the enhanced services being offered to patients". The submissions continued by setting out the appellant's position that the provision of the patient information would breach data protection laws and the common law relating to confidentiality.

32. The first respondent, exercising the functions of the Secretary of State under Part 4 of the 2015 Regulations, appointed an adjudicator to consider and determine the dispute.

The Adjudicator's Determination

33. By a determination dated 24 June 2021, the adjudicator held that the CCG was entitled to terminate the two contracts. The adjudicator's determination said the following:

> "3.26. The Commissioner issued a remedial notice in respect of the PCN co-operation breach on 11 February 2020 ("PCN Remedial Notice") for failure to comply with clause 499 of the West London Medical Centre contract, which states:
>
> "*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."*
>
> 3.27. The legislation the Contractor was found to be in breach of is paragraph 15A of Schedule 3 of the Regulations…"

34. The determination then considers arguments relating to the lawfulness of providing patient data and confidential information. He concluded that the provision of the relevant patient data would not breach the law. He concluded that:

> "3.40 In light of the above, I consider that the Contractor has not complied with paragraph 15A(2)(a) and paragraph 15(2)(f) of Schedule 3 of the Regulations and therefore the Commissioner was entitled to issue the PCN Remedial Notice for breach of clause 499 of the West London Medical Centre Contract".

35. The Adjudicator's determination is at section 4 of the determination where he said, so far as material, that:

> "4.1 I determine that in relation to West London Medical Centre Contract:
>
> …
>
> 4.1.1 the Commissioner was entitled to terminate the West London Medical Centre contract on the basis of the PCN Co-operation Breach.
>
> 4.2 I determine that in relation to the Church Road Contract, the Commissioner was entitled to terminate the Church Road Contract on the basis of the PCN Co-operation Breach."

THE CLAIM FOR JUDICIAL REVIEW

36. The appellant brought a claim for judicial review of (1) the decision of the adjudicator to uphold the termination of the appellant's contracts and (2) the decision of NHS England to terminate those contracts. The appellant contended, amongst other things, that the adjudicator's decision and the termination notices were flawed as they proceeded on the basis, wrongly, that paragraph 15A of Schedule 3 to the 2015 Regulations imposed a duty on the appellant and that, therefore, failure to comply with the duty would be a breach of clause 499 of the contracts. The second respondent's grounds of resistance contended that the claim was not amenable to judicial review as the appellant had chosen to have his relationship with the CCG regulated by a private law binding contract and did not raise issues of public law. Further, it submitted that the appellant had not raised the argument that paragraph 15A of Schedule 3 did not impose an obligation on the appellant and so the adjudicator could not be said to have acted unlawfully by not addressing the point.

37. The judge held first that the adjudicator had made an error of law as he had "proceeded on the mistaken basis that paragraph 15A created an immediately effective requirement of co-operation" and that the failure to comply with that requirement was a breach of clause 499. Further, the judge held that the letter of 28 October 2019 was not effective to vary the contracts.

38. The judge held however, that neither the adjudicator's determination nor the termination notices issued by the CCG were amenable to judicial review. The judge reviewed the case law. His essential conclusion can be found at paragraphs 144 and 145 of his judgment which are in the following terms:

> "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."

39. Permission to appeal was granted in relation to the adjudicator's decision but not in relation to the termination notices issued by the CCG. Consequently, I say nothing about the correctness of the decision of the judge that the issuing of termination notices under the contracts was not amenable to judicial review.

