

Primary Health Properties PLC

('Primary Health Properties' or 'PHP' or the 'Company')

PHP wins landmark judgment in High Court

Primary Health Properties, one of the UK's largest providers of modern primary healthcare facilities, announces it has made a successful test case challenge to the dispute resolution procedures to be followed when determining the level of rent to be reimbursed by the Department of Health for GP's leasehold premises.

In a landmark judgment in the High Court, Mr Justice McCombe ruled in favour of PHP, one of PHP's subsidiaries, and the GP tenants of a PHP leasehold premises ("the Claimants") in their application against the National Health Service Litigation Authority Family Health Services Appeal Unit ("the NHSLA") and the Secretary of State for Health.

The Claimants challenged the NHSLA's decision to consult with the Chief Executive Officer of the Valuation Office Agency ("VOA") when determining a dispute as to the level of rent that should be reimbursed to the GP tenants. The Claimants argued that it was not appropriate for the Chief Executive Officer of the VOA to be involved in reviewing an assessment of the level of rent that had originally been made by the District Valuer on behalf of the relevant Primary Care Trust. Instead, the Claimants' submitted that a truly independent third party surveyor should assist in determining the appropriate level of rent at the appeal stage.

In his judgment Mr Justice McCombe agreed with the Claimants' challenge. He decided that the connections between the District Valuer, (acting for the PCT at the initial stage), and the Chief Executive Officer of the VOA (advising the NHSLA at the appeal stage) were too close for justice to be "seen to be done" and gave rise to apparent bias.

PHP hope that if the judgment is properly acted upon by the NHSLA a fairer, more robust and more transparent system for reviewing rent will be implemented with the effect that, at least in some cases, the rent determined on appeal may be higher than would otherwise have been the case under the previous system. An improvement in the level of reimbursed rent, even on a small number of properties, could have significant revenue implications for PHP

Commenting on the successful application, Harry Hyman, Managing Director of PHP, said:

"We are delighted with the judgment and we hope that the appeal system will now be altered to remedy the deficiencies we have identified. We continue to maintain that the involvement of an independent surveyor at the appeal stage (either as the adjudicator or as an advisor to the Chief Officer of the NHSLA) will help to ensure that all future valuations are seen to be fair and impartial."

"PHP has a strong track record in providing modern healthcare facilities for the primary healthcare sector and is committed to increasing its portfolio of properties across the UK. PHP supports the NHS initiatives and ongoing commitment to renewing the UK's current primary healthcare estate and ensuring that primary care is delivered out of modern, purpose-built accommodation."

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Notes and Background

Application for judicial review

A judicial review application was made on behalf of (i) Primary Health Investment Properties Limited (ii) Primary Health Properties PLC and (iii) the doctor tenants at a medical centre in Bourne. The Defendants to the action were (i) The Secretary of State for Health and (ii) the NHS Litigation Authority Family Health Services Appeal Unit ("NHSLA").

The judicial review proceedings challenged the dispute resolution procedures which the NHSLA adopts in respect of disputes about the level of "current market rent" to be reimbursed to doctor tenants (and therefore paid on to PHP as landlord of primary health properties).

Background to the application

The Department of Health provides reimbursement to doctors supplying general medical services to the NHS for the rent they pay for leasehold premises. The relevant statutory framework governing the reimbursement of rent in respect of leasehold premises is the NHS (General Medical Services - Premises Costs) (England) Directions 2004 ("the 2004 Directions").

Under the 2004 Directions, where there is to be reimbursement of rent for leasehold premises, this is to be the lower of either (i) the actual lease rent or (ii) the "current market rent" ("CMR") as calculated in accordance with the 2004 Directions.

In practice, primary healthcare landlords such as PHP, are likely to receive rent from GP tenants at the level of CMR as reimbursed by the Department of Health. In many cases, the GP tenants will also have an interest in ensuring that the level of CMR is fair as it can impact on the level of contribution made to repair costs. It is therefore essential that the level of CMR is determined in a fair and robust manner.

Under the relevant statutory framework, the determination of CMR involves a two stage process:

1. Negotiations with the relevant Primary Care Trust ("PCT")

The landlord serves a notice for a rent review and sets out the revised level of rent sought. The PCT then usually instructs the District Valuer to advise it as to the appropriate level of CMR. The PCT proposes a level of CMR based on the District Valuer's recommendation. The landlord's agent and the District Valuer (as agent for the PCT) attempt to negotiate and agree the level of CMR.

2. Dispute Resolution Procedure for Appeal

If the level of CMR cannot be agreed between the parties, the dispute is ultimately resolved by the Chief Officer of the NHSLA (or an adjudicator he appoints to decide the matter on his behalf). In reaching a decision, the Chief Officer of the NHSLA is entitled to seek advice from a third party. Historically, the Chief Officer of the NHSLA has determined disputes as to the level of CMR himself and in doing so usually takes expert advice from the Chief Officer of the Valuation Office Agency ("VOA").

