

20 April 2023

**FILE REF:** SHA/25817

Tel: 0203 928 2000  
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**DECISION MAKING BODY:** NORTH EAST AND CUMBRIA INTEGRATED CARE BOARD

**GMS CONTRACTOR:** YARM MEDICAL PRACTICE

**PREMISES:** 1 WORSALL ROAD  
YARM  
STOCKTON ON TEES  
TS15 9DD

**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 In the circumstances I am of the view that, if the Contractor wishes to obtain notional rent reimbursement with effect from 5 March 2021 for the additional area of 89.7 sqm it must make an application for reimbursement under paragraph 41 of the Directions. In addition, should an application be approved, the agreed valuation for the reimbursement is £15,518.10.
- 1.2 I note that neither party has submitted a claim for interest with regard to this dispute so I make no determination in this regard.

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### Advise / Resolve / Learn

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**RE:** NOTIONAL RENT REIMBURSEMENT

## 1 Introduction

- 1.1 As a GMS Provider, the above named Contractor has referred the matter of notional rent for dispute resolution under the provisions of Part 12 of the NHS (General Medical Services Contract) Regulations 2015 (the “Regulations”).
- 1.2 The Regulations came into force on 7 December 2015. The Regulations apply to an agreement to which the National Health Service (General Medical Services Contract) Regulations 2004 applied immediately before this date. The Contractor's GMS Contract indicates a commencement date of 1 April 2014 and I therefore consider that the Regulations apply to this dispute.
- 1.3 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.

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## **2 Application for Dispute Resolution**

- 2.1 The Contractor has appointed BW Healthcare Surveyors Limited as its representative.
- 2.2 BW Healthcare Surveyors Limited has applied to NHS Resolution for dispute resolution in a letter dated 7 December 2022. The application relates to the reimbursement of notional rent in respect of the total area of the GP premises that is in use for GMS purposes.
- 2.3 I have had regard to the following documents made available to me in consideration of this matter:
  - 2.3.1 Email of 7 December 2022 from BW Healthcare Surveyors Limited on behalf of the Contractor with enclosures;
  - 2.3.2 Email of 13 December 2022 from BW Healthcare Surveyors Limited on behalf of the Contractor enclosing the GMS Contract;
  - 2.3.3 Email of 20 January 2023 from BW Healthcare Surveyors Limited on behalf of the Contractor with enclosures;
  - 2.3.4 Email of 24 January 2023 from North East and Cumbria ICB with enclosures;
  - 2.3.5 Email of 8 February 2023 from BW Healthcare Surveyors Limited on behalf of the Contractor with enclosures; and
  - 2.3.6 Email of 10 February 2023 from North East and Cumbria ICB with enclosures.

## **3 Statutory Framework**

- 3.1 As set-out above, the Regulations apply in this case. Part 12, 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 contract 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 82(1) (where the agreement is not an NHS contract).
- 3.2 Both parties accept that the 2004 version of the Directions apply to this dispute. I note that recurring premises costs such as rent payments are dealt with in the Directions at part 5, paragraph 31 onwards, with notional rent dealt with at paragraph 41.

## **4 The Contractors Application**

- 4.1 “Nature of Dispute
  - 4.1.1 The Dispute relates to a technical dispute surrounding reimbursable space of the Current Market Rent assessment for Yarm Medical Centre 1 Worsall Road Yarm Stockton-on-Tees TS15 9DD.
  - 4.1.2 The Contractor was notified by NHS Cumbria and the North East (NHSCNE) on 24 June 2021 that the District Valuer’s (DVs) assessment of Notional Rent was £162,500 per annum with effect from 05 March 2021. Copy correspondence enclosed at Appendix 1.

