

# RENT REVIEW & LEASE RENEWAL GUIDANCE FOR GP TENANTS

## Introduction

This Guidance has been prepared by the Primary Care Premises Forum (PCPF) following full liaison with NHS England and NHS Improvement (NHSE&I), District Valuer Services (DVS) and the BMA. It is intended to give initial help to guide GPs through the process of rent reviews and lease renewal. However, it is not a substitute for any official NHSE&I or BMA guidance or for any proper professional advice and neither the PCPF nor any of the bodies listed above accept any liability.

## References

**Act:** the Landlord & Tenant Act 1954 (Part II);

**CMR:** the current market rent assessed by the DVS on behalf of the NHS to be reimbursed to you following the date of the Rent Review and which will include an allowance for external repairs, buildings insurance and external redecoration;<sup>1</sup>

**DVS:** the District Valuer appointed by your NHS Funder to determine the CMR payable from the Review Date;

**FRI Lease:** a full repairing and insuring lease (where the tenant is responsible for the cost of all repairs and maintenance and for the cost of insuring the building);<sup>2</sup>

**Heads of Terms:** the key terms to be included within your renewed Lease as referred to in Section B (4) below;

**IRI Lease:** an internal repairing and insuring lease (where the tenant is responsible for only internal repairs and maintenance and for the cost of the building insurance;

**Lease Rent:** the rent payable under the terms of your Lease;<sup>3</sup> **NHS Funder:** the NHS body responsible for the payment of the CMR (which may include NHSE&I or your CCG as the Commissioner of primary care services);

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<sup>1</sup> The sum reimbursed is the lower of CMR or the actual Lease Rent (adjusted to TIR terms) and is limited to those parts of the Premises accepted by the NHS Funder as qualifying for inclusion in the CMR assessment.

<sup>2</sup> Depending upon the terms of your Lease, you will either be liable to undertake the repairs yourselves or alternatively you will be required to meet the Landlord's cost of doing so through the payment of a service charge.

**PCD/Directions:** NHS (GMS - Premises Cost) Directions 2004, 2013<sup>4</sup>;

**Rent Review:** the date specified for the review of the Lease Rent in your Lease;

**Solicitor:** a specialist solicitor appointed by you who should have good experience in dealing with NHS Healthcare property and who should: (i) comment on the draft Heads of Terms; (ii) negotiate the terms of your Lease upon renewal; and (iii) advise you generally throughout the review/renewal process;

**Third Party:** the Arbitrator or Independent Expert to whom a Referral may be made under the terms of your Lease to determine the Lease Rent in the event you are unable to reach agreement with your Landlord;

**TIR Lease:** an internal repairing only lease (where the tenant is responsible for only internal repairs and maintenance, and not for the cost of external repairs and buildings insurance);

**Valuer:** a specialist Chartered Valuation Surveyor appointed by you who should have good experience in dealing with NHS Healthcare property and who should: (i) negotiate the proposed Lease Rent on your behalf with your Landlord/its Valuer; (ii) deal with any referral to a Third Party under the Lease; (iii) liaise with DVS regarding the CMR ; (iv) deal with any appeal to the NHS Local Dispute Resolution; (v) negotiate the Heads of Terms leading to the grant of a new Lease on renewal; and (vi) advise you generally throughout the review/renewal process.

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<sup>3</sup> This may or may not be the same as your Lease Rent following the conclusion of the Rent Review, depending upon whether your Lease provides for a link between the two. If there is no such link, this may leave you with a shortfall;

<sup>4</sup> This Guidance is based upon the PCD currently available. A further revision of the PCD is anticipated which may impact upon some parts of this Guidance. Your specialist Solicitor and Valuer should be able to advise you on this.

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## A. RENT REVIEWS

### Summary of Steps Required

#### *Step 1 – Preparation for the Rent Review*

- (1) Diarise ahead the date of the next Rent Review due under your Lease;<sup>5</sup>
- (2) In good time prior to the Review Date, appoint specialist Healthcare advisers - both a Solicitor and a Valuer - to act on your behalf;
- (3) Ask your Solicitor to check that the names of the Tenant under the Lease are the same as those of the current GP Partners; failing this, take steps to assign the Lease into the names of the current Partners as soon as possible (and with a view to concluding this prior to the conclusion of the Rent Review procedure);<sup>6</sup>
- (4) Ask your Valuer to check the terms of the Lease to identify the steps set out in association with the implementation of the Rent Review.

