Community Dental Services

Contents of this chapter:

The abbreviations used in this chapter are:

1977 Act	National Health Service Act 1977
2012 Act	Health and Social Care Act 2012
2012 Regulations	National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012
CCGs	Clinical Commissioning Groups
FHSAU	Family Health Services Appeal Unit
GDS contract	General Dental Services Contract
GDS Regulations	The National Health Service (General Dental Services Contracts) Regulations 2005 (as amended at 1 January 2018)
NHS England	National Health Service Commissioning Board

PDS agreement	Personal dental services contract or agreement, also known as a s. 107 agreement
PDS Regulations	The National Health Service (Personal Dental Services Agreements) Regulations 2005 (as amended at 1 January 2018)
NHS Act	National Health Service Act 2006
NHS Charges Regulations	The National Health Service (Dental Charges) Regulations 2005
NICE	National Institute for Clinical Excellence
SFE	General Dental Services Statement of Financial Entitlements (as annually amended)
UDA	Unit of Dental Activity
UOA	Unit of Orthodontic Activity

1. Background to contracting for community dental services[1]

1.1. As with general medical practitioners, dentists providing community dental services have never been required to be employees of the NHS. The majority of dentists in the past have been and still do operate as independent practitioners.

1.2. Those dentists operating as independent practitioners previously provided NHS dental services pursuant to a statutory regime provided under s. 35 of the National Health Service Act 1977 ("**the 1977 Act**"). That regime was in turn overtaken by the new GDS contracts introduced in 2006, by way of amendments made to the 1977 Act by the Health and Social Care (Community Health and Standards) Act 2003 and the National Health Service (General Dental Services Contracts) Regulations 2005 ("**the GDS Regulations**") which came into force on 1 January 2006.[2] The relevant provisions were consolidated in the National Health Service Act 2006 ("**the NHS Act**") when that Act came into force on 1 March 2007.

[1] This chapter explains the law as it relates to England.

[2] For an explanation of certain of the transitional provisions operating in respect of the Health and Social Care (Community Health and Standards) Act 2003, see R (Hussain) v Secretary of State for the Health Department and Warwickshire PCT [2011] EWCA Civ 800.

1.3. Prior to the 2006 reforms, several pilot schemes were undertaken (as they were with GPs) by which dentists entered what were known as "personal dental services" agreements with a Health Authority or Primary Care Trust. This was by way of provisions introduced under the National Health Service (Primary Care) Act 1997 ("**the 1997 Act**"). Personal dental service agreements trialled several different forms of remuneration systems, and so did not operate under any standard form of wording.

1.4. The 1997 Act also provided for permanent personal dental services agreements to be entered with a Health Authority. This was introduced by way of amendments made to the 1977 Act. Reflective again of the approach taken with GPs, these powers were not implemented until March 2004. The delay allowed the Department of Health an opportunity to evaluate the success or otherwise of the pilot agreements.

1.5. The changes made to dental services contracts in 2006 reflected the desire to bring NHS community dentistry broadly in line with other NHS services, principally by giving Primary Care Trusts (now NHS England) responsibility for the commissioning of dental practitioners to provide an agreed level of activity and thus allowing NHS commissioners to be able to control the expenditure on NHS community dentistry. There was little effective financial control until the reforms because NHS dentists were allowed to charge for every patient they saw. The charging system was changed under the new contracts with dentists being only being able to charge the NHS for a fixed number of agreed units of dental activity ("**UDA**") within a financial year. The stated aspirations at the time were to provide better coverage of NHS dental services across the country and to better incentivise the provision of preventative care and advice. However, it was primarily driven by a desire to gain financial control over the cost to the NHS of community dentistry.

1.6. Since it operates as a consolidating Act, the law as consolidated in the NHS Act has continuing effect, including in relation to both GDS contracts and PDS agreements.[3] Express provision was made for any subordinate legislation to continue to have effect as if it was made, or done under, or for the purposes of, the corresponding provision in

[3] Paragraph 1 of Schedule 2 of the National Health Service (Consequential Provisions) Act 2006.

the NHS Act, and for references to previous provisions to be construed as if they are references to the corresponding provision in the NHS Act.[4]

1.7. This explains why the relevant regulations (see below) relating to GDS contracts and PDS agreements continue to refer to provisions within the 1977 Act. Those provisions have now been consolidated within the NHS Act and the regulations operate as if made under the NHS Act and as if the references to the 1977 Act are references to the NHS Act.

1.8. The commissioning of primary dental services by NHS England must now be undertaken in compliance with its general duties, which are discussed in chapter [**]. Thus, maintaining and increasing access to NHS dentistry should now be a key objective for NHS England's commissioners, as will effective contract management. The focus of commissioners should be on ensuring the universal availability, quality and value of commissioned community dental services.[5]

2. How the NHS Act provides for different types of dental contracts

2.1. The NHS Act provides that NHS England must, to the extent that it considers necessary to meet all reasonable requirements, exercise its powers so as to secure the provision of primary dental services throughout England.[6] The NHS Act does not define the term "primary dental services", but instead provides that the definition may be provided in regulations. Again, this overarching structure has aligned dentists with the structure applicable to GPs.

2.2. The form of legal duty upon NHS England is not directed to individual patients. It is instead a target duty to make arrangements to "secure the provision of" primary dental services. This duty is discharged by setting up an appropriate number of contracts with a network of community dental providers, thus creating a primary

[4] Paragraphs 2 to 4 of Schedule 2 of the National Health Service (Consequential Provisions) Act 2006.

[5] See the "Dental handbook: A guide for commissioners, practices and dentists in England", produced by the NHS Business Services Authority.

[6] Section 99(1).

dental service across the country, which is supposed to be sufficient to meet all reasonable requirements.

2.3. The means by which the NHS Act then provides powers to secure the provision of primary dental services is by way of dental contracts. The two types of contracts provided for by the NHS Act are:

a) GDS contracts, under s. 100; and

b) PDS agreements, under s. 107 (described in the NHS Act as "section 107 arrangements").

