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### 1. PCT Clawbacks

It has recently been reported that "GPs are being hit by 'smash and grab raids' from cash-strapped primary care organisations<sup>1</sup>". These "raids" are PCT's exercising their statutory or contractual powers to clawback monies overpaid/incorrectly paid to practices by way of a reduction in future payments. From the reports made some threatened clawbacks apparently relate to periods dating back many years.

Practices faced with a clawback may consider the situation deeply unfair, especially where the clawbacks relate (as can often be the case) to overpayments due to PCT errors that have gone unnoticed. Practices may also feel aggrieved where there have been significant changes in the make up the practice partnership that the "sins" of the past are being exacted on the current partners. Neither position is likely to give a practice a defence to a clawback proposed by the PCT. In most circumstances (and certainly under GMS) the PCT is not obliged to recover from the individuals to whom the money was paid, but is entitled to make a "set off" for monies found to be owing from the payments due to the contractor now, whoever that might be.

Where a practice is facing a significant clawback it is worth remembering that there may be potential defences available

that the practice could raise, depending on the facts of the particular situation. In some cases it can be possible to reduce the amount re-payable (where an overpayment is admitted). In many cases Lockharts has seen a willingness of PCTs to increase the time spent repaying an admitted overpayment. It is essential that practices focus on what is arguable, the defences that are available and give a proper consideration to the presentation of their case from an early stage.

Where practices are facing a clawback of overpayments, they should immediately seek to verify whether they agree that the overpayments claimed have in fact been made (if necessary by asking the accountants for assistance). Before responding to any PCT proposal for repayment, i.e. before any admission concerning the amount or recoverability of the any sum, the practice should consider taking advice on whether any legal defence is available to them which could reduce any repayments being claimed.

The solicitors at Lockharts have advised many practices on disputes with PCTs on a range of issues from clawbacks to terminations. If your practice is facing a clawback we would be happy to assist should you require advice. For further information contact Michael Rourke.

#### **Michael Rourke (Associate)**

mbr@lockharts.co.uk

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### 2. Private Medicine?

It is a fact of life in the modern NHS that private companies are involved in the provision of primary care. The entrance of private companies into the NHS has been controversial from the start, and led to Court challenges against the award of contracts to these companies.

One of the first such challenges was by Pam Smith against the award by

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<sup>1</sup> Pulse- Wednesday 24 August 2011

Derbyshire Primary Care Trust of a contract to United Health Europe Ltd where she was, ultimately, successful in having the decision to award the contract quashed by the Court of Appeal. This was, not because awarding a contract to a company was "wrong", but the Court concluded that requirements of consultation as they were then drafted had been breached. Complaints against the "privatisation of the NHS" were expressly ignored by the Judge considering that claim.

Private companies have been able to be involved in private provision for some time. In 2004 the Department of Health Guidance on APMS Agreements was that:

*APMS offers substantial opportunities for the restructuring of services to offer greater patient choice, improved access and greater responsiveness to the specific needs of the community...*

*PCTs can enter APMS contracts with any individual or organisation that meets the provider conditions set out in Directions. This includes the independent sector, voluntary sector, not-for-profit organisations, NHS Trusts, other PCTs, Foundation Trusts, or even GMS and PMS practices.*

The controversial nature of private companies providing NHS services perhaps makes it likely that further challenges will be raised in the Courts, trying to upset the award of contracts to these bodies. The mere fact that a provider who wins a tender is a private company is unlikely to be a successful basis for challenge against the award of a contract. Indeed the involvement of private providers is probably set to increase over the coming years as the any qualified provider concept is developed more fully.

There is, of course no requirement that new contracts are awarded to private companies, and a range of individuals, groups and companies are able to compete for the award of the contract. The requirement to follow a procurement process does not necessarily assist

"private" or larger/national bidders, although larger groups and some private providers are perhaps obtaining experience in the bidding processes lacked by "local" practices.

The issue of "size" being a factor in future contract awards has been expressly considered by the Government in the recently published response to the "listening exercise" on the any qualified provider proposals. It has been reported that private companies are winning a large number of tenders.

