

Determination on Preliminary Issues

15 December 2020

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Merrion Way
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FILE REF: SHA/23390

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DECISION MAKING BODY: NHS ENGLAND
NORTH EAST & YORKSHIRE (YORKSHIRE & THE
HUMBER) (NHS England)

GMS CONTRACTOR: DR SAXENA

PREMISES: CAXTON HOUSE SURGERY
43 HIGH ST
GRIMETHORPE
BARNLEY, S72 7BB

DISPUTE RESOLUTION: NHS (GENERAL MEDICAL SERVICES CONTRACT)
REGULATIONS 2015

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

RE: NOTIONAL RENT REIMBURSEMENT

1. Outcome

- 1.1 I determine that the reimbursable space for the 2018 review should be based on the 2009 review (ground floor 98.83 m² and first floor 22.50 m²) and in addition, include the disabled toilet on the ground floor.
- 1.2 I direct that the parties should now undertake LDR in relation to the 2018 review on the basis of the reimbursable area as set out below in paragraph 5.8 of the determination. While there have been no trigger notices in relation to the 2012 and 2015 reviews, I encourage the parties to include these reviews in the LDR process as the most cost effective approach.
- 1.3 This referral will be stayed pending any application to Primary Care Appeals in relation to a valuation dispute.

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RE: **NOTIONAL RENT REIMBURSEMENT**

1. Introduction

- 1.1 As a former GMS Provider, the above Contractor has referred the matter of notional rent reimbursement for dispute resolution.
- 1.2 The NHS (General Medical Services Contracts) Regulations 2015 (the "Regulations") came into force on 7 December 2015. The Regulations apply to an agreement to which the National Health Service (General Medical Services Contracts) Regulations 2004 applied immediately before this date.
- 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. Background

- 2.1 The Contractor has applied to NHS Resolution for Dispute Resolution in relation to the level of notional rent to be reimbursed in relation to reviews due in 2012, 2015 and 2018.

- 2.2 As a matter of process, we have been provided with a notice triggering the 2018 Current Market Rent (CMR) review and nothing in relation to the two earlier reviews, which therefore cannot be a formal part of this referral. However they are intrinsically linked and I will give suggestions in relation to them.
- 2.3 The parties are unable to progress local dispute resolution (LDR) on the appropriate level of notional rent reimbursement because they cannot agree on the space to be included for reimbursement. It is a question of what areas within the surgery should be included, rather than of a measuring disagreement.
- 2.4 This determination deals with the question of the extent of reimbursable space as a preliminary issue. The parties were informed of this approach in the letter from Primary Care Appeals of 15 October 2020.
- 2.5 The Contractor has appointed GP Surveyors (GPS) as her representative. NHS England has appointed the District Valuer (DV) to advise on valuation issues.
- 2.6 I have had regard to the following documents (together with any enclosures and annexures) made available to me in consideration of this matter:
- 2.6.1 Administrative correspondence from NHS Resolution's file including emails from GPS from 9 September to 9 October 2020;
- 2.6.2 Application 14 September 2020;
- 2.6.3 Email exchanges between NHS Resolution and GPS from 18 September 2020 to 6 October 2020 including a file note of a conversation on 28 September 2020.
- 2.6.4 NHS England Representations 12 November 2020.
- 2.6.5 GPS Representations 12 November 2020.
- 2.6.6 GPS Observations 27 November 2020.
- 2.6.7 NHS England Observations 30 November 2020.
- 2.7 I have not been provided with a copy of the Contractor's GMS contract. I am informed that it was terminated on 31 August 2020. She did not keep a copy and no longer has access to NHS records. NHS England has accepted the existence of a contract. In these very limited circumstances I am prepared to progress with the referral, although I require both parties to continue to look for a copy of the contract and to provide it to me as soon as it may be found.

3. **Statutory Framework**

- 3.1 The Regulations apply in this case. Paragraph 83 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 Both parties accept that the 2004 version of the Directions applies to this dispute. I note that recurring premises costs such as rent payments are dealt with in the Directions at Part 5, paragraphs 31 onwards, with notional rent dealt with at paragraph 41.