- 4.1.3 The Contractor contacted NHSCNE by email on 13 July 2021 to confirm their disagreement to the DV's opinion of CMR and to confirm the appointment of BW Healthcare Surveyors Limited (BWH) as representatives to act on their behalf in this matter.
- 4.1.4 NHSCNE subsequently confirmed in an email dated 08 July 2021 that the DV had been instructed in this matter. As part of this correspondence, NHSCNE claimed a floor area of 846.2 sqm had been previously agreed to be reimbursed Notional Rent as part of a 'Value for Money' report carried out in 2011 when the surgery was built. Copy correspondence enclosed at Appendix 2.
- 4.1.5 The building extends to a total area, in use for GMS purposes of 965.9 sqm. This is made up of 846.2 sqm plus an additional 89.7 sqm. It was the view of NHSCNE that as part of the original funding agreement, in order for the practice to be used as a training practice, this additional 89.7 sqm was to be excluded from the Notional Rent indefinitely despite the training agreement running for a period of five years. It is this inclusion of 89.7 sqm that forms the sole basis of this appeal.
- 4.1.6 For the avoidance of doubt, the Notional Rent based on an area of 846.2 sqm has been agreed with the District Valuer, as has the potential value attached to the 89.7 sqm (£15,518 per annum). This is therefore a technical dispute, not a valuation dispute.
- 4.1.7 Following discussions with the District Valuer (DV), BW Healthcare Surveyors (BWHS) had informal discussions with NHSCNE and Graeme Earl of NHS Tees Valley Clinical Commissioning Group (CCG). Following these discussions, BWHS were invited to make written representations as part of Local Dispute Resolution for the inclusion of this additional space. Submissions were provided on 16 May 2022 and can be found at Appendix 3.
- 4.1.8 On 28 June 2022, the CCG confirmed to the practice that the appeal for inclusion of this space had been rejected. Copy correspondence enclosed at Appendix 4.
- 4.1.9 On 22 September 2022, further written submissions were provided by BWHS seeking clarification and reasoning on the specific decision to exclude the space as it was felt the arguments put forward in the original submission had not been fully considered. Copy correspondence enclosed at Appendix 5.
- 4.1.10 On 24 October 2022, the CCG responded stating the additional 89.7 sqm would remain excluded indefinitely from Notional Rent reimbursement. Also on this date, the CCG stated that evidence provided by BWHS was new evidence, however this is not correct as it was provided in the original submission of 16 May 2022. This questions whether the document in question was considered at all as part of the original submission. Copy correspondence enclosed at Appendix 6.
- 4.1.11 On 24 October 2022, BWHS replied to the CCG email of the same day, questioning the validity of the decision. No response was forthcoming. Copy correspondence enclosed at Appendix 7.
- 4.1.12 Local discussions have been completed. As a reminder, this is not a dispute of valuation, it is purely a dispute of the reimbursement of additional 89.7 sqm of space. For the avoidance of doubt, the additional space is often referred to as 90 sqm within the correspondence, this is the space in question, an area of 89.7 sqm was agreed by the DV.

Parties to the Dispute

4.1.13 [GE], Digital and Estates Lead – Tees Valley North East & North Cumbria Integrated Care Board.

4.1.14 The Practice Partners of Yarm Medical Centre 1 Worsall Road, Yarm, Stockton-on-Tees, TS15 9DD.

#### Relevant Regulations

4.1.15 The Contractor is a GMS provider and has operated at the premises since its construction in 2011.

4.1.16 As GMS providers, the Contractor refers the matter of Current Market Rent as at 05 March 2021 for dispute resolution under the provision of part 12 of the NHS (General Medical Services Contracts) Regulations 2015.

4.1.17 The Contractor has appointed BW Healthcare Surveyors Limited to represent them in this dispute. Copy letter of authority to act is enclosed at Appendix 8.

#### Local Negotiations and Local Dispute Resolution Protocol

4.1.18 As detailed within the nature of dispute section, the values of all aspects of the notional rent have been agreed with the DV. This includes the additional 89.7 sqm of £15,518 per annum as at the valuation date. Local Dispute has been followed with written submissions made to NHSCNE and CCG.

#### Appropriate Outcome of Dispute

4.1.19 The Contractor seeks direction from NHS Resolution to determine that the additional 89.7 sqm which was formally excluded as part of the agreement that the practice would provide training, now be included for reimbursement for the review dated 05 March 2021, and all subsequent Notional Rent reviews. The Contractor does not agree that the original stance of NHSCNE/CCG which excluded the additional 89.7 sqm from notional rent reimbursement is fair, reasonable or valid.

#### Opinion of Current Market Rent as at 5<sup>th</sup> March 2021

4.1.20 In accordance with guidance issued by NHS Resolution, the Contractor's position in respect of the disputed Current Market Rent is £181,768, this is made up of the agreed figure of £166,250 (not in dispute) plus an additional amount of £15,518 per annum."

## 5 Representations

### 5.1 ICB's representations

5.1.1 "This response is sent in relation to the Appeal by Yarm Medical Centre dated 7 December 2022.

#### Parties to the Dispute

5.1.2 [GE], Digital and Estates Lead – Tees Valley, North East & North Cumbria Integrated Care Board.

5.1.3 The Practice Partners of Yarm Medical Centre, 1 Worsall Road, Yarm, Stockton on tees, TS15 9DD (represented by BM Healthcare Surveyors).

