GDS Contracts – The Litigation Continues!
Tim Lee reviews a judicial review of nGDS

During GDS Contract “baseline year”, the claimant employed two qualified dentists. In calculating the claimant’s baseline activity and contract value, the activity carried out by those employed dentists during the baseline year, were ignored by the PCT. The PCT did not include the baseline activity and contract values set out in the legislation, the activity of the two employed dentists should be taken into account in such calculations. The Claimant argued that, when applying the appropriate statutory criteria and guidance, the essence of the claim before the adjudicator was whether the PCT was entitled, in determining the activity and contract value of the GDS Contract, to omit the activity and contract values attributable to the two employed dentists during the baseline year.

The Claimant disputed this and subsequently referred the matter to the NHSLA. The NHSLA decision followed in June 2008. NHSLA Decision For the purposes of this article, the baseline activity and contract value of the two employed dentists, in the claimant GDS Contract. The Claimant argued that, when applying the appropriate statutory criteria and guidance, the essence of the claim before the adjudicator was whether the PCT was entitled, in determining the activity and contract value of the GDS Contract, to omit the activity and contract values attributable to the two employed dentists during the baseline year.

The intention of the legislation was that the size and value of the practice was to be protected, to ensure funding was in place for the number of patients serviced by the practice, including its employed dentists. When a particular employee left the practice ought to be able to replace the departing employee with another dentist, so as to continue to honour the demands of its patients.

If the departing employee effectively took “his” NHS funding with him, the employer’s practice was being diverted. The intention of the legislation could not have been to encourage employed dentists to leave their employer, taking with them goodwill, which the employer had built up.

High Court Review In a nutshell the High Court concluded that the adjudicator’s decision must be set aside for error of law. Where work had been undertaken during the baseline period, by employee or assistant dentists, such activity and contract value was potentially includable within the employer’s GDS Contract.

Where to Now The High Court has referred the matter back to the NHSLSA for further consideration of the appropriate activity level/contract value and, no doubt, the NHSLA will report the outcome in due course.

Implications for General Dental Practitioners Other general dental practitioners may have been similarly affected in 2006, by their PCTs issuing GDS Contracts to employed dentists, and not including the baseline activity/contract value of such employees in the principal’s GDS Contract.

Can any such aggrieved contractor bring a claim at this stage or is it too late?

What might the value of such a claim be? Both issues may be dependent on the NHSLA’s decision following the remission back to them of the Hussain case, for further consideration.

For potentially affected contractors reading this article, it is clearly too late to refer the matter to the NHSLA. There is a three year “limitation” period in disputes to the NHSLSA, the time running from the date of the claim (likely to be March 2006, or at the latest 1st April 2006).

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There may be two possibilities.

1. Firstly there may be an action for “breach of statutory duty”. The framework for calculating the level of activity and contract value is a statutory framework. If the PCT failed to carry out such calculations properly they have failed in their statutory duty, enabling a claim to be brought.

2. Secondly there may be a claim for breach of warranty under clause 23 of the GDS Contract. By those warranties the PCT promised that “all information in writing which is provided to the contractor specifically to assist the contractor to become a party to this Contract was, when given, true and accurate in all material respects”. Under clause 25 are further warranties, for example, that no relevant information has been omitted.

Under the provisions of the 2005 Transitional Provisions Order (which sets out the framework for the transition from the “old” section 35 arrangements to the “new” arrangements), the responsible body for analysing the baseline year data, was specifically given to PCTs. “It might be arguable that if incorrect calculations had been made to the contractor’s baseline UDAs and contract value, the relevant PCT had been in breach of warranty.” This could lead to a claim for damages for breach of contract.

Actions for breach of contract must usually be brought within six years from the date of the breach in question, so care needs to be taken with limitation periods.

A contractor contemplating action should also ensure that they had not elected, in their Contract to be regarded as a health service body (clause 14) restricting action only to the NHSLA (with the three year limitation period problem). It might be sensible to seek an early “opt out” of clause 14, which is possible under Regulation 9 of the National Health Service (General Dental Services Contract) Regulations (Regulation 9(4)). A contractor may, “at any time” request a variation of the Contract to remove the election from health service body status. Any such opt out should be in place before any proceedings were commenced.

What might a claim be worth?

Firstly how much might a claim be worth? The general rule is that damages for breach of contract are such losses as may have been reasonably foreseeable when the breach took place. An aggrieved contractor might argue that had their GDS Contract been at the appropriate higher level of activity and the higher contract rate, the contractor would have had to pay, say, 50 per cent of each “UDA value” to that relevant employee.

The remaining 50 per cent balance would have been part of their gross annual profits. They might go on to argue that such increased profits would have been the “top slice”, that the practice overheads would already have been provided for by the “lower slice”, and that their net loss was therefore 50 per cent of the value of each UDA lost as a result of the PCT’s breach of contract/breach of statutory duty, on an annual and charging basis. Such loss might amount to a substantial sum.

About the author
Young & Lee’s litigation team, headed by Chris Leek, acted for the claimants before the High Court, and before that in the NHSLA but were not the solicitors, who originally acted for the claimants.

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