

24 June 2021

FILE REF: SHA/24546 & SHA/24547

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DECISION MAKING BODY: NHS COMMISSIONING BOARD (“NHS ENGLAND”) AND HILLINGDON CLINICAL COMMISSIONING GROUP (“CCG”) (“COMMISSIONER”)

GMS CONTRACTOR : DR S SHASHIKANTH (“CONTRACTOR”)

DISPUTE RESOLUTION – NATIONAL HEALTH SERVICE (GENERAL MEDICAL SERVICES CONTRACTS) REGULATIONS 2015 (“REGULATIONS”)

RE: TERMINATION OF CONTRACTS AT CHURCH ROAD SURGERY, CHURCH ROAD, UXBRIDGE, UB8 3NA AND WEST LONDON MEDICAL CENTRE, 20 PIELD HEATH ROAD, HILLINGDON, MIDDLESEX, UB8 3NG

1. Outcome

- 1.1 I determine that in relation to the West London Medical Centre Contract:
 - 1.1.1 the commissioner was not entitled to terminate the West London Medical Centre Contract on the basis of the Refused Patients Breach; and
 - 1.1.2 the commissioner was entitled to terminate the West London Medical Centre Contract on the basis of the PCN Co-operation Breach.
- 1.2 I determine that in relation to the Church Road Contract, the commissioner was entitled to terminate the Church Road Contract on the basis of the PCN Co-operation Breach.

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1. INTRODUCTION

- 1.1 The above Contractor referred the dispute in relation to his General Medical Services Contracts for dispute resolution under the provisions of regulation 82 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 his behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2. APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By email dated 1 October 2020 the Contractor applied to NHS Resolution, for dispute resolution challenging the CCG’s decision to terminate two General Medical Services Contracts held by the Contractor (the “**Dispute**”).
- 2.2 The Dispute relates to two General Medical Services Contracts for the provision of primary medical services; dated 15 August 2005 (“**West London Medical Centre Contract**”) and 1 April 2004 (“**Church Road Contract**”) (together the “**Contracts**”).
- 2.3 The Contracts are between the Contractor and the NHS Commissioning Board (“**NHS England**”). The CCG manages the contracts under a delegated arrangement with NHS England. For the purpose of this determination, I shall refer to the CCG and NHS England as the “**Commissioner**”.
- 2.4 On 10 March 2021 I issued a preliminary determination (reference SHA/23401 and SHA/23415) (“**Preliminary Determination**”) concluding that I was satisfied that the Contractor and the Commissioner had undertaken local dispute resolution and had not been able to reach an agreement on this Dispute. In later submissions, the Contractor requested that I revisit my decision set out in the Preliminary Determination. I am not

persuaded that I am required to revisit my decision in the Preliminary Determination and as such I make no further comment on this issue.

2.5 I have had regard to the following documents made available to me in consideration of the matters in Dispute:

2.5.1 Commissioner's representations dated 24 March 2021;

2.5.2 Contractor's representations dated 26 April 2021; and

2.5.3 Commissioner's observations dated 24 May 2021.

3. CONSIDERATION

3.1 By a letter dated 24 September 2020, the Commissioner notified the Contractor of its decision to terminate the West London Medical Centre Contract ("**West London Termination Notice**"). By another letter dated 24 September 2020 the Commissioner notified the Contractor of its decision to terminate the Church Road Contract ("**Church Road Termination Notice**"). I shall first consider the West London Termination Notice.

West London Termination Notice

3.2 The West London Termination Notice was served under clause 569 of the West London Medical Centre Contract, which states:

"Where the PCT is satisfied that the Contractor has not taken the required steps to remedy the breach by the end of the notice period, the PCT may terminate the Contract with effect from such date as the PCT may specify in a further notice to the Contractor."

3.3 The circumstances giving rise to the decision to terminate were described as arising from the following breaches:

3.3.1 *"Refusal to register patients to the Practice without reasonable grounds for doing so, in breach of clauses 181 of the Contract (the "Refused Patients Breach"); and*

3.3.2 *Refusal to co-operate with the Long Lane and First Care Group Primary Care Network (the "PCN"), contrary to clause 499 of the Contract and paragraph 15A, schedule 3 of the National Health Service (General Medical Services Contracts) Regulations 2015 (as amended) (the "GMS Regulations") (the "PCN Co-operation Breach")."*

3.4 I shall begin by considering the Refused Patients Breach.

3.5 The Commissioner issued two remedial notices in respect of the Refused Patients Breach; on 8 January 2020 and 24 January 2020 (each a "**Remedial Notice**" and together the "**Remedial Notices**").

