1. Introduction

1.1 The above named Applicant has referred the dispute in relation to the Contract for dispute resolution under the provision of paragraph 55 of Schedule 3 of the NHS (Personal Dental Services Agreement) Regulations 2005 (the "Regulations").

1.2 The Secretary of State for Health has directed that the NHS Litigation Authority exercise the functions of dispute resolution on his behalf. The Family Health Services Appeal Unit discharges that function for the Authority. I as an officer of the FHS Appeal Unit and authorised officer of the NHS Litigation Authority have made this determination.

2. Application for Dispute Resolution

2.1 By letter dated 21 April 2011, RadcliffesLeBrasseur on behalf of the Applicant applied to the FHS Appeal Unit of the NHS Litigation Authority, for dispute resolution of the above issue (the "Application").

2.2 I have had regard to the following documents made available to me in consideration of this matter:-

2.2.1 the Application together with enclosures;

2.2.2 letter from the PCT to the NHSLA dated 24 May 2011 (the "PCT's Observations");

2.2.3 letter from RadcliffesLeBrasseur on behalf of the Applicant, dated 25 May 2011 (the "Applicant's Representations");

2.2.4 email from NHSLA to the PCT, dated 1 June 2011;

2.2.5 Letter from the PCT to the NHSLA dated 9 June 2011, (the "PCT's Observations")

2.3 The Applicant wishes to challenge the termination of her PDS Contract by the PCT.
3. Consideration

3.1 The Applicant has held a Personal Dental Services Agreement (the "Agreement") since 26 October 2007 to provide NHS dental services at the Smiles Centre, Andover (the "Practice") as a single handed practitioner. On 5 November 2009, the PCT issued a 'Remedial Breach Notice' (the "Remedial Notice") (Appendix 8 of the PCT Representations and Appendix 2 of the Applicant's Representations) to the Applicant giving 28 days for the Applicant to remedy several breaches. On 29 March 2011, the PCT sent a letter to the Applicant informing her that the Matters of Serious Contractual Concern Panel held on 23 March 2011 had determined that the breaches identified in the Remedial Breach Notice had not been remedied and, in addition, further breaches had been identified (the "Termination Notice") (Appendix 16 of the PCT Representations). As a result the Agreement would terminate on 26 April 2011.

3.2 The Applicant wishes to challenge the termination of the Agreement on the following basis:

3.2.1 the PCT has not provided any, or any sufficient, evidence of continuing breach and/or failure to remedy;

3.2.2 that in those circumstances the Applicant is not in a position to respond to the allegations of continued breach and/or failure to remedy;

3.2.3 the PCT's decision to terminate the Agreement is both unfair and disproportionate;

3.2.4 the PCT has failed to have any, or any sufficient, regard to remedial action taken by the Applicant since service of the Remedial Notice dated 5 November 2009.

3.3 The points raised in 3.2.1 and 3.2.2 are sequential and interdependent. I will therefore consider these two points together. The assertion that the PCT's decision to terminate the Agreement was unfair and disproportionate can only be assessed on the outcome of the other points raised. Therefore, I will consider this point last.

3.4 In addition to the matter to be considered in this determination, the PCT is currently taking action to remove the Applicant from the Performer's List. Whilst this action has not been considered in conjunction with the termination of the Agreement, both parties have submitted documents which relate to the Performer's List proceedings.

The PCT has not provided any, or any sufficient, evidence of continuing breach and/or failure to remedy; and

That in those circumstances # is not in a position to respond to the allegations of continued breach and/or failure to remedy.

3.5 The PCT has included in the PCT's Representations clear evidence of breach of contract and failure to remedy. The Applicant admits in her Representations that the actions she took following the Remedial Notice were insufficient to remedy the breach. I do not think therefore, that there is any dispute that the Agreement was breached and that there was a failure to remedy. The question is, therefore, whether the PCT, having gained substantive evidence of breach of contract, communicated this to the Applicant in a way that would allow her to fully understand the breaches identified and implement actions to remedy such breaches.

