

9 June 2021

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**FILE REF: SHA/18628-18647**

**DECISION MAKING BODY: LIVERPOOL PRIMARY CARE TRUST NOW THE  
NHS COMMISSIONING BOARD ("NHS ENGLAND")**

**CONTRACTOR: SSP HEALTH LIMITED ("CONTRACTOR")**

**DISPUTE RESOLUTION: ALTERNATIVE PROVIDER MEDICAL SERVICES  
(APMS) AGREEMENT**

**DIRECTIONS: NATIONAL HEALTH SERVICE LITIGATION  
AUTHORITY (PRIMARY MEDICAL SERVICES  
– DISPUTE RESOLUTION) DIRECTIONS 2017**

**RE: INTEREST PAYMENTS**

## **1 DETERMINATION**

- 1.1 I determine that an interest payment of 8% per annum from 13 November 2013 to 18 October 2018 in the total sum of £231,902.33 shall be paid by NHS England to the Contractor within 45 days of the date of this determination.

### **Advise / Resolve / Learn**

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**RE: INTEREST PAYMENTS**

## **1 INTRODUCTION**

- 1.1 The Contractor referred the dispute to the Secretary of State for Health and Social Care under section 9(8) of the National Health Service Act 2006.
- 1.2 The Secretary of State directed by Directions dated 27 February 2017 that NHS Resolution, the operating name of NHS Litigation Authority, exercise the functions of dispute resolution on his behalf. I, as an authorised officer of NHS Resolution, have made this determination.

## **2 APPLICATION FOR DISPUTE RESOLUTION**

- 2.1 The Contractor submitted an application for dispute resolution which was determined by NHS Resolution on 19 September 2018 under case references SHA/18628 to 18647. That determination found in favour of the Contractor in respect of entitlement to payments but concluded that interest was not payable as claimed by the Contractor.
- 2.2 The Contractor issued Judicial Review proceedings challenging NHS Resolution's refusal to make an award of interest. The judgment of the High Court in the claim for Judicial Review, which found that the Adjudicator was exercising discretion to not award interest, was appealed by the Contractor. The Court of Appeal considered this matter and issued its judgment on 25 November 2020 finding in favour of the Contractor on the substantive question with regard to the relevant power to award interest.
- 2.3 Accordingly, as determined by the Court of Appeal in its Judgment, I have the power to award interest where appropriate. The source of this power is conferred by s9(11) of the NHS Act 2006 ("the Act") read in conjunction with

s9(12) of the Act. By s9(11) of the Act, I am empowered to give such directions as I think appropriate to resolve the matter in dispute; and this power is to be exercised in the context of my authority to vary the relevant primary medical services agreement.

- 2.4 The matter has been remitted to NHS Resolution to exercise my power to decide whether an award of interest is appropriate in this case.
- 2.5 I have sought representations from each of the parties involved in relation to this matter. Each of the parties have been provided with the opportunity to provide observations on the representations received.
- 2.6 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 the dispute:
  - 2.6.1 Email from solicitors on behalf of NHS England dated 22 December 2020;
  - 2.6.2 Email from solicitors on behalf of the Contractor dated 8 January 2021 together with enclosures;
  - 2.6.3 Email from solicitors on behalf of NHS England dated 8 January 2021 together with enclosure;
  - 2.6.4 Email from solicitors on behalf of the Contractor dated 25 January 2021 together with enclosure; and
  - 2.6.5 Email from solicitors on behalf of NHS England dated 25 January 2021 together with enclosures.
- 2.7 This determination relates to interest payable on a sum of £587,808 payable to the Contractor in respect of disputes under the terms of 20 contracts between the parties for the operation of 22 GP practices and health centres in Liverpool and Sefton (the Contracts). The substantive sum was paid by NHS England to the Contractor on 18 October 2018 and is the total collective sum across all of the Contracts. This determination deals with the interest payable on the sum of £587,808 and therefore relates to all the Contracts collectively.