#### *Step 2 - Agreement of the Lease Rent between yourself and your Landlord*

- (5) Your Landlord should trigger the process through the service of a Rent Review Notice upon you;<sup>7</sup>
- (6) Provide your Valuer with a copy of the Notice asap as this is required by them to ensure any time limits specified are not missed and to enable them to commence negotiation of the rental figure proposed as the new Lease Rent with your Landlord/your Landlord's Valuer;<sup>8</sup>

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<sup>5</sup> If the Rent Review under your Lease is determined by RPI or CPI, you will not be required to take any action other than check your Landlord's calculations and apply to the NHS Funder for reimbursement.

<sup>6</sup> This will prevent any delay in the conclusion of the Rent Review and therefore in the payment of the arrears of the new Lease Rent (which will be backdated to the date of the Rent Review) - to which your Landlord may add interest (which is not reimbursable).

<sup>7</sup> If your Landlord does not do so, you should ask your Solicitor/Valuer whether you can take steps to move this forward yourself, as any delay could expose you to additional interest costs which would not be reimbursable.

<sup>8</sup> Be aware that some forms of lease provide for the Notice to be sent direct to the DVS with a view to them entering into direct negotiations with the Landlord's Valuer – but as this provision does not align

- (7) Your Valuer and the Landlord/Landlord's Valuer should enter into a full and proper negotiation with a view to reaching agreement of the new Lease Rent payable from the Review Date. In the event of them failing to reach agreement Referral should be made to a Third Party whose assessment of the Lease Rent will be binding on both you and your Landlord (in accordance with the terms of your Lease);
- (8) Following agreement of the new Lease Rent or (where no agreement is reached between the Landlord/Landlord's Valuer and your own Valuer) upon the determination of a Third Party, you and your Landlord should each sign an interim Memorandum of Rent Review which records the provisionally agreed new Lease Rent;

### *Step 3 – Agreement of the CMR with the NHS/DVS*

- (9) You should refer the provisionally agreed Lease Rent to the NHS Funder for approval by the DVS, together with a copy of your Lease;<sup>9</sup>
- (10) In the event the DVS does not agree with the provisionally agreed Lease Rent, you should instruct your Valuer to liaise with the DVS further;
- (11) In the event of agreement not being reached between your Valuer and the DVS you should (i) complete Local Dispute Resolution procedures; and then (ii) appeal to NHS Resolution;
- (12) Following the outcome of your appeal and assuming the figure is less than the provisionally agreed Lease Rent, further negotiations may then take place with your Landlord with a view to agreeing that the NHS determination of CMR (which will be on a TIR basis) is adjusted to reflect the actual repairing and insuring terms of your Lease) which should then be the same as the Lease Rent going forward;
- (13) Formally document the revised Lease Rent by entering into a final Memorandum of Rent Review and request a formal demand for the arrears of the new Lease Rent from your Landlord;
- (14) Following its conclusion of the CMR assessment NHSE&I/I will formally confirm the offer to you as the GP Contractor;

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with the current PCD, your Valuer will advise you on how to proceed in order to achieve such alignment.

<sup>9</sup> It would be helpful to submit evidence and supporting information which has led to this agreed level of rent, including any comparable sites referenced.

(15) You should formally accept the offer and you are encouraged to write to NHSE&I to enable the CMR review to be concluded as soon as possible and in any event no later than 56 days thereafter wherever possible;

(16) You should then claim the additional CMR from the NHS (being the difference between the CMR paid prior to the Review Date and that assessed with effect from the Review Date), supported by the demand issued by your Landlord;

(17) As soon as possible following receipt of the reimbursement from the NHS Funder you should pay your Landlord: (i) the sum representing the difference between the Lease Rent previously payable and the Lease Rent assessed with effect from the Review Date;<sup>10</sup> and (ii) any interest claimed by your Landlord under the terms of the Lease (which will not be reimbursable).

### **1. Initial Procedure to follow**

If you occupy your Premises under a Lease, you need to be aware of the provisions it contains for Rent Reviews. These are likely to take place every three years, usually (but not necessarily) starting with the third anniversary of the commencement date of your Lease. It is important that you diarise the pattern of the Rent Reviews referred to in the Lease and that you are aware of the action you need to take. Failure to do this could result in you incurring significant financial penalties, including the payment of interest which is not reimbursable.

The NHS procedures and requirements to which you must adhere are set out in full in the PCD. The Solicitor and Valuer you engage should already be fully acquainted with these Directions (and with any updates to them).