3.6 The first Remedial Notice states that "*On 9th September 2019, the Ealing GP providing services to the residents at Kingsley Court Care Home, which provides care for 85 residents, gave notice that they were ceasing to provide services.*

3.7 *On 16th December 2019, Hillingdon CCG wrote to you to advise that the process of registering Kingsley Court Care Home patients would take place on 2nd January 2020. You were instructed to action the registration requested via GP Links; it was confirmed that patients would be advised by letter of the assignment allowing them to get in touch with West London Medical Centre.*

- 3.8 On 20th December 2019, you were provided with the list of assigned patients. On the basis of the fair share distribution methodology developed by Hillingdon CCG, you were allocated 15 beds (in respect to Kingsley Court Care Home). The assigned list sent to you consisted of 14 patients (with one bed currently vacant) with ages ranging from 79 to 97 years.
- 3.9 As the responsible Contractor for West London Medical Centre, you made a decision not to accept the allocation of patients for Kingsley Court Care Home in line with the fair share distribution methodology developed by Hillingdon CCG.
- 3.10 In accordance with the GMS contract, you shall only refuse an application if you have reasonable grounds for doing so which do not relate to the applicant's race, gender, social class, age, religion, sexual orientation, appearance, disability or medical condition. Reasonable grounds include the ground that the applicant does not live in the Contractor's practice area. The sequence of events and the evidence shows that you do not have reasonable grounds to refuse the patients affected at Kingsley Court Care Home."
- 3.11 The second Remedial Notice contained similar content.
- 3.12 I have been provided with detailed background information in relation to this matter for which I am grateful and significant amounts of documents to which I have had regard.
- 3.13 The Remedial Notices and the West London Termination Notice state that the basis of the termination is a breach of clause 181 of the West London Medical Centre Contract. Clause 181 states:
- "The Contractor shall only refuse an application made under clauses 171 to 180 if it has reasonable grounds for doing so which do not relate to the applicant's race, gender, social class, age, religion, sexual orientation, appearance, disability or medication condition."*
- 3.14 Clause 171 states:
- "The Contractor may, if the Contractor's list of patients is open, accept an application for inclusion in that list made by or on behalf of any person, whether or not that person is resident in its practice area or is included, at the time of that application, in the list of patients of another contractor or provider of primary medical services."*
- 3.15 The Contractor argues that "It is clear from the above contractual provisions that an application must be made by delivering to the practice a medical card or an application signed by the applicant or a person authorised by the applicant to sign on his behalf. This did not happen. The Contractor is not under any contractual obligation to accept an application for registration on an open list. The use of the word "may" does not compel him to do so".
- 3.16 The Commissioner states that "Under clause 254 of the Contracts, the Commissioners may assign a new patient to the Contractor's patient list whilst it remains open, as the patient list at West London is. It is agreed, insofar as it is argued at paragraph 75 of the Contractor's Representations, that the Contractor is not under an absolute obligation to refuse to register a patient. However, the Contracts are clear that the Contractor requires reasonable grounds for refusing to do so". Clause 254 of the West London Medical Centre Contract states:
- "The PCT may, subject to clause 258, assign a new patient to the Contractor whose list of patients is open."*

