NHS Resolution

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20 October 2023

FILE REF: **SHA/26030**

DECISION MAKING BODY: **NHS ENGLAND & NORTH WEST LONDON INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GMS CONTRACTOR: **THE BUSH DOCTORS**
16 - 17 WEST 12 SHOPPING CENTRE
SHEPHERD'S BUSH
LONDON
W12 8PP

DISPUTE RESOLUTION – NATIONAL HEALTH SERVICE (GENERAL MEDICAL SERVICES CONTRACT) REGULATIONS 2015

RE: NON-REIMBURSEMENT OF SERVICE CHARGES

1. Outcome

1.1 The Commissioner has correctly applied the 2004 Directions to the claim for reimbursement by the Contractor of service charges from the period of 2013 to 2021 and that under those Directions no further amounts are payable in accordance with Directions 46, 47 and 48.

1.2 No interest is payable as no amounts are due to the Contractor.

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RE: NON-REIMBURSEMENT OF SERVICE CHARGES

1. INTRODUCTION

1.1 The above Contractor referred the dispute in relation to its General Medical Services Contract for dispute resolution under the provisions of Regulation 83 of the National Health Service (General Medical Services Contracts) Regulations 2015 (the "Regulations").

1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2. APPLICATION FOR DISPUTE RESOLUTION

2.1 By email dated 16 May 2023 the Contractor applied, to NHS Resolution, for dispute resolution.

2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute:

2.2.1 Email dated 16 May 2023 from the Contractor addressed to NHS Resolution, together with enclosures;

2.2.2 Email dated 22 May 2023 from the Contractor addressed to NHS Resolution, together with enclosure;

2.2.3 Email dated 28 May 2023 from the Contractor addressed to NHS Resolution;

2.2.4 Email dated 12 July 2023 from the Commissioner addressed to NHS Resolution;

2.2.5 Emails dated 17 July 2023 from the Contractor addressed to NHS Resolution, together with enclosures;

2.2.6 Email dated 29 July 2023 from the Commissioner's representative addressed to NHS Resolution, together with enclosures;

2.2.7 Emails dated 7 August 2023 from the Contractor addressed to NHS Resolution, together with enclosures;

2.2.8 Email dated 22 August 2023 from the Commissioner's representative addressed to NHS Resolution, together with enclosures; and

2.2.9 Emails dated 30 August 2023 from the Contractor addressed to NHS Resolution.

3. PARTIES SUBMISSIONS

The Contractor's application

3.1 The Contractor's email to NHS Resolution dated 16 May 2023 stated:

3.1.1 "Please find attached documents in relation to an appeal for service charge reimbursement at The Bush Doctors, E85055. The last attachment "20230511 Letter to Bush Doctors" details the outcome of local dispute resolution which is unsatisfactory from the surgery's perspective given the circumstances described in the other materials."

Representations

The Commissioner's representations

"**Introduction**

3.2 These submissions are made on behalf NHS North West London ICB (formerly in this matter Hammersmith & Fulham CCG) ("**the Commissioner**"), acting by delegated authority from NHS England (formerly the NHS Commissioning Board).

Summary

3.3 The Commissioner invites Primary Care Appeals to dismiss this referral by the Contractor and conclude that no sums are payable to the Contractor on the following grounds:

3.3.1 The Contractor is long out of time to challenge the decision by the Commissioner to stop reimbursing sums previously paid by the PCT;

3.3.2 Applying the Directions, the application for reimbursement would result in no sums payable to the Contractor;

3.3.3 The Contractor's reliance on the Rookery Decision by Primary Care Appeals is misguided and does not assist it. That decision was on materially different facts in a specific situation not relevant here. Rather, the Commissioner is correctly applying the Premises Costs Directions.

Factual background

3.4 H&F Partnership ("**the Contractor**") is a large multi-site GP Partnership which includes Practice premises at 16-17 West 12 Shopping Centre, Shepherds Bush, London, W12

8PP ("**the Premises**"). The Contractor provides primary medical services from the Premises under the name "The Bush Doctors".

3.5 The Premises form part of the "West 12" (or "W12") Shopping Centre, which is owned and operated by Land Securities Group plc and its subsidiaries ("**the Landlord**"). Although the postal address of the Premises is 16-17 West 12 Shopping Centre, the Contractor has the benefit of two leases – one of Unit 15, and one of Units 16 and 17 ("**the Leases**").

The Service Charge

3.6 It is common ground that for the purpose of Premises Costs Directions Direction 31, the Leases are approved leases, and that the Contractor is entitled to rent reimbursement in respect of them. The Leases are in materially identical terms.

