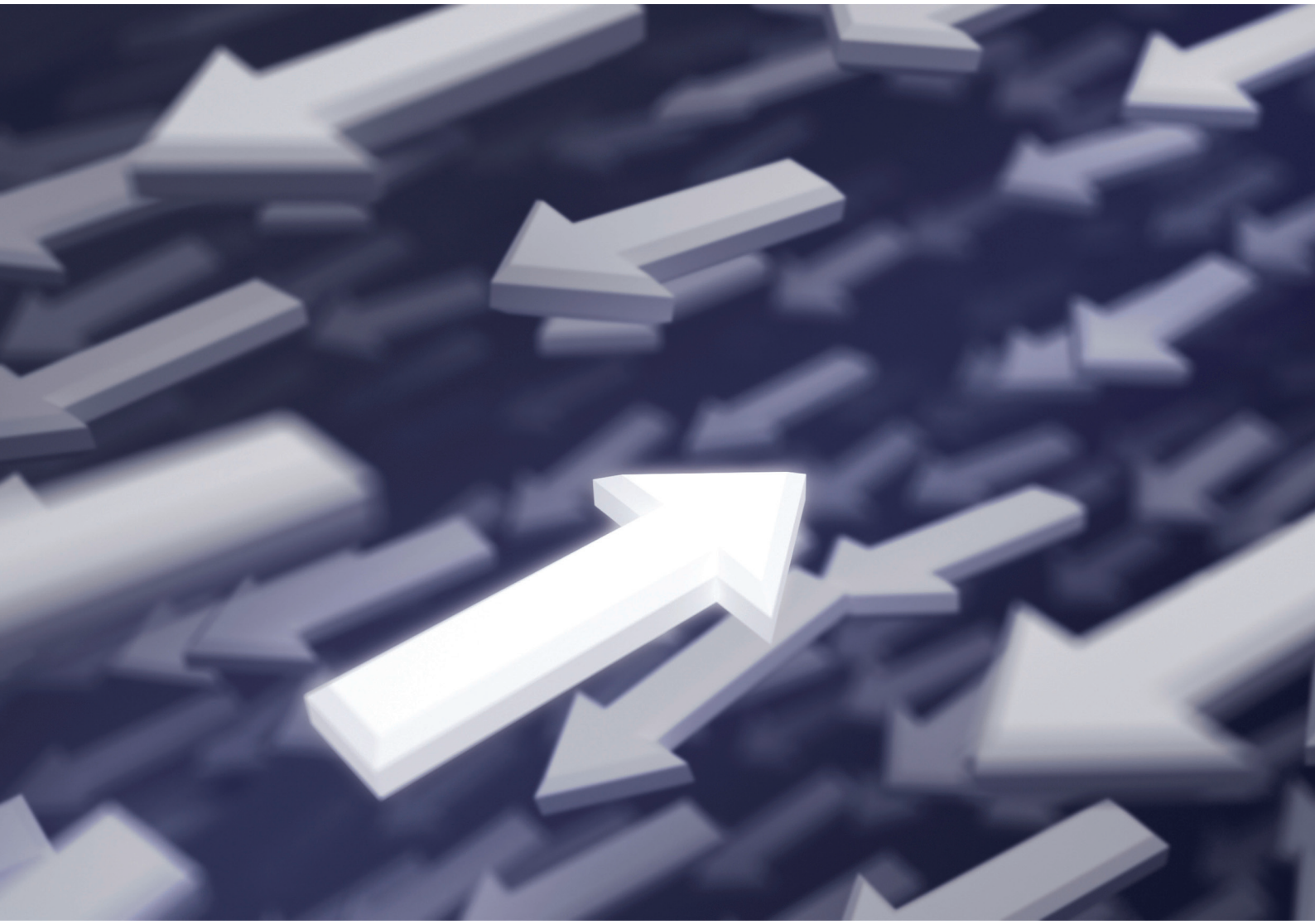
RICS guidance note

RICS Professional Guidance, UK

# Surveyors acting as independent experts in commercial property rent reviews

9th edition



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## Acknowledgments


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# Contents

# Foreword

The swift, efficient and proportionate resolution of disputes is flavour of the decade. Recent reforms of court procedures are intended to serve this purpose. The Civil Procedure Rules and associated commentary now run to over 2,000 pages; so they are not for the faint hearted. But the resolution of disputes in the courts is the last resort. In the private sector the process of arbitration was overhauled and modernised in the *Arbitration Act* 1996. But even that runs to over 100 sections and the case law is growing.

Expert determination, by contrast, is purely contractual. There is no legislative underpinning; and no procedural code. Unlike both judges and arbitrators an expert determining a dispute brings his or her own knowledge to bear on the issues, and is entitled to form a view based entirely on his or her own expertise, without the need for evidence. Again, unlike both judges and arbitrators an expert is potentially vulnerable to claims in negligence.

It is all the more important, therefore, for those appointed to act as independent experts to have access to guidelines about how to conduct both themselves and also how to conduct the dispute to be resolved.

This guidance note, produced by the RICS Dispute Resolution Professional Group, fulfils that function admirably. It describes the whole process from the acceptance of the appointment through to the conclusion of the dispute, including those rare occasions when the expert's decision is challenged in court after the event. The advice it contains is clear, practical and concise. Unlike some so-called Handbooks, you do not need well-developed biceps to use it.

I have no doubt that it will be essential reading, not only for appointed experts but also for anyone participating in an expert determination.

**Sir Kim Lewison**, A Lord Justice of Appeal,

Royal Courts of Justice,

Strand, London WC2A 2LL

# RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations which in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member had acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each surveyor to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the examining Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

## Document status defined

RICS produces a range of standards products. These have been defined in the table below. This document is a guidance note.

| Type of document | Definition | Status |
|---|---|---|
| Standard | | |
| *International standard* | An international high-level principle based standard developed in collaboration with other relevant bodies | Mandatory |
| Practice statement | | |
| *RICS practice statement* | Document that provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members | Mandatory |
| Guidance | | |
| *RICS code of practice* | Document approved by RICS, and endorsed by another professional body/stakeholder that provides users with recommendations for accepted good practice as followed by conscientious practitioners | Mandatory or recommended good practice (will be confirmed in the document itself) |
| *RICS guidance note (GN)* | Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners | Recommended good practice |
| *RICS information paper (IP)* | Practice-based information that provides users with the latest information and/or research | Information and/or explanatory commentary |

# 1 Introduction

## 1.1 Scope and application of this guidance note

This guidance note is designed primarily to assist those who are appointed either by the president of RICS, or directly by the parties to a dispute, to act as an independent expert to determine their dispute. It is also intended to assist the parties themselves and those acting for them by making them aware of the procedures likely to be followed. This guidance note is reproduced, with commentary, in the *Handbook of Rent Review.*

This guidance note is based upon the law and practice relating to expert determinations in England, Wales and Northern Ireland. Expert determination in Scotland, although similar in many respects, has its own guidance note, issued in 2002, *Surveyors acting as arbiters or as independent experts in commercial property rent reviews in Scotland.* This will be updated in due course, and those involved in expert determinations to which Scottish law applies should refer to that guidance note for its full content.

The majority of appointments of independent experts made by the president of RICS are in landlord and tenant matters, notably rent review. Accordingly, this guidance note has been specifically prepared for rent review expert determinations. A separate RICS guidance note for surveyors acting as arbitrators is available, *Surveyors acting as arbitrators in commercial property rent reviews*.

## 1.2 Interpretation

The following words are used in this guidance note with the following meanings:

**CPR**: The Civil Procedure Rules (known as CPR). This is the set of rules governing the procedure of the senior courts and county courts in England and Wales. They can be found at www.justice.gov.uk/civil/procrules_fin/index.htm. These rules are supplemented by Protocols, Pre-Action Protocols, Practice Directions and court guides. The objectives of the CPR are to make access to justice cheaper, quicker and fairer.

**DRS**: the RICS Dispute Resolution Service.

**Direction**: a requirement (also called a 'Procedural Instruction') laid down by an independent expert (see paragraph 9.4).

**Evidence**: this may be evidence of fact (whether direct or hearsay) or expert (opinion) evidence. The weight to be attached by independent experts to evidence will depend on various factors, the importance of which may vary from case to case.

**Expert witness**: a witness called by a party to give expert opinion evidence by virtue of experience, knowledge and expertise of a particular area beyond that expected of a layperson. The overriding duty of expert witnesses is to provide independent, impartial and unbiased evidence to independent experts – covering all relevant matters, whether or not they favour the client – to assist independent experts in reaching their determination (see Section 10).

**Hearsay evidence**: evidence by way of the oral statements of a person other than the witness who is testifying and/or by way of statements in documents, offered to prove the truth of what is stated.

**Independent expert**: a surveyor appointed either by the president of RICS or by the agreement of the parties to determine the rental value of a property in a rent review dispute.

**Privilege**: a rule that protects a document from disclosure, either because it was written without prejudice, or because it is covered by legal professional privilege (see paragraphs 18.3 to 18.5).

**Representation(s)**: an oral or written statement that may, depending on the circumstances and context, be used to refer to one or more statements of case (i.e. documents setting out or rebutting the case that is to be proved); an assertion of fact(s); expert opinion evidence; and an advocacy submission. Because of its lack of precision, this generic term is best avoided, although it is used for convenience in this guidance note.

**Submission(s)**: the presentation by way of advocacy of a matter in dispute to independent experts. The term is occasionally used loosely in the surveying community to refer to evidence of fact or expert opinion evidence presented, or to a mix of such expert opinion evidence and advocacy; such usage is misplaced and should be avoided.

**Surveyor–advocate**: a surveyor who presents to a tribunal a client's properly arguable case as best as they may on the evidence and facts available. The advocacy role is markedly different from the role of an expert witness or a negotiator (see Section 10).

**Terms of Engagement**: terms issued by the independent expert which define the extent of the obligations being undertaken (see Section 7).

**'Without prejudice'**: a rule that generally prevents any reference to written or oral statements made in a genuine attempt to settle an existing dispute. There are a number of established exceptions to the rule explained in paragraph 18.5.

**Witness of fact**: a person who, usually on oath or solemn affirmation, gives evidence before independent experts on a question of fact.

While in general this text aims to be gender neutral, on occasions where masculine terms only are used (such as in legislation quotations) these should be taken as also referring to the feminine (e.g. 'she', 'her'), and to 'they' or 'it' (in the case of a corporate body), as the context so requires.

References to the singular also include the plural and vice versa where the context so requires.

## 1.3 Comparison of expert determination with arbitration

Although the duties and suggested procedures for independent experts and arbitrators are similar in some respects, they are markedly different in others. To emphasise that difference, RICS has chosen to issue separate guidance in respect of each. This guidance note therefore deals with expert determination alone. The main differences between independent experts and arbitrators as regards commercial rent reviews are set out in the table in the Appendix at the end of this guidance note.

## 1.4 Further reading

While this note will provide adequate guidance for surveyors acting as independent experts in the great majority of cases, it must be stressed that, in some cases, surveyors will need to have a wider and deeper understanding of the law and procedure than it has been considered appropriate to provide here.

Surveyors wishing to enhance their knowledge of expert determination procedure and practice are recommended to attend one of the courses conducted by RICS, the Chartered Institute of Arbitrators or the College of Estate Management. Independent experts should also have access to a library containing the standard legal textbooks on the subject, which are the *Handbook of Rent Review, and Expert Determination* (see Bibliography for further details). In addition, numerous papers are published by ARBRIX and are available to members on the website.

# 2 The nature of expert determination

## 2.1 Introduction

Where parties to a lease intend that disputes as to rental value shall be determined not by arbitration but by a surveyor exercising their own professional expertise and judgment, they may call the surveyor an 'independent expert', 'independent valuer', 'independent surveyor' or 'third surveyor'. In this note, the single expression 'independent expert' is used. There is no legislation, and little case law, governing the appointment or conduct of a surveyor acting in this capacity, and this note therefore seeks to set out the relevant guidance by analogy where appropriate with cases concerning arbitration and, in other cases, from first principles.

## 2.2 Essential requirements

It is vital that surveyors appointed to act as independent experts recognise that there are important differences between an arbitrator and an independent expert. These are summarised in the table in the Appendix at the end of this guidance note. The following essential requirements should be stressed:

a) independent experts are appointed in order to provide an impartial rental valuation based on their own investigations, knowledge and experience

b) independent experts may be liable for damages if either party is able to show that the independent expert has been negligent, either in the assembly of material relevant to the valuation or in the application of professional skill and judgment to that material

c) independent experts must ensure that they settle Terms of Engagement with the parties in writing before commencing the procedure (if any) that they have chosen to adopt, because later they will be unable to obtain support from statute; and

d) independent experts must deal with the specific issues referred to them: a failure to do so may result in difficulty in recovering their remuneration or, worse, lead to an action against them for negligence.

# 3 Powers and duties of the independent expert

## 3.1 Sources of the independent expert's powers and duties

Parties who include in their agreement a clause for settling by expert determination any dispute within the scope of that clause are thereby referring those disputes to private determination rather than to a court of law, or other process (such as arbitration) that is overseen by the courts. Since it is the parties who give the independent expert the authority to act, they can also agree the principles and procedure that are to apply in any dispute that may arise.