3.6 In the PCT's Representations the PCT states that it provided sufficient evidence of continuing breach and/or failure to remedy. There was continuing correspondence between the parties and the Applicant was provided with details of the clauses
breached and the remedial action required. The most recent record check (undertaken by the PCT in January 2011 (the “2011 record check”)) was provided to the Applicant and evidenced the continued breaches. The Applicant was offered the opportunity to meet the PCT and discuss the concerns raised but subsequently cancelled these meetings. In the PCT’s Representations the PCT states the Applicant was in a position to respond to the allegations of continued breach and/or failure to remedy. Having identified shortcomings in relation to the Agreement on a number of occasions, the PCT would have expected evidence of remedial action undertaken by the Practice to mitigate further occurrences. The PCT would expect these actions to be evidenced via further record card checks undertaken over the period of the Agreement. The record card checks did not evidence any remedial actions having been taken. Furthermore, the PCT has provided patient-specific evidence of continued breaches of the Agreement, enabling the Applicant to undertake an internal review and respond accordingly.

3.7 The Applicant has asserted that the PCT did not respond or respond sufficiently to requests for information to substantiate its concerns. Had such information been provided the Applicant would have been able to make good the breach and avoid any further inadvertent breach of the Agreement.

3.8 During the lifetime of the Agreement the PCT received numerous complaints from patients in relation to the services offered at the Practice. These complaints are included as Appendix 2 to the PCT’s Representations. These complaints, many of which relate to patients being told they cannot receive certain treatments on the NHS, span the time both before and after the service of the Remedial Notice. Whilst these complaints evidence the continued breach it is unclear as to whether they were, in fact, communicated to the Applicant. The only items of evidence provided of a patient complaint being formally brought to the attention of the Applicant are contained in Appendix 4 of the Applicant's Representations which includes a letter dated 27 July 2010 in relation to a dispensing complaint, and the first letter in Appendix 3 of the PCT's Representations.

3.9 The PCT wrote to the Applicant on 11 and 14 April 2008 (Appendix 3 to the PCT's Representations). These letters regarded the need for the Practice to give every patient a treatment plan setting out what treatment would be provided on the NHS and what the patient was to receive privately. The letters made clear that this was in the Applicant's interests, in order to provide the Practice protection should a patient complain. The first letter was clearly in response to a patient complaint that had been received. The second letter was not in response to a patient complaint but specifically drew attention to clauses 47 and 49 of the Agreement. These were not formal notices under the Agreement and give limited detail of any specific concerns in relation to the Practice.

3.10 A Dental Practice Advisor visited the Practice on 7 May 2008 (Appendix 4 to the PCT’s Representations). The essential action points for the Practice that came out of the assessment identified various health and safety and staff related issues. No action points were identified in respect of the types of treatment offered to patients. The only points noted as being "in progress" on the assessment on 15 May 2008 were the appropriate professional registration and indemnity insurance of all staff. The Practice was compliant with all other essential action points identified in the DPA visit. In the PCT’s Representations, the PCT states that, despite this visit, the patient complaints continued. However, there is no indication in the report that the visit even concerned patient complaints (except for the point that there must be a named complaints manager, a point that the Practice was compliant with upon further assessment).

3.11 The DPA completed a record card check on behalf of the PCT on 16 February 2009 (Appendix 5 to the PCT’s Representations). The comments contained in this report are incomplete in the submission. However, where available, they show that the DPA considered the Practice to be making inappropriate claims for courses of treatment.
The report comments, in respect of patient CB, that it is "unclear from the patient notes whether the patient was treated as NHS or private". No other comment in respect of treatment is made. The PCT has not shown evidence that the outcome of this report was communicated to the Applicant.

3.12 The PCT wrote to the Applicant on 24 June 2009 (Appendix 6 of the PCT’s Representations) following a PCT Performance Screening Group in relation to concerns regarding completion of FP17DC’s, record keeping and claiming patterns, requesting a meeting with the Applicant to discuss these concerns. The Applicant has submitted correspondence with the PCT (Appendix 1 of the Applicant's representations) asking for further details from the PCT, in particular the information that had been presented to the PCT Performance Screening Group, in order to prepare for the meeting with the PCT. Both the Applicant and the PCT have included the letter dated 24 June 2009 (Appendix 6 of the PCT's Representations and Appendix 1 of the Applicant's Representations) requesting that a meeting be set up between the parties to discuss the concerns raised at the PCT Performance Screening Group. Copies of record cards were provided to the Applicant on 24 July 2009 but not details of claims submitted. The Applicant wrote to the PCT on 29 July 2009 to cancel a meeting, to take place on 2 September 2009, following advice from her dental protection organisation that the matter should be pursued on a formal level (Appendix 6 to the PCT's Representations). However, correspondence between the PCT and the Applicant's representatives, attempting to arrange a meeting continued. The fact that no meeting between the PCT and the Applicant took place appears to be due to the PCT not disclosing details of the claim submitted to the BSA, (which was presented to the PCT Performance Screening Group) as requested by the Applicant.