- 3.17 I note that Clause 258 lists the factors to which the Commissioner shall have regard when making a decision to assign a patient under clause 254 of the West London Medical Centre Contract.
- 3.18 I note that clause 254 and clause 181 of the West London Medical Centre Contract cover two distinct and separate processes. Clause 181 applies in relation to an application by a person for inclusion on a contractor's patient list; it describes circumstances when a contractor can refuse to accept an application from a person to be on their patient list. Clause 254 deals with assignment of patients by the commissioner to the contractor's patient list. This is an entirely different process which does not provide for an option to refuse an assignment. Clause 181 is therefore not relevant to assignment of patients.
- 3.19 I note that Clause 566 of the West London Medical Centre Contract states that "*Where the Contractor has breached the Contract other than specified in clauses 552 to 565 and the breach is capable of remedy, the PCT shall, before taking any action it is otherwise entitled to take by virtue of the Contract, serve a notice on the Contractor requiring it to remedy the breach ("remedial notice")*".
- 3.20 Clause 567 goes on to specify the content a remedial notice must contain, including "*details of the breach*". In respect of the Refused Patients Breach, the Remedial Notices issued to the Contractor cite Clauses 181 to 184 as the relevant provisions of the West London Medical Centre Contract, explain that the Commissioner sought to assign patients to the Contractor and explain why the Commissioner considers the Contractor to be in breach of Clause 181.
- 3.21 It appears from the Commissioner's submissions that the Commissioner sought to assign patients to the Contractor's patient list however, the language used in the Remedial Notices was confused; referring to assignment, allocation and crucially finding the Contractor in breach of clause 181 which relates to refusal to accept patients on the patient list.
- 3.22 The consequence of informing the Contractor in the Remedial Notices that he is in breach of clause 181 is that it leads the Contractor to believe that he is in breach of an entirely different part of the West London Medical Centre Contract and that he has a right to refuse the patients assigned to him. It may be that the Commissioner is entitled to assign patients to the Contractor pursuant to clause 254 of the West London Medical Centre Contract (although I note that the wording in clause 254 and the corresponding provisions in the Regulations are not the same. I am also not aware of there being a variation to the West London Medical Centre Contract in relation to this matter). However, I consider that in that case, in failing to provide services to the patients assigned to him, the Contractor would be in breach of a different provision in the West London Medical Centre Contract, not of Clause 181.
- 3.23 In my view, if the Commissioner would have been consistent in its language in the Remedial Notices and during the local dispute resolution process, the outcome may have been different, in that the Contractor may have realised that he does not have a right to refuse assigned patients and thus the breach forming the basis of the West London Termination Notice would have been resolved.
- 3.24 I do not consider that the Contractor was in breach of clause 181 of the West London Medical Centre Contract therefore I consider that the Commissioner is not entitled to terminate the West London Medical Centre Contract under Clause 569 due to the defect in the Remedial Notices described in the preceding paragraphs.
- 3.25 I shall next consider the PCN Co-operation Breach.
- 3.26 The Commissioner issued a remedial notice in respect of the PCN Co-operation Breach on 11 February 2020 ("**PCN Remedial Notice**") for failure to comply with Clause 499 of the West London Medical Centre Contract, which states:

“The Contractor shall comply with all relevant legislation and have regard to all relevant guidance issued by the PCT, the relevant Strategic Health Authority or the Secretary of State.”

3.27 The legislation the Contractor was found to be in breach of is paragraph 15A of Schedule 3 of the Regulations, which states:

*“(1) A contractor must comply with the requirements in sub-paragraph (2) where it is—
(a) signed up to the Network Contract Directed Enhanced Service Scheme (“the Scheme”); or
(b) not signed up to the Scheme but its registered patients or temporary residents, are provided with services under the Scheme (“the services”) by a contractor which is a member of a primary care network .
(2) The requirements specified in this sub-paragraph are that the contractor must—
(a) co-operate, in so far as is reasonable, with any person responsible for the provision of the services;
(b) comply in core hours with any reasonable request for information from such a person or from the Board relating to the provision of the services;
(c) have due regard to the guidance published by the Board;
(d) participate in primary care network meetings, in so far as is reasonable;
(e) take reasonable steps to provide information to its registered patients about the services, including information on how to access the services and any changes to them; and
(f) ensure that it has in place suitable arrangements to enable the sharing of data to support the delivery of the services, business administration and analysis activities.
(3) For the purposes of this paragraph, “primary care network ” means a network of contractors and other providers of services which has been approved by the Board, serving an identified geographical area with a minimum population of 30,000 people.”*

3.28 I have been provided with detailed background information in relation to this matter for which I am grateful and significant amounts of documents to which I have had regard.

3.29 The PCN Remedial Notice states *“it is a requirement that every patient in England will have equitable access to all the Network Contract DES services / activities, regardless of whether or not their registered practice is participating in the Network Contract DES”*.

3.30 I note that the Contractor has opted to not participate in the Scheme (as defined in paragraph 15A(1)(a) above) and there is no dispute in this regard.

3.31 I note that *“the CCG created a Network Contract Local Improvement Scheme (“ the LIS”)* and that *“the nominated Primary Care Network (“PCN”) for patients is Long Lane and First Care Group Primary Care Network” (“Long Lane PCN”)*.