It is important to note that your Landlord cannot unilaterally force through any revision to the Lease Rent without having followed through the procedure set down in the Lease - and the Lease will specify whether the Lease Rent will increase by a fixed amount (e.g. linked to an index such as the Consumer Prices Index or the Retail Prices Index) or to an open market rent to be assessed at that time. Your Lease may also include a Proviso that the Lease Rent should not exceed the CMR to be reimbursed by your NHS Funder, on a TIR basis adjusted to the terms of your Lease.

Prior to the anticipated Review Date, you should ensure your Lease is held in the names of the current GP Partners as the Tenant. This may require you to update the names of the Tenant on the Lease by means of an assignment – and you should instruct your Solicitor to deal with this as quickly as possible. Failure to do so could result in a delay in the finalisation of the Rent Review, which could incur you with additional costs and interest.

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| <ul style="list-style-type: none"><li>• <b>Be aware of your Lease terms &amp; Rent Review dates</b></li></ul>            |
| <ul style="list-style-type: none"><li>• <b>Be aware of the required procedures of the CCG &amp; NHSE&amp;I</b></li></ul> |

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<sup>10</sup> This may be greater than the sum claimed from the NHS depending upon whether or not your Lease contains a clause linking the two.

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| <ul style="list-style-type: none"> <li>• <b>Ensure the correct Tenant names are on the Lease</b></li> </ul> |
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## 2. Notification

Normally the Lease will require the Landlord to formally give you Notice of its desire to increase the Lease Rent. The timing will be detailed in the Lease, but it is common practice for your Landlord to be able to serve Notice up to six months before, or at any time after, the Review Date. It is in your interests for the new Lease Rent to be agreed as early as possible, as any delay could cause you to pay interest on the late review (which is non-reimbursable) even though you may well not have been the cause of the delay.

Often, but not always, the Notice will specify the level of rent your Landlord believes to be the new Lease Rent at the Review Date. Whether this is a requirement or not, will be detailed in the Lease.

As soon as any Notice is received you should:

- Alert your Valuer and provide them with a copy of the Notice;
- Follow any requirements under your Lease for any notifications to be served (such as the requirement for you to serve a Counter-Notice) or other actions you are required to take, such as informing your NHS Funder. There may also be a timetable that you are required to follow;
- Instruct your Valuer to negotiate the new Lease Rent with your Landlord.

If you do not receive a Notice by the Review Date you should alert your Solicitor/Valuer to this and ask them whether there is any means by which you can activate the Rent Review procedure to enable you to avoid unnecessary delay.

<ul style="list-style-type: none"> <li>• <b>Instruct your Valuer to negotiate</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b>Do not forget to serve any Counter Notice required</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b>Check time limits</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b>Take whatever action may be possible to start the process if the Landlord delays</b></li> </ul>

## 3. Negotiations

Generally, care must be taken to ensure your Lease requirements are followed strictly, not least as you may well be required to take specific action within specific time limits. It will be your Valuer's responsibility to act on your behalf and to ensure that all procedures are adhered to. Where no Proviso or other link to CMR exists in your Lease, you will need to make sure that your Valuer thoroughly negotiates the new Lease Rent *before* finalising agreement with your Landlord. Even if your Lease is a *specialist* medical centre lease which contains clauses aimed at linking the new Lease Rent with the level of CMR agreed by the NHS Funder (as advised by the DVS), a full negotiation with your Landlord will still be

required as your Valuer will be required to demonstrate they have endeavoured to reach agreement of the proper open market rent to form the new Lease Rent.

Where agreement of the new Lease Rent cannot be achieved through negotiation with your Landlord, your Lease will usually contain some form of arbitration clause. See further detail in Section 4 below.

<ul style="list-style-type: none"> <li>• <b>Is there a link between Lease Rent &amp; CMR Reimbursement?</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b>No formal DVS involvement until after new Lease Rent agreed</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b>DVS</b></li> </ul>

#### **4. Lease Arbitration Awards or Expert Determination**

Your Lease is likely to contain a dispute resolution facility to deal with the position where you and your Landlord are unable to agree the new Lease Rent. This will usually entail an application by either yourselves or your Landlord to the President of the Royal Institution of Chartered Surveyors for the appointment of a Third Party (as specified in the Lease).

The Lease will give the Third Party the ability to set the new Lease Rent which, except in the case of exceptional circumstances, cannot be challenged. The Third Party will usually have the ability to determine who pays their fees.

However, a Referral to a Third Party can be very expensive and thus should be avoided if at all possible. You should be aware that many cases referred to a Third Party arise as a result of one of the parties taking no action and thus forcing the other party to seek a determination. Therefore, taking no action can be costly.

