

September 2022

England

1. *Background*

In 2013, the premises of around 3,600 GP surgeries in England were transferred to NHS Property Services (NHSPS), a Department of Health and Social Care (DHSC) owned company with the Secretary of State as sole shareholder. In 2016, NHSPS implemented its Consolidated Charging Policy, with the stated aim of levying charges against surgeries for rent, maintenance and service charges, on a full cost recovery basis.

In the years that followed, the BMA received hundreds of reports from practices that believed NHSPS was charging them unjustly (i.e., not in accordance with their existing contractual terms) and for much higher levels than that charged by NHSPS' predecessors.

2. *Why did BMA support the practices to take legal action against NHSPS?*

For some years, BMA members have been raising concerns about the basis on which NHSPS was issuing charges to practices, and the ever-increasing quantum of costs NHSPS was seeking to recover. Crucially, these practices had been informed that they were required to make payments to NHSPS in accordance with NHSPS's Consolidated Charging Policy ("the Policy"). These charges have reached a magnitude to make some practices unviable, and we have heard from many partners who are reluctantly contemplating handing their GMS/PMS contracts back as a result. Underlying this were additional concerns about NHSPS' business practices – specifically its inability to provide a coherent explanation to practices about what they owed NHSPS and the legal basis for the demands and invoices it was issuing.

Five practices, with support from the BMA, chose to take legal action against NHSPS in pursuit of declarations from the court that 'the Policy' did not automatically vary practices' legal terms of occupation, and therefore NHSPS's imposition of charges based on this policy was unlawful.

3. *What has happened in the case to date, and what has the Court now ruled?*

The case began at the outset of 2020. In June 2020 NHSPS in their court filings conceded that 'the Policy' had not been incorporated into, or retrospectively varied, these five practices' tenancies and existing service charge obligations.

Ultimately, this admission from NHSPS meant that the court felt that declarations would serve no useful purpose.

In the meantime, NHSPS decided to countersue the five practices involved, escalating the dispute into a major commercial lawsuit, in the middle of the global pandemic where practices were working desperately to roll out the national vaccination programme. We were disappointed that NHSPS decided to unnecessarily escalate this process, heaping more stress on the affected practices and ultimately dragging out legal action.

Just over a month before trial, the court decided that the proceedings will be split into 2 parts. Phase 1 to deal with the principles of what services NHSPS can charge each of the practices for and Phase 2 to deal with the amounts due to be paid by the practices.

Interestingly, NHSPS has also radically amended its claims (in one case they have reduced their claim by as much as 34%, or over £178,000). This indicates that NHSPS had decided to countersue these practices without having first properly establishing what services it provided and the costs it had incurred in providing those services.

This reduction in claims made by NHSPS indicates that NHSPS was unable to justify its own claims even after the keen scrutiny that comes with the legal process. It also corroborates what practices have been saying all along; NHSPS cannot prove all of its charges when questioned by practices. The judgment– handed down on 8 July – deals with the principles element of NHSPS’ counterclaims, i.e., what were the terms of these five tenancies. In a 170 page, 100,000 word ruling, the judge found that each of the five practices are liable to pay NHSPS its reasonable costs for providing the services on the basis that each have agreed or implied terms of occupation. The specific quantum of charges for each practice is to be determined at a subsequent hearing of Phase 2.

4. What does this mean for the five practices involved in proceedings?

The case is not yet over. A subsequent hearing will be scheduled to determine, on a line-by-line basis, what is owed by these practices to NHSPS. This will turn on – amongst other things – whether the services were provided to the required standard (if provided at all), whether the costs claimed are reasonable and the extent to which NHSPS is able to furnish proof to that effect.

NHSPS has considerably revised the amount it is claiming from these practices. Two of the five practices have seen a moderate increase (of £1,711 and £5,625 respectively – although the former is understood to be inaccurate and should instead be a large reduction as it does not account for large credits agreed historically by NHSPS) whereas the other three have seen a dramatic reduction, totalling £235,415. We contend that there are still considerable gaps in what NHSPS can prove these practices owe, and so further reductions are likely to be made.

We are in talks with the five practices about how they would like to proceed. The BMA will continue to stand by these practices in the months to come.

5. What does this mean for NHSPS’ tenants more generally?

The length and complexity of the judgment underscores the difficulties facing practices in trying to navigate changes NHSPS is making to its approach to service charges. The judge in this case took pains to avoid setting precedents for the wider system, instead emphasising that the basis and quantum of costs owed by practices must be determined on a case-by-case basis.

NHSPS admitted in these claims that it cannot rely solely on ‘the Policy’ when charging practices. Instead NHSPS must have regard to the individual facts and circumstances of the practice concerned – including written and unwritten occupancy arrangements.

Despite this, the judge determined that NHSPS had remained committed to the Policy and has sought to implement the Policy in practice in both documented and undocumented tenancies.

NHSPS has been asked time and again to produce information and documentation to support the invoices it supplies to practices. It was only after years of legal action that NHSPS did this for these five practices. When NHS PS did finally provide the documentation it had to amend its claim as it no longer relied on the majority of its disputed invoices.