#### The Dispute

- 5.1.4 This is not a valuation dispute, something that is acknowledged by Yarm Medical Centre ("the Practice") in its referral at paragraph [4.1.6]. This is a disagreement between the parties as to whether the Notional Rent in this instance should be based on a floor area of 846.2 sqm or 965.9 sqm. The difference between the two areas relates to an area of 89.7 sqm. The area of 89.7 sqm consists of four training rooms.
- 5.1.5 The parties are agreed that the Notional Rent in relation to the floor area of 846.2 sqm should be £162,500 and there is no dispute in relation to that figure. The dispute purely relates to the remaining 89.7 sqm and whether Yarm Medical Centre is entitled to a further sum of £15,518 per annum for the additional area.
- 5.1.6 The background to this dispute is as follows. The Practice has a Standard GMS Contract dating back to 1 April 2004. In 2011 the Practice was awarded a 100% Deanery Grant of £175,000 to fund four training rooms. It is, of course, the case that in such a situation that there is no automatic receipt of Notional Rent. This is a position that is accepted by both parties to this dispute.
- 5.1.7 Given that the space was fully funded it falls outside the Premises Cost Directions ("PCD"), a fact acknowledged by the Practice in its Application Form for Premises Reimbursement Changes at paragraph 3 noting that the PCD states a maximum of 66% funding. It therefore follows that rent reimbursement falls outside of the PCD.
- 5.1.8 Since 2011 the four rooms, the disputed 89.7 sqm, have been excluded from the notional rent reimbursement. It is the ICB's position that this is a permissible position to take.
- 5.1.9 The Practice has on one previous occasion challenged the Notional Rent position in relation to the 89.7 sqm but did not appeal the matter to the FHSAU.
- 5.1.10 On 24 June 2021 the Practice was notified that the position remained the same namely that the space of 89.7 sqm remained excluded from the notional rent reimbursement.
- 5.1.11 The Practice has challenged this decision and now appeals it to NHS Resolution via the Dispute Resolution procedure.
- 5.1.12 The Practice appends to its appeal a number of documents. Document 1 is a GP Registrar Premises Initiative, Practice Undertaking. This is on headed notepaper and forms the standard terms of this ICB. Paragraph 3 of the Undertaking states "*Rent Re-imbursement: The value and room areas funded by this programme will be excluded from the District Valuer's assessment for rent reimbursement*".
- 5.1.13 The Practice then at Document 2 appends a letter dated 9 July 2009 not on letterhead. There is also the GP Registrar Premises Initiative, Practice Undertaking. This Undertaking is also not on letterhead. Paragraphs 2 and 3 from the version appearing at Document 1 are omitted. The document is signed where the name should appear but the author is not identified and it is not dated. The ICB maintains that it has always been consistent in its view that the value and the room area (89.7 sqm) have always been excluded from the District Valuer's assessment for rent reimbursement.
- 5.1.14 The Practice has referred to its discussions with NHSE (see paragraph 4 of its application) and describes the decision to exclude the space as an "*unfair technicality*" whilst seemingly accepting that the PCD allows the decision which has been made to be made. The decision is also described as "*unreasonable*".

- 5.1.15 The ICB say that its decision was one it was permitted to make and that the decision it made was and is consistent with the decisions it makes in these circumstances. It has taken into account that for the additional space of 89.7 sqm the Practice received full funding and not a lower sum (say under the 66% figure quoted in the PCD). The ICB considered the PCD and the fact that it is not obliged to treat the extra space as eligible for Notional Rent.
- 5.1.16 The ICB submits therefore that the decision it took was one that it was permitted to take and that it has, as part of the Dispute Resolution process, considered the submissions made by the Practice. However, having considered the submissions of the Practice it remains of the view that the additional space should be excluded from Notional Rent.
- 5.1.17 Whilst the Practice may take the view that the decision is unreasonable or based on a technicality, it is a decision the ICB was permitted to take and the ICB's submission is that its decision should not be set aside. There is no legal entitlement for the Practice to receive the Notional Rent and it is not alleged by the Practice that the ICB has made a mistake in law. The ICB makes the submission that the decision it made is one made not only by this ICB but ICBs across the country and is a reasonable decision to be made. It is submitted by the Practice that "*in the absence of further guidance or agreement, we believe the default position should be to mirror the rules contained in the PCD*". However, the PCD is clear on the face of it what the position is up to funding of 66%. Once funding is in excess of 66% it is discretionary. Had the rule makers intended that to be the default position why would the figure of 66% appear in there? It is clearly the case that it is up to ICB's to evaluate the position. This ICB has and made its decision accordingly. In those circumstances the ICB say that its decision should be upheld.
- 5.1.18 The ICB notes that in its letter dated 3 January 2023 NHSR say "*Where a contractor has been receiving reimbursement under the Premises Costs Directions since before 1 April 2013 **the 2004 version of the Directions applies to the claim.** Paragraph 46 of the 2004 Directions makes any service charge reimbursement dependent upon already having a rent reimbursement approved under 2004 Directions. Therefore, the transitional provisions in paragraph 56(1) of the 2013 Directions requires that once payments are made under the 2004 Directions they will continue to be paid under that version of the Directions*". For the avoidance of doubt the ICB's position is that for the 98.7 sqm [sic] there is no rent reimbursement approved under 2004 Directions and therefore no payment that falls due to be paid pursuant to the 2013 Directions.
- 5.1.19 The ICB therefore submits that the appeal should be dismissed."