3.13 The BSA undertook a Clinical Policy Adviser case assessment and the report resulting from this was sent to the PCT on 16 Sept 2009 (Appendix 7 to the PCT’s Representations). The report found that:

3.13.1 the overall financial risk for the PCT was "moderate";

3.13.2 there was an indication that courses of treatment may have been split in order to maximise UDAs; and

3.13.3 patient responses to questionnaires would suggest that non-exempt patients were not being offered a full range of mandatory services as required under the Agreement.

3.14 The report suggested that the PCT "may wish to challenge the provider regarding the multiple FP17 claims and also about providing a full range of NHS treatments to all patients."

3.15 On 5 November 2009, the PCT issued the Remedial Notice to the Applicant. The Remedial Notice stated that the Applicant had breached clauses 59 and 74 to 76 of the Agreement. The Remedial Notice stated that the required Remedial action for both breaches was "the full range of treatment to be made available to patients requiring care in order to maintain their full oral health". The remedial action to be taken by the Applicant was to be assessed by reference to claims submitted after 28 days. Any potential breaches in respect of submitting FP17DCs, inappropriate claims or patient records as identified by the DPA record check, PCT Performance Screening Group and the BSA report were not included in the Remedial Notice. No evidence of the identified breaches accompanied the letter.

3.16 A record card check was undertaken and reported on 3 March 2010 (the "2010 record check"). This does not appear to have been specifically undertaken in order to assess compliance with the Remedial Notice. The letter requesting the records dated 21 January 2010 states that the request was "in line with NHS Hampshire’s contract
monitoring process.” It does not refer to the Remedial Notice or state that the review is to assess compliance with the Remedial Notice. No indication of any other action to assess compliance has been given by the PCT.

3.17 The PCT returned the patient records to the Applicant on 27 April 2010 with a covering letter informing her that the 2010 record check was complete. No information was given in respect of the outcome of the review in this letter. The record check has been supplied by the PCT as part of the PCT’s Representations and identified further breaches as well as the remedial breaches not being remedied. I agree with the Applicant’s Representations that had the record check given rise to concerns the PCT should have communicated this to the Applicant at this point. Whilst I understand that no action was taken in respect of this record check by the PCT (as a result of a lack of capacity in the PCT contract team) I agree that the outcome of this record check had it been communicated, would have allowed the Applicant the opportunity to remedy the breach. Given this lack of information or follow-up, it might reasonably have been assumed by the Applicant that no further action was required in respect of the Remedial Notice.

3.18 The PCT conducted a further record card check in November 2010 (the “2011 record check”). Again the correspondence requesting patient records does not state that the record check was undertaken in order to assess performance against the Remedial Notice. The letters to the Applicant dated 1 and 22 November 2010 (Appendix 6 of the Applicant’s Representations) state the records are being requested in accordance with paragraph 35 of Part 5 to the GDS Regulations (although the Agreement is a PDS Agreement, equivalent provisions are found under paragraph 36 of Schedule 3 to the Regulations).

3.19 The 2011 record check confirmed that the breach had not been remedied and highlighted a number of further concerns. These concerns were of the same nature as had been continuous during the Agreement both before and after the service of the Remedial Notice. The 2011 record check identified that a number of patients had received, as private patients, treatment that was available on the NHS.

3.20 In the Applicant’s Representations it is submitted that essential information remained outstanding at the time the Remedial Notice was served. Based on the documentation submitted by both parties this would appear to be the case. I do not believe that the Applicant should be disadvantaged by cancelling the meeting that was arranged with the PCT as the cancellation was on the advice of her dental protection organisation that the matter should be undertaken at a formal level. In the PCT’s Observations, the PCT states that the correspondence submitted by the Applicant at Appendix 1 of the Applicant’s Representations is, in fact, between staff at the PCT responsible for managing the Performers List Regulations and the Applicant did not contact the PCT team responsible for contract management following the issue of the Remedial Notice. However, the Remedial Notice itself contains no invitation to the Applicant to discuss its contents with the PCT. The Applicant was given no indication that these were in fact two separate matters and that she should, as a result, initiate dialogue with a separate team within the PCT. Given that no evidence of the breaches was provided in the Remedial Notice the circumstances of the Applicant and her ability to discuss the breaches with the PCT were the same in respect of both matters. The Applicant lacked the necessary information to discuss either matter with the PCT. There appeared to be a breakdown of communication between the PCT and the Applicant.