The first rule for independent experts is therefore to look at the expert determination agreement (in this context, typically the rent review clause or dispute resolution clause in the lease) to see what is provided. There is no statutory framework to rely on and little case law that is of assistance.

## 3.2 Contract with the independent expert

The contract with the independent expert will consist of:

- the appointment (through RICS or privately)
- the lease or other contract, together with any variations or supplemental deeds
- the Terms of Engagement agreed with the parties, including fee arrangements; and
- additional terms implied by the common law and statute (see paragraphs 3.6 to 3.14).

The parties may impose reasonable additional requirements on the independent expert by agreement between them, and the independent expert should comply unless those requirements make it impossible to carry on. The independent expert will, however, be entitled, unless this is precluded by the fee arrangements, to charge for any additional work involved.

## 3.3 Appointment by RICS

The appointment of an independent expert by the signing of the appointment letter by the president of RICS does not in itself bring into effect a tripartite agreement between the parties and the independent expert, for the independent expert must accept the appointment in order for it to be effective. The president of RICS is not a party to the contract.

Before accepting any appointment, independent experts must satisfy themselves that they have any qualifications and experience required for undertaking the task (see Section 4). Independent experts must pay particular attention to the special requirements set out within the lease or so advised by the parties or RICS. Independent experts should also make the required declarations in respect of involvements and conflicts of interest (see Section 5).

## 3.4 Private appointment

In the case of a private appointment, independent experts will only be bound to do the work upon acceptance of their appointment from the parties. Independent experts will need to reach a written agreement with the parties as to the basis on which they will act, including the fee basis and any relevant limits to the work (see Section 7).

Independent experts must make any declarations of involvement, and state whether they consider such involvement amounts to be a potential conflict of interest or not, in the same way as they would to RICS.

## 3.5 Other matters agreed between the parties

As expert determination is a consensual procedure, the parties are free to agree how their dispute is to be determined. Thus, it is open to them to override the mechanism laid down in the lease (including any special requirements as to the appointment), and agree a different procedure for the determination of their dispute, which the independent expert must then respect, provided of course that the independent expert agrees to it in the first place.

## 3.6 Duties imposed by common law and statute

The common law and statute (primarily the *Supply of Goods and Services Act* 1982) imposes a number of additional duties upon the parties and the independent expert. Some of these may be varied or even avoided altogether by the terms of the dispute resolution clause in the lease or subsequent agreement between the parties. The principal duties are as follows (the first being a duty upon the parties, with the remainder applying to independent experts):

a) to pay independent experts a reasonable fee for their determination (see paragraph 3.7)

b) to act fairly (see paragraph 3.8)

c) to carry out the determination within a reasonable time (see paragraph 3.9)

d) to conduct independent investigations (see paragraph 3.10)

e) to apply the law (see paragraph 3.11)

f) to reach a final and binding decision (see paragraph 3.12)

g) to maintain privacy (see paragraph 3.13); and

h) not to delegate (see paragraph 3.14).

## 3.7 Duty to pay independent experts a reasonable fee

Independent experts should be careful to agree with the parties at the time of accepting the appointment suitable terms for remuneration (see Section 25). If they fail to do so, they cannot then refuse to proceed with the determination on the ground that the parties have not agreed the basis of their fees or other desirable additions to the contract. At this point, independent experts are obliged to proceed to carry out an independent valuation in the same professional manner in which other similar valuations are ordinarily carried out.

However, the parties are obliged to pay independent experts a reasonable fee for doing so. If disputed, this fee is likely to be at a reasonable hourly rate.

## 3.8 Duty to act fairly

The common law usually requires that decisions made by a tribunal should be procedurally fair, or (to put the matter another way) should comply with the principles of 'natural justice'. This in turn means that a) parties should have the right to an unbiased tribunal; and b) parties should have the right to make representations before a decision is made.

There can be no dispute with the application of point a) to independent expert determinations: independent experts must act impartially (see paragraph 5.2). However, the application of point b) will obviously depend upon the terms of the dispute resolution clause or other contract between the parties. If, for example, this provides that the independent expert should proceed to his or her determination without input from the parties, then there will be no occasion for representations to be submitted to the independent expert.

However, even where the dispute resolution clause simply requires a determination without further ado, independent experts should be careful to act fairly. This will include ensuring that communications are copied to both parties, and that conversations do not take place with one party only (see paragraphs 12.7 to 12.9). This should be contrasted with a duty to act reasonably, which the courts have held not to apply to an expert determination. However, if independent experts do not act in accordance with the standards commonly observed by chartered surveyors, they may be liable to the parties in negligence, and may be subject to disciplinary procedures (see paragraphs 1.2 to 1.3).

## 3.9 Duty to carry out the determination within a reasonable time

Before taking up their appointment, independent experts are asked by the DRS to confirm that they will be able to undertake the task with all reasonable speed (see paragraph 4.1). Once they accept, they are under an implied duty to conduct the reference and provide their determination within a reasonable time (see s. 14 of the *Supply of Goods and Services Act* 1982).

This duty may of course be relaxed or tightened by agreement between the parties, and independent experts should therefore in all cases be careful to ensure that they are able to comply with the duty. This is discussed further in paragraph 23.9.

## 3.10 Duty to conduct independent investigations

In what is probably the greatest difference to arbitration, which involves the judicial function of deciding between rival contentions and evidence, the purpose of an expert determination is to ascertain the truth. Independent experts will therefore be bound to carry out their own investigations as part of this task, unless a) the dispute resolution clause or other agreement between the parties (usually for reasons of cost) limits the extent to which they are able to do so; or b) the information supplied to them by the parties (or other information to which they are already privy by virtue of their expertise) is sufficient for that purpose.

This important topic is examined in detail in Section 13.

## 3.11 Duty to apply the law

Independent experts are expected to apply the law when reaching their determinations.

## 3.12 Duty to reach a final and binding decision

Independent experts are commonly instructed to arrive at a rental value. On occasion, they may be tempted to produce a determination involving alternative findings (i.e. one that states that the rent would be £x were assumption a) correct, but £y on the basis that assumption b) is correct). This must be avoided. Following the determination, the parties are entitled to know what rent is payable, and alternative findings will not provide them with a conclusive result.

## 3.13 Duty to maintain privacy

Expert determinations are private proceedings, and it is therefore implicit that independent experts are bound a) not to reveal the course of the proceedings or their outcome to outsiders; and b) to maintain privacy by making appropriate Directions (see paragraph 16.2).

## 3.14 Duty not to delegate without the parties' consent

Independent experts are chosen by the parties for their expertise. Accordingly, unless the terms of reference permit otherwise, independent experts must carry out the whole determination themselves. Failure to do so may impair the determination, and may render the independent expert liable in negligence.

The principle stated in general terms above does not, however, preclude independent experts from making use of routine administrative assistance, provided that the assistance is given under their supervision, and they can vouch for its accuracy. The distinction that has to be drawn is between the delegation of responsibility, which is not permitted, and the assignment of the performance of routine, time-consuming tasks, such as arranging inspections or helping experts with the measurement of buildings, which is permitted.

Although, therefore, the starting point for independent experts to consider is that they should aim to carry out every single aspect of the task referred to them, common sense suggests that the parties will not wish to be charged fees at the expert's full charging rate for routine work that could justifiably have been assigned to an assistant without detracting from the independent expert's function.

However, where problems outside the range of independent experts' expertise and understanding arise (e.g. where a valuation surveyor is required to take into account issues of structural or mechanical engineering, or highly specialised valuation issues as to part of a property), independent experts should provide in their Terms of Engagement that they reserve the right to seek such advice (see paragraph 7.4). Should they fail to reserve this right, independent experts may encounter significant problems as the reference proceeds.

# 4 Steps prior to appointment

## 4.1 Application for appointment

Independent experts may be appointed either privately or via an appointing body, typically the president of RICS. The application to the president for the appointment of an independent expert is made in writing, usually on the form obtainable on application to the DRS or from the RICS website, www.rics.org. The application will not be processed until the appropriate non-refundable fee has been received by the DRS.

## 4.2 Matters to check upon invitation

When surveyors are asked to accept an appointment to determine a dispute, there are a number of matters that must be checked before acceptance. In the case of an appointment by the president of RICS, some of the matters are listed in the letter or form sent out by the DRS (see paragraph 4.3). The full list of matters to be checked may be summarised as follows:

a) Does the appointing body have authority to appoint? (See paragraph 4.4.)

b) Is the surveyor to act as arbitrator or as independent expert, or in some other capacity (such as mediator)? This is discussed in paragraph 6.6.

c) Is the surveyor correctly appointed? (See paragraph 6.2.)

d) Does the surveyor meet the criteria for the task? (See paragraph 4.5.)

e) Is the surveyor fit to take the appointment? (See paragraph 4.5.)

f) Are there any conflicts of interest that would prevent the surveyor accepting the appointment? This important topic is dealt with in Section 5 of this guidance note.

g) Will the parties accept the surveyor's Terms of Engagement? This subject is considered in Section 7.

h) Does the surveyor have appropriate professional indemnity cover? (See paragraph 4.6.)

If the surveyor is not sent the copy of the lease (or other document containing the independent expert agreement) at this stage (which will commonly be the case), then it may not be possible to be certain about some of these matters, in particular, points b) and c). In such circumstances, surveyors should ask for a copy of the lease as soon as the appointment is made (see paragraph 6.4).

## 4.3 Invitation for appointment by RICS president

In the case of an application for appointment by the president of RICS, the person considered suitable for appointment receives a letter or email from the DRS asking for confirmation about a range of matters concerning their suitability for appointment.

The questions from the DRS on the current email response form are as follows:

1. Does the subject matter fall within the sphere of your own professional practice, not merely that of your firm?
2. Can you undertake the task without delay or unnecessary expense?
3. Do you have appropriate professional indemnity cover?
4. Have you made appropriate enquiries, and are you satisfied you have no current involvements that would give rise to a real or perceived conflict of interest?
5. Have you made appropriate enquiries, and are you satisfied there are no involvements within the past five years that give rise to a real or perceived conflict of interest?
6. Can you confirm that you are not currently acting as an arbitrator or independent expert in another matter which would conflict with this appointment?
7. Do you comply with any special requirements (if stated) which may be listed in the case details?

The specific wording of this letter/form may be changed over time. In the case of an invitation by letter from the president, the questions will broadly follow the format of the response form set out above. In the case of a private appointment, it will be good practice for independent experts to consider the same matters, even if they are not asked directly.

The response should be treated not as a formulaic exercise in ticking boxes, but rather as a good opportunity for prospective appointees to ask themselves searching questions about their appropriateness for the task. For example, the five-year period with which question 5 deals should be taken as a guide rather than an absolute standard: there may well be matters falling outside that period that should be considered. Conversely, there may be matters falling within the period that might be of no consequence.

In particular, it is undesirable to answer the final question on the letter/form seeking confirmation of compliance with 'special requirements', with a simple 'yes': there should be a full compliance statement in the box at the bottom of the form – for example, 'I confirm that I have 10 years' experience in retail valuation in the Watford area'.

## 4.4 Authority of the appointing body

The request for the appointment of an independent expert may come from the parties themselves, by prior or ad hoc agreement, or it may come from an official appointing body, commonly the DRS acting on behalf of the president of RICS, or the president of the Law Society.

In each case, independent experts should check the terms of the invitation before proceeding further. In the case of a presidential appointment, the DRS does not require the parties to supply a copy of the lease or other relevant document conferring on the president power to make the appointment, and independent experts will therefore have to assume for the time being that the lease does validly confer that power. Once the appointment is accepted, independent experts should immediately request a copy of the lease and check that the appointment has been made correctly and that there are no time constraints or special conditions that were not revealed on the original application (see paragraph 6.7).

In the case of an agreement between the parties, independent experts should check that it is in writing, and whether or not it contains any specific terms. If a copy of the agreement has not been provided, independent experts would be prudent to ask for a copy before proceeding further, and make acceptance of the appointment conditional upon satisfactory provision in the agreement.

## 4.5 Suitability for appointment

Before accepting any appointment, independent experts need to be satisfied that they have sufficient knowledge of the practice, procedures and the law of expert determination, as well as the subject matter of the dispute.

Independent experts should not accept appointments if they consider that they may not be able to deal with the determination within a reasonable time frame.

## 4.6 Professional indemnity cover

The DRS asks on its appointment form whether the prospective appointee has appropriate professional indemnity cover. The question is academic, since the appointee is likely to be a practising professional who will maintain cover as a matter of course.

# 5 Involvements and conflicts of interest

## 5.1 RICS guidance note on conflicts of interest

As the summary of the contents of the letter from the DRS in paragraph 4.2 shows, every effort is made by the president to select a person suitable for appointment, while avoiding any potential conflict of interest.

Given the importance of this subject, RICS has issued a dedicated guidance note *Conflicts of interest*, which covers conflicts and involvements for surveyors acting as dispute resolvers, and gives examples in an appended information paper. The following paragraphs summarise the guidance set out in that note. Reference should be made as necessary to its detailed provisions.

## 5.2 Overriding principle regarding conflicts of interest

The overriding principle is that every independent expert should be impartial at the time of accepting an appointment and must remain so during the entire proceedings until the final decision has been rendered or the proceedings have otherwise finally terminated. Accordingly, if they have any doubts as to their ability to be impartial, independent experts must decline to accept an appointment or, if the reference has already been commenced, bring the circumstances to the attention of the parties.