## 5.2 The Contractor's Representations

- 5.2.1 "Many thanks for your letter dated 3 January 2023. As requested, I am writing to set out the representations on behalf of the Contractor. They are as follows:

### Nature of Dispute

- 5.2.2 The Dispute relates to a technical dispute surrounding reimbursable space of the Current Market Rent assessment for Yarm Medical Centre 1 Worsall Road Yarm Stockton-on-Tees TS15 9DD.
- 5.2.3 This dispute is not a valuation dispute. It is a technical dispute for the inclusion of an additional 89.7 sqm of space.
- 5.2.4 The Current Market Rent (Notional Rent) for the review effective 5<sup>th</sup> March 2021 has been agreed at £166,250 per annum, this is not in dispute. The value

of the additional 89.7 sqm, of which its inclusion for reimbursement which forms the sole basis of this appeal, has been agreed at £15,518.10 per annum. (Appendix 1).

- 5.2.5 The property was constructed in 2009. At this time, the practice was given a grant of £175,000 in return for the practice operating as a training practice. If the surgery ceased to operate as a training practice, the contractor would be required to repay the grant on a sliding scale over a period of five years.
- 5.2.6 The practice fulfilled their obligations as training practice however were then notified by NHS Cumbria and the North East (NHSCNE) that the additional space of 89.7 sqm was not eligible for Notional Rent reimbursement.
- 5.2.7 There is however, no signed documentation which suggests that the 89.7 sqm would remain excluded from reimbursement indefinitely. As such it is the contractor's opinion that the abatement regulations of the Premises Costs Directions 2004 (PCDs) should apply and this space should now, following the ten year abatement period and the fact the practice have fulfilled their training obligations, be eligible for Notional Rent reimbursement.
- 5.2.8 Following discussions with the District Valuer (DV), BW Healthcare Surveyors (BWHS) had informal discussions with NHSCNE and [GE] of NHS Tees Valley Clinical Commissioning Group (Now North East & North Cumbria Integrated Care Board – referred to throughout this document as 'CCG'). Following these discussions, BWHS were invited to make written representations as part of Local Dispute Resolution for the inclusion of this additional space. Submissions were provided on 16 May 2022 and can be found at Appendix 2.
- 5.2.9 On 28 June 2022, the CCG confirmed to the practice that the appeal for inclusion of this space had been rejected. Copy correspondence enclosed at Appendix 3. The reasons for the appeal being rejected were as follows:
- 5.2.9.1 The initial funding criteria stated that no rent would be claimable and there was no time limit on that.
- 5.2.9.2 Premises Cost Directions does not allow 100% grants therefore the reimbursement falls outside of the directions.
- 5.2.9.3 The Practice own the asset which was 100% funded by the NHS grant.
- 5.2.10 Despite all of these reasons being covered in the original application, the contractor further challenged each reason for the rejection of the funding. Please see our direct response at Appendix 4 and summary below.
- 5.2.11 **The initial funding criteria stated that no rent would be claimable and there was no time limit on that.** Please see Appendix 5. This is the only document provided by CCG stating that the rent will be excluded indefinitely (Point 3). There is no date, nor signature on this document. Please now see Appendix 6, this is the same document but with Point 3 specifically removed. This is a signed document. It is the admission of the CCG that a number of original documents have been mislaid due various NHS organisational changes over the years. These two documents are the only remaining relevant pages which remain and refer to reimbursement. It is the contractor's opinion that the intention at the time is the original letter (Appendix 5) was presented to the practice stating that no Notional Rent would be applied, and subsequently agreement was then reached between the PCT and practice at the time to remove this clause (point 3) and a revised document (Appendix 6), and this was signed.



