Neutral Citation Number: [2019] EWCA Civ 1245

Case No: A2/2018/2908

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
Mr Justice Murray
HQ17X02248

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th July 2019

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE LEWISON
and
LORD JUSTICE COULSON

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Between :

NHS COMMISSIONING BOARD (known as NHS England)	**Appellant**
- and -	
(1) DR MANJUL VASANT (t/a MK Vasant & Associates) **(2) DR ANGELICA KHERA (t/a The Family Dental Practice)** **(3) DR GURSHARAN KALSI (t/a Lancaster House Dental Practice)**	**Respondents**

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MR RHODRI WILLIAMS QC (instructed by **Hill Dickinson LLP**) for the **Appellant**
MS MARIE DEMETRIOU QC & MR SIMON BUTLER (instructed by **Simon Butler**) for the **Respondents**

Hearing date : 4th July 2019

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Approved Judgment

Lord Justice Lewison:

The issue

1. The essential issue on this appeal is whether NHS England, as successor to Croydon PCT, is entitled to terminate contractual arrangements under which three dentists supply an Intermediate Minor Oral Surgery ("IMOS") service to the NHS. That, in turn, requires consideration of the contractual effect of a purported variation to the General Dental Services Contract ("the GDS contract") under which the three dentists supplied general dental services. Murray J held that NHS England was not entitled to terminate those contractual arrangements. His judgment is at [2018] EWHC 3002 (QB). NHS England appeals. The three dentists advanced an alternative argument based on estoppel; but in view of his conclusion on the contractual arrangements, the judge did not need to deal with it. It forms no part of this appeal either. There has been no claim to rectify the variation.

The initial contractual framework

2. Each of the dentists provided general dental services under a GDS contract originally made with Croydon PCT in 2006. NHS England is the successor to Croydon PCT. The GDS contract is a lengthy and detailed standard form contract. Many of its provisions are mandated by the terms of the National Health Service (General Dental Services) Regulations 2006. Although we were taken to many of the regulations, in the end I do not consider that they add to a consideration of the GDS contract itself. Clauses 16 and 17 of the GDS contract provide:

> "16. Subject to clause 17 the Contract shall subsist until it is terminated in accordance with the terms of this Contract or the general law.
>
> 17. Additional Services provided by the Contractor will be negotiated separately to this contract. These will include services listed in clauses 18-20."

3. Part 8 of the GDS contract (clauses 74 to 76) specifies the mandatory services which each contractor must supply. They are specified in some detail; but the contract provides expressly that they do not include "additional services". "Additional services" are defined by clause 1 of the GDS contract. The definition includes "advanced mandatory services"; which are, in turn also defined by clause 1. It is common ground that the definition of "advanced mandatory services" is wide enough to encompass IMOS. Part 9 is the section of the GDS contract that deals with Additional Services.

4. In many places the clause numbers contained in the GDS contract are not accompanied by any contractual text. Instead they are said to be "reserved". Clause 4 explains that where the parties have agreed in writing that a clause is reserved, that clause is not relevant and has no application to the contract.

5. Part 10 of the GDS contract is headed "Further Services". It consists of clauses 168 to 172, each of which is "reserved". Thus, unlike Part 9 (which contains substantive provisions about Additional Services), Part 10 contains no substantive clauses at all.

6. As the judge explained, clauses 77 to 100 in Part 8 of the GDS contract set out the basic mechanism by which the contractor accounts and is compensated for mandatory services provided to patients, namely, using "units of dental activity" ("UDAs"). Schedule 4 to the GDS contract stipulates a number of UDAs that must be provided during the course of a year and the sum to be paid to the contractor in respect of that number of UDAs for that year. The value of a UDA is subject to annual adjustment; and the contract specifies the evidence that a contractor must submit to the PCT or NHS England in order to justify the number of UDAs performed.

7. Part 21 of the GDS contract contains a number of clauses all concerned with dispute resolution.

8. The GDS contract may be terminated by mutual agreement; or by notice given by the dentist. Clauses 305 to 362 set out detailed circumstances in which NHS England may terminate the contract. But it is common ground that none of them apply in present circumstances. NHS England has no general right to terminate the GDS contract without default by the dentist.