2.4. There may also be former pilot scheme agreements made under the 1997 Act which have continued under transitional provisions. These however are not provided for by the NHS Act, but instead under previous legislation. Since 2015, trials have also taken place in respect of "prototype agreements". These agreements (initially 100 in number) are GDS or PDS agreements which have been temporarily varied as part of the Prototype Agreements Scheme.[7]

2.5. Regulations made under the NHS Act provide for much of the detail of the terms that will be included within GDS contracts and PDS agreements. These are, respectively, the GDS Regulations and the PDS Agreements Regulations. The regulations also provide for some of the details relating to prototype agreements. The remaining provisions relating to prototype agreements are found in the National Health Service (Dental Services) (Prototype Agreements) Directions 2015. All of these Regulations are amended from time to time. References in this chapter are to the versions of the Regulations in force on 1 January 2018, but readers are cautioned to check the up to date versions of any relevant Regulations.

[7] The "Prototype Agreements Scheme" is referred to in the GDS Regulations as being the scheme "introduced by the Secretary of State on 1st November 2015, that the Secretary of State has developed to assist in continuing to promote and secure improvement in the provision of dental services in accordance with the [NHS Act]": see footnote 41 within the definition for prototype agreement in regulation 2.

2.6. GDS contracts are referred to as "contracts" within the NHS Act. However, a GDS Contract can take effect as a legally binding contract or as an NHS contract[8]. PDS arrangements are referred to as "agreements" as opposed to "contracts". There does not appear to be any significance in the different wording. A PDS agreement can take effect either as a legally binding contract or as an NHS contract. However the default position set out in the PDS Agreements Regulations[9] is that the contractor to a PDS agreement is a health service body for the purposes of section 9 of the NHS Act and thus the agreement take effect as an NHS contract.[10] However the contractor has the ability to service notice on NHS England to change the status of the agreement to being a legally binding contract.

3. General Dental Services ("GDS") contracts

GDS contracts under the NHS Act

3.1. Section 100 of the NHS Act provides that NHS England may enter into GDS contracts under which primary dental services are provided in accordance with Part 5 of the Act. Unsurprisingly, much of the detail in respect of the content of a GDS contract is left to regulations that may be made under s. 101(2).[11] This includes the definition of "primary dental services."

3.2. The NHS Act does however provide the general outline of what a GDS contract may constitute, and makes provision for the persons entitled to enter a GDS contract (s. 102), the powers to make directions as to payments to be made under a GDS contract (s. 103), and for the matters that may be included within regulations.

3.3. The persons who may enter into a GDS contract are as follows:

[8] See Chapter XX page XX for the distinction between an NHS contract and a legally binding contract.

[9] Previously, s. 4 of the National Health Service and Community Care Act 1990

[10] For a discussion of the legal effect of a NHS contract, see below.

[11] The GDS Regulations are now deemed to have been made under s. 101(2): see paragraphs 2 to 4 of Schedule 2 of the National Health Service (Consequential Provisions) Act 2006.

a) A dental practitioner[12];

b) A dental corporation;

c) Two or more persons practicing in partnership, providing that at least one of the partners is a dental practitioner and either: (a) that partner is able to secure that the partnership's affairs are conducted in accordance with that partner's wishes, or (b) a combination of partners is able to secure that the partnership's affairs are conducted in accordance with their wishes, and at least one of them is a dental practitioner or an employee of the type defined in s. 102(3C);

d) A limited liability partnership, providing that at least one of the members is a dental practitioner and either: (a) that member is able to secure that the LLP's affairs are conducted in accordance with that member's wishes, or (b) a combination of members is able to secure that the LLP's affairs are conducted in accordance with their wishes, and at least one of them is a dental practitioner or an employee of the type defined in s. 102(3C).

3.4. Regulation 12 of the GDS Regulations provides:

> "(1) Where the contract is with two or more individuals practising in partnership, the contract shall be treated as made with the partnership as it is from time to time constituted, and the contract shall make specific provision to this effect.
>
> (2) Where the contract is with two or more individuals practising in partnership, the contractor must be required by the terms of the contract to ensure that any person who becomes a member of the partnership after the contract has come into force is bound automatically by the contract whether by virtue of a partnership deed or otherwise"

3.5. This provision means that the contract continues with whoever the partners in the relevant practice choose to take into partnership. Thus, a dental partnership that holds a GDS contract is able to change its partners (and thus change the identity of the persons delivering these public services and being paid for doing so) without going

[12] Section 274 defines a dental practitioner as meaning a person registered in the dentists register under the Dentists Act 1984.

through any form of procurement process. NHS England must be informed of the identity of any new partner (see paragraph 42 of Schedule 3 to the GDS Regulations) but has no general right to object to anyone being a contractor provided that person is eligible to hold a GDS contract.

3.6. Paragraph 63 of Schedule 3 to the GDS Regulations allows the partners to dissolve the partnership and for all of the partners to agree that one of the former partners to elect to continue to hold the GDS contract and paragraph 65 provides for the possibility of the contract continuing after the death of a sole practitioner. The right to have a contract with the partners in a partnership as it exists from time to time only applies to GDS contracts, but not to PDS contracts.

3.7. The GDS Regulations in turn make specific provision for those who are not entitled to enter into a GDS contract. The persons disentitled from entering a GDS contract include those who are subject to a national disqualification, those who within the past five-years have been dismissed from employment with a health service body, and those who have committed serious criminal offences.[13]

3.8. So far as payments are concerned, s. 103 provides that a GDS contract must require payments to be made in accordance with directions made by the Secretary of State. Before issuing any such directions, the Secretary of State must consult with any body appearing to the Secretary of State to be representative of those who would receive payment in accordance with the direction. In practice the Secretary of State consults with the British Dental Association who represent NHS community dentists.

The GDS Regulations

3.9. The legal status of a GDS contract as governed by private contractual law principles (as is generally the case) is discussed below. There is however the possibility for a contractor to elect to be regarded as a health service body for the purposes of s. 9 of the NHS Act, in which event the GDS contract would become a "NHS contract". Such an election takes the GDS agreement outside of being able to be enforced through the

[13] There are others also not entitled to enter a GDS contract. See regulation 4.

courts based on private contractual law principles. This election can be unilaterally withdrawn by the contractor at any time.[14]

3.10. Detailed requirements are provided in Schedule 3 of the GMS Regulations as to the terms that must be included within a GDS contract. These terms can be amended at any time and thus it is necessary to refer to an up to date version of the regulations when addressing any matters relating to the terms of a new contract, or modifications to an existing contract.

