Determination for the purposes of the National Health Services (General Medical Services Contacts) (Scotland) Regulations 2004/115, Schedule 5, Part 7

in the dispute between

[Redacted], General Medical Practitioner ("the Contractor")

and

Greater Glasgow Health Board ("the HB")

Edinburgh 29 April 2015.

DETERMINATION

The Panel hereby determines that the HB are obliged to reconsider the Contractor's claim for reimbursement of service charges.

GROUNDS FOR DETERMINATION

The Panel

1. The Panel was appointed by the Scottish Ministers in accordance with the National Health Services (General Medical Services Contacts) (Scotland) Regulations 2004/115, Schedule 5, Part 7 to act as adjudicator and to determine a General Medical Services contract dispute between the Contractor and the HB. The panel comprises David A Stephenson Q.C., [redacted] Principal Property Adviser and Dr [redacted] G.P.

The Dispute

2. The Contractor applied for dispute resolution by letter dated 09 September 2013 addressed to the Health and Social Care Integration Division, Primary Care Division. By letters dated 16 October 2013 the Health and Social Care Integration Directorate, Primary Care Division informed the Contractor and the HB that the Scottish Ministers were satisfied that a referral had been made in accordance with the requirements of paragraph 91(3) of Schedule 5 to the Regulations; and that "the matter of NHS Greater Glasgow and Clyde [*sic*] decision not to reconsider the claim for reimbursement of service charges, will be formally treated as a dispute for determination and resolution under the terms of the Regulations". Written representations were invited in accordance with the procedure in Schedule 5 and were subsequently received, comprising (a) the HB's letter dated 28 October 2013, (b) [Redacted]'s letter on behalf of the Contractor, dated 31 October 2013. The procedure requires that parties be invited to make written observations within a prescribed timescale. We understand that written observations were invited but that none were received within the period stipulated.

Procedure

3. In terms of Paragraph 91(14) of the Regulations the Panel, as adjudicator, has a wide discretion in determining the procedure of the dispute resolution to ensure the just, expeditious, economical and final determination of the dispute. In terms of Paragraph 91(10)(a) the Panel, as adjudicator, may but need not invite representatives of the parties to appear before the Panel and may in advance provide the parties with a list of matters or questions to which it wishes them to give special consideration. In their written representations [Redacted] requested in the second paragraph "that this matter be dealt with by written representation only and without the need for any oral hearings." The Board made no comment as to procedure in its written representations. In the circumstances the Panel are of the view that the dispute referred to us is sufficiently focused by the parties' respective written representations and that an oral hearing is not required.

The Facts

4. Between 09 May 2008 and August 2012 the Contractor was in practice as a GP at [Redacted] ('the practice premises"). The practice premises were leased by the Contractor from Glasgow City Council ("the Landlord") under and in terms of a lease dated [Redacted] and [illegible] March 2008. A partial copy of the lease is appended to the Contractor's written representations. The copy lease comprised a two page Preface and a pro forma Lease. Although the Preface refers to an attached plan, we have not seen this. In terms of the Preface the Premises let were "Ground floor premises incorporating offices, kitchens and toilets located in the eastern position within [Redacted] Neighbourhood Initiative Base building at [Redacted]. The Preface defines "The Common Parts (In addition to those in Lease)", as "Car park and grounds at [Redacted], as shown on attached plan." The Lease includes areas and parts of the larger building in its definition of Common Parts.

5. The Lease imposes upon the Contractor the obligation to make payment of "Service Charge" in addition to rent and certain other payments. It contains the following provisions:
   "3.1 *Payments to the Landlord*
   Throughout the Period of the Lease … the Tenant binds himself to pay to the Landlord the following …
   …
   3.1.2 *Service Charge*
   On demand such proportion of the Service Charge as the Landlord shall from time to time assess as equitable the decision of the Landlord being final and binding in this regard;"
   The Services Charge is defined in clause 1.1.19, as follows:
   " 1.1.19 'Service Charge' means the costs incurred, or anticipated by the Landlord to be incurred, in respect of the repairing, maintaining, (and when repair or maintenance is not practicable nor economically feasible, renewing, rebuilding and reinstating), keeping secure, lighting and cleansing … of the Common Parts …