THE GROUND OF APPEAL – AMENABILITY OF THE ADJUDICATOR'S DETERMINATION TO JUDICIAL REVIEW

Submissions

40. Mr Sachdeva KC, with Mr Habteslasie and Mr Thorold, for the appellant, submit that the adjudicator was discharging statutory functions on behalf of the Secretary of State. As the source of his jurisdiction was statutory, the exercise of those functions was treated as involving public law functions and was amenable to judicial review. The fact that the appellant had a choice to opt into the statutory adjudication scheme did not outweigh the fact that the exercise of statutory functions was generally seen as being amenable to judicial review. The 2015 Regulations created one dispute resolution process which applied both to NHS contracts (which did not give rise to any binding private law rights) and non-NHS contracts such as the general medical services contracts in this case. There was no argument but that the dispute resolution process was a matter of public law so far as NHS contracts were concerned. There was nothing to suggest that the same dispute resolution process was not amenable to judicial review in respect of non-NHS contracts where the appellant opted to use that process. The dispute resolution process itself was statutory and was amenable to judicial review. Nor should the element of choice be overstated. The appellant could have elected that the contracts be NHS contracts (in which case the dispute resolution mechanism would be amenable to judicial review) or elect to refer a dispute arising in relation to a non-NHS contract to be dealt with under the dispute resolution mechanism. The question of choice was a matter of timing and did not affect the fact that the dispute resolution mechanism was statutory. Furthermore, the context in which the question arose was one of the provision of national health services which did involve functions which were public functions.

41. Ms Richards KC, for the intervener, submitted that the courts had adopted an expansionist view of the scope of judicial review. Two approaches could be detected in the case law, the source of the power and the nature of the function. Where the source of a power was statutory, the exercise of that power was treated as amenable to judicial review. There would need to be compelling reasons for holding that it was not amenable to judicial review. In the present case, the source of the power was statutory as it was derived from regulation 82 of the 2015 Regulations. The fact that the appellant had a choice to use that statutory mechanism did not mean that the statutory mechanism, if used, was not amenable to judicial review. The approach adopted by the judge meant that there was no mechanism for challenging the decision of the

adjudicator even though it was based on an error of law. The absence of an alternative means of challenge was a relevant additional factor indicating that the decision of the adjudicator was amenable to judicial review.

42. Mr Auburn KC, with Mr Hogarth, for the second respondent, submitted that the source of the power did not provide the answer in the present case. Here there were statutory elements present but there were also contractual elements. That required the court to look at a range of factors including the nature of the decision being taken. Here, that involved a determination of the parties' private law contractual rights and whether the CCG was entitled to terminate its contracts with the appellant. There was an element of election in the present arrangements. It was the choice of the appellant to have his relationship with the CCG governed by contract and it was his choice to refer the dispute to the adjudicator rather than enforce his contractual rights in the civil courts. The function of the adjudicator in adjudicating on private law rights was not intrinsically a public law function. The fact that the dispute occurred in the context of the provision of public services did not alter that fact. Nor did the fact that the dispute might raise issues of wider importance make the function a public function. The same was true of many private law disputes. The fact that the dispute process may be amenable to judicial review in respect of NHS contracts but not in relation to non-NHS contracts did not alter matters. The former did not involve any determination of contractual rights; the latter did and was not a public function. Mr Auburn relied on a number of authorities including, in particular, on the question of whether a determination of private law rights was a public function, the decisions of this court in *R (Holmcroft Properties Ltd.) v KPMG LLP and others* [2020] Bus. L R 203, and *R (West) v Lloyd's London* [2004] 3 All E.R. 251. He also relied upon the observations of Stacey J. in *R (Haffiz) v NHS Litigation Authority and NHS Commissioning Board* [2020] EWHC 3792 (Admin) to the effect that a challenge to an adjudicator's decision upholding a termination notice in respect of a general medical services contract (which did not allege fraud or improper motive) would not be amenable to judicial review.

Discussion and conclusion

Preliminary Observations

43. Judicial review is only available against a body exercising public functions. There are, broadly, two approaches to the question of whether a person or a body is exercising a public function. First, if a person or body is exercising power derived from statute (or the prerogative, if the matter is justiciable), the person or body is generally assumed to be exercising public functions. The courts have recognised that there are cases where a power may be derived from statute but the nature of the decision is such that it does not involve the performance of a public duty to the individual in the particular circumstances of the case (see, for example, *R (Tucker) v Director-General of the National Crime Squad* [2003] ICR 599 where a decision to terminate the secondment of a police officer did not involve a public function). Furthermore, even if a decision is amenable to judicial review, the available grounds of challenge in public law may be more limited in certain contexts, such as in a commercial context (see, for example, *The State of Mauritius v The (Mauritius) CT Power Ltd.* [2019] UKPC 27 and *Mercury Ltd v Electricity Corporation* [1994] 1 WLR 521).