Whether a company or partnership is bidding for a contract, whether they are big or small, private or part of the "NHS family" (such as a local GP practice), is less likely to effect the award of the contract than whether they have understood the bid, submitted their tender correctly and in a manner to ensure that they achieve the relevant criteria for the award of the contract.

Important issues may also arise if the PCT offering the contract has failed to comply with any relevant consultation requirements.

Lockharts has experience of assisting all kinds of bidders for NHS contracts, at all stages of the tender process. From assistance in understanding the contract under tender, to advising on whether challenges can be made to unsuccessful bidders we would be happy to assist should you require advice. For further information contact Andrew Lockhart-Mirams ([alm@lockharts.co.uk](mailto:alm@lockharts.co.uk)).



**Andrew Lockhart-Mirams**

If you have any queries please contact  
**Andrew Lockhart Mirams**  
[alm@lockharts.co.uk](mailto:alm@lockharts.co.uk)

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**3. The legal implications behind your group structures and what works best for you.**

This article aims to evaluate the pros and cons of different organisational models by looking at a comparison of alliances, partnerships, limited liability partnerships and private limited companies and their relative advantages and disadvantages.

Collaboration at one end of the spectrum can be small scale and informal – practitioners sharing reception services, for example. At the other end of the spectrum, a consortium of practices could come together more formally to offer a broader range of complementary clinical services – akin to the federations of NHS practices being formed around the country for the purposes of competing for the award of contracts to run huge GP-led health centres.

Any kind of collaboration should be entered into with caution. You need to weigh up the benefits against the inevitable challenges that arise when dealing with people outside of your own practice. You will need to identify areas of collaboration and distinguish aspects of your own practice that will be kept separate from the collaborative arrangements. Once you have done this, you will need to consider the most appropriate organisational model for what you want to do.

### **Alliances**

At the most informal level, you may form alliances with other practices for the purposes of sharing ideas and experiences. Where the arrangements extend to tangible forms of collaboration (such as sharing premises, clinical equipment or back-room services), you must put the arrangements in writing in order to avoid disputes about terms: what is the nature and scope of the collaboration? What is specifically excluded? Who has the right to use what and how often? Who pays for what? How are decisions taken? In what circumstances may the arrangements be terminated and how?

You may decide that for some forms of collaboration, a more formal structure

may be appropriate. If you are coming together to provide clinical services jointly, you will certainly need to formalise your arrangements. The options are essentially partnership versus corporate entity.

### **Partnership**

A partnership is formed when two or more people trade together with a view to profit. A partnership can arise through conduct, even if the parties do not specifically set out to form a partnership – if, for example, you start to offer services with another practitioner to the public under a common name, a partnership could be deemed to arise. The danger is that if you allow a partnership to arise without an agreement, the default provisions of the Partnership Act will apply and these will rarely serve your requirements. We recently acted for two consultant practitioners who had agreed to collaborate but who had made it clear, between themselves, that they did not intend to operate as a partnership. Incredibly however they were sharing the profits that they made and despite a written statement to the contrary, were found to be partners and thus both liable for a serious default.

If you are entering into a partnership it is therefore essential that you enter into an agreement about the terms: what are the respective work commitments of the partners? How will profits and losses be shared? How will you deal with partners who are under-performing? What happens when a partner wants to retire?

The key consideration when deciding whether you want to enter a partnership is the issue of liability. Partners are jointly and severally liable for the actions of other partners. If your partner is sued for clinical negligence or if he enters a contract committing the partnership to unusual expenditure, you could be pursued by a third party for the full sum or part of it.

As far as clinical issues are concerned, it will be a matter of ensuring that all the partners have professional indemnity insurance. If you include appropriate

indemnities in your partnership agreement, any partner who incurs liabilities outside the scope agreed by the partnership will be required to reimburse the innocent partners for any loss they suffer as a result of his wrongful actions. However, indemnities are a private arrangement between the parties and do not prevent you from being liable to third parties. If the partner in default is not financially secure you could find that the indemnities are worthless. You should only enter a partnership with people that you trust and who are solvent.