Had this information been provided at the outset, these practices would have been able to better understand the service charges levied against them, perhaps engendering more constructive conversations with NHSPS and avoiding the need for costly legal action. In any event, NHSPS will likely need to provide a similar level of information to all its other tenants where the accuracy of historic invoices are in dispute.

We have always advised practices to engage constructively with NHSPS. Practices should seek their own advice on the position and put their particular case to NHSPS on what they believe is, and is not recoverable by way of service charges. Amounts in dispute should be raised with NHSPS. NHSPS should then respond and confirm the basis on which each item is being charged to each practice specifically, and also demonstrate that these services have actually been provided, and absent any contrasting terms in the tenancy, to a required standard at reasonable cost.

If practices enter into any discussions in good faith with NHSPS to find mutually-agreeable terms of occupancy going forward, they should be mindful that any agreements do not jeopardise their existing legal rights and do not put future sustainability of the practices at risk. As in every case, we encourage practices to seek independent legal advice before agreeing to anything.

6. I dispute the amount NHSPS wants to bill my practice – what should I do?

There are many reasons for which practices may dispute what NHSPS asserts that it is owed. Examples abound of overcharging, charging for services that were not delivered, delivered to an unacceptable quality, or where these services were unnecessary and/or unrequested.

Any amounts that are disputed should be raised with NHSPS in the first instance, including the basis for why they are disputed. If they disagree, NHSPS should explain the charges by reference to what they say are the terms of occupation. In some cases, parties may be able to come to an agreement about what is owed, and plot a route forward.

The legal case has served to demonstrate the problems NHSPS has in terms of managing its methods of calculating charges and record keeping. It took the better part of two years for NHSPS to articulate what it felt was owed by a mere five practices, and yet that process is still ongoing. Unless NHSPS takes a different, more cooperative approach to sharing information relating to the specific charges, we do not expect other practices to have their disputes quickly resolved. Practices cannot be expected to pay for services where neither party has a record of them being delivered, or where NHSPS have failed to set out the legal basis upon which they are claimed.

The significant reduction in claims made by NHSPS clearly proves that NHSPS was unable to justify its own claims when put under the keen scrutiny that comes with the legal process. It also proves what practices have been saying all along – that NHSPS cannot prove all of its charges when questioned by practices. Without the BMA's support to these practices and the subsequent legal action, these practices could have paid charges well in excess to what NHSPS was able to substantiate.

7. I have already paid NHSPS in previous years, am I likely to have overpaid and be due a refund?

It is entirely possible that some practices might have paid charges to NHSPS or might be pursued for charges by NHSPS that it is unable to substantiate. Practices should ask NHSPS to provide evidence for all the charges that they are claiming, otherwise they might end up paying charges that NHSPS can not justify. In some cases, practices might even be due a refund for charges that have been paid but NHSPS might not be able to substantiate.

8. *I do not think NHSPS services are good value for money, do I have to allow them to provide services?*

NHSPS have confirmed that they will be willing for practices to contract other suppliers for services. Practices intending to do this should inform NHSPS before doing so, to avoid the overprovision, and incurring charges for unwanted services. NHS PS are likely to ask practices to enter into a service agreement to clearly document the provision of services and who is responsible for what. Practices should seek independent legal advice on any such document.

9. *Is it necessary to agree a written lease with NHSPS?*

Generally speaking, no. You do not need to agree a written lease, and can continue operating under the occupancy arrangements you already have in place. However, NHSPS could initiate formal lease renewal proceedings requesting a written lease (by serving a Section 25 Notice (Landlord & Tenant Act 1954)), but they are yet to do so with any practice that we are aware of.

While these should not be agreed under duress, there are some advantages to signing leases. They serve as a useful opportunity for practices to negotiate and agree occupancy arrangements. This can provide contractual clarity, certainty of expenditure and help to avoid disputes in future.

10. *Has BMA agreed a standard or template lease?*

No, the BMA has not agreed a standard or template lease. Each tenancy is an individual contract and practices should seek independent legal advice before signing a lease with their landlord.

Practices should not be forced into signing a lease or any other document that jeopardises their existing legal protections or put their future sustainability at risk.

11. *Do I need to pay NHSPS's management fees?*

The Court ruled that for each of the five practices, NHSPS can charge some management costs. The exact figure or percentage of management fees will be determined in Phase 2 of the cases. However as noted elsewhere, these 5 cases are not test cases and practices' obligations might vary.

In a related development, In August 2021 NHSEI [issued a policy note](#) setting out its expectations regarding the charging and payment of NHSPS fees. It outlines that management fees charged by NHSPS and CHP should be reimbursed by the commissioner:

Reimbursement of management fee for reimbursable costs

Both CHP and NHSPS charge a management fee for certain reimbursable costs; where these are being charged, these should also be included in the reimbursable amount paid by the commissioner and it is therefore important that these costs are fully agreed and understood before agreeing terms.