44. Secondly, the courts may have regard to the nature of the function being performed to determine whether that function has a sufficient public element such as to make it amenable to judicial review. A number of considerations may be relevant which include, but are not limited to, the extent of government or other public authority involvement in the function, whether and to what extent the exercise of the function is performed against a background of statutory powers, and the nature and importance of the function. As it was expressed by Sir John Donaldson MR at page 381E-F of his judgment in *R v Take-over Panel, ex parte Datafin Plc* [198] 7] 1 QB 825:

> "Possibly, the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."

45. Judicial review is also only available against public law bodies in respect of public law matters. Judicial review is not available to enforce purely private law rights such as rights derived from contract or tort. Such rights are enforceable by way of claims in the civil courts, not a claim for judicial review in the Administrative Court as explained in *R v East Berkshire Area Health ex p. Walsh* [1985] Q.B. 152.

The application of those principles to this case

46. The source of the Secretary of State's power in the present case is statutory. Regulations 82(1)(b) and 83(5) of the 2015 Regulations confer jurisdiction, or power, to determine disputes. Regulation 82(1)(b) provides that, where a contract is not an NHS contract, "any dispute arising out of or in connection with the contract" may be referred by the contractor "for consideration and determination by the Secretary of State". Regulation 83(5) provides that where the dispute relates to a non-NHS contract, "the Secretary of State may "either (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". The Secretary of State is not a party to the contract between the CCG and the general practitioner and he does not acquire any power or jurisdiction by virtue of that contract.

47. There is an element of choice on the part of the appellant in deciding to refer the matter to the Secretary of State. He could choose to enforce his rights through proceedings in the civil courts. But regulation 32 recognises that the general medical services contract must include, amongst other things, provision equivalent to the provisions in regulations 82(1)(b) and 83(1) to (4) enabling the contractor to refer a dispute to the Secretary of State. The contracts in the present case, therefore, include provisions giving the contractor the choice, unilaterally, to refer a dispute to the Secretary of State. Thereafter, the procedure for determining the dispute is prescribed by Regulations 83(5) to (15) and 84. The starting point, therefore, is that this is a dispute resolution process where the Secretary of State, or an adjudicator appointed by him, acquires jurisdiction by statute and which is regulated by statutory provisions. The presumption is that the exercise of such a function is a public function amenable to judicial review.

48. I turn next to the question of whether there is anything in the nature of the decision that the Secretary of State, or the adjudicator appointed to carry out the function,

which rebuts the presumption that the decision is amenable to judicial review. The fact that the Secretary of State, or adjudicator, is determining issues which involve private law rights does not, of itself, indicate that the function being performed is not a public function. Judicial review is generally available in respect of inferior courts and tribunals even where they are adjudicating on matters which involve private law rights. County courts, for example, are amenable in principle to judicial review although, in practice, the availability of alternative remedies by way of appeal mean judicial review is not appropriate but that is a matter of discretion rather than because the decisions of such bodies are not amenable to judicial review.

49. That conclusion is reinforced by the following two further considerations. First, there is one statutory dispute resolution process, namely that established under Part 12 of the 2015 Regulations. There are two means by which disputes may be referred to the Secretary of State, that is by parties to NHS-contracts pursuant to section 9(6) of the 2006 Act or unilaterally by the contractor who is a party to a non-NHS contract (or by the clinical commissioning group if the contractor agrees). The dispute resolution process must be amenable to judicial review in relation to disputes about NHS contracts (that is, disputes about arrangements made by health service bodies): it is a statutory process and does not affect any private law contractual rights. On judicial review, the courts will need to consider whether the Secretary of State, or adjudicator, has made an error of law (for example, in relation to the interpretation of the arrangements) or otherwise made a public law error.

50. In essence, the same function is being carried out by the Secretary of State, or adjudicator, in relation to disputes about non-NHS contracts (such as the general medical services contracts in this case) which are referred to the Secretary of State for determination. The courts, on judicial review, may have to determine if the Secretary of State, or adjudicator, has erred in law by misinterpreting the general medical services contract. The fact that the contract gives rise to private law contractual rights does not alter the nature of the function that the Secretary of State, or adjudicator, is performing which is to determine the proper meaning of the arrangements governing the relationship between the contractor and the clinical commissioning group.

