

PROTOCOL FOR LOCAL DISPUTE RESOLUTION FOR THE DETERMINATION OF CURRENT MARKET RENT UNDER THE NHS (GMS PREMISES COSTS) DIRECTIONS 2004, THE NHS (GMS CONTRACTS) REGULATIONS 2004 AND THE NHS (PMS AGREEMENTS) REGULATIONS 2004

1. Objective

- 1.1 This document sets out principles of best practice and protocols which the NHS Litigation Authority (“the NHSLA”) will take into account when determining whether to accept a referral to it by a party to a dispute under the above Regulations.

2. Background

- 2.1 The NHS (GMS Premises Costs) Directions 2004 (“the Premises Costs Directions”) put in place the mechanism by which a Primary Care Trust (“PCT”) can grant an application made by its GP contractors for financial assistance towards the rental costs (or notional rental costs) for GP premises (paragraph 31).
- 2.2 Once the PCT has granted the application the Premises Costs Directions require (at paragraph 32) that the PCT reimburses the lower of the rent due under the lease or the current market rent (“CMR”), except where the premises is in an area of low rents where an uplift may be applied.
- 2.3 Where the GP contractors are owner occupiers of premises they may apply for financial assistance towards notional rental costs in a similar way (paragraph 41).
- 2.4 Paragraph 33 of the Premises Costs Directions deals with how CMR is determined by applying Parts 1, 2 and 3 of Schedule 2 to the Premises Cost Directions. Part 1 paragraph 2 directs the PCT’s valuer in all cases to *“consider what might reasonably be expected to be paid by a tenant for the premises at the valuation date. The aim will be to arrive at a rent which can be agreed between the contractor (or his or her representative) and a third party in willing negotiation.”* Certain disregards which will be applied.
- 2.5 There is no detail as to how the GP contractors and PCT should structure their attempts to agree the CMR.
- 2.6 If the CMR cannot be agreed by the GP contractors and PCT, the NHS (GMS Contracts) Regulations 2004 and the NHS (PMS Agreements) Regulations 2004 (“the GMS and PMS Regulations”) contain the procedure to be applied. Paragraph

99 of the GMS Regulations and paragraph 93 of the PMS Regulations headed “*Local resolution of [contract/agreement] disputes*” provide

“...in the case of any dispute arising out of or in connection with the [contract/agreement], the contractor and [the relevant body/the PCT] must make every reasonable effort to communicate and co-operate with each other with a view to resolving the dispute, before referring the dispute for determination in accordance with the NHS dispute resolution procedure”.

In addition, the GMS Regulations specifically permit the GP contractors or the PCT to invite the Local Medical Committee to participate in the discussions which take place pursuant to this provision.

- 2.7 The NHS dispute resolution procedure is set out in paragraphs 101 and 102 of the GMS Regulations and paragraphs 95 and 96 of the PMS Regulations which mirror each other and generally result in the NHSLA appointing an independent valuer to assist in determining the issues between the parties.

3. **Key Issues**

- 3.1 Recently it has become clear that references to the NHSLA under paragraph 99 of the GMS Regulations and paragraph 93 of the PMS Regulations are being made where local dispute resolution has not been exhausted. There are a number of reasons for this, the most common of which are:
- 3.1.1 GP contractors referring the dispute to the NHSLA because some PCTs will not deal with the contractors’ appointed representatives.
 - 3.1.2 Some PCTs suggest at local dispute level that a RICS panel surveyor is appointed to determine CMR. They ask the GP contractor to pay half of the costs of the surveyor. By contrast, there is no cost liability in a reference to the NHSLA under paragraphs 99 and 93 of the GMS and PMS Regulations respectively.
 - 3.1.3 Some PCTs are attempting to negotiate the CMR without the involvement of the District Valuer. GP contractor representatives argue that the PCTs do not have the expertise to do this and so leap-frog straight to a reference to the NHSLA.
- 3.2 In these circumstances the application to the NHSLA is premature. This protocol is designed to ensure that local dispute resolution has been exhausted before any reference is made to

the NHSLA.

3.3 The intention is to:

3.3.1 encourage consistency across PCTs in how local dispute resolution is handled,

3.3.2 maximise the possibility of local resolution as it is anticipated that proper engagement with local dispute resolution procedures will result in the resolution of considerably more disputes, and

3.3.3 enable disputes to be resolved as quickly, and with as little expense, as possible.

4. **Local Dispute Resolution Protocol**

4.1 The purpose of this protocol is to encourage a uniform approach to local dispute resolution. It is also intended to assist in a swifter and cheaper resolution of the dispute.

4.2 Whilst this protocol does not have the binding effect of NHS Directions or Regulations, it will be taken into account by the NHSLA when it makes its decision under paragraph 99 of the GMS Regulations and paragraph 93 of the PMS Regulations as to whether “every reasonable effort [has been made] to communicate and co-operate...with a view to resolving the dispute” before accepting a referral.

4.3 When a referral is made to the NHSLA, it will expect the referring party to confirm whether, and to what extent, there has been compliance with the protocol. If there has not been compliance, the reasons for this must be explained.

4.4 In order to facilitate an agreement on the appropriate level of CMR between GP contractors (or their representative) and the PCT (or its representative) (referred to as “the parties” below) the following steps are recommended as likely to promote the resolution of such a dispute at local level:

4.4.1 Either party may request the involvement of the Local Medical Committee to participate in the negotiations.

4.4.2 Using an appropriately qualified valuer the parties should attempt to agree facts including, for example, the correct rent review date and measurements of the area subject to reimbursement.

4.4.3 With reference to these agreed facts, each party using an appropriately qualified valuer should prepare a valuation report to support the level of CMR for which it contends. This report should contain reference to

comparable evidence on which the valuation is based and evidence of these comparables should be provided where possible.

- 4.4.4 The parties should exchange valuation reports.
 - 4.4.5 If the CMR cannot be agreed after exchange of valuation reports the parties and/or their valuers should meet (possibly on site) following exchange of valuation evidence in an attempt to agree and the level of CMR or, if this cannot be achieved, to narrow the issues between them.
 - 4.4.6 Following this meeting the valuers should produce a schedule of comparables both agreed and disputed.
 - 4.4.7 Each party should then provide to the other an open letter stating the level of CMR for which each party now contends.
 - 4.4.8 After receipt of these letters the parties should explore whether CMR can be agreed.
 - 4.4.9 If CMR cannot be agreed at this point either party may suggest further steps that may be taken in order to attempt to resolve the dispute.
 - 4.4.10 If the other party objects to these proposals, they must provide reasons in writing.
 - 4.4.11 If either party believes that local dispute resolution has been exhausted and that the dispute must be referred to the NHSLA, the referring party must certify in its referral that all local dispute resolution options have been exhausted or if this has not been possible, the reasons for this.
- 4.5 When making a referral to the NHSLA all documents produced as a consequence of the procedure outlined in 4.4 above must be included with the referral.
 - 4.6 In deciding whether they should accept a referral for determination under paragraph 99 of the GMS Regulations or paragraph 93 of the PMS Regulations, the NHSLA will take into account the efforts of the parties at local dispute resolution in light of the procedure outlined in paragraph 4.4 above.

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