9. Part 22 of the GDS contract contains terms about variations to the contract. Clause 287 (which is in Part 22) provides:

> "287. Subject to clause 200, no amendment or variation shall have effect unless it is in writing and signed by or on behalf of the PCT and the Contractor.

10. Clauses 366 and 367 provide:

> "366. Subject to clause 200 and any variations made in accordance with Part 22, this Contract constitutes the entire agreement between the parties with respect to its subject matter.
>
> 367. The Contract supersedes any prior agreements, negotiations, promises, conditions or representations, whether written or oral…"

11. Clause 200 is not relevant for present purposes.

12. In 2007 Croydon PCT established a pilot scheme designed to transfer IMOS from hospital to primary care, in order to reduce waiting lists and to save cost. The three dentists in this case participated in that scheme. For that purpose, they entered into separate contracts with Croydon PCT. Each contract had a fixed duration of 12 months from 1 December 2007, although the term was extendable by agreement. In relation to this 12-month pilot scheme, there was a triage system to decide which patients referred by general practitioners for an IMOS treatment should be seen at the Hospital and which should be seen by one of the four IMOS services providers. The terms of the service were set out in a contract headed "Contract for the Provision of an Intermediate Minor Oral Surgery (IMOS) Service in a Primary Care Setting" ("the

IMOS contract"). Although shorter than the GDS contract, the IMOS contract runs to 62 clauses, one Appendix and four annexes. The IMOS contract includes provision about its scope (clauses 5 and 6); service quality (clauses 10 to 13); compliance with national standards (clauses 14); incident management (clause 16); monitoring and information requirements (clauses 19 to 25); contract volume (clauses 29 to 33) and so on. Clause 17 of the IMOS contract provided:

> "This service is for the provision of an IMOS service as identified in the advanced mandatory service specification for IMOS (Appendix 1)"

13. Payment under the IMOS contract was not tied to UDAs, as it was under the GDS contract. Instead, each dentist was entitled to a fixed sum payment per treatment. Although in the first instance the IMOS contract ran for a fixed term, clauses 51 and 52 provided for earlier termination by one month's notice.

14. As foreshadowed by clause 17, Appendix 1 contains a more detailed description of the services to be provided as the IMOS service. It includes provisions for triage, three possible care pathways, eligibility for the IMOS service, and provisions dealing with payment. Under the heading "Costs" the Appendix states that the PCT will negotiate with the providers a "fee per patient" and a "sessional rate" for oral surgeons and triage.

15. The fixed term of the IMOS contract expired on 30 November 2008. The dentists continued to supply IMOS to Croydon PCT; and continued to be paid at the rates specified in the IMOS contract. The judge held at [81] that the IMOS contract continued by conduct. There is no challenge to that conclusion. The essential question on this appeal is whether that state of affairs continues, or whether the provision of IMOS had been incorporated into the GDS contract. NHS England says that the state of affairs continues, with the result that it is entitled to terminate the ongoing contract by notice under clauses 51 and 52 of the IMOS contract. The dentists, on the other hand, say that the provision of IMOS has been incorporated into the GDS contract, with the consequence that NHS England has no right to terminate the IMOS service without default by the dentist.

The purported variation of the GDS contract

16. On 7 April 2009, Mr Butcher of Croydon PCT sent the following e-mail to the dentists:

> "Dear all,
>
> You will shortly be receiving two copies of a GDS contract variation form from the PCT. These make a clause change to the contract, in order for you to provide advanced mandatory services under GDS arrangements. This seems a far more sensible approach to me [than] re-signing the present IMOS contract. All governance arrangements now fall under the GDS contractual arrangements, rather than a contract which was originally intended for the PCT's dermatology service! Can you please sign both copies of the form, and return one to me?

> Whilst I'm writing, I'm pleased to announce that the fee for a procedure as of 1/04/09 will be £157.50. All other tariffs remain the same as last year."