4. Consideration

4.1 The parties were asked to agree floor plans and measurements for the surgery space to assist in consideration of this referral. That has not proved possible. The photographic schedule provided by GPS at Appendix Five of the Representations may have been useful had the photographs been labelled with the space they depicted.

4.2 For the 2006 and 2009 reviews the floor areas were 175.84 m² and 121.33 m² respectively. For the 2018 review NHS England worked from a basis of 103.83 m² (paragraph 4.2 of the Application).

Contractor

4.3 It is submitted on behalf of the Contractor that progress has not been made on the 2018 CMR review because NHS England has instructed the DV to exclude space from the reimbursement calculation which should be included (paragraph 2.5 of the Application). GPS contends that NHS England “have no discretion in unpicking/reducing floor area from an approved building and their initial areas” (paragraph 4.1 of the Application).

4.4 GPS forwarded to Primary Care Appeals on 28 September 2020 an email from 25 August 2020 to NHS England which stated that it attached “correspondence confirming that CCG/PCT have no discretion on pre-approved space within a building once accepted for reimbursement”. The correspondence was not attached and neither was it produced when Primary Care Appeals chased a copy (6 October 2020).

4.5 In paragraph 2.1 of its Representations GPS states “All rooms within the property have continued to qualify for notional rent reimbursement throughout the time of the contract and there is no basis for exclusion.” In addition “GP Surveyors understand that all space within the building has remained in use for General Medical Services and continued to qualify for rental reimbursement” (paragraph 2.3.5). GPS submits that once a surgery has been approved for reimbursement then all the building qualifies for reimbursement and continues to do so. Paragraph 2.2 contains an undated quote from an unnamed source “Once PCTs have agreed to reimburse recurring premises costs they must continue to do so...”. I assume that this quote is from the early 2010s at the latest, as PCTs are mentioned.

4.6 GPS contends that 175.84 m² (being 155.59 m² for the ground floor and 20.25 m² for the first floor) is the minimum reimbursable area (at paragraph 4.6 of the Application and 3.1 of the Representations), but claims at paragraph 4.7 of the Application 255.20 m² for review years 2012, 2015 and 2018 (being 155.59 m² for the ground floor and 99.61 m² for the first floor).

- 4.7 In its Representations GPS sets out the space that was included in the reimbursement calculation from 2006 to 2018 in paragraph 2.3. The square footage varies and reduces over time. There is very little detail of the rooms involved and which have been removed but in each case it is stated that the staff room on the first floor is excluded from the calculation. This is the wrong way round. In the email at Appendix One to the Representations it is stated that 20.25 m² on the first floor was the staff room as “The areas excluded at FF level were every room except the Staff Room.”
- 4.8 GPS notes that the 2009 review, based on a reduction in reimbursable space from the 2006 review of around 55 m² in relation to the ground floor, was accepted by the Contractor.
- 4.9 In its Observations, GPS expands on its position in relation to the 2009 review in response to NHS England’s Representations claiming that the Contractor did not raise a dispute. In paragraph 2.1.1 GPS asserts that the Contractor “has been appealing the CMR since 2014”. At paragraph 1.3 it asserts “Dr Saxena contested the 2009 valuation in 2016 and requested an appeal straightaway.” I am referred to the documents at the Appendix. I am hampered in my review by the emails where the sender and/or recipient are redacted, although I note that these emails report that “some of the upper part of the building was not part of the surgery”.
- 4.10 I note also that the CMR notification for the 2009 review is from April 2016 as is correspondence referring to an appeal process if the Contractor wishes to object to the reviewed figure. GPS refers to an email from VL of NHS England of 25 June 2018 as evidence that the CCG accepted that there could be no change to the reimbursable space. Although the wording is unclear, I think that it is unlikely that this is the meaning of Ms L’s email. It is much more likely that she intended to convey the fact that there had been no change to the space since the 2009 changes.
- 4.11 GPS claim it is wrong to exclude the first floor staff room from the 2018 review just because it is dilapidated as the room has “continued to provide General Medical Services for the patients of the practice” (paragraph 3.3 of the Observations).

