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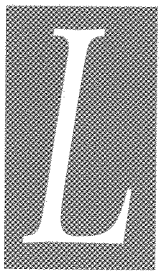

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To: PMS Contractor

BY EMAIL

Our Ref: 17/MEJ/M00283.003/1157

25 May 2007

IN CONFIDENCE – NOT FOR FURTHER CIRCULATION

Dear Sir/Madam

Your practice's superannuation claim against its PCT

I refer to the above matter and understand that you operate under a "Lockharts' Model" PMS Agreement and your PCT is refusing to pay the employer's superannuation contributions on your QOF and growth monies.

In this regard, we have recently reviewed further decisions from the NHS Litigation Authority ("**NHSLA**") and sought an Opinion from a specialist Administrative Law Counsel on the effect of the superannuation clauses under the Lockharts Agreement. The purpose of this letter is to set out:

- Part 1 - our view regarding the PCTs' liability to pay employer's superannuation contributions on QOF payments and growth monies under the Lockharts' model PMS Agreement ("**Lockharts Agreement**"); and

- Part 2 - the proposal for a number of test cases to spread the costs of dispute resolution between a large number of practices.

To aid in understanding our view outlined below, I **enclose** copies of the following documents:

- An extract of Part 17 ("*Payments*") of the Lockharts Agreement with the relevant parts underlined;

- Version 3.1 of the PMS Agreement Framework published by the Department of Health and dated 29 March 2004 ("**PMS Framework Document**"); and

- Letter by John Hutton, Minister for Health, to all PMS GPs dated 15 October 2003 ("**John Hutton letter**").

PART 1 – OUR VIEW

The arguments

From our review of further NHSLA decisions and Counsel's Opinion, we can now advise that:

Liability to pay superannuation contributions

1. Under the NHS Pensions Regulations 1995, the superannuation requirements for PMS practices are as follows:

    - all monies received by GPs including growth monies and QOF monies (but excluding non-salary practice expenses) are "pensionable pay";

    - unless otherwise agreed in a PMS agreement, the practice is primarily liable to pay the employer's superannuation contributions on pensionable pay; and

    - these contributions are usually deducted (and paid to NHS Pensions) by the PCT before the PCT makes funding payments to the practice.

2. Clause 436.2.3 of the Lockharts Agreement varies the standard position (above) by requiring that the PCT is responsible for paying, in addition to the "contract value", the employer's superannuation contribution calculated on the value of the contract value. The NHSLA accepts this position. What is in dispute is the manner in which contract value is calculated for superannuation purposes.

Calculating the contract value

3. To calculate the contract value we must turn to Clause 436.1 of the Lockharts Agreement which provides that the contract value shall be calculated in accordance with the spreadsheet set out in the PMS Framework Document. This document specifically includes the following funding in the contract value:

    - the estimated total quality payment including the "quality prep" payment, aspiration payment and the rewards[1] payment (at page 28); and

    - growth monies (at on page 30, point 2).

    The NHSLA has never referred to the PMS Framework Document in its decisions and it appears it has failed properly to consider this document. Since clause 436.1 and the PMS Framework Document have the

[1] "Rewards" was formerly the word used to describe the QOF achievement payment. We have written documentation from PCTs and expert evidence to support this.

combined effect of including QOF and growth monies within the contract value and the PCT is obliged to pay superannuation contributions on the contract value, we are confident the PCT must pay superannuation contributions on QOF payments and growth monies.

4. Furthermore, the Department of Health funding document titled "2004/05 Pensions Indexation Adjustments on GP's New Income" – AWP(04-05)PCT43 supports this interpretation by indicating that PCTs were allocated additional funds from the Department of Health for the purpose of paying the superannuation on QOF payments. Our view, supported by Counsel, is that the PCTs are required to use such funding for this purpose only.

Clauses 436.3 & 441

5. Instead of relying on the PMS Framework Document, the NHSLA has looked (we believe mistakenly) to other clauses in the Lockharts Agreement on which to base its decisions. For superannuation payable on growth monies, it has based its decision on its interpretation of clause 436.3 and for QOF payments it has based its decision on its interpretation of clause 441. The NHSLA interprets:

   - Clause 436.3 – as separating growth payments from the contract value on which superannuation payments are payable; and
   - Clause 441 - as firstly separating QOF payments from the contract value and hence from the PCT's obligation to pay superannuation contributions on QOF. Secondly, the NHSLA suggest that clause 441 has the effect that the PCT's only obligation in relation to QOF payments is to pay the funds under the Statement of Financial Entitlement and not any superannuation on the QOF payments.

