healthcare.
Your quarterly news update from Sintons

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Making savings in PFI contracts – easier said than done

With continued pressure on NHS Trusts to save money, looking at cost savings from existing PFI projects remains on the agenda for many Trusts. Whether or not a Trust is able to realise any savings depends on various factors, which means it is not always as easy to achieve as we have been led to believe.

The Centre for Health and the Public Interest (CHPI) report this summer ("PFI Profiting From Infirmary") looked at how much profit had been generated by PFI companies in England and stated that the PFI companies had made pre-tax profits of £831m over the last 6 years. The report called for caps on the amount of profit that can be made from PFI contracts. In reality, this means a re-negotiation of the Annual Service Charge within the PFI contract. There is no legal obligation on PFI companies to enter into such re-negotiations, which can leave the Trust on the back foot in the negotiations unless there is something that the PFI company needs from the Trust in return. If a Trust is considering such re-negotiations, it is worth the Trust reviewing any potential areas of non-compliance by the PFI company under the PFI contract before entering into such discussions, so it has some leverage.

The CHPI report also called for the use of public sector loans to “buy out” PFI contracts. “Buy out” means terminating the arrangement and bringing the services back in-house. There are some examples of this in the market - Northumbria Healthcare Trust used a loan from Northumberland County Council to enable the Trust to terminate its PFI contract. This option can be prohibitive for many Trusts because of the amount of compensation payable to the PFI company on termination. The compensation is likely to include paying the costs of constructing the hospital that have not yet been repaid, along with certain breakage costs including a certain amount of profit for the PFI company for ending the arrangement early.

Trusts considering the buy out option need to be mindful of HMT’s policy note on the early termination of contracts, which sets out the process to be followed when considering terminating a PFI contract. The process includes DoH and HMT approval for the termination and unless it can be demonstrated that “termination delivers value for money taking into account the effect on public services as a whole, a proposed termination will not be authorised by HMT”. The Labour Party are in favour of PFI buy out, but currently this process is by no means a straightforward option.

The HMT code of conduct for PFI/PPP contracts sets out the basis on which Trusts and PFI companies agree on a voluntary basis to identify and deliver efficiencies and savings in operational PFI contracts. The code is voluntary and will depend on whether your PFI provider is a signatory, but there is merit in undertaking a savings review to check that the contract is being managed properly with effective performance monitoring and use of the payment mechanism (including applying deductions). This requires additional resource for the Trust but the benefits can be worth the investment. Effective monitoring of performance may lead to increased deductions and may assist in re-negotiations of the Annual Service Charge.

If defects are uncovered or known about which have not yet been rectified, it is worth bearing in mind that many of the construction contracts which sit behind the PFI contract may be coming to the end of their 12 year limitation period, after which the builder will no longer be liable for such defects. There are steps that the Trust can take to preserve this liability which would need to be considered as part of any review.

It is possible to maximise the savings under your PFI contract, but it is worth taking a strategic view of the PFI contract as a whole when determining the most effective place to focus your efforts and resources to achieve the best results.
Securing occupation of surgery premises

As the financial year end approaches, it is prudent for any GP Practice to begin to finalise its business strategy for the coming year and to consider its approach to deal with any loose ends.

Surgery premises issues have been in sharp focus over the last 12 months with continued discussion around the position of GP Practices occupying premises owned by NHS Property Services Limited (NHSPS) or Community Health Partnerships (CHP).

Most of those Practices have by now received advice, or are receiving ongoing advice, in relation to their individual circumstances and the specific action needed to maximise the security of occupation of their surgery premises.

However, a large proportion of GP Practices around the country occupy surgery premises that are not owned by NHSPS or CHP, but instead are owned by individuals such as some of the clinical Partners or retired Partners.

There has been very little recent discussion regarding the importance of ensuring that robust documentation is in place in relation to occupation of surgery premises in those cases.

It is vital that where Practices occupy premises that are not owned by all of the current clinical partners they have in place:

- an up-to-date Partnership agreement; and
- formal documentation for the occupation of the surgery premises, preferably a fixed term lease.

An example of where this might arise would be where the surgery is owned by retired Partners or perhaps only a proportion of the clinical Partners.

An up-to-date Partnership agreement coupled with a lease will serve to protect the interests of any non-property owning Partners. Where this documentation is not in place, the position of any non-property owning Partners could be extremely vulnerable in the event of any dispute with the property owners.

A Partnership needs long-term stability in respect of its surgery premises and the only way to achieve that for non-property owning Partners is to put in place a lease which will offer protection and regulate the relationship between the owners of the premises and the Partnership as a whole.