NHS England

- 4.12 In its Representations, NHS England refers to correspondence from 2016 and 2017 dealing with the delayed 2009 review. After an inspection of the surgery in November 2016 the advice of the DV was accepted and confirmed, that some areas should properly have been removed from the reimbursable space. For the 2018 review NHS England has removed from reimbursable space the first floor staff room. The ground floor disabled toilet was added into reimbursable space.
- 4.13 NHS England refers to a letter of 10 March 2017 in which it explains the process by which the 2009 review (which resulted in the reduction of reimbursable space) was conducted and notified in April 2016. This letter also confirmed the Contractors right to appeal the decisions and advised that she sought professional assistance.
- 4.14 In its observations, NHS England addresses the question of acceptance of the 2009 review referring to the letter of 10 March 2017 above and to the

confirmation in GPS's Representations at paragraph 2.3.5. NHS England also takes issue with GPS's statement at paragraph 2.4.5 of its Representations that there had been no changes in the use of the building since the 2009 review, pointing to the addition of the disabled toilet and the disuse of the first floor staff room. The reason for the removal of the first floor staff room (its dilapidated condition and the limited number of staff at the surgery who might use it) is explained.

- 4.15 At paragraph 2 b) of the Observations, NHS England asserts that in a visit to the surgery in 2019 the CCG representative was allowed access only to rooms that were included in the 2009 reimbursement. NHS England submits that this was taken as acceptance that no other space was being used for the delivery of medical services.

5. Determination on Preliminary Issues

- 5.1 I refer the parties to the determination in **SHA/19913** (Gladstone Medical Centre) in which it was determined that it was permissible under the Directions for space that was no longer used for the provision of medical services to be excluded from reimbursement. Therefore as a matter of principle, GPS's assertion that once approved, the extent of reimbursable space cannot be reduced is wrong. The question is, whether the space in dispute is used for the provision of medical services.
- 5.2 **I therefore determine that it is possible for NHS England to review the reimbursable space and to adopt a reduced space for the 2009 review.**
- 5.3 This leads to the question of whether the reduction in space for the 2009 review can be appealed.
- 5.4 Applications to Primary Care Appeals must be made 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 (paragraph 83 of the GMS Regulations). With regard to CMR disputes, it has been determined that the three years start to run when NHS England reports to the Contractor a CMR with which the Contractor does not agree (as established in SHA/18735). The 2009 review was notified in April 2016 and the Contractor was aware of her right to appeal from at least March 2017. Although the Contractor expressed dissatisfaction with the 2009 review no formal appeal has ever been launched. Indeed, on her behalf GPS has in the context of its Representations, accepted the review. It is now too late.
- 5.5 **I therefore determine that the 2009 review at 98.83 m² for the ground floor and 22.50 m² for the first floor stands.**
- 5.6 Moving on to the 2018 review, NHS England bases its figures on the 2009 review. I accept that this is the correct approach as I have not been provided with sufficient evidence to support a position that space excluded from the 2009 review should be brought back into later reviews.
- 5.7 NHS England adds into the 2009 figures the disabled toilet on the ground floor and removes the staff room on the first floor. NHS England's position is that the staff room is too dilapidated and there are too few staff to use it. GPS submits that it understands that the staff room continues to be used as it has always

been used. I have been provided with insufficient evidence to determine that this space should be excluded on review.

- 5.8 **I therefore determine that the reimbursable space for the 2018 review should be based on the 2009 review (ground floor 98.83 m² and first floor 22.50 m²) and in addition, include the disabled toilet on the ground floor.**
- 5.9 It is not completely clear from the information with which I have been provided at which point between 2009 and 2018 the disabled toilet was added to the ground floor. In an email from the Contractor to NHS England of 18 June 2018 she suggests that the work was done in 2010.
- 5.10 It seems appropriate therefore that any LDR for the 2012 and 2015 reviews is based on the same reimbursable space as the 2018 review.
- 5.11 I direct that the parties should now undertake LDR in relation to the 2018 review on the basis of the reimbursable area in paragraph 5.8 above. While there have been no trigger notices in relation to the 2012 and 2015 reviews, I encourage the parties to include these reviews in the LDR process as the most cost effective approach.
- 5.12 This referral will be stayed pending any application to Primary Care Appeals in relation to a valuation dispute.

Head of Operations, Primary Care Appeals