This overriding principle does not, however, mean that independent experts cannot accept any appointment just because there has been an involvement with one of the parties, as paragraph 5.3 explains.

## 5.3 Conflicts distinguished from involvements

An involvement is simply any relationship between an independent expert and one of the parties, or the property, while a conflict of interest is an involvement that raises justifiable doubts concerning the fair resolution of the dispute.

Justifiable doubts necessarily exist as to independent experts' impartiality if they have a significant financial or personal interest in the dispute. Doubts are also justifiable if a reasonable and informed third party would reach the conclusion that there was likelihood that an independent expert might be influenced by factors other than the merits of the case in reaching a decision.

## 5.4 Mere involvement not a disqualification

It follows from the distinction drawn in paragraph 5.3 that the mere fact that a prospective appointee has a relationship with one of the parties is not an automatic ground for disqualification. Indeed, the prospective appointee's relationship with the parties and the property may be seen instead to demonstrate market knowledge, and therefore to be a part of the rationale for the prospective appointee's selection as the independent expert in the first place. This is more so where the rent review clause requires that the independent expert be sufficiently qualified and have experience in dealing with that particular market sector.

Accordingly, the mere fact that an involvement may exist is not reason enough for prospective appointees to disqualify themselves, or even for the existence of the involvement to be disclosed: prospective appointees must then apply the overriding principle (see paragraph 5.2) and consider whether:

a) the involvement is so trivial that it need not even be disclosed or

b) there is sufficient doubt for the involvement to be disclosed, but not for disqualification (in which case prospective appointees should give the DRS full details and say why there is no conflict); and

c) the involvement is such as to give rise to justifiable doubts as to the prospective appointee's impartiality, in which case it will be a conflict of interest, with the result that the invitation must be declined.

## 5.5 Impartiality distinguished from independence

Although independence is often grouped together with impartiality, with the two concepts sometimes used interchangeably, there is a critical difference between them. Parties rightly expect their independent experts to understand the subject matter of the dispute, and often choose to have a dispute resolved by a surveyor rather than a court because they are looking for technical knowledge and experience to assist in the proper evaluation of their dispute.

This experience with the market will take the form of a number of involvements that may in some cases be said to amount to a lack of independence. Provided, however that independent experts do not allow their judgment to become affected by the lack of

independence – provided that they remain impartial – there is no need for them to be disqualified. Better an independent expert who is acquainted with the subject matter of the dispute, even if dependent in some way, than one who is completely independent, but has no relevant knowledge or experience. Independent experts must be impartial but need not be independent (unless the dispute resolution clause expressly requires this).

Accordingly, while parties are usually concerned to ensure that their independent expert is independent, they are not entitled to insist upon it (unless the dispute resolution clause expressly so requires). Such concerns may sometimes lead to attempts to exclude from consideration a large number of prospective appointees on the grounds that they have, or in the past have had, some connection, no matter how remote, with one of the parties. In some specialist fields, the president could find that he or she was being asked to disregard every specialist. The president cannot properly be placed in that position, if he or she is to perform his or her intended function under the terms of the lease of appointing a suitable person.

## 5.6 Role of the president and the DRS

The role of the president of RICS in appointing an independent expert is, on the face of it, a straightforward one. The president is concerned to select a member with the appropriate expertise who is not precluded from taking the appointment due to a lack of impartiality. Ideally, therefore, the president should be entirely free to exercise his or her discretion as regards both the requirement of expertise and that of impartiality.

However, the DRS, to which this task is in practice delegated has little information available to decide for itself whether a conflict of interest might exist. Instead, it relies upon prospective appointees to carry out their own conflict checks. Prospective appointees are specifically asked to disclose any involvement, in particular any involvement they or their firm have (or have had in the relevant past) with the property, a nearby property or a party to the dispute. If such an involvement exists, prospective appointees are asked to state whether this involvement is believed to constitute a conflict of interest.

The decision as to whether such an involvement may or may not give rise to the possibility or appearance of bias, or will in any way affect the potential appointment, is a matter for the president, not the prospective appointee. Under no circumstances should prospective appointees make any contact with the parties or their representatives at this stage.

## 5.7 Investigations for prospective appointees to carry out

Prospective appointees should make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause their impartiality to be questioned. That is not because prospective appointees are liable for a conflict about which they know nothing – for of course they are not. Rather, if and when the facts amounting to a conflict emerge, prospective appointees will rightly be criticised for the failure to have made the enquiries that would have allowed the parties to make alternative arrangements at an earlier, less costly, stage.

The checks should include:

a) current and historic relationships between the prospective appointee and the subject matter of the dispute

b) current and historic relationships between the prospective appointee and the parties to the dispute

c) more remote relationships, such as those involving the prospective appointee's employer or partners, or organisations associated with the parties; and

d) other involvements that may be seen as related in comparable and/or associated terms in so far as they may either influence or be influenced by the result of the prospective appointee's decision.

Potential appointees must, therefore, have an appropriate system for undertaking involvement checks within their firms that is reliable and efficient. The nature of this system will depend on the size and type of the practice. It is also important to have a system to prevent conflicts arising subsequently by partners or other members of staff accepting instructions from parties, or in connection with nearby properties that might give the appearance of creating bias.

Although the DRS sets a five-year time limit for the scope of the investigation, this should not be treated as absolute: prospective appointees are expected to exercise discretion and caution with respect to matters immediately outside the strict limit, e.g. an involvement with the building on the previous review is likely to be more than five years ago, but should nevertheless be disclosed.

## 5.8 Disclosure of involvements

Disclosure of an involvement to the president does not mean that the surveyor will not be appointed. Upon receipt of details of any involvement, the president will have regard to the overriding principle set out in paragraph 5.2. It is inconceivable that the president would knowingly appoint a person with a real pecuniary or other interest in the outcome of the dispute. A very remote or indirect pecuniary interest would not, however, disqualify an appointee.

The president would not appoint someone whose appointment would raise a real possibility of bias in the eyes of a reasonably minded person. The test is not what the parties to the dispute or their representative believe, or what in fact would happen or has happened, but rather one of perception. Once aware of all the relevant facts, the president must consider whether a reasonably minded person could perceive a real possibility of bias if the member in question were to be appointed.

The president may take the view, based upon the information supplied by the prospective appointee, that the member concerned could not be seen to be impartial. In such circumstances, the president will seek another prospective appointee.

Alternatively, the president may take the view that the matters disclosed are remote and should not raise a real possibility of bias in the eyes of a reasonably minded person. In this situation the appointment is made without disclosure to the parties.

In the further alternative, the president may pass on the prospective appointee's disclosure to the parties or their representatives, inviting comments within a specified period of time. At that stage, the president will consider and give due weight to any objections but will not be bound by them, and the final decision as to the appointment will be the president's alone.

## 5.9 Disclosure of involvements after appointment

Once appointed, in the interest of transparency, independent experts may consider it appropriate again to disclose any involvements to the parties. This is particularly so in cases with any involvements with the parties themselves. However, independent experts should not allow a party to use this information in an attempt to persuade them to resign. By this stage, assuming he or she had been furnished with all the facts, the president will have been satisfied that the independent expert is suitable. Only the parties by agreement, the independent expert or the courts can decide otherwise. Independent experts should ask the parties to inform them immediately if the parties consider any such involvement gives rise to a conflict.

Of course, if independent experts become aware after their appointment of an involvement that may amount to a conflict, then that is something that should be disclosed immediately to the parties, without regard to the fact that the expert determination may by then have reached an advanced stage (see paragraph 5.2). The president has no further role to play at this stage, and should not therefore be consulted.

Section 8 sets out the steps that independent experts should take in the event that a subsequent involvement comes to light.

## 5.10 Failure to disclose involvements

Where a surveyor wilfully fails to disclose an involvement, or accepts an appointment and subsequently purports to resign on the basis that instructions accepted after appointment give rise to a conflict, the president may conclude that the surveyor is not suitable for future appointments.

# 6 Action on appointment

## 6.1 Date of appointment

It may be important for independent experts to know how and when their appointment legally takes effect. Two situations should be distinguished:

a) Where the president is to make the appointment it will probably take effect when, after the proposed appointee has been consulted and indicated that he or she is prepared to be appointed, the president signs the appointment letter. This creates a tripartite agreement between the parties and the independent expert. Neither the president nor RICS are party to the contract.

b) If the parties themselves make the appointment, it takes effect on the date of the independent expert's letter of acceptance of the parties' invitation.

## 6.2 Objections to appointment: (1) on grounds of jurisdiction

If an objection to the appointment is to be made on the ground that an independent expert lacks the power to make a determination, i.e. as to a) whether there is a valid expert determination agreement; and/or b) as to the matters that have been submitted to expert determination in accordance with the expert determination agreement, it should be made promptly after the independent expert's appointment. If not, the party that later wishes to raise such a ground of challenge may find that it is said that it has waived the right to do so.

If such an objection is raised in time, independent experts have no power to decide a challenge to the validity of their appointment, and should invite the parties to resolve the challenge before proceeding. Strictly speaking, independent experts are appointed to determine only the matters in dispute, and their jurisdiction will not therefore extend to whether they have been properly appointed. In an obvious case, independent experts may take the view that they should accept or dismiss the challenge, using a power that is necessarily ancillary to their expert function. In a more complex case, they should consider taking legal advice.

Whether independent experts would be wise to continue the reference in any given case will depend upon a balance of considerations, such as their duty to proceed with the reference if the appointment is valid; the need to conform to any mandatory time limits in the lease; the gravity and difficulty of the point raised; the urgency of the expert determination; the speed with which the point might be determined by the court; and the likely effect on costs of proceeding in advance of the determination of the point. Of course, if both parties have agreed that the matter is to be determined by the court, there is no question of the independent expert proceeding further with the reference.

The possibility of a challenge as to jurisdiction emphasises the importance of independent experts checking at the first available opportunity that the appointment has been properly made (see Section 4).

## 6.3 Objections to appointment: (2) on grounds of fitness to act

The obligations to be implied into the appointment of an independent expert (see Section 3) **may** enable the court to entertain a challenge to an independent expert's appointment on the basis, for example, that the independent expert would not be able to carry out the task within a reasonable time.

Independent experts may continue with the expert determination and make a decision while any such application to the court is pending. Whether this would be a prudent course to adopt will depend upon a number of factors (see paragraph 6.2). If the court removes the independent expert, it may be questioned whether it has any power to make any order in respect of the independent expert's entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

## 6.4 Initial contact with parties

Once appointed, it is the independent expert's general duty to proceed without delay. In keeping with this duty, independent experts should write to the parties immediately after the appointment, seeking confirmation that a dispute still exists, and if so requesting a complete copy of the lease (with properly coloured plans), together with any deeds of variation or other documents material to the appointment, and setting out the proposed Terms of Engagement (see Section 7).

## 6.5 Checking appointment documents

Once the appointment documents and the lease have been received, independent experts should study the appropriate sections in detail so that they are clear as to the precise nature of the dispute and any special provisions that might apply. It is not usually necessary

to read the entire lease at this stage. It is important, however, to check for mandatory time limits and that the independent expert has been properly appointed in the correct capacity.

At this stage, it might become clear either that the appointment is not as an independent expert (see paragraph 6.6); or that the independent expert does not meet the appointment criteria (see paragraph 6.7); or that the lease lays down a timetable with which compliance will be difficult if not impossible (e.g. that the independent expert must take a particular step within so many days of the review date, being a date that has already passed). Such problems will be rare, because ordinarily the relevant parts of the lease will be extracted or summarised on the application form. Nevertheless, it is incumbent upon independent experts to carry out their own careful checks as soon as they have seen the lease.

If those checks reveal that there is a problem, then independent experts should bring it to the attention of the parties. If the matter is serious enough, independent experts should consider resignation or, in a debatable case, taking legal advice.

## 6.6 Independent expert or arbitrator?

Some leases and agreements may be unclear or ambiguous as to whether the appointment is in the capacity of independent expert or arbitrator. Where a lease or agreement, with reference to the appointment of a surveyor, mentions 'arbitrator' or 'arbitration' or 'the Arbitration Acts', even though it may also make reference to a 'valuer', 'independent expert', 'expert' or other such term, it is generally treated as calling for the appointment of an arbitrator, unless it is clear that the parties intend otherwise. Appointed surveyors should resolve any ambiguity concerning the capacity in which they are appointed before proceeding.

If there is any doubt as to the correct interpretation of the lease or other document giving rise to the independent expert's appointment, the parties may agree which interpretation is correct. However, there is a danger that third parties (such as the original lessee, or a surety) might be able to dispute that agreed interpretation. For detailed consideration of this topic, see the *Handbook of Rent Review* and the standard textbooks on expert determination.

## 6.7 Criteria for appointment

Whether the request for appointment has come from the president or privately, independent experts should immediately upon receipt of the appointment and the lease check the terms of the expert determination clause, so that they are clear as to the precise nature of the dispute and any special provisions that might apply to their appointment that have not been previously disclosed.