17. At about the same time each of them received a Contract Variation Agreement Form (a "VAF") signed on behalf of Croydon PCT. The VAF consists of a single page. The upper part of the form is entitled "Nature of Contract Variation" and consists of a number of boxes for ticking. Two boxes are ticked: "Clause Change" and "Additional Services". The next part of the form is for the description of the variation. It contains the following text:

> "Part 10 'Further Services'
>
> Clause 168 changed from '*Reserved*' to *'Providing an Advanced Mandatory Service in the form of an Intermediate Minor Oral Surgery (IMOS) service*'"

18. The form was signed on behalf of each party. On the copy which we have seen it was signed on 14 April 2009, a week after Mr Butcher's e-mail. A further note on the form stated that the variation was to be "recorded in Contract File and notified" to the PCT Programme Management Office and the PCT Choice Support Team.

19. Since that time the three dentists continued to provide IMOS for many years without difficulty. The problem arose only in the autumn of 2016 when NHS England purported to terminate the arrangement.

The judgment

20. NHS England argued that the bald statement in the VAF was insufficient to amount to a binding variation of the GDS contract. All that it did was to describe a service in very general terms. It contained no details of what the service consisted of; and no provisions for payment. It was not possible to repair these deficiencies by reference to the IMOS contract, because that was precluded both by the terms of clause 366 ("the entire agreement clause") and by the terms of clause 287 ("the written variation clause"). It followed that since the GDS contract had not been effectively varied, IMOS continued to be supplied on the terms of the IMOS contract; with the consequence that NHS England was entitled to terminate it by notice.

21. The judge rejected that argument. He considered the effect of the entire agreement clause at [85] and [85]. He said:

> "[85] … an Entire Agreement clause is essentially about the past, the period prior to entry into the contract. Whatever may have previously been said or even agreed between the parties, the contract is now limited to what is set out in this contract, expressly or by necessary implication, as at the time the parties enter into it.
>
> [86] An Entire Agreement clause is not a covenant that at all times until the contract comes to an end the contractual

> arrangements between the parties will be set out within the "four corners" of the document."

22. Thus, he considered that the crucial question was whether the written variation clause prevented the VAF from having the effect for which the dentists argue. At [88] he said:

> "… the proper construction of the GDS Contract, as amended by the VAF, is that the GDS Contract governs both (i) mandatory services in the form of GDS and (ii) IMOS services. That is clear from the words used by the parties. Clause 168 is changed from "Reserved" to "Providing an Advanced Mandatory Service in the form of Intermediate Minor Oral Surgery (IMOS) service"."

23. At [89] he said:

> "The VAF is a purported amendment to the GDS Contract, it is in writing and it is signed on behalf of the PCT and the Contractor. It therefore fulfils the express requirements of clause 287, and it therefore has effect. There is nothing in the lengthy extract from the *MWB Business Exchange* case above (or elsewhere in the judgments of the Supreme Court in that case) that requires anything more than this."

24. He said at [90]:

> "NHS England's objection that the VAF fails for uncertainty because it does not spell out in sufficient detail the contractual arrangements that apply from the time of entry into the VAF is not sustainable, in my view, on the facts of this case. It is clear from the contemporaneous correspondence to which I have already referred, from the evidence of the Providers and Mr Butcher (as corroborated by his contemporaneous emails) and from the conduct of the parties subsequent to entry into the VAF that it would be "business as usual" … as far as the practical operation of the IMOS services were concerned (in other words, as to payment, invoicing and the triage and referral process) but that all other aspects of the arrangement would be governed by the GDS Contract, including, for example, as to clinical governance, quality assurance, insurance, complaints, dispute resolution and, critically for this case, termination."

25. At [96] he said:

> "As I have said, in my view, the amended contractual arrangement effected by the VAF was clear: it was "business as usual" in relation to the operation of the IMOS services (and, for that, reference could be made to the terms of the IMOS Contract including the Appendix), but all other aspects would

> be governed by the GDS Contract. It was common ground, as I have already noted, that, apart from the question of whether NHS England could terminate the contractual arrangement in relation to IMOS services as Ms Clarke purported to do in 2016, there have been no disputes between NHS England and any Provider in relation to the provision of IMOS services."

