Neutral Citation Number: [2014] EWHC 339 (Admin)

Case No: CO/13585/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: 21/02/2014

Before:

MR JUSTICE WYN WILLIAMS

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Between:

PIOTR DUSZA	**First Claimant**
- and -	
HAKO SOBHANI	**Second Claimant**
- and -	
POWYS TEACHING LOCAL HEALTH BOARD	**Defendant**

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Ms Mary O'Rourke QC (instructed by **Berryman Lace Mawer**) for the **First & Second Claimants**
Mr Rhodri Williams QC & Mr Carl Harrison (instructed by **NHS Shared Services Partnership Legal & Risk Services**) for the **Defendant**

Hearing dates: 19 December 2013

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Approved Judgment

Mr Justice Wyn Williams:

Introduction and procedural issues

1. In these proceedings the Claimants challenge by way of judicial review a decision made on 18 September 2012 by Dr Brendan Lloyd, the Defendant's medical director, that the Claimants should re-pay to the Defendant the sum of £110, 012. 42. On 4 February 2013 permission to apply for judicial review was refused on the papers. However, following a contested oral hearing on 25 March 2013 HH Judge Keyser QC granted permission; he also granted an application to amend the grounds of challenge.

2. On or about 15 April 2013 the Claimants served amended grounds of claim. 10 individual grounds were specified. The Defendant served its detailed grounds for contesting the claim on or about 28 May 2013. Many points were taken in answer to the claim. They included points relating specifically to the merits of the claim; they also included assertions that the decision under challenge was not susceptible to judicial review because, in reality, the dispute was a private law dispute arising out of a contract and that relief by way of judicial review should be refused because the Claimants had failed to exhaust other available remedies.

3. On 12 September 2013 Ms Lynne Rees, an employee of Dental Protection (the dental defence organisation of which the Claimants are members) made a request for information to the Defendant pursuant to the Freedom of Information Act 2000. The Defendant responded on 3 October 2013. As a consequence of the response the Claimant sought permission to rely upon further evidence. Thereafter an order was made by consent permitting the parties to adduce further evidence related to the information provided as a consequence of the request under the 2000 Act.

4. Meanwhile Ms O'Rourke QC had submitted her skeleton argument (it is dated 4 December 2013) and on or about 10 December 2013 a skeleton was submitted on behalf of the Defendant by Mr Williams QC and Mr Harrison. The skeleton submitted by Ms O'Rourke QC raised 4 discrete issues. The Defendant's skeleton answered those points but also the 10 grounds advanced in the amended grounds.

5. As the hearing before me unfolded the issues became even more focussed. Ultimately I concluded that my task was to adjudicate upon one ground of challenge, namely, that in reaching his decision Dr Lloyd had adopted an interpretation of the contract which subsists between the Claimants and the Defendant which was erroneous. Ultimately, the parties agreed that this was what I should do. While Mr Williams QC was disposed to argue that I was engaging in determining the meaning of a commercial contract between the Claimants and Defendant (which was a private law issue) he accepted that it was cost effective for me to determine the proper meaning of the contract at this stage since the parties were before me and all relevant arguments had been deployed both in the skeleton arguments and orally.

6. With those introductory remarks about procedural issues I turn to identify the express terms of the contract which subsists between the Claimants and Defendant which are or may be relevant to the issue of interpretation which I have to determine.

The Standard General Dental Services Contract

7. The contract between the Claimants and the Defendant is a comprehensive written document in standard form. It contains 24 parts and a number of schedules. It is

intended to be used generally; i.e. between dental practitioners and Health Boards throughout Wales. The agreement between the parties was signed on 1 January 2009.

8. Part 8 (Clauses 74 to 100) is concerned with "mandatory services". Clause 74 provides:-

> "74. The contractor must provide to its patients, during the period specified in clause 75, all proper and necessary dental care and treatment which includes –
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> 74.1 The care which a dental practitioner usually undertakes for a patient and which the patient is willing to undergo;
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> 74.2 Treatment, including *urgent treatment*; and
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> 74.3 Where appropriate, the referral of the patient for *advanced mandatory services, domiciliary services, sedation services* or other relevant services provided under Part 1 of *the Act*."

The reference to the Act in Clause 74.3 is a reference to the National Health Service Act 1977.