and in general the costs of fulfilling the Landlord's obligations in terms of clause 5.1 hereof and shall include a charge for the administration, organization and overseeing of the foregoing …"
Clause 5.1 referred to in the definition just quoted contains the Landlord's maintenance and repairing obligations. Under clause 5.1 the Landlord assumed no obligation to maintain and repair the Premises (which obligation was solely and directly the Contractor's as tenant) but did assume such obligations (along with an obligation, if appropriate to light) in respect of the Common Parts – the Contractor then becoming liable to pay the Service Charge in respect of a share of the costs incurred by the Landlord. Additional to the obligation to make payments in respect of Rent and Service Charge, separate provision was also made whereby the Contractor was to make payment of various other sums including property insurance premiums (clause 3.1.7), and rates, taxes, duties and charges (including for utilities and services) in respect of the Premises (clause 3.2.2). These payments do not fall within the ambit of the Service Charge, as defined. The Preface includes as a "relevant matter which requires documentation", "Service charge of £17,500 (Seventeen Thousand Five Hundred Pounds Sterling) per annum (exclusive of VAT)."

6. According to the HB's letter dated 26 November 2013 (probably in fact 2012) appended to the Contractor's written representations, "During his [the Contractor's] occupation of the [Redacted] premises the Health Board paid direct Glasgow City Council and/or City Properties (Glasgow) LLP the rent and rates relating to his practice premises." We assume that the Contractor accepts the accuracy of this statement as he submitted the letter without qualification, with his written representations. Any sums that were sought by the Landlord under the Lease directly from the Contractor should not then include rent or rates, which the Landlord was receiving from the HB. The Contractor and Landlord were soon in dispute as to the former's liability for the Service Charge he was being billed for. While we have no detail as to the precise basis of the dispute the Contractor's written representations say that it arose from the Landlord's "particular interpretation of the service charge payable". Paragraph 2.3 of the Contractor's written representations includes the following narrative: "The premises had been extensively modernized prior to .. [the Contractor] .. taking possession on 9 May 2008 under a lease with Glasgow City Council. That lease included an obligation to pay a service charge for the services provided in connection with the remainder of the large building of which the surgery premises formed a small part. Regrettably, as the amount of service charge payable in respect of the larger building was high, the level of service charge formed the major part of occupancy costs."

7. The Contractor says he paid Service Charge totaling £43,973.51 in respect of the lease: although his total liability to the Landlord would appear to have been £74,375, based on a fixed Service Charge of £17,500 per annum throughout the existence of the lease. The Contractor has produced copy Invoices from the Landlord seeking sums in respect of "S.C." and charged out to the Contractor between May 2008 and October 2011, initially six monthly and thereafter

monthly, at the equivalent of £17,500 per annum (£1,458.34 x 12). (We note in addition a single charge of £609.96 described on two of the Invoices as "SERVICE CHARGE", dated 24 June 2010.) There is nothing with the papers to suggest that the charges for "S.C." on the Invoice could have been for anything other than the Service Charge. The outstanding sums are consistently referred to as service charge in the correspondence we have seen between the Landlord and the Contractor's respective agents. The sums being sought accord with the sum notified as the annual Service Charge in the Preface to the lease.