3.7 The dispute concerns whether, and to what extent, the Contractor is entitled to the additional reimbursement of running costs, namely service charges, in accordance with Directions 46 and 47.

3.8 The Contractor states (and the Commissioner accepts) that Hammersmith and Fulham PCT agreed to reimburse the Contractor for some or all of their service charges until March 2013 (but see paragraph [3.15] below). At the time responsibility for reimbursement was transferred from Hammersmith and Fulham PCT to the Hammersmith & Fulham CCG, reimbursement ceased, i.e. from 1 April 2013.

3.9 The Contractor challenges the cessation of reimbursement of service charges from 2013 onwards and claims the full amount of those charges for part of the 2013/14 financial year and for every year thereafter.

Dispute History

3.10 The present Contractor was formed by the merger of three partnerships in 2017. The matter of service charges was first raised by the Contractor with the Commissioner in or around November 2019, and the Commissioner has treated them as having made an application for reimbursement as of that date ("**the Application**").

3.11 By email dated 7 June 2022, the Contractor applied to NHS Resolution for dispute resolution on the basis that the Application had not yet been decided and the matter was given File Reference SHA/24723. On 3 August 2022, NHS Resolution confirmed they were unable to accept the application for NHS Dispute resolution given local dispute resolution was not exhausted. Case SHA/24723 was closed.

3.12 On 11 May 2023, the Commissioner wrote to the Contractor regarding the Application. The Commissioner's response was two-fold:

3.12.1 First, the Commissioner reserved its view on various aspects of limitation, and other respects in which the Application was otherwise out of time; and

3.12.2 By reference to the 2021/22 service charge year, the Commissioner explained the basis on which it had concluded that the amount which was properly due to the Contract by way of reimbursement (so would be so due if not for the foregoing) was nil.

3.13 On 13 July 2023, NHS Resolution wrote to the Commissioner to confirm that it had (on 16 May 2023) received a further application for dispute resolution, with File Reference SHA/26030. The parties are in agreement that local dispute resolution has now been exhausted, and the matter should be considered by Primary Care Appeals.

Response to the Contractor

3.14 The Contractor has previously referred the Commissioner to the decision of the then PCT between c.2008 and 2013 to reimburse the same or similar sums as presently applied for ("**the PCT Argument**").

3.15 The Contractor has provided copy invoices, indicating that the PCT did reimburse some or all of the service charge incurred by the Practice up to April 2013. It is however not clear what the PCT actually decided, and therefore what decision the Commissioner is being asked to apply. The Commissioner observes that the PCT had a number of options when considering providing financial assistance to the Contractor, including temporary financial assistance or assistance offered on a reducing basis, the present application of which would not assist the Contractor. The copy invoices do not adequately capture this information.

3.16 In any event, the Commissioner does not accept that it is bound to follow the decision of the PCT in this matter. Instead, the Commissioner is required to determine any application (including the Application) on its merits, and in accordance with the Premises Costs Directions themselves. Any other result would place the Commissioner at risk of breaching its duty in applying the Premises Costs Directions.

3.17 Whether or not the PCT reimbursed sums to the Contractor is, in effect, irrelevant to this dispute. The Commissioner is not bound by the PCT decision and in any event, as set out below, the Contractor is out of time to dispute the Commissioner's action in not reimbursing sums in 2013/14 and thereafter (which the Contractor was or ought reasonably to have been aware of at the time).

Limitation

3.18 In accordance with Regulation 83 of the NHS (GMS Contracts) Regulations 2015 matters must be referred to NHS Resolution for dispute resolution before the end of the period of three years beginning with the date on which the matter giving rise to the dispute occurred or should reasonably have come to the attention of the referring party.

3.19 The Commissioner submits that in this case, the "matter giving rise to the dispute" was the Commissioner's decision in 2013 to cease reimbursement. It follows that the Application is either wholly out of time, or large parts of it are so out of time.

3.20 Without prejudice to the generality of the foregoing, the limitation issue is most acute in respect of the PCT Argument. If the Contractor's suggestion is that the Commissioner is bound to follow the decision of the PCT, then the matter giving rise to the dispute was unambiguously the failure to reimburse those sums in 2013/14, significantly more than 3 years before the reference to NHS Resolution for dispute resolution. The Contractor was aware, or ought reasonably to have been aware, that the service charges were not reimbursed in 2013/14. The Contractor's referral for dispute resolution is out of time and the Contractor is not entitled to the sums sought.

3.21 Nevertheless, the Commissioner has, for the purpose of providing a suitably complete response, undertaken a thorough consideration of the Application on its merits, in the alternative.