3.11. NHS England has produced a standard form GDS contract which complies with the GDS Regulations and also contains a series of other standard clauses, including a specific obligation on NHS England to act reasonably. However, once a GDS contract is signed (and providing the contractor has not elected to enter a NHS contract), the meaning of the contract falls to be construed by the court in the same way as any other commercial contract: see *Tomkins v Knowsley Primary Care Trust* [2010] EWHC 1194 (QB), at [8].

Mandatory services (regulation 14)

3.12. Regulation 14 provides for the mandatory services that must be provided under a GDS contract. It is these service that define the core obligations of a dentist who takes on a contract to provide primary dental services. It defines the services he or she is expected to provide in order to enable NHS England to comply with its duty in s. 99 of the NHS Act to secure the provision of all reasonable requirements for dental services throughout England.

3.13. The services are: (a) urgent treatment (during normal surgery hours) and (b) routine treatment at a surgery to include the treatment set out in regulation 14(4). These matters are as follows:

> "(a) examination;
>
> (b) diagnosis;

[14] Regulation 9(4).

(c) advice and planning of treatment;

(d) preventative care and treatment;

(e) periodontal treatment;

(f) conservative treatment;

(g) surgical treatment;

(h) supply and repair of dental appliances;

(i) the taking of radiographs;

(j) the supply of listed drugs and listed appliances; and

(k) the issue of prescriptions"

3.14. The contractual terms provided for in Schedule 3 to the GDS Regulations, among many other matters, address how the above mandatory services are to be provided to NHS patients. This includes by a requirement for the contractor to comply with any relevant guidance issued by NICE when providing services.

3.15. In particular, paragraph 14 of Schedule 3 stipulates that contractors must provide services in accordance with the guidance entitled "Dental recall – Recall interval between routine dental examinations". This guidance is reflective of the desire to move away from fixed dental review periods (previously as frequently as six-monthly), so as to make better use of NHS resources. The guidance makes clear that patients should be informed that recall periods may vary over time to take into account any changes in their level of risk of or from oral disease (with recall periods ranging from 3 – 24 months).

Additional services (regulation 15)

3.16. Non-routine treatment, defined in the GDS Regulations as "additional services", may also be provided for under a GDS contract. In so far as such services are provided for, then the GDS contract is required to have terms that have the same effect as those specified in Schedule 1 to the GDS Regulations.

Units of dental or orthodontic activity (regulations 17 and 18)

3.17. Regulations 17 and 18 of the GDS Regulations make provision for a GDS contract to specify the number of units of dental activity (UDA) or (where a contract includes the provision of orthodontic services) units of orthodontic activity (UOA) that is the maximum level that the contractor must provide and hence is entitled to charge for in each financial year.[15] It is the completion of these units of activity that provides the basis under a GDS contract both for payment to be recovered from a patient (if applicable) and to claim any payment from NHS England having taken account of the patient charge revenue received from the patient.

3.18. There is no fixed amount payable for a Unit of Dental Activity. The amount is subject to local negotiation and can vary significantly from one NHS dental practice to another.

4. Personal dental services ("PDS") agreements

4.1. The provisions contained within the NHS Act and in the PDS Regulations which relate to PDS agreements in many respects mirror the provisions that apply to GDS contracts. There are however important differences. These include that:

a) The default position is that the contractor is a health services body, such that the PDS agreement must be treated as a NHS contract (regulation 9(1));

b) A PDS agreement is for a fixed duration, unlike GDS agreements which subsist until terminated (regulation 12(1)(b)); and

c) No mandatory services are required to be included within a PDS agreement, there instead being greater flexibility in the nature of services to be provided.

<u>PDS agreements under the NHS Act</u>

4.2. The NHS Act provides in s. 107 that NHS England may make agreements, other than GDS contracts, under which primary dental services are to be provided. Under the NHS

[15] See the section on Units of Dental Activity below.

Act these are described as "section 107 arrangements" and as "agreements" under the PDS regulations.

4.3. Section 107 provides the principal vires for PDS agreements. It provides at s. 107(2) that all such PDS agreements must be in accordance with regulations made under s. 109 (i.e. the PDS Regulations), that PDS agreements may not combine arrangements for the provision of primary dental services with primary medical services (s. 107(3)) or local pharmaceutical services (s. 107(4)), but that they may combine with the provision of other services (s. 107(5)).

4.4. The persons who may enter into a PDS agreement are set out in s. 108. The list of persons is complicated and requires careful reading if an issue ever arises as to whether a person is entitled to be a party to a PDS agreement. In general terms, permissible parties include an NHS trust or NHS foundation trust, a dental practitioner, a health care professional, certain individuals providing general medical services, certain NHS and other employees, dental corporations and certain companies and partnerships so long as rules about control of those companies and partnerships are met.

4.5. The PDS Regulations in turn make specific provision for those who are not entitled to enter into a PDS agreement. The persons barred from entering a PDS agreement include those who are subject to a national disqualification, those who within the past five-years have been dismissed from employment with a health service body, and those who have committed serious criminal offences.[16]

The right to a GDS contract

4.6. A PDS contractor which is providing "mandatory services"[17] and which wishes a GDS contract to be entered may terminate a PDS agreement and elect to enter a GDS

[16] There are others also not entitled to enter a PDS agreement. See regulation 4.

[17] See paragraph [**], above.

contract.[18] Providing that the usual qualifying criteria are met, NHS England is required to enter a GDS contract in place of the PDS agreement.

The PDS Regulations

4.7. Unlike with GDS Regulations, the default position with PDS agreements is that a contractor is to be regarded as a health services body for the purposes of s. 9 of the NHS Act.[19] A contractor may at any time unilaterally elect to be a health services body, or to cease to be regarded as such, and NHS England must agree to the variation.[20] If a contractor is to be regarded as a health services body, regulation 10 provides that the PDS agreement must state that it is a NHS contract.