3.21 In the PCT’s Observations, the PCT states that the termination should be considered separately to the ongoing proceedings in relation to the Performers List. I am inclined to agree. However, the PCT, in its correspondence with the Applicant has not dealt with the two matters separately. The PCT sent details of the 2011 record check to the Applicant in the same mailing as a letter from the PCT in relation to contingent removal from the Performers List (dated 7 February 2011) (Appendix 12 to the PCT’s Representations). As the accompanying letter to the Applicant is in relation to the
Performers List issue, it does not refer to the Remedial Notice or inform the Applicant that the 2011 record check has provided evidence that the breach has not been remedied. Therefore, the Applicant would not have been able to assess this information in light of the Remedial Notice. The Applicant also received a copy of the BSA report which was presented to the Panel by way of the Performers List proceedings with the letter dated 15 March 2011 (Appendix 3 of the Applicant's Representations and Appendix 14 of the PCT's Representations).

3.22 The letter sent to the Applicant dated 11 March 2011 (Appendix 13 of the PCT's Representations) informed the Applicant that, based on the outcome of the 2011 record check, it had established that the breach had not been remedied. However, this letter does not contain any details of the record check. Full disclosure of all information was sent to the Applicant's representatives on 19 April 2011 (Appendix 4 of the Applicant's Representations). However, this disclosure appears to be in relation to the Performer's List proceedings and not the termination of the Agreement.

3.23 I have not received sufficient evidence from the PCT that the outcomes of the record checks were adequately communicated to the Applicant. In particular, had the result of the 2010 record check been communicated to the Applicant she would have had the opportunity to remedy the breaches that had been identified. The PCT have throughout the term of the Agreement identified numerous breaches, however the only formal communication of these breaches to the Applicant was the Remedial Notice which only identified breaches of clauses 59 and 74 to 76 of the Agreement, despite there being clear evidence that other clauses of the Agreement had been breached. I believe the Applicant was not given adequate notification of such further breaches so as to have the opportunity to remedy them. I am, therefore, of the opinion that the Applicant was not in fact in a position to remedy the breaches identified, to the PCT's satisfaction, due to the breaches not being communicated to the Applicant in a manner to allow the Applicant to take the required steps.

The PCT has failed to have any, or any sufficient, regard to remedial action taken by the Applicant since service of the Remedial Notice dated 5 November 2009.

3.24 The PCT does not accept that it has failed to have any, or any sufficient, regard to any remedial action taken by the Applicant, on the basis that the PCT has undertaken repeated record card checks to see if there was any evidence of remedial action having been taken. The Applicant has not provided evidence of remedial action taken despite notice of the PCT's intention to review the breach. Having identified shortcomings in relation to the Agreement the PCT states that it would have expected to see evidence of the remedial action by the Practice to mitigate against further occurrences.

3.25 The Applicant accepts that the remedial action she undertook following the Remedial Notice was not sufficient. However, she did implement the use of FP17DC at the Practice as a result of the Remedial Notice. The Applicant has also sought advice from Ms Helen Falcon, the Dental Director and Postgraduate Dental Dean of the Dental School of Oxford and Wessex Deaneries. However, in relation to the advice the Applicant has sought from Helen Falcon, (Appendix 11 of the Applicant's Representations) it is clear that this was sought in response to the Performers List proceedings and not as a result of the Remedial Notice.

3.26 As mentioned earlier, on 5 November 2009, the PCT issued to the Applicant the Remedial Notice. The Remedial Notice identified that the Applicant had breached clauses 59 and clauses 74 to 76 of the Agreement. The Remedial Notice stated the required remedial action for both breaches was "the full range of treatment to be made available to patients requiring care in order to maintain their oral health". Remedial action taken was to be assessed by claims submitted after 28 days. Any potential breaches in respect of splitting courses of treatment, inappropriate claims or patient records as identified by the DPA record check, the PCT Performance Screening
Group and the BSA report were not included in the Remedial Notice.

