Pro-forma standard premises lease issued by the NHS for premises leases with NHS Property Services Co (NHSPS)

This note is communicated jointly by the General Practitioners Committee of the BMA (GPC) and the BMA's specialist legal services provider, BMA Law, following the issue of the above by the NHSPS. It is a document purporting to be a standard lease agreement for use by GP practices and other primary care providers when entering into a lease in respect of premises owned by (and so leased from) NHSPS.

The lease has been prepared by Captsicks, lawyers for NHSPS, but (in its present form) has not in any way been endorsed, or commented on, by the BMA. On the contrary, having now internally reviewed the document presented, the BMA has grave concerns about practices signing up to leases based on it.

The proposed standard lease, although offered as a template from which to begin (with various 'options' embedded within it), is very biased in favour of the landlord (NHSPS) throughout. It also contains several key clauses (which we refer to below in more detail) which we would particularly warn practices against.

In any event therefore, we advise practices or other providers not to sign up to any lease based on the proposed document without first taking suitable professional advice.

As referred to above, what follows are notes on some of the headline issues and key provisions arising from the Draft Standard Lease issued by NHSPS.

1. Break clause

As it stands only NHSPS has the ability to break the lease where the tenant loses its GMS/PMS or APMS contract.

This exposes GPs to potentially huge personal liability in the sense that unless NHSPS were to break the lease, the GPs would be legally obliged to continue with the lease for its full term (unless some other time relevant tenant break clause is agreed – such as an ability to break on the fifth anniversary of the term). This is despite the fact that the GPs will then have no core contract against which rental sums can be recovered.

GPs must have the ability to walk away from the lease if their core contract ceases.

2. Wording of the break clause

Even if the current break clause (clause 44) is mutually applicable (i.e. it can be invoked by the tenant and landlord) care must be taken to ensure that there is an intrinsic link between when a practice's core contract ends and the date upon which the break clause will become effective.

As it stands, three months' notice to end the lease can be served (albeit solely by NHPS under the current wording) where i) the GP practice ceases to hold a core contract, or ii) where the GP practice ceases to carry out services under their relevant core contract for a period of two months.

This therefore means that there will be a gap between i) when a practice will cease to be able to recover rent by reference to its holding of a core contract and ii) when their obligations to pay rent under the lease end. At best this gap will be three months after a practice loses its core contract whilst at worse (if NHSPS do in fact invoke their right to end the lease early) it will be five months after they do.

The financial implications could run into tens of thousands of pounds.

3. Rent review

The draft rent review provisions provide for an 'upward only' open market rent review. Extreme care should be taken here. The open market may not reflect what the DV or RICS surveyor indicates as being the sum that a practice should be entitled to recover under, nor the intricacies of, any reimbursement under the premises costs directions.

As a consequence, consideration should be given towards negotiating this clause so that (as an example) i) the rent reviews fall more (if not entirely) in line with what a practice can recover under the relevant costs directions or ii) a practice has an ability to break where they feel that the difference between what they can recover and what they are being asked to pay undermines the viability of the practice.

4. Relocation

The draft standard lease contains a clause (clause 36) enabling NHSPS to serve six months' notice to relocate a tenant providing they have found them "alternative premises". There are considerable concerns with this clause. These include:

i) The time frame of six months being far too short (bearing in mind there will need to be changes to the core contract to reflect the change in location, the need to notify patients, move staff and equipment and potentially re-fit the alternate premises).

ii) The definition of what constitutes "alternative premises" (to which NHSPS can move a practice) needs to be broader. The current definition takes no account of (by way of just two examples):
   a. The need for it to be in the same locality as the previous premises so as to ensure that the practice continues to be able to meet its patients' needs (an alternative premises cannot be remotely located for example where the original practice was in the heart of a town or a city centre); and
   b. The impact it will have on the business/practice as a whole.

iii) The clause entitling the tenant to recovery of relocation costs is, in our view, too narrow. This clause, clause 36.5, needs to be broader so that a tenant who is being asked to leave:
   a. Won't have to pay to reinstate the premises they are leaving; and
   b. Has the ability to be compensated for any works they had carried out (which could well be quite extensive) to the premises they are being forced to vacate.