The Leases

3.22 Clause 3(2) of each of the Leases require the Contractor:

3.23 "*to pay to the Landlord by way of further and additional rent a fair and reasonable proportionate part (as hereinafter provided not exceeding* [the Prescribed Percentage] *of the expenses and outgoings incurred by the Landlord in performing and observing the covenant on the Landlords part* [sic] *contained in Clause 4 hereof (including payments made to any managing agents appointed under sub-clause 5 of that Clause in satisfaction of their reasonable and proper charges) such further and additional rent being subject to the terms and conditions set out in the Third Schedule hereto.*

"t**he Service Charge**"

3.24 The Prescribed Percentage is, in respect of Unit 15, 0.695% and in respect of Units 16 and 17, 1.291%.

Submissions

3.25 *Direction 53*

3.26 In accordance with Direction 53, the Commissioner may only grant an application for reimbursement of ongoing premises costs if the application is made within six years of the premises costs to which the application relates falling due.

3.27 In this case, the Application was made in November 2019 and the Commissioner can only grant the Application in respect of premises costs incurred in or after November 2013. Any costs within the period between 1 April 2013 and November 2013 therefore fall outside the scope of the Application.

3.28 *Direction 46*

3.29 Direction 46 states that:

(1) Where –

a. A contractor is in receipt of payments pursuant to this Part in respect of leasehold rental costs or borrowing costs, or by way of notional rent payments;

b. The contractor actually and properly incurs the costs which are or relate to:

i. Business rates,

ii. Water and sewerage charges,

iii. Charges in respect of the collection and disposal of clinical waste, or

iv. A utilities and services charge which covers the matters in paragraph (2);

c. Those costs are not covered in the other payments that the contractor is receiving pursuant to these Directions, and

The Contractor makes an application to the Board for financial assistance towards meeting any or all of these costs, subject to direction 47, the Board must consider that application and, in appropriate cases (having regard, amongst other matters, to the budgetary targets it has set of itself), grant that application.

(2) The utilities and services charge in paragraph (1)(b)(iv) –

a. May include a service charge under a lease or a charge levied under separate arrangements made by a contractor which is an owner-occupier,

b. Must cover–

i. Fuel and electricity charges,

ii. Building insurance costs,

iii. Costs of internal or external repairs, and *iv. Plant, building and grounds maintenance costs.*

3.30 It is common ground that the Contractor is in receipt of payments pursuant to that Part in respect of leasehold rental costs and the Service Charge is not covered in the other payments that the contractor is receiving pursuant to these Directions. The Commissioner has therefore considered the Application on the basis that the Contractor would be entitled to reimbursement of those amounts referred to in sub-paragraph b, unless those amounts are excluded by Direction 47 (in an "appropriate case"). Here, Direction 47 requires the deduction of sums sought by the Contractor.

3.31 Furthermore, the Commissioner believes it common ground that Application does not include any amounts within 46(1)(b)(i) to (iii) (save potentially as set out at paragraph [3.44] below), but does consist of a "utilities and services charge" within 46(1)(b)(iv), covering the matters at 46(2)(b)(i) to (iv).

3.32 In other words, the Commissioner must reimburse:

3.32.1 the full amount of the Service Charge "actually and properly incurred";

3.32.2 except to the extent:

3.32.2.1Direction 47 and

3.32.2.2Direction 48 apply; and

3.32.3 subject to consideration of whether or not it is an "appropriate case".

3.33 The Commissioner here notes the Contractor's reference to the decision of Primary Care Appeals in SHA/20000 ("**the Rookery Decision**"). We note that the decision is not binding on Primary Care Appeals. The Rookery Decision can be distinguished from the current situation. In that case, NHSE has specifically approved certain costs (the Commissioner submits here it was not required to do so). The Rookery Decision notes that the form of lease in that case was unusual. The Rookery Decision was a case where additional payment was provided to the contractor in relation to particular costs "*for which* [the contractor] *maintains it derives no benefit*". The Rookery Decision indicates that in that case once NHSE paid reimbursement of certain items, it could not at its discretion then select years and items to pay. Rather, it should apply the Premises Costs Directions.

3.34 In this case, the Commissioner is properly applying the Directions and concludes that no sum is payable to the Contactor. The unusual decision in the Rookery appears to have come about as additional funding to support the contractor with in its particular circumstances was erroneously provided as service charge reimbursement rather than, for example, 'resilience funding' or financial support under another Direction or other power of the commissioner. The Contractor's attempt here to seek recovery of sums is misguided and not in line with the Directions; it is not actually supported by the Rookery Decision.

