BMA Law

Premises seminar.

Legal considerations.

Presented by: Rob Day

What will be covered?

Legal considerations needed in connection with….

1. Premises that are leased
2. Premises that are owned within the partnership
3. Premises that are owned by partners outside the partnership
4. A merger (premises specific points to note).

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Topic 1

Premises are leased.

What is a lease & why are they important?

What is it…

- A contractual document.
- Core elements:
  - Exclusive possession
  - A fixed or periodic term
  - At a specified rent.
- It is a separate and distinct contract to your core NHS contract. If one ends it is not automatically the case the other will.

Why is it important…

- It clearly identifies the extent of the demise.
- It clearly identifies the rights, obligations and restrictions which will benefit and bind you.

Lease essentials.

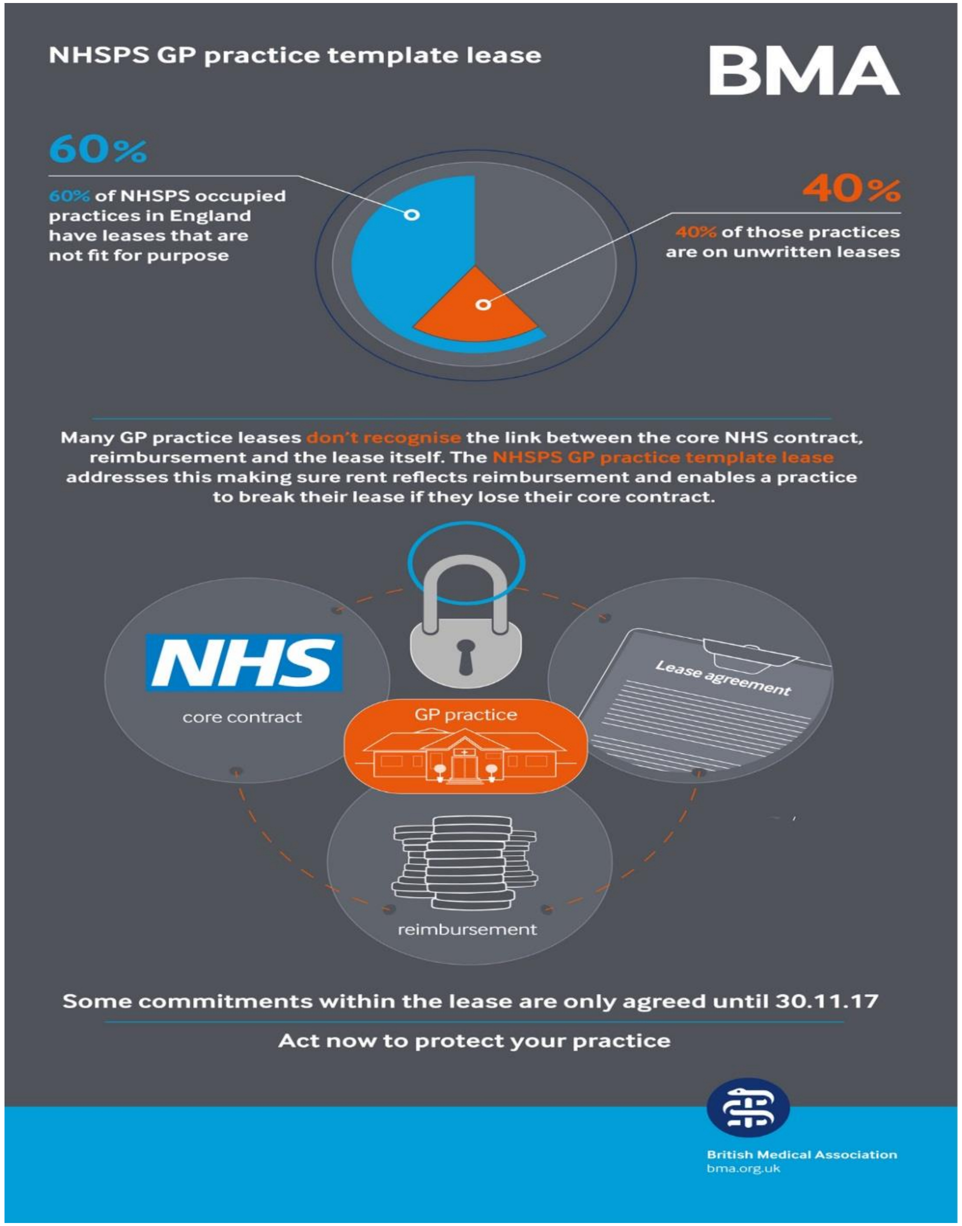
1. Break clause.