5. Repairing obligations

Practices need to carefully consider their exposure to liability in respect of dilapidations and disrepair. As a starting point a practice will be under an obligation to keep the property clean, tidy and in good repair and condition.

Having regard to this fact each practice must carefully consider the definition of "property" and whether it covers the internal and external parts of the premises.
The broader the definition the greater a practices' repairing obligation will be.

This aside each practice must be careful to ensure:
i) That their repairing obligations (however broad these are) are subject to a schedule of

dilapidations (or condition) which will in turn identify any items of disrepair that existed before the tenant takes occupation. These items will not be the tenant's responsibility.

ii) That a full and complete schedule of dilapidations (or condition) is carried out by a suitable and qualified professional before the lease is entered into. This is critical and particular care should be taken to check any air conditioning units, air conditioning systems and/or lifts that are located within the premises. If these go wrong they are extremely expensive to put right.

The standard lease has optional clauses to cover the fact that a tenant's repairing obligations will be subject to such a schedule of dilapidations (clause 24.1). These optional clauses should be included.

6. Sharing occupation

The standard lease has a curious clause (clause 4.3) allowing NHSPS to permit (by way of a licence) other providers to use the property during times where the tenant practice does not (or is not allowed to) put it to use.

For this to be acceptable there need to be stringent controls on the terms of any such licence which should cover, amongst other things: i) preserving patient confidentiality of the practice who represents the tenant, ii) dealing with the need to ensure the cleanliness of the premises is maintained, and iii) dealing with the fact that damage, disrepair and wear and tear caused by the alternate providers use of the premises must be at their cost.

This clause should, therefore, be negotiated to ensure that the tenant practice is adequately protected.

7. Alterations

Structural alterations are, as is usually the case, not permitted.

Internal, non-structural alterations are but they need the prior approval of NHPS (clause 26.2). All practices should be advised to seek that approval prior to signing the lease in order to cut down on time and costs.

Allied to the above, care should be taken in connection with clause 27.2. This states that the landlord may, at the end of the term (howsoever that occurs) ask that the tenant removes any alterations and makes good any damage caused by this process.

This is not uncommon but it is suggested that practices seek to negotiate clause 27.2 so that the landlord is under an obligation to provide prior notice of their requirement for alterations to be removed before the lease term actually ends (for instance two months prior notice unless the lease ends due to a forfeiture event).

The reason for this is simple. Until such time as all the alterations are removed (and any damage caused by their removal is remedied) the landlord can demand rent pursuant to clause 27.5. As such, unless a clause is inserted to provide for prior notice to be issued, the landlord could wait until the last moment before demanding that any and/or all alterations are removed.

This would result in the tenant being left to pay rent after the expiry of the lease term whilst the remedial works are being concluded.

8. Security of tenure

The standard draft lease indicates (at clause 43) that the lease will ***not*** be a protected business lease under the Landlord and Tenant Act 1954, unless it is for a term of 15 years or more.

This is a clause which is usually negotiated but the consequences of this fact need to be appreciated by all practices.

If a lease **IS** protected by the Landlord & Tenant Act 1954 it means, in very basic terms, that the tenant has a statutory right to call for a new lease on substantially the same terms as the old one (save for rent) at the end of the lease term. The Landlord would only be able to refuse the granting of such a lease in limited circumstances (such as where the landlord is looking to redevelop the premises).

If the lease **IS NOT** a protected lease then the tenant has no statutory right to remain and it would be at the discretion of the landlord as to whether or not a new one is granted.

This note has been prepared for GPC by their specialist legal services provider, BMA Law.

Robert Day – Senior Lawyer, BMA Law
Neal Hooper – Senior Lawyer and GPC premises advisor.

For further details on the help and support that BMA Law can provide you, please contact them on: info.bmalaw@bma.org.uk or **020 7383 6976**.

Disclaimer/Notes

- This membership guidance note is for information, gives general or limited guidance only and should not be relied upon solely or treated as a complete and authoritative statement in respect of its subject matter.
- The guidance note applies to the arrangements in England. Although similar conditions may apply to Wales, Scotland and Northern Ireland, members should contact the BMA for further Information in those cases.
- Members are advised to seek advice on their rights and responsibilities at an early stage of any proposed lease arrangements.

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