PREMISES COSTS – CURRENT MARKET RENT

GUIDANCE

INDEX OF DEFINED TERMS

2004 Directions - The National Health Service (General Medical Services-Premises Costs) (England) Directions 2004
https://www.gov.uk/government/publications/the-national-health-service-general-medical-services-premises-costs-england-directions-2004

2013 Directions - The National Health Service (General Medical Services-Premises Costs) Directions 2013
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/184017/NHS__General_Medical_Services_-_Premises_Costs__Directions_2013.pdf

2024 Directions - The National Health Service (General Medical Services-Premises Costs) (England) Directions 2024
The National Health Service (General Medical Services - Premises Costs) Directions 2024 (publishing.service.gov.uk)

Advisor - Valuer appointed by RICS at the request of Primary Care Appeals

CMR - Current Market Rent

Determination - Decisions of Primary Care Appeals published on the NHS Resolution website

Directions - 2004 Directions, 2013 Directions and 2024 Directions

DV - District Valuer

NHS Commissioning Board - NHS England (delegated to integrated care boards since 1 April 2023) ("the Commissioner")

Protocol - Protocol for Local Dispute Resolution for the Determination of Current Market Rent under the relevant NHS (GMS Premises Costs) Directions, the NHS (GMS Contracts) Regulations 2015 and the NHS (PMS Agreements) Regulations 2015
resolution.nhs.uk/wp-content/uploads/2020/12/Local-Dispute-Resolution-Protocol-for-CMR-21-Dec-2020-with-updated-appendix.pdf

Regulations - NHS (Personal Medical Services Agreements) Regulations 2015 and NHS (General Medical Services Contracts) Regulations 2015
https://www.legislation.gov.uk/uksi/2015/1879/contents/made
https://www.legislation.gov.uk/uksi/2015/1862/contents/made

RICS – Royal Institute of Chartered Surveyors

THE GUIDANCE

1. ABOUT THIS GUIDANCE

1.1 The aim is to provide information which should be used in conjunction with the Regulations, Directions, Protocol, Determinations and Guidance Note for Parties Involved in Dispute Resolution (see paragraph 11). It is not its function to summarise these documents, which should be referred to before making any referral to Primary Care Appeals in relation to CMR reimbursement.

2. JURISDICTION

2.1 The Directions provide a mechanism by which GP contractors may obtain financial assistance towards premises costs. Part 5 of the Directions covers Recurring Premises Costs, including rent and notional rent (for premises owned by the contractor) together known as claims for CMR.

2.2 NHS Resolution adjudicates contractual disputes between the Commissioner and contractors, including in relation to premises costs under delegated authority from the Secretary of State. The Primary Care Appeals service discharges these functions for NHS Resolution. Parties to an NHS contract have the right to use this process under Section 9 of the NHS Act 2006.

2.3 The 2024 Directions are stated to only apply to premises costs under GMS Contracts. PMS Agreements will be considered under previous Directions unless there is specific provision in the Agreement to deal with otherwise. In these cases, jurisdiction is accepted.

2.4 Primary Care Appeals has a wide discretion in relation to the procedure of the referral. The process set out in initial letters sent to the parties dictates the conduct of procedure unless there is a good reason why an exception should be made.

3. RELEVANT DIRECTIONS

3.1 Historically, reimbursement of premises costs was made under the Statement of Fees and Allowances (the Red Book). This was replaced on 1 April 2004 by the 2004 Directions which in turn were superseded by the 2013 Directions on 1 April 2013.

3.2 Paragraphs 54 and 55 of the transitional provisions of the 2004 Directions provide that if payments were made under the Redbook for recurring premises costs (including CMR payments) before 1 April 2004 reimbursement should continue and should be paid in accordance with Part 5 of the 2004 Directions except where it is reasonable to continue to make payments without the need to make a new application.

3.3 For contractors receiving premises costs payments from 1 April 2004 and before 1 April 2013 the 2004 Directions applied in accordance with the transitional provisions of the Premises Costs Directions 2013 at paragraph 56(1) which states: "Where immediately before 1st April 2013, a Primary Care Trust [now NHS England/integrated care board] was making payments to a contractor under Part…5 (recurring premises costs),…of the 2004 Directions, the Board must continue to make those payments as if the 2004 Directions, as in force immediately before 1st April 2013, continued to apply, and those Directions are to be treated as directions to the Board." (see SHA/18394)

3.4 Following the publication of the 2024 Directions, the current position is as follows:

3.5 The 2024 Directions state at paragraph 58.— “(1) Where, immediately before 10th May 2024, NHS England was making payments to a contractor under the 2004 Directions or the 2013 Directions, NHS England shall instead make those payments under the corresponding provisions of these Directions.