- Essential to have a break clause should you cease to hold a "core contract" (whether voluntarily or its terminated).

- Consider your future plans and whether a break clause is necessary (e.g. relocation to a new site).

- Make sure that the break clause is carefully drafted….

    - What is the period of time (if any) in between you ceasing to be a contracted practice and you having the ability to end the lease [competing issues: lack of reimbursement vs need to have time to vacate]
    - What are the pre conditions for the break to be effective?
        - Vacant possession?? (this is a very high bar/ requirement!)
        - What sums need to be paid (all sums or just the rent)?


NHSPS GP practice template lease
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60%
60% of NHSPS occupied practices in England have leases that are not fit for purpose
40%
40% of those practices are on unwritten leases
Many GP practice leases don't recognise the link between the core NHS contract, reimbursement and the lease itself. The NHSPS GP practice template lease addresses this making sure rent reflects reimbursement and enables a practice to break their lease if they lose their core contract.
NHS
core contract
GP practice
Lease agreement
reimbursement
Some commitments within the lease are only agreed until 30.11.17
Act now to protect your practice
British Medical Association
bma.org.uk

Lease essentials.

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2. Rents (initial & revised rents) [AND VAT]

- These must reflect what the DV agrees as being the Current Market Value
- Make sure all initial rents (and shared area rents) are agreed with the DV before entering into the lease
- Make sure all rent reviews track the level of reimbursement. ***DO NOT SIGN RENT REVIEW MEMORANDUMS UNTIL THE DV APPROVES THE RENT***

3. Service charges

- Be clear on what your exposure could be (particularly management costs!).
- Remember only a proportion of such costs are reimbursable (40% of those that are)
- Consider if a cap is needed.
- Make sure services are provided on a not for profit and transparent basis.
- Have a clear dispute resolution mechanism.

Lease essentials.

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4. Repairs & maintenance

- Need to know the extent of your obligations (**starts with understanding the demise – clear plans & descriptions**)
- Need to avoid assuming liability for historic issues (schedule of condition)
- Need to exclude items you don't use.
- Need to take care to consider big ticket items (air con systems, lifts etc.)
- If you exclude items make sure they don't inadvertently end up in the service charge.

5. Rights granted

- What right do you specifically need to use and enjoy the premises?
- Parking spaces, permitted use (not too restrictive), permitted hours (which provide for opening hours beyond "core hours".

Lease essentials.

6. Term

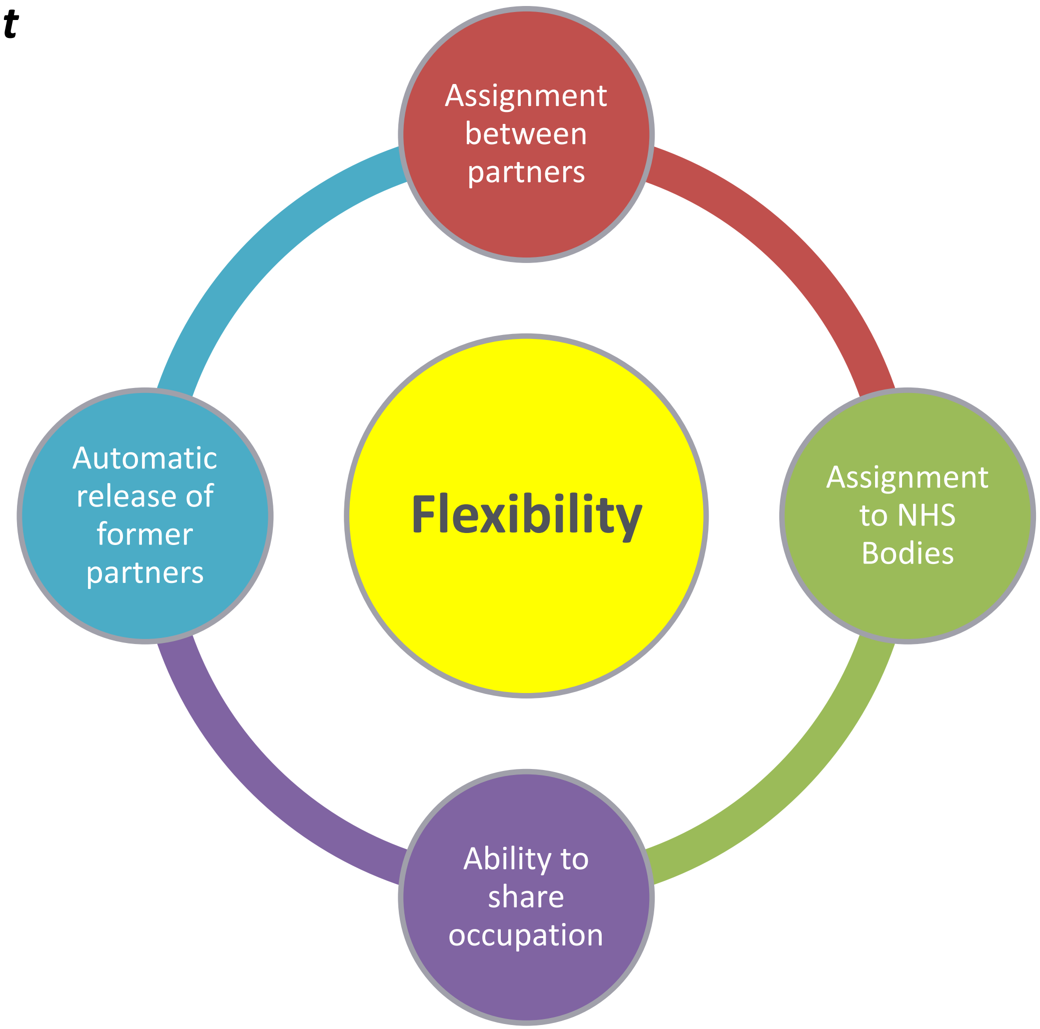
- Be clear what the length of lease will be. Commercial decision.