### **3 CONSIDERATION**

- 3.1 It is NHS England's position that *"the Court of Appeal has confirmed that, pursuant to section 9(11) of the 2006 Act, the PCA [Primary Care Appeals] has the discretion to award interest. This is not, however, an unfettered discretion, but rather a discretion to make such an award where appropriate. It is NHS England's position that it is not appropriate to exercise such discretion in this instance.*

*Given the wording of the statutory provision, there are plainly circumstances envisaged by the statute in which it will not be appropriate to award such interest. In other words, the fact that a payment is considered to be due to the Applicant is not in itself sufficient to entitle it to interest on that payment. There must be circumstances above and beyond the mere existence of a payment obligation to merit an award of interest, i.e. the circumstances that render such an award "appropriate".*

3.2 I am directed to the principles outlined in *Carasco v Johnson* [2018] EWCA Civ 87 by way of analogy. I note NHS England's comment that "*The Court makes it clear that interest awarded is intended purely to compensate claimants for being kept out of money which ought to have been paid to them, not as compensation for damage done or to deprive the defendants of profit. At [17] [of Carasco v Johnson], it is noted that, for commercial claimants, there will be a presumption that the claimant would have borrowed less and that interest is awarded accordingly. Plainly, there will be very few circumstances in which such considerations will bear substantial relevance to a contractor providing primary care services to NHS England.*"

3.3 I note NHS England's position that "*The Applicant has provided no basis upon which either the time period or rate in question is claimed. The Applicant is claiming a substantial interest sum, equivalent to approximately one quarter of the payments awarded in 2018, and it is unacceptable that it has to date done so without detailed reference to the reasoning behind the sum sought.*

*More crucially, we are also not aware of any particular circumstances of the Applicant that would suggest that it has been deprived of any substantial financial opportunity in relation to these sums. These sums do not relate to contractual payments for services, but rather were sums intended to compensate SSP for certain anticipated costs savings that ultimately did not materialise as a result of intervention from the Office of Fair Trading.*

*It is plausible, as envisaged by section 9(11) of the 2006 Act, that there may be circumstances in which losses have been incurred by a contractor as a result of being kept out of money that ought to have been paid to them. However, in the absence of any such supporting evidence for the interest claim, it is respectfully submitted that there are no relevant circumstances that would appear to render this matter one such exception."*

3.4 I note that the Contractor has highlighted the following paragraph of the judgment of the Court of Appeal as referenced above at 2.2 and 2.3:

*"Whatever the pre-existing practice, I can see no justification for a blanket policy or decision not to include an award of interest as a constituent part of the appropriate resolution of a dispute where a party has been kept out of sums of money to which it was rightfully entitled. Put another way, if a party to a dispute has been kept out of their money, it is prima facie appropriate that the resolution of that dispute should include provision to reflect and compensate the party for that fact. There may of course be reasons why that may not apply in a given case; but that should be for the decision of the adjudicator on the facts of the particular case. I would hold that the general powers available to the Adjudicator under ss. 9(11) and 9(12) confer a power to award interest where it is appropriate to do so. When considering whether or not such an award is appropriate it is open to the Adjudicator to take into account the considerations that would apply and weigh with a decision maker if the arrangement were a contract at law and the Adjudicator were a court. To that extent the 1998 [NHS] Act and general equitable principles may be relevant by analogy; but, ultimately, the decision as to what is appropriate is a matter for the Adjudicator to decide on the facts of a given case taking all relevant matters into account."*

