

25 February 2010

FILE REF: SHA/15502

PRIMARY CARE TRUST: #

GMS PROVIDER: #

SUBJECT PREMISES: #

DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE (GENERAL MEDICAL SERVICES CONTRACTS) REGULATIONS 2004

RE: ELECTION FOR CURRENT MARKET RENT UNDER THE NATIONAL HEALTH SERVICE (GENERAL MEDICAL SERVICES – PREMISES COSTS)(ENGLAND) DIRECTIONS 2004 (“Premises Costs Directions”)

1. INTRODUCTION

- 1.1 As a GMS Provider, the Contractor has referred the dispute for dispute resolution under the provisions of Schedule 6, Part 7 of the NHS (General Medical Services Contract) Regulations 2004.
- 1.2 On behalf of the Secretary of State for Health, the NHS Litigations Authority (“NHSLA”) is directed to exercise the functions of dispute resolution. I, as an authorised officer of the NHSLA, have made this determination.

2. THE FOLLOWING POINTS ARE RELEVANT TO THIS APPLICATION FOR DISPUTE RESOLUTION

- 2.1 The Contractor has appointed GP Surveyors as its representative in this dispute. In letters dated 9 and 17 November 2009 the Contractor’s dispute with the PCT is set out and referred to the NHSLA for Dispute Resolution.
- 2.2 Neither letter by itself contains a clear explanation as to the basis of the dispute. However, taken together I understand the complaint to be that the PCT has refused to provide a current market rent (“CMR”) for the subject premises to enable the Contractors to decide whether to elect retrospectively to move from cost rent/borrowing costs to notional rent from August 2005 under the Premises Costs Directions. It is the Contractor’s contention that the PCT is obliged to provide a CMR valuation every three years.
- 2.3 I have had regard to the following documents made available to me in consideration of this matter:
 - 2.3.1 Letters of 9, 17 and 25 November 2009 and 11 January 2010 plus an email of 16 December 2009 from G P Surveyors to the NHSLA;

- 2.3.2 Letter of 11 May 2009 from G P Surveyors to the PCT;
- 2.3.3 Letter from the PCT dated 14 October 2008; and
- 2.3.4 Letters from Hempsons Solicitors acting for the PCT of 30 December 2009, 5 and 29 January 2010.

3. STATUTORY FRAMEWORK

- 3.1 I note the GMS Regulations apply in this case. Schedule 6, Part 7, paragraph 101 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 4(3) of the 1990 Act (where the agreement is an NHS contract); or
 - (b) in accordance with paragraph 100(1) (where the agreement is not an NHS contract)."
- 3.2 I note paragraph 101(3) states that any written request to the Secretary of State for Dispute Resolution shall include or be accompanied by:
 - 3.2.1 the names and addresses of the parties to the dispute;
 - 3.2.2 a copy of the contract; and
 - 3.2.3 a brief statement describing the nature and circumstances of the dispute.
- 3.3 The Contractor has failed to send a copy of the contract with its request for dispute resolution as is required by Part 7 paragraph 101(3) of the Regulations. I am satisfied that I can resolve this dispute without sight of the contract.
- 3.4 I am mindful that Part 5 of the GMS Statement of Financial Entitlements, which applies to payments under a GMS Contract, indicates the relevant provision is contained within the Premises Costs Directions.

4. CONSIDERATION

- 4.1 The Contractor had received cost rent/borrowing costs since 2000 first under the Statement of Fees and Allowances and then from April 2004 under the Premises Costs Directions.
- 4.2 In August 2008 the PCT provided to the Contractor a figure for CMR. The Contractor decided to elect to move from a cost rent/borrowing costs to a notional rent payment calculated in accordance with the provisions in the Premises Costs Directions.
- 4.3 Subsequent to this, the Contractor and then G P Surveyors approached the PCT to ask for a retrospective CMR for August 2005 to enable the Contractor to decide whether it should elect for notional rent from this date.
- 4.4 Direction 41 of the Premises Costs Directions provides that where a Contractor in these circumstances makes an application for notional rent payments the PCT must grant that application.

- 4.5 Direction 42 of the Premises Costs Directions provides that when this application is granted then 3 yearly reviews of notional rent must be undertaken.
- 4.6 There is nothing in the Premises Costs Directions which requires (or even allows for) retrospective 3 yearly reviews of CMR, or indeed retrospective elections to move to notional rent, after a Contractor has elected to move to notional rent.
- 4.7 I am not satisfied that the Statement of Fees and Allowances had any application to the subject premises after 1 April 2004 when it was replaced by the Premises Costs Directions. Even if it did it does not provide that the PCT must review CMR every three years unless the Contractor has already elected to receive notional rent. It certainly does not allow for retrospective reviews.
- 4.8 Accordingly, the Contractor cannot require the PCT to provide a retrospective CMR for August 2005 and the Contractor is not entitled to a retrospective election for notional rent.

LISA HUGHES
Appeals Manager