Having a partnership deed is essential to safeguard the business which can otherwise be easily wound up under the provisions of the Partnership Act. This can have disastrous consequences for the parties and also prove to be a very costly experience.

### **Corporate Structures**

A corporate structure has the advantage of limiting the liability of its members to the capital they have invested in the organisation (or the guarantee they have provided in the case of a company limited by guarantee). A corporate structure is a legal "person" in its own right, separate from its members. If it is wound up or sued, the members may lose what they have invested or guaranteed, but generally can't be pursued further.

The main options of corporate structure are a company limited by shares, a company limited by guarantee or a limited liability partnership (LLP). Companies limited by guarantee are most commonly used by not-for-profit organisations.

A limited company has members who own the company and directors who are responsible for running the company. The company's constitution is set out in articles of association that are lodged at Companies House together with other information about the company such as directors' details. The price to be paid for limited liability is a far greater degree of legal formality than applies to a partnership. There are comprehensive and complex statutory rules governing what a

company can and cannot do. Company directors have onerous duties and there are criminal sanctions for breaching them.

A LLP is a less formal structure than a company, but is still a formal legal entity in its own right (unlike a partnership in England, Wales and Northern Ireland). There is no distinction between ownership and management of the LLP; the members are responsible for running the LLP. There is no legal requirement for a constitutional document but, as with partnerships, if there is no LLP Agreement, default statutory rules apply which are unlikely to be satisfactory. The LLP Agreement (if there is one) is a private document between the members. Certain details about the LLP (such as members' details) must be filed at Companies House and are therefore on the public record.

It is essential to seek advice before using a corporate vehicle. We have had a client who formed an LLP without taking advice on the correct structure and found difficulties with their Pension Scheme. The venture had to be restructured and in effect we had to start again.

Another point about LLPs, but one not often appreciated, is that in certain circumstances the members limit on liability may be removed if their relationship with the provider is of a 'personal' nature. It is possible that in certain circumstances, a court will hold a member personally responsible for a default if there is an assumption of a special relationship i.e. "my doctor", and the patient has reasonably relied on such an assumption.

### **Tax Issues**

There are tax considerations when deciding on your organisational structure, about which accountancy advice should be sought.

### **Social Enterprises**

A social enterprise does not have a formal definition, but it is any business that conducts itself with a view to putting

something back into the community. This does not mean that it cannot make any profit.

It is possible for any business to define and conduct itself as a social enterprise regardless of its chosen structure. However, the company limited by guarantee structure is commonly chosen. Another alternative is to form a community interest company (CIC) which can be limited by shares or guarantee. This is like a normal limited company but has certain mandatory constitutional provisions restricting distribution of profits and capital. A CIC has to satisfy a "community interest test". A number of NHS primary care federations have opted for CIC status.

It is important to remember that this model has a limitation in that once you have opted for CIC you cannot revert back to a normal limited company.

If you have any queries please contact **Neha Shah (Associate)** [ns@lockharts.co.uk](mailto:ns@lockharts.co.uk)

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We prepare newsletters for practitioners at approximately monthly intervals and occasional newsletters for LMCs. LMCs are welcome to distribute these to their constituents in their entirety.

If LMCs or other persons or bodies wish to circulate only part of our newsletters, we are happy for them to do so provided that the following acknowledgement and disclaimer are printed immediately below the relevant extract:

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## Contacting Lockharts

Lockharts Solicitors  
Tavistock House South  
Tavistock Square  
London WC1H 9LS

Tel: **44 (0)20 7383 7111**  
Fax: **44 (0)20 7383 7117**  
Email: [csd@lockharts.co.uk](mailto:csd@lockharts.co.uk)



Drawing upon its expansive commercial, litigation and property expertise, the team regularly advises on matters specific to the healthcare sector. "They have expansive knowledge, and advise with great sensitivity and patience"



"Headed by Andrew Lockhart-Mirams, Lockharts advises over 1,800 GP practices, plus numerous dental practitioners, healthcare professionals and professional bodies throughout the country. The practice also helps to establish companies and LLPs tailored for the delivery of healthcare services"