3.32 I note on 3 January 2020, the Clinical Director of the PCN, Dr Ajay Birly, made contact with Dr Shashikanth by email to confirm that the PCN will provide services to his patients and requested information in order to fulfil this requirement. Dr Birly requested the names and contact information for the patients of both practices so that they could be contacted by Long Lane and offered services under the Network Contract. I note that the Contractor had not responded to Dr Birly and informed the Commissioner that he *“does intend to respond”* and that he is *“enthusiastic about offering more services to our patients if you give us the funding and opportunity. We will do this ourselves while protecting our patient data”*.

3.33 I understand that the reason for not co-operating with Long Lane PCN stems from two related concerns, that *“he would be breaching data protection legislation”* and that the Contractor would be in breach of his confidentiality obligations in respect of his patients.

- 3.34 In relation to the Contractor's concern with regard to the legitimate basis of sharing patient data, I note the Contractor's submissions that his patients had not consented to such sharing.
- 3.35 I note the Commissioner's submissions with respect to alternative legitimate basis for sharing of patient data namely article 6(1)(c), and/or article 6(1)(e) of the General Data Protection Regulation ("**GDPR**"), where personal data can be lawfully shared where it is "*necessary for compliance with a legal obligation' and/or where it 'is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller*". Further the Commissioner states that "*under article 9(2)(h) of the GDPR, the Contractor would have a lawful basis to process special category data where the processing is necessary for the provision of care. The wording of article 9(2)(h) permits data to be shared where it is necessary for certain purposes, including:*

preventive or occupational medicine;

for the assessment of the working capacity of an employee;

medical diagnosis;

the provision of health or social care or treatment or the management of health or social care systems; and

pursuant to a contract with a health professional.

The Patient Data was required to be shared with the Long Lane PCN in order for it to ensure that the Contractor's patients could receive enhanced services under the Network Contract, and therefore would fall within the scope of Article 9(2)(h), GDPR in that the data was required to provide NHS services".

- 3.36 Based on the information provided, I am satisfied that consent is not the only legitimate basis that the Contractor could have relied on in order to co-operate with Long Lane PCN and provide it with the information it required. I consider that if the Contractor had concerns as to whether he can lawfully share patient data with Long Lane PCN, he could have obtained legal advice in this respect. I do not consider that it is open to me to comment or make any determination with regard to the legality of paragraph 15A of Schedule 3 of the Regulations, in particular as to whether it is incompatible with the data protection or other legislation or whether its effect is such that it would place the Contractor in breach of data protection or other legislation (which is insinuated by the Contractor). I therefore make no such comment and/or determination.
- 3.37 Paragraph 15A(2)(f) of Schedule 3 of the Regulations requires the Contractor to "*ensure that it has in place suitable arrangements to enable the sharing of data to support the delivery of the services, business administration and analysis activities*". I note the Contractor has taken legal advice in respect of the draft data sharing agreement provided to him by the Commissioner and that this advice concluded that the data sharing agreement, as reviewed by the solicitors, is deficient in some ways. I would expect the Contractor to therefore go a step further and instruct a solicitor (if he so wished) to amend the data sharing agreement provided by the commissioner or to draft a data sharing agreement that would enable him to comply with paragraph 15A of Schedule 3 of the Regulations.
- 3.38 I note that the Contractor states that he is concerned that he would be breaching his obligations of confidentiality if he was to share his patients' data with Long Lane PCN. I note the Commissioner's submissions that "*the GMC guidance on confidentiality explicitly acknowledges that implied consent can be relied upon to share data if it is: 'reasonable to infer that the patient agrees to the use of the information, even though this has not been directly expressed'*" and that the Contractor's privacy notice (which has been provided to me) states "*We will share relevant information from your medical*

record with other health or social care staff or organisations when they provide you with care. For example, your GP will share information when they refer you to a specialist in a hospital". I note that the privacy notice quotes Article 6(1)(e) and Article 9(2)(h) of the GDPR as the lawful basis for sharing patient data with other healthcare professionals. I note that the privacy notice also states that the patients "*have the right to object to information being shared between those who are providing you with direct care*". The Contractor states that "*he has consulted the patients at both practices and they did not consent to the data sharing*", however I consider that I have not been presented with enough evidence to conclude that each patient has objected to their data being shared with Long Lane PCN. I therefore consider that the Contractor has the patients' implied consent to share their data with Long Lane PCN for the relevant purpose.