8. The breakdown appended to the Landlord's solicitors' email dated 03 November 2011 indicates a total then outstanding of £38,740.40 after receipt of payments (allowing for a bounced cheque in November 2009) totaling £23,119.80. The Landlord's solicitor's letter dated 6 July 2012 confirms "accrued service charges totaling £47,074.12", which we take to be the amount then outstanding: suggesting a total liability incurred to that date of £70,193.92 (£23,119.80 + £47,074.12). There was litigation between the Landlord and the Contractor. The action is said to have involved the interpretation of the liability to pay Service Charge. We have no detail but we have seen a certified copy interlocutor granted of consent in favour of the Landlord against the Contractor in [Redacted] on [Redacted] and including decree for ejection from the premises, decree for payment of a sum of £18,733.81 and decree for the expenses on an agreed scale. We accept in the absence of any contradictor the representation by the Contractor's solicitor that the amount of the contractual liability to the Landlord for payment of Service Charge was in dispute and not judicially determined until at or about the date of the decree. On 10 August 2012 the Contractor wrote to a Disability Rights Advocate purporting to enclose a cheque for £19,153.71 and asking that it be delivered to the Landlord. This sum could represent the sum of the decree plus another sum such as judicial expenses and/or Sheriff Officers' fees. We accept in the absence of any contradictor the implicit representation by the Contractor's solicitor that the cheque was paid to the Landlord in satisfaction of the sum due in terms of the decree. We do not however accept on the basis of the papers we have seen the suggestion that the Contractor paid the total amount he says he did in respect of Service Charge. We surmise that the Contractor's claim to have paid Services Charge totaling £43,973.51 is the result of adding the following:
   (a) the sum of £23,119.80 vouched as paid by 03 November 2011
   (b) the sum of £1,700 presumably included by the Contractor in error as representing the bounced cheque in November 2009
   (c) the whole amount of the cheque for £19,153.71 sent to the Disability rights Advocate in August 2012.

   That is, £23,119.80 + £1,700 + £19,153.71 = £43,973.51.
   In our view the £1,700 representing the bounced cheque should not be included in the payments made for obvious reasons. We are not presented with any explanation as to why an amount was added to the decree sum and see no reason on present information to conclude that the additional payment was for Service Charge rather than for some other purpose such as litigation expenses and outlays, or judicial interest. We consider on the basis of the information available to us that on the balance of probabilities the Contractor made payment to the

Landlord in respect of Service Charge totaling £41,853.61 (£23,119.80 + £18,733.81). These payments span the whole period of the Contractor's occupation of the Premises, and the total would be significantly less than the full potential liability of £74,375: see above. The decree sum might have been a compromise figure and if so we are uncertain how, if at all, it and the earlier payments fall to be allocated to any particular periods during the currency of the lease. We suggest below that this might create difficulties for the Contractor in respect of the application of Direction 49.

9. The Contractor's claim against the HB is for payment of £26,384.11, being 60% of the £43,973.51 he says he paid to the Landlord in respect of Service Charge. As we consider on the evidence presented by the Contractor that the sum paid by him as Service Charge was probably the lower sum of £41,853.61 the Contractor's claim would, if he is entitled to 60% of that sum, reduce to £25,112.17 (£41,853.61 x 0.6).

Basis of the claim

10. Although we have not seen a copy of a signed General Medical Services contract we understand it to be accepted that the HB and the Contractor executed such a contract, in the standard form (12.03.04) issued by the Scottish Executive Health Department ("the Contract"). In terms thereof the Contractor was to provide primary medical services and other services in accordance with the provisions of the Contract. Part 17 of the Contract provided for certain payments to be made to the Contractor. In particular it required the HB to make payments to the Contractor in accordance with directions from time to time in force under section 17M of the National Health Service (Scotland) Act 1978, as amended. Part 17 of the Contract provides as follows:

"PART 17

PAYMENT UNDER THE CONTRACT

419. The HB shall make payments to the Contractor under the Contract promptly and in accordance with both the terms of the Contract (including, for the avoidance of doubt, any payment due pursuant to clause 420) and any other conditions relating to the payment contained in directions given by the Scottish Ministers under section 17M of *the Act* subject to any right the HB may have to set off against any amount payable to the Contractor under the Contract any amount-

419.1 that is owed by the Contractor to the HB under the Contract; or

419.2 that the HB may withhold from the Contractor in accordance with the terms of the Contract or any other applicable provisions contained in directions given by the Scottish Ministers under section 17M of *the Act*.

420. Subject to clause 421 the HB shall make payments to the Contractor in accordance with directions for the time being in force under section 17M of *the Act.* Where, pursuant to directions made under section 17M of *the Act*, the HB is

required to make a payment to the Contractor under the Contract but subject to conditions, those conditions are to be a term of the Contract.