   We strongly believe that the NHSLA has misinterpreted clauses 436.3 and 441 by both misreading the clause and misunderstanding the intention behind these clauses. Under the rule for interpreting contractual clauses, it is necessary to first establish the intention of the parties.

6. From the wording of the first two sentences of clause 441, there is little doubt that the intention was to ensure that PMS practices are paid QOF in accordance with the GMS SFE i.e. on the same terms as GMS practices. This clause should have no effect on the PCT's obligation to pay superannuation on QOF under clause 436.2.3.

7. To understand the intention behind clauses 436.3 and last sentence of 441, we must also recall the concerns of GPs around the time the Lockharts Agreement was being prepared. GPs were concerned that the contract values of their PMS pilot agreements would be "unpicked" on the

transition to a new PMS agreement on 1 April 2004[2]. Specifically, GPs were concerned that the QOF payments scheme would replace their existing additional funding from growth and local incentive payments.

8. In light of this background, it becomes clear that both these clauses were intended to avoid any doubt that existing growth and local incentive payments would be protected and paid in addition to QOF. They were not intended to separate growth and QOF payments from the contract value.

   On this basis, both we and Counsel firmly believe that superannuation on growth money and QOF payments are payable by the PCT under the Lockharts Agreement.

I note that the arguments set out above are based on the un-amended Part 17 of the Lockharts Agreement. In each case, we need to be sure that there are no amendments that vary this position.

NHSLA's current stance

While we have confidence in the arguments set out above, as you would appreciate, we are starting from an adverse position in that the NHSLA have already decided unfavourably on the interpretation of the superannuation clauses of the Lockharts Agreement. Having said this, we have not been involved with any of those cases and we believed that they have not been argued properly in that appropriate evidence and submissions were not provided to the NHSLA.

Judicial review

A party who receives an unfavourable decision from the NHSLA has no right of appeal and the NHSLA's decisions are final within the NHS system. The only option available, which has a binding legal outcome, is for the aggrieved party to apply to the Administrative Division of the High Court for a judicial review of the NHSLA's decision. However, judicial review proceedings are not a re-hearing of the case and are limited to an examination of the legality of the NHSLA's decision. That is, whether the decision was lawful, procedurally fair and rational based on evidence and submissions before it.

It is Counsel's view that, had the previous superannuation cases been argued as set out above, with adequate evidence, the probability is that the NHSLA's would have come to a different decision. Had it not done so, its decision would have been judicially reviewable.

Evidence of non-payment

We have seen that, in other superannuation cases, some PCTs have argued that they have indeed increased the contract value to include the 14%

[2] This concern is acknowledged on page 5 of the John Hutton letter.

employer's contribution on all superannuable amounts and the GP application has not provided satisfactory evidence to rebut this. Unless you have clear evidence establishing how the contract value has been calculated, the NHSLA may be entitled to accept the PCT's evidence. For this reason a superannuation proforma has been developed to assist you to ascertain the level of underpayment by the PCT.

Local dispute resolution

Before your practice may apply to the NHSLA, the local dispute resolution procedures must be satisfied. Clause 481[3] provides that:

> *"... in the case of any dispute arising out of or in connection with the agreement, the Contractor and the PCT must make every reasonable effort to communicate and cooperate with each other with a view to resolving the dispute, before referring the dispute for determination in accordance with the NHS dispute resolution procedure (or, where applicable, before commencing court proceedings)."*

Your practice has probably already satisfied this pre-requisite but, if not, we would be happy to assist. This is particularly important as we would not want to find that a subsequent application was limited by the pre-contract dispute submissions.

Risk of termination

It is the case that some PCTs have indicated that if practitioners do not accept the payment of superannuation contributions on the basis determined by them, the PCT would consider terminating a practice's PMS Agreement.

There are a number of points which arise on this:

1. We do not believe that it is appropriate for PCTs to propose the termination of a PMS Agreement purely on the basis that they do not wish to/find themselves able to pay superannuation contributions that are properly payable and furthermore PMS contractors have, we believe, we legitimate expectation that their Agreements will be continued undisturbed save for termination on grounds that are properly provided for, e.g. contractor default.