7. Security of tenure

- Automatic position under the LL&T Act 1954 is that “business tenants” are protected and have a statutory right to remain at the end of the lease term.
- Circumstances where this doesn’t apply:
  - Excluding security of tenure
  - Other specified events (non payment of rent, LL wanting to redevelop, LL wanting to use the premises themselves etc.
- WHAT IF THE LL REFUSES TO GRANT ME A PROTECTED LEASE… consider a contractual right to renew.

Lease essentials.

8. Assignment



Other points to note re leases.

- ***NHSPS / CHP premises***
  - funding is available up to the end of November 2017 to encourage practices to enter into leases who are in occupation of their premises
  - SDLT & (a proportion of) legal costs

- **Heads of Terms**
  - Negotiations usually start with Heads of Terms.
  - Make sure they are noted to be “subject to contract”.

- **Sale & lease backs**
  - Beware of the competing issues: maximize value vs onerous lease terms.
  - From a tenant/ practices perspective all those things previously mentioned should (ideally) be negotiated.

- **Searches & enquiries**

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Topic 2

Premises are owned inside the partnership.

Essentials to consider.

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- Consider what the position is with the Cost Directions:-

  - If you own it outright then you will get "notional rent" based on a hypothetical lease [**note the horror of the permitted use provision**]
  - DV will only ever reimburse the CMV. "what would a premises subject to the hypothetical lease be let for on the open market".
  - If you are unhappy then challenge the assessment via NHSLA

  - If you have acquired it and have a mortgage you may have cost rent paid [**beware the importance of notifying NHSE of a change in lender or interest rate!!**]

  - If you are carrying out works and getting a grant – CHECK THE TERMS (particularly the level of rent abatement)

Essentials to consider.

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- Partnership Agreement is essential! It must be clear.
- Avoid the default position under the PA 1890.

HOW: <u>ASK YOURSELF KEY QUESTIONS AND DOCUMENT THE ANSWERS.</u>

1. Firstly is it held inside the partnership?
2. Are all partners to buy in OR have they all bought in?

   Is there a need to distinguish between property owning partners / non property owning partners.

3. Will all new partners be required to buy in?

Essentials to consider.

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4. Will all retiring partners be bought out?

- Put & Call options? Avoids binding contracts which could undermine BPR on death.
- Over what period of time?
  - If not immediately will there be a subsequent option to buy?
  - Will they continue to receive a share of notional rent?
- If they aren't to be bought out consider
  - the tax consequences of transferring an interest outside of the partnership (SDLT), and
  - the possibility of non partners owning a share and a loss of control.

Essentials to consider.