This will in turn offer benefits to the owners of the surgery by boosting the investment value of the premises and ensuring that the responsibilities of both parties are clear.

In addition, where the property owners wish to take out lending against the surgery premises, most banks will insist, as a condition of their loan, that a lease is first put in place between the property owning Partners and the clinical Partnership.

An up-to-date lease between the property owners and the clinical Partnership will speed up the process of any refinance.

Where a Practice needs to review existing arrangements or put in place new arrangements, it should always consult a specialist healthcare surveyor and solicitor.

If you wish to discuss your specific circumstances, please contact us and one of our healthcare real estate team would be happy to help.
We specialise in advising general practitioners, from individuals to large practices, on a national basis.

We understand the range of issues affecting healthcare professionals. We advise on all legal aspects which regulate the provision of primary and secondary care, as well as being able to advise on contractual documents.

We can offer you specialist expertise and experience in a range of areas including:

- Buying into a practice;
- Sale & leaseback;
- Surgery development;
- Medical law;
- Partnership agreements;
- Practice agreements;
- CQC registration;
- Employment & HR;
- Property/real estate law;
- Practice mergers;
- Federations;
- Joint ventures & collaborations;
- Procurement & competitive tendering;
- Health centre development;
- Health centre leases;
- Retirement planning & succession arrangements;
- Service charge disputes; &
- Partnership disputes.

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Considering setting up a wholly owned subsidiary company?

The use by NHS Foundation Trusts of wholly owned subsidiary companies to provide non-clinical services back to the Trust is increasing in popularity due to the potential benefits that such arrangements can bring to the Trust, the Subsidiary and the group as a whole.

NHS Trusts are also looking at this option but the ability of NHS Trusts to establish similar arrangements is less straightforward. There is a lot to consider when exploring this option, including some key legal considerations.

Services to be provided – the services that the Subsidiary can provide to the Trust range from pharmacy services to estates and facilities and procurement. The scope of services to be provided needs to be clearly defined at the outset in order to determine the Trust staff that are likely to transfer to the Subsidiary.

Engagement with Staff – it is important to engage with staff as early as possible in the process about the proposed plans. The reports in the press that these schemes are viewed as “backdoor privatisation” by the Labour Party and trade unions may cause concern to those staff likely to be affected by the transfer. Where staff are not positively engaged in the process, the rumour mill can spread incorrect and often damaging information about what establishing a Subsidiary can mean for staff. As the staff are vital to the success of the Subsidiary, it is important to ensure their support of the project.

Corporate Governance – the Trust will wish to ensure that the objects of the Subsidiary are aligned with those of the Trust. There also need to be appropriate controls in place for decision making by the Subsidiary as well as ensuring processes are in place for dealing with conflicts of interest, given the likely composition of the Board of both organisations.
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Separate legal entity – as the Subsidiary is a separate legal entity, there needs to be robust contracts in place between the Trust and the Subsidiary to govern the provision of the services with appropriate mechanisms for default and termination in the event of a failure by the Subsidiary to provide the services to the required standards.

Public Procurement – the Trust may be able to take advantage of Regulation 12 of the Public Contracts Regulations 2015 (previously known as the Teckal exemption) so that the direct award of the services agreement to the Subsidiary is considered to be exempt from the procurement regulations as an in-house contract.

Commercialisation – if the Subsidiary is also looking to provide services to third parties (including other NHS bodies), it needs to be mindful that such arrangements will not necessarily be exempt from the procurement regulations. Although this is a matter for the contracting authority, the Subsidiary should ensure that appropriate protections are afforded to it in the relevant agreement.

If a Trust is considering setting up a wholly owned subsidiary company, we would recommend getting some initial legal advice at the scoping stage of the project to ensure that the arrangement is structured appropriately and to future proof it as much as possible.
Suspension
an informed decision

Why suspend?

It is only in instances of alleged serious misconduct where employees may be suspended pending investigation. This could be where there is a:

- potential threat to property, an organisation or employees;
- risk of damage to evidence;
- relationship breakdown;
- risk of witnesses being influenced; or
- health and safety risk.

Acas suggests suspension allows ‘tempersto cool and hasty action to be avoided’. However, it requires careful consideration.

Do you have the right?

It is advisable to ensure contracts provide a right to suspend, but what if they don’t?

There isn’t a general obligation to provide work as long as employees are paid. However, implied rights can arise where the nature of employees’ work means they need to work. This could be where they:

- are deprived of remuneration (e.g. shift premiums or commission);
- need to maintain a public profile; or
- need to exercise professional skills frequently.

If there is such a right, suspension could amount to a breach of contract and legal advice should be sought.