3.6 (2) Where a contractor made an application for financial assistance under the 2013 Directions before 10th May 2024 but that application had not been determined by NHS England— (a) where any part of the costs to which the application relates were incurred before 10th May 2024, NHS England must in respect of those costs determine the application and make any payments as if the 2013 Directions, as in force immediately before 10th May 2024, continued to apply; (b) where any part of the costs to which the application relates are to be incurred on or after 10th May 2024, NHS England must in respect of those costs determine that application and make any payments in accordance with these Directions.”

4. LIMITATION

4.1 Applications to Primary Care Appeals must be made before the end of the period of three years beginning with the date on which the matter giving rise to the dispute occurred or should reasonably have come to the attention of the referring party (paragraph 76 PMS Regulations and paragraph 83 GMS Regulations).

4.2 If local negotiations are ongoing and the limitation period is due to lapse, the Contractor should lodge their application for NHS dispute resolution with Primary Care Appeals to protect their position.

4.3 With respect to disputes as to the appropriate level of CMR, it has been determined that the three years start to run when the Commissioner reports to the contractor a CMR with which the contractor does not agree (see SHA/18735).

5. LOCAL DISPUTE RESOLUTION (LDR) AND THE PROTOCOL

5.1 The Regulations require the parties to have attempted local dispute resolution (LDR) before a referral is made to Primary Care Appeals (paragraph 81 GMS Regulations, paragraph 74 PMS Regulations). The expected approach to LDR in CMR cases is set out in the Protocol.

5.2 When making a referral to Primary Care Appeals, the parties will be asked to confirm that LDR has been exhausted. If the parties cannot confirm that the Protocol has been followed, they will be expected to explain in detail why it has not and why, in these circumstances, Primary Care Appeals should accept the referral.

5.3 It has been suggested that anything (except a final report and/or statement of agreed facts) prepared in the context of LDR and the Protocol is “without prejudice” and therefore should not be produced to Primary Care Appeals as it has been produced in the context of attempts to resolve a dispute.

5.4 This is not the correct approach to LDR. “Without prejudice” protects those who are prepared to compromise, to make an offer to settle, without the other party having committed to this. It does not protect the process through which parties go through to resolve a dispute. The Protocol deals with the steps that NHS Resolution expects to see before it will accept a referral and it needs to be able to see that these steps have been taken. The concept of “without prejudice” is dealt with in more detail in paragraph 7 below.

6. WITHOUT PREJUDICE CORRESPONDENCE

6.1 Correspondence created in an attempt to settle a dispute gains certain protections. One reason for this is the public policy aim of encouraging parties in dispute to settle. The rationale is that settlement discussions and settlement itself will be facilitated if parties are able to speak freely, knowing that what they have said and any admissions made, may not be used against them should the settlement discussions fail.

6.2 The rule will generally prevent statements made in a genuine attempt to settle an existing dispute, whether made in writing or orally, from being put before a tribunal as evidence of admissions against the interest of the party which made them.

6.3 Whether a statement is to be treated as being made “without prejudice” is a question of the substance (rather than the form) of the disputed statement. This means that:

6.3.1 Labelling a document "without prejudice" will not make it a privileged document if it is not, in substance, a communication made in a genuine attempt to settle an existing dispute.

6.3.2 Omitting to label a document "without prejudice" will not preclude it from benefiting from privilege if it is a communication made in a genuine attempt to settle an existing dispute.

6.3.3 The “without prejudice” rule applies only where there have been

"negotiations genuinely aimed at settlement". It cannot apply where the parties have merely asserted their case or criticised the other side's case. However, the privilege may apply to genuine settlement negotiations that take place before a claim has been issued, or even formulated.

7. INDEPENDENCE OF APPOINTED VALUERS

7.1 There has been much debate about the independence of valuers appointed to represent parties, particularly the Commissioner, in CMR referrals. The High Court and Primary Care Appeals (for example SHA/17543) have provided guidance in this area. It has been determined that the DV is not independent from NHS England.