PHP strongly believes that the involvement of the District Valuer as the representative of the PCT at the initial stage and the subsequent involvement of the Chief Officer of the VOA at the

appeal stage is unfair. In PHP's view, the Chief Officer of the NHSLA should exercise his discretion to refer the appeal to a truly independent third party adjudicator (such as a chartered surveyor) or should take advice from such an independent third party when reaching his own decision.

The NHSLA dismissed the above submissions in correspondence. As a result, the Claimants took their case to the High Court to challenge the involvement of the Chief Officer of the VOA at the appeal stage.

The judgment

The Claimants challenged the dispute resolution procedure adopted by the NHSLA on the basis that (i) it failed to comply with Article 6 of the European Convention on Human Rights (the right to a fair and independent tribunal established by law) and (ii) it was unfair as it gives rise to the appearance of bias.

Mr Justice McCombe found that Article 6 of the ECHR was not engaged on the facts of the case (but if it had been there would have been a breach).

The Claimants' claim for judicial review succeeded on the grounds of apparent bias. The part of the judgment which deals with apparent bias starts at paragraph 105. The issue in question is set out in that paragraph: whether the NHSLA was wrong to make a decision to continue with the appointment of the CEO VOA to assist it because it would appear to the fair minded observer that there is a real risk that the VOA would be biased. Whether any actual bias is proved is irrelevant for the purposes of this basis for challenging a public body's decision.

As set out in paragraph 107 of the judgment, a decision may be tainted with bias if the decision maker has consulted or was permitted to consult a person who was tainted with apparent bias.

McCombe J found that the District Valuer was acting on behalf of the PCT in giving a valuation (see, in particular, paragraphs 111, 114 and 115). The DV also represented the PCT in presenting its case to the NHSLA.

Paragraph 117 of the judgment deals with the fact that the DV's case file was made available under the standard procedure to the CEO VOA who advised the NHSLA in making its decision. By analogy to usual litigious procedures, McCombe J stated that it "would be unheard of in such matters for the judge, arbitrator or independent expert (or anyone advising him) to see the case file of the expert who has acted on behalf of one of the parties".

Paragraph 122 of the judgment notes that the decision maker relied upon a review made by someone within the same organisation as the person whose decision was being reviewed. The guidance sent out to DVs in September 2005 (see para 114) stated that the process to be undertaken by the NHSLA was a review of the DV decision, rather than a revaluation of the dispute "in the light of [and] upon all the materials submitted, including the evidence and opinions submitted by the doctors and their expert".

In paragraphs 123 and 124, the Judge accepted Leading Counsel for the Claimants' analogy that a solicitor could not act as a legal assessor to an arbitrator in a case where one of the parties had been advised by another solicitor in his firm. McCombe J's qualification in paragraph 124 is that the situation may differ from that analogy due to the public nature of the NHSLA and the CEO VOA, but in the same paragraph it is stated that in setting the current market rent under PMS agreements neither the DV nor the CEO VOA is performing a public statutory function and, as set out in the paragraphs that follow, the VOA is positively encouraged to act like a commercial organisation.

Paragraph 130 sets out the conclusion that the fair minded observer would perceive that the DV advising the PCT and the CEO advising the NHSLA were no different from any other expert surveyor advising his client (and therefore in accordance with paragraphs 123 and 124

that it would be unacceptable for advisers from the same organisation to act for one of the parties and the decision maker).

The court found that the decision maker (the NHSLA) was basing its decision upon consultation with the CEO VOA, which was not sufficiently independent from the DV, which acted for one of the parties to the dispute, the PCT.

In conclusion, at paragraph 141, the Judge stated that the connections between the DV (acting for the PCT) and the CEO VOA (advising the NHSLA) were too close for justice to be seen to be done and the challenge to the procedure on the basis of apparent bias should succeed.

Potential consequences of the judgment

As a result of this judgment, the NHSLA is likely to have to alter the way in which it determines appeals relating to the level of CMR in circumstances where the District Valuer is engaged by the PCT to represent the PCT at the initial stage. In such circumstances, the NHSLA will not be able to involve the Chief Officer of the VOA at the appeal stage.

The Claimants to the application have always maintained that the NHSLA should involve an independent qualified surveyor (as is more common in other commercial rent review disputes) either as the appeal adjudicator or as an advisor to the NHSLA.

Whilst there can be no guarantees as to how this change will impact on the determination of CMR under the 2004 Directions, PHP believes that if the judgment is properly acted upon by the NHSLA a fairer, more robust and more transparent system for reviewing CMR will be implemented with the effect that, at least in some cases, the CMR determined on appeal may be higher than would otherwise be the case if determined following a review of the CMR by the Chief Officer of the VOA. An improvement in CMR, even on a small number of properties, could have significant revenue implications for PHP.

The Claimants were represented by Nabarro LLP, who instructed Jonathan Karas QC (of Wilberforce Chambers) and James Maurici (of Landmark Chambers).