You should appreciate that the Lease Rent payable under the Lease as determined by the Third Party will not necessarily be the same as the CMR reimbursement determined by the DVS because the Lease Rent will be adjusted to a TIR basis as defined in the PCD.

<ul style="list-style-type: none"> <li>• <b>Avoid the cost of a Third Party Referral whenever possible</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b>Arbitration Awards &amp; Expert Determinations are final</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b>The Lease Rent as determined by the Third Party will not dictate the CMR to be determined by the DVS</b></li> </ul>

#### **5. The Rent Review Memorandum**

Following agreement of the new Lease Rent with your Landlord (whether this is achieved by negotiation between you or following a Third Party Referral) the Lease will usually require the completion of a Rent Review Memorandum or Interim Rent Review Memorandum. This remains the case even where there is a Proviso in the Lease linking the new Lease Rent to the CMR.

In addition, before making a referral to the DVS, the NHS may require confirmation such a Memorandum has been signed (albeit on a provisional basis as referred to below).

The Rent Review Memorandum should be signed by the Partners currently registered as the Tenant under the Lease– and any updating of Tenant names required to enable this to be achieved should hopefully have been completed by this stage (See Step 1 (3) above). You should be aware that a Rent Review Memorandum is generally legally binding, meaning you could be committed to pay the Lease Rent to the Landlord at the level agreed/determined, regardless of whether the DVS agrees the CMR at the same level. The only exception to this is where your Lease contains the specific Proviso referred to above, linking the new Lease Rent to the CMR. Once again, care must be taken to ensure all procedures set down in your Lease are properly followed and if possible, the Rent Review Memorandum should be drawn up subject to any such Proviso. As such, it will be expressed to be signed conditionally on an interim basis.

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| <ul style="list-style-type: none"> <li>• <b>Take care over completing the Rent Review Memorandum</b></li> </ul>               |
| <ul style="list-style-type: none"> <li>• <b>Make the Memorandum subject to any Proviso contained in your Lease</b></li> </ul> |

## 6. Notification to your NHS Funder

When you have agreed the new Lease Rent with your Landlord and completed the (interim) Rent Review Memorandum, your NHS Funder needs to be informed. This is done by completing and submitting the relevant CMR Form alongside the (interim) Rent Review Memorandum. Your Valuer should be able to help you with the completion of the CMR Forms. All such documentation should be submitted to the appropriate office of your NHS Funder as soon as possible. You are advised to contact your local CCG to ensure you use the correct email address of your NHS Funder’s GP Rent Review Team as the name and style of the local Team differs around the country.

The Team will check that the (interim) Rent Review Memorandum and the CMR forms have been properly completed. They will get in touch with you and may want to check the Premises themselves if there are any queries over the occupation of the accommodation; (for example if GMS space is being used for non-GMS purposes, if sub-leases are in place etc). You should ensure you attend to all such queries as soon as possible to prevent any delay in the NHS CMR review procedure being carried forward (see section 11).

Once your NHS Funder is satisfied with the documentation it will instruct the DVS to assess the CMR.

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| <ul style="list-style-type: none"> <li>• <b>Notify your NHS Funder upon reaching agreement of the new Lease Rent with your Landlord</b></li> </ul> |
| <ul style="list-style-type: none"> <li>• <b>Promptly complete your CMR Application Forms</b></li> </ul>  |
| <ul style="list-style-type: none"> <li>• <b>Avoid unnecessary delay</b></li> </ul>   |

## 7. Current Market Rent (CMR) Reimbursement

CMR is the basis upon which CMR Reimbursement is assessed under the PCD. When calculating the CMR the DVS will look at the terms of your Lease but then adjust them on the assumption (if not a fact) that your Landlord bears the liability of external/structural repairs and maintenance, plus external decoration and buildings insurance. The amount of this adjustment will depend upon the type of building but is likely to add between 5% and 7.5% to the Lease Rent.

CMR therefore assumes the Tenant bears only an internal repair liability which may not in fact equate to the actual liability under your Lease. This will impact upon the amount you pay your Landlord as follows:

- If you hold a TIR Lease, you should pay the entirety of the CMR to your Landlord;
- If you hold an FRI Lease, you should pay your Landlord a sum equal to only the Lease Rent, meaning you retain the surplus CMR of between 5% - 7.5% towards the additional expenses for which you will bear personal liability as the Tenant.
- If you hold an IRI Lease (which is less common) an adjustment should be made to enable you to retain a small amount from the CMR to cover the annual insurance charge (usually between 1% - 2%).