Discussion

26. In paragraphs [90] and [96] the judge reached his decision by reference to three sources:

    i) Contemporaneous correspondence;

    ii) The evidence of the dentists and of Mr Butcher; and

    iii) The conduct of the parties after variation.

27. What he does not explain, however, is the exercise upon which he was engaged. Was he construing the express words of the VAF? Or was he implying a term into the VAF? In addition, it is not clear to me what the judge meant by saying at [96] that "(… reference could be made to the terms of the IMOS Contract including the Appendix)". Was he deciding that some of the terms of the IMOS contract (and if so, which?) had been incorporated into the GDS contract as varied? Or was he saying that the terms of the IMOS contract were an aid to the interpretation of the GDS contract? Or something else?

28. The first strand in the judge's reasoning at [90] relied on contemporaneous correspondence. The general principle is that documents forming part of pre-contractual negotiations are irrelevant (and hence inadmissible) for the purposes of interpreting the concluded agreement. There have been suggestions that an exception should be made in the case of documents that explain, in general terms, the "genesis" and "aim" of a transaction; and even of a particular provision in a contract: *Investec Bank (Channel Islands) Ltd v The Retail Group Plc* [2009] EWHC 476 (Ch). But this court has now ruled that that view is heretical, in so far as such material is relied on to draw inferences about what the contract means: *Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526. The general intention to include the IMOS service within the GDS contract is plain from the words of the VAF itself, without recourse to the e-mail. The e-mail is thus unnecessary to establish the genesis and aim of the variation as a whole; and it is not permissible to use it to establish anything narrower. Moreover, in the present case, the judge seems to me to have relied on the contemporaneous correspondence as itself incorporating terms by reference into the varied contract. I assume that it was the phrase "all governance arrangements" in Mr Butcher's e-mail which had this effect. Mr Butcher's e-mail was not, of course, signed by or on behalf of the dentists, and cannot comply with clause 287.

29. The second strand in the judge's reasoning was his reliance on the oral evidence of the contracting parties. But that evidence cannot, in my judgment, amount to more than the expression of subjective intention, which again is irrelevant and therefore inadmissible in interpreting a written contract.

30. As far as the third strand in the judge's reasoning is concerned, the starting point, as it seems to me, is that the contract is a contract made entirely in writing. It could not be otherwise, in view of both the entire agreement clause and the written variation clause. Although the conduct of the parties subsequent to an agreement may be relied on to identify the terms of a contract where the contract is wholly or partly oral, there is a long-standing principle of contractual interpretation that in the case of a written contract post-contract conduct is irrelevant (and therefore inadmissible). I do not, therefore, consider that the judge's reliance on the parties' post variation conduct was a sound basis for his decision.

31. It follows, in my judgment, that none of the judge's three strands of reasoning can be supported.

32. It is now established that the courts will in principle enforce a contractual provision which regulates the way in which the contract can be validly amended: *MWB Business Exchange Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119. Lord Sumption said at [11]:

> "There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement."

33. He went on to explain the purpose underlying such clauses:

> "The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but *also about its exact terms*. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them." (Emphasis added)

34. Commenting on entire agreement clauses he added:

> "Such clauses are commonly coupled (as they are here) with No Oral Modification clauses addressing the position after the contract is made. *Both are intended to achieve contractual certainty about the terms agreed*, in the case of entire agreement clauses by nullifying prior collateral agreements relating to the same subject matter." (Emphasis added)

35. Ms Demetriou QC, on behalf of the dentists, forcefully submits that the court should be reluctant to hold that an agreement is too uncertain to be enforced. The court's reluctance should be all the greater where what the parties believe to have been a valid contract has been partly performed. That is undoubtedly the case where the question is whether the parties are legally bound at all. The court's extreme reluctance

to find that the parties have failed to make any contract because of their omission to specify particular terms in detail is well illustrated by the recent decision of the Supreme Court in *Wells v Devani* [2019] UKSC 4, [2019] 2 WLR 617. That is not quite this case. It is common ground that there is a contract in place between the dentists and NHS England: either the GDS contract (as varied) or the IMOS contract. The question is: which contract? Moreover, as Lord Sumption recognised in *MWB Business Exchange* at [16]:

> "The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it."

