

10 November 2009

FILE REF: 13836

PRIMARY CARE TRUST: #

PMS CONTRACTOR: #

PREMISES: #

DISPUTE RESOLUTION: NHS (PERSONAL MEDICAL SERVICES AGREEMENT) REGULATIONS 2004

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

RE: LEASEHOLD PREMISES RENTAL COSTS

1 Introduction

- 1.1 As a PMS Provider, the above named contractor has referred the matter of leasehold premises rental costs as at 29 September 2004 for dispute resolution under the provision of Paragraph 95, Schedule 5 of the NHS (Personal Medical Services Agreement) Regulations 2004.
- 1.2 The relevant provision is contained within the NHS (General Medical Services – Premises Costs) (England) Directions 2004; Part 5 and in particular paragraphs 31 and 32 [‘the 2004 Directions’].
- 1.3 The Secretary of State for Health had directed the NHS Litigation Authority to exercise the functions of dispute resolution on his behalf. I, as an authorised officer of the Authority, have determined this application.
- 1.4 The dispute resolution procedure also allows for advice to be sought.

2 The Following Points are relevant to this Application for Dispute Resolution

- 2.1 In a letter dated 1 June 2007, the contractor through his representative, applied to the NHS Litigation Authority for Dispute Resolution. The letter argued that current market rent in respect of the contractor’s surgery premises should have been assessed at a figure higher than £159,500 with effect from 29 September 2004.
- 2.2 I have had regard to the documents provided by parties to the application in support of their position.

3 Statutory Framework

- 3.1 The PMS Agreements Regulations 2004 apply in this case. Schedule 5, Part 7, paragraph 95(1) of the Regulations, indicates with some exclusions, that the NHS dispute resolution procedure applies in the case of “any dispute arising out of or in connection with the agreement which is referred to the Secretary of State –

(a) *in accordance with section 4(3) of the 1990 Act (where the agreement is an NHS contract); or*

(b) *in accordance with paragraph 94(1) (where the agreement is not an NHS contract)."*

3.2 I note however that parties do not dispute that Part 5 of the GMS Statement of Financial Entitlements applies in this case and this indicates that recurring premises costs such as rent payments are dealt with in the 2004 Directions. Part 5, paragraphs 31 & 32 of the 2004 Directions state:

Recurring Premises Costs

Leasehold premises' rental costs

31. Subject to the following provisions of this Part, where—

(a) a contractor which rents its practice premises makes an application to its PCT for financial assistance towards its rental costs; and—

(b) in the case of rental costs arising under a lease agreed or varied on or after 1st April 2004, the PCT is satisfied (before the lease is agreed or varied), where appropriate in consultation with the District Valuer, that the terms on which the new or varied lease is to take effect represent value for money,

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.

Amount of leasehold premises' rental costs payable

32. If a PCT does grant the application, subject to the following provisions of this Part, the amount that it must pay in respect of a contractor's rental costs for its practice premises is—

(a) the current market rent for the premises; or

(b) the actual lease rent for the premises, plus any Value Added Tax payable by the contractor if this is properly charged to the contractor by the landlord,

whichever is the lower amount.

4 Preliminary Matters

4.1 It would appear that the contractor has applied to the PCT pursuant to paragraph 31(a) of the 2004 Directions. I am mindful that the instant dispute relates to the assessment of the Current Market Rent of the subject premises. Nonetheless, the amount of leasehold premises rental costs payable under the GMS Contract by the PCT to the Contractor is 'whichever is the lower amount' pursuant to paragraph 32 of the 2004 Directions.

4.2 In order to be able to determine the dispute properly, I decided to consult and seek advice from an Independent Expert Advisor (IEA) appointed by the Royal Institution of Chartered Surveyors (RICS). The IEA uses its expert knowledge on these matters to weigh the merits of the arguments presented but, importantly, has no pecuniary or budgetary interest in the outcome. It is open to the IEA to ensure that it has available to it as full an understanding as possible of the parties' view on the appropriate valuation. This can include providing the parties the opportunity to fully disclose matters, which have not previously been made available, expand on that already provided and also inspect the subject premises and any comparables.

4.3 The IEA provides a report that deals with any factual matters in dispute e.g. the floor area of the premises, addressing the issues raised by the parties. The report is in the form of a reasoned assessment and recommendation. The Authority received the

report, and the parties were provided with an opportunity to make observations upon it.

5 Consideration

- 5.1 I note that the final total figure upon which the contractor seeks to rely is £174,600, which is contained in submissions to the IEA. I further note that the PCT, in submissions to the IEA, contended that the revised CMR as at the date fixed for review was £159,500.
- 5.2 I note that parties were asked for comments on the report of the IEA but that none were received from either party. In my view, the rational in the advice to me is robust. On this basis I am not persuaded to depart from the advice given to me by the IEA.
- 5.3 For the reasons given in the report from the IEA, I accept the recommendation on the current market rent of the subject premises with effect from 29 September 2009, which is £168,350.
- 5.4 I note in a letter to me dated 23 October 2009 the Contractor's representative raised the issue of interest payments. I draw this matter to the attention of the PCT.

Lisa Hughes
Appeals Manager