9. Clause 76 specifies what the care and treatment referred to in Clause 74 includes. Such care and treatment includes examination, diagnosis, advice and planning of treatment, preventative care and treatment, periodontal treatment, conservative treatment, surgical treatment, supply and repair of dental appliances, the taking of radiographs, the supply of listed drugs and listed appliances and the issue of prescriptions. Care and treatment within Clause 74 does not include additional services – for a definition of that phrase see Clause 1. "Examination" is not defined in clause 76. Indeed there is no definition of that word to be found anywhere in the contract.

10. Clauses 77 to 82 are concerned with "units of dental activity". Clause 1 defines that phrase as follows:-

> "Unit of dental activity" means the unit of activity which is in this contract used to –
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> a) express the amount of, and
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> b) measure in accordance with Clauses 79 to 82 the provision of, *mandatory services* and *advanced mandatory services* provided under this contract.

"Advanced mandatory services" is given a specific definition in Clause 1 which is of no significance in this case.

11. Clause 77 provides that the Claimants "shall provide 19347 *units of dental activity* during each financial year. Clauses 79 to 82 specify how that number is to be calculated. Clause 79 provides:-

> "79. Where the contractor provides a *banded course of treatment*, the contractor provides the number of *units of dental activity* specified in the appropriate row of Table A below."

Table A provides that a Band 1 course of treatment which excludes urgent treatment counts as one unit of dental activity, a Band 1 course of treatment consisting of urgent treatment only counts as 1.2 units of dental activity, a Band 2 course of treatment counts as 3 units of dental activity and a Band 3 course of treatment counts as 12 units of dental activity.

12. Clause 1 provides definitions of Bands 1, 2 and 3 courses of treatment. These are as follows:-

> ""Band 1 course of treatment" means a *course of treatment*, including a course of treatment consisting of *urgent treatment*, provided to a patient in respect of which a Band 1 *NHS charge*, is payable pursuant to the *NHS charges regulations*, or would be payable if the patient was not an *exempt person;*
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> "Band 2 course of treatment means a *course of treatment* provided to a patient in respect of which a Band 2 *NHS charge* is payable pursuant to the *NHS charges regulations*, or would be payable if the patient was not an *exempt person*;
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> "Band 3 course of treatment" means a *course of treatment* provided to a patient in respect of which a Band 3 *NHS charges* is payable pursuant to the *NHS charges regulations*, or would be payable if the patient was not an *exempt person*."

13. Clause 1 also provides definitions of the phrases "course of treatment" and "complete course of treatment." "Course of treatment" means:-

> "a) an examination of a patient, an assessment of his oral health, and the planning of any treatment to be provided to that patient as a result of that examination and assessment, and
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> b) the provision of any planned treatment (including any treatment planned at a time other than the time of the initial examination) to that patient, provide by, except where expressly provided otherwise, one or more providers of primary dental services, but it does not include the provision of any *orthodontic services or dental public health services.*"

The phrase "complete course of treatment" is defined to mean:-

> "i) where no treatment plan has to be provided in respect of a course of treatment pursuant to Clause 51, all the treatment recommended to, and agreed with, the patient by the Contractor at initial examination and assessment of that patient has been provided to the patient; or

> ii) where a treatment plan has to be provided to the patient pursuant to Clause 47, all the treatment specified on that plan by the Contractor (or that plan as provided in accordance with Clause 49) has been provided to the patient."

14. Clause 82 is relevant when a banded course of treatment has commenced but is not completed. In that situation "the appropriate number of *units of dental activity* provided shall be calculated on the basis of the components of the course of treatment which has been completed, or commenced but not completed".

15. The contract does not specify, in terms, the amount which the Claimants are to be paid in respect of each unit of dental activity. However, Schedule 4 specifies that the annual contract value in respect of the units of dental activity which the Claimants are obliged to undertake is £510,762. The Schedule also specifies that this sum is to be paid in equal monthly instalments in arrears. Part 14 (Clauses 239 and 240) contain further provision relating to payments to be made under the contract.

16. Clauses 83 to 88 deal with the situation in which the Claimants fail to provide the number of units of dental activity specified in Clause 77. It is worth noting Clause 83 which provides that the Defendant shall not be entitled to take any action for breach of Clause 77 where Clause 84 applies. Clause 84 reads:-

> "84. This Clause applies where the contractor has failed to provide the number of units of "dental activity" it is contracted to provide pursuant to Clause 77 where
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> 84.1 That failure amounts to 5% or less of the total number of units of dental activity that ought to have been provided during a *financial year*, and
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> 84.2 The Contractor agrees to provide the units it has failed to provide within such time period as the LHB specifies in writing, such period to consist than not less than 60 days."