3.27 The 2010 record check was reported on 3 March 2010 but does not appear to have been undertaken specifically in order to assess compliance with the Remedial Notice. The letter requesting the records dated 21 January 2010 (Appendix 5 of the Applicant's Representations) states that the request was "in line with NHS Hampshire's contract monitoring process." It does not refer to the Remedial Notice or state that the review is to assess compliance with the notice. However, and notwithstanding the lack of communication to the Applicant that the 2010 record check was undertaken specifically to assess compliance with the Remedial Notice, one might reasonably assume that the Applicant would have expected it to do so. No indication of any other action aside from the 2011 record check to assess compliance has been given by the PCT. The PCT wrote to the Applicant on 27 April 2010 informing her that the review was complete. No information is given in the letter in respect of the outcome of the review.

3.28 The review, provided in the PCT's Representations comments that "the contractor is offering a full range of dental treatment". It is also noted that in two cases dentists have provided private scales and polishes, a treatment that is available on the NHS. It is not clear whether this treatment should in fact have been provided on the NHS to these patients. The 2010 record check went on to identify numerous other potential breaches to the Agreement. These were all of the same nature as had been identified by the PCT prior to the Remedial Notice being issued. However, no actions were taken as a result of the record check due to a lack of capacity within the PCT contracts team.

3.29 At this point, one might have expected the PCT to either issue a further remedial notice in respect of the new breaches it had identified or alert the Applicant to the fact that it might have grounds to terminate under paragraph 71(4) of the Regulations. However, the PCT took no action and did not alert the Applicant to the fact further action would be required. Therefore upon receipt of the letter of 27 April 2010 it would be reasonable for the Applicant to consider the matter closed and for the PCT to be taking no further action in respect of the Remedial Notice.

3.30 The PCT met with the Applicant on 3 September 2010 to discuss the extension of the Agreement (due to expire on 31 October 2010) to 30 June 2011. Due to personnel changes the outcome of the 2010 record check was not available to the PCT at the meeting. In the PCT's Representations the PCT asserts that the extension was agreed in order to allow investigations in relation to the remedial action, continuing patient complaints and an investigation into dispensing at the Practice to be completed. The PCT's Observations further explain this was to ensure any decision made was evidenced-based. However the letter sent to the Applicant does not impose conditions on the extension and the PCT has not evidenced that this reasoning for the extension was communicated to the Applicant. I cannot, therefore, based on the papers, establish this was the reason the contract was extended.

3.31 The PCT conducted a further record card check in November 2010 (the 2011 record check), again the correspondence requesting the records does not state that the record check was undertaken in order to assess performance against the Remedial Notice. The letters to the Applicant dated 1 and 22 November 2010 (Appendix 6 of the Applicant's representations) state that the records are being requested in accordance with paragraph 35 of part 5 to the GDS Regulations (although the Agreement is a PDS Agreement, equivalent provisions are found under paragraph 36 of Schedule 3 to the Regulations). Again, no mention of the Remedial Notice is made in the request for records (Appendix 6 of the Applicant's Representations).

3.32 The 2011 record check confirmed the breach had not been remedied and highlighted a number of further concerns. Again, these concerns were the same concerns that had been evidenced prior to, but not included in, the Remedial Notice. The 2011
record check identified that a number of patients had received treatment, as private patients, that was available on the NHS. The PCT has provided a copy of this report as Appendix 12 to the PCT Representations alongside a letter in relation to the contingent removal of the Applicant from the PCT's Performers List (dated 7 February 2011).

3.33 The PCT wrote to the Applicant on 11 March 2011 informing her that the 2011 record check had shown that the breach had not been remedied and the matter had been referred to the Matters of Serious Contractual Concern Panel (the "Panel") who would decide on further action. No copy of either record check accompanied this letter. Instead, the Applicant received a copy of the record check by way of the proceedings in relation to the Performers List on 15 March 2011.

3.34 On the 29 March 2011, the PCT served a Termination Notice on the Applicant following the review of the Panel. The Panel reviewed the 'Analysis of the Business Service Authority claim data and patient examples one to ten'. The Termination Notice states as follows:

"The review undertaken of the 'Analysis of the Business Service Authority (BSA) claim data and patient examples 1 – 10', sent to you on 15th March 2011 identified a number of areas where you had not complied with the terms of your PDS Agreement.

We have set out below the specific examples where the panel felt there was an actual breach to the terms of the contract, the clause numbers referring to the clauses of the PDS Agreement."