3.35 *Actually and properly incurred*

3.36 The Commissioner may only reimburse amounts which were properly due and payable by the Contractor to the landlord under the terms of the Leases. Two points arise:

3.36.1 It appears that the Landlord has charged the Contractor amounts in excess of the Permitted Percentage. By way of illustration, in the 2021/22 service charge year, the total service charge for the shopping centre was £1,524,782, apportioned as to Unit 15 £7,535.29 (0.49%) and to Units 16 and 17 £21,427.91 (1.41%). The total Service Charge for that year was therefore £28,963.20, when the most the Landlord was entitled to charge appears to have been £27,220.23.

3.36.2 It appears that the Landlord has charged the Contractor amounts which do not fall within the clause 3(2) of the Lease. The Landlord is not required to market the shopping centre, but the sum of £257.45 nevertheless appears to have been charged to the Contractor in circumstances where the Contractor (as a provider of primary medical services) does not benefit from such marketing and promotion.

3.37 Absent any further consideration (addressed below), the maximum amount to which the Contractor would potentially be entitled for the 2021/22 year would therefore be **£26,962.78**. However, Direction 47 requires deductions which here reduce the amount to nil.

3.38 *Direction 47*

3.39 Direction 47 states that:

The Board must deduct from any amount that it would otherwise be required to pay in respect of a service charge pursuant to an application of the type mentioned in direction 46–

a. An average (calculated on the basis of the previous year's costs) amount that the contractor paid in respect of –

i. Fuel and electricity charges,

ii. Insurance costs,

iii. Cost of internal or external repairs, and

iv. Plant, building and grounds maintenance costs,

calculated by reference to the same time period as the period in respect of which the service charge is payable; or

b. If suitable and sufficient information is not (or does not become) available) to calculate the average referred to in paragraph (a), 40% of the amount otherwise payable

3.40 Direction 47 therefore requires the deduction of sums relating to:

3.40.1 Fuel and electricity charges,

3.40.2 Insurance costs,

3.40.3 Cost of internal or external repairs, and

3.40.4 Plant, building and grounds maintenance costs.

3.41 Direction 47 allows for a situation where the composition of the "utilities and service charge" for the year in question would not yet be known but sums in respect of the items at Direction 47(a) are to be deducted. Here, the Contractor has provided the Commissioner with the service charge breakdowns of sums for these items required to be deducted.

3.42 The Commissioner has applied the above principles to each full year within the Application and the results of that Application are reflected in the Schedule to these Representations. 2013/14 has not been included, pending further consideration of how the charges incurred should properly be apportioned across the year.

3.43 For example, as noted above, the total Service Charge for that year was £28,963.20 and the Contractor's Application is understood to be in that amount. However, having assessed the information provided by the Contractor in order to deduct sums required by Direction 47:

3.43.1 £1,842.26 relates to "Fuel and electricity charges" within Direction 47(a)(i);

3.43.2 £79.33 relates to "Insurance costs" within Direction 47(a)(ii); and/or the "cost of internal or external repairs" within Direction 47(a)(iii), depending on further information;

3.43.3 £5,224.89 relates to the "cost of internal or external repairs" within Direction 47(a)(iii); and

3.43.4 £21,581.74 relates to "Plant, building and grounds maintenance costs" Direction 47(a)(iv).

3.44 If the correct starting point is £26,962.78 (as suggested above) then the deduction of these amounts from the amount claimed (as required by Direction 47) would produce a negative result, i.e. the Contractor is not entitled to any reimbursement. If instead they were deducted from £28,963.20, along with £257.45 for marketing and promotions, they would leave the sum of £42.08; this relates to a 'water' charge; it is not clear to what this relates and as such whether it is a charge which the Landlord is permitted to seek from the Contractor or not). The Commissioner has treated this as potentially within Direction 46(1)(b)(ii), as a water and/or sewerage charge and proceeded on that assumption, pending evidence to the contrary. This is subject to consideration of Direction 48 below. The result is similar for each year.

3.45 *Direction 48*

3.46 Direction 48 requires that the Commissioner abate the amount paid under Directions 46 and 47 by any amount received by a third party which is "*required by any agreement… to make or makes any contribution towards any recurring premises costs…"* which are the subject to the Application.

3.47 Included within the Service Charge is "Income from Commercialisation", i.e. contributions which third parties have made towards recurring premises costs which the Landlord has offset against the other items of the Service Charge. For example, in the 2021/22 year, these were £3,474, of which £64.54 was attributable to the Premises and should be abated in accordance with Direction 48.

3.48 In each case, the application of Direction 48 would reduce the amount payable by the Commissioner to the Contractor to zero.

Conclusion

3.49 For the reasons set out above, the Commissioner invites Primary Care Appeals to decide that the Contractor's referral to seek payment of additional sums is not upheld."

<u>The Contractor's representations</u>

3.50 "In response to your letter of 13 July 2023, we would like to summarise the various relevant documents which form the basis of our case referenced above.