- 3.39 The Contractor states that sections 251(1) and 251(11) of the NHS Act 2006 "*do not permit the disclosure of patient information in respect of name, address and contact details*". I consider that sections 251(1) and 251(11) do not prohibit the disclosure of confidential information, in fact these sections allow the Secretary of State for Health and Social Care to set aside the common law duty of confidence for defined medical purposes. I have not considered this point in detail as I am satisfied there is implied consent in place for patient data to be shared by the Contractor for the relevant purpose.
- 3.40 In light of the above I consider that the Contractor has not complied with paragraph 15A(2)(a) and paragraph 15A(2)(f) of Schedule 3 of the Regulations and therefore the Commissioner was entitled to issue the PCN Remedial Notice for breach of Clause 499 of the West London Medical Centre Contract.
- 3.41 I shall next consider if the Commissioner was entitled to terminate the West London Medical Centre Contract as a result of the PCN Co-operation Breach.
- 3.42 The Contractor states that "*the CCG had no contractual right to serve termination notices unless it was satisfied that the cumulative effect of the breaches is such that it would be prejudicial to the efficiency of the services to be provided under the Contracts*". I note the Commissioner's submissions in this regard.
- 3.43 I consider that clause 572 applies to the termination right under clause 571 of the West London Medical Centre Contract. The West London Termination Notice clearly states that the termination is pursuant to clause 569 of the West London Medical Centre Contract. I therefore consider that the Commissioner was not required to consider compliance with clause 572 in its decision to terminate the West London Medical Centre Contract pursuant to clause 569.
- 3.44 The Contractor states that the "*CCG was under a contractual obligation to consider the impact termination would have on over 7,500 patients who have decided to be registered with Dr Shashikanth*". I note that paragraph 1.6.7 of the Primary Medical Care Policy and Guidance Manual (a copy of which has been provided to me) states "*NHS England has a statutory duty to ensure continuity of provision of primary care services. Termination of existing service provision may result in some persons not being able to access primary care services. The Commissioner must therefore consider how this duty will be discharged if it decides to terminate the contract*". I have not been provided with any evidence to suggest that the Commissioner had not considered the duty to ensure the continuity of provision of primary care services. I further note that the minutes provided by the Commissioner of the meeting dated 7 September 2020 confirm that a member of the Local Medical Committee was present during the meeting, "*in an advisory capacity*" where the possible termination of the West London Medical Centre Contract was discussed and approved. I therefore consider that the Commissioner has complied with clause 592 of the West London Medical Centre Contract.

- 3.45 I consider that pursuant to clause 569 of the West London Medical Centre Contract, the Commissioner was entitled to issue the West London Termination Notice on the basis of the Contractor failing to comply with the PCN Remedial Notice.

Church Road Termination Notice

- 3.46 Similar to the West London Termination Notice, the Church Road Termination Notice was issued under clause 569 of the Church Road Contract. The circumstances giving rise to the termination were described as the refusal to co-operate with Long Lane PCN contrary to clause 499 of the Church Road Contract and paragraph 15A of Schedule 3 of the Regulations i.e. the PCN Co-operation Breach.
- 3.47 I understand that the facts of the PCN Co-operation Breach also apply to the Church Road Contract and the parties' submissions relating to this apply to the Church Road Contract.
- 3.48 I therefore apply my consideration at paragraphs 3.26 to 3.44 of this determination and determine that pursuant to clause 569 of the Church Road Contract, the Commissioner was entitled to issue the Church Road Termination Notice on the basis of the Contractor failing to comply with the remedial notice dated 11 February 2020 in respect of the Church Road Contract.

4. DETERMINATION

- 4.1 I determine that in relation to the West London Medical Centre Contract:
- 4.1.1 the Commissioner was not entitled to terminate the West London Medical Centre Contract on the basis of the Refused Patients Breach; and
 - 4.1.2 the Commissioner was entitled to terminate the West London Medical Centre Contract on the basis of the PCN Co-operation Breach.
- 4.2 I determine that in relation to the Church Road Contract, the Commissioner was entitled to terminate the Church Road Contract on the basis of the PCN Co-operation Breach.

Head of Operations, Primary Care Appeals