51. Secondly, the overall context in which private law rights arise in the present case is a statutory context. The 2006 Act deals with the making of arrangements for the provision of services. It provides power to enter into general medical services contracts and those contracts must include provisions equivalent to those prescribed by regulation. Furthermore, the contractor can, in fact, opt to be treated as a health service body and if so the general medical services contract would not give rise to contractual rights and liabilities. The suggestion that the Secretary of State or adjudicator is simply determining questions of private law contractual rights ignores how those rights came into being and how they may be enforced. It seeks to divorce those rights from the statutory framework within which rights are created and operate and disputes determined. Once the nature of a general medical services contract is appreciated, the suggestion that a statutory dispute process for resolving disputes about such contracts does not involve a public function does not reflect the reality of the situation.

52. I turn to the two cases on which Mr Auburn principally relied as indicating that decisions involving the determination of private law rights may not be public in nature. Mr Auburn very fairly and properly emphasised that these, and other, cases

differed in some respects from the present case. He did not seek to suggest that these authorities bound this court to reach a particular conclusion, but he submitted that they were helpful and indicative in terms of analysing whether a particular decision was amenable to judicial review.

53. The first is *Holmcroft*. That concerned a scheme for providing redress in cases of the mis-selling of certain financial products. The statutory regulator, the Financial Services Authority, required a bank to provide financial redress and to appoint an independent assessor to review the offer of compensation. That person was also authorised to provide reports to the Financial Services Authority on the redress system. The relevant bank appointed a firm of accountants as an independent assessor to review whether an offer of compensation was reasonable. The arrangements were voluntary as between the bank and the assessor and the assessor had no statutory power to conduct an assessment.

54. Notwithstanding the absence of any statutory source for the power being exercised in *Holmcroft*, Arden LJ, with whom the other members of the court agreed, considered that it was necessary to look at the wider regulatory framework, as well as the contractual origin of the power, to determine if the function that the assessor performed was a public function amenable to judicial review. Arden LJ accepted that there was a degree of regulatory involvement as the Financial Services Authority required the provision of a compensation system and the review of offers by an independent assessor. Those factors did not alter the fact that the dispute between the bank and customer was one that involved private law rights and the system of redress was not intended to replace the role of the court in civil proceedings. The Financial Services Authority was not involved in the negotiations between the customers and the bank, and the responsibility for agreeing compensation rested with the bank and the customers. The system by which a customer made a complaint to the bank, and sought to challenge the reviewer's assessment of the reasonableness of the bank's offer of compensation, was ancillary to pursuing its private law rights. The requirements of the Financial Services Authority to have a scheme and an independent assessor did not change the character of the dispute between the bank and the customer which was essentially a private law dispute. The independent assessor was therefore not performing a public function and was not amenable to judicial review.

55. That case is different from the present case. Here the source of the Secretary of State's power is statutory and the dispute resolution process is statutory. That of itself is enough in the present case to make the decision of the Secretary of State, or the adjudicator appointed to carry out his statutory functions, amenable to judicial review. The starting point in this case is the opposite of that in *Holmcroft* where the source of the power was contractual but, nevertheless, the court considered if there were other factors which meant the function being exercised was a public function. The fact that the adjudicator determined in this case contractual rights did not alter the public nature of his adjudicatory function. Furthermore, as indicated above, statute dictated the content of the contract and required the contractor to be able to refer the dispute to the statutory dispute resolution process. The position is, therefore, different from that in *Holmcroft* and that latter case does not provide a basis for considering that the function of the Secretary of State or the adjudicator were anything other than public functions.