In this respect, it is not uncommon to find that the expert determination clause requires either particular experience (e.g. 'expert in retail warehousing in Brighton'); or qualification in a particular way (e.g. 'of not less than 15 years' seniority in valuing commercial property' or 'a director in an international practice'); or that the independent expert should take particular steps in relation to the appointment, such as arranging insurance to a certain level of cover. Assuming that such 'special requirements' have been disclosed prior to the appointment being made, if independent experts are unable to meet them, they should lose no time in taking up the matter with the appointing body. Failure to do so may result in a later objection by one of the parties. If the special requirements were not disclosed and emerge only once the lease has been received, independent experts should immediately contact the parties to agree the way forward. There will be no point in informing the DRS, since, as noted in paragraph 5.10, the DRS has no further role following appointment.

## 6.8 Non-receipt of appointment documents

Occasionally the parties will fail to supply a copy of the lease or other appointment document to the independent expert. Independent experts cannot proceed in the absence of this document. In such circumstances, the independent expert may wish to inform the parties that if the lease is not supplied within a specified reasonable period, the independent expert may resign.

# 7 Terms of Engagement

## 7.1 Introduction

The terms for the appointment of an independent expert may consist of nothing more than a direction in a lease that the independent expert is to carry out an independent valuation, leaving much that is unsaid as to the way in which that task is to be discharged. It is therefore essential that independent experts clearly establish the terms of reference for the appointment, including the basis of the fee. If not, independent experts increase both the risk of losing their fee and the risk of a claim against them for negligence. The possibility of a claim for negligence is higher where a surveyor is acting for two parties with conflicting interests than where the surveyor is acting for a single client. It is therefore particularly important that surveyors should incorporate into the procedure agreed with, the parties' terms appropriate to define the extent of the obligations the surveyors are undertaking. The Terms of Engagement are not the same as the Directions or Procedural Instructions that set out how the independent expert will conduct the reference, but may be contained in the same letter. If the Terms of Engagement and/or Directions are agreed with the parties, independent experts will be bound to comply with them.

When the independent expert is privately appointed, the appointment may include a variety of conditions. These may direct that the independent expert is to hold an inquiry or to receive representations from the parties' representatives.

Even when the independent expert is appointed by the president, the appointment may implicitly incorporate conditions contained in the rent review provisions under which the independent expert is appointed.

## 7.2 Key contents

There is no standard or prescribed form for the Terms of Engagement, but the key contents should cover the following points (which may of course be elaborated on as the reference proceeds):

a) Confirmation of the appointment (date, from whom and capacity).

b) Confirmation that each representative has authority from the relevant party to the dispute.

c) Agreement to any necessary or desirable extension of any timetable laid down in the dispute resolution clause in the lease.

d) A request that the parties write within a stated timetable to confirm if they wish the independent expert to proceed immediately or if they are agreed that the independent expert should allow them more time for negotiations. The independent expert should confirm that if one or both parties wish the independent expert to proceed, he or she will do so.

e) An instruction that no privileged material, whether or not marked 'without prejudice', is to be made known to the independent expert during the course of the reference.

f) A right for the independent expert to take legal or other technical advice (see paragraph 7.4).

g) The extent to which the independent expert is to be guided by facts agreed between the parties (see paragraph 7.5).

h) Any assumptions or limitations that the independent expert intends to apply in the valuation (see paragraph 7.6).

i) An instruction that all correspondence sent to the independent expert must also be copied to the other party's representative by the same means and marked as such.

j) Provision regarding the independent expert's fees, costs and expenses (see paragraph 7.3).

k) Provision for indemnity (see paragraph 7.7).

## 7.3 Establishing fees and charges

Unless the independent expert's fees were agreed at the time the appointment was accepted (which cannot apply in a presidential appointment), it is desirable that the basis of the independent expert's fees and expenses (i.e. the amount of fees and charges, or the basis on which they are to be calculated) is agreed by the parties before the independent expert incurs any expenses. If no such agreement is made, the independent expert will be restricted to whatever amount is subsequently considered to be reasonable (see paragraph 3.7).

The Terms of Engagement must also deal with the recovery of such fees and expenses even if independent experts through no fault of their own are unable to proceed further. If no such provision has been made, independent experts may have to bear such costs themselves.

The parties' written agreement to the independent expert's fees and charges is desirable but cannot be required.

The following points should be noted in relation to the fee proposal:

a) Independent experts should always propose a figure or basis that is justifiable in the event of challenge (see paragraph 25.2).

b) The proposal should cover the possibility of abortive costs if the expert determination is terminated by the parties before completion.

c) Independent experts are entitled to proper remuneration for the work done, and it may be appropriate to provide for the independent expert to require each party to deposit its share of the independent expert's estimate of the costs of each stage of the expert determination.

d) It may also be appropriate to build in a mechanism for rate increases and interim accounting if the expert determination is unduly protracted or delayed.

e) A charge merely for accepting the presidential appointment is not appropriate.

## 7.4 Right to take legal or other technical advice

Strictly speaking, because independent experts may not delegate the task assigned to them (see paragraph 3.14), they may be unable to seek legal or other technical advice to assist them with that task unless they have reserved the right so to do in their Terms of Engagement. This is in contrast to arbitration, where the right to seek such advice is conferred by the *Arbitration Act* 1996.

The resort to such advice is dealt with in Section 14.

## 7.5 Reliance on facts agreed by the parties

It is sensible for independent experts to make provision in their Terms of Engagement for the parties to supply them with legal documentation relevant to the subject premises and that they may rely on such information as being complete. Additionally, independent experts may request that the parties produce an agreed statement of facts in relation to the subject premises and again that they may rely on the information contained in it. Such a statement could cover such matters as the floor areas, specification, permitted use of the various parts of the premises, service charge, rating assessments, details of services, etc. If independent experts are relying on floor areas agreed by the parties, they will need sufficient information in respect of the basis of calculation so as to be able to confirm that they are comparing on a like-for-like basis with the floor areas of the comparable transactions.

Further consideration of this topic is provided in Section 13.

## 7.6 Exclusions and limitations

The Terms of Engagement should also record any assumptions or limitations that independent experts intend to apply in their valuation, unless they are put on notice by the parties otherwise, for example that:

- the property is free from defects (inherent or otherwise)
- there is no contamination or deleterious materials
- there is proper legal and planning title
- no statutory notices have been served and there has been compliance with statutory requirements
- all services and other such matters are in working order; and
- no structural survey is required.

While the practice statements contained in the *RICS Valuation – Professional Standards (the Red Book)* are not mandatory (PS1.3(b)), they may provide useful suitable wording for these assumptions and limitations.

## 7.7 Indemnity

Whereas arbitrators are not liable for anything done or omitted in the discharge of their functions as arbitrator unless acting in bad faith (see s. 29 of the *Arbitration Act* 1996), independent experts have no such immunity. They should therefore consider whether to insert an appropriate exclusion clause in their Terms of Engagement, capping their liability.

A clause seeking to omit liability for everything would probably be struck down as unreasonable pursuant to the *Unfair Contract Terms Act* 1977. Accordingly, if independent experts wish to seek an indemnity from the parties, it should be limited appropriately, for example by providing expressly that they are not liable for damages beyond the amount capped.

# 8 Subsequent inability to act

## 8.1 Problems after the appointment

Once the president has appointed an independent expert, the president's jurisdiction in the matter is at an end unless the lease itself (or, in a relatively few cases, statute) provides to the contrary. If, therefore, after the appointment a party brings to the independent expert's attention a matter alleged to render it wrong for the independent expert to continue with the determination (in practice, a real pecuniary or other interest in the outcome of the dispute, or other matters giving rise to a real possibility of bias), the independent expert would be expected to:

a) obtain full details of the objection in writing

b) notify the other party in writing and invite its comments

c) make such further enquiries as might be necessary in order to establish, for example, how long the party raising the matter has known about the alleged conflict (which may be relevant to the question whether the right to object has been waived)

d) decide whether there is a conflict of interest that would require the appointment to be terminated

e) if the answer is yes, seek the agreement of the parties to an orderly resignation and replacement by the president of RICS, unless both parties agree in writing that the independent expert should continue (and the independent expert feels able to do so); or

f) if the answer is no, continue.

If, following an offer to resign, one party accepts and the other party declines, independent experts should seek legal advice as to their options, as a failure to advance the determination may place them in breach of contract (see paragraph 8.3).

## 8.2 Disclosure of involvements after appointment

If, following an appointment, independent experts discover a matter that might affect their mind in coming to a decision, or would raise a real possibility of bias in the eyes of a reasonably minded person, independent experts would be expected immediately to disclose it to the parties and then proceed as in points d) or e) in paragraph 8.1. Any doubt as to whether independent experts should disclose certain facts or circumstances should be resolved in favour of disclosure.

When considering whether or not facts or circumstances exist that should be disclosed, independent experts should not take into account whether the proceedings are at the beginning or at a later stage.

It is to be emphasised that the mere fact of disclosure should not indicate to the parties that independent experts consider either that a conflict of interest exists, or conversely that independent experts believe that there is no such conflict. Those are matters that independent experts can only finally decide having weighed up the parties' reactions to the disclosure.

## 8.3 Resignation

Where independent experts become ill or otherwise incapable of conducting the determination, or where it would be improper to continue (e.g. if a conflict of interest is exposed or without prejudice correspondence is shown to them, which makes their position untenable), then they may have no alternative but to resign. Such circumstances are thankfully rare, and there is little or no case law concerning the consequences that may flow from a resignation, such as liability for the independent expert's fees, or the costs thrown away.

Independent experts who resign unreasonably may be found liable to the parties for the consequences. It is therefore prudent for independent experts who are minded to resign first to consult the parties in writing and, if possible, gain the parties' acceptance that their resignation would be reasonable in all the circumstances, with agreement also as to payment of their fees and expenses.

## 8.4 Replacement

The procedure for replacement of an independent expert who resigns, or who is incapacitated in some way, is as follows:

a) the parties can agree upon the replacement independent expert; or

b) the parties may apply to the president of RICS to appoint a replacement independent expert (for which the DRS does not normally charge a fee).

# 9 Case management

## 9.1 Introduction

The term 'case management' is one that was used for the first time in the CPR to describe the means by which the overriding objective of enabling courts to deal with cases justly was to be achieved, including: a) ensuring that the parties are on an even footing; b) saving expense; c) dealing with the case in ways that are proportionate; d) ensuring that the case is dealt with expeditiously and fairly; and e) allotting to it an appropriate share of the court's resources (see CPR1.1).

Expert determination differs from civil litigation, not least in that (i) it is funded privately, with no pressure on the tribunal's resources; (ii) the parties are free to decide how their dispute is to be determined; and (iii) in the absence of such agreement, the expert determination must proceed in accordance with the dispute resolution clause in the lease, which may prescribe little or no formal procedure that is to be followed. It is quite possible, therefore, for a reference to an independent expert to proceed without any input from the parties at all.

In most cases, however, the parties themselves like to take the opportunity of submitting an agreed statement of facts and representations (and usually cross-representations). In all cases, independent experts will be prudent, if not bound, both to ascertain the parties' wishes regarding procedure and to indicate the way in which they propose to proceed with the expert determination, even if the dispute resolution clause is silent as regards procedure, as this section explains. For convenience, the term 'case management' is borrowed from civil litigation to describe the possible procedural steps that independent experts may consider.

## 9.2 Dealing with the parties

In some cases, independent experts will be in the fortunate position of having parties before them that are represented by surveyors, who comply readily with independent experts' instructions. In other cases, independent experts will have to deal with parties that are unrepresented, uncooperative, or who are replaced during the proceedings. Guidance concerning these matters is set out in Section 21.

When the parties are represented by surveyors, independent experts may wish to confirm whether the surveyors are acting as expert witnesses or as advocates, or in the dual role. This is examined in Section 10.

## 9.3 Preliminary meeting or other contact

Although independent experts will already have written a preliminary letter to the parties (see paragraph 6.4), many case management matters, such as whether there is to be a meeting, the timetable for exchange of documents, evidential matters, and many other aspects of the conduct of the expert determination, should be dealt with at the outset in order to allow the parties (and independent experts) to plan ahead.

Such preliminary matters are often most effectively and expeditiously dealt with by some form of preliminary contact rather than by correspondence, which may become protracted. In the first instance it is for the parties to decide whether this preliminary contact should be at a meeting, or be conducted by way of conference call or email; failing agreement, it is for independent experts to decide. In doing so they must balance such considerations as whether the dispute resolution clause contemplates such a step, or whether it is clear that they should simply make their own enquiries and proceed straight to a determination; the possible savings in costs; the convenience of the parties; and the size and complexity of the expert determination. Preliminary contact is considered in more detail in Section 12 of this guidance note.

## 9.4 Directions/Procedural Instructions

At the end of the preliminary meeting, and perhaps from time to time during the course of the expert determination as further decisions are needed, independent experts will need to record certain matters of timing and procedure that have been agreed or decided relating to the conduct of the expert determination. The best way of doing this is to issue a list of instructions to the parties – usually referred to as 'Directions' or 'Procedural Instructions'.

Independent experts will usually wish to build up their own standard sets of Directions to serve as an aide memoire. However, the use of such precedents should not obviate the need to approach each situation afresh, in order for independent experts to be able to gauge what is best for the particular parties in that particular expert determination.

The Directions that may be considered suitable for an expert determination are considered in paragraph 15.4. There is a remote possibility that some form of hearing could be required, in which case independent experts

would be advised to consider the guidance given in Section 15 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews*.

