

PROTOCOL FOR LOCAL DISPUTE RESOLUTION FOR THE DETERMINATION OF CURRENT MARKET RENT UNDER THE NHS (GMS PREMISES COSTS) DIRECTIONS 2004/2013, THE NHS (GENERAL MEDICAL SERVICES CONTRACTS) REGULATIONS 2015 AND THE NHS (PERSONAL MEDICAL SERVICES AGREEMENTS) REGULATIONS 2015

1. Objective

1.1 This document sets out principles of best practice and protocols which NHS Resolution 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 2004/2013 (“the Premises Costs Directions”) put in place the mechanism by which the NHS Commissioning Board (NHS England) may grant an application made by its GP contractors for financial assistance towards the leasehold rental costs (paragraph 31) or notional rent payments (paragraph 41) for their premises.

2.2 For rented premises, once NHS England has granted the application the Premises Costs Directions require (at paragraph 32) that NHS England reimburses the lower of the rent due under the lease or the current market rent (“CMR”), in accordance with Parts 1 and 2 of Schedule 2, 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 the notional rent is the CMR as determined in accordance with Parts 1 and 3 of Schedule 2.

2.4 Paragraphs 33 and 42 of the Premises Costs Directions deals with how CMR is determined by applying Schedule 2 to the Premises Cost Directions. Part 1 paragraph 2 of Schedule 2 directs NHS England’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.”*

2.5 There is no detail as to how the GP contractors and NHS England should structure their attempts to agree the CMR.

2.6 If having received “NHS England CMR4 [leasehold]” or “NHS England CMR6 [notional rent]” the Contractor indicates in writing (as set out in that letter) to NHS England that it does not agree the CMR then it will be a matter for parties to enter into Local Dispute Resolution. Paragraph 81 of the NHS (GMS Contracts) Regulations 2015 (as amended) and paragraph 74 of the NHS (PMS Agreements) Regulations 2015 (“the GMS and 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/NHS England] 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*”.

2.7 The NHS dispute resolution procedure is set out in paragraphs 83 and 84 of the GMS Regulations and paragraphs 76 and 77 of the PMS Regulations which mirror each other and

may result in NHS Resolution appointing an independent valuer to assist in determining the issues between the parties.

3. Key Issues

3.1 References to NHS Resolution under paragraph 83 of the GMS Regulations and paragraph 76 of the PMS Regulations are being made where local dispute resolution has not been exhausted. In these circumstances the application to NHS Resolution is premature. This protocol is designed to ensure that local dispute resolution has been exhausted before any reference is made to NHS Resolution.

3.2 It is appropriate to note that a frequent cause of the failure to progress local dispute resolution is the delays in NHS England (or the CCGs on its behalf) processing applications. Contractors become frustrated, and see a referral to NHS Resolution as the only option.

3.3 The intention for this protocol is to:

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 NHS Resolution when it makes its decision under paragraph 81 of the GMS Regulations and paragraph 74 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 NHS Resolution, it will expect the referring party to confirm and evidence 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 Contractors (or their representatives) and NHS England (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 If having received “*NHS England CMR4 [leasehold]*” or “*NHS England CMR6 [notional rent]*” the Contractor disagrees with NHS England’s assessment of CMR, then the Contractor should indicate this to NHS England and at the same time supply the appropriate evidence as indicated in “*NHS England CMR4 [leasehold]*” or “*NHS England CMR6 [notional rent]*”.

4.4.2 Using an appropriately qualified valuer the parties should attempt to agree a Statement of Agreed Facts (“SoAF”) including:

- (a) the correct rent review date;
- (b) a bundle of agreed legal documents including where appropriate coloured lease plans;
- (c) a physical description of the subject premises;
- (c) a set of floor plans;
- (d) the floor areas and measurements of the area subject to reimbursement;
- (e) details of building specification, so far as relevant to valuation;
- (f) relevant planning and other statutory matters.
- (g) a statement summarising the issues that remain in difference between the parties. Where an issue is the floor areas, the difference should be highlighted with each party explaining its contention with plans and sketches as necessary and
- (h) Signed by both parties representatives

4.4.3 With reference to these agreed facts, each party using an appropriately qualified valuer should prepare a valuation report in accordance with RICS Valuation Standards and Guidance Notes to support the level of CMR for which it contends.

4.4.4 The parties should exchange valuation reports.

4.4.5 If the CMR cannot be agreed after exchange of valuation reports, the GP contractor and the valuers should meet (and that meeting should take place at the practice premises, unless they agree that no additional assistance will be provided by meeting at the practice premises) in an attempt to agree the level of CMR or, if this cannot be achieved, to narrow the issues between them.

4.4.6 Following this meeting the valuers must agree an updated Schedule of Agreed Facts to reflect progress made through the Protocol process. The valuers should also using Appendix 1 to this protocol, produce a schedule of comparables both agreed and disputed. This should normally contain reference to at least 3 comparables as evidence on which the valuation is based and evidence of these comparables should be provided where possible. Comparable evidence **must be presented** in the form attached at Appendix 1 and including:-

- (a) The address of the property;
- (b) The names of the parties;
- (c) Legal interest – confirmation as to whether the property is Freehold or Leasehold

- (d) The nature of the transaction, e.g. whether it is a new letting, or new notional rent or an agreed rent review or an agreed CMR review, or an arbitration award or independent expert determination;
- (e) The figure that has been agreed, awarded or determined
- (f) The age of the property;
- (g) A brief description of the property and its construction;
- (h) A brief description of its specification amenities and ancillary services;
- (i) The agreed floor
- (j) date of the lease under which the property is held, together with the length of term and its specified commencement date;
- (k) Full details of all terms and conditions in the lease that might be relevant to rental value;
- (l) The rent review pattern; and
- (m) Confirmation that there are no circumstances relevant to the weight that should be given to the transaction as a comparable in this arbitration other than those particularised.
- (n) Where the comparables relied on are CMR settlements and the Contractor has settled against professional advice, details should be provided of the reasons, together with contact details of the Practice Manager.

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 NHS Resolution, 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.

4.4.12 On completion of local dispute resolution NHS England shall send to the Contractor its final decision on the matter of CMR by way of either "NHS England CMR5 [leasehold]" or "NHS England CMR7 [notional rent]".

4.5 When making a referral to NHS Resolution all documents produced as a consequence of the procedure outlined in 4.4 above **must be included** with the referral including the schedule of agreed or disputed comparables (see Appendix 1), which should be provided in electronic form.

4.6 In deciding whether it should accept a referral for determination under paragraph 83 of the GMS Regulations or paragraph 76 of the PMS Regulations, NHS Resolution will take into account the efforts of the parties at local dispute resolution in light of the procedure outlined in paragraph 4.4 above.

Change Record

Date	Author	Version	Reason for Change
21 December 2020	Technical Case Manager, Primary Care Appeals	4	Refreshed protocol

Appendix 1

Address	Names of parties	Legal interest – Freehold or Leasehold	Transaction details e.g. new letting, new notional rent, agreed rent review, agreed CMR review, arbitration award, independent expert determination
Figure agreed, awarded or determined	Age of property	Description of the property and its construction, pb/conv	Description of specification amenities and ancillary services
Accommodation square metres	Date of lease and length of term and specified commencement date	Full details of all terms and conditions in the lease that might be relevant to rental value	Rent review pattern
Confirmation that there are no circumstances relevant to the weight that should be given to the transaction as a comparable in this arbitration other than those particularised	If this is a CMR settlement has the GP settled against professional advice? If so give details of the reasons with contact details of the Practice Manager	Parking type and rate	Analysis
Transaction Date	Agent's name and contact details		