Detailed account of the 999 Call for the NHS Court of Appeal hearing

Public benefit is paramount

At the outset, our barrister David Lock said that it's difficult to think of a more radical change than the Accountable Care Organisation/Integrated Care Provider contract payment arrangement proposes; Parliament cannot have envisaged the wholesale abandonment of payment by results and the substitution of something even more radical than the block contracting that the NHS adopted in 1993 when it started contracting.

He drew the judges' attention to the need for public benefit to take precedence over the benefit of parties to a contract.

He said that in passing the 2012 Health and Social Care Act, Parliament legislated for a certain form of contract in law, to operate in the public interest. A 1980 case (Johnson v Moreton) established that where Parliament has legislated for a particular form of contract in the public interest, a contract in a different form is legally unenforceable. This is because the public benefit takes precedence over the benefit of parties to the contract.

This is a very important point and the main judge nodded when DL explained that although the appeal was about the law - not the merits or otherwise of the proposed new payment mechanism in the Accountable Care Organisation contract - the effect of a block contract for a whole healthcare system would result in a race to the bottom, which is obviously not in the public interest.

David Lock added that the statutory scheme in the 2012 Health and Social Care Act comes with a health warning - the Act went through a tortuous parliamentary passage and he wanted the Court to give a coherent and consistent interpretation to the Act as a whole.

Limits to the concept of variation of prices in the 2012 Health and Social Care Act

He then explained how the 2012 Health and Social Care Act sets rules for how prices for healthcare services can be varied - which is central to our case that the payment for healthcare services under the Accountable Care Organisation contract is unlawful.

He said that the concept of variation of prices had limits and that the changes from the National Tariff model to the Accountable Care Organisation model are "an entirely different payment system" and so go beyond the concept of anything that could be called a "variation". He cited 2 authorities that support the case that the concept of a variation has limits and that something entirely different to the original cannot be described as a "variation."

NHS England were calling the Accountable Care Organisation payment system a "variation" but in fact it's a different obligation and the substitution of an entirely different contract.

Under the Accountable Care Organisation contract, both healthcare services specifications and prices are not varied - but abandoned. If the Court agrees that under 2012 Health and Social Care Act section 116 (2) the ACO contract does not amount to a variation, that is the end of the case.

One of the Judges asked if the National Tariff has rules.

David Lock said yes, there are rules to make sure contracting works in the public interest - including rules about varying the national tariff price. The same set of rules also apply to price modifications.

Section 116 in the 2012 Health and Social Care Act defines the rules at stage 1 - to protect the public interest if varying a health service specification or national price
Stage 2 is when a commissioner and a provider want to vary a national price, go to Monitor and say this is our agreement and ask for approval.
The rules are national, the application is local.

This explains the tension between two sections of the Health and Social Care Act 2012: 115 s1 is about the price payable on the basis of the national price - and 116 s2 says it's possible to vary the national price so it wouldn't be complying with 115 s1.

The answer to that tension is that 115 (1) has exemption under s124, so a commissioner and a provider can can go to Monitor and ask to pay different price. But because the scheme is to protect patients, the floor of the National price is set.

It is impossible in practice under National Tariff rules to come up with a price for a healthcare service that covers a whole healthcare facility

Another key point was about whether it's possible under National Tariff rules to come up with a price for a healthcare service that is not limited to specific services received by a patient, but covers a whole healthcare facility such as an orthopaedic department, A&E department etc, that could be replicated across multiple sites.

This is crucial because the Accountable Care Organisation contract payment arrangement is for a fixed block payment for a whole range of healthcare services for a given population.

David Lock explained to the judges that the problem is that no method has yet been devised for doing this, and although it may be possible in theory, it's impossible in practice since there is no standardised facility for such departments.

The Whole Population Annual Payment arrangement in the Accountable Care Organisation contract goes far beyond rules that allow bundling healthcare services together in strictly limited circumstances

From this point, David Lock explained that there are specific provisions in 2012 Health and Social Care Act section 117 (1) that allow Monitor to make rules about "bundling" healthcare services together in strictly limited circumstances, with caveats.

Monitor has used this for maternity services and services for patients with cystic fibrosis.

He said that NHS England's Accountable Care Organisation contract uses "bundling" in a way that far exceeds this.

Section 117 (1)(b) of the 2012 Health and Social Care Act allows Monitor to specify a service as a bundle of two or more healthcare services which together constitute a form of treatment. This means bundling is only permissible if it constitutes a form of treatment. That requires specifying the National Tariff prices for the bundle/care pathway.

One of the Judges said, This gives flexibility - so you can explode or compress services into a bundle.

David Lock said, not as a bundle of services across a whole population, you can only bundle services that link together treatment for a specific patient. You can't create a bundle that amalgamates services for entirely different patients when it's not part of a specific healthcare treatment.

The judge asked what Judge Kerr (who had ruled against the 999 Call for the NHS Judicial Review) said about this.

David Lock said this is in para 92 in part 2 of Judge Kerr's ruling. And Judge Kerr was wrong there for two reasons. One, he conflated services that don't relate to a specific treatment. Two, there is still a duty to make the price payable on the basis of the national price. If it were possible to do otherwise, it would be possible to underprice services - undermining the idea of national prices with transparency which is there to protect patients.

The Judge got this.

A commissioner and a provider can only make local variations to the national price for specific healthcare services

David Lock went on to say that if a commissioner and a provider agree to vary the national price, this required engagement with public and clinicians about the proposed variation. But the process we see does not give any role for the public to be involved.