2. If a termination can be brought about it cannot be brought about retrospectively and would, in our view, in the absence of any stated termination period in the Agreement, have to be brought about on reasonable notice which we believe would be a minimum of 6 months. Thus a proposed termination, with notice being given at some stage in 2007/08, would not apply retrospectively to the superannuation

[3] This clause is required by the National Health Service (Personal Medical Services Agreements) Regulations 2004.

position which arises in each of 2004/05, 2005/06 and 2006/07. As noted below we understand that quite substantial sums are outstanding for many practices ranging between possibly £30,000 - £60,000 and in some cases considerably more and the benefits of recovering these sums are clearly important considerations.

3. If a PCT persisted in its threat to terminate a PMS Agreement it is open to the practice as a whole to seek to return to a GMS Contract and this is provided for in Regulation 19 of the PMS Agreements Regulations. On such a transfer it is the case that the continued payment of growth monies is discretionary, the payment of MPIG is discretionary and there could well be accounting difficulties in re-establishing the baseline for a return to GMS. For some practices the potential loss of growth monies will be a substantial issue but for others the possible non-availability of MPIG and issues surrounding the establishment of a new GMS baseline may not be insurmountable.

4. It may also be the case that a PCT's decision to terminate an Agreement on the basis that it does not wish to make contracted payments is itself, open to judicial review.

Clearly this is a decision for each practice to take but, in our view, this is very much a question of 'strength in numbers'; we suggest that PCTs will be more inclined to seek to terminate PMS Agreements where they are working on a case by case basis rather than if faced with an effective challenge by a substantial number of practices.

PART 2 – PROPOSAL FOR TEST CASES

The proposed approach

As stated above, success in these cases (or a subsequent judicial review) is very dependent on evidence and submissions put before the NHSLA in a further application. In these circumstances, to ensure the best possible chance of obtaining a favourable decision from the NHSLA or success on judicial review and, to spread the costs amongst a large number of practices who are in a similar position, we recommend the following approach:

1. Establish a "fighting fund" for test cases in the NHSLA and judicial review, if necessary.

2. Select 3-4 practices[4] as test cases to apply to the NHSLA for dispute resolution on QOF and growth money superannuation issues.

[4] Rather than just 1 test case, it is desirable to have at least 3-4 test cases to allow the proceedings to continue in circumstances where a particular case settles or where we subsequently find that the circumstances of a particular case differ from the majority of the cases.

3. Instruct Counsel to prepare submissions to the NHSLA and to attend an oral hearing of the application.

4. If the NHSLA again gives an unfavourable decision, then bring judicial review proceedings against it[5].

5. Following a successful decision, Lockharts would send the decision to each relevant PCT with a demand for immediate payment. If they failed to pay within a reasonable period, Lockharts would lodge individual dispute resolution applications with the NHSLA.

Time limits

Each practice wishing to make an application to the NHSLA for dispute resolution regarding this issue has three years to lodge the application "beginning with the date on which the matter giving rise to the dispute happened or should reasonably have come to the attention of the [practice]": Regulation 95(4) of the National Health Service (Personal Medical Services Agreements) Regulations 2004. We will need to consider each practice on a case by case basis, but generally we would have thought that the PCT first declined to pay the practice's employer contributions in or around April/May 2005, meaning that such application would need to be lodged by April/May 2008.

The consequence of this is that, if the NHSLA was made to alter its position, PMS contractors would be entitled to all such superannuation payments from the date of commencement of their PMS Agreement and for the life of your PMS Agreement which, in many cases, can be in the order of £20,000 to £30,000 for a year. **If the three year period is allowed to expire (i.e. around April 2008), these rights will be lost forever**.

Following an unfavourable decision from the NHSLA, an aggrieved party has 3 months to apply to the High Court for judicial review.