- 3.5 The Contractor, in its representations, does not provide a detailed position on what NHS England considers “exercise of discretion” by me in awarding interest.
- 3.6 I note that NHS England has provided a copy of financial papers relating to the Contractor in its observations together with statements as regards the financial position of the Contractor including *“The rate at which the Applicant could have borrowed the sums of which it had been deprived is, therefore, likely to be zero, on the basis that it would have struggled to borrow such sums at all.”*
- 3.7 NHS England’s response to the Contractor’s representations (and in particular the witness statement of Shikha Pitalia) argues that the Contractor “has not been deprived of any substantial financial opportunity in relation to these sums”. Despite the arguments, no expert financial commentary in relation to the primary medical services practices has been provided and on a plain reading of the comments and documents provided to me, I cannot be satisfied with NHS England’s position that *“As against a turnover in the tens of millions, it is suggested that, over a 5 year period, a sum of £587,808 would have been transformative to the Applicant’s business. This is simply not credible. In the circumstances, it would plainly have been neither viable nor prudent for the Applicant to expand its business even if it had received the benefit of the additional £587,808.”*
- 3.8 I note the comment in the Court of Appeal Judgment that *“SSP Health Ltd [“SSP”] provided primary care services to Primary Care Trusts by taking over 22 failing GP practices and health centres.”* This is repeated in the witness statement of Shikha Pitalia who states that *“SSP agreed to assist and take over 22 failing GP practices.”*
- 3.9 I note the statement of Shikha Pitalia and the comments as regards the opportunity cost of loss of access to the funds.
- 3.10 The Court of Appeal has provided clear guidance on my power namely *“if a party to a dispute has been kept out of their money, it is prima facie appropriate that the resolution of that dispute should include provision to reflect and compensate the party for that fact.”*
- 3.11 As a result of the Court of Appeal decision, NHS Resolution has established an approach in relation to interest payments. A copy of the approach has been published and can be found here - <https://resolution.nhs.uk/wp-content/uploads/2021/03/NHS-Resolution-approach-to-Interest-Payments-FINAL.pdf> .
- 3.12 As stated in that approach, in light of the Court of Appeal decision, I shall start on the basis that interest, as it has been claimed in the application for NHS dispute resolution, will be awarded. I consider the following issues are appropriate for me to consider based on the facts of this matter, which could support a departure from this position:
- 3.12.1 where the conduct of the claiming party would make the award of interest unreasonable, for example, undue delay in resolving the dispute, or culpability in why a principal sum was under or overpaid;

- 3.12.2 where an overpaid sum was received in good faith and repayment with interest would cause unreasonable hardship, particularly if it could impact on the delivery of primary care services to the public;
- 3.12.3 where payment of interest would not represent a proper use of public money or where claiming interest does not represent proper conduct for a public body;
- 3.12.4 where the assumption that a winning party to a dispute has been kept out of their money is not supported by the facts of the case.
- 3.13 I am not satisfied that the Contactor must evidence that it has been deprived of a substantial financial opportunity in relation to the funds as is raised by NHS England. While it may be a relevant factor to consider, it is not the sole factor.
- 3.14 I am satisfied that the conduct of the Contractor does not make the award of interest unreasonable. I note the period during which this dispute has been ongoing (since 13 November 2013) and the position of the parties in their efforts to resolve this dispute in what was a complex matter involving significant sums of money.
- 3.15 This matter does not relate to an overpaid sum which is being recovered.
- 3.16 NHS England provides comments in relation to my exercise of discretion to award interest including whether the circumstances render the award appropriate. It disagrees with the Contractor's position that NHS England being a public body is irrelevant and notes that the Contracts to which this NHS dispute resolution relate are NHS Contracts. I am not satisfied that payment of interest in this case would not represent a proper use of public funds. I am satisfied that the award of interest is not punitive to NHS England. Whilst NHS England is a public body, this is a matter where the Contractor was kept out of money that ought to have been paid to it, for a substantial period.
- 3.17 I am satisfied that the award of interest in these circumstances is to compensate the Contractor for being kept out of money due to them. It is not compensation for damage done or to deprive NHS England of funds.
- 3.18 I accept that the award of interest is discretionary. Taking the above factors into account, I determine that interest shall be awarded to the Contractor. I am satisfied that the Contractor was kept out of their money and I am not persuaded that interest ought not to be paid to the Contractor having regard to the Contractor's approach to taking on failing practices and the financial issues and other resources detailed in representations from NHS England and Contractor including the witness statement of Shikha Pitalia.
- 3.19 I note NHS England's comment that *"The Applicant has provided no basis upon which either the time period or rate in question is claimed. The Applicant is claiming a substantial interest sum, equivalent to approximately one quarter of the payments awarded in 2018, and it is unacceptable that it has to date done so without detailed reference to the reasoning behind the sum sought."*
- 3.20 The time period for the interest claim has been known to NHS England since the application for NHS dispute resolution, which the Adjudicator determined

on 19 September 2018. Detailed representations have been provided by each of the parties. Both parties have provided observations on the other parties' representations. I am satisfied that both parties have provided their comments on the appropriate rate of interest that should apply to this matter. The Contractor has restated the time period for interest set out in its application for NHS dispute resolution and argues that the time period starts to run from the date payments should have been made. NHS England has not, as part of this remission for determination, provided any detailed comments on why the time period claimed by the Contractor might be inappropriate, as they have, for example, in relation to the rate of interest that might be applied by me.

