

1 April 2022

FILE REF: SHA/24615

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DECISION MAKING BODY: NHS COMMISSIONING BOARD (“NHS ENGLAND”)

PMS CONTRACTOR: DR GLYN STOCKTON AND DR LOUISE THOMPSON

DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE (PERSONAL MEDICAL SERVICES AGREEMENT) REGULATIONS 2015

RE: RENTAL PAYMENTS DISPUTE

1 Outcome

1.1 I am unable to accept this application for NHS Dispute Resolution which is out of time.

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RE: RENTAL PAYMENTS DISPUTE

1 INTRODUCTION

- 1.1 NHS England has referred to NHS Resolution the dispute in relation to the Personal Medical Services Agreement for dispute resolution under Paragraph 76 of the NHS (Personal Medical Services Agreement) 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 emailed letter dated 17 August 2021 NHS England 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 Correspondence from Solicitors on behalf of NHS England dated 17 August 2021;
 - 2.2.2 Correspondence from Solicitors on behalf of NHS England dated 27 August 2021;
 - 2.2.3 Correspondence from Solicitors on behalf of NHS England dated 8 September 2021;
 - 2.2.4 Correspondence from Solicitors on behalf of the Contractor dated 8 September 2021;
 - 2.2.5 Correspondence from Solicitors on behalf of NHS England dated 9 September 2021;
 - 2.2.6 Correspondence from Solicitors on behalf of the Contractor dated 10 September 2021;

- 2.2.7 Correspondence from Solicitors on behalf of the Contractor dated 13 September 2021;
- 2.2.8 Correspondence from Solicitors on behalf of NHS England dated 13 September 2021;
- 2.2.9 Correspondence from Solicitors on behalf of the Contractor dated 14 September 2021;
- 2.2.10 Correspondence from Solicitors on behalf of the Contractor dated 16 September 2021;
- 2.2.11 Correspondence from Solicitors on behalf of the Contractor dated 20 September 2021;
- 2.2.12 Correspondence from Solicitors on behalf of the Contractor dated 23 September 2021;
- 2.2.13 Correspondence from Solicitors on behalf of NHS England dated 23 September 2021;
- 2.2.14 Correspondence from Solicitors on behalf of NHS England dated 13 October 2021;
- 2.2.15 Correspondence from Solicitors on behalf of the Contractor dated 1 November 2021;
- 2.2.16 Correspondence from Solicitors on behalf of NHS England dated 1 November 2021;
- 2.2.17 Correspondence from Solicitors on behalf of the Contractor dated 3 November 2021;
- 2.2.18 Correspondence from Solicitors on behalf of NHS England dated 3 November 2021;
- 2.2.19 Second correspondence from Solicitors on behalf of the Contractor dated 3 November 2021;
- 2.2.20 Correspondence from Solicitors on behalf of the Contractor dated 28 November 2021;
- 2.2.21 Correspondence from Solicitors on behalf of NHS England dated 13 December 2021;
- 2.2.22 Correspondence from Solicitors on behalf of the Contractor dated 14 December 2021;
- 2.2.23 Correspondence from Solicitors on behalf of NHS England dated 21 January 2022;
- 2.2.24 Correspondence from Solicitors on behalf of NHS England dated 4 February 2022;
- 2.2.25 Correspondence from Solicitors on behalf of the Contractor dated 4 February 2022;
- 2.2.26 Correspondence from Solicitors on behalf of NHS England dated 14 February 2022;

2.2.27 Correspondence from Solicitors on behalf of the Contractor dated 14 February 2022; and

2.2.28 Correspondence from the Solicitors on behalf of NHS England dated 7 March 2022.

3 PARTIES' SUBMISSIONS

3.1 In its application for NHS dispute resolution, NHS England set out a brief statement of the nature of, and circumstances giving rise to, the dispute. This statement is as follows:

"The Dispute is a contractual dispute following mistaken overpayments made by the claimant to the respondents in respect of costs attributed to the property costs of a GP Surgery known as the Hive Health Centre ("the Surgery"). The Surgery itself is a temporary Portakabin that the respondents procured to provide services from at short notice in late 2008. The long term intention was initially for the respondents to obtain more suitable long term accommodation. An annual rent was originally agreed at £79,800 per annum on the PCT's understanding that the Surgery was rented from a third party at arm's length. Monthly payments from the PCT (and subsequently the claimant) began in January 2009 and continued until December 2018. During all relevant periods it was the understanding of the claimant that the Surgery was rented from a third party at arms' length.