General terms

4.8. A PDS agreement must specify the services that are to be provided by the contractor (the extent of these are left to individual agreement, unlike with a GDS contract), the duration of the agreement, to who services are to be provided, and the premises at which those services will be provided (regulation 12).

4.9. Detailed requirements are also provided in Schedule 3 of the PDS Regulations as to the terms that must be included within a PDS agreement. As with GDS contracts, these terms are able to be amended at any time and thus it is necessary to refer to an up to date version of the regulations when addressing any matters relating to the terms of a new contract, or modifications to an existing contract. NHS England has produced a standard form PDS agreement which complies with the GDS Regulations and also contains a series of other standard clauses.

4.10. PDS agreements must otherwise specify the number of units of dental activity (UDA) or (where a contract includes the provision of orthodontic services) units of orthodontic activity (UOA) that a contractor must provide in each financial year. As with GDS contracts, it is the completion of these units of activity that provides the basis under a

[18] See regulation 21 of the PDS Regulations

[19] Regulation 9(1).

[20] Regulation 9(4)

PDS agreement both for payment to be recovered from a patient (if applicable) and to claim any payment from NHS England having taken account of the patient charge revenue received from the patient.

Additional services (regulation 11)

4.11. Non-routine treatment, defined in the GDS Regulations as "additional services", may also be provided for in a PDS agreement. These services are defined in regulation 2 as meaning one or more of:

a) advanced mandatory services, being any mandatory service generally provided under a GDS contract but provided on a referral basis due to the high level of facilities, experience or expertise required in respect of a particular patient;

b) dental public health services, meaning services provided by a contractor under s. 111 of the NHS Act (previously s. 16CB(4)(c) of the 1977 Act;

c) domiciliary services, meaning services provided other than at a surgery, a mobile surgery or a prison;

d) orthodontic services, meaning, generally, treat of, or treatment to prevent, malocclusion of the teeth and jaws, and irregularities of the teeth; and

e) sedation services.

4.12. In so far as such services are provided for, the PDS agreement is required to have terms that have the same effect as those specified in Schedule 1 to the PDS Regulations.

5. Prototype agreements

5.1. Prototype agreements are being used to trial alternative contractual arrangements for NHS community dentistry, with the stated aim of assisting the NHS to change the focus of dental service provision from delivery of treatment to address disease, to a system

whereby prevention is the focus, with the patient participating in their own care to minimise the occurrence of disease.

5.2. Both the GDS Regulations[21] and the PDS regulations[22] provide for the terms of a GDS or PDS agreement, as the case may be, to be varied upon a contractor and NHS England electing to enter into a prototype agreement. The key differences in the terms provided for under prototype agreements are set out in the National Health Service (Dental Services) (Prototype Agreements) Directions 2015, and the related Prototype Agreement Scheme Statement of Financial Entitlements.

5.3. The prototype agreements have trialled different forms of payments, which are based on a blend of payments for capitation and for activity. Capitation is based on the number of actual patients a practice is expected to have on its "list" by the year-end, and provides for payments to be made based on this number of patients in place of payments for certain types of activity. The differences in the agreements relate to the blend of capitation payments versus activity payments (Blend A provided for approximately 60% capitation payments and Blend B provided for approximately 83%). This is a return to the system of "practice lists" which took effect prior to 2006. The 2006 reforms abolished the concept of a practice list but many NHS dentists continued to operate *de facto* patient lists. The prototype arrangements are a return to this type of arrangement.

5.4. Should these prototype agreements be rolled out more generally, then it will be necessary to give close regard to the means by which capitation is calculated for any dental practice, in addition to having regard to units of activity.

6. Units of dental activity

6.1. Both the GDS Regulations[23] and the PDS Regulations[24] require relevant dental contracts to specify the number of units of dental activity or UDA that a contractor must provide

[21] Regulation 24C.

[22] Regulation 20C.

[23] Regulations 17 and 18.

in each financial year. Where a contract includes the provision of orthodontic services, the contract will also specify the number of units of orthodontic activity or UOA that a contractor must provide in each financial year.

6.2. The requirement upon a contractor to complete a specified number of UDA or UOA in a financial year is the principal means by which NHS England can seek to incentivise (or require) dentists to provide a measurable amount of primary dental services in any given year and thus maintain financial control of the cost of NHS community dentistry. In this regard, paragraph 1 of Schedule 3 of the GDS Regulations simply provides that a contractor "may" provide NHS primary care dental services to any person if a request is made by a person who requires the services, or a request is made on behalf of a person who requires the services.

6.3. However, sub-paragraph 1(4) provides that the contractor is not entitled to refuse to provide services to a person who makes a request unless the contractor has reasonable grounds for doing so. There is a list of impermissible grounds in sub-paragraph 1(4) relating, broadly speaking, to equality matters. An NHS dentist is also not entitled to refuse to provide NHS services in order to persuade a person to accept privately paying services. Thus, as mentioned above, the 2006 reforms abolished each NHS dental practice having a list of patients who had preferential status within the practice.

6.4. However, it is reasonable to refuse to provide services to NHS dental patients because the contractor has exceeded his annual allocation of units of dental activity or (where a contract includes the provision of orthodontic services) units of orthodontic activity, and therefore cannot charge the NHS for providing treatment to a patient in the financial year.

6.5. It follows that if a patient seeking dental treatment presents himself or herself to a dentist who holds a GDS contract and the contractor has unused UDAs (or UOAs) that could be allocated to that treatment, there is a contractual obligation on the

[24] Regulations 13 and 14.

contractor to provide NHS dental treatment to that patient unless the contractor has reasonable grounds for refusing to provide the requested treatment. If the patient is not exempt from paying NHS dental charges, the contractor is entitled to seek payment of the relevant charge from the patient and is entitled to refuse to go ahead with the treatment if the charge is not paid: see paragraph 4 of Schedule 3 of the GDS Regulations. A dentist can only recover the balance of the fee from the NHS Business Services Agency (**NHS BSA**") which administers dental payments on behalf of NHS England). Thus, the dentist is left with the loss if the patient refuses to pay the dental charge.