- 5.2.12 **Premises Cost Directions does not allow 100% grants therefore the reimbursement falls outside of the direction.** The contractor is of the opinion that this is an unfair technicality. It is unreasonable to assume that the default position for any funding over 66% (as detailed within the Premises Cost Directions) would have no legislation attached and therefore would automatically receive no funding indefinitely, as this is unreasonable. To suggest there is a blanket policy that this assumes there is no reimbursement is in our opinion flawed. The reason for this is if the grant was for example, 67% funded, by this logic, the practice would still have had to put in their own funds but receive no benefit indefinitely. In the absence of further guidance or agreement, we believe the default position should be to mirror the rules contained with the PCD.
- 5.2.13 **The Practice own the asset which was 100% funded by the NHS grant.** The point of stating this as a reason for rejection is unclear. It is assumed that the CCG believe that as the 89.7 sqm was effectively fully funded, the partners would then benefit from the increase in capital value. This is of course incorrect as the value of the surgery is directly linked to the rent reimbursement. Without the additional rent, the capital value will not increase by the same relative amount. In reality, any purchaser would likely offer a lower amount as this is effectively a liability due to costs of running the space with no rental benefit.
- 5.2.14 The CCG again rejected the arguments, stating that the signed document (Appendix 6) was 'new evidence' when in fact it was originally presented and fully explained in the original rental application (Appendix 2). As all the reasons for rejection were previously covered in the original rental submission and the fact the CCG refer to the signed documents as new evidence when they already had this, raises the question if the original application was thoroughly considered. Please see correspondence in Appendix 7.
- 5.2.15 We are of the opinion that the additional 89.7 sqm should be approved for reimbursement from the most recent review date of 5<sup>th</sup> May 2021. We believe that in the absence of specific signed documents stating that the space will be excluded from reimbursement indefinitely, that the abatement regulations of the Premises Costs Directions should apply. The contractor is aware that this would mean for the period of 2009-2019 they would have been entitled to a benefit of 10% under the regulations for running costs however in order not to add further financial pressures to the NHS, they are not seeking this back payment and only wish to have full funding from 5<sup>th</sup> May 2021.
- 5.2.16 Further justification and arguments are set out within the original rental application in the section entitled "What is the justification for making this application?" In appendix 2. We ask that these are considered alongside the main argument as set out within [5.3.16].
- 5.2.17 For the avoidance of any doubt within the appendices and local discussions, the 89.7 sqm is sometimes referred to as 90 sqm. An area of 89.7 sqm was agreed by the DV. This is the same space.
- 5.2.18 This matter is being referred to NHS Resolution for Appeal on the basis that the practice have fulfilled their training obligations as set out within the originally funding grant. There is no signed documentation to state the rent should be excluded indefinitely. They have missed out on significant funding but have still been expected to run this space for GMS purposes. There is no benefit to the practice in continuing offering free space and are well within their rights to let this space to a third party and receive a market rent, this would of course be of detriment to the NHS. The suggestion that anything over 66% funding results in an automatic blanket policy that no Notional Rent would ever be received but the practice are still expected run a [sic] GMS service from this space, is simply unfair.

A timeline of events is stated herein as follows:

- 5.2.19 The Contractor was notified by NHSCNE on 24 June 2021 that the DVs assessment of Notional Rent was £162,500 per annum with effect from 05 March 2021. Copy correspondence enclosed at Appendix 8.
- 5.2.20 The Contractor contacted NHSCNE by email on 13 July 2021 to confirm their disagreement to the DV's opinion of CMR and to confirm the appointment of BWH as representatives to act on their behalf in this matter.
- 5.2.21 NHSCNE subsequently confirmed in an email dated 08 July 2021 that the DV had been instructed in this matter as part of this correspondence, NHSCNE claimed a floor area of only 846.2 sqm was eligible to be reimbursed Notional Rent. Copy correspondence enclosed at Appendix 9.
- 5.2.22 BWHS were invited to make written representations as part of Local Dispute Resolution for the inclusion of this additional space. Submissions were provided on 16 May 2022 and can be found at Appendix 2.
- 5.2.23 On 28 June 2022, the CCG confirmed to the practice that the appeal for inclusion of this space had been rejected.
- 5.2.24 Copy correspondence enclosed at Appendix 3.
- 5.2.25 On 22 September 2022, further written submissions were provided by BWHS seeking clarification and reasoning on the specific decisions. Copy correspondence enclosed at Appendix 4.
- 5.2.26 On 24 October 2022, the CCG responded stating the additional 89.7 sqm would remain excluded indefinitely from Notional Rent reimbursement. Also on this date, the CCG stated that evidence provided by BWHS was new evidence, however this is not correct as it was provided in the original submission of 16 May 2022. Regardless, the CCG did not change their opinion. Copy correspondence enclosed at Appendix 9.
- 5.2.27 On 24 October 2022, BWHS replied to the CCG email of the same day, questioning the validity of the decision. No response was forthcoming. Copy correspondence enclosed at Appendix 10.
- 5.2.28 Local discussions have been completed. As a reminder, this is not a dispute of valuation, it is purely a dispute of the reimbursement of additional 89.7 sqm of space.

#### Parties to the Dispute

- 5.2.29 [GE] Digital and Estates Lead – Tees Valley North East & North Cumbria Integrated Care Board.
- 5.2.30 The Practice Partners of Yarm Medical Centre 1 Worsall Road, Yarm, Stockton-on-Tees, TS15 9DD.

#### Relevant Regulations

- 5.2.31 The Contractor is a GMS provider and has operated at the premises since its construction in 2011.
- 5.2.32 As GMS providers, the Contractor refers the matter of Current Market Rent as at 05 March 2021 for dispute resolution under the provision of part 12 of the NHS (General Medical Services Contracts) Regulations 2015.

5.2.33 The Contractor has appointed BW Healthcare Surveyors Limited to represent them in this dispute. Copy letter of authority to act is enclosed at Appendix 8.

#### Local Negotiations and Local Dispute Resolution Protocol

5.2.34 As detailed within the nature of dispute section, the values of all aspects of the Notional Rent have been agreed with the DV. This includes the additional 89.7 sqm of £15,518 per annum as at the valuation date. Local Dispute has been followed with written submissions made to NHSCNE and CCG.