Investigations in mid-late 2018 by the claimant, prompted by the apparent delay in moving to more permanent accommodation discovered that the Surgery had initially been purchased by Dr Stockton's grandmother who transferred ownership of the Surgery to the respondents after the initial 11 months' rent reimbursement had been paid. Since November 2009 the respondents have received significantly more than was due to them under the 2012 PMS Contract and the later 2016 PMS Contract which respectively incorporate the 2004 and 2013 Premises Cost Directions insofar as they relate to "market rent" and "notional rent". These mistaken payments were made as a result of the respondents failing to disclose that the Surgery was not rented from an unconnected third party and were in any event in excess of the respondents' contractual entitlement.

The respondents seek repayment of the overpayments calculated as £585,058.33 in accordance with the enclosed schedule and interest thereon.

The parties have sought to settle their differences via without prejudice correspondence and various meetings, but have not been able to reach agreement. An extant standstill agreement expires on 21 August 2021 and the respondents have not been willing to agree to extend it."

3.2 I have been provided with various correspondence as regards this matter and a standstill agreement in place between the parties together with arrangements previously considered in relation to how this dispute would be managed. I am satisfied that NHS England has the ability to refer this matter to NHS Resolution for NHS dispute resolution.

3.3 The Contractor states in its "Respondent's Statement of Case" dated 26 November 2021 that "The Applicant has not satisfied the obligations pursuant to s74(1) to engage in reasonable local dispute resolution" and provides a detailed list of reasons for its view. The Contractor states that "the decision by the Applicant to now refuse local dispute resolution including mediation has prejudiced the Respondents in terms of lost time, legal costs and significant costs in the delay in moving to new premises..."

3.4 I am satisfied that there has been a long and detailed period of local attempts to resolve this dispute. I note that both parties are legally represented. I note that there are differing views from each of the parties regarding limitation. I am satisfied that NHS

England had the ability to refer this matter for NHS dispute resolution and that local attempts at dispute resolution have occurred and not been successful in resolving the dispute between the parties.

4 CONSIDERATION

- 4.1 I have been provided with significant volumes of papers by both NHS England and the Contractor. I have sought additional information from the parties for which I am grateful. I am satisfied that I have been provided with sufficient information to determine the position set out below.
- 4.2 I am aware from the information provided that there is a long and significant history to this dispute. As set out and summarised by NHS England in their brief statement above, the arrangements between the parties for the Contractor to provide services appear to have commenced in 2008.
- 4.3 I note that discussions have occurred and arrangements have been in place for some time as regards a move from the current practice premises to a proposed development of a new site. Discussions as regards the proposed development of the new site have been ongoing for a considerable period and are interrelated to the dispute between the parties.
- 4.4 There are numerous references to The National Health Service (General Medical Services – Premises Costs) (England) Directions (“the Directions”) throughout the papers provided to me and the payment of rental costs by NHS England to the Contractor. It is evident from the information provided to me that neither the Contractor nor NHS England consistently and entirely accurately use the correct term for the rental payments. It is for this reason that I refer to “rental payments” in this document, and neither ‘current market rent’, nor ‘notional rent’. That neither party has been clear, consistent and unambiguous in its use of terms is not helpful and it is clear that there is a dispute as regards the rental payments under the Directions.
- 4.5 I note the provisions of Regulation 76(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.”
- 4.6 I am satisfied that Regulation 76(4) of the Regulations sets the limitation period applicable to the NHS contract between the parties.
- 4.7 I note that there are a number of references throughout the papers provided to NHS Resolution as regards the actions of the Contractor. I note that this is not being pursued by NHS England further and as such any active concealment or fraud are not relevant in relation to this matter.
- 4.8 I note that NHS England has referred the dispute to NHS Resolution in their application dated 17 August 2021.
- 4.9 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 should reasonably have come to the attention of that party” (my emphasis).
- 4.10 It is clear that the matter giving rise to the dispute did not occur within the three years of the date of NHS England’s application for NHS dispute resolution. I have therefore considered when the matter giving rise to the dispute should reasonably have come to the attention of NHS England, as the referring party.

