

28 December 2018

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FILE REF: SHA/19967

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DECISION MAKING BODY: NHS ENGLAND (CHESHIRE and MERSEYSIDE)

PMS CONTRACTOR: DR JOHNSON AND PARTNERS

PREMISES: WEAVERVALE PRACTICE,
HALLWOOD HEALTH CENTRE,
HOSPITAL WAY,
RUNCORN,
CHESHIRE, WA7 2UT.

DISPUTE RESOLUTION: NHS (PERSONAL MEDICAL SERVICES
CONTRACTS) REGULATIONS 2015

DIRECTIONS: NHS (GENERAL MEDICAL SERVICES – PREMISES
COSTS) DIRECTIONS 2004

RE: NOTIONAL RENT PARKING SPACES

1 Outcome

- 1.1 Main Building Spaces. I therefore determine that all the main building spaces should be the subject of reimbursement (on a 50:50 split with the sharing practice).
- 1.2 Extension Spaces. I therefore determine that these 12 spaces should qualify for reimbursement on the same basis as the main building space, that is in full without a proportionate deduction for space occupied by tenants (on a 50:50 split with the sharing practice).
- 1.3 If not already agreed, the parties should agree on the number of spaces at the Premises so that full reimbursement (at £250 per space) can be calculated.

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Unit 1-2020



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CONTRACTS) REGULATIONS 2015****DIRECTIONS: NHS (GENERAL MEDICAL SERVICES – PREMISES
COSTS) DIRECTIONS 2004****RE: NOTIONAL RENT PARKING SPACES****1 Introduction**

- 1.1 As PMS Provider, the above contractor has referred the matter for dispute resolution under the provision of Paragraph 95, Schedule 5 of the NHS (Personal Medical Services Agreement) Regulations 2004 or Paragraph 76 of the NHS (Personal Medical Services Agreement) Regulations 2015.
- 1.2 The NHS (Personal Medical Services Agreements) Regulations 2015 (the Regulations) came into force on 7 December 2015. The Regulations apply to an agreement to which the National Health Service (Personal Medical Services Contracts) Regulations 2004 applied immediately before this date. The contractor's PMS Agreement indicates a commencement date of 1 March 2005 and I therefore consider that the Regulations apply to this dispute.

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

2 The Following Points are relevant to this Application for Dispute Resolution

- 2.1 The contractor has applied to NHS Resolution for Dispute Resolution. The application relates to the reimbursement of notional rent in respect of disputed car parking spaces due on 1 July 2014. NHS England wishes to exclude spaces on the basis that they were excluded from reimbursement in previous settlements, or that they have not had NHS approval. The contractor maintains that in principle it should not be bound by a previous acceptance when it was unrepresented and that such previous acceptance was wrong on the basis of the relevant documents and that all spaces have approval so that the contractor is entitled to be reimbursed in full.
- 2.2 The Premises comprise a purpose built surgery extended twice with parking to the front and rear. Two practices occupy the Premises on the basis of 50:50 split which is accepted by both parties.
- 2.3 The contractor has appointed GP Surveyors (GPS) as its representative. NHS England has instructed the District Valuer (DV) to assess the current market rent.
- 2.4 Recurring premises costs such as notional rent payments are dealt with in the NHS (General Medical Services – Premises Costs) Directions. In principle these apply only to GMS contracts but in this case the parties have agreed that the Directions will apply.
- 2.5 I have had regard to the following documents (together with any enclosures and annexures) made available to me in consideration of this preliminary issue:
- 2.5.1 General administrative correspondence from NHS Resolution's file (including in relation to LDR);
 - 2.5.2 Letter contractor to NHS Resolution 17 July 2018;
 - 2.5.3 Letter GPS to NHS Resolution 13 August 2018;
 - 2.5.4 Letter NHS England to NHS Resolution 22 October 2018
 - 2.5.5 Letter NHS England to NHS Resolution 7 November 2018;
 - 2.5.6 Letter NHS England to NHS Resolution 13 November 2018;
 - 2.5.7 Letter GPS to NHS Resolution 29 October 2018;
 - 2.5.8 Letter GPS to NHS Resolution 5 November 2018;
 - 2.5.9 Email GPS to NHS Resolution 13 November 2018;
 - 2.5.10 Email GPS to NHS Resolution 6 December 2018;
 - 2.5.11 Letter NHS England to NHS Resolution 6 December 2018.

3 Statutory Framework

- 3.1 The Regulations apply in this case. Paragraph 76(1) of the Regulations, indicates with some exclusions, that the NHS dispute resolution procedure applies in the case of “any dispute arising out of or in connection with the agreement which is referred to the Secretary of State –

- (a) in accordance with section 9(6) of the Act (where the agreement is an NHS contract); or
 - (b) in accordance with paragraph 75(1) (where the agreement is not an NHS contract)."
- 3.2 I note that recurring premises costs such as rent payments are dealt with in the Directions. Part 5, paragraphs 41 states:
- "Recurring Premises Costs
- Notional rent payments
41. Subject to the following provisions of this Part, where a contractor that is an owner-occupier of its practice premises—
- (b) makes an application to [NHS England] for notional rent payments,
- [NHS England] must consider that application and, in appropriate cases (having regard, amongst other matters, to the budgetary targets it has set for itself), grant that application..."

