

Preparing to lease

Having a lease in place can have immediate and long-lasting benefits for both existing and new partners in a GP practice, but what considerations are needed before it is drawn up? Lisa Geary, Partner, Real Estate at Capsticks Solicitors LLP explains.

There are many circumstances in which a GP practice may need to have or grant a lease. These include:

- where the practice needs to occupy premises owned by a third party and wants certainty of occupation for a defined period (possibly with flexible break options) and clearly stated financial obligations and responsibilities, such as maintenance, repair and insurance liabilities, defined for certainty and to minimise risk.
- where the partners contracted to NHS England to provide the primary care services do not own the premises and NHSE require a lease to be granted to the contracted partners before any premises costs are reimbursed. In some circumstances NHSE may agree to continue to reimburse premises costs on an owner-occupier basis where a certain number of property owners are contracted partners, but this cannot be guaranteed and should be checked in each case. If no lease is required, then

advice should be taken on how the non-property owners' liabilities for property running costs and any other obligations are to be documented. The Partnership Agreement or a Declaration of Trust can be a useful tool for these purposes.

- where the freehold property owners or funders want to ensure guaranteed rental incomes.
- where a practice partnership or individual GP wishes to sell and leaseback their premises to release capital and to facilitate succession planning.

OCCUPATIONAL CERTAINTY

If a landlord sells the freehold of a GP premises, the new owner is legally obliged to honour the existing occupation if a lease has been properly set up.

A lease enables a clear statement of liabilities relating to key issues e.g. repair, rent, rent review, alterations, subletting, use, succession of partner arrangements, service charge, etc. Where no lease exists, obligations are unclear. Who repairs the roof? Who insures? Can the Landlord require a tenant to leave on minimal notice?

Security of tenure benefits may apply if a lease is in place.

Landlords for a GP contracted practice could be:

- commercial developers and investors as the original developer/investor or following a sale from a current or former GP owner.
- NHS Landlords (e.g. NHS Trusts, Community Health Partnerships Limited or NHS Property Services Limited).
- retired GPs who are no longer contracted partners, but have chosen to hold the freehold as an investment or because they have been unable to sell to the new contracted partners.

NHSE PREMISES COSTS REIMBURSEMENT

If they are the practice property owners, contracted partners can be reimbursed premises costs as either notional rent or borrowing cost reimbursement under the NHS Premises Costs Directions 2013 (PCD).

Where the contracted partners do not own the premises, NHSE may and can require a lease to the contracted partners to enable premises costs to be reimbursed as Lease Cost Reimbursement (LCR). Notional rent and borrowing costs reimbursement are no longer applicable.



- NHSE may and can require a lease to be in place before LCR is paid (either to document an existing situation where LCR is already paid but where there is no lease or where there has been a change triggering the need for a lease). It is within the gift of NHSE to refuse to reimburse where LCR applies unless a formal lease approved by NHSE is in place.
- Banks or other financiers seek assurance on either the certainty of rental income or the certainty of costs payment by the contracted practice (or both) in order to gauge funding viability.
- Having other occupiers of the premises could mean reimbursed premises costs are reduced (abated) to the extent of the occupation. A GP Practice should ensure it has an arrangement in place with the occupier to give certainty that charges

equal to the abatement can be recovered from the occupier and risks passed down as appropriate.

CQC INSPECTION

A partnership's CQC (Care Quality Commission) inspection may be negatively impacted by the lack of a lease because of the risks this can present.

A lease should clearly highlight who is liable for health and safety, insurance, repairing defects and any other occupier risks in the premises in order to score well with the CQC.

SUCCESSION PLANNING

Succession planning and attracting new partners may be easier if a lease is in place. Changes to leasehold ownership on retirement should be straightforward (where the lease is properly drafted) and not require

a capital investment by an incoming partner. It also allows flexibility for a partner who may only wish to work in the practice in the short to medium term.

CONCLUSION

Leases can be complex documents, but GP practices need to ensure they are used effectively when any contracted partners do not have a property ownership interest. If properly drafted, this will ensure that obligations and liabilities are clear and acceptable, premises costs will be reimbursed by NHSE, partnership changes can be smoothly accommodated and the CQC can be kept at bay.

CONSIDERATIONS WHEN NEGOTIATING A LEASE

| Important terms | Extra consideration for GP Practices |
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| Length of term (the period of permitted occupation) | Ensure security of tenure – an important protection for any tenant carrying on a business (including GP practices), which affords certainty and flexibility. Having a lease is the best way for a non-owner-occupier to gain this protection. Consider tenant break rights to allow for early termination. |
| Financial commitments (rent, service charge and utilities costs) and how they are reviewed | Ensure the rent review provisions reflect particular processes increasingly scrutinised by NHS England. |
| Repairing obligations | Check certainty of and limits on repairing liabilities. |
| Actions permitted by the tenant (e.g. use and alterations) | Have flexible sharing rights with other occupiers providing ancillary services. |
| Transfer of the lease | Ensure clauses dealing with selling the lease include provision for easy succession of partners to minimise admin and costs. |
| Termination rights | Link these to termination of the GMS/PMS/APMS contract. |

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