## 9.5 Possibility of compromise

Independent experts are not mediators, and it is not their role to promote negotiations and compromise. Independent experts should, at the outset, enquire of the parties whether there is any possibility of their reaching a negotiated settlement and, if so, whether they wish the independent expert to defer the proceedings. Either in the initial letter, or at the preliminary meeting if any, the parties should be reminded that they are at liberty to settle between themselves at any time prior to the determination, but in this event will be liable for independent experts' fees and disbursements to date (see paragraph 24.1).

## 9.6 Identification of the issues

Although independent experts will seek to use their preliminary contact with the parties to attempt to define the issues, it may be some time before the issues emerge to their full extent. It will be important for independent experts to keep a close eye on this, to ensure both that the issues are properly identified, and that the parties' resources are properly targeted from the earliest possible opportunity.

If there are likely to be complex legal or technical issues, then independent experts will need to put measures in place to deal with these. This topic is considered in detail in Section 14.

## 9.7 Agreeing the facts

Independent experts will want to urge the parties to agree as many of the facts as possible, with the aim of ensuring that the determination is concerned only with matters that are genuinely in dispute, with consequent economies in time and cost. This is dealt with further in Section 13.

## 9.8 Dealing with the evidence

The fundamental task of independent experts will usually be to marshal and evaluate the evidence before them (excluding as necessary that which is inadmissible), using their skill and experience as chartered surveyors. These important matters are dealt with in Section 17.

# 10 Expert witnesses and advocates

## 10.1 Introduction

Surveyors acting in rent review expert determinations commonly assume the roles of expert witness or advocate, or sometimes both (but not at the same time). In the final analysis, the only opinion that matters is that of the independent expert – but if such experts are going to secure assistance from those making representations to them, they should be able a) to discern which role is being adopted at any one time (because very different rules apply to each); and b) to depend upon the truthfulness of the expert evidence being adduced.

RICS has for some years now issued practice statements and guidance notes for surveyors acting in either role, and independent experts will need to be familiar with the content of each, both in order that they may know what they are entitled to expect from the parties' representatives, where they are surveyors, and in order to identify and correct transgressions at an early stage.

It is generally accepted that the specific roles of the two combatant surveyors is less critical before an expert than before an arbitrator, but RICS guidance to date based upon practice is that surveyors may adopt either role before an expert.

This section summarises the principal duties in each practice statement.

## 10.2 Surveyors acting as expert witnesses

Where surveyors act in an expert determination in the role of expert witness, their overriding duty is to the independent expert (see *Surveyors acting as expert witnesses*, RICS practice statement and guidance note). This duty, which overrides the contractual duty to surveyors' clients, is to set out the facts fully and give truthful, impartial and independent opinions, covering all relevant matters, whether or not they favour the client. The practice statement emphasises that special care must be taken to ensure that the expert evidence is not biased towards those who are responsible for instructing or paying the surveyor. Opinions should not be exaggerated or seek to obscure alternative views or other schools of thought, but should instead recognise and, where appropriate, address them. Surveyors are required to state in their written evidence that they have complied with the practice statement.

## 10.3 Surveyors acting as advocates

By contrast, surveyors acting as surveyor–advocates are bound to act in the best interests of their clients, and are absolutely entitled to be partial. Although they also owe a duty to independent experts to act properly and fairly, and must not mislead independent experts, these duties fall some way short of the overriding duty that expert witnesses owe to independent experts.

## 10.4 Surveyors in the dual role

The dual role tests the professional integrity of surveyors, who may sometimes struggle to comply with the different duties and standards the two roles demand.

Accordingly, both the practice statement, *Surveyors acting as expert witnesses*, and the practice statement, *Surveyors acting as advocates* provide that where surveyors are acting in such a dual role, they must clearly distinguish between those two roles at all times, as explained in the accompanying guidance notes.

# 11 The parties

## 11.1 Establishing the identities of the parties

It is essential that independent experts record the names of the parties correctly. A preliminary meeting with the parties, if held (see Section 12), or draft Directions, will provide an opportunity for this. Remember that the application will have been made by one side to the dispute, and it is conceivable that they will not have been in possession of the full facts. The following situations should be treated with care:

a) One of the parties might be a company that has changed its name following a takeover or amalgamation. Here the new name should be given (although it would do no harm to refer to the old name as well – e.g. 'Bigco plc (formerly Bigco (UK) Ltd)'.

b) One of the parties might be a partnership, or carrying out business under a trade name. Suppose, for example, that the tenant's letters are headed 'Joe Bloggs Builders'. This might either be a trading name for, say, J Bloggs Ltd, or a partnership consisting of Joe Bloggs and Fred Bloggs. In the former example, the tenant's name in the heading would be 'J Bloggs Ltd trading as Joe Bloggs Builders'; in the latter case, it would be 'Joe Bloggs and Fred Bloggs trading as Joe Bloggs Builders'.

c) The parties might not be the same as the parties shown on the lease – for example, the freehold might have changed hands, or the lease might have been assigned. Care should be taken to show the current name. The reason for the change can then be explained in the introduction to the determination.

d) The parties might change their identities during the course of the referral, for example through assignment. In such an event, independent experts should ensure both that the new party is aware of its obligations in relation to the referral, and that provision is made for the recovery of costs from the outgoing party.

## 11.2 Unrepresented parties

The independent expert's task is to find the answer to the question put to them, rather than to adjudicate between the parties (in obvious contrast to arbitration). Independent experts will therefore wish to investigate the evidence to the extent necessary to carry out their task. In this way, they are likely to remedy any deficiencies in the presentation of the unrepresented party's case, simply as a consequence of the independent expert's thoroughness.

## 11.3 Liquidators/receivers and guarantors

Although the usual parties to an expert determination are the landlord and the tenant, there may be circumstances in which others are entitled to act on their behalf, or, more rarely, to intervene in the expert determination.

A properly appointed liquidator, receiver or administrator for either party may take over the relevant role. Financial difficulties of a party (including expected insolvency) are not grounds for delay providing the other party is aware of the circumstances and wishes to proceed.

An assignor or guarantor will not be a party to the expert determination unless the rent review clause or expert determination clause so provides (which would be very rare). An assignor or guarantor could, however, be called by either party as a witness. The assignor or guarantor cannot attend meetings or present their own case unless both parties agree, or one party consents to the assignor or guarantor having the conduct of that party's case in the expert determination. In such a case, independent experts should satisfy themselves that the assignor or guarantor is properly authorised by the relevant party.

# 12 Preliminary meeting is necessary

## 12.1 Introduction

Most independent expert referrals will proceed from the preliminary letter to the parties (see paragraph 6.4) to receiving representations/counter representations, and then straight to making a determination, without further ado. There will be no need for the independent expert to meet the parties, and indeed to do so would waste costs and cause delay.

In some cases, however, a preliminary meeting or other contact (perhaps by email) may be appropriate if the matter is complex, or (rarely) the dispute resolution clause so provides. In such a case, the relevant considerations will be similar to those applicable to a preliminary meeting in the case of arbitration, and reference should be had as necessary to Section 12 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews*.

This section therefore confines itself to pointing out the considerations that will only apply to independent expert referrals.

## 12.2 Confirming Terms of Engagement

Section 7 deals with the independent expert's Terms of Engagement with the parties. A preliminary meeting will provide a good opportunity for these to be finalised in discussion with the parties.

## 12.3 Directions or Procedural Instructions

Any such preliminary meeting should be followed by Directions or Procedural Instructions from the independent expert to the parties, together with the Terms of Engagement if these have not been agreed previously.

Typical Directions/Procedural Instructions will cover matters such as the collection of evidence and timetabling. A full list is set out in paragraph 11.5 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews* but the key points are summarised below:

a) The identities of the parties and their representatives.

b) A statement of facts to be agreed between the parties in relation to the subject premises. This could include: agreed copies of the lease and other relevant legal documents; a description of the subject premises and agreement of the basis of valuation; agreed floor areas including the basis of measurement; floor plans; rating assessment; service charge; and any other relevant and helpful matters. The parties should also be asked for confirmation that the independent expert may rely on this without recourse to further enquiry.

c) Information that independent experts would ideally wish to see in relation to the comparable evidence. In this connection it is helpful if the parties can agree as much factual information as possible.

d) The form of written material to be submitted. Most independent experts will wish to receive an initial representation from each party with a right of each party to make a counter-representation to the other party's representation. These documents will normally be exchanged within a specified timetable, which is either agreed between them or determined by the independent expert.

e) A timetable for the production of written documents and procedure for exchange.

f) No reference to privileged material, and no submission of any material that is not copied to the other party.

g) Compliance by the parties with the RICS practice statement, *Surveyors acting as expert witnesses*. Independent experts are entitled to state that they will draw an adverse inference if parties who are not professionally qualified object to complying with the RICS practice statement.

h) Specific reservation by independent experts of the right to take legal and other technical advice, with the cost of such advice to form part of their fees.

i) All correspondence with independent experts to be copied to the other side by the same means and marked accordingly.

j) Confirmation that any representation or counter-representation will not bind independent experts and that they will carry out such investigations and make such enquiries as they consider appropriate.

k) Arrangements for inspections.

l) Release of the determination on payment of the independent expert's fees.

m) If the lease grants power to independent experts to allocate costs, a procedure for representations from the parties after the determination in respect of the reviewed rent.

Under the RICS practice statement, *Surveyors acting as expert witnesses*, surveyors are obliged to comply with any Directions made by the tribunal, which is defined to

include independent experts. However, unlike arbitrators, independent experts cannot force the parties to accept their Directions in the first place. If the parties do not accept, the independent expert will still be obliged to proceed with the reference. In this connection, the independent expert should point out that a failure by the parties to agree any facts may require more extensive investigations, and will therefore increase the cost of the reference.

## 12.4 Communications with parties

Although independent experts are not bound by a statutory framework governing their conduct of the reference (in contrast to arbitrators), they would nevertheless be prudent to ensure that communications to and from the parties, by whatever means, are routinely copied to all.

Paragraphs 11.6 to 11.8 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews* set out some detailed considerations concerning communications that independent experts may wish to bear in mind.

## 12.5 Request to defer reference

Experience has shown that parties frequently require extensions of timetables. If an extension is requested by both parties, then independent experts should agree. If this revision is going to cause difficulties for independent experts (e.g. a further delay in finalising the determination due to other commitments) then they should advise the parties of this. Independent experts should inform the parties that they will proceed on the application of either party at any time.

If the request is made by one party alone and the other either resists or remains silent, then independent experts are under a duty to proceed, and cannot be seen effectively to vary the contract at the suit of one party alone. However, independent experts should be pragmatic and take into account the seriousness of the request and the effect that any delay will have before making their decision.

# 13 Establishing the facts

## 13.1 Introduction

Unless limited by previous agreement, independent experts should assume that it is necessary to verify all information and to carry out all investigations that a reasonable surveyor acting as an independent expert might be expected to carry out, together with any that they themselves consider would assist them in reaching their decision. These should include:

- details of the comparable evidence (including as appropriate independent verification)
- effect of lease terms
- measurements/floor areas (this should be done by the independent expert and not by a member of staff, although the independent expert may use the assistance of a member of staff)
- condition of the subject premises as found and as to be valued under the terms of the lease
- planning and user; and
- any relevant matters that have not been excluded from the remit either by the lease documents or by any assumptions or limitations agreed with the parties.

Even if the parties have produced a statement of agreed facts and agreed that the independent expert may rely on it, the independent expert remains under a duty to acquire any additional information that is necessary to reach a conclusion based on his or her own opinions and calculations.

## 13.2 Common ground between parties

The presentation of evidence is time consuming and therefore costly. There are great advantages in persuading the parties to agree facts, including the facts of comparables, to the greatest possible extent, and at the earliest opportunity, so that independent experts can concentrate on the evaluation of the evidence.

It will be good practice for the parties' agreement to include those matters of a factual nature that cannot be agreed (see paragraph 13.5), and the reasons for the disagreement.

Independent experts should assume that they cannot rely on any apparent common ground in the parties' representation unless they have mutually agreed that this common ground can be adopted in reaching the decision.

## 13.3 Facts to be agreed

The facts that should be agreed will vary depending upon the complexity and type of dispute. In most common rent review scenarios, however, matters such as the appropriate basis of measurement, building description, user rights (including planning user) and comparable evidence (see paragraph 13.4) will normally be material, and there is no reason for not agreeing the facts relating to them.

The agreement should be recorded in writing.

## 13.4 Comparable evidence

The purpose of agreeing a list of comparable evidence is twofold. Firstly, it helps to narrow the room for contention in the determination (and hence helps to save costs). Secondly, it reduces the potential for one party to ambush the other with late evidence that the other will find difficult to rebut in the time available.

The following headings should be considered as a convenient way of structuring the list of comparable evidence:

a) the address of the property

b) the identities of the parties and any agents

c) a brief description of the property (including its age and construction, floor areas, and any amenities and ancillary services)

d) the nature of the comparable evidence, e.g. an open market letting; a rent review; the failure of a property to let

e) the figure that has been agreed or determined (or not, as the case may be)

f) in the case of a new letting, the dates when the terms were agreed and when contracts were exchanged

g) the amount of any rent-free period granted, any capital contributions made or any other incentive

h) in the case of a rent review or lease renewal, the date of the lease, the term commencement date and the length of term

i) relevant details of terms and conditions in the lease documents that might affect rental value; and

j) any relevant matter that is recorded elsewhere (e.g. in side letters, related transactions), which affects value, such as rent-free periods and other inducements.