3.51 The surgery initially wrote to Hammersmith & Fulham CCG (as was) on 9 November 2020. [copy attached]

3.52 In that letter, we provided reference to an NHS resolution case which was substantially the same situation and found in favour of the surgery. "Dr Jackson and partners". [copy attached]

3.53 In the determination outcome letter of that case paragraphs 2.3 and 3.3 describe the basis on which NHS Resolution found in favour of the contractor. Paragraph 4.1 describes the basis of the lease in the case and the key characteristics are very similar to Bush Doctors:

3.53.1 We are also in a retail shopping centre

3.53.2 Our lease expired over 10 years ago, and we are in “holdover”

3.53.3 The lease was for retail units to be used as an NHS GP surgery

3.53.4 We are subject to the same service charges on a pro rata basis as all the other retail tenants in the centre

[a copy of our original lease is attached from 1995]

3.54 Our letter of 9 November 2000 also included 2 documents which together demonstrate that the surgery was receiving reimbursement from the PCT (as was) in 2008 for both the rent and the service charge [2x documents from 2008 attached]

3.55 In October 2021 we provided a full reconciliation going back to 2013 showing the complete list of service charge invoices from the landlord which the surgery had paid, totalling £257,113. Our records do not cover the period between 2008 and 2013 and so no claim was made for that period. We think that the service charge may have continued to be reimbursed until 2013 when the NHS Premises Directions were updated. Obviously, we have also continued to incur service charge costs since providing the reconciliation. [copy of reconciliation attached]

3.56 NW London ICB wrote to us on 11 May 2023 and the table on page 5 indicates that their view is that nil reimbursement is due. NHS Resolution has a copy of this letter.

3.57 Our contention is that we were being reimbursed for the service charge up to at least 2008, and probably up to 2013, but that since then, we have not been reimbursed. Furthermore, our lease and premises situation is substantially the same as that in the case of Dr Jackson & Partners.”

Observations

The Commissioner’s observations

3.58 “These are the Commissioner’s observations on the Contractor’s submissions dated 17 July 2023 (**“the Contractor’s Submissions”**). The Contractors’ Submissions (understandably) repeat the points previously made by the Contractor to the Commissioner in direct correspondence, and which have therefore already been addressed in the Commissioner’s own submissions.

3.59 Nevertheless, for ease of understanding, the Commissioner addresses them again in outline here. Paragraph numbers indicated in square brackets are references to paragraphs within the Commissioner’s Submissions.

Previous decision SHA/20000 (“the Rookery Decision”)

3.60 The Contractor refers to a previous decision, SHA/20000, by reference to the contractor, Dr Jackson and Partners. It is referred to in the Commissioner’s submissions by reference to the property it concerned, the Rookery.

3.61 The Commissioner has applied the 2013 Directions in a way which is consistent with the legal principles in the Rookery Decision, including for example sums that would be deducted under Direction 47. The Contractor’s Submissions do not identify any error in the Commissioner’s decision or reasons, other than they disagree with the outcome.

3.62 The Contractor relies on the Rookery Decision primarily on the basis of that outcome, i.e. that the Contractor understood that the Dr Jackson and Partners were a GP practice in a shopping centre and had become entitled to additional sums in reimbursement as a result of the Decision, and therefore the Contractor, as a GP practice in a shopping centre, should receive additional sums. However, the Rookery Decision is consistent with the Commissioner’s approach in this case, i.e. that the Directions are to be applied. In any event the Commissioner does not accept that the cases are factually similar [30].

Payments from the PCT

3.63 The Contractor refers to payments made by the PCT to the Practice in 2008/2009 (“the Earlier Payments”), although it lacks proper records of these. The implication of the Contractor’s Representations is that the Commissioner is bound to make similar payments. The Commissioner rejects any such inference, on the basis that:

3.63.1 The Commissioner does not accept that it is bound to accept the previous decision of the PCT [15]. This would appear to contradict the requirement placed on the Commissioner consider each application in accordance with the Directions. For example, if the PCT had previously concluded that no amounts were payable, it would not be open to the Commissioner to reject the application on that basis alone (even though the Contractor argues that the reverse should apply);

3.63.2 The basis for Earlier Payment is unclear, for example, under what Direction or statutory power they were made, or if they were offered as transitional assistance; therefore it unclear to what the Commissioner is being ask to agree [14];

3.63.3 No evidence having been provided for the period between 2008 to 2013, i.e. to challenge the inference that the PCT ceased to make the Earlier Payments well before the period covered by the Application – the position is unclear;

3.63.4 Even if the Earlier Payments continued to 2013 (which is unclear), their cessation in 2013 (at the latest) would clearly be the matter giving rise to the present dispute, and the Contractor is well outside the period of time allowed for disputing it (3 years) on the basis that the Earlier Payments entitle them to payment now (which is not accepted) [16 *et seq.*]. If payments ceased in 2009, that would also, of course, be well out of time.