421. Payments to be made to the Contractor (and any relevant conditions to be met by the Contractor in relation to such payments) in respect of services where payments, or the amount of any such payments, are not specified in directions pursuant to clause 420, are set out in Schedule 6 to this Contract."

Part 24 of the Contract makes provision as to dispute resolution procedures. In particular conditions 469 to 474 apply the NHS dispute resolution procedures as set out in paragraphs 91 and 92 of Schedule 5 to the National Health Services (General Medical Services Contacts) (Scotland) Regulations 2004.

11. The Directions as to payment for the purposes of the Contract made under section 17M of the 1978 Act, as amended, include the Primary Medical Services – (Premises Development Grants, Improvement Grants and Premises Costs) Directions 2004 ("the Directions"). The Directions were given by the Scottish Ministers to Health Boards and apply in relation to certain payments to be made by Boards to General Medical Services Contractors in relation to Contractors' premises. Directions 48 and 49 provide:

"48. Where–
(a) a contractor is in receipt of payments pursuant to this Part in respect of leasehold rental costs, health centre rents or borrowing costs, or by way of notional rent payments;
(b) the contractor actually and properly incurs the costs which are or relate to–
(i) business rates,
(ii) water and sewage charges,
(iii) charges in respect of the collection and disposal of clinical waste,
or
(iv) in the case of modern practice premises, a utilities and services charge (for example, a service charge under a lease or a charge levied under separate arrangements made by a contractor which is an owner-occupier), and the charge covers–
(aa) fuel and electricity charges,
(bb) building insurance costs,
(cc) costs of internal or external repairs, and
(dd) plant, building and grounds maintenance costs;
(d) these costs are not covered in the other payments that the contractor is receiving pursuant to these Directions; and
(e) the contractor makes an application to its Health Board for financial assistance towards meeting any or all of these costs,
subject to direction 49, the Health Board 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.

Financial assistance towards service charges

49. A Health Board must deduct from any amount that it would otherwise be required to pay in respect of a service charge pursuant to an application of the type mentioned in direction 48–
(a) an average (calculated on the basis of the previous three years) amount that the contractor (or, prior to 1st April 2004, the antecedent practice) paid in respect of–
(i) fuel and electricity charges,
(ii) building insurance costs,
(iii) costs of internal or external repairs, and
(iv) plant, building and grounds maintenance costs,
calculated by reference to the same time period as the period in respect of which the service charge is payable; or
(b) if suitable and sufficient information is not (or does not become) available to calculate the average referred to in paragraph (a), 40% of the amount otherwise payable."

12. Direction 60 provides:
"Time limitation for making applications
60. Health Boards must only consider or grant an application of the types mentioned in these Directions if the application is made within six years of the premises costs to which the application relates fall due."

13. Neither party has made reference to legal authority or administrative guidance that might assist us in our approach to interpretation of Directions 48 and 49, whether specific to the Directions or of more general relevance. This is despite the Directions having been in place since 2004, and the fact that there are essentially similar provisions in place for NHS England (currently Directions 46 and 47 of The National Health Service (General Medical Services – Premises Costs) Directions 2013), Northern Ireland and Wales. We are unable to identify any previous Panel or FHSAU decision that assists. There might be some limited assistance in relation to the discretion apparently relied upon by the HB (see below) in dicta in the case of *R (Primary Health Investment) v Health Secretary* [2009] PTSR 1563. Directions in the UK jurisdictions are drawn up and reviewed after consultation with the relevant General Practitioners Committees of the British Medical Association. We note
(a) The BMA summary of the previous (2004) English provisions in Focus on Premises Costs at http://bma.org.uk/practical-support-at-work/gp-practices/premises/focus-on-premises-costs
"5.6 Running costs (paras 46-47)
If contractors are receiving payments from the PCT for lease rental costs, notional rent or borrowing costs it must consider applications for financial assistance towards the following, provided they are not already receiving payments for these costs under other Directions:
• business rates
• water and sewage charges or
• in the case of modern practice premises, a service charge if this covers
• fuel and electricity charges
• insurance costs

• costs of internal or external repairs
• building and grounds maintenance.