## 13.5 Matters that cannot be agreed

There will of course be some matters that cannot be agreed, although these will tend to be matters of interpretation (such as the correct method of devaluation) rather than the facts themselves. Independent experts should, however, impress upon the parties that any failure to agree should be despite the parties' attempts to narrow the range of their differences, and not because they have not made those attempts in the first place.

Where the facts cannot be agreed it will assist independent experts to be informed of the reason for the disagreement. Having to justify a stance taken in relation to a fact that cannot be agreed will often give the parties the necessary impetus to reconsider their stance.

## 13.6 Verifying the facts

The question how far independent experts should rely upon factual information, in relation to comparable evidence put before them by an obviously interested party, is a problem that may face any surveyor preparing a valuation, whether for a client or as an independent expert. It clearly calls for great caution in ensuring that the full facts have been disclosed to the surveyor and that the facts are wholly accurate, e.g. seeing the correspondence and lease or agreed rent review confirmation concerning the comparable under discussion. It is helpful to request that the parties agree the facts of all the comparable transactions on which they are relying (see paragraph 13.3).

Independent experts will have to evaluate the quality of the evidence identified, or provided by the parties. In any event, unless the parties have agreed otherwise, independent experts have a duty to make their own investigations into details of all transactions that they consider might be relevant and all matters of fact affecting the rental value of the property. As a general rule it is considered to be good practice that even when the parties have produced agreed comparable evidence, independent experts should still make their own enquiries of persons with first-hand knowledge of the transaction.

## 13.7 Independent experts' own enquiries

Whereas arbitrators approach their task by assessing the evidence adduced to them by the parties, and only use their statutory powers under the *Arbitration Act* 1996 to supplement that evidence where this would not conflict with their duty to avoid unnecessary expense, independent experts are in a completely different position.

Independent experts' task in a rent review is to determine the rent using their own expertise. Although the lease or other agreement between the parties may provide for the parties to submit evidence and submissions to independent experts, the independent experts are bound to make their own enquiries in order to execute their task, unless the parties agree otherwise. Accordingly, in contrast to cases involving arbitrators, where use of the arbitrator's own specific knowledge without allowing the parties to comment has been criticised by the courts, independent experts are not merely bound to use their own knowledge, but may also be bound to supplement that knowledge in cases where the information supplied by the parties is inadequate, and the independent experts have to carry out further enquiries.

There is no duty upon independent experts to inspect all the properties said to be comparable, if they do not consider them to be relevant.

In most cases, seeking views and opinions from peers and acknowledged experts in the relevant field will be desirable. Full notes should be taken of all enquiries made and responses received. Independent experts should of course arrive at their final view using their own knowledge and expertise, without delegating that critical task to others.

## 13.8 Limits to investigatory powers

The parties are free to agree what investigations independent experts should carry out. In the absence of such agreement, independent experts must carry out such investigations as will enable them to discharge their task.

However, independent experts have no power to order disclosure, allow witness summonses, or compel production of information or documents. Independent experts can improve on this position by securing the parties' agreement to cooperate and comply with their requests.

# 14 Points of law and other technical issues

## 14.1 Introduction

Independent experts may occasionally find it necessary or helpful to take advice, including legal and technical advice, from external sources. It is essential for independent experts to note, however, that:

a) they may not do so if they have been informed by the parties that they have agreed that they do not want the independent experts to do so

b) they will not be able to charge the cost of the advice to the parties unless they have reserved the right to take advice and charge the parties for the cost in addition to their own fees

c) they must consider the advice received and decide independently whether to adopt it and, if so, to what extent (unless the parties expressly agree that the independent expert may rely on and adopt the advice); and

d) they should also consider whether to invite the parties to comment upon any advice received, and/or whether to disclose the advice to the parties as part of their determination. Where the parties' agreement requires reasons for the determination to be given (as to which, see paragraph 22.2), then it will almost certainly follow that the independent expert should include the advice within the determination.

## 14.2 Disputes involving issues of law

Although most rent review expert determinations involve only issues of valuation, some may raise one or more points of law, such as the meaning of the rent review clause or of other parts of the lease, or the admissibility of evidence. Independent experts' Terms of Engagement (see Section 7) should provide not only for those matters that are dealt with in all references to an independent expert, but also for those that occur occasionally. The determination of a point of law falls into the latter group. In some instances, the point of law will not have occurred to the parties. In such cases, the independent expert should raise it, to see how it may best be dealt with. Appropriate terms will encourage the parties to address the method of resolving the problem.

When a point of law is raised, independent experts should require the party raising it to formulate it to them in writing, and to send a copy to the other party. Equally, if the point of law is one discovered by the independent expert that he considers could have a material valuation influence, both parties should be notified and asked for their observations. Independent experts should then seek to agree with the parties (and, in the absence of agreement, determine) the exact nature of the point of law, and how it can best be resolved. Where no procedure to deal with a contested point of law has been agreed but it is likely to affect the determination, and independent experts consider the point merits taking advice, they should ask the parties to consider whether:

a) the parties will agree what is the correct answer to the point of law, or one of them will commence proceedings in the courts to decide it, before the independent expert proceeds with the determination

b) the parties would instead prefer the independent expert to take, and proceed on the basis of, legal advice on the point, which will be incorporated into the determination; or

c) the independent expert should continue to deal with the reference, but (by the parties' written consent) as an arbitrator, with or without a legal adviser.

If all these courses are rejected, independent experts should consider taking legal advice before proceeding further.

## 14.3 Disputes involving other technical issues

The same analysis as in paragraph 14.2 applies to any other facet of the expert determination that appears to require special expertise in its determination (e.g. the remaining life of M&E plant). Here, too, independent experts should inform themselves of the different ways of proceeding set out in paragraph 14.2.

## 14.4 Using a legal adviser

In straightforward cases, the independent expert need do little more than set down the timetable for submissions and counter-submissions to be provided to the chosen legal adviser. Following receipt of the legal adviser's opinion on the point at issue, and having (as appropriate) disclosed it to the parties for their comments (see paragraph 14.2b), the independent expert will then have to decide whether to accept it (although it would be rare for this not to be the case).

In more complicated cases, the independent expert and legal adviser may need to meet to discuss a number of matters. The independent expert may have a far greater understanding of the nature of the background problem,

including a feel for the real difference between the parties, which will inform the thinking of the legal adviser. Such matters may include:

a) **The issue:** has this been correctly defined by the parties, or does it not quite cover the point that is really at issue?

b) **The evidence**: is there sufficient material available for the legal adviser to be able to decide the issue, or is further material (e.g. any agreement for lease, the planning status of the premises) needed?

c) **The submissions**: do these reveal any deficiencies in the approach that has been taken that will require questions to be asked of the parties?

d) **The draft opinion**: it will often be prudent for legal advisers to supply their opinion in draft to independent experts, and then to meet to discuss the views expressed before the final version is issued.

## 14.5 Referral to court

As an alternative to the preliminary point of law or other technical issue being decided by the independent expert, it may be decided by the court. This is only possible if:

a) the parties agree; or

b) the court is satisfied that it would be appropriate for it to determine the question instead of the independent expert.

Where the parties do not agree, independent experts are presented with a dilemma: should they continue with their expert determination and make a decision while an application to the court is pending or should they await the outcome of the application? In the first place, independent experts should consider the question that has arisen, and seek to decide for themselves whether that question is part of the exercise the rent review clause requires them to carry out, or whether it arises as an anterior point that must be resolved before they are able to proceed. If the former, they should proceed with their determination, unless the court proceedings are likely to be resolved in the near future. If the latter, they should await the outcome of the proceedings. In a more complicated case, independent experts should consider taking legal advice.

If neither party refers the matter to court, and the parties do not agree on the way forward, then unless independent experts obtain legal advice to any other effect, they will have no alternative but to resign their appointment, since they will by definition have no power to determine the issue if it is outside the terms of their appointment.

## 14.6 Raising legal issues as a means to delay

Independent experts should bear in mind when a point of law is raised that this may merely be an attempt to delay matters. They should not therefore hesitate to be robust in considering whether there is any merit in the point and in deciding whether to determine the point themselves, or whether to wait while the party seeks to have the matter decided by the court.

# 15 'Documents only' expert determinations

## 15.1 Introduction

Many independent expert referrals involve little contact between the parties and the independent expert, who will accept the appointment at the outset, and then carry out the determination without needing, or being obliged to accept, any input from the parties, other than a complete bundle of the legal documentation relevant to the case.

In other cases, contrary to what may be seen as the leading strengths of independent expert determination (a quick, simple and cost effective means of dispute resolution), it has become established practice, especially in higher value or complex disputes, to invite the parties to provide material to the independent expert, consisting of statements of agreed facts, evidence or submissions and replies/counter submissions which they wish to be taken into account. The rent review clause or other contract pursuant to which the independent expert is appointed may set out a procedure by which this is to happen.

In such cases, the independent expert's consideration of the material will more usually be conducted without a hearing, as in this section. Oral hearings (which are very rare, given that expert determination is effectively an investigatory procedure that seldom requires oral discussion), are dealt with in Section 16. However, an informal meeting with the parties' representatives at the outset and/or after receipt of the parties' representations may assist in the clarification of the issues or matters arising from the material submitted.

In all cases, independent experts should seek to ensure that the procedure to be adopted is appropriate for the nature of the property, the wishes of the parties, the amount of the rent and any relevant provisions in the lease.

## 15.2 Comparison with arbitration

Surveyors appointed as independent experts should not treat the procedure in a documents-only determination as identical to that of an arbitration. They should regard their task as being that of carrying out a valuation in the ordinary way, with the difference that they are jointly instructed by the parties and that the parties will regard themselves as bound in adversarial proceedings and may therefore provide additional information to the independent expert.

## 15.3 Terminology

A 'documents-only' expert determination (also referred to as one conducted by means of 'written representations') is, as the expression suggests, one that avoids the more expensive and inconvenient alternative of a hearing, but it does not prevent independent experts from calling the parties' representatives to a meeting to seek clarification of matters put forward. The dispute between the parties is conducted on paper, through exchange of evidence and submissions. These documents are often referred to generically as 'representations' (and 'cross-representations' in the case of documents in rebuttal), but this term is unfortunate, since it tends to blur the important distinction between expert evidence, on the one hand, and submissions (or argument) on the other, to which entirely different rules of professional conduct apply (see Section 10).

It would be better practice to require surveyors to use more appropriate, dedicated terms to describe the relevant sections of the documents – e.g. 'report' for the section dealing with their evidence, and 'submissions' for the remainder. Nevertheless, the term 'representations' is so familiar as a generic concept that it is used for convenience in this section to cover all the different types of document that will be exchanged by the opposing sides.

## 15.4 Directions/Procedural Instructions

Independent experts should establish at the earliest possible stage whether any and if so what procedural matters have been agreed between the parties. They should encourage the parties to cooperate in reaching agreement on Directions.

Whether or not a preliminary meeting is held, in preparing the Directions independent experts should consider the applicability of the following matters:

a) any requirements of the expert determination agreement
b) the relevant communications protocol (see paragraph 12.4)
c) the documents to be agreed and put before the independent expert
d) the date for service of a statement of agreed facts (see Section 13)
e) that, in advance of service of representations, any comparable transaction intended to be referred to by a party shall be disclosed to the other party; the parties to agree the details with respect to each

such transaction. As to agreeing facts generally, see Section 13

f) that any without prejudice negotiations or offers or other privileged material, whether oral or contained in correspondence, shall not be referred to in the representations

g) where either party wishes to raise any point of law (e.g. as to the meaning of the rent review clause) affecting the dispute, how the point is to be resolved. As to disputes involving issues of law, see Section 14

h) the timetable and mechanism for service upon the independent expert and each party of their representations

i) whether provision is to be made for cross-representations in reply, and if so the timetable and mechanism for service

j) a reminder concerning the duties of surveyors acting as expert witnesses and/or as advocates (see Section 10)

k) the independent expert's requirements for inspecting the subject property and comparables (see Section 22)

l) whether the independent expert should call for a meeting if at any time he or she considers it necessary to seek clarification of matters arising (see paragraph 9.8)

m) whether the parties wish to have a reasoned determination

n) whether the determination will be final, dealing with all matters in issue including costs, or a determination with the costs reserved if not agreed

o) that the determination will only be released upon payment of the independent expert's fees and costs; and

p) unless agreed otherwise, the right for the independent expert to issue such further Directions as necessary, together with liberty for the parties to apply for variations or further Directions.

The amount of independent experts' fees or the basis for evaluating them is best set out in a separate letter to the parties and is not usually included in the Directions (see paragraph 7.3).

## 15.5 Confirmation in writing

When the procedural matters outlined above have been decided (whether by agreement or by decision of the independent expert), the independent expert should confirm them in writing.

## 15.6 Exchange procedure

Independent experts must specify in their Directions a suitable procedure for exchange of written representations (see paragraph 15.4(h)). This should ensure that all communications with independent experts are also copied to the other party, in accordance with the chosen communications protocol (see paragraph 12.4). This will apply to written representations as much as to any other document.