Implied term of trust and confidence

Employers will still have to consider this implied term. Reasonable and proper cause is required to avoid a breach, and avoiding “knee jerk” reactions. Otherwise employees could resign and claim unfair dismissal (subject to service).

Alternative steps should be considered, such as any entitlement to move employees or implement other safeguards.

When suspending...

Inform employees as soon as possible, with confirmation in writing. Employers should confirm:

- the suspension, reasons, and expected duration;
- its temporary nature, that it doesn’t assume guilt or constitute a sanction;
- ongoing rights and obligations;
- the contract continuation, other than attendance, and that patients or colleagues must not be contacted; and
- a point of contact for during suspension.

Employers should give thought to the reasons for suspension and ensure suspension will fulfil these.

Consider what colleagues, patients and others are told. Avoid portraying assumptions of guilt that could prejudice disciplinary hearings. Employees often view suspension as a punishment. It must therefore be handled sensitively, be as short as possible and reviewed.

Suspension policies require consistent application. For example, if two or more employees are implicated in allegations and only one suspended without good reason, this could be a breach of trust and confidence. Employers also expose themselves to discrimination allegations if an employee treated differently has a protected characteristic under the Equality Act 2010.

What about pay?

Unless there is a clear contractual right otherwise, employers must suspend with pay.

If a suspended employee falls sick, employers may wish to review their pay, if they would only be entitled to statutory sick pay (SSP). In such circumstances, employers may end suspension, with an employee defaulting to sick leave. Employers should then reserve the right to re-impose suspension should an employee become fit again.

Overall suspension should only be used when reasonable and necessary and employers need to be able to show why this is the case.
Leading public sector specialist joins Sintons

A leading public sector specialist lawyer has joined law firm Sintons, further strengthening its nationally-known commercial team.

Chloe Dinsdale has joined Newcastle-based Sintons as a Senior Associate and is a well-known specialist in public sector work, acting for both commissioners and providers of services.

Much of her work is in the healthcare sector, an area in which Sintons is one of the leading law firms nationally, working for NHS Trusts, GPs, dentists and other healthcare providers across the UK.

Prior to joining Sintons, Chloe had a 15-year career at Womble Bond Dickinson, prior to which she trained and worked as a lawyer in London.

The appointment of Chloe comes at a time of growth for Sintons, which has seen the firm recently unveil plans to reach a turnover of £20m within the next five years, alongside a continued recruitment strategy to bring in and retain the very best legal talent.

Chloe said: “Sintons is well-known for its capability and its ability to work nationally from its single office in Newcastle, and that is what attracted me to move here.

“Sintons has an enviable reputation in many areas, with healthcare being particularly strong, so I am very pleased to be moving here at a time of growth and development for the whole firm.”

Mark Quigley, managing partner of Sintons, said: “Chloe is a very well-known and highly respected lawyer for her work in public sector matters, and especially healthcare, so her moving to Sintons is a very good fit. We are known nationally for our work in healthcare and are growing strongly in our presence.

“Our vision for the firm is to set the standard for legal excellence, and to recruit and retain the very best legal talent. The appointment of Chloe is an example of that and will help strengthen our offering even further. We are delighted to welcome her to the firm.”
Spotlight on David Naughten

David is an Associate in the Real Estate Department acting for a range of public sector clients, including NHS trusts, GPs, dentists and pharmacists.

What sort of transactions do you ordinarily deal with?
On a day to day basis I advise clients on a full range of property transactions, whether that be in relation to putting leases in place on behalf of clients, or advising clients on refinance arrangements that directly involve their premises. There is also a large amount of my time that is taken up by “ad hoc” queries from clients, reacting to situations as and when they arise (car parking arrangements on site being a particularly common query!).

What do you see as the biggest challenge in dealing with property within the public sector?
Primarily the ever changing nature of the NHS and healthcare services in this country, and the need to ensure that premises are (from a legal perspective) as far as possible fit for purpose. This is particularly difficult when dealing with leasehold premises, as there is a clear conflict between the commercial expectations of landlords (long term leases, commercial rents) and the realities of service provision within the NHS (short service contracts, lack of desire by healthcare organisations/individuals to be tied in long term).

What changes do you envisage having the greatest impact on your field over the next 12 months?
The long awaited updated to the Premises Directions (the legislation that governs the system of rent reimbursement for GP practices) will be of primary relevance, but it is not expected that any wholesale changes to the system are going to be made.

I am also interested to see what further initiatives are introduced in respect of physical improvements to healthcare premises; there have over the past couple of years been some “headline grabbing” announcements as to investment being made in healthcare premises by NHS England, but in reality our clients have had mixed success in actually benefitting from said schemes.