



Article appeared in the 29/09/08
edition of GP Magazine



Reproduced by kind permission

SURGERY REIMBURSEMENT APPEALS

John Hearle explains the NHS Litigation Authority's new protocol for resolving notional rent disputes

Following years of uncertainty and unfair procedures when practices disputed the current market rent value of their premises, the NHS Litigation Authority (NHSLA) has published a new local dispute resolution protocol, which applied in February 2010.

The current market rent value, set by a district valuer (DV) working for the PCT, is the basis on which practices' notional rent funding is calculated. Until July 2009 if a practice appealed the current market rent amount, although nominally handled by the NHSLA, the appeal was ultimately decided by a DV.

New Appeals Protocol

In 2009, following a judicial review which ruled this system unfair, the NHSLA established an independent panel of expert advisors to replace DVs in dispute resolutions. In February 2010, it set out principles of best practice and a protocol aimed at both GPs and PCTs.

Clear advice on how to move matters forward is now available to GPs, and there is strong guidance to PCTs on the fair and reasonable procedures they need to adopt for local current market rent dispute resolution.

Expert Advisory Panel

The NHS (GMS Premises Costs) Directions 2004 contain the basis of calculating the current market rent – the notional rent for reimbursement purposes. However, a long recognised problem with the directions (and with the old Red Book before them) is that they do not contain any detail on how GP contractors and PCTs should structure their attempts to agree the current market rent.

If the current market rent cannot be agreed between the GP contractors and PCT, the NHS (GMS Contracts) Regulations 2004 (or its PMS equivalent) allow the parties to appeal to the Family Health Appeals Unit (FHSAU) which acts on behalf of the NHSLA.

With the new panel of expert advisors – set up by the Royal Institution of Chartered Surveyors (RICS) – now at the FHSAU's disposal, this aspect of resolving current market rent disputes is already working well.

Other Problems

The GMS regulations specifically note that in the case of any dispute between the GP contractor and the relevant NHS body, the parties 'must make every reasonable effort to communicate and cooperate with each other with a view to resolving the dispute before referring it for determination in accordance with the NHS dispute resolution procedures'.

But in the past few years, current market rent disputes referrals to the NHSLA were made in some cases without any attempt at local dispute resolution. In some areas, a local dispute resolution process did not even exist.

Some PCTs even attempted to negotiate the current market rent without involving the DV. This, however, allowed GP contractors' representatives to argue that PCTs did not have the proper expertise, and to leapfrog straight over them to the NHSLA.

Bullying Tactics

Other PCTs actually set up internal, non-specialist panels as a prequel to even allowing proper negotiations between GP contractors (or their representatives) and the DV.

When setting rent reimbursement for GP contractors who lease premises, at least two PCTs (one in the north east and the other in the south east) refused to follow legal procedures set down in lease contracts for determining the reimbursement level.

These PCTs were using what can only be described as bullying tactics.

Speedy Local Resolution

In the light of such issues, the NHSLA has adopted a protocol (see box) designed to ensure that local dispute resolution is fully exhausted before the matter can be appealed under the GMS regulations – or, if it involves lease terms, under the premises costs directions.

The intention is to encourage consistency of dispute handling across PCTs, and in turn, maximise the potential for getting local and amicable agreement without a formal appeal.

From now on, current market rent disputes should be resolved quickly and with as little expense as possible to all the parties concerned.

In the past couple of years, one PCT in the south east has forced so many rent reimbursement cases through to full arbitration or appeals under the terms of the practices' leases that the cost of the practices concerned totalled tens of thousands of pounds.

Local Dispute Resolution Protocol

- Either the GP contractor or the PCT may request the involvement of the LMC.
- Each party is advised to use an appropriately qualified valuer with a view to agreeing all factual data (including the relevant date, floor areas, and so on).
- Each party's valuer should prepare a report in support of the current market rent each claims is correct. This should include full details of comparable evidence (such as rents paid on similar properties).
- After exchanging reports, the two valuers should meet to try to agree the current market rent.
- If this fails, a schedule of comparable evidence should be prepared, highlighting both agreed and disputed evidence, and the parties should exchange letters setting out their best offer values for the current market rent.
- The parties should continue trying to agree and investigate further steps that would facilitate this.
- Only if all this fails, should either party refer the matter to the NHSLA with copies of all relevant documentation. They must confirm that all local dispute resolution options have exhausted and explain why agreement could not be reached.
- The protocol is not binding on the parties, but the NHSLA will take into account whether it has been followed when deciding if the PCT and GP contractor have undertaken the requirement in the GMS regulations that every reasonable effort has been made to resolve the dispute.

You can download a copy of the protocol by visiting

<http://www.surgeryvaluer.co.uk/DocumentLibrary/NHSProtocol.pdf>