56. The second case is *West*. That concerned the Society of Lloyd's of London which is an association of insurance underwriters incorporated pursuant to a private Act of Parliament. Membership of Lloyds was voluntary, and members entered into a contract with Lloyds under which they were obliged to comply with the provisions of the relevant private Acts of Parliament governing Lloyds and subordinate legislation including byelaws. Members joined underwriting syndicates managed by managing agents. The members had a contract with the managing agent and the member's right to participate in the syndicate was governed exclusively by contract. Byelaws made by Lloyds (and which members were obliged to comply with) provided for members of a syndicate to buy out the shares of other syndicate members subject to approval of the Council of Lloyd's ("the council"). Lloyd's did not perform any regulatory function in relation to the insurance market as that was undertaken by other statutory bodies. In *West*, a member of a syndicate sought judicial review to challenge the approval by the council of the terms of a buy-out of a member's share in a syndicate. Brooke LJ, with whom the other members of the court agreed, held that the decision under challenge was concerned solely with the commercial relationship between the member and the managing agent of the syndicate and was governed by the contract between them. The decision was of a private, not a public, nature, and had consequences in private not public law. That again is a case where the source of the power was essentially contractual and there was no proper basis for treating the matter as involving the exercise of public functions. The present case is one where the function is statutory, and public in nature, and there is no proper basis for treating the nature of the decision as changing the position.

57. Two other matters were raised. A question arose as to whether the dispute resolution process amounted to arbitration for the purposes of the Arbitration Act 1996. That issue arose, it seems, as it had been suggested by the appellant that, if judicial review was not available, he would have no means of challenging an erroneous decision by the adjudicator. The second respondent sought to argue that the arrangements for dispute resolution amounted to arbitration and there were remedies available in the Arbitration Act 1996. I am satisfied that the determination of a dispute by the Secretary of State, or an appointed adjudicator, is amenable to judicial review. It is not necessary, nor appropriate, to decide whether or not it involves arbitration within the meaning of the Arbitration Act 1996. As the second respondent said at paragraph 82A of its re-amended skeleton argument, it was "common ground that the Court does not need to determine the arbitration issue in order to resolve the question of amenability to judicial review". I agree.

58. Next, an issue arose in relation to regulation 84(2)(b) of the 2015 Regulations. That provides that section 9(5) of the 2006 Act applies to any dispute referred for determination. Section 9(5) is the provision which says that an NHS contract does not give rise to contractual rights or liabilities. The precise effect of regulation 84(2)(b) is unclear but it might, on one reading, indicate that the underlying dispute was not to be seen as something giving rise to contractual rights or liabilities. If that is so, that might weaken the second respondent's submission that the determination concerned private law contractual rights and so was not amenable to judicial review. The second respondent submitted in its skeleton arguments that regulation 84(2)(b) contained an error and the reference should have been to section 90(5) of the 2006 Act (which provides for directions to be enforceable in the county court) not section 9(5). Regulation 84(2)(b) has been amended to refer to section 90(5) not 9(5) with effect

from 27 May 2024. It remained in force in its original, unamended form between 7 December 2015 and 27 May 2024. In my judgment, the determination of the Secretary of State, or an adjudicator, is amenable to judicial review irrespective of the correct interpretation of regulation 84(2)(b) as it stood at the time of the determination. In those circumstances, it is not necessary, nor appropriate, to decide whether or not it is open to the courts to conclude that regulation 84(2)(b) contained an error which the courts could correct. It is better that that issue is decided in a case where it is determinative of the outcome and after full argument.

Conclusion

59. The determination of the adjudicator in this case was amenable to judicial review for the reasons given above. The judge was wrong to hold that the determination did not involve the exercise of a public function and was not amenable to judicial review. Similarly, the observations of Stacey J. at paragraph 78 of her judgment in *Haffiz* to the effect that a determination made in the course of the dispute resolution procedure contained in the 2015 Regulations fell outside the scope of judicial review were wrong and should not be followed.

THE RESPONDENT'S NOTICE AND THE ISSUE OF VARIATION

Submissions

60. Mr Auburn accepted that the decision of the adjudicator was wrong in so far as it treated paragraph 15A of Schedule 3 to the 2015 Regulation as a free-standing obligation with which the appellant was contractually obliged to comply. He accepted that the contracts needed to be varied to include provisions equivalent to paragraph 15A of Schedule 3. He submitted, however, that the letter of 28 October 2019 was a variation or that, in any event, it was clear that the appellant knew he was expected to comply with the requirement to co-operate with the primary care network. Furthermore, he submitted that this issue was not one that the appellant was entitled to raise in these proceedings as the issue of contractual variation was not a dispute referred to the Secretary of State and the adjudicator could not be said to have erred by not considering it. Finally, Mr Auburn submitted that, alternatively, the appellant was estopped by convention from raising the issue now.