36. The argument for the dentists is put in two ways. First, Ms Demetriou says that the entire agreement clause is "subject to" any variations made under Part 22 of the GDS contract. The effect of that is that variations made under Part 22 are outside the scope of the entire agreement clause. In the present case the variation was made in writing, as required by clause 287. That was the only formal requirement. There was, therefore, no bar to the judge's decision that some of the terms under which IMOS was to be provided under the GDS contract are to be found in the IMOS contract.

37. I accept, as a general proposition, that where one clause in a contract is said to be "subject to" another clause in the same contract, the second clause takes precedence over the first. Staughton LJ pointed out in *Scottish Power Plc v Britoil (Exploration) Ltd* (1997) 141 SJLB 246:

> "Correctly used, the words "subject to" mean that two provisions in the contract are in conflict, and that the first-mentioned is to be subject to, yield to, the second when the conflict occurs."

38. The question is, then, what variation has been made in accordance with Part 22 of the GDS contract?

39. Clause 287 requires a variation to be (a) in writing and (b) signed by the parties. The VAF itself satisfies both those requirements. But once a variation has been made, I consider that the GDS contract, as varied, is governed by clause 366. For the purposes of that clause it seems to me that the contract terms consist of (and consist only of) what is contained in the GDS contract itself, and what is contained in the VAF. It is true, as Ms Demetriou submitted, that many entire agreement clauses are wholly backward-looking; and do not have any impact on how the parties may alter the terms of their bargain once the contract has been made. But in the present case clause 367 performs that function. In my judgment the combination of clause 366 and 287, taken together, evince a clear purpose of ensuring that all the terms of the bargain are to be found in the combination of the original GDS contract and any written variation compliant with clause 287. I do not doubt that the words contained in the VAF could have incorporated by reference some, or all, of the terms of the IMOS contract. But they did not do so, at least expressly. Moreover, if the VAF had incorporated all the terms of the IMOS contract that would not have suited the dentists' purposes; because the termination provisions in that contract would also have been incorporated. I am unable to discern, from the words in the VAF, on their own, which (if any) of the 62

clauses have been incorporated into the GDS contract. I agree, therefore, with Mr Williams QC for NHS England, that it is not possible to interpret the words in the VAF, standing alone, as incorporating the particular selection of terms in the IMOS contract that the judge held to have been incorporated (if, indeed, that is what he did decide). In her skeleton argument Ms Demetriou argued that terms could be incorporated by a previous course of dealing or a common understanding. In support of that proposition she relied in the judgment of Lord Denning MR in *British Crane Hire Corporation v Ipswich Plant Hire Ltd* [1975] QB 303. Absent an entire agreement clause, I would agree that terms can be incorporated by a previous course of conduct. I am more doubtful about a "common understanding" as a distinct concept. She did not pursue this argument orally. But assuming that terms can be incorporated in that way, there is still the problem of deciding *which* terms of the IMOS contract were thus incorporated. One purpose of the entire agreement clause, coupled with the restrictions on variation, was surely to preclude arguments of that kind. In my judgment the judge paid insufficient attention to the purpose underlying both the entire agreement clause and the written variation clause.

40. I would therefore reject the first argument.

41. The second argument is that the phrase "Providing an Advanced Mandatory Service in the form of Intermediate Minor Oral Surgery (IMOS) service" has a meaning that was well-known to the parties. The dentists had been providing those services under the IMOS contract; and continued to do so after the expiry of the fixed term. Accordingly, in the light of the parties' past dealings, "the IMOS service" meant the provision of minor oral surgery at the fee that had been agreed at the time of the VAF (and referred to in Mr Butcher's e-mail of 7 April 2009).