3.64 For the reasons set out above, the Commissioner invites Primary Care Appeals to decide that the Contractor’s referral to seek payment of additional sums is not upheld.”

4. CONSIDERATION

4.1 Since 1 July 2022, Integrated Care Boards have taken on delegated responsibility for the commissioning of primary medical services. NHS Resolution will issue this decision to the Commissioner which has responded to this dispute.

4.2 As part of this consideration of the application for NHS dispute resolution, I required an up-to-date version of the contract in dispute containing all variations agreed since the contract was signed. This was provided and has not been disputed by the Commissioner.

4.3 I note that, having considered both parties Representations, this application for NHS dispute resolution relates to the non-reimbursement of service charges incurred by the Contractor from April 2013 to November 2019. I consider that there are three separate elements to consider in relation to this application for dispute resolution:

4.3.1 In relation to the decision by the Commissioner, taken at some point between 2008 and 2013, to cease reimbursement of the service charges, and if this decision is suitable for dispute resolution due to the applicable limitation period;

4.3.2 Whether any of the sums incurred from April 2013 are suitable for reimbursement; and

4.3.3 On the application of the decision of Primary Care Appeals in SHA/20000 ("**the Rookery Decision**").

4.4 I will consider each of these in turn, starting with the question of limitation.

4.5 **Limitation**

4.6 I note the provisions of Regulation 83(4) of the Regulations which states that:

"*Where a party wants to refer a dispute, it must send a request under paragraph (3) to the Secretary of State before the end of the period of three years beginning with the date on which the matter giving rise to the dispute occurred or should reasonably have come to the attention of that party*."

4.7 I am satisfied that Regulation 83(4) of the Regulations sets the limitation period applicable to the GMS Contract between the parties.

4.8 I note that in its Representations, the Commissioner has raised the issue that "*the matter giving rise to the dispute*" should be considered as the Commissioner's decision to cease reimbursement, rather than the failure to reimburse for the years following. This is due to the reasoning by the Contractor in relation to the fact that in 2008 service charges were reimbursed – as per the evidence provided – by the Hammersmith and Fulham Primacy Care Trust. Therefore, these should have continued to be paid as they were before.

4.9 I consider that the Commissioner is correct, in that, if this line of reasoning is followed then any decision to make service charge payments must stem from the fact that the decision by the Commissioner to cease making these payments was incorrect.

4.10 I note that the Contractor has referred the dispute to NHS Resolution in its application dated 16 May 2023. I also note that the Contractor had previously applied to NHS Resolution for dispute resolution on 7 June 2022. This application was rejected due to the fact that local dispute resolution had not been exhausted.

4.11 I have considered whether the dispute has been referred within the given limitation period. I note that the application must be referred "*before the end of the period of three years beginning with the date on which the matter giving rise to the dispute occurred or* ***<u>should reasonably have come to the attention of that party</u>***" (my emphasis).

4.12 I cannot be certain, from the information provided to me, of the exact date from which the matter giving rise to the dispute should reasonably have come to the attention of the Contractor. I note that the Contractor has stated that "*service charge may have continued to be reimbursed until 2013*". However, it does not have records from 2008 to 2013 so it is unclear at what point service charges actually ceased to be reimbursed and hence when the decision was taken.

4.13 Nevertheless, I note that in the Contractor's previous application it stated:

"*We have known about the non-payment since 2013, but only raised a formal complaint with our CCG after finding the previous case settled by NHS Resolution*."

4.14 The complaint being referred to was raised in November 2020, as per the statements by the Contractor. Given that the Contractor, by its own admission, became aware of the decision not to reimburse service charges in 2013 then any application for dispute resolution needed to be made before the start of 2017 at the very latest.

4.15 For these reasons, I am not satisfied that the matter giving rise to the dispute has been referred for NHS dispute resolution within the period of three years beginning with the date on which the matter should reasonably have come to the attention of the Contractor. Therefore, any dispute relating to the decision to cease payments is out of time.

4.16 **Reimbursement**

4.17 I note that there are two possible Directions which could apply:

4.17.1 the National Health Service (General Medical Services – Premises Costs) (England) Directions 2004 (the "**2004 Directions**") 2004; or

4.17.2 the National Health Service (General Medical Services – Premises Costs) Directions 2013 (the "**2013 Directions**").