## 15.7 Allowing time for objections

Independent experts should state in their Directions that a specified period, say five working days, is to elapse before they will examine the parties' written representations and cross-representations, during which either party may object to the admissibility of any evidence. This gives each side the opportunity of checking the opposite side's documents to ensure that they do not disclose without prejudice negotiations or other inadmissible material.

## 15.8 Cross-representations/ replies

Cross-representations may be dispensed with on the ground that independent experts have the expertise to evaluate the material in the representations without further assistance from the parties. If they are agreed to be provided, then this second stage of the exchange of documents between the parties is ordinarily limited to comments upon the initial written representations. For that reason, these documents are commonly referred to as 'cross-representations' or 'counter-representations', although they may also be called 'counter-submissions' (where they deal with advocacy) or 'points of reply' (where they deal with evidence).

Independent experts may need to make it clear that cross-representations should not contain representations or evidence other than in rebuttal of the points made in the opposing party's initial representations. In order to emphasise this matter, independent experts may find it useful to provide a specific instruction dealing with the admissibility of late evidence and the opportunity of the other party to comment upon it.

## 15.9 Further written representations

It is important that independent experts make it clear (subject of course to the parties' right to agree otherwise) that there should be a limit to the opportunity to file documents in rebuttal. Nevertheless, parties sometimes deliberately use the opportunity afforded by cross-representations to ambush their opponents by including fresh material. In such circumstances, independent experts should be prepared to indulge the party taken by surprise by allowing an opportunity for further written representations, should that be requested.

In other cases, an unforeseen approach taken by the opposing party's representations may leave little

alternative but for the party to adduce fresh evidence in response in its cross-representations. Here, too, independent experts may consider it appropriate to allow further written representations to deal with that fresh evidence.

These practices are clearly unfortunate, since they tend to prolong the expert determination and increase costs. Independent experts should therefore seek to control these practices by instructing that:

a) the cross-representations are to be used for points of rebuttal only

b) if fresh evidence is adduced in cross-representations, an opportunity for further written representations may be afforded to the other party; and

c) any increased costs incurred as a result of the breach of the instructions may be required to be paid by the transgressing party, but this can only be imposed where the independent expert has the power conferred by the lease or by the parties by way of agreement.

# 16 Oral hearings in expert determinations

## 16.1 Right to a hearing

There is no automatic right to a hearing in the case of an expert determination, and it would be a highly unusual occurrence in independent expert referrals. The following situations may be distinguished:

a) if the lease stipulates that there should be a hearing (which would be rare), then a hearing must take place unless both parties agree otherwise

b) if the lease does not so provide, but both parties agree that there should be a hearing, independent experts have no power to overrule them, and a hearing must take place

c) if the parties cannot agree, and the lease is silent on the matter, then in practice a hearing cannot take place as the expert cannot compel the attendance of the parties (or anyone else), even if the independent expert takes the view that a hearing would be a better way of resolving the issues; and

d) the hearing does not need to be a very formal occasion dealing with every aspect of the case, but might simply be a meeting (with both parties present) to clarify specific areas that the independent expert wishes to explore.

The question whether a hearing would be appropriate (as to which, see paragraph 9.8) should be kept under review. It may appear inappropriate for there to be a hearing in the initial stages of the expert determination, but that view may change as the expert determination progresses, the parties' evidence unfolds, and their representations are developed. If the parties agree there should be a hearing, the following additional matters set out in this section may need to be considered.

## 16.2 Procedure for the hearing

In the unusual event that the procedure agreed between the parties (whether on an ad hoc basis, or in their lease) provides for the expert determination to proceed by way of an oral hearing, much of the guidance contained in Section 15 of the RICS guidance note, *Surveyors acting as arbitrators in commercial property rent reviews,* will apply, and reference should be made to that material, with appropriate adjustment to reflect the fact that the *Arbitration Act* 1996 will not apply.

# 17 Independent experts' approach to evidence

## 17.1 Introduction

The fundamental difference between an independent expert and an arbitrator is that the independent expert can make whatever enquiry is thought appropriate to enable a proper and full evaluation of the quality and reliability of the evidence. The rules of law as to admissibility of evidence do not apply.

In the more simple cases, where an independent expert is proceeding to a determination without input from the parties, the independent expert will form his or her own view as to what evidence should be taken into account, and how that should be evaluated.

In the more complicated cases, where an independent expert referral is to proceed with input from the parties (either by way of a documents only determination, or by way of a hearing), the independent expert will wish to indicate what 'rules of evidence' are to apply, so as to regulate the provision of material by the parties. This section reviews in brief detail the rules that the independent expert may choose to apply in those circumstances.

## 17.2 Purpose of the rules of evidence

The essential task for independent experts is to require parties to establish or submit their assertions (whether as to fact or opinion) without undue formality, unless of course the parties agree otherwise. It is then for independent experts to evaluate the evidence (see Section 18) and make a determination. The rules of law as to the admissibility of evidence do not apply to this process. Unless the lease lays down any particular requirements (which would be rare), independent experts are entitled to decide for themselves what rules of evidence should be applied, if any. In theory, they can pay attention to any information they think relevant. But there is good reason underlying the rules and procedure concerning evidence, and before ignoring those aspects of evidence, independent experts should ask themselves whether it is sensible to do so.

## 17.3 Rules of evidence

In practice, the rules with which independent experts must be familiar (in order to be able to understand whether to apply or disapply them) are as follows:

a) the rules regarding hearsay evidence

b) the (so-called) strict rules of evidence

c) the rule concerning the burden of proof

d) the treatment of post-review date evidence

e) the rules concerning the admissibility of arbitrators' awards or independent experts' determinations; and

f) the without prejudice rule (see paragraph 17.5).

These rules are explained in detail in Sections 16 and 17 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews*, to which regard should be had where such detail is needed.

## 17.4 Choice as to which rules of evidence should apply

Subject to the parties' right to agree which rules of evidence should apply, independent experts have a free hand as to which of the rules referred to in paragraph 17.3 they should select. The principal options are, in descending order of strictness:

a) that all facts should be properly proved

b) that the so-called 'strict rules of evidence' derived from the *Civil Evidence Act* 1995 should apply

c) that there will be no rules of evidence; or

d) that a specially tailored set of rules should apply.

Options a) and b) are often perceived as unduly technical in rent review expert determinations and may prove difficult to apply in practice, where parties' representatives are not legally qualified or experienced in such matters. If the rules adopted are too strict and rigid, unnecessary and undesirable barriers may be erected that prevent or significantly increase the difficulty and cost of a party presenting a piece of relevant evidence to the independent expert. An example might be requiring 'strict proof' of a comparable from someone with direct personal knowledge of the transaction when the relevant facts of the transaction were common knowledge and agreed between the parties.

On the other hand, if the rules of evidence adopted are too lax, the value of the evidence itself may be diminished because independent experts cannot be sure of its reliability and probity. For example, if uncorroborated hearsay evidence of an important comparable transaction is accepted from one party, how can the independent expert be sure that all relevant details, including possible inducements, have been revealed? The possibility of incomplete or misleading evidence (whether by innocent mistake or deliberate manipulation) is increased. Moreover, even if option c) is chosen, this does not mean that privileged material

should be admitted. The rules on privilege are based on the public policy that parties should be free to obtain advice and prepare for proceedings, and encouraged to settle their differences, without fear of prejudicing their position in a dispute.

In these circumstances, independent experts will often wish to direct (and the parties will often consent to) the fourth option, a practical and cheap solution tailored to the facts of their dispute. An example of this is the giving of evidence through the use of proformas.

It is, however, important for independent experts to keep an open mind regarding which of these approaches should be adopted. For example, if it is clear that the primary dispute is going to revolve around the exact factual circumstances of a particular comparable transaction, and these are hotly disputed and the independent expert has been unable to unravel the factual matrix by his/her own enquiry, then it may be appropriate to direct that the facts should be strictly proved, even if this would be exceptional in other circumstances.

## 17.5 Without prejudice rule

This rule of evidence deserves special mention, if only because it is commonly misunderstood. The following is a brief summary of the main aspects of the rule. A fuller treatment will be found in paragraphs 17.5 to 17.7 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews,* and in Chapter 7 of the *Handbook of Rent Review*.

The rule applies to communications between parties concerning a dispute where the dominant purpose of the communications is an attempt to settle the dispute. Such communications are said to be 'without prejudice' (whether or not labelled as such), and must not be referred to the independent expert by either party, unless both parties agree.

There is an argument that privilege does not automatically attach to without prejudice material in an independent expert's determination, on the ground that technically there is no adversarial dispute. However, public policy dictates that independent experts should seek to facilitate the parties resolving their differences by compromise. It would run counter to this policy for independent experts to take without prejudice material into account, at least without the agreement of both parties.

In order to avoid any such controversy, independent experts should state at the earliest possible stage of the procedure that they will not take into account such material and that it should not be disclosed to them.

Where one party has inadvertently included privileged material in its representations to the independent expert, the remedy will normally be for the other party to require the withdrawal of the material before the independent expert has seen it, relying upon the independent expert's standard Direction that he or she will not look at representations immediately, in order to give time for objection. Where privileged material is nevertheless brought to the independent expert's attention, then they will have to decide what course to take, as explained in paragraph 17.7 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews*.

# 18 Evaluating the evidence

## 18.1 Introduction

As Section 17 explains, the modern tendency in litigation is for most evidence, whether hearsay or otherwise, to be admitted, and then evaluated in the way the tribunal considers appropriate. This approach lends itself particularly well to expert determination, since independent experts, with their specialist expertise in the subject matter of the dispute, will be especially adept at evaluating the evidence. This section deals with independent experts' approach to that task.

## 18.2 Powers regarding procedural and evidential matters

Independent experts' powers to decide procedural and evidential matters are an implicit part of their role as experts. While the exact extent of those powers may be circumscribed by the lease or other agreement between the parties, the powers will include evaluating the evidence (see paragraph 18.3) and conducting their own enquiries (see paragraph 13.7).

## 18.3 Evaluating the quality of the evidence

One of the main reasons for the parties choosing to have their dispute determined by a chartered surveyor acting as an independent expert is that independent experts can be expected to have the appropriate expertise and experience to evaluate the evidence properly. In some cases, both parties may put in inadequate representations; for example, they may concentrate on the evidence of comparables that are out of date in relation to the review date, and put forward little or no discussion of evidence of how the market has moved over the relevant period. In other cases, the evidence (and most usually the expert evidence) will conflict substantially.

In such cases, independent experts are entitled – and indeed bound – to use their skills to evaluate the evidence and decide what credence to give it. In doing so, unless the parties have agreed otherwise, independent experts are not constrained by:

a) the bracket of the parties' contentions (see paragraph 18.5)

b) the fact that neither party has referred to a piece of evidence that the independent expert considers important (see paragraph 18.6); and

c) the fact that neither party may have used a method of valuation that the independent expert proposes to use (see paragraph 18.6).

## 18.4 Where there is little or no evidence

Depending upon the market at the review date, there may be very little transactional evidence to put before an independent expert. He should therefore rely upon his own experience and expertise, assisted as appropriate by any opinions expressed by the parties' experts. Even where independent experts are presented with reliable evidence, they should carry out the requisite investigation themselves (see paragraph 13.6).

## 18.5 Bracket of the parties' contentions

Similarly, whereas arbitrators should not ordinarily award more than the ultimate figure sought by the landlord nor less than is submitted by the tenant, and should not award more or less than is derived from the evidence before them, independent experts are free to determine the rent that they consider is appropriate without any such constraints (subject to any special terms attached to their appointment).

## 18.6 Use of independent experts' own knowledge

Again, by contrast with the position of arbitrators, who should not deploy a piece of evidence or valuation method drawn from their experience that neither party has had an opportunity to deal with, independent experts are free to deploy their own knowledge and experience and even to use a valuation method that departs from that used by the parties, unless their agreement provides otherwise. They are not obliged to revert to the parties for their comments.

Independent experts should, however, be satisfied that any valuation approach that they would adopt in reaching their decision (e.g. zoning or valuing overall) is supported by a respectable body of opinion within the appropriate area of expertise.

# 19 Overlapping expert determinations

## 19.1 Introduction

Where the same or a substantially similar issue arises in a 'hierarchical' situation (e.g. between landlord and tenant and between tenant and sub-tenant), or in a 'parallel' situation (e.g. between a landlord and his or her tenants of a row of identical shops), and the applications for the appointment of an independent expert are made to the president of RICS at or about the same time, the president may decide to appoint the same person as independent expert in both or all cases (here referred to for convenience as 'overlapping expert determinations'), both in order to save costs and to achieve consistency of result.

This section considers the problems that may arise with such appointments and suggests the procedures independent experts should adopt to deal with them.

## 19.2 The problems

There are four main problems that may confront independent experts appointed in overlapping expert determinations:

a) Independent experts have no power to consolidate the proceedings unless the parties so agree. It may be found that no procedure for combined representations can be devised that would be acceptable to all the parties.

b) Each set of parties is entitled to insist upon privacy being observed in relation to their expert determination, with the result that independent experts will not be able to divulge any of the detail of expert determination A to the parties in expert determination B.

c) The parties to each expert determination are entitled to insist that the expert determination proceeds at a speed and cost that suits their own particular circumstances. The result may well be that the expert determinations will become out of step with each other, and that evidence or legal submissions in expert determination B that could have had a bearing upon the conduct or outcome of the delayed expert determination A will have to be left out of account.

d) If the parties insist upon their expert determinations being dealt with separately and privately, independent experts will have to consider whether they will be able to maintain their impartiality. However, if independent experts feel that the circumstances are such that they may not be able to proceed, they may decide to resign one or more of the appointments, but they should take into consideration whether there are any circumstances that might make them liable for the abortive costs incurred.