61. Mr Sachdeva submitted that the adjudicator had erred in law in the way he approached paragraph 15A of Schedule 3. He further submitted that the adjudicator had to determine if the contracts had been varied in order to uphold the termination notices in this case. He submitted that the appellant was not estopped from raising the issue.

Discussion and Conclusion

62. Regulation 32 of the 2015 Regulations provide that "a contract must also contain provisions which are equivalent in their effect to the provisions set out" in, amongst other things, "schedule 1 to 3 to…these Regulations". Schedule 3 was amended to include paragraph 15A. The CCG, therefore, was obliged to vary the general medical services contracts it had entered into with the appellant to include in the contracts an obligation equivalent to that described in paragraph 15A. The method of doing so is

prescribed by clauses 529 to 531 of the contracts which are set out above. Paragraph 15A does not, of itself, impose any obligation on a contractor.

63. First, the adjudicator did proceed on an erroneous legal basis. He treated paragraph 15A of Schedule 3 as legislation imposing an obligation on the appellant. He then treated the appellant as being in breach of the contractual obligation to "comply with all relevant legislation": see paragraphs 3.26 and 3.27 of the decision set out above. That was wrong. Paragraph 15A did not itself impose any obligation on the contractor. There was, therefore, no contractual obligation to comply with paragraph 15A of Schedule 3. There was no basis, therefore, for finding that the termination notices were based on a breach of clause 499 of the contracts.

64. Second, there was no variation of the contracts to include an obligation equivalent to paragraph 15A of Schedule 3 to the 2015 Regulations. The letter of 28 October 2019 did not, and did not purport to, vary the contracts. Reading the letter fairly and as a whole, the author of the letter mistakenly assumes that paragraph 15A of Schedule 3, introduced by amending legislation, imposes an obligation on the appellant and that he was required to comply with it by virtue of the clause in the contracts requiring the appellant to comply with legislation. The author was not purporting to vary the contracts to include an obligation to co-operate with the primary care network because he did not appreciate that the contracts needed to be varied. Where the letter refers to writing to inform the appellant "how the new contractual requirement" will affect his general medical services contract, the author is referring to the requirement introduced by paragraph 15A. But that was not, of course, a contractual requirement. Consequently, the CCG failed to give notice of a variation and failed to stipulate the date on which such a variation would take effect. The appellant did not, therefore, come under a contractual obligation to comply with the primary care network. Nor is it enough to assert that the appellant knew or must have realised that the CCG wanted him to co-operate with the primary care network. The CCG was the public body responsible for arranging for the provision of primary medical services. It knew, or should have known, the relevant law. If it wished to impose an obligation on a contractor to do certain things, it had to vary the contracts. The CCG cannot simply assert that there is a contractual obligation, still less terminate a contract because of a breach of a contractual obligation, when no such obligation existed. It was not open to the CCG to serve a notice terminating a contract because it thought that it must have been clear to the appellant that the CCG wanted him to co-operate with the primary care network. If the CCG wished to terminate the contracts here, it had to establish that there existed a contractual obligation to co-operate which the appellant had breached.

65. Furthermore, I consider that it was open to the appellant to raise this issue in his judicial review claim. Regulation 84(1)(b) provides that "any dispute arising out of or in connection with the contract" including "the termination of the contract" (see regulation 85) may be referred. The dispute in the present case was that the appellant objected to the termination of the contracts. As he said in his e-mail he was writing "to appeal the termination notice". The termination notice in this case asserted that the appellant had failed to take the relevant steps to remedy a breach of contract, namely the obligation to comply with legislation. It was inherent in the dispute that the adjudicator had to determine whether the CCG was entitled to terminate the contracts on that basis. It was a necessary part of the adjudicator's task to determine if there

was a contractual obligation and if the appellant had breached it so that the CCG could serve a notice requiring him to take steps to remedy the breach. In the present case, the adjudicator mistakenly thought there was an obligation to comply with paragraph 15A of Schedule 3. He, therefore, failed to consider whether the contracts had been varied to impose an obligation on the appellant to co-operate. It is correct to say that the appellant's lawyer, in submissions to the adjudicator said in one paragraph that it was accepted that the appellant was under a contractual obligation to co-operate in respect of the enhanced services being offered to patients. I do not consider that that submission (coming after the referral of the dispute) meant that the "dispute" that had been referred did not include, or necessitate, the adjudicator determining whether there existed a contractual obligation which had been breached in circumstances which entitled the CCG to terminate the contracts.