6.6. However, in the usual case, the contractor performs its contractual obligations to NHS England by providing appropriate dental treatment to the patient and the patient pays the charge, and the balance of the UDA sum is recovered from the NHS BSA.

Treatment bands and charge exempt courses of treatment

6.7. Schedule 2 in both the GDS Regulations and the PDS Regulations specifies how a UDA or a UOA are to be calculated. UDAs are split between (a) banded courses of treatment and (b) charge exempt courses of treatment. Both forms of treatment attract UDAs (of varying amounts), but as the name suggests, the charge exempt courses of treatment are free to the patient.

6.8. Chargeable treatment is divided into three bands. The course of treatment falling within each respective band is defined within Schedules 1 to 4 of the NHS Charges Regulations. A course of activity falling within band 1 attracts 1 UDA (1.2 units in the case of urgent treatment), while band 2 attracts 3 units and band 3 attracts 12 units. The more routine courses of treatment fall within band 1, with the complexity of treatment increasing commensurately within bands 2 and 3 respectively.

Payments to GDS contractors based on UDAs and UOAs

6.9. By s. 103(2) of the NHS Act, a GDS contract must require payments to be made under the contract to a contracting party in accordance with Directions made under s. 103(1).

The sorts of matters that may be included within such a direction are set out in s. 103(3), which provides as follows:

> "(3) A direction under subsection (1) may in particular–
>
> (a) provide for payments to be made by reference to compliance with standards or the achievement of levels of performance,
>
> (b) provide for payments to be made by reference to–
>
> (i) any scheme or scale specified in the direction, or
>
> (ii) a determination made by any person in accordance with factors specified in the direction,
>
> (c) provide for the making of payments in respect of individual practitioners,
>
> (d) provide that the whole or any part of a payment is subject to conditions (and may provide that payments are payable by the Board only if it is satisfied as to certain conditions),
>
> (e) make provision having effect from a date before the date of the direction, provided that, having regard to the direction as a whole, the provision is not detrimental to the persons to whose remuneration it relates.

6.10. The relevant Directions made on behalf of the Secretary of State are the "General Dental Services Statement of Financial Entitlements" ("the SFE"). The SFE is produced annually although the form of the Directions can be structured by way of an amendment of the previous consolidated Directions. The most recent consolidated version of the SFE was published in 2013. Accordingly, current amendments are cumulative amendments to the form of the SFE published in 2013.

6.11. The SFE provides that the NHS Business Services Authority, which administers the dental payment scheme on behalf of the Secretary of State, must pay a monthly sum to all GDS contractors. The monthly sum is based on 1/12th of the Annual Contract Value but is reduced by the amount of declared patient charge revenue notified by the dentist each month. This is, in effect, a payment on account to dentists.

6.12. Unlike other areas of NHS treatment, dental services are not universally free at the point of use. The Secretary of State has made the NHS Charges Regulations which define the categories of NHS dental patients who are obliged to make financial contributions towards the cost of their dental care (which in practice is everyone who is not exempt through age, financial status or medical condition) and which set the amount required to be paid by the NHS patient for different types of treatment.

6.13. Regulation 8(2) of the NHS Charges Regulations provides:

> "(2) A provider of relevant primary dental services, in providing relevant primary dental services for which a charge may be made under regulations 4(1) to (3), (5) or 12A(2)—
>
> (a) may, on arranging to provide a course of treatment or urgent course of treatment, make the appropriate charge;
>
> (b) shall require the patient to acknowledge, on the appropriate part of the form supplied for that purpose by the Board, and before that form is sent to the Secretary of State, his obligation to pay a charge which is made;
>
> (c) may, on completing the course of treatment or urgent course of treatment, recover the charge from the patient (if it has not previously been paid);
>
> (d) shall, on receiving a sum for payment (in full or in part) of the charge payable under these Regulations, give a receipt for it on—
>
> (i) a paper form provided for that purpose by [the Board] 2 ; or
>
> (ii) an electronic form which identifies the provider of the relevant primary dental services, the patient, the amount of the charge paid and the date on which it is paid"

6.14. Accordingly, a GDS contractor is entitled but not obliged to recover a charge determined in accordance with the Regulations which is payable by an NHS patient who is not exempt from paying the charge. However, regulation 12 of the NHS Charges Regulations provides:

> "Where a provider of relevant primary dental services has provided relevant primary dental services for which a charge is payable under these Regulations, the remuneration which would otherwise be payable by the Board to that Provider shall be

reduced by the amount of charge, irrespective of whether or not that charge has been recovered by the provider"

6.15. The usual arrangement is that a potential patient presents themselves at the dental surgery and requests NHS treatment. If the contractor has no reasonable grounds for refusing to treat the patient, it is under a contractual obligation to provide NHS primary care dental treatment to the patient. Either before or (more usually) after providing the relevant treatment, an appropriate amount is demanded (and hopefully collected) from the patient. This sum ought to cover any charges payable by that patient under the NHS Charges Regulations. The charge is paid to the contractor and is retained by the contractor.

6.16. This sum then reduces the amount of payment received by the contractor under the SFE. NHS England has suggested in correspondence with various dental contractors that patient charge revenue (known as "**PCR**") is the property of the Secretary of State. There is no basis in the Regulations for making this suggestion. The patient is under a statutory duty to pay the charges, but they are payable to the contractor, not to the Secretary of State. Further, once the sum is paid, it becomes the property of the contractor and not the Secretary of State. It follows that there does not appear to be any basis for suggesting that PCR is held by a contractor on behalf of the Secretary of State. The correct legal position is that the contractor is free to treat the money as its own as soon as the sums are paid over by an NHS patient.

Payments to PDS contractors based on UDAs and UOAs

6.17. The system for payments to dental contractors under PDS agreements is largely the same as under GDS contracts. There is however no obligation for the Secretary of State to consult upon the terms of any directions that are made in respect of payments

under PDS agreements. The directions that have been made for PDS agreements are the "Personal Dental Services Statement of Financial Entitlements 2013".[25]

6.18. The NHS Charges Regulations also apply to PDS agreements. The relevant regulations (discussed above) apply in respect of "relevant primary dental services", which are defined in the regulations to include dental treatment (including urgent treatment and orthodontic treatment) provided and dental appliances and orthodontic appliances supplied under a PDS agreement.

