

29 June 2010

FILE REF: 15573

PRIMARY CARE TRUST: # PRIMARY CARE TRUST

PMS CONTRACTOR: DR # AND PARTNERS

DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE
(PERSONAL MEDICAL SERVICES
AGREEMENTS) REGULATIONS 2004

RE: DISPUTE RESOLUTION

1. INTRODUCTION

- 1.1 The Contractor, through its representatives, has referred the dispute in relation to its Personal Medical Services Agreement ("the Agreement") for dispute resolution under the provisions of paragraph 95 of Schedule 5 of the National Health Service (Personal Medical Services Agreements) Regulations 2004 ("the Regulations").
- 1.2 The Secretary of State for Health has directed that the NHS Litigation Authority exercise the functions of dispute resolution on his behalf. As an authorised officer of the NHS Litigation Authority I have made this determination.

2. APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By letter dated 16 February 2010, the Contractor applied to the NHS Litigation Authority 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 letter from the Contractor's Representatives dated 23 December 2009 together with enclosures;
 - 2.2.2 e-mail from the Contractor's Representatives dated 20 January 2010;
 - 2.2.3 letter from the Contractor's Representatives dated 25 January 2010;
 - 2.2.4 e-mail from the Contractor's Representatives dated 16 February 2010 together with enclosure;
 - 2.2.5 letter from the Contractor's Representatives dated 16 February 2010;
 - 2.2.6 letter from the PCT dated 10 March 2010 together with enclosures;
 - 2.2.7 letter from the Contractor's Representatives dated 9 March 2010 together with enclosures;
 - 2.2.8 letter from the Contractor's Representatives dated 26 March 2010 together with enclosures;
 - 2.2.9 e-mail from the Contractor's Representatives dated 29 March 2010 together with enclosures;
 - 2.2.10 letter from the PCT dated 7 April 2010 together with enclosure;

2.2.11 e-mail from the PCT dated 15 April 2010;

2.2.12 letter from the PCT dated 5 May 2010 together with enclosures;

2.2.13 e-mail from the PCT dated 6 May 2010.

2.3 The Contractor and the PCT dispute whether the Contractor was entitled to receive Notional Rent under the provisions of the NHS (General Medical Services – Premises Costs) (England) Directions 2004 ("the Directions"). The Contractor states that by refusing to increase the baseline [of the PMS Agreement between the parties] the PCT were 'acting against the NHS (General Medical Services – Premises Costs) (England) Directions 2004.'

3. **CONSIDERATION**

3.1 It is the Contractor's position that it was notified by letter dated 30 July 2007 from the Cheshire Health Agency that the District Valuers opinion of value for Notional Rent purposes was £33,400 with effect from 1 April 2007. I have been provided with a copy of this letter which states 'Rent and Rates' 'I can confirm that the District Valuer's assessment in respect of the Westbrook Medical Centre as at 1st April 2007 is as follows: Current Market Rent: £33,400... If you are not satisfied with the above assessment and would like to negotiate with the District Valuer please advise this office and we will arrange for the District Valuer to contact you.'

3.2 The Contractor appointed representatives on 12 September 2007 to agree the CMR which state that 'accordingly I met with the District Valuer and agreement reached as to the appropriate level of CMR to be reimbursed.' I have been provided with a copy of a letter dated 20 November 2007 from the Cheshire Health Agency which states that 'I am now in a position to confirm the District Valuers agreed assessment, as negotiated by your agent... in respect of the above premises as at 1st April 2007 – Current Market Rent: £47,500pa.'

3.3 The Contractor's Representatives dispute that the PCT has 'refused to increase the PMS baseline to allow for the increase in Notional Rent that had been agreed and documented' and 'respectfully request that the NHSLA determine that the PCT should increase the baseline funding within the contract by £14,100 per annum and state separately the CMR of £47,500, comprising the agreed CMR as at 01 April 2001. Going forwards, this is to be reviewed in line with the GMS Directions relating to Notional Rent, just as this has been done in the past where nil increases in CMR were determined.'

3.4 PCTs are not directed by the Secretary of State to make payments in accordance with the Directions to PMS Contractors. In the absence of any conditions relating to payment contained in Directions given by the Secretary of State in relation to PMS Agreements, the arrangements for payment under a PMS Agreement must be set out within the PMS Agreement as envisaged by Regulation 13 of the Regulations. There is an entire Agreement provision at Section 21 of the PMS Agreement provided to me.

3.5 The PCT observe in relation to the Contractors Representatives comments that [the Contractor's Representatives] 'assumes it is possible for premises to be included in the PMS Contract Baseline and also have a triennial review. The practice either receive a sum for premises costs within their PMS Contract Baseline which is inflated inline with their PMS Contract Baseline (which is the current position for the practice) or the PMS Contract must be varied at an end of financial year to exclude passing premises costs from the Contract Baseline, and rebase the premises to CMR under the Directions with triennial reviews thereafter.'

3.4 I accept that the PCT and the Contractor could agree that the Premises Costs Directions apply to the PMS Agreement. Whilst I have not received any evidence which suggests that the PCT and the Contractor have expressly agreed that the Premises Costs Directions apply to the PMS Agreement, it is clear that the Cheshire Health Agency has offered to negotiate the Current Market Rent with the Contractor, such offer being accepted by the Contractor. It

is not disputed that the Contractor's Representatives and the District Valour have agreed the Current Market Rent and this is set out in the Cheshire Health Agency letter dated 20 November 2007.

- 3.5 The PCT states that 'the referral of the negotiation request had been managed by the Cheshire Health Agency as an automatic response to the request.' I am satisfied that the Cheshire Health Agency was acting as an agent of the PCT in relation to these matters and that the offer of the Cheshire Health Agency to negotiate the Current Market Rent which was accepted by the Contractor amounted to an offer on behalf of the PCT to pay the Current Market Rent, as negotiated to the Contractor.
- 3.6 The PCT had offered 'to make a concession and remove the amount of £30,153 from the baseline and replace it with the CMR as at 1st April 2010 based on a valuation supplied by the District Valuer. This would then be paid outside of the baseline and subject to the normal processes.'
- 3.7 I accept the PCT position that the PMS baseline should not be adjusted to reflect the agreed Current Market Rent. Instead, the element of the baseline sum in relation to premises should have been removed from the PMS baseline with effect from 1 April 2007 and the PCT must pay the Contractor the Current market Rent which shall be subject to the Directions.

LISA HUGHES
Appeals Manager