3.35 The report attached to the letter sent to the Applicant on the 15 March 2011 (Appendix 14 of the PCT's representations and Appendix 3 of the Applicant's Representations) is an analysis of not only the record card audit undertaken by the PCT in January 2011 but also claim data relating to the period from 2008 to 2011. The patient examples given range from dates from 2008 i.e. before the Remedial Notice was served.

3.36 The PCT failed to follow up the Remedial Notice. Although two record checks were undertaken I do not believe that the reason for those checks was in order to establish whether or not the Applicant had complied with the Remedial Notice. The letters sent to the Applicant to request the records were misleading in that they did not inform the Applicant that this was in order to review compliance with the Remedial Notice. The letters stated that the record checks were being undertaken as part of the PCT's contract monitoring procedures and not as a response to the Remedial Notice. The PCT failed to implement the findings to the 2010 record check and instead gave the impression to the Applicant that there was no issues arising from the record check upon the return of the patient records to the Applicant.

The PCT's decision to terminate the Agreement is both unfair and disproportionate.

3.37 On the 29 March 2011 the PCT served a Termination Notice on the Applicant following the review of the Panel. The Panel agreed that clauses 59, 74 and 75 had not been remedied. In addition the Panel identified breaches of clauses 79, 202, 240 and 47. There were also concerns in relation to clause 54 but not enough information to assess whether this clause had been breached (however clause 97 of the Agreement provides a course of action other than termination in respect of this clause). The Panel considered that the cumulative effect of the breaches was such that to allow the Agreement to continue would be prejudicial to the efficiency of the services to be provided under the Agreement, allowing the PCT to terminate under paragraphs 71(6) and (7) of Schedule 3 to the Regulations. The Panel also had concerns that if the Agreement were to remain in place it would expose the PCT to continued and sustained financial loss. The Applicant was offered the opportunity to discuss the concerns raised and the consequences of termination.
3.38 The PCT's Representations state that, as the PCT is required to take actions under the Regulations and that the action taken was within the Regulations, the decision is not unfair or disproportionate. The PCT notes its overriding obligation to ensure the delivery of high quality primary dental services that are safe and provide value for money. The PCT states it has given the Applicant the opportunity to remedy but this has not been evidenced by the Applicant. The PCT has evidenced further breaches and the cumulative effect is that to allow the Agreement to continue would be prejudicial to the efficiency of the services. In addition the PCT has stated that to allow the Agreement to continue would expose the PCT to continued and sustained financial loss.

3.39 The Applicant has responded to this stating that the breaches and alleged further breaches are insufficiently serious to warrant the termination of the Agreement. The proposed termination needs to be considered in conjunction with the Performers List proceedings.

3.40 I agree with the PCT that the Performance List proceedings should not be considered in conjunction with this matter.

3.41 I agree with the PCT's Observations in respect of point 3.1 that under paragraph 71(4) of the Regulations, the PCT is not required to assess the seriousness of the breach as the PCT has the right to terminate if it is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the notice period. However the PCT has terminated under paragraph 71(6) of the Regulations, which does require the PCT to assess the effect of the breaches. In any case, for the reasons given in 3.36 above the PCT did not have a right to terminate under paragraph 71(4), due to it failing to assess the steps taken by the Applicant at the end of the notice period.

3.42 The PCT has terminated the Agreement under paragraphs 71(6) and (7) to the Regulations. These paragraphs are as follows:

"(6) If, following a breach notice or a remedial notice, the contractor—

(a) repeats the breach that was the subject of the breach notice or the remedial notice; or

(b) otherwise breaches the agreement resulting in either a remedial notice or a further breach notice,

the Relevant Body may serve notice on the contractor terminating the agreement with effect from such date as may be specified in that notice.

(7) The Relevant Body shall not exercise its right to terminate the agreement under sub-paragraph (6) unless it is satisfied that the cumulative effect of the breaches is such that the Relevant Body considers that to allow the agreement to continue would be prejudicial to the efficiency of the services to be provided under the agreement."