Mid-year review of dental activity

6.19. The GDS Regulations and the PDS Regulations provide identical provisions relating to the mid-year review of dental activity.

6.20. Paragraph 58 of Schedule 3 in both regulations provides that NHS England must conduct mid-year reviews to determine the amount of UDAs and UOAs, as the case may be, that a contractor has provided. Such a review provides a mechanism to ensure that overpayments to a contractor are monitored, and also presumably to monitor the level of dental services being provided within any particular area.

6.21. NHS England is empowered (and encouraged[26]) to take steps to seek to remedy underperformance at a mid-year review, which is referable to a contractor which has provided less than 30 percent of the total number of UDAs or UOAs that the contractor is required to provide in the first 6 months of a financial year. Those steps consist of the following:

a) Notifying the contractor of concerns about underperformance (paragraph 58(5)(a) of Schedule 3);

b) Requiring the contractor to participate in a mid-year review to inform decision-making as to the appropriate remedial steps (paragraph 58(5)(b) of Schedule 3);

[25] Available at the NHS Business Services Authority website at https://www.nhsbsa.nhs.uk/fp17-processing-and-payments/sfe-payments.

[26] See the "Dental handbook: A guide for commissioners, practices and dentists in England", produced by the NHS Business Services Authority.

c) Having assessed any information provided by the contractor, NHS England may then: (a) require the contractor to comply with a written plan drawn up by NHS England to ensure that the level of activity meets the contractor's target of UDAs and/or UOAs; or (b) withhold monies under the GDS contract, or (c) agree a contract variation with the contractor.

6.22. In so far as monies are withheld by NHS England, the objective will be to support service delivery in-year elsewhere, so as to maintain the level of primary dental care assessed as being required to meet the reasonable requirements of an area.

7. Variation and termination of GDS contracts and PDS agreements

Contract length

7.1. By regulation 13 of the GDS Regulations, GDS contracts must provide that they are to subsist until terminated. By this means, GDS contracts, like General Medical Services Contracts, are perpetual contracts which can only be terminated by the contractor resigning the contract, mutual consent or as a result of NHS England terminating the contract for breaches of contract by the contractor. The perpetual nature of the contracts gives contractors security because they are able to invest in dental practices knowing that, subject to not breaching the contract, the contract will continue indefinitely. The only exception is when NHS England has terminated the contract of another provider of primary dental services and wishes to make temporary arrangements with another contractor. No maximum duration is provided for such a contract, though it will be in the interest of any temporary contractor to move to a permanent contract with no fixed duration should they wish to do so. In contrast, PDS agreements are required to specify the duration of the agreement,[27] so will in the normal course be for a fixed period, and subject to renegotiation at the end of that period.

7.2. There is an interesting legal argument as to whether such perpetual contracts are lawful under EU law on the grounds that they may not be compatible with EU

[27] See regulation 12(1)(b).

procurement principles. The primary objection is the identity of a contractor providing public services is, for all practical purposes, determined by the contractor and not by the contracting authority. The issues arise in practice where, for example, a two partner partnership that holds a GDS contract consists of individual dentists who wish to retire. The existing partners advertise for new partners to "buy into" the partnership and 2 younger dentists do so, paying a considerable sum for the "goodwill" in the partnership. Unlike the case with NHS medical partnerships, there is no statutory restriction on the sale of goodwill in NHS dental partnerships. Once the younger dentists are have become partners in the partnership, the outgoing partners retire, and the new partners carry on with the perpetual contract. Thus, in effect, the younger partners have purchased the right to deliver public services and be paid by the NHS for doing so. However, the selection of the new partners is a matter for the outgoing partners (and thus the contract is in effect "auctioned") as opposed to being selected by the NHS commissioner as a contracting authority. This is a procedure for the selection of a person to hold a public contract which seems difficult to reconcile with the EU procurement directives.

Variation

7.3. Although there is generally no power to limit the period of a GDS contract, NHS England does have power to unilaterally vary a GDS contract. Similar power exists in respect of a PDS agreement. The parties may of course also agree between them to vary the contract or agreement. However, an unresolved issue is the extent to which these wide powers of variation need to be substantially constrained by the limitations on Regulation 72 of the Public Contracts Regulations 2015.

7.4. The circumstances in which such a variation may be made are set out in largely identical terms in paragraph 60 of Schedule 3 of both the GDS and PDS Regulations. The GDS Regulations provide as follows:

> "(1) Subject to paragraph 31(3), no amendment or variation shall have effect unless it is in writing and signed by or on behalf of the Board and the contractor.

(2) In addition to the specific provision made in paragraphs 62(6), 63(6) and 75, the Board may vary the contract without the contractor's consent where it—

(a) is reasonably satisfied that it is necessary to vary the contract so as to comply with the Act, any regulations made pursuant to the Act, or any direction given by the Secretary of State pursuant to the Act; and

(b) notifies the contractor in writing of the wording of the proposed variation and the date upon which that variation is to take effect,

and, 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 paragraph (b) is served on the contractor."

7.5. The PDS Regulations provide as follows:

"(1) Subject to paragraph 32(3), no amendment or variation shall have effect unless it is in writing and signed by or on behalf of the Board and the contractor.

(2) In addition to the specific provision made in paragraph 73, the Board may vary the agreement without the contractor's consent where it—

(a) is reasonably satisfied that it is necessary to vary the agreement 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; and

(b) notifies the contractor in writing of the wording of the proposed variation and the date upon which that variation is to take effect,

and, 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 paragraph (b) is served on the contractor."

7.6. Thus, the parties can agree between them to vary the contact, in which event that variation must be in writing and signed by both parties. NHS England's powers to unilaterally vary a GDS contract or PDS agreement otherwise depend on it being reasonably satisfied that such a variation is necessary so as to comply with the NHS Act or relevant regulations, and where appropriate notice is given.