- 3.21 I shall now turn to the rate of interest to be applied.
- 3.22 As outlined in NHS Resolution's approach in relation to interest payments, where interest is awarded, the rate will normally be at 8% above base rate<sup>1</sup> although I have a discretion to consider this rate. Interest will be simple interest rather than compound interest.
- 3.23 I have had regard to all of the papers provided to me and in particular in relation to the appropriate level of interest that might be awarded.
- 3.24 I note NHS England's comment that *"In the event that interest is awarded, there would appear to be no basis upon which to depart substantially (or indeed, in NHS England's view, at all) from the base rate for the time periods in question" and that "... if the PCA were minded to exercise its discretion in order to award interest, a rate of 6 percent per annum is plainly excessive in the circumstances, and ought instead to be minimally compensatory, rather than punitive. The Respondent submits that an award of interest at base rate ought to be sufficient for that purpose."*
- 3.25 The Contractor has provided detailed submissions in relation to what it considers is the appropriate level of interest to be applied. It has also provided me with calculations of both simple interest and compound interest on the sum of £587,808 (a figure which is not in dispute as between the parties) between 13 November 2013 and 18 October 2018.
- 3.26 The Contractor concludes its representations on the appropriate sum of interest which might be awarded by stating that:

*"Apart from section 35A of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984, the 1998 Act provides a fair and rigid statutory scheme for the entitlement to interest from those who fail to make payments on time. It applies to any contract between businesses or public authorities for the provision of a service. Under such a contract a term is implied that debts are to carry a rate of interest fixed by statutory instrument from the time they become payable until the debt is discharged. The rate is currently base plus 8%.*

*SSP has been deprived of money which was due and payable in November 2013. It would be reasonable and appropriate in the context of this contractual relationship to have regard to the provisions contained in the 1998 Act and*

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<sup>1</sup> <https://www.gov.uk/late-commercial-payments-interest-debt-recovery/charging-interest-commercial-debt>

*the discretion of the courts to award interest on debts under the 1981 and 1984 Acts.*

*The basic principle is that the court should award interest wherever the defendant's breach of contract deprived the claimant of profits or income. The interest is determined by the court having regard to commercial interest rates and the fact that SSP has been kept out of the money for a considerable period of time. The fact that NHS England is a public body is irrelevant.*

*SSP should be appropriately compensated for being kept out of sums of money which it was lawfully entitled to receive..."*

3.27 Each of the parties have provided detailed representations and observations on the appropriate rate of interest that should be awarded (if any). I note in particular the many references to case law and the levels of interest awarded by the Courts. I note that the parties are far apart in their considerations of what level of interest might be appropriate and have provided detailed comments to establish their positions.

3.28 I note that NHS England make reference to rates of either 2% or 3% above base rate as being rates which the Courts have applied and the case references regarding these. I also note NHS England's position that the Contractor has not provided a basis for their position that an interest rate of 8% would be appropriate. NHS England considers that a claim "...of 8% is gratuitous." NHS England has not however satisfied me that a lower rate of interest would be appropriate, having regard to the facts of this particular matter.

3.29 I note that the Contracts are silent in relation to entitlement to interest in the event of late payment of any sums due under the Contracts. There is therefore no contractual arrangements between the parties as regards the appropriate rate of interest. Whilst the interest rate may be lower in a contract with NHS England, a public body, the Contracts do not support this and NHS England has not made out an argument which I find persuasive in relation to the matters before me.

3.30 The Contractor has provided the following calculation of simple interest at a rate of 8%. This calculation has not been disputed by NHS England:

*"Calculation*

*13 November 2013 to 18 October 2018*

*£587,808.00 x 8% per annum*

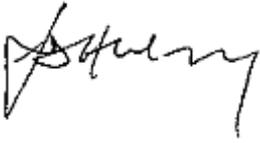
*Interest per day = £128.84*

*1800 days x £128.84 = £231,912.00*

*Total sum for interest = £231,912.00"*

3.31 I calculate that this should be £231,902.33. Taking the above factors into account, I determine that an interest payment of 8% per annum from 13 November 2013 to 18 October 2018 in the total sum of £231,902.33 shall be

paid by NHS England to the Contractor within 45 days of the date of this determination.

A handwritten signature in black ink, appearing to read 'Jonathan Haley', written in a cursive style.

**Jonathan Haley**  
**Head of Operations, Primary Care Appeals**  
**NHS Resolution**