5.2.35 LDRP has been exhausted.

#### Agent's Remuneration

5.2.36 It is confirmed that the Agent (BW Healthcare Surveyors) is appointed by the Contractor on a performance fee related basis.

#### Appropriate Outcome of Dispute

5.2.37 The Contractor seeks direction from NHS Resolution to determine that the additional 89.7 sqm which was formally excluded as part of the agreement that the practice would provide training, now be included for reimbursement in addition to the currently reimbursed space for the review dated 05 March 2021, and all subsequent Notional Rent reviews. The Contractor does not agree that the original stance of NHSCNE/CCG which excluded the additional 89.7 sqm from Notional Rent reimbursement is fair, reasonable or valid.

#### Summary of Figures

Current reimbursement	£166,250 (value agreed, reimbursement not disputed)
Additional space (89.7 sqm)	£15,518.10 (value agreed, reimbursement disputed)
Total potential NR	£181,768.10

With effect from 5<sup>th</sup> March 2021”

## 6 Observations

### 6.1 ICB's Observations

6.1.1 “This response is sent in relation to the observations made to the response made by Yarm Medical Centre dated 20 January 2023.

6.1.2 In the contractors response at section [5.2.11] there is a reference to the contractor's “opinion” and “intention” in relation to the signing of the form. What they do not do in that paragraph is set out a factual matrix which demonstrates their case, that is, a factual matrix which shows that agreement was reached between the parties. There is no evidence before NHSR that an agreement was reached. They say that the document is signed but as we have noted previously there is no name (so we don't know if it is alleged to have been signed by an authorised signatory) and not dated.

6.1.3 In section [5.2.18] they refer to an automatic blanket policy. Our position is that the ICB is not obliged to approve reimbursement in these circumstances. It has options available to it as to the decision it makes. It has chosen not to reimburse and that is within the range of permissible responses.

6.1.4 Based on the above observations, the ICB continues to submit that the appeal should be dismissed.”

## 6.2 The Contractor's Observations

6.2.1 "Many thanks for your letter dated 30 January 2022. As requested, I am writing to set out my replies to the ICB's representations. They are as follows:

### DMB Reps – Bullet Points

6.2.2 [5.1.9] Whilst the Contractor accepts the ICB are outlining the history of the case, the comment that it has not been challenged at this level before is irrelevant.

6.2.3 [5.1.12] Document 1 (30 June 2009) has clearly been superseded by Document 2 (9 July 2009).

6.2.4 [5.1.13] The comment is made, twice, that Document 2 is not on headed paper. It is clear that Point 3 which is in Document 1 has been removed and it is this point that states the additional 89.7 sqm will be excluded. The question should be asked, why would the ICB raise the fact that Document 2 is not on headed paper if they didn't see that as relevant? If Document 2 had been on headed paper, would they therefore accept that it was agreed that Point 3 of Document 1 has been removed and the space should therefore be reimbursed? If not, why would they raise this? There are of course many reasons why a particular document may not be on headed paper and Document 2 should not be dismissed because of this.

6.2.5 [5.1.14] It is unclear as to which part of the Contractor's submission the ICB are referring to but the suggestion that it is agreed this decision can be made is incorrect. This is covered in 1.8.2 of our submission and assumed to be the section which the ICB are referring to.

6.2.6 [5.1.16] It is questionable as to whether the ICB considered the original submissions as they refer to Document 2 as being 'new evidence' (within Appendix 10 of our submission) when it was sent with the original request. In addition, all the reasons initially given for refusing reimbursement were covered at length in the same original request as it detailed further within the Contractor's submission.

6.2.7 [5.1.17] The ICB makes the comment that the 'decision it made is one made not only by this ICB but ICBs across the country' – Whilst of course it is not possible to raise new evidence at this stage, there are many examples across the country that allow for grants in excess of 66% funding to receive Notional Rent.

6.2.8 [5.1.18] For the avoidance of doubt, it is assumed the 98.7 sqm referenced is a typographical error and it should indeed read 89.7 sqm

### Appropriate Outcome of Dispute

6.2.9 The Contractor's position in this matter is relatively straightforward. Fairness and reasonableness aside, Document 1 was clearly written up at or around the grant of the loan stating that the space would be excluded from rent reimbursement. This was not signed. Document 2 nine days later was drawn up (clearly after further discussion between the parties at the time) with that specific point removed. This was then signed. The ICB have accepted that documents have been lost and the decision makers at the time are no longer around. Why would Document 2 exist if it was not the intention of the parties that the space would attract rental reimbursement?

6.2.10 The Contractor seeks direction from NHS Resolution to determine that the additional 89.7 sqm which was formally excluded as part of the agreement that

the practice would provide training, now be included for reimbursement in addition to the currently reimbursed space for the review dated 05 March 2021, and all subsequent Notional Rent reviews.”