## **8. The Role of the District Valuer (DVS)**

The DVS is an adviser to the NHS. Upon receiving the referral from the NHS Funder, the DVS will contact you to undertake an inspection in order to view the Premises and check room measurements and floor areas. Following this, the DVS will consider the Lease terms and appraise the level of the new Lease Rent as provisionally agreed between you and your Landlord.

If the DVS considers the CMR resulting from the adjusted (see section 7) provisional level of Lease Rent to be acceptable, this CMR assessment will be reported accordingly to the NHS Funder.

If the DVS considers the CMR resulting from the adjusted provisional Lease Rent to be excessive, they will assess their own opinion of the CMR and report accordingly to the NHS Funder. This would lead to a shortfall between the Lease Rent and the CMR, for which you would be liable, unless the Lease contains a Proviso linking the Lease Rent to the CMR. In such cases, provided the requirements of the Lease have been properly followed, any Lease Rent previously agreed with your Landlord (as set out in an Interim Rent Review Memorandum) will become void and the DVS' assessed CMR figure will be adjusted (as described in Section 7) to accord with the Lease terms and to reflect whether it is FRI, IRI or TIR. The result is that the adjusted figure will become the Lease Rent payable with effect from the Review Date in substitution for the figure earlier agreed with the Landlord. However, if your Landlord is unhappy with the CMR assessed by the DVS, the Lease terms may enable it to require you as the Tenant to appeal the DVS' figure (usually at your Landlord's cost) through the Local and National Dispute Resolution procedures set out below. In such circumstances, the CMR assessed as a result of such an appeal would be substituted as the Lease Rent (subject to the CMR adjustments referred to above).

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| <ul style="list-style-type: none"> <li>• <b>Encourage and facilitate the DVS visit</b></li> </ul>  |
| <ul style="list-style-type: none"> <li>• <b>Consider whether an appeal is necessary</b></li> </ul> |

### **9. Local and National NHS Dispute Resolution.**

If you are not satisfied with the assessment for CMR, regardless of your Lease terms you have the right to implement the Local Dispute Resolution for which NHS Resolution has set out a protocol. As above, and depending upon the terms of your Lease, your Landlord may also have the right to require you to do so. Your Valuer should run all of these procedures – although your Lease may provide for your Landlord’s valuer to add to and amend your own Valuer’s submissions. Alternatively, the Lease may permit your Landlord to appoint its own valuer and to run the appeal and act as the Tenant’s Agent. As this could potentially lead to a conflict of interests, your NHS Funder is likely to encourage you to appoint an independent Valuer.

This initially entails responding to your local NHS Funder with the grounds of the dispute backed up by evidence. A two-month time limit on your ability to appeal may be imposed and you should check this with your NHS Funder to ensure you don’t miss any deadline.

The NHS Funder will then instruct either the DVS or an alternative appointed Valuer to negotiate with your Valuer to try to reach an agreement. This will entail preparing Rental Valuation Reports and, where necessary, carrying out meetings to discuss figures.

If the DVS/NHS appointed Valuer and your Valuer fail to reach agreement, and after the full procedures under the NHS Resolution Protocol have been extinguished, the appeal can be passed on to NHS Resolution. This will entail submitting a Statement of Case followed by a full and formal Expert Valuation Report containing a full justification. NHS Resolution will exchange these Reports between your Valuer and the DVS/NHS appointed Valuer and ask for each side’s Counter Submission. NHS Resolution will then approach the Dispute Resolution Services of the Royal Institution of Chartered Surveyors to request them to appoint an Independent Expert Advisor to consider the Reports and Counter Submissions and advise NHS Resolution on what the fair and reasonable CMR should be. The Independent Expert Advisor will report to NHS Resolution who will make the final determination of CMR. This is binding on both your NHS Funder and on you.

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| <ul style="list-style-type: none"> <li>• <b>Referral to the Local Dispute Resolution (negotiation with the DVS)</b></li> </ul>  |
| <ul style="list-style-type: none"> <li>• <b>Referral through NHS Resolution (previously NHS Litigation Authority) to an Independent Expert appointed by the RICS</b></li> </ul> |

### **10. Where the Lease Rent and the CMR differ**

There may be factors why the Lease Rent and CMR differ. The most common is where the actual liability for external/structural repair plus external decoration and buildings insurance under your Lease differs from the assumed liability which the DVS is required to take into account when calculating the CMR (see Section 7 above).

The other main area of difference is where the Premises are not fully used for GMS purposes. In the case of non-GMS areas (or where specifically agreed, non-PMS areas) such as areas sublet to other NHS Service providers, part of the income derived is from the rent payable to you under the sublease and not from CMR. Please note that where there is specific agreement with your NHS Funder, CMR may still apply to areas used by a third party for the benefit of practice patients which are licenced on a non-exclusive basis, provided only a service charge for running costs such as heating, lighting, cleaning etc is payable (which excludes any rent).