- 4.11 For the reasons set-out below, 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 NHS England.
- 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 NHS England. I am however confident that NHS England and the NHS Heywood, Middleton and Rochdale Clinical Commissioning Group (“the CCG”), to which it has delegated primary medical care commissioning (I also note the local team of NHS England managed the rent review process under a Memorandum of Understanding on behalf of the CCG) were actively involved in enquiries as regards the rental payments for some time prior to 17 August 2018. This is more than three years prior to the date of NHS England’s application for NHS dispute resolution.
- 4.13 In considering this matter, I am not satisfied by NHS England’s position that they were acting on the direction of the CCG (thereby carrying out the wishes of the CCG) when a decision was made to suspend the rental payments to the Contractor. I note the comments as regards the Primary Care Delegation Agreement in place between NHS England and the CCG as regards the delegated functions exercised by the CCG and the Memorandum of Understanding in place in relation to management of the rent review processes. I have not been provided with any breach or remedial notices as regards the suspended payments as evidence to support their position as regards the contracting basis on which they made these suspension payments. I have noted NHS England’s comment that the primary purpose of the CCG investigation was to establish ownership details of the cabin and whether there was entitlement to rental payments.
- 4.14 I am not satisfied that NHS England can rely on the limitation period starting to run only when they are in a position of absolute certainty, having completed their investigation and received absolute confirmation as to the position and that this is the date from which the matter giving rise to the dispute should reasonably have come to the attention of it. It is clear from the papers provided to me that this issue has been ongoing, that the parties have been legally represented for some time and was open to NHS England to look ahead to any potential issue regarding limitation.
- 4.15 Whilst I am satisfied that the parties may, by contractual agreement, agree that the Directions apply in relation to the rental payments for the practice premises, I am disappointed that the PMS Agreement does not clearly establish the payments that are due to be made. The usual regular rental payments reviews were not undertaken for reasons that are not clear from the papers. Had they been undertaken, the change in ownership of the Premises from a connected third party to the Contractor should have come to light and the effect on valuation, and therefore reimbursement, calculated. I note the comments as regards the reviews from each of the parties and why these did not occur. It is clear that neither party has had regard to the detail of the Directions and consistently and entirely accurately used the correct terms.
- 4.16 I note that in 2013 the Primary Care Trust, which originally procured the Contractor to deliver the primary medical services ceased to exist and the primary medical care commissioning functions transferred to NHS England. This would have been a reasonable point for NHS England to have considered the position as regards the rental payments for this Contractor. Whilst I appreciate the amount of work this may have required at a national scale, it would not have been unreasonable at this point to have asked the Contractor to confirm that the payments it was receiving were accurate.
- 4.17 I note the comments as regards the Primary Care Delegation Agreement in place between NHS England and the CCG as regards the delegated functions exercised by the CCG and the Memorandum of Understanding in place in relation to management of the rent review processes. I further note that this might have been a further appropriate opportunity for NHS England to have considered the rental payments to the Contractor.

- 4.18 I note that there have been national reviews of PMS Agreements. Again, I note that this may have been an appropriate opportunity for NHS England to have considered the rental payments to the Contractor.
- 4.19 In the absence of any active concealment or any fraud by the Contractor which might have misled NHS England and the clear position in early 2018 that there was an actual enquiry ongoing as regards the rental payments to the Contractor which resulted in a decision by NHS England to suspend rental payments, I am satisfied that this application for NHS dispute resolution has been made out of time. This application for NHS dispute resolution has not been referred to NHS Resolution within a 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 NHS England.
- 4.20 I am therefore unable to accept this application for NHS dispute resolution which is out of time.

Head of Operations, Primary Care Appeals