## 7 Consideration

- 7.1 I note that following the letter of 24 June 2021 from NHS England titled “Rent Reimbursement Determination” the Contactor wrote to NHS England seeking to dispute the reimbursable area of the premises as set out in the letter of 24 June 2021. I note that NHS England considered the information from the Contractor and stated in an email of 24 October 2022 that “*Based on that the decision made and the reasoning by the CCG, in which full consideration was given to the request, still stands and the ICB will not be reviewing the decision.*”
- 7.2 I am content that parties have entered into local dispute resolution and following the final decision of the ICB, the Contractor, remaining dissatisfied, has referred the matter to NHS Resolution. I note that there is no dispute between the parties that local dispute resolution has been completed and that the Contractor has made an application for dispute resolution following receipt of a final decision from the ICB. I am content that local dispute resolution has been completed.
- 7.3 I note that the letter of 24 June 2021 contains the rent valuation and that there is no dispute between parties with regard to this or the number of car parking spaces at the premises.
- 7.4 I note that all figures, both with the relevant area included and excluded, are agreed by both parties. I note that there is no dispute between the parties with regard to the area of the premises. I further note that there is no dispute between the parties with regard to the area that is currently excluded from the reimbursable area or the value that is associated with this area.
- 7.5 I note that the dispute centres on whether the 89.7 sqm should be excluded from the reimbursable area of the medical centre with effect from the 5 March 2021 rent review.
- 7.6 Given the rent valuation and all the areas are agreed between the parties I am of the view that there is no need for me to consult an Advisor and have therefore proceeded on this basis.
- 7.7 I note that both parties accept that the Contractor has been in receipt of notional rent for the premises under the Directions.
- 7.8 I note that again there is no dispute between the parties that the area in question is made up of 4 rooms and that these have been excluded from the notional rent since construction.
- 7.9 The Contractor was given a 100% Deanery grant of £175,000 to fund the construction of the four rooms and this is accepted by both parties. It is also accepted by both parties that no notional rent has been payable to the Contractor for the 89.7 sqm in question.
- 7.10 I note that I have been provided with a copy of a “Rental Changes Form” for the practice in which the Contractor, in response to the question ‘What is the practice applying for?’ has stated “The inclusion of 90sqm of additional GMS space which is not currently reimbursed Notional Rent.” I note that this form is undated and has not been signed by the practice and the “For office use” part of the form has not been completed.
- 7.11 I note that the area applied for in this form is 90 sqm whilst the area in dispute is 89.7 sqm. In their application the Contractor states “*For the avoidance of doubt, the additional space is often referred to as 90 sqm within the correspondence, this is the*

space in question, an area of 89.7 sqm was agreed by the DV". I note that this is accepted by both parties.

- 7.12 The ICB are of the view that as the space was fully funded it falls outside of the Directions. The ICB go on to state that this is acknowledged by the Contractor in paragraph 3 of the "Application Form for Premises Reimbursement Changes" which states:

*"Discussions with NHSE – We are aware discussions have already taken place with NHS England and the reason the space is not reimbursed is on the basis that as the grant was fully funded, then this excludes the space from the Premises Cost Directions (PCD) which state a maximum of 66% are to receive no rent indefinitely. We disagreed that the 'default' position of anything over 66% funding would have no legislation attached and therefore would automatically receive no funding indefinitely, as this is unreasonable. In the absence of further guidance or agreement, we believe the default position should mirror the rules contained within the PCD. Obviously if the PCD had applied going back to the grant date then this would have been subject to the abatement regulations from 2009 – 2011. We were unaware of this at the time however and as such, to draw a line under this matter, we do not contest the situation from prior to the current review date and ask only that it is reimbursed from 5<sup>th</sup> March 2021 going forward."*

- 7.13 I note that I have also been provided with two similar copies of the "GP Registrar Premises Initiative – Practice Undertaking".

- 7.14 I note that the first copy of this document has not been completed. The second copy, whilst signed is undated and is also slightly different in that the wording is not the same and is missing clauses 2 and 3 which state:

*"2. I agree that if the Practice does not undertake the expansion programme as specified in the submitted application, 100% of funding is returnable.*

*3. Rent Re-imburement: The value and room areas funded by this programme will be excluded from the District Valuer's assessment for rent re-imburement."*

- 7.15 I have also been provided with a copy of the covering letter from NHS England of 9 July 2009, which makes reference to this form. The order of documents from the Contractor suggests that the second copy of the document is the one that was sent with the letter of 9 July 2009, however this is not clear from the information provided. Further, there is no explanation as to why the Contractor has two forms but only one covering letter. Further there is no confirmation as to whether this form was returned to NHS England at the time as I have not been provided with any correspondence from the Contractor to NHS England enclosing this form.

- 7.16 In these circumstances, I must conclude that there is no evidence of an agreement between the parties on how the rooms would be treated after the 5 years' training requirement had been completed.