Whilst PMS practices are not strictly covered by the PCD, the PMS Agreement may dictate that the PCD should be adopted on matters of CMR Reimbursement. You will need to check the terms of your own PMS Agreement to verify this.

<ul style="list-style-type: none"><li>• <b>Beware of differences between the Lease Rent &amp; CMR</b></li></ul>
<ul style="list-style-type: none"><li>• <b>Understand the Assumed Terms of CMR</b></li></ul>
<ul style="list-style-type: none"><li>• <b>Reimbursement technically applies to GMS space only</b></li></ul>

## 11. Penalties for Delays in Rent Review Completion.

In some extreme cases, failure to serve Counter Notices or complete certain procedures within the Lease's specified time limits (often referred to as "*Time of the Essence*" clauses) can result in your Landlord's initially proposed rent being treated as the new Lease Rent. However, as this is not binding on the NHS Funder/DVS, it could well lead to a difference between the Lease Rent and the CMR. Assuming you have followed all due procedures, situations as described above are relatively rare and your Valuer will be able to check your Lease and advise on what is required.

However, what is not so rare is the requirement for a Tenant to pay interest on late payment of the new Lease Rent and almost all leases will include this requirement, including that relating to delays in the Rent Review procedure. Thus, if delays are allowed to build up, and the Rent Review is not concluded until, for example, 12 months after the Review Date, your Landlord will not only be looking to you for payment of one year's back rental of the Lease Rent increase, but also one year's interest on that increase. Whilst your NHS Funder will reimburse any agreed increase in CMR resulting from the Rent Review, they will *not* reimburse any interest, and the payment will fall on you as the Tenant to meet this from your own reserves.

Against this background, you will appreciate it is not in your interests to allow the negotiation leading to the agreement of the new Lease Rent to be deferred any longer than is absolutely necessary – hence you should instruct your Valuer to press ahead with the negotiation as quickly as possible.

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| <ul style="list-style-type: none"><li>• <b>Loss of ability to challenge with the risk of your Landlord's Proposed Rent becoming the new Lease Rent</b></li></ul> |
| <ul style="list-style-type: none"><li>• <b>Loss of Lease Rent &amp; CMR Reimbursement link</b></li></ul>   |
| <ul style="list-style-type: none"><li>• <b>Non-Reimbursable interest charged to the Tenant</b></li></ul>   |

## **B. LEASE RENEWAL**

### **1. Timing Factors**

When considering your Lease renewal, it is essential you do not leave matters until the final year of the old Lease. Well before there is any prospect of formal notices being served on you under the Act, which can occur up to twelve months before the Lease expiry date, you really need to have a forward Business Plan in place and agreed with the CCG/STP.

Before taking any steps, you are advised to check with your CCG that your Premises form part of the CCG/STP's future plans. Assuming they do (and whilst it is not an NHS requirement) it is strongly recommended that you prepare a Business Plan to enable you to demonstrate the direction of travel of your Practice over the next few years, the potential growth in patient numbers, possible mergers, additional services etc. This will then allow you and the CCG/STP to plan any improvement or necessary extension required to your Premises to accommodate future arrangements. Before you commence formal lease renewal negotiations, you should ensure you have the formal support of the CCG/STP to do so. You should also have regard to any impact this may have upon the PCN of which you are a member

Should your Premises not form part of the CCG/STP's future plans, and thus have a limited life, you will need to know, so you can ensure that any new Lease to be negotiated will have a short Term and provide you with good flexibility. Equally, plans to vacate the Premises at the end of the Term may be required. In the event that a short-term lease renewal is required, such short-term flexibility would only usually be achievable at an increased rent, so you will need to be certain of your requirements before embarking on this course.

Should exit from the Premises be the agreed course of action, make sure you are aware of your liabilities under the Lease for dilapidations and reinstatement. These costs will not be reimbursed or supported by the NHS so will fall to the Practice to cover. Your Landlord will serve you with a schedule of dilapidations, which is likely to appear extremely onerous. You are strongly advised to appoint a specialist building surveyor to negotiate this on your behalf with a view to agreeing a reduced figure with the Landlord. Hopefully, you will have ensured the Premises are well maintained throughout the Term of the Lease, which will help to reduce your liability at the end – and you may also have made a reserve each year towards your residual liability, to include the cost of reinstating any alterations you made throughout the Lease Term. Usually, you can opt whether to carry out the works yourself or to pay the Landlord the funds to manage the works itself.