There may be circumstances where service charges are already rolled up in the lease or other payments, and so the PCT is already providing financial assistance towards service charges. To avoid double payment when payments are made under this Direction, the PCT must deduct from the other, possibly hidden, service charge payment either

• an average amount that the contractor paid for the four service charge items listed above (the average amount must be calculated from the previous year's costs) or
• 40% of the amount otherwise payable."

(b) The General Practitioners Committee, *The future of GP practice premises, Guidance for GPs*, 2010 Revision at http://www.glasgowlmc.co.uk/download/Premises/GPC-%20Future%20of%20Practice%20Premises.pdf

"2.6.1 Service charges. Another factor to take into account is the service charges on the building. The service charge includes cleaning, security and utilities costs. There have been significant increases in the service charge costs on LIFT schemes, which affect all occupants of the LIFTCo building. This is unavoidable but GPs can ask for transitional payments, or for financial assistance, under paragraph 47 of the premises costs directions, from the PCT which may help to cover the difference in costs for an interim period. As many service charges are agreed before the completion of the building, GPs should be aware that initial figures are estimates and could therefore be inaccurate. GPs should only be paying 'real costs' and should therefore negotiate with LIFTCo over the service charge levied"

If the HB has a discretion to exercise in relation to payment of a sum sought by a GP under the Directions, and it has properly considered all relevant factors before taking its decision, for reasons that fall within its discretion, there will be no breach of the GMS contract. If on the other hand the HB has failed to follow its own guidance or has acted outside its powers, the Contractor has a legitimate complaint that can be adjudicated upon by us. We note the summary of the law in *R (on the application of Assura Pharmacy Ltd) v E Moss Ltd (t/a Alliance Pharmacy)* [2008] EWCA Civ 1356 at paragraphs 59 to 62.

14. Applying the requirements of Direction 48.

(a) It is accepted that the Contractor was in receipt of payments pursuant to the relevant Part of the Directions in respect of leasehold rental costs, as rental payments were being made on his behalf to the Landlord by the HB.

(b) The phrase "modern practice premises" is not defined in the Directions and does not appear in any other Direction. It is not defined, nor does it appear, in the parties Contract. "Practice premises" is defined and it is clear the Premises in this case were practice premises. In our view the Common Parts of the Contractor's premises would, to the extent of his interest in them, form part of his "practice premises" for the purposes of the Directives. "Modern" is not the same as "new". We take "modern" to denote a requirement that the practice premises be reasonably up-to-date. The inclusion of "modern" might be intended to avoid HB liability to reimburse a utilities and service charge

under this part of the Directions in respect of premises that were, for example, dilapidated by reason of age: although we express no concluded view on this and make the comment only to indicate that our approach does not render the use of "modern" otiose. The Contractor says the premises were "extensively modernized" prior to his taking possession: see paragraph 6 above. No issue has been taken by the HB as to the qualifying nature of the premises as "modern practice premises". We accept they qualify as such.

(c) The Contractor's liability for the Service charge under his lease appears to have been contested by him in court proceedings in which ultimately his liability was determined. We therefore conclude that the Contractor actually and properly incurred the costs associated with the Service Charge, to the extent we have held above that we can be satisfied the Service Charge was paid by him.

(d) The HB do not suggest that the Service Charge was a cost covered in any other payments that the Contractor received pursuant to the Directions. It is implicit in their written representations that it was not.

(e) The Contractor applied to the HB for financial assistance toward the meeting of the costs no later than October 2012, some three months after conclusion of the Sheriff Court action. His occupation of the practice premises did not commence until 2008. Therefore all claims being made by him were within the six year period relative to premises costs falling due, as required for claims in Direction 60.

Two further matters remain for determination for the purposes of Direction 48. First was the Service Charge a "utilities and services charge" for the purposes of Direction 48(b)(iv)? And, if so, did the HB require to consider the application?