<u>Termination</u>

7.7. A contractor may terminate a GDS contract or PDS agreement at any time, by giving written notice to NHS England.[28] On the other hand, termination by NHS England may only be for one of the reasons set out in Schedule 3. This includes by reason of a contractor ceasing to be an eligible party to a GDS contract, risk to patient safety, or risk of material financial loss to NHS England by reason of the contractor's financial situation.

7.8. Upon receipt of a notice of termination, a GDS contractor may elect to invoke the NHS dispute resolution procedure (see below). The incentive for doing so, as compared to relying on a private law claim, is that the GDS contract in issue will usually not be terminated so long as there remains a pending dispute within the dispute resolution procedure, and (a) providing that termination is not on grounds relating to patient safety or risk of material financial loss to NHS England[29] and (b) the contract is not suspended (as to which see below).

7.9. A PDS contractor also has the right to refer a dispute about a notice of termination to the NHS dispute resolution procedure. As with a GDS contract, upon referral to the NHS dispute resolution procedure, a notice of termination will not take effect until that procedure is completed, save if termination was on the grounds of patient safety or risk of material financial loss to NHS England.[30]

7.10. By paragraph 75 of Schedule 3 of the GDS Regulations, and paragraph 73 of Schedule 3 of the PDS Regulations, contracts and agreements must also make provision for NHS England to be able to impose a "contract sanction". These are defined as meaning:

> "(a) termination of specified reciprocal obligations under the contract;
>
> (b) suspension of specified reciprocal obligations under the contract for a period of up to six months; or
>
> (c) withholding or deducting monies otherwise payable under the contract."

[28] Paragraph 66 of Schedule 3 of the GDS Regulations, and paragraph 64 of Schedule 3 of the PDS Regulations.

[29] Paragraph 77 of Schedule 3 of the GDS Regulations.

[30] Paragraph 75 of Schedule 3 of the PDS Regulations.

7.11. A contact suspension may be imposed when NHS England is otherwise entitled to terminate a GDS contract or PDS agreement on specified grounds, providing that NHS England is reasonably satisfied that the sanction is appropriate and proportionate to the circumstances. A contract sanction cannot have the effect of terminating or suspending any obligation to provide a mandatory service[31] under a GDS contract. Under both the PDS and the GDS Regulations, a contractor may refer any dispute about a contract sanction to the NHS dispute resolution procedure.

8. The legal relationship between the parties to a dental contract and NHS England

8.1. As with GPs, the vast majority of dentists are not employees of an NHS organisation. This is reflected in the standard GDS contract produced by the Department of Health, which at clause 6 provides as follows:

> "The Contract is a contract for the provision of services. The Contractor is an independent provider of services and is not an employee, partner or agent of the Board. The Contractor must not represent or conduct its activities so as to give the impression that it is the employee, partner or agent of the Board"

8.2. The standard PDS agreement contains a materially identical clause. In many instances, a dentist may instead be an employee of the dental practice for which she or he works, but that (legal) relationship is necessarily then not one that is with NHS England.

8.3. The legal relationship between a dentist or a dental practice and NHS England will thus be defined by the terms of the contract or agreement under which GDS or PDS are provided. That contract will for most purposes be construed by the courts in accordance with general principles of contractual interpretation.

9. The distinctions between NHS contracts and private law contracts

9.1. As set out above, a contractor to either a GDS contract or a PDS agreement may choose to be recognised as a health services body so that the dental services contract then entered into is a NHS contract. Indeed, the default position in respect of PDS agreements is that these will be a NHS contract, subject to the right of a contractor to

[31] See paragraph [**] above.

elect to not be a health service body prior to the agreement being made,[32] or to request a variation to a PDS Agreement which NHS England is required to agree.[33]

9.2. Section 9 of the NHS Act makes provision for NHS contracts as follows:

> "(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) ….
>
> (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.

[32] Regulation 9(1) of the PDS Regulations.

[33] Regulations 9(3) and 9(4) of the PDS 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.

9.3. The principal consequence of entering a NHS contract is that such a contract does not give rise to legally enforceable rights by any person in the civil courts. This is by operation of s. 9(5). Provision is also made in section 9 for the resolution of disputes either relating to the terms of a proposed agreement, or relating to an existing agreement. Both the GDS Regulations and the PDS Regulations also make provision for the resolution of disputes (see below). Thus, a NHS dental contactor who is party to an NHS contract cannot either sue or be sued in the courts: see *Pitalia & Anor v The National Health Service Commissioning Board* [2014] EWCA Civ 474.

9.4. Once a GDS contractor who is an individual or in a partnership has elected to become an NHS body, regulation 9(3) of the GDS Regulations provides that this status will continue notwithstanding any change in the individuals who become parties to the GMS contract. Thus, if a sole practitioner were to take on a partner under his GMS contract and then resign from the partnership, the new contractor will continue to be treated as an NHS body.

9.5. Under regulation 9(2) of the PDS Regulations, any change in the identity of the parties comprising the contractor (such as a change of partners) does not affect the health service body status of the contractor. In other words, unlike with position with GDS contracts, the continuation of status as a health service body is not dependent upon the original contractor being an individual or a partnership.

9.6. Regulation 9(4) of both the GDS and PDS Regulations permits any contractor who wishes to change the contractor's status to become an NHS body or to cease to be an NHS body shall be able to do so by serving notice on NHS England. Upon receipt of such a notice, NHS England is required to agree the variation, which will take effect once the variation procedures in paragraph 60 of Schedule 3 are complied with. Thus, a legally binding contract can be changed to being an NHS contract at the election of a contractor and vice versa, and upon completion of the requisite formalities.

9.7. Regulation 9(7) in both the GDS and PDS Regulations provides that a contractor shall cease to be a health service body for the purposes of section 4 of the 1990 Act (now section 9 of the NHS Act) once a variation takes effect following an election under regulation 9(4) being made, or if the contract or agreement terminates. Accordingly, if NHS England has a claim against a contractor for something that has happened after the termination of a dental services (PDS or GDS) contract, or indeed after a switch from being a health service body, that claim has to litigated in the courts unless it comes within the exceptions in regulation 9(7).