4.18 Neither party has provided any representations to indicate why the 2013 Directions should apply. I consider that Direction 56(1) of the 2013 Directions require that once any payments are made under the 2004 Directions they will continue to be paid under that version of the Directions. It appears from the evidence provided that the decision to reimburse the Contractor's rent was taken by the PCT in 2008. Since service charge payments are in addition to rental payments, as per Direction 46, and rent was paid prior to 2013, I consider that the 2004 Directions apply.

4.19 I note that in the Commissioner's original decision in regard to the reimbursement claim by the Contractor it noted the possibility of the application of the 2004 Directions and considered that it made no difference to the outcome.

4.20 With regard to the limitation of the application for reimbursement, I note that Direction 58 of the 2004 Directions indicates:

"[The Commissioner] *must only consider or grant an application of the types mentioned in these Directions if the application is made within six years of the premises costs to which the application relates falling due."*

and the Contractor's application was made in November 2019.

4.21 Therefore, I determine, in agreement with the Commissioner, that any service charges between April 2013 and November 2013 are outside of the scope for reimbursement under the 2004 Directions.

4.22 This leaves the service charges from November 2013 onwards. I note that the reasoning put forward by the Commissioner for non-reimbursement of the service charges is that on proper application of Directions 46, 47 and 48 of the 2004 Directions there would be no amount remaining as suitable for payment.

4.23 The Contractor has not provided any Representations that dispute this fact, other than pointing to the Rookery Decision as supporting its application.

4.24 I note that Direction 46 allows for, subject to Direction 47, the payment of "*a utilities and services charge*" by the PCT (now the Commissioner). Therefore, these payments would appear to be suitable for an application for reimbursement by the Contractor.

4.25 However, I note that the Commissioner has stated that some of the charges incurred by the Contractor were not "*actually and properly*" incurred under the terms of the lease held by the Contractor. I note that this is reflective of the wording in Direction 46, which states "*the contractor actually and properly incurs the costs which are or relate to* [a service charge]."

4.26 It is clear that the Contractor has actually incurred the costs, therefore it is the "properly" element that is in dispute. I note that the first part raised by the Commissioner is in relation to the terms of the leases the Contractor holds for unit 15 and units 16 and 17 (the "**Leases**"). Under the Leases, the landlord is only entitled to charge a maximum prescribed percentage of the landlord's costs for any given year in relation to service charges, this is 1.291% for units 16 and 17 and 0.695% for unit 15. The Commissioner states that, based on the breakdown of the service charges provided, that the service charges exceed this amount. I note I have been provided the terms of the lease for units 16 and 17 but not those for unit 15.

4.27 In order to show that the prescribed percentages had been exceeded the Commissioner's representations provide both the fees from units 16 and 17 and unit 15 for 2021/2022 and the total building service charge. I have not had sight of the lease for unit 15, therefore it is unclear if the prescribed percentage for maximum service charges operates in the same way as it does for units 16 and 17. However, the Commissioner has stated that the service charge for unit 15 was only 0.45% of the total service charge, and therefore within the purported limit. The Commissioner has stated that 1.41% of the landlord's total service charge was incurred by units 16 and 17 for 2021/2022 and which exceeds the 1.291% limit prescribed under the Leases.

4.28 I, therefore, consider that, based on the information before me, the maximum service charge payable by the Contractor under the Leases has been exceeded for the period 2021/2022 and may not be properly deemed "payable" as per Direction 46. However, I also note that the Commissioner has only included the total building costs for 2021/2022 as part of its representations. Therefore, I cannot consider whether the maximum service charge payable by the Contractor in relation to the Leases has been exceeded for other years for which the Contractor is claiming. I will, consequently, only take account of these amounts if, following my analysis of the rest of the service charges payments, there is an outstanding sum due to the Contractor by the Commissioner, that may be further reduced due to these amounts which surpass that which is allowed under the Leases.

4.29 The second amount that the Commissioner considers as not properly payable under Direction 46 are those relating to marketing and promotions, as listed in the service charge breakdown. The Commissioner has cited clause 3(2) of the Leases as excluding these. I note that clause 3(2) references clause 4 as setting out those items for which the landlord is entitled to charge. Clause 4 is wide ranging but does allow for the landlord in 4(2)(d):

> *"To provide such other services as shall from time to time reasonably be deemed necessary or desirable by the Landlord."*

4.30 I consider that it is at the very least possible for the landlord to conclude that marketing and advertising services are reasonably necessary or desirable. It does appear that, as a provider of medical services, this would not aid the Contractor. However, the Contractor does not appear to have disputed this with the landlord. Therefore, it appears to have accepted these charges as falling under clause 3(2). As such, they are properly payable under the Leases, and hence fall under the definition of service charges in Direction 46.

4.31 Consequently, I disagree with the Commissioner's suggestion that the marketing and advertising costs are not "*properly payable*" and determine them to be payable under the terms of the Leases.