You should be aware that any negotiations can take a considerable amount of time to conclude and to allow for this, it is recommended the new lease negotiations should

commence in good time before your current Lease is due to expire – possibly (depending upon the circumstances) several years in advance.

## **2. Improvements**

The negotiations leading to your Lease renewal may also present the opportunity for discussions concerning improvements to your Premises. Such works may well vary from generally upgrading your accommodation to major extensions to cater for planned growth/mergers. Any such works would be required to meet NHS Health Building Notes/ Technical Standards. The cost should be justified by both the level of the revised Lease Rent on renewal as well as the other Lease terms, particularly the length of the Term of your Lease.

Your Landlord should be able to liaise with your Valuer to show you and the CCG/STP the potential Rent/Lease term variations. The maximum lease terms of refurbished primary care centres to be supported by the NHS will be dependent on building quality, suitability and the NHS plans for the premises as set out within its Estates' Strategy, together with satisfying the value for money test. You are advised to open discussions with your NHS Funder at the earliest opportunity.

For all works which are likely to impact the Lease Rent, you will require an additional approval for the project from your NHS Funder to include approval of your formal Business Case (OBC) and/or a Project Initiation Document (PID).

## **3. Security of Tenure & Court Protection.**

Unless specifically contracted out from the Act, most leases will provide the tenant with security of tenure. With certain exceptions (such as redevelopment, or where premises are required for the landlord's own occupation) the Act gives a tenant the right to negotiate a new lease on similar terms to the existing. It will however, allow for lease terms to be updated in line with modern commercial practice.

However, notwithstanding this protection, the terms of your new Lease will need to be adapted to reflect the current marketplace - and of course there is nothing to prevent you from proposing that wider changes should be included, if agreeable to your Landlord.

The negotiation process is a complex one, whether or not your Lease carries the protection of the Act, and your specialist Solicitor will advise you and represent you throughout the negotiation process

If your Lease has the protection of the Act, the renewal process will usually be triggered by the service upon you of a Notice by your Landlord, known as a Section 25 Notice. This should be served on you between six and twelve months prior to the expiry date of your Lease. The Notice could either offer you a new Lease on specified terms – or seek to end your Lease entirely! However, your Solicitor may also advise you about the possibility of *you* triggering the process through the service on your Landlord of a Section 26 Notice, which may (depending upon the circumstances) afford you greater protection and may be helpful if

your Landlord has not responded to your requests for the renewal of your Lease. Your Solicitor will advise on the most appropriate route in this respect.

Once a Notice has been served, if the Lease Rent and other Lease terms cannot be agreed by negotiation, either party can take the matter to Court. However, to do this, certain procedures set down in the Act must be followed strictly and your Solicitor will advise you on the steps to be taken to protect your interests and to preserve your rights under the Act. This includes strict time limits where “*time is of the essence*”, which must be observed. One such step requires the Tenant to make application to the Court before the expiry of the date set down in the Section 25 Notice - and failure to do so will result in you losing your protection under the Act. In a worst-case scenario, this would leave you with nowhere to practise! At the very least, it would radically reduce your negotiating position when attempting to agree the terms of the renewed Lease with your Landlord.

#### **4. The Heads of Terms**

Before the Lease itself is negotiated, it is usual for Heads of Terms to be agreed between the parties which cover the key terms of the new Lease. Your Valuer should have principle responsibility for this and the Heads of Terms will cover areas such as:

- The Rent;
- The Lease Term;
- Repair & Insurance Liability;
- Right to undertake Alterations;
- The User Clause;
- Assignment & Sub Letting;
- An agreed set of plans which should include: (i) a location plan; (ii) a site plan showing rights of way and car parking spaces etc.; and (iii) a plan showing the internal areas, demarcating the demise, any shared areas and the common parts.

One of the most likely areas that will be contested in the negotiation of the Heads of Terms is the new Lease Rent which your Valuer will negotiate on your behalf.

The Heads of Terms will eventually be agreed and signed on a “*Subject to Contract & Without Prejudice*” basis. This means that they are not yet legally binding and will be subject to NHS approval (see below) and to your Solicitor agreeing the final format of the Lease with your Landlord’s Solicitor. However, it would be prudent to ask your Solicitor to approve the draft Heads of Terms prior to them being signed off in case there are specific aspects e.g. relating to the Title to the Premises, which need to be reflected within them.