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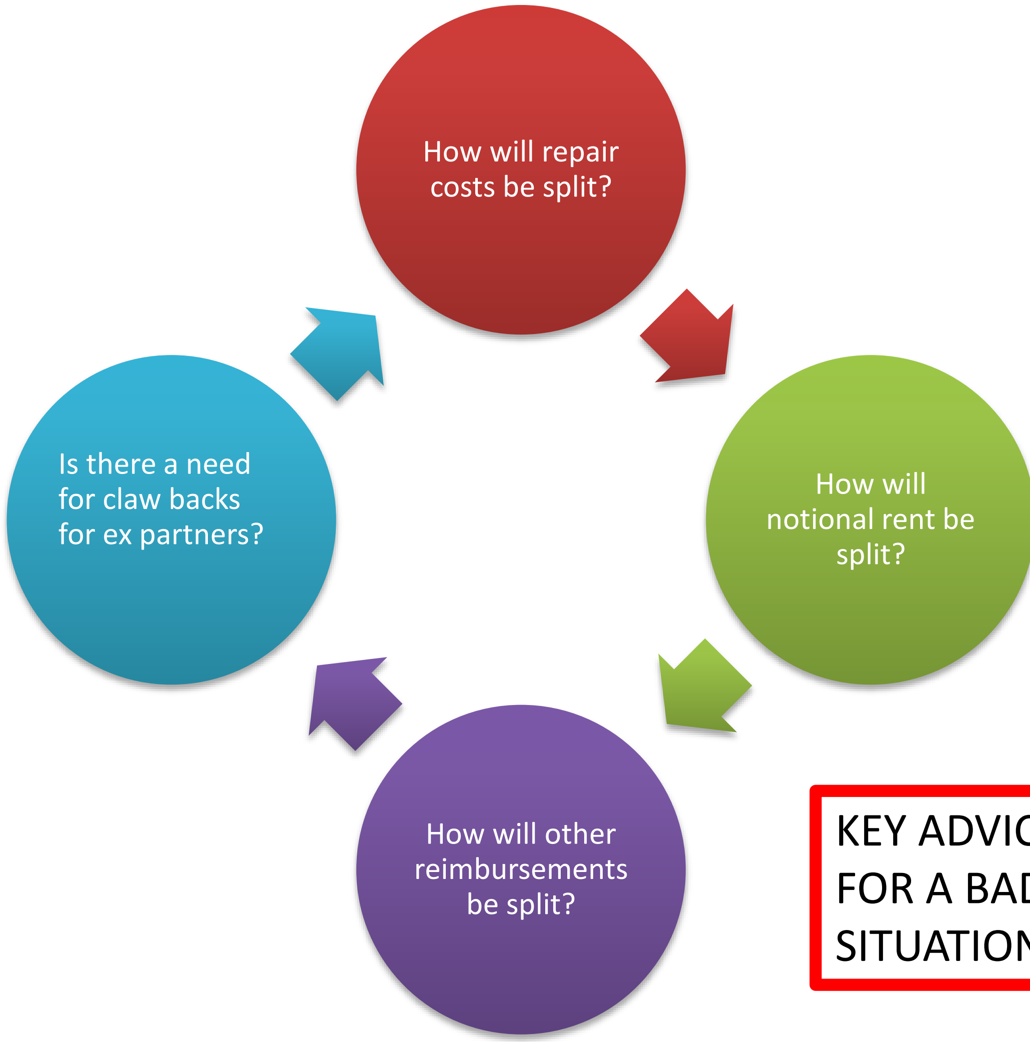
4. How will the premises be valued when it comes to buying in or out? "Market value" is too vague! You need to aim for consistency.

What do we use in our Agreements:

"**Market Value:** means the open market value of the Premises to be valued by reference to the principles identified in the RICS Valuation – Professional Standards (the Red Book) or such other standards as are from time to time introduced by RICS to replace them and having regard to both the existing use of the premises and the benefits of any income or rent reimbursement (whether real or notional) paid in respect of the premises but disregarding any element of personal goodwill which may attach to them as a result of the occupation of them by the partners or any of them or by any deceased or retiring partner immediately prior to the death or retirement of that partner.

follows the current cl recommended by GPC – Valuing Surgery Premises – last revised in 2007.

Other considerations.



KEY ADVICE: ALWAYS COVER FOR A BAD LEAVER SITUATION.

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Topic 3

Premises owned outside the practice.

Key considerations.

- Similar considerations to those required if held inside the partnership:-
  - Are they to be bought out?
  - If so at what value?
  - Who is to be responsible for repairs/ maintenance?
- Crucially the Partnership Agreement is unlikely to cover these issues (particularly if you have non partner property owners who are not a party to the Agreement!).
- Consider a Property Deed / Option Agreement to cover these arrangements in doing so….

Key considerations.

