

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

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 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) for their premises.

2.2 Once the Local Office has granted the application the Premises Costs Directions require (at paragraph 32) that the Local Office 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 Local Office’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 Local Office 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 s/he/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 2004 (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/the Local Office] 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 the NHS LA 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 still being made where local dispute resolution has not been exhausted, often because NHS England are taking a long time to process applications and Contractors are becoming frustrated, so are attempting to leapfrog straight to a referral to NHS Resolution.

3.2 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.

3.3 The intention is to:

3.3.1 encourage consistency across Local Offices 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 NHS Resolution when it makes its decision under paragraph 83 of the GMS Regulations and paragraph 76 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 GP contractors (or their representative) and the Local Office (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 if s/he/it is not content to accept NHS England’s assessment of CMR, then the Contractor should indicate this to NHS England together with 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 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 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 of the table attached at Appendix 1.

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 at the practice premises 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, using Appendix 1 to this protocol, 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 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 LDR 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 they 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
18.06.2018	Business Services Manager, Primary Care Appeals	3	Rebrand to NHS Resolution Change Area Team to Local Office