42. Extrinsic evidence is admissible to explain the meaning of unconventional expressions in a contract, especially where the expression in question is used in a particular sector of economic activity. Thus, in *Max Cooper & Sons Pty Ltd v The Council of the City of Sydney* (1980) 54 ALJ 234 a "rise and fall" clause in a building contract stated that it applied to alterations in rates of "pay, pay loadings, holidays, etc." Lord Diplock, giving the advice of the Privy Council, said:

> "The crucial expression in this paragraph is "pay loadings". It is a technical term, or term of art, used in the building industry. It is not an expression that is used in ordinary speech; without extrinsic evidence from a witness experienced in the building industry and familiar with the technical terms used in it, a judge could only speculate as to the meaning of "pay loadings". That the ordinary meaning in which a technical expression is used in a particular industry is not a question of construction but is a question of fact to be decided upon expert evidence, has been undoubted law since it was laid down by Baron Parke in *Shore v Wilson* (1842) 9 Cl and Fin 355. A question of construction (which is one of law) arises only when it becomes necessary to determine whether the particular context in which the expression is used shows that in that context it was intended to bear its ordinary technical meaning or some more extended or restricted meaning."

43. Likewise, in *Lloyd's TSB Bank plc v Clarke* [2002] UKPC 27, [2002] 2 All ER (Comm) 992 two banks entered into a "sub-participation agreement". Again, giving the advice of the Privy Council, Lord Hoffmann said at [15]:

> "The term "sub-participation agreement" is not a legal term of art like "assignment" or "trust". It is however a term commonly used in the market and there was before the courts in The Bahamas a good deal of evidence about what it meant. Such evidence, showing what certain words would have been understood to mean in the relevant trade at the time of the agreement, is in their Lordships' opinion admissible as part of the background against which the agreement should be construed."

44. Although in the two quoted extracts the relevant evidence was expert evidence, I do not consider that that is an invariable rule. Nor is the principle limited to terms of a specialised trade. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 Lord Hoffmann said at [45]:

> "It is true that evidence may always be adduced that the parties habitually used words in an unconventional sense in order to support an argument that words in a contract should bear a similar unconventional meaning. This is the "private dictionary" principle, which is akin to the principle by which a linguistic usage in a trade or among a religious sect may be proved: compare *Shore v Wilson* (1842) 9 Cl & F 355. For this purpose it does not matter whether the evidence of usage by the parties was in the course of negotiations or on any other occasion. It is simply evidence of the linguistic usage which they had in common."

45. In *Shore v Wilson* itself (which concerned the expression "godly preachers of Christ's holy Gospel") Lord Lyndhurst LC said that the "evidence will vary with the circumstances of each particular case". As Tindal CJ put it in advising the House of Lords, the evidence was admitted "for the purpose of making the written instrument speak for itself."

46. The fact that the contract contains an entire agreement clause does not, in my judgment, affect this principle: *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 (where it was said, in the case of a contract containing an entire agreement clause, that evidence was admissible to explain the phrase "preferred supplier status"). Lord Reed, sitting in the Outer House, took a similar view in *Macdonald Estates Plc v Regenesis (2005) Dunfermline Ltd* 2007 SLT 79. Likewise, in *John v Price Waterhouse* [2002] EWCA Civ 899 Robert Walker LJ said that an entire agreement clause:

> "… cannot in my view affect the question whether some matter of fact (whether or not in documentary form) is admissible as an aid the process of construing a contractual document."

47. Longmore LJ took a similar view in *Barclays Bank plc v Unicredit Bank AG* [2014] EWCA Civ 302, [2014] 2 All ER (Comm) 115 at [27]:

> "The entire agreement clause is concerned with identifying the terms of the contract. The use of the phrase 'constitute the entire agreement and understanding' is intended to exclude any evidence or argument to the effect that the terms of the contract are to include any mutual understanding that is not recorded in the contract. It is not intended to exclude admissible evidence or argument about the way in which parties exercise rights given to them by the terms of the contract."