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- (In relation to the Option Agreement) there are core things to cover :-
  - What is the option period? (i.e how long will it subsist)
  - Is it a one time only exercise?
  - At what price can it be bought?
  - Is there to be a minimum price that must be met?
  - Is it to be a put and call option?
  - Can the property/ share be bought in tranches?
  - Who has the benefit of the option (the partners of the practice)?
- Consider the need for a lease back.
  - In doing so weigh up the risks that the practice needs to protect against against what the landlord will want

Key considerations. Using SPVs

- Why? Pensions, liabilities, estate planning…

- How do I set up an SPV (Ltd Co)

  - Establish comany at Companies House
  - Draw up its Articles (governing rules)
  - Draw up a Shareholders Agreement
    - Decision making,
    - Restrictions,
    - Dealings with shares (voluntary and involuntary transfers)
    - Drag & Tag along (shares and property sale)Similar considerations to those required if held arrangements.
  - Transfer the property into the company
  - Lease the premises back to the practice.

(“Tax advice alert”)

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Topic 4

Merging.

What is a merger?

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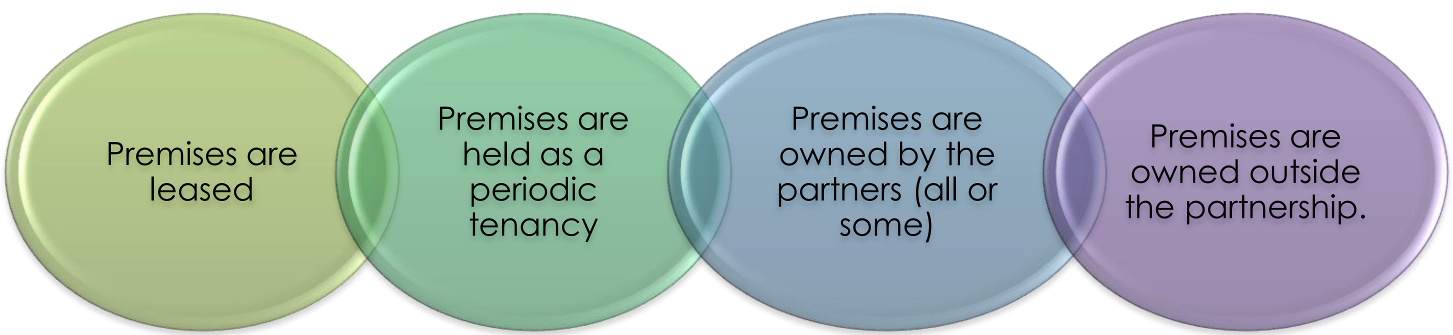
A confusing phrase as it is used:-

i) In take over situations

ii) Where one or more practices join another

iii) Two or more practices create a brand new practice

In all cases you effectively have separate businesses coming together. These businesses, and the way in which they hold their premises, will almost certainly vary.



Key considerations: Leased premises.

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- Check the lease terms…"the eyes wide open principle"
  - Can I assign the lease with ease?
    - Can I assign to aproperty arm of the merged practice – unlikley due to the PCD – reimbursements made to the contractor.
  - Can I use the premises for the purposes we need them for (permitted hours / permitted use)
  - What are the repairing obligations? Do these need to be ring fenced?
  - By assuming the lease will you expose yourself to shortfalls between costs and reimbursements?
  - Is there a break clause in the lease which ties into your plans?

Key considerations: Periodic tenancy.

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- What is a periodic tenancy?

- What are the benefits:-
  - Flexibility.
  - Automatic security of tenure after 6 mths.

- What are the risks:-
  - No real long term security.
  - A lack of certainty as to terms (repairs etc.).
  - There is a risk NHSE will withhold reimbursement.
  - There is a risk that CQC will raise issue with the lack of definitive terms.

CONSIDER IF IT IS APPROPRIATE TO FORMALISE THE ARRANGEMENT OR CONSIDER WHETHER (IF TAKING THE PREMISES OVER) YOU NEED ASSURANCES BACKED UP BY WARRANTIES/ INDEMNITIES

Key considerations. Premises owned

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- Ultimately **<u>three</u>** questions:-

  Will it be bought/ transferred into the merged practice?

  - If it will be bought/ transferred will it sit inside the “partnership” or sit outside (possibly in a Ltd Co. / SPV)
  - At what price? This can be a big sticking point if the way in which premises are valued differs from practice to practice.
  - How will this be funded? Will it be bank borrowing or introduced as capital?
  - Remember that a merger is a momentary event. Make sure you are covering the handling of the property going forward.

Key considerations. Premises owned

Will it be retained and leased back?

- Make sure the terms are clear. Conflicting interests may rear their head:
  - Ability to break against security of a tenant
  - Rents being at market level to those being at a level equal to reimbursement
  - Repairs falling squarely on the tenant or some being assumed by the landlord (schedule of condition)

- Is there to be an option agreement to enable it to be bought in at a later date?
  - What is the option period?
  - At what price can it be bought?
  - Is it to be a put and call option?

Will it be retained?

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Thank you.

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