9.8. These exceptions are again in identical terms in each of the regulations, and are as follows:

> "(7) Where a contractor ceases to be a health service body pursuant to—
>
> (a) paragraph (5) [variation] or (6) [termination], 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 purposes it ceases to be such a body on the termination of that NHS contract);
>
> (b) paragraph (5), where it or the Board—

(i) has referred any matter to the NHS dispute resolution procedure before it ceases to be a health service body, or

(ii) refers any matter to the NHS dispute resolution procedure, in accordance with paragraph 54(1)(a) of Schedule 3, after it ceases to be a health service body,

the contractor is to continue to be treated as a health service body (and accordingly the agreement is to continue to be regarded as an NHS contract) for the purposes of the consideration and determination of the dispute; or

(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 agreement; or

(ii) after the termination of the agreement, whether in connection with, or arising out of, the termination of the agreement or otherwise,

for which purposes it ceases to be such a body on the conclusion of that procedure.

10. Pre-contract dispute resolution

10.1. Both the GDS and PDS Regulations provide a mechanism by which a dispute about the terms of a proposed GDS contract or PDS agreement can be referred to the Secretary of State to resolve. In practice, that dispute will be resolved by the Family Health Services Appeal Unit or FHSAU.

10.2. The opportunity to refer pre-contract disputes to the FHSAU is peculiar to this type of category of NHS contracts. A failure to agree contractual terms in an arms-length commercial negotiation usually results in the prospective parties not entering a contract. The pre-contract resolution procedure can thus operate as a means to put pressure on a proposed commissioner, probably NHS England, to offer reasonable terms to a proposed contractor. A ruling of the FHSAU on such a reference will be binding on NHS England but is not binding on the contractor. By this means, the contractor can gain some measure of confidence that any terms to be included within a relevant contract or agreement are objectively justified, while at the same time still

being able to walk away from a contract if the adjudicated terms remain unsatisfactory.

10.3. The resolution procedure operates in the following way:

a) The parties must be "in the course of negotiations intending to lead to" a contract or an agreement: regulation 8(1). At the least, then, negotiations must have commenced with the intention of agreeing a GDS contract or PDS agreement. If a person has a request for a contract or agreement rebuffed, the pre-contract dispute resolution will not apply.

b) The dispute must be about a particular term of the agreement or contract: regulation 8(1). Guidance issued by Primary Care Contracting suggests that NHS England should discourage referral of disputes about mandatory terms (i.e. those that properly reflect the terms set out in the regulations) since such disputes will be rejected. More common will be disputes about negotiable terms such as contract value and UDAs.

c) Before referring a dispute, both parties must "make every reasonable effort to communicate and o-operate with each other with a view to resolving" the dispute: regulation 8(3) GDS Regulations; regulation 8(2) PDS Regulations.

d) The dispute so referred (either under the regulations or under s. 9 of the NHS Act) is then required to be determined in accordance with the dispute resolution procedures provided in Schedule 3 to each set of regulations (see below).

e) The FHSAU will issue a determination which may specify terms to be included in the proposed contract or agreement and which may require NHS England (in so far as the dispute is referred under the GDS or PDS Regulations) to proceed with the proposed contract or agreement.

10.4. The FHSAU's determination binds NHS England but the contactor has the right to reject the terms proposed by the FHSAU and walk away from the proposed contract (unless the contractor is already an NHS body in which case the decision is binding as a result

of section 9(10) of the NHS Act). In practice the contractor has the choice at that stage of either accepting the contract on the terms set by the FHSAU or walking away from the agreement (unless NHS England come up with an offer of other acceptable terms).

11. The NHS Disputes Resolution Procedure

11.1. Section 9(6) of the NHS Act requires that any dispute about a NHS contract must be referred to the Secretary of State for resolution. As with pre-contract disputes, it is the FHSAU which has the delegated authority to resolve such disputes.

11.2. In addition, in the case of either a GDS contract or a PDS agreement that is not a NHS contract, a dispute may also be referred to the Secretary of State to resolve. Such a referral can only be made by the contractor, or with the contractor's agreement in writing if the referral is made by NHS England. If a dispute in respect of a non-NHS contract is referred, both the GDS and PDS Regulations provide that the parties agreed to be bound by the determination then made.[34]

11.3. Both the GDS Regulations and the PDS Regulations provide details regarding the means as to how disputes will be resolved, in paragraph 55 of Schedule 3. The procedure to be followed is as follows (assuming it is the FHSAU that is ruling on a dispute):

a) Notice must be provided to the Secretary of State in writing of the names and addresses of the parties to the dispute, together with a copy of the contract or agreement and a brief statement describing the nature of the dispute.

b) Any such notice must be provided within three years beginning with the date on which the matter giving rise to the dispute happened or should reasonably have come to the attention of the party wishing to refer the dispute. No provision is made in the regulations to extend time.

[34] Paragraph 54(2) of Schedule 3, in both the GDS and PDS Regulations.

c) The FHSAU provides the respondent to any dispute with a copy of the notice of the dispute and provides a time frame within which any written observations may be made in response.

d) The FHSAU will then decide whether it will determine the dispute on paper or whether oral representations will be requested. In most instances, an oral hearing does not take place, meaning that the representations made in writing need to be thorough.

e) The FHSAU will issue a determination in writing. Reasons for the determination will be provided.

11.4. If a party is dissatisfied with a determination of the FHSAU, that decision can be challenged by way of judicial review proceedings in the High Court: see R (Hussain & Ors) v Secretary of State for the Health Department & Anor [2011] EWCA Civ 800 where the Court of Appeal rejected an argument from the NHS commissioner that this was a form of private arbitration and lacked the necessary public law elements to be challengeable by way of judicial review. However, the Court of Appeal went on to find in favour of the PCT in that case.

11.5. Where a GDS contract or a PDS agreement is not a NHS contract and there is no agreement to refer a dispute to the Secretary of State, such a dispute will be resolved through the courts who can be expected to apply normal private law contractual principles: see *Krebs v NHS Commissioning Board* [2014] EWCA Civ 1540.