15. Was the Service Charge a "utilities and services charge" within the meaning of Direction 48(b)(iv)? We start by considering the Service Charge.

(a) The Contractor's lease is a "clear lease" of a familiar and common type for business premises. By a clear lease is meant, "leases in which the tenants bear all the costs and risks of repairing maintaining and running the building of which the demised premises form part, so that the rent payable reaches the landlord clear of all expenses and overheads." [*O'May v City of London Real Property Co Ltd* [1982] 1 All ER 660, Lord Wilberforce at 671.] One would expect the rent paid in such a lease to be less than if the landlord had retained his obligation to fund his repairing, maintaining and managing functions. In the case of premises such as the Contractor's forming part of a larger building and with extensive common parts the service charge can be a substantial proportion of the overall costs of occupancy for the tenant. This appears to have been the case here. The Preface indicates the rent is to be £14,000 per annum and the Service Charge £17,500 per annum. A commercially sophisticated tenant might see little practical difference for him between the labels "rent" and "service charge" particularly if, as was the case here, Service Charge was for a regular fixed amount.

(b) The Contractor's liability for Service Charge was in respect of the Common Parts rather than the Premises themselves: see the provisions from the Preface and Lease quoted above. The Service Charge would not appear to include utility costs except to the extent that the landlord incurred such costs

in respect of any lighting of the Common Parts. We do not know whether such utility costs were incurred and included as part of the Service Charge: but it seems a reasonable inference that, if they were, they would form a small proportion of the total.

16. We now turn to what is meant by "a utilities and services charge" in Direction 48(b)(iv).
    (a) The Direction gives as part of the non-exclusive definition of "a utilities and service charge" the specific example of "a service charge under a lease". The Service Charge payable by the Contractor in our view was such a charge.
    (b) A utilities and service charge, as defined, is to cover four matters as set out in (aa) to (dd). At the end of (cc) the word "and" is used. Is its use conjunctive or disjunctive? In our view it would produce an absurd result if a service charge would only fall within the Direction when it included charges in respect of all four matters. Such an interpretation would mean a Contractor would not be able to recover a service charge if it did not incorporate one of the four elements (e.g., building insurance costs) whereas another Contractor who paid a service charge with exactly the same costs as the first but with building insurance in addition would. That cannot have been the intention.
    (c) As we take this view it follows it is not necessary in order to qualify for reimbursement that the service charge includes an element for utility charges, as only (aa) relates to such charges.
    (d) In our view it is sufficient if the service charge covers at least one of the listed matters (aa) to (dd).
    (e) In our view the implied intention is that the service charge would be taken into account only to the extent it charges the listed matters. Otherwise the inclusion of a proportionately small amount attributable to the listed matters would qualify the whole amount for reimbursement. This would be absurd and cannot have been the intention.
    (f) On the basis of the provision for Service Charge in the Contractor's lease it is our view that the sums paid will relate to matters (cc) costs of repairs and (dd) plant, building and grounds maintenance costs. The sums paid might also include sums falling within (aa) fuel and electricity charges, subject to whether the Landlord in fact incurred costs for lighting of the Common Parts. The Service Charge should not include matters falling within (bb) building insurance costs as the provision for payment of such costs in the Lease is separate from the calculation of Service Charge.
    (g) There is no element of the Contractor's liability under his lease for Services Charge that we can identify which would obviously fall outwith matters (aa), (cc) and (dd). However we have seen no breakdown of the actual costs incurred by the Landlord and included in the Service Charge.

    We therefore conclude that the Service Charge claimed by the Contractor is capable of being a utilities and services charge for the purposes of Direction 48(b)(iv) and did as such qualify for consideration by the HB.

17. Is the HB obliged to reconsider the application?

(a) The HB's consideration of the application must be subject to Direction 49. We will return to this separately below as we consider the terms of that Direction present the Contractor with difficulties. For present purposes, having reached the conclusions we have in paragraph 16 above, it follows that in terms of Direction 48, "the Health Board 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". We note the double use of "that" in conjunction with "application", suggesting the application must be considered on its own terms.