3.43 The PCT therefore needs to show that the cumulative effect of the breaches is such that to allow the Agreement to continue would be prejudicial to the efficiency of the services. In order to consider this the whole course of dealings between the parties should be taken into account. The PCT has given sufficient evidence that the Applicant was in breach of the Agreement since 2008. Complaints have been received from patients throughout the term and record checks have shown that the Applicant has not acted in accordance with the provisions of the Agreement. Based on the representations of both parties it is clear that there is no dispute of the fact the Applicant was in breach and failed to remedy the breach. On this basis the PCT did have a right to terminate under paragraph 71(6). However, the PCT had to demonstrate that the breach satisfies paragraph 71(7) in order to exercise that right.
3.44 The PCT gave due consideration to the decision to terminate. It has demonstrated its wish for any expiry or termination to be evidence-based. Notwithstanding the appropriateness of the material reviewed by the Panel (which appears to be based on claims made before the Remedial Notice was served), the PCT acted fairly in presenting evidence to be evaluated by the Panel before deciding to terminate. However, the decision of the Panel should not be viewed in isolation from the preceding conduct of the PCT in relation to the breaches of the Agreement.

3.45 The PCT has been aware of all the breaches identified in the termination notice throughout the term of the Agreement. For example a potential breach of clause 47 was notified to the Applicant as far back as 2008. However the only breaches the PCT chose to pursue on a formal level were those in the Remedial Notice. Any potential breaches in respect of splitting courses of treatment, inappropriate claims or patient records as identified by the DPA record check, the PCT Performance Screening Group and the BSA report were not included in the Remedial Notice. I am aware that these breaches all relate to the same nature of conduct by the Applicant however by not including these expressly in the Remedial Notice the Applicant was not given the opportunity to remedy these breaches at the time of the Remedial Notice. The Applicant was only under an obligation to remedy those breaches identified in the Remedial Notice. Whilst (under clause 349 of the Agreement) allowing these breaches to continue would not constitute a waiver, it does demonstrate that the PCT, when given the opportunity, did not treat these breaches in a serious manner.

3.46 The fact that the PCT failed to take action despite continuous notification of the breaches demonstrates the fact that the PCT did not consider the breaches as sufficiently serious. Nor was the Applicant notified of these breaches or given an opportunity to remedy them. Therefore, it seems to me that the decision to terminate is disproportionate in light of the manner and lack of seriousness with which the PCT has treated these breaches throughout the term of the Agreement.

3.47 The PCT has mentioned that it considered that it would be exposed to material financial loss if the Agreement was not terminated. However, this is not, of course, the grounds upon which the PCT purportedly did decide to terminate the Agreement. Although, therefore, it is not necessary for me to comment upon this point, in any event, the PCT has not demonstrated that it would be exposed to material financial loss if the Agreement was not terminated. The BSA report states that the financial risk to the PCT is “moderate”.

4. Determination

4.1 The PCT has evidenced that there was a continuing breach of the Agreement. However, the PCT did not adequately communicate this to the Applicant. On this basis the Applicant did not have sufficient information to evidence that the PCT considered her as remaining in breach of the Agreement (and why) or to remedy further breaches to the Agreement. Whilst numerous breaches were identified by the PCT the Applicant was only notified of the need to remedy those specifically identified in the Remedial Notice.

4.2 Whilst record checks were undertaken there is no evidence that these were conducted in order to assess compliance with the Remedial Notice. The fact that these record checks were used by the PCT to assess compliance with the Remedial Notice was not adequately communicated to the Applicant.

4.3 The decision to terminate was disproportionate as the evidence demonstrates that the PCT did not treat the conduct of the Applicant in a sufficiently serious manner, despite evidence throughout the Agreement that the Applicant was in breach, to allow the PCT to deem the cumulative effect of the breaches such to warrant termination under paragraphs 71(6) and (7) of the Regulations. Given the very serious impact that termination has for the Applicant it is essential that the PCT follows the correct
procedure in terminating the Agreement. The PCT had sufficient opportunity, particularly following the 2010 record check, to alert the Applicant to the potential termination of the Agreement and/or serve further remedial notices. However the PCT failed to implement the findings of this record check and its correspondence to the Applicant was such as to allow her to be entitled to believe the matter closed in April 2010. In its delay in taking action on the findings of the 2010 record check which demonstrated non-compliance with the Remedial Notice, the PCT did not follow the correct procedure to allow it to terminate the Agreement and by not then issuing further breach and/or remedial notices, during the following months when it was clear that there were continuing breaches and/or new breaches, the PCT demonstrated it did not deem these breaches as sufficiently serious.

LISA HUGHES
Appeals Manager