17. Part 13 of the contract is headed "Records, Information, Notifications and Rights of Entry." Clause 202 imposes upon the Claimants the obligation to ensure that a full, accurate and contemporaneous record is kept in the patient record in respect of the care and treatment given to each patient under the contract, including treatment given to a patient who was referred to the Claimants. Clause 205 obliges the Claimants to retain patient records for specified periods. Clause 221 provides:-

> "221. The Contractor shall, within 2 months of the date upon which –
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> 221.1. It completes a course of treatment in respect of mandatory or additional services…..
>
> send to the LHB on a form supplied by that LHB, the information specified in clause 222."

The information specified in clause 222 is a) details of the patient to whom it provides services b) details of the services provided (including any appliances provided) to that patient c) details of any NHS charge payable and paid to that patient and d) in the case of a patient exempt from NHS charges and where such information is not submitted electronically, the written declaration form and note of evidence in support of the declaration.

18. Clauses 261, 315 to 346 and 366 should also be noted. Clause 261 imposes upon the Claimants an obligation to "comply with all relevant legislation and have regard to all relevant guidance issued by the Defendant or the National Assembly for Wales. Clauses 315 to 346 contain detailed provisions empowering the Defendant to terminate the contract in specified situations and/or to impose sanctions. The Defendant's power to terminate the contract is contained within sections 316 to 340. Section 341 defines "contract sanction" to include "withholding or deducting monies otherwise payable under the Contract" and the circumstances in which such a sanction can be imposed are specified in paragraphs 342 to 345. Clause 366 makes it plain that the contract constitutes "the entire agreement between the parties with respect to its subject matter."

19. The word "examination" appears at various points within the contract. In the witness statements relied upon by the Defendant the phrase "full mouth examination" is equated to "examination" within the contract. The phrase "full mouth examination" does not appear in the contract; nor does it appear in the General Dental Services Contracts (Wales) Regulations 2006 which provide the statutory underpinning for the contract.

The rival contentions

20. Mr Rhodri Williams QC submits that the Claimants are entitled to payment under the contract in respect of their undertaking of "units of dental activity". It is common ground that such activity always involves providing a "course of treatment". Mr Williams submits that the carrying out of a course of treatment upon a patient necessarily involves an obligation on the part of the Claimants a) to carry out a "full mouth examination" of the patient and b) to make a written record in the patient record that such an examination has been undertaken. He submits, further, that if those obligations are not performed the Claimants are not entitled to payment in respect of the course of treatment provided to that patient. Mr Williams QC cannot point to any specific contractual term which spells out the precise obligations for which he contends; further he cannot point to any specific term which identifies the consequences of a breach of the those obligations assuming they exist. Nonetheless, Mr Williams contends that if the contract is read as a whole and in the context of the 2006 Regulations and appropriate guidance the court should conclude that the obligations for which he contends exist and the consequences of breach of the obligations are as he maintains.

21. Ms O'Rourke QC, on behalf of the Claimants, acknowledges, as she must, that providing "a course of treatment" always involves an examination (see the definition of "course of treatment at paragraph 13 above) and that the Claimants are obliged to ensure that a full, accurate and contemporaneous record is kept in the patient record in respect of the care and treatment given to each individual patient (see clause 202). She denies, however, that compliance with both these obligations is a necessary condition

precedent for payment for services actually rendered or that failure to comply with both these obligations entitles the Defendant either to withhold payment for services rendered or reclaim money which has been paid over for such services. She submits, in effect, that what triggers payment is the work actually performed and that a failure to record the fact of an examination in the patient record cannot justify withholding payment for work which the Claimants can prove they carried out. She disputes, too, that the Claimants are obliged to perform a "full mouth examination" in respect of each patient regardless of the circumstances in which the Claimants are called upon to provide treatment. She submits that express contractual words within the contract would be necessary to impose such an obligation upon the Claimants and no such words are to be found in the contract.

Discussion

22. I begin with the principles which govern the approach I should adopt to the interpretation of this contract. In my judgment they are to be found in the decision of the House of Lords in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1WLR 896. During the course of his speech, Lord Hoffmann (with whom the other Law Lords agreed) set out the following principles of construction which should be adopted when a court is engaged in the task of interpreting a contractual document.