4.32 This leads to me Direction 47, which indicates that, from any service charge applied for under Direction 46, certain deductions must be made:

" *an average (calculated on the basis of the previous year's costs) amount that the contractor (or, prior to 1st April 2004, the antecedent practice) paid in respect of–*

(i) fuel and electricity charges,

(ii) insurance costs,

(iii) costs of internal or external repairs, and

(iv) building and grounds maintenance costs,

calculated by reference to the same time period as the period in respect of which the service charge is payable"

4.33 I note that the Commissioner has provided, as part of its representations a complete breakdown of the application of Direction 47 to the service charges claimed by the Contractor. These have been labelled with the applicable deduction under Direction 47. I consider that these have all been properly applied to their respective costs.

4.34 I note that the 2004 Directions indicates that an average should be applied, however the exact amounts are available since these payments were incurred previously. Given the presence of accurate information that indicates the actual costs I do not consider it necessary to calculate an average, nor do I have the information available to me to do so. The Contractor has also not disputed this approach and I do not consider that it would lead to a more favourable outcome. Therefore, I determine that the Commissioner's approach is appropriate in the circumstances.

4.35 I note that this only leaves the water charges and the marketing and promotions costs as suitable for reimbursement under Direction 46. I have calculated this as a total of £1,419.89 broken down as follows:

4.35.1 £8.23 for water and £330.72 for marketing for 2014/2015;

4.35.2 £24.94 for water and £81.71 for marketing for 2015/2016;

4.35.3 £55.66 for water and £100.28 for marketing for 2016/2017;

4.35.4 £87.62 for water and £103.86 for marketing for 2017/2018;

4.35.5 £16.68 for water and £102.05 for marketing for 2018/2019;

4.35.6 £18.84 for water and £73 for marketing for 2019/2020;

4.35.7 £20.06 for water and £96.71 for marketing for 2020/2021; and

4.35.8 £42.08 for water and £257.45 for marketing for 2020/2022.

4.36 However, the Commissioner has also stated that there are further amounts that should be set off against this claim. This is under Direction 48 which requires that where the landlord of a premises:

> "*is required by any agreement (which includes a licence or a lease) to make or makes any contribution towards any recurring premises costs in respect of which* [the Commissioner] *is providing financial assistance to the contractor in accordance with this Part*"

Then the Commissioner must set off that contribution against the payments made to the Contractor.

4.37 Such payments are demonstrated in the service charge breakdown as "*income from commercialisation*" and is shown as a negative charge against the overall service charge. I note that this also has not been contested by the Contractor. Therefore, I determine that these amounts should properly be deducted from the amount I have calculated at paragraph 4.35. These amounts total £1,461.84. which reduces the amount owed to the Contractor under the 2004 Directons to nil.

4.38 Given that no amount is due to the Contractor I do not consider it necessary to consider any amounts that may have been charged by the landlord that exceed the prescribed percentage under the Leases to any further extent than I already have.

4.39 **Applying the Rookery Decision**

4.40 I note that the central element of the Contractor's representations is the Rookery Decision and its application to its current situation. I have also had regard to the Commissioner's statements regarding why it does not apply.

4.41 I consider that I am not bound by previous determinations by NHS Resolution and that each individual dispute should be determined on its own merits. I also consider that the facts of the Rookery Decision are not set out within the decision at great length, and that the finding in the decision is not that of repayment but that the Commissioner should reconsider the issue taking into account the matters raised.

4.42 I consider that there are two key passages of the determination:

"*I therefore determine that the Contractor is entitled to make an application for reimbursement of service charge actually and properly incurred up to 6 years before 22 March 2018.*"

and

"*Once the application is considered and approved, and subject to the deductions applicable in paragraph 47, the only parts of the claim which can be excluded are those which do not fall within categories which qualify for reimbursement under paragraph 46.*"

4.43 I consider that this approach has been expressly followed in this dispute. The Contractor's service charges from November 2013 onwards have been considered for reimbursement and the Commissioner has determined those that fall within Direction 46. Following this, the deductions applicable under Direction 47 have been applied.

4.44 I do not consider that the Rookery Decision sets out that all service charges that are incurred should be paid, ignoring the 2004 Directions. Therefore, I determine that the proper application of the decision does not result in any different determination from that which I have already arrived at.

5. DECISION

5.1 I determine that the Commissioner has correctly applied the 2004 Directions to the claim for reimbursement by the Contractor of service charges from the period of 2013 to 2021 and that under those Directions no further amounts are payable in accordance with Directions 46, 47 and 48.

5.2 I determine that no interest is payable as no amounts are due to the Contractor.

Head of Appeals
NHS Resolution