66. Finally, Mr Auburn submitted that the appellant was estopped by convention from asserting that he was not under a contractual obligation. He submitted that the CCG and the appellant had proceeded on the basis of a common underlying assumption that the "contract had been varied so as to incorporate the Co-operation duty" and it "would be unjust to deny the truth of that assumption" (see paragraph 93 of the second respondent's re-amended skeleton argument). Mr Auburn submitted that the five requirements for establishing such an estoppel identified by the Supreme Court in *Tinkler v HMRC* [2021] UKSC 3, [2022] AC 886 were satisfied in this case.

67. I have some doubt as to whether it is open to the second respondent to raise this argument on appeal. The re-amended respondent's notice does not refer expressly to this issue. The general reference in the notice to the contracts having been varied to incorporate a duty to co-operate and the adjudicator's determination not being based on an error of law does not to my mind suggest that the additional ground relied upon was that the appellant was estopped from raising this point. In any event, I am satisfied that the appellant is not estopped from raising the question of the variation of the contracts. A number of the requirements said to be needed for an estoppel to arise are absent. They can be expressed shortly. First, there was no common assumption that the contracts had been varied as asserted in the second respondent's skeleton argument. The assumption, if any, was that the appellant had to comply with paragraph 15A of Schedule 3.

68. More significantly, Mr Auburn submitted that the appellant must share some responsibility for the assumption. It is difficult to see why. The CCG was responsible for varying the contracts to ensure that they included obligations equivalent to paragraph 15A. If it made a mistake about its legal obligations, it is difficult to see that the appellant should assume responsibility for the CCG's error. Mr Auburn submitted that the CCG had relied upon the common assumption and suffered a detriment. The detriment that Mr Auburn relied upon was that if the appellant had informed the CCG that it had not properly varied the contracts, the CCG would have done so. It is difficult to see that the failure by the appellant to warn the CCG that it was not acting in accordance with statutory and contractual requirements amounts to a detriment in this context. In any event, the detriment suffered must be such as to make it unjust or unconscionable for the appellant to assert the true legal position. I do not see that it is in any way unconscionable for the appellant to assert the true legal position. The fact is that the CCG had responsibility for ensuring that the contracts were varied in accordance with the statutory requirements. It was the body

responsible for commissioning primary medical services. It knew or at least should have known, what its legal obligations were in relation to general medical services contracts. It should not be seeking to terminate contracts on the basis of a failure to take steps to comply with a contractual obligation when no such obligation existed because it had failed to take the necessary steps to vary the contracts to create such an obligation. It is not unconscionable, nor is it unjust, to allow the appellant to demonstrate that the true position is that the adjudicator should not have upheld the termination notices as the appellant had not breached the contracts in the way alleged.

CONCLUSION

69. I would allow the appeal. The determination by the adjudicator of a dispute referred to the Secretary of State under regulation 82 of the 2015 Regulations is amenable to judicial review. The adjudicator erred in law in determining that the CCG were entitled to terminate the contracts by reason of a breach of a contractual obligation to comply with paragraph 15A of Schedule 3 to the 2015 Regulations. The parties may wish to make short submissions on the appropriate order. For my part, I would consider that the appropriate order is to quash the determination of the adjudicator and to remit the matter to him to determine in accordance with this judgment, that is, on the basis that there had been no breach of any obligation to co-operate with the primary care network as the provisions of the two contracts had not been amended to include obligations equivalent to paragraph 15A of Schedule 3 to the 2015 Regulations.

LADY JUSTICE NICOLA DAVIES

70. I agree.

LADY JUSTICE ASPLIN

71. I also agree.