7.2 For example, the position of the DV was examined in detail by the High Court in **Primary Health Investment Properties Ltd and Others –v- Secretary of State for Health and others [2009]**. In this case the Judge decided that the DV was engaged to act and did for the NHS "just like any other surveyor advising in a rent review context" and that public perception would be that "the DV was acting in all senses as the agent of the PCT and as its expert advisor in the negotiation of the present matter". The Judge also found that the independence claimed of the DV by the NHS in this case was "in reality, no more than a qualified independence within the constraints of the commercial objectives of the VOA organisation as a whole".

7.3 The 2024 Directions refer to an “appointed valuer”, a suitably qualified professional who is registered with the Royal Institution of Chartered Surveyors who is appointed by the Commissioner in the circumstances of a particular case to perform any property valuation or related specialist services for the purposes of these [2024] Directions. In this regard, conflicts of interest will be taken into account should NHS Resolution seek external advice and appoint a valuer.

7.4 The appointed valuer should certify in his or her report or representation the basis of the appointment and nature of the evidence given, for example as advocate or expert in accordance with RICS Practice Statement guidelines.

7.5 Valuation evidence will be treated differently depending on the basis of the valuers appointment. For example, it is the duty of an expert to help the tribunal on the matters within their expertise. This duty overrides any obligation to the person from whom the expert takes instructions, or by whom they are paid. Valuers who appear as advocates for their clients on the other hand, will act in the best interests of that client.

8. PRIMARY CARE APPEALS APPOINTED ADVISOR

8.1 The Regulations entitle Primary Care Appeals to seek external advice. In relation to CMR referrals, Primary Care Appeals has put in place a process whereby valuation surveyors with expertise in the Directions are appointed to a panel administered by the RICS. Primary Care Appeals may apply to have an independent Advisor appointed to assist with valuation questions.

8.2 It has been argued by the Commissioner that Primary Care Appeals is not entitled to adopt the findings of the Advisor unless there has been a clear error by the DV. In a number of determinations (including SHA/17543) it was determined that the Regulations provide NHS Resolution with a very wide discretion to determine disputes (paragraph 101(10)(b)) including the appointment of an Advisor.

8.3 The Advisor’s primary duty is to determine the appropriate value for CMR in accordance with the assumed basis of valuation in the Schedules to the Directions. In order to do this, he or she may be required to make appropriate factual findings, for example on measurements or the number of car parking spaces. Primary Care Appeals will review these findings in producing its Determination.

9. DETERMINATION OF PRELIMINARY ISSUE

9.1 On occasion it is necessary to determine an initial point or points before the reference

can proceed either to be settled between the parties, or to a Determination. The determination of initial points in the past was described as a "Preliminary Determination". This has caused some confusion, with the suggestion that the determination of the initial point was preliminary and therefore open to change. For this reason, these initial determinations are now referred to as a Determination on a Preliminary Issue.

10. PARTIES ACTING WITHOUT REPRESENTATION

10.1 Generally speaking, parties will receive advice and be represented by professionals experienced in dealing with the Directions, whether that is from experts within their own organisation or third party experts.

10.2 It is important for those who choose to conduct the referral without such advice, that they understand that the rules and procedures apply to them in the same way as to those experts. Primary Care Appeals will not provide advice to unrepresented parties about how to present its arguments, or the merits thereof.

10.3 It may be useful to refer to the Guidance Note for Parties Involved in Dispute Resolution found on NHS Resolution web site (https://resolution.nhs.uk/wp-content/uploads/2019/05/Primary-Care-Appeals-Dispute-Resolution-Guidance-Note.pdf) . Please note that only in very exceptional cases will an oral hearing be held for premises costs disputes.

11. EXTENSIONS OF TIME

11.1 All submissions should be made promptly and within the time frame indicated by Primary Care Appeals. In exceptional circumstances extensions of time will be granted, but generally only when the application has been made before the time limit in question has expired.

11.2 In the interests of openness and transparency, the reason for the request for an extension will be disclosed to the other party for information only. The other party is not invited to make submissions on any extension requests. Whether an application for an extension of time should be granted is a matter of judgement which turns upon the specific circumstances of the request.

13. IS THERE OTHER INFORMATION AVAILABLE?

13.1 NHS Resolution publishes previous decisions, statistical information and other material on its website at https://resolution.nhs.uk .

Document Control - Change Record

Date	Author	Version	Reason for Change
14 June 2024	Technical Case Manager, Primary Care Appeals	3	Amended to reflect 2024 Premises Costs Directions. New para 11.2