The core point is that it's only possible to make local variations for specific services. This requires an agreement to vary a Healthcare Resource Group (HRG). (A Healthcare Resource Group is a group of services that are clinically similar and require similar resources to deliver. An HRG is the basis for National Tariff prices which are used to make payments to providers. These National Tariff prices are known as 'currencies'.)

Even if a specification is varied so that the healthcare service is delivered in a different way, national price still governs the payment arrangements.

David Lock went on to say that the language used by Parliament makes it clear that even if a specification is varied so that the healthcare service is delivered in a different way, national price still governs the payment arrangements.

Health and Social Care Act 2012 section 116 (2) allows rules to change either the national price or specification - but not both. DL said "Or means or" and this is replicated in the rules themselves. So even if the language used by Parliament suggests "and/or", the rules specify only one or the other.

Our Grounds for Appeal

The main Judge said he was happy that David Lock had addressed the big points and then turned to the Grounds for Appeal in our Skeleton argument.

David Lock pointed out that Judge Kerr ran the Judicial Review at great speed - we'd asked for 2 days and got half a day.

One of the judges asked whether we were talking about the Accountable Care Organisation or Integrated Care Provider contract in our Ground 6.

(This was: Failure to give effect to payment being required to be made "on the basis of" the national price for a specified service - The Judge failed to properly deal with the Appellant's argument that a WPAP could not be "on the basis" of a national price, as any individual service did not have a price in a WPAP.)

David Lock said it doesn't really matter - NHS England is saying regulations will be introduced to sort out the issue of GP payments. But the history of this Accountable Care Organisation/ICP contract means that NHSE want the court to rule on the contract as it stands.

At 1pm there was an hour break for lunch. The Judge thanked our barrister for efficiently and clearly laying out our Appeal.

NHS England's Humpty Dumpty defence - the "liberal and permissive" 2012 Health and Social Care Act allows pretty much anything

When the court resumed, the main Judge said to the NHS England barrister Fenella Morris that he was particularly interested in their response to Judge Kerr's ruling in para 99 and in Ground 6 for this Appeal.

(Judge Kerr's ruling in para 99 basically said that as long as there is a pre-existing pricing regime contained within the National Tariff, section 116 (2) of the 2012 Health and Social Care Act means that any variation to this price can be made.)

The NHS England barrister Fenella Morris made what seemed to us a very weak presentation of their defence. This amounted to the claim that the Health and Social Care Act 2012 is so "liberal and permissive" that it permits any payment arrangement for contracting health services.

She started by stating the obvious, that the issue is whether the Whole Population Annual Payment in the draft contract is lawful. The Whole Population Annual Payment concept is tied to the Accountable Care Organisation/Integrated Care Provider contract. Is it capable of amounting to a price payable under Health and Social Care Act 2012 s 115? Judge Kerr said yes. Judge Arden (who gave 999 Call for the NHS permission to appeal against Judge Kerr's ruling) said, does this require individual price arrangements? NHS England say no.

Fenella Morris said there is a "liberal and permissive regime" under the 2012 Health and Social Care Act - Monitor has wide discretion in drawing up rules under the National Tariff and CCGs are empowered to devise local prices, specifications, bundles and specified and non-specified services.

She said that the Whole Population Annual Payment is an option that promotes innovation and integration - which are statutory goals of health care bodies. She banged on about this

in terms of duties of NHS England and said that CCGs also have obligations re innovation and integration.

But she didn't explain HOW the Whole Population Annual Payment promotes innovation and integration.

She said that under the original Accountable Care Organisation contract, local CCGs who use it will be able to choose their own constellation of services and prices of them - this can only be done in consultation with public and patients. Nothing turns on the difference between the Accountable Care Organisation and Integrated Care Provider contract.

She referred to para 38 about the Whole Population Annual Payment in NHSE's skeleton argument and the issues of statutory intention in s115 of the 2012 Health and Social Care Act.

This para in NHS England's Skeleton Argument summarises the mechanics of the Whole Population Annual Payment as explained in supporting material to the draft ACO/ICP contract, in particular "Finance and Payment Approach for ACOs" (August 2017), "Whole population models of provision: Establishing integrated budgets" (August 2017), and "Overview of integrated budgets for ICPs" (August 2018).

She claimed that s117 of the 2012 Health and Social Care Act (about how a healthcare service may be specified) means pretty much anything, because the list is only indicative. So it includes bundling services.

The price payable is the price payable after looking at the price in the National Tariff and then doing to it what is allowed under National Tariff rules. Which she claimed is pretty much anything.

The main judge said, "So you're saying the National Tariff is a moveable feast."

Fenella Morris replied that it's a vehicle for moving. Variation is inherent in the scheme, not antithetical to it.

One of the judges said, Although in current form the National Tariff can go to granular detail, it's a flexible structure that can be used in an entirely different way if people using it wish.

Another judge said words to the effect that: so it's a baseline from which flexible options can be developed.

Someone (I think Fenella Morris, but my notes aren't clear here) said the concept of variation is built into the statutory scheme in sections 115 and 116 of the 2012 Health and Social Care Act - as explained in para 49 of the NHS England Skeleton argument.

David Lock came back on 2 points.

First, there are three GP participation options: full integration, partial integration (excludes primary care) and the virtual model. He said the partial integration option is what NHS England was talking about. Under full integration, GPs' GMS/PMS contracts payments would flow into the Whole Population Annual Payment.

Second, one thing that can't be changed in that price payable is that it must be on the basis of the national price for that healthcare service - flexibilities have a defining end point, in that the flexibilities are rooted in the payment scheme.

The main judge said that NHS England said the national price means the full panoply of everything.

David Lock said no, it's clearly defined in 116(1)(c) of the 2012 Health and Social Care Act.