(b) Ignoring for the moment the words that appear in brackets suggesting a discretion based upon budgetary targets, it is our view that "in appropriate cases" the HB must grant the application. It is therefore critical to know what is meant in the Direction by "appropriate cases". The Directions do not define the phrase. Were it not for the words in the brackets we would be inclined to view this as meaning little more than an application which met the qualifying criteria in Directions 48 and 49: perhaps giving the HB an ability to have regard to some special consideration specific to an application such as the culpability of the Contractor in the need for the repairs, etc, billed by the Landlord as service charge, or the existence of an insured claim for the cost of such repairs. (There being no such suggestions in the present case.)

(c) The bracketed words must however be taken into account and must inform what it meant by "appropriate". The only specific matters it seems the HB must have regard to are "the budgetary targets it has set for itself". We note the use of the word "targets", and the requirement that the HB has set these "for itself".

(d) On what basis has the HB dealt with the application?

(i) The claim was rejected by [redacted] letter dated 14 January 2012 (2013?) addressed to the Contractor's solicitor, on the basis that "paragraph 1.1.19 of the lease clearly indicates what the service charge consists of and we believe that they are consequently not eligible for reimbursement". Although it is difficult in context to determine precisely what is being said in our view it is incorrect to say that the Service Charge was not eligible for reimbursement *per se*, for the reasons given by us above.

(ii) The claim was rejected again, this time by the HB, as notified by [redacted] in his letter to the Contractor's solicitor dated 10 May 2013: "they have determined not to grant the application. The Health Board's budgetary targets and framework do not provide for the reimbursement of service charges to GP contractors". We note eligibility for reimbursement was not now challenged by the HB and was not part of the reason given for its decision – correctly in our view. We are unsure what is being referred to as the HB's "framework". However the decision as intimated does not appear to proceed upon a consideration of the appropriateness, or otherwise, of the Contractor's application *per se*, but upon the basis of a statement of a general policy not to reimburse service charges to GP contractors. Apart from the reference to "framework" the language used does not extend beyond the language of the Direction. We doubt whether the

letter provides adequate notice to the Contractor of the basis of the decision.

(iii) The HB's written representations appear to rest on the decision intimated in the letter of 10 May but differ materially from what is said in the letter: "Unfortunately the GP premises reimbursement costs are increasing year after year at a substantially greater rate than our GP premises reimbursement budget which cannot sustain additional claims. … Greater Glasgow & Clyde Health Board did review ..[the Contractor's] .. claim and in view of the fact that the GP premises budget could not support the claim, determined not to grant the application." We note that to the extent this could be read as indicating particular consideration had been given to whether the relevant budget could meet the Contractor's claim it is contrary to the decision as advised by the letter of 10 May. We note that letter is accepted to be the letter informing the Contractor of the reason why his application was refused. In our view we have to proceed on the basis that the HB's reasons for their decision were as stated in the letter dated 10 May, and not the somewhat different position advanced in the HB's written representations.

(iv) If the HB was entitled to pursue what seems to us to be a statement of general policy as intimated in their letter dated 10 May then the Contractor's, and other contractors', contractual right to assistance with utility and service charges under the Contract would be capable of being defeated by the adoption by a health board of a budget target, or its decision not to budget for the payment of service charges, or (as here appears to be the case) the adoption by it of a blanket policy not to pay such claims. The adoption of a budget target for service charges would give rise to the possibility that contractors who applied early enough might be paid, but applications would cease to be granted once the budget was exhausted. In our view it was not the intention of the Directions to provide such a wide contractual discretion to health boards. In our view Contractors would have a reasonable expectation based upon their Contracts and the Directions that the HB would not adopt the blanket approach stated in their decision letter of 10 May. We conclude that the HB were not entitled to refuse the Contractor's claim for the reasons given by them in the decision letter of 10 May, and are therefore obliged to re-consider the Contractor's claim for reimbursement of service charges

18. The narrow scope of the matter remitted to us for determination might mean we should proceed no further, or that it is unnecessary for us to do so. However we are concerned about the way in which the Contractor's claim has been presented. Our concerns arise chiefly from Direction 49. Were the matter to come before us in future we would need to consider the arguments then made. However it might help parties resolve their remaining dispute if we indicate the reservations we have about the Contractor's current approach to the application of Direction 49. We would offer the following observations, without reaching any concluded view in the absence of parties' representations about the matters raised.