48. The critical words in the present case are:

> "*an Intermediate Minor Oral Surgery (IMOS) service*"

49. The term of the contract (as varied) is that the dentists would supply that service as a further service within Part 10 of the GDS contract. The question, then is: what do those words mean? Although each word, considered separately, is an ordinary English word, I do not consider that it is possible to give meaning to the phrase as a whole without extrinsic evidence. Fortunately, the relevant extrinsic evidence is close to hand. Clause 17 of the IMOS contract tells us what the parties meant by an "IMOS service". According to that clause the description of what amounts to an IMOS service is contained in Appendix 1 to the IMOS contract and its annexes. In my judgment that material is admissible (and indeed vital) in order to give meaning to the phrase. Such evidence does not add to or alter the terms of the GDS contract as varied by the VAF: it merely explains what the words in the VAF mean. Moreover, it is contained in a written document which has been signed on behalf of both parties.

50. It is not entirely clear to me whether the judge was going beyond Appendix 1 in saying that "payment, invoicing and the triage and referral process" would be governed by some of the substantive clauses of the IMOS contract. If that is what he meant, then I respectfully disagree. But in fact, Appendix 1 to the IMOS contract does mention these matters. Under the heading "Costs" the Appendix states that the PCT will negotiate with the providers a "fee per patient" and a "sessional rate" for oral surgeons and triage. If, therefore, the judge was confining himself to Appendix 1, then I would agree with him. The critical point for this appeal, however, is that the description of the IMOS service in Appendix 1 does not incorporate the termination provisions contained in the IMOS contract.

51. I do not regard the provisions stating that the fees would be negotiated as themselves rendering the description void for uncertainty (or incompleteness). An entire agreement clause does not preclude the implication of a term that is intrinsic to the agreement (as opposed to one that is implied only because of background facts): see *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2012] Bus LR 203 at [41] and [42]; or one that is necessary to give business efficacy to the contract: *J Hipwell & Son v Szurek* [2018] EWCA Civ 674, [2018] L & TR 15 at [27]. It is a commonplace that in the case of a continuing contract for services in the course of performance the court will readily imply a term that a fair price will be paid for the services rendered. In addition, section 15 of the Supply of Goods and Services Act 1982 contains a statutorily implied term to the like effect. Although section 16 of that

Act allows parties to exclude the term by a contractual provision that is inconsistent with that term, it requires clear words to do so. A conventional entire agreement clause is not enough: *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm) at [37] and [44]. There are no such words in the present case. In addition, the existence of the contractual dispute resolution procedure may act as a safety valve to deal with any potential uncertainty: *Mamidoil-Jetoil Greek Petroleum Co SA v Otka Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep 76 at [69].

52. Mr Williams suggested in the course of his reply that even if the entire agreement clause did not preclude the implication of terms, the written modification clause did so. I do not consider that to be the case. Clause 287 does no more than say that a variation of the GDS contract must be in writing and signed by the parties. It does not purport to exclude the implication of terms necessary to give business efficacy to a variation that has been agreed in writing. In addition, I understood Mr Williams to accept that a written variation clause would not of itself exclude a term implied by statute, such as that implied by section 15 of the Supply of Goods and Services Act 1982. In any event, on the facts, the parties have actually agreed the price to be paid for each element of the IMOS service. The agreement of a price by negotiation, as contemplated by the terms of Appendix 1, would not, in my judgment, be a variation of the terms of the contract. On the contrary, it would be an implementation of those terms.

53. Accordingly, I would hold that clause 287 was satisfied by the VAF. It validly amended the GDS contract so as to provide that the IMOS service was a further service within Part 10 of that contract. The meaning of the phrase may be (and is) explained by Appendix 1 to the IMOS contract; but no other part of the IMOS contract has been incorporated into the GDS contract.

54. For these reasons, which differ to some extent from those of the judge, I would dismiss the appeal.

Lord Justice Coulson:

55. I agree.

Lord Justice Longmore:

56. I also agree.