4 Consideration

- 4.1 There is no dispute between the parties as to the reimbursement of notional rent for the main Premises. Additionally, there is no dispute about the appropriate level of reimbursement for each car parking space (£250). The dispute is about the number of car parking spaces for which the contractor should be reimbursed.
- 4.2 In its submissions. NHS England suggests there are 66 or 68 spaces in total. GPS suggest 80. For the purpose of this determination I do not need to make a final decision.
- 4.3 The dispute can be split into 2;
 - 4.3.1 Main Building Spaces. These are to the front of the Premises. Space within the Premises is let to Boots and the Secretary of State for Health (now Bridgewater Community Healthcare NHS Foundation Trust). The DV has calculated how much of the Premises is occupied by the tenants and how much by the contractor and apportioned the car parking spaces accordingly. NHS England is only prepared to reimburse notional rent in respect of the spaces that can be apportioned to the contractor.
 - 4.3.2 Extension Spaces. 12 spaces were created to the rear of the Premises when the Premises were extended in 2003. NHS England refuses to reimburse any of these spaces on the basis that there is no evidence that the spaces themselves were approved for reimbursement by the NHS body at the time of development.
- 4.4 In respect of each claim NHS England maintains that;
 - 4.4.1 Main Building Spaces. The DV has calculated that the contractor occupies 23% of the practice space and so should be entitled to be reimbursed for 23% of the car parking spaces. In support of this contention NHS England relies on an agreement on this basis reached in March 2013 between the contractor and the DV in respect of the 2011 notional rent (second paragraph of the second page of NHS England's letter of 22 October 2018). In turn this split was arrived at following consideration of the Bridgewater and Boots leases which gave the tenants the right to use spaces as designated by the contractor. NHS England does accept that the spaces have not been designated. There is a suggestion that 2 spaces were given to Boots but

there is no direct evidence to support this. NHS England points to the Boots branch web site which indicates that the branch has parking and disabled parking (letter to NHS Resolution 7 November 2018). NHS England expressed the view that it would be very unusual for community service providers like Bridgewater not to have agreed parking. NHS England does not provide any evidence with respect to any arrangements with Bridgewater at this practice.

4.4.2 Extension Spaces. NHS England submits that the DV cannot find any evidence that the additional spaces were given planning permission or PCT approval to qualify for reimbursement.

4.5 In its turn, GPS argues on behalf of the contractor;

4.5.1 Main Building Spaces. Having considered the provisions of the Boots and Bridgewater leases GPS submits that NHS England has misunderstood the basis upon which the tenants are entitled to use any parking spaces (paragraphs 2.10 and 2.11 of the amended Representations). The leases do not unconditionally entitle the tenants to use any spaces. The contractor has confirmed that no spaces are designated (paragraph 2.12), and although it accepts that the tenants use the car park it does not have the resource to monitor this (email from GPS to NHS Resolution 13 November 2018). In additional support of the contention that in these circumstances all spaces should be reimbursed GPS provides comparable evidence from nearby practices with similar tenant arrangements (paragraph 4 of the amended Representations). GPS maintains that the contractor should not be bound by the agreement reached in relation to the 2011 review as the contractor was unrepresented and without valuation expertise (paragraph 1.4.2 of the Observations).

4.5.2 Extension Spaces. GPS submits that the extension including the car parking spaces included in the planning application and that in absence of evidence to the contrary must have been approved for reimbursement. In paragraph 1.5.3 of the Observations the point is made that the "extension under the same planning application is not disputed and agreed to be included by NHS. We observe that it is difficult to accept the NHS approved only part of a planning application when they have no documents to demonstrate this".

5 Determination

5.1 In respect of each claim;

5.1.1 Main Building Spaces. I accept that the contractor accepted reimbursement for apportioned spaces in respect of the 2011 review but this was without representation or consideration of the terms of the leases. I am satisfied that the contractor should not be bound by this agreement in these circumstances. Further, I do not accept that the Boots and Bridgewater leases give the tenants rights to use parking spaces which would entitle NHS England to refuse reimbursement. The leases allow use as designated by the contractor and at the contractor's discretion (a designation that NHS England accepts has not been made) but do not grant any proprietary rights nor require any payment by way of rent or service charge in respect of spaces. The fact that the tenants use spaces and that Boots advertise the availability of undefined spaces at the centre does not constitute a designation. I accept that other nearby practices with similar tenant arrangements are treated in the way for which the contractor contends. **I therefore determine that all the main building spaces (which I believe to be 68, but see below) should be the subject of reimbursement (on a 50:50 split with the sharing practice).**

5.1.2 Extension Spaces. Although I have not been provided with any direct evidence, I am satisfied on balance that the extension spaces were approved for reimbursement along with the extended building space. I accept that the extension project had the backing and encouragement of the NHS (the letter of 24 October 2002 from The University of Liverpool). More directly, the letter of 15 February 2013 from NHS Halton and St Helens refers to an increase of parking spaces for which there was reimbursement (wrongly apportioned in that letter) when the additional spaces were built in 2003 (numbered para 2)) **I therefore determine that these 12 spaces should qualify for reimbursement on the same basis as the main building space, that is in full without a proportionate deduction for space occupied by tenants (on a 50:50 split with the sharing practice).**

5.2 If not already agreed, the parties should agree on the number of spaces at the Premises so that full reimbursement (at £250 per space) can be calculated.

Head of Primary Care Appeals