#### **5. NHS Heads of Terms’ Approval**

Both your Valuer and Solicitor should be aware that the proposed Heads of Terms for the new Lease will require NHS approval before they are signed. As in the case of a Rent Review, it will be expected that a full and thorough negotiation of the proposed Heads of

Terms has been undertaken on behalf of both you and your Landlord through your respective advisers before they are presented to the NHS for approval.

Once agreed between you and your Landlord, you will therefore need to apply to your CCG and NHS England for approval of the Heads of Terms. The PCD require that any new Lease is approved as being “*Value for Money*” which is the role of the DVS. The CCG will also want to approve the principle of the service continuing from the same Premises, although by this stage this should already have been established; (see Timing Factors above). The application to be made is similar to the Rent Review process (as noted under Section 6 in Part A above) and requires the completion of a CMR Form which should be sent to your relevant NHS Funder, alongside the Heads of Terms. Initially they will follow the same procedures as noted for Rent Reviews.

The DVS will, however, have a greater role to play, as in addition to reporting on the level of CMR, they must also consider the Heads of Terms as a whole and confirm to the NHS that overall, they represent Value for Money.

Once the DVS has made its recommendation to the NHS that the Heads of Terms deliver Value for Money and the CCG and NHS England have also confirmed their agreement, the Heads of Terms can be passed to the Solicitors acting for both you and your Landlord, which will enable the negotiation of the new Lease to take place.

## **6. The Lease Negotiation Process**

Hopefully, the respective Solicitors will be able to reach agreement on the terms of the new Lease between themselves – although notwithstanding the new Lease should be based on broadly similar terms to its predecessor, as is the right of a tenant with protection under the Act, there can be considerable debate over the extent of the updating provisions.

If the terms of the new Lease cannot be agreed, and assuming the renewal is taking place under the Act, it is open to either you or your Landlord to insist on the matter being referred to the Court to determine the terms. This may be used as a threat by one side to coerce the other side into giving in on the assumption the costs of taking the matter to Court may ultimately outweigh any benefits!

If the renewal negotiations are not taking place within the protection of the Act, your Landlord’s negotiating position is likely to be considerably stronger than yours as you will have no statutory protection to rely on. As such, your Landlord may seek to impose more stringent terms than you may be willing to accept. In such circumstances, the ultimate saving grace may be that the DVS refuses to sign off the Lease on the basis the terms overall do not represent Value for Money

## **7. Final Approval**

Once the Lease has been agreed between yourselves and your Landlord and is therefore in its final format, the CCG and NHS England will require sight of the final draft before it is

signed and exchanged to confirm that it remains true to the agreed Heads of Terms and continues to satisfy the appropriate tests.

You should be aware that the various stages of the approval process can take some considerable time to conclude and it is essential your Solicitor ensures any time limits imposed under the Act are formally extended (wherever possible) to ensure the protection it affords you is not lost. If an adequate extension cannot be achieved, you could be forced to incur the cost of taking forward Court proceedings to protect your position under the Act, with the possibility the Court could impose the Lease terms as proposed by the Landlord. These would then become binding upon you, *prior* to you having received the formal approval of your NHS Funder. However, you should understand that where protection is lost, the Landlord would have the right to refuse to renew your Lease and to evict you from the Premises. This is just one of the reasons why it is so important to secure the protection of the Act from the moment your Lease is granted – and to ensure you do nothing to lose it throughout the renewal process!

## 8. Post Completion

Stamp Duty Land Tax will be payable on the completion of your new Lease and you are likely to have to budget to fund this yourselves. You should ensure your Solicitor alerts you to the cost of this well in advance as it can run to tens of thousands of pounds, dependent upon the amount of the Lease Rent and the length of the Lease Term.

If the Term is for 7 years or more, the Lease will have to be registered at the Land Registry for which there is also a (more modest) fee payable.

Once these procedures have been completed you should ensure the original document is safely stored in a fireproof vault (your Solicitor may be able to offer this service) as it will be required in the event you ever need to litigate any of the rights reserved under it and at the time of the next renewal. You will also need to:

- Diarise the future Rent Review dates under the new Lease;
- Update – and keep under review - your partnership documentation to reflect the new arrangements. This may include updating:
  - your Partnership Deed;
  - any Declaration of Trust;
  - the reserves you set aside for (i) routine decoration and (ii) subsequent alterations.
- Promptly update the names of the Tenants on the Lease to reflect the names of the current Partners in the Practice each time there is a change.

Your Solicitor should be able to advise you on how best to deal with these aspects.

**Guidance prepared by John Hearle and Lynne Abbess  
Joint Chairs of the Primary Care Premises Forum**

**[Date]**