(a) Direction 49 is headed "Financial assistance towards service charges". This might suggest service charges will not be paid in full by health boards, although as noted above such charges are commonly incurred and from a practical tenant's perspective might be hard to distinguish from rent, as parts of the overall costs of occupancy.
(b) That the intention is not to reimburse service charges in full may be confirmed by the provisions for deduction in Direction 49(a) and (b). One view would be that Directions 48 and 49 taken together are intended to allow reimbursement for periodic exceptional service charges incurred during the course of a lease rather than regular repeated annual charges; for example, the deduction provisions in Direction 49 suggest the drafter might not have had in mind recovery of regular annual service charges for the same amount.
(c) It is not clear to us that the averaging provisions in relation to past years' charges were intended to be capable of calculation on the basis of service charges paid under a previous lease, or in respect of previous practice premises.
(d) It seems *prima facie* anomalous to argue that in the absence of any truly comparative figures there should be an entitlement to 60% of the service charge in a new lease. Direction 49(b) when it refers to "suitable and sufficient information" may envisage that relevant information exists or might exist, making provision for a deduction of 40% only where for some reason it is not in fact available. If such information does not, and could never, exist because any previous payments were under a different arrangement it is difficult to see how the provisions could be applied.
(e) We would expect relevant historic information as to costs to be made available by the Contractor where it exists or can reasonably be obtained, for example duplicate invoices from suppliers or figures appearing in previous years accounts. We do not read the provision as to the 60% proportion as entitling a Contractor to choose not to present information as to previous charges e.g., because it is inconvenient to obtain the historical information, or unlikely to be in his financial interests to do so.
(f) The Contractor's approach to the deduction provisions is to treat the total amount paid by him in respect of Service Charge as a lump sum attributable to the whole period of his occupancy. However this part of the Directions generally is dealing with annual charges. Charges are usually treated as being on an annual basis in the Directions. See, for example, Direction 60 quoted above. The Contractor's liability to pay Service Charges was on a *per annum* basis. The total amount paid can only be calculated retrospectively at termination of the lease. However we would have expected the Contractor's claim to be presented on the basis of the annual Service Charge incurred and paid by him on a year to year basis.
(g) The Contractor does not attempt to attribute the total Service Charge paid by him to particular years. If, as suspected by us above, his disputed liability was eventually subject to a compromise with the Landlord it could be difficult for him to do so.
(h) If the Contractor has an outstanding unpaid liability to the Landlord for Service Charge it appears it may not be possible to seek payment of that sum until such time as it is paid.

(i) If one could properly attribute £17,500 per annum to the earliest years of the lease the full sum paid would then relate to the first three years of the Lease, with the £17,500 being paid in years one and two and the balance in year three. That is not how the Contractor has presented his claim, which relates to the whole period of occupancy. He may be correct not to do so. However this would then seem to leave him with averaging the total paid over each year of occupancy.

(j) Averaging the sum actually paid over the whole period of occupancy might require a recalculation by the Contractor of his claim. If the same amount is attributed to each year then after year three the provisions for the calculation of deduction in Direction 49(a) might exclude any net claim i.e. if the same amount is paid each year for matters (aa)-(dd).

On behalf of the Panel

[David A. Stephenson Q.C.,]
Edinburgh 29 April 2015

Determination for the purposes of the National Health Services (General Medical Services Contacts) (Scotland) Regulations 2004/115, Schedule 5, Part 7

in the dispute between

[Redacted], General Medical Practitioner ("the Contractor")

and

Greater Glasgow Health Board ("the HB")