

VICTORY IN PREMISES FUND FIGHT

A landmark verdict has levelled the playing field for reimbursement values.

As occupiers of GP premises providing NHS care you expect your actual rent, if you lease your surgery - or your notional rent, if you own it - to be fully reimbursed. But this may not always be the case.

If the district valuer (DV) assesses the rent for your premises at less than the rent you have to pay to your landlord - or sets a lower than expected notional rent, meaning it will not cover the mortgage payments on the surgery - the PCT will not pay the difference.

On 24 March 2009 a property investment company won a case which has important implications for practices on how appeals over valuations for reimbursement purposes should be settled.



Unfair Appeal Process

In a judicial review, the judge found in favour of landlord Primary Health Investment Properties Ltd. This was after the company had lost an appeal on a DV's assessment at which the person who decided the appeal was the DV's boss.

The company claimed this was unfair but the health secretary said that rent reimbursement is subject to the PCT having sufficient funds in its budget available. While the health secretary's stance has possibly opened the way for PCTs to decide in future how much of the rent/notional rent that is set they will reimburse, the judge's ruling was on different grounds.

At present, PCTs reimburse the lower of the actual rent (or notional rent equivalent) that you are liable (or notionally liable) for under a lease and the 'current market rent' for your premises. The DV advises the PCT on the latter. This is reimbursed in line with the National Health Service's (General Medical Services - Premises Costs) (England) Directions 2004.

Similar provisions apply in Wales

Any shortfall between what you have to pay your landlord, or your mortgage provider, and what the PCT pays you must be paid by the practice.

However, a practice that is soundly advised when negotiating its lease will ensure that this gap never appears by seeking to align the lease rent to the sum reimbursed. The landlord, in turn, will try to ensure the DV's current market rent assessment is not below what it believes the open market rent is worth. Likewise if your practice (current partners or past and/or current partners) owns its premises you will want to ensure a market rent is assessed.

So what if the DV does not agree with your own surveyor on the open market rent? To challenge the DV is complicated and depends on the exact wording of your lease and on your contract.

One scenario is to appeal to the health secretary. Landlord Primary Health Investment Properties did this after unsuccessfully appealing a three-yearly rent review of the Hereward Medical Centre in Lincolnshire.

The health secretary has delegated appeals to the NHS Litigation Authority. The Litigation Authority's Appeals Unit is intended to distance the PCT and health secretary from rent appeals as setting rents as low as possible is in NHS interests.

Demonstrable Fairness

The Appeals Unit turns for its professional advice to the Valuation Office Agency's chief executive officer to determine the current market rent. They in turn ask a DV to make the assessment, so determining the rent turns full circle. In this case, the company then appealed to the courts.

The health secretary and the Litigation Authority argued that the professionalism of the Valuation Office Agency was such that it would not possibly be influenced by the DV's negotiations with the company's surveyor. However, the part of the directions for dealing with appeals includes calling for the DV's file, and this was not disclosed to the company or its surveyor.

The company won its case on the ground of apparent bias and its appeal to natural justice, which relies on the famous 1924 judgment where the judge said that justice must be 'seen to be done'.

The health secretary then argued in vain, that under the directions, the PCT was not obliged to reimburse the current market rent, but only the sum within its budgetary targets. Potentially this opens up a new can of worms when PCTs do not get their way, although the court took evidence that in all cases the PCT had always reimbursed all the current market rent.

As with all cases, there are particular facts that could mean an appeal on these grounds would not succeed in the future. However, the unfairness of the Valuation Office Agency being the negotiator for the PCT and arbiter on appeal, has been put to bed and the need for DVs to negotiate fairly has been established.

In future premises market value appeals must be referred to independent experts.

CASE NOTES

- On 24 March 2009 a primary care property company won a case on how appeals on valuations for reimbursement purposes should be settled.
- The verdict has important implications for GP practices.
- The case was brought when an appeal on the rental value of a medical centre was not referred to an independent expert.
- The company won on the grounds of apparent bias and its appeal to natural justice, which 'must be seen to be done'.

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