Steps and timetable

Stage 1 – Applications to the NHSLA for NHS dispute resolution

No.	Steps in Stage 1	Duration
1.	Deadline for expressions of interest and contribution to the fighting fund	mid June 2007
2.	Counsel to prepare draft submissions for circulation to all practices and Lockharts to prepare NHSLA application and evidence bundle.	2 weeks
3.	Deadline for comments from practices on draft	2 weeks

[5] If more than 1 test case reaches this stage, the Court is likely link them to be dealt with together.

	submissions	
4.	Lockharts to finalise application bundle and lodge with the NHSLA	2-3 days
5.	Deadline for PCT to respond to our application	4 weeks
6.	Deadline for preparing and filing our response to PCT's response	3 weeks
7.	Hearing date	3-4 weeks
8.	Receive NHSLA decision	2-4 weeks
	Total duration	**5-6 months**[6]

Stage 2 – Application to the High Court for judicial review

No.	Steps in stage 2	Duration
9.	Counsel to prepare JR submissions for circulation to all practices and Lockharts to prepare JR application and evidence bundle	3-4 weeks
10.	Lockharts to finalise JR application bundle and lodge application for JR permission[7] with the High Court	2-3 days
11.	Receive notice of grant or refusal of permission	8 weeks
12.	Case management hearing and Counsel to prepare skeleton argument	4 weeks
13.	Trial hearing	4-8 weeks
	Total duration	**4-6 months**[8]

Estimate of costs for Stage 1

Our estimate of costs for stage 1 is:

Party	Estimate of costs
Lockharts	£20,000 - £25,000
Counsel	£15,000 - £20,000
Estimate of costs	**£35,000 – 45,000**

In the NHSLA dispute resolution process, the losing party is not required to pay the winning party's costs.

Contributing to the fighting fund for stage 1

[6] Considering the time limits discussed above, we would seek the for the matter to be dealt with on an expedited basis so as to ensure that the test cases are concluded prior to the expiration of the 3 year time limit for bring a claim in the NHSLA.

[7] An aggrieved party must first apply to the Administrative Division of the High Court for permission to make a judicial review application. This permission application nevertheless must contain the full set of judicial review application submissions and documentation.

[8] Again, considering the time limits discussed above, we would seek for the matter to be dealt with on an expedited basis.

We have been advised by at least 30 practices that wish to challenge to the NHSLA but know that there are many more practices that are affected. If we received contributions from this number of practices, the "per practice" contribution would be in the order of £1,500. It is understood however that there may be up to several hundred practices who continue to have unresolved claims – many of which amount to £30,000 or £60,000 or more and clearly if there is sufficient expression of interest the cost per application would drop quite considerably. It is suggested that, in the first place, a per-practice contribution of £1,000 is collected and these sums would be held in our client account pending the establishment of precise numbers and the refund of surplus contributions.

Estimate of costs for Stage 2

Our estimate of costs for stage 2 is:

Party	**Estimate of costs for judicial review**
Lockharts	£15,000 – 20,000
Junior Counsel[9]	£15,000 – 20,000
Estimate of costs	**£30,000 – 40,000**

Unlike for the NHSLA, in judicial review proceedings, "costs follow the event" meaning that the losing party normally pays approximately 70% of the costs of the winning party. Therefore, a further amount of approximately £30,000 - 40,000 needs to be contemplated in the event the judicial review is successful. We would suggest however that the coverage of costs for any judicial review applications is left outstanding for the present pending NHSLA decisions in the test cases and a detailed analysis thereof - the costs for such analysis being allowed for in the first collection.

Why should I be involved?

As we have said above, we are starting from an adverse position because the NHSLA has already decided unfavourably on numerous occasions and will be reluctant to change its position. Without considerable involvement, we are concerned that the proper presentation of the case will not be made allowing the NHSLA to continue to decide unfavourably.

For confidentiality reasons, only contributing parties will be kept informed of the status of the challenges in the NHSLA and High Court. Contributing parties will also be invited to comment on and participate in the conduct of the test cases.

[9] If the PCT(s) were to retain a Queens Counsel to advise and appear at the judicial review, it would be advisable if we were to do the same. The QC's costs would be in the order of £15,000 for preparing for and appearing at the trial of the judicial review, in addition to the junior counsel's fee.

Selection of practices for test case
Once the fighting fund is established, practices will need to be nominated to be the test cases.

To date my colleague, Micah Jenkins, and I have been working on the analysis of the issue in these cases. Micah will be on annual leave until 27 April, very shortly before the closing date for expressions of interest. In this period there is probably not a great deal that needs to be done but my colleague Alison Oliver will be pleased to take a note of any inquiries in the first place.

Yours sincerely

Andrew Lockhart-Mirams
Senior Partner

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