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respect unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant

> background will reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see *Mannai Investments Co. Ltd. V Eagle Star Life Assurance Co. Ltd* [1987] A.C.749.
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> (5) The "rule" that words should be given their "natural ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless include from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] A.C. 191, 201.
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> > "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""

23. I turn, first, to consider whether the word "examination" which appears on many occasions in the contract should be taken to mean "full mouth examination". What would the word "examination" convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the conclusion of the contract. In my judgment the probability is that the reasonable person would conclude that the word did mean a "full mouth examination". I accept the submission of Mr Williams QC that the purpose of an examination, at least in the vast majority of cases, must be to facilitate an assessment of a patient's oral health overall. That can be done, effectively and efficiently, by the carrying out of a "full mouth examination" when a patient first visits the dentist. The carrying out of such an examination is not unduly time consuming and I can think of no sensible reason why an examination in the context of this contract should not extend to seeking to ascertain the true state of the patient's oral health overall at the first reasonable opportunity. As Mr Williams QC pointed out during the course of argument it would constitute an unsatisfactory state of affairs if the word examination was so interpreted so as to lead to the likelihood of "successive examinations" limited to particular areas of the mouth in respect of individual patients. In my judgment it would be wrong to restrict the meaning of the word examination so that it meant no more than an examination of the particular point in the mouth about which a patient may complain.

24. I turn, next, to the submission that the failure to record the carrying out of such an examination in the patient record of a particular patient means that the Claimants have no entitlement to payment in respect of the course of treatment provided to the patient in question. I cannot accept that this is how the contract is to be interpreted. I say that for a number of reasons. First, I can see no reason why the contract would not have specified, in terms, that the making of a complete and accurate record of all

treatment provided including any examination undertaken was a pre-condition to payment for that course of treatment if that was what the parties intended. Second, clause 202 imposes an express obligation upon the Claimants to make complete and accurate records of patient treatment. If it was intended that payment for a course of treatment was dependent upon all treatment (including the fact of an examination) being accurately recorded I would have expected that the consequences of a failure to comply with clause 202 would have been spelled out in unequivocal language. Third, I do not consider that the reasonable man would expect that a failure to record an aspect of treatment, such as an examination, should have the consequence that no payment would be made to a dentist in respect of a course of treatment provided to a patient. Fourth, it must be possible, at least in the vast majority of cases, to determine whether an examination has been conducted to an individual patient from the nature and extent of the treatment afforded about which there can be no doubt. It would be fanciful to suppose that no examination had been conducted in cases when it is known full well that complicated dentistry has been performed upon the patient. In my judgment this factor would reinforce the view of the reasonable man that payment for services provided should not depend upon whether the fact of an examination has been recorded in the patient record.

25. In reaching the conclusion expressed above I do not intend to denigrate the need for the keeping of accurate and complete records of patient treatment. The importance of such records is self-evident insofar as it relates to the patient and his/her treatment. I accept too that such records are also a useful means by which those charged with ensuring that a dentist is paid only for the work which he or she performs can ensure that they perform their function appropriately. When claims for payment are made I can well understand why the content of the patient record is important to those considering what work has been done. To repeat, however, I cannot interpret this contract as making it a pre-condition to payment for work done that the fact of an examination is recorded in the patient record or that a breach of clause 202 should always have the consequence that there will be no payment for a course of treatment provided to the particular patient. I make it clear that I have reached this conclusion having paid proper regard to the Regulations which underpin the contract and such guidance as exists which throws light on this issue.

26. Ms O'Rourke submits that I should also take account of the practice which other Health Boards, in the position of the Defendant, have adopted when determining whether payments should be made in respect of the units of dental activity/courses of treatment when the fact of an examination has not been recorded in patient records. On the basis of the evidence relied upon by the Claimants that there have been a number of instances when Boards have made payments to dentists in respect of units of dental activity/courses of treatment notwithstanding the failure to record the fact of an examination in patient records.

27. The evidence relied upon by Ms O'Rourke is "extrinsic evidence". Such evidence is admissible as a guide to the proper interpretation of a written contract only in clearly defined circumstances – see volume 1 Chitty on Contracts 21st Edition Chapter 12 paragraph 12-095 et seq. None of the bases of admissibility set out in that section of Chitty apply to this case. Accordingly in reaching my conclusion upon the interpretation of the contract I have ignored the evidence which the Claimants obtained as a consequence of the freedom of information request under the 2000 Act.

Summary

28. The word "examination" in the contract means a "full mouth examination." A dentist is obliged to make a full and accurate record of the treatment afforded to a particular patient in the patient record (including the carrying out of an examination) but the failure to record the fact of an examination in the patient record does not mean that the dentist has no entitlement to be paid for "the units of dental activity" or "course of treatment" provided to the particular patient. His entitlement will depend upon whether or not it is established that he has provided the "units of dental activity" which justify the payment.