## 19.3 The solutions

To an extent, if the parties to each expert determination are not prepared to cooperate with each other, then there will be very little that the independent expert will be able to do about it. The best policy for independent experts will be to adopt a proactive approach right from the beginning, by warning the parties of the perils of independent behaviour, including the increased cost and delay and the potential for inconsistent decisions.

Accordingly, if they have been appointed by the president of RICS in two or more such expert determinations, independent experts should consider, in consultation with all the parties, whether a procedure of combined representations could be devised that is acceptable to all of them. A suggested procedure is set out in paragraph 19.5. This is best proposed at a meeting with all present.

## 19.4 Action on appointment

The following are the points to be noted whenever independent experts are appointed in two or more related cases:

a) independent experts must follow any procedural requirements laid down in any of the leases, even if these vary from lease to lease

b) independent experts have no power to order combined representations unless the parties so consent

c) independent experts must respect the parties' rights to have their expert determinations dealt with separately and privately; and

d) independent experts should strive to obtain the parties' agreement to a procedure that will enable both expert determinations to run concurrently, even if they are not to be consolidated (see paragraph 19.5).

## 19.5 Cooperative procedure

When appointed in two or more expert determinations with overlapping issues, independent experts should:

a) notify all parties in writing of all appointments

b) invite all the parties to a preliminary meeting, mindful, however, of the parties' right to require their own expert determination to be conducted privately, and without reference to any other

c) at that meeting explain the nature of a consolidated

process, with particular reference to the matters set out in paragraphs 19.1 and 19.2

d) seek to give Directions/Procedural Instructions for the conduct of the references bearing in mind the matters set out in paragraphs 19.1 and 19.2

e) despite the fact that the expert determinations may have been agreed to be dealt with concurrently or even consolidated, give each individual consideration, and issue separate determinations in respect of each; and

f) be mindful that where there is cooperation each party will in all probability see the others' representations and their replies will deal with issues or challenges raised by the others, e.g. the relative positions of two units to one another.

## 19.6 Uncooperative procedure

The ideal solution for overlapping determinations is for the independent expert to issue all determinations simultaneously. Where this cannot be done, then the expert determinations must be dealt with separately.

In these circumstances, independent experts will have no alternative but to deal with each expert determination as an entirely separate undertaking. It is inevitable, however, that their approach in relation to one expert determination will be influenced by the evidence and representations they may have heard in the other. Independent experts may raise matters that have arisen in a previous expert determination, or probe the evidence in the light of such knowledge. Further, the fact that the expert determinations must be dealt with separately does not mean that independent experts can reopen a determination already given and change their conclusion as further evidence becomes available. Each reference is dealt with individually, and when independent experts have made their determination, their authority as an independent expert has come to an end in that particular reference.

# 20 Uncooperative parties

## 20.1 Introduction

The independent expert's contract with the parties may only be varied or extended with their agreement. This is therefore not possible if one or both parties do not cooperate with the independent expert.

Independent experts are, however, only obliged to carry out their valuation professionally and in the same manner in which such valuations are ordinarily carried out. Thus they may be entitled to rely on limitations to their valuation that they can show are ordinarily excluded in the course of normal practice. The *Red Book* may provide a useful reference point.

In the event of non cooperation, independent experts should write to the parties setting out a statement of any reasonable limitations or assumptions that they intend to incorporate. Their position will be strengthened if the parties make no specific objection.

## 20.2 Representation by one party only

If only one party wishes to make representations or to submit facts and the other party refuses or is silent, then (unless the terms of the lease plainly preclude them) independent experts should make it plain that they will still be prepared to receive representations. In this case, a copy of the representations that have been received should be sent to the other party to give it the opportunity to comment on them. If the latter does so, then the party making the original representations should be offered an opportunity to respond. Thereafter, no further representations should be invited unless in response to a request by the independent expert.

If one party remains silent throughout, independent experts must use great care in ensuring that any relevant facts disclosed to them by the other are both full and accurate.

Independent experts are under a duty to make their own investigations and therefore are likely to require copies of any correspondence relied upon and to have confirmation of the rental evidence cited. They should measure the accommodation.

## 20.3 Limited power to enforce agreed procedure

Independent experts have little sanction available to them to compel the parties if they both fail to honour the terms of the agreed procedure for determining the dispute. In these circumstances, independent experts should point out that there is an agreed contract between themselves and the parties and that failure to comply with the agreed procedure would be in breach of that contract. In practice, if one party or both parties fail to cooperate, independent experts will have to proceed with their determination after due notice to both parties but without the assistance of information from them.

Independent experts are advised to protect themselves from any alleged breach of contract by:

a) ensuring that all their Terms of Engagement are included in the contract with the parties; and

b) providing themselves with the ability within that contract to continue with their determination whether or not the parties make submissions.

The RICS practice statement, *Surveyors acting as expert witnesses*, requires surveyors to comply with any Directions of the judicial tribunal, which is defined to include independent experts. Independent experts should draw this requirement to the attention of RICS members who decline to cooperate.

## 20.4 Disclosure of documents

Independent experts have no power to direct any party to disclose documents. However, they can request a party to supply documents or any other information. If this request is refused, they can consider what inference can properly be drawn from the refusal.

# 21 Inspections

## 21.1 Requirement for inspections

Independent experts may find it of advantage to make a brief preliminary inspection, particularly on high value disputes, before any meeting is held. They should make a more detailed inspection after having received all the evidence. Independent experts should inspect the subject property and the comparables submitted to them (or at least those that they consider relevant or important) and any other comparables that they consider merit investigation as soon as possible, so that the relevant evidence and submissions are still fresh in their minds when they inspect.

## 21.2 Attendance at inspections

Independent experts may often find it more convenient to make inspections unaccompanied. Where independent experts are to be accompanied both parties, or their representatives, should be present unless either party indicates in advance that it has no wish to be present and no objection to the inspection taking place in the presence of the other party.

The inspection is not an appropriate occasion for reopening any debate.

## 21.3 Oral evidence at inspections

It is unusual for the parties accompanying independent experts on their inspection to address any uninvited comments to them. However, if comments are made to independent experts, the comments should be limited to drawing the independent experts' attention during the inspection to factual matters covered in their evidence. Conversely, independent experts may put relevant questions to the parties during their inspection of any property.

# 22 The determination

## 22.1 Introduction

The purpose of a determination in a rent review dispute is to resolve all the issues in the dispute that have been referred to the independent expert and embody them in a valid and enforceable document.

This section deals with the question of whether a determination should be reasoned; with the different types of determination; and with the requirements for a valid determination.

## 22.2 Should the determination be reasoned?

Some parties have an understandable desire to understand how an independent expert has arrived at his or her rental figure, and may ask for a reasoned determination. Indeed, from a 'customer care' perspective, providing an explanation as to how one has arrived at the decision is to be encouraged. However, independent experts are only *obliged* to provide reasons if the lease or contract of appointment from the parties stipulates that reasons are required. It is a matter of personal preference of the independent expert if he wishes to raise the question of reasons at the outset, or leave the matter for the parties to raise themselves.

Three situations should be distinguished.

First, if the agreement says that reasons should be given then of course they should (unless the parties have informed the independent expert that they have agreed otherwise).

Secondly, if the agreement states that reasons should not be given, the independent expert is not entitled to give reasons unless both parties agree that reasons should after all be given. If, notwithstanding this, one party asks the independent expert to give reasons, it would be in accordance with RICS best practice (but not mandatory) for the independent expert to ask the other party whether or not they agree to this. If that party says they disagree then the independent expert should not give reasons. If the other party remains silent, independent experts may give reasons (or an explanation) although they are not obliged to. This is not a question of professional ethics – it is simply a matter of compliance with the instruction from the parties.

Thirdly, if the agreement is silent on the question whether the determination should be reasoned (a matter that may call for scrutiny), then the independent expert will probably be justified in providing reasons for the determination, regarding the reasons as an intrinsic part of the determination.

Members of RICS will rightly feel that, in any other sphere of practice, it is their professional duty to provide an explanation as to how they arrived at a valuation for which one or both of the parties will be expected to pay. Accordingly, although the provision of independent expert determinations is governed by the terms of the agreement between the parties, the independent expert should appreciate that the parties will ordinarily have a desire to understand how the decision has been reached, and should aim to meet that desire unless the parties' agreement forbids it.

## 22.3 Extent of reasons to be provided

Where it has been agreed or determined that the determination should be reasoned, the extent of the reasons to be given (e.g. basis of calculations, comparables to which weight is attached, legal assumptions/interpretations adopted, etc.) should be considered carefully.

Reasons given by independent experts in a reasoned determination will be likely to be rather less extensive than those written by arbitrators in a reasoned award, not least because there is no obligation upon them to deal with all the arguments put forward by the parties. They should however set out the reasons for their decisions, including their acceptance or rejection of aspects of the comparable evidence, on those matters that are relevant to and underpin their determination.

If reasons have not been agreed to be given prior to the determination, no explanation or justification should be given subsequent to the determination. The independent expert may however exceptionally agree to give reasons after the determination if so requested by both parties, but if so an additional fee would almost certainly be justified.

Since independent experts are potentially liable in negligence, it will be prudent for them to make proper working papers supporting their valuation, including notes on the information on which their valuation is based, and a written explanation of how they have arrived at the conclusions. These documents should be retained for an appropriate period.

## 22.4 Types of determination

A rent review dispute may have only one issue – to take the most obvious example, the amount of the rental value of the premises. Alternatively, it may have several – for example, whether the independent expert has

jurisdiction; whether the rent review clause provides for a headline rent; and what the rent should be.

In the latter case, the parties may want the independent expert to decide all such issues together and produce one determination. Alternatively, it may be appropriate (particularly where the determination of one issue will affect the approach to another) for independent experts to deal with the issues sequentially, by making a series of determinations. There is no universally accepted name for the series of preliminary determinations that independent experts may make to deal with issues that they or the parties wish to deal with sequentially. A good practice is to call such determinations 'Determination No 1', 'Determination No 2', and so on; or 'First Determination', 'Second Determination', etc.; or 'Determination No 1 (Legal issue)', 'Determination No 2 (Rent)', 'Determination No 3 (Determination of Costs)', and so on.

## 22.5 Determination as to costs

The first question is to define what the draftsman intended. Was it simply the independent expert's fees and expenses under consideration? This is the norm – or was it a wider expression to embrace the parties' costs as well – surveyors' or legal advice, etc.? If there is any doubt about the extent of the independent expert's jurisdiction this should be raised at the outset of the proceedings.

In a small value documents-only rent review, it may be appropriate and cost effective to deal with all issues (including costs) in one determination, which will usually be entitled 'Final Determination'.

Even in a straightforward case, however, it will generally be preferable to deal with the question of costs once the parties have had time to consider the independent expert's decision on the substantive issues. In such a case (where the lease permits), independent experts will commonly make a determination that deals with everything save costs. They will usually then label their substantive determination 'Final Determination save as to Costs' or 'Interim Determination', followed by a determination dealing with costs, which they might call the 'Final Determination on Costs'.

## 22.6 Essentials of a valid determination

The requirements for a valid determination will be found in part in the parties' own agreement, and to a limited extent in the common law (see paragraphs 3.8 to 3.12). The parties are free to agree the form of the determination. The determination must not deal with matters that have not been referred to the independent expert. If the determination purports to determine matters beyond those submitted, it will be of no effect in relation to those matters.

## 22.7 Contents of the determination

It is good practice to develop a template for use in setting out the determination, to ensure that all the salient elements are covered in a logical, clear and complete way. Most well-written determinations follow a set pattern containing a number of different ingredients. These are examined in Section 23.

## 22.8 Time for making the determination

Again, the only constraints upon the timing of the determination will be found in the lease, or other agreement of the parties. This will sometimes specify that the determination is to be produced within a certain number of months of the rent review date. It may not be possible for independent experts to comply with this by the time of their appointment, and if so they should raise this with the parties and ensure that a different date is substituted.

Where there are no time limits, independent experts should nevertheless proceed with their inspections and determination as soon as the written representations process has been concluded, consistently with their duty to carry out their determination within a reasonable time (see paragraph 3.9).

Independent experts will generally have many commitments in their working practices that will need attending to. However, independent experts should not accept an appointment if it is likely that such other professional commitments will unduly delay the making of their determination. On a practical level, moreover, the longer independent experts wait before finalising their determination, the more difficult their task, since their grasp of the detail will start to weaken.

There are a number of practical measures independent experts can adopt to ensure that their determination is made as quickly as reasonably possible. First, they should diarise sufficient time for considering and drafting the determination. Secondly, they should use a determination template that will assist them with the layout and operate as a checklist for the contents. Thirdly, they should devise a system for ensuring that they have dealt fairly with the evidence and representations of each party, and arrived at properly reasoned conclusions in relation to all the issues.

## 22.9 Date and delivery of the determination

The parties are free to agree on the requirements as to the notification of the determination to the parties. If there is no such agreement, then when the determination

is ready for issue the