# Court of Appeal confirms lawfulness of Whole Population Annual Payments

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The Court of Appeal has dismissed a challenge to the payment mechanism – the "Whole Population Annual Payment" ("**WPAP**") proposed by NHS England and NHS Improvement in the draft contract intended for use by Integrated Care Providers (formerly known as Accountable Care Organisations).

The Court found that "the Appellant's arguments on construction [were] misconceived and without merit". It therefore dismissed all seven of the Appellant's grounds of appeal and it held that the WPAP was lawful under the Health and Social Care Act 2012 ("**the 2012 Act**").

DAC Beachcroft partner Alistair Robertson and solicitor Jonathan Blunden acted for NHS England, the successful Respondent.

## Lessons for commissioners

The judgment (which can be found here) will be welcome news to commissioners who plan on using the ICP contract or variants of it. It confirms that the WPAP is lawful. The judgment also confirms that block payment mechanisms are not, in principle, unlawful under the 2012 Act.

## The Judgment

The appeal concerned the statutory construction of the pricing provisions of the 2012 Act and, relatedly, the National Tariff ("NT") made under those provisions.

The Appellant challenged Kerr J's decision of 15 May 2018 dismissing her judicial review.

Before the Court of Appeal, the Appellant's "essential argument on construction" was as follows:

> "(i) The only mechanism for variation of "the national price…specified in the national tariff" payable by commissioners for [health care service] HCS is the mechanism laid down under ss.124 and 125, namely "local modifications" (under s.115);
>
> (ii) Agreements by way "local modifications" require prior approval by Monitor to be enforceable (s.125(3));
>
> (iii) Price changes by way of "local modifications" would, in practice, only be subject to increase because of the requirement for Monitor to apply the "uneconomic" test (s.124(5)); and
>
> (iv) There is no material distinction between "local variations" under s.116(2) and "local modifications" under ss.124-125; and
>
> (v) Section 115(1) imposes a statutory duty on an NHS commissioner to pay the specified price".
>
> (para. 68)

For eleven reasons (set out below), the Court rejected the Appellant's argument and, in so doing, accepted the counter-argument of the Respondents (NHS England and Monitor) that the WPAP was lawful:

**1. First**, the price payable under s.115 was not simply "the national price…specified in the national tariff" as the Appellant supposed. Instead:

> "It is important to pay close regard to the full wording of s.115 .... Sub-section 115(1) provides in terms that the price payable is: "…such price as is determined [i] in accordance with the national tariff [ii] on the basis of the price (referred to in this Chapter as "the national price") specified in the national tariff for that service" (subject to s.124 and s.125). All the words in the sub-section must be given meaning: the words "in accordance with the national tariff…" indicate that the price payable may differ from "the national price" by reason of the provisions of the NT itself".
>
> (para. 71)

**2. Second**, the NT was "not simply a list of prices". It was an extensive and complex document of 120 pages which provides

for prices to be varied nationally or locally, by “local variations” or “local modifications”. As the Respondents' argued, it was "baked in" to the NT that it contemplates variation.

**3. Third**, contrary to the Appellant's assertion, there are a "variety of ways in which the “national price” could be changed including by "local variations":

> "Section 115(1) does not suggest there is only one method of departing from the “national price” as a result of applying the NT. On the contrary, s.115(1) refers broadly to determining the price “in accordance with the national tariff”. This covers any variation or modification permitted by the NT. The NT sets out in considerable detail the manner in which prices may be varied or modified".
>
> (para. 74)

**4. Fourth**, the Appellant's argument that "local variations" under s.116(2) were the same as "local modifications" under ss.124/125 was incorrect: "it is plain that the two price adjustment mechanisms of “local variation” and “local modification” are quite separate and distinct" (para. 75).

**5. Fifth**, the Appellant's proposed construction of the pricing provisions ignored "a host of key differences between the distinct statutory mechanisms for “local variations” and “local modifications”" (para. 76).

**6. Sixth**, the NT contemplates a wide variety of different “local variations” (including those based on “whole population budgets”).

**7. Seventh**, by contrast, the “local modification” regime under ss.124-125 "allows adjustments to price only, and in the form of a price increase only, in circumstances where Monitor is satisfied that it is “uneconomic” for the provider to provide services at the price determined in accordance with the NT (i.e. “the national price” as nationally or locally varied)" (para. 79).

**8. Eighth**, the Appellant's submission that the word “or” in s.116(2) means that “local variations” may be agreed to “specifications” or “national price” but not both was incorrect: "[t]here is no warrant for such a strained and restrictive construction" (para. 80).

**9. Ninth**, the Appellant's submission that “local variations” and “local modifications” are but stages in a single process was incorrect. Under the 2012 Act, the two price adjustment mechanisms are separate and have different purposes (para. 81).

**10. Tenth**, s.115 does not create a statutory duty which requires a commissioner to be liable to pay a provider “the price payable”, irrespective of what has been contractually agreed between them. This argument was incorrect and, in any event, was irrelevant (para. 82).

**11. Finally**, the Court rejected the Appellant's suggestion that the proposed WPAP scheme pays no regard to the principles which underpin NHS commissioning. The opposite was the case (para. 83).

For these reasons, the Court dismissed all seven of the Appellant's grounds of appeal. The Court determined that Kerr J had been right to hold that there is nothing unlawful about the proposed WPAP scheme.

Should the draft ICP Contract be made available for general use by commissioners, the judgment confirms that the WPAP is lawful under the 2012 Act. More generally, the judgment also confirms that, in principle, variants of the WPAP, including block payment mechanisms (which in 2017-18 accounted for some 37% of all NHS commissioning contracts (para. 44)), are lawful under the 2012 Act.

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