

## **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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/184017/NHS_General_Medical_Services_-_Premises_Costs_Directions_2013.pdf)

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 web site

Directions - both 2004 Directions and 2013 Directions

DV - District Valuer

NHS Commissioning Board - NHS England

Protocol - Protocol for Local Dispute Resolution for the Determination of Current Market Rent under the NHS (GMS Premises Costs) Directions 2013, the NHS (GMS Contracts) Regulations 2015 and the NHS (PMS Agreements) Regulations 2015

<https://resolution.nhs.uk/wp-content/uploads/2018/10/Local-Dispute-Resolution-Protocol-for-GP-Premises-disputes.pdf>

Regulations - NHS (Personal Medical Services Agreements) Regulations 2015 and NHS (General Medical Services Contracts) Regulations 2015

<https://www.legislation.gov.uk/ukxi/2015/1879/contents/made>

<https://www.legislation.gov.uk/ukxi/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 NHS England 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 Directions are stated to apply to premises costs under GMS contracts. However, as a matter of practice, it is often the case that parties proceed on the basis that the Directions apply to other forms of contract such as PMS Agreements. 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. WHICH DIRECTIONS APPLY?**

- 3.1 Before 2004, 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 will apply 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] 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)

### **4. IS A COMPLETED RENT REVIEW MEMORANDUM A PRECONDITION TO A REFERRAL?**

- 4.1 A completed Rent Review Memorandum is specifically required for CMR reviews under the 2013 Directions (Schedule 2 Part 2 para 4.(c) (iv).
- 4.2 In respect of other CMR reviews, the 2004 Directions provide that if an application for reimbursement is approved the contractor must be paid:

"32. (a) the current market rent for the premises; or  
(b) the actual lease rent for the premises..."

- 4.3 In these circumstances, it is required that any outstanding rent review must be settled, and evidenced by a Rent review Memorandum, before a referral can be made (SHA/16926).

### **5. LIMITATION**

- 5.1 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).

- 5.2 With respect to disputes as to the appropriate level of CMR, it has been determined that the three years start to run when NHS England reports to the contractor a CMR with which the contractor does not agree (see SHA/18735).
- 5.3 There are instances where NHS England agrees not to raise a dispute in relation to limitation in circumstances where this three year period has been exceeded. Primary Care Appeals will abide by such a decision.
- 5.4 Initial applications to NHS England for approval for the reimbursement of costs referred to in Parts 2-5 of the 2004 and 2013 Directions must be made within 6 years of the premises costs falling due (paragraphs 58 and 53 respectively) (see SHA18154).

## **6. LOCAL DISPUTE RESOLUTION (LDR) AND THE PROTOCOL**

- 6.1 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.
- 6.2 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.
- 6.3 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.
- 6.4 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.

## **7. WITHOUT PREJUDICE CORRESPONDENCE**

- 7.1 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.
- 7.2 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.
- 7.3 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:
  - 7.3.1 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.
  - 7.3.2 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.
  - 7.3.3 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.

## **8. INDEPENDENCE OF APPOINTED VALUERS**

- 8.1 There has been much debate about the independence of valuers appointed to represent parties, particularly NHS England, 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.
- 8.2 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".
- 8.3 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.
- 8.4 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.

## **9. PRIMARY CARE APPEALS APPOINTED ADVISOR**

- 9.1 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.
- 9.2 It has been argued by NHS England 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 a disputes (paragraph 101(10)(b)) including the appointment of an Advisor.
- 9.3 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.

## **10. DETERMINATION OF PRELIMINARY ISSUE**

- 10.1 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.

## **11. PARTIES ACTING WITHOUT REPRESENTATION**

- 11.1 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.
- 11.2 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.
- 11.3 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.

## **12. EXTENSIONS OF TIME**

- 12.1 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.

## **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**

<b>Date</b>	<b>Author</b>	<b>Version</b>	<b>Reason for Change</b>
25/11/2019	Business Services Manager, Primary Care Appeals	1	New document