- 7.17 I note that there is no dispute from parties that the rooms have been previously excluded from the rent reimbursement.

- 7.18 I further note that there is no dispute that this additional space is no longer being used by the Deanery but that it is being used by the Contractor for GMS services.

- 7.19 In view of the lack of proof of any definitive agreement between the parties on the treatment of the rooms once the 5 year training period had expired, I will need to look to the Directions for guidance.

- 7.20 I note that paragraph 12 of the Directions under "Premises Development and Improvement" states:

### **Priority funding projects and conditions attached to payments**

*12. If the PCT determines that a proposal from a contractor for premises development or improvement of a type mentioned in direction 7 is to be included in the PCT's estates strategy for investment prioritisation, and is to be one of its priority funding projects, the PCT must seek to finalise a project plan with the contractor. If the financial assistance is by way of a premises improvement grant, the PCT must not commit itself to covering less than 33% or more than 66% of the total cost of the premises improvement.*

7.21 I am mindful however that the grant does not fall within these conditions as it was a Deanery grant and was for 100% of the total costs involved. I am therefore of the view that this paragraph is not helpful in this case.

7.22 I have next considered paragraph 43 of the Directions under "Recurring Premises Costs" which states:

#### **Abatement of notional rent payments**

**43. Where—**

*(a) NHS capital has contributed to the cost of building or refurbishment work done in respect of the practice premises of a contractor; and*

*(b) that contribution of NHS capital was made after 18th September 2003,*

*on completion of the building or refurbishment work, the amount of the notional rent payable by a PCT must be the abated notional rent for those premises, calculated in accordance with Part 1 of Schedule 3, rather than the full notional rent, determined in accordance with direction 42. However, after a period of 10 years the full notional rent again becomes payable.*

7.23 I note that any abatement of rent should cease after a period of 10 years. I note that further calculations of the abatement are given in Schedule 2 of the Directions.

7.24 With references to the above paragraph, I note that the grant was given to the practice in 2009, which is over 10 years ago, and that there is no dispute from parties on this matter. Therefore, even if abatement had ever been a possibility in this case, the requirement to do so fell away several years ago.

7.25 I note that the rent was not abated for this additional space as it was never included in the total reimbursable area and therefore the Contractor has not been receiving any payments for the area in question. I further note that there is no dispute over this point.

7.26 I note for completeness that the Directions contain no provisions for dealing with funding associated with Deanery grants.

7.27 I have next considered paragraphs 41 and 42 of the Directions which state:

#### **Notional rent payments**

*41. Subject to the following provisions of this Part, where a contractor that is an owner-occupier of its practice premises—*

*(a) either—*

*(i) has repaid the loans secured on its practice premises, or*

*(ii) incurs borrowing costs as a result of purchasing, building or significantly refurbishing practice premises (or would have incurred*

*such costs had the contractor not funded the project with its, or its partners' or shareholders', own resources) but elects not to receive any payments from its PCT in respect of those borrowing costs; and*

*(b) makes an application to its PCT for notional rent payments, the PCT 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. If a contractor has been in receipt of payments in respect of its borrowing costs pursuant to direction 39, elects not to receive further payments pursuant to that direction and makes an application in accordance with this direction, its PCT must grant that application and make notional rent payments to the contractor under its GMS contract at an appropriate level and frequency.*

#### **Amount of notional rent payments**

*42. Where a PCT grants an application of the type mentioned in direction 41, subject to the following provisions of this Part, the amount that it must pay to a contractor in respect of notional rent is the current market rental value of its practice premises, as determined in accordance with Parts 1 and 3 of Schedule 2. The PCT must review this amount as part of a three yearly review of the contractor's notional rent, although this review may be brought forward if–*

*(a) there is a change to the purposes for which the premises are used;*

*(b) there is further capital investment in the premises, and payments are to be made to the contractor in respect of that investment under its GMS contract.*

- 7.28 I note from parties that the Contractor is no longer using the area as part of the GP Registrar initiative and that the area is now being used by the Contractor to provide GMS services, and has been used for this purpose for a number of years
- 7.29 The four rooms in question have never been included in the space for which the Contractor has been reimbursed for notional rent. Now that the Deanery grant funding has effectively been repaid (by the provision of the requisite 5 years of training) and the rooms have been re-purposed to provide GMS services I consider it appropriate for the Contractor to make an application under paragraph 41 of the Directions for reimbursement in respect of these rooms. The ICB must consider that application in line with the requirements of paragraph 41. Should the application be approved, I note that the agreed valuation for the reimbursement is £15,518.10.
- 7.30 I further note the comments from the Contractor that they are not seeking any historic monies and are only seeking the additional area to be included with effect from the date of the current rent review (5 March 2021).
- 7.31 I note that neither party has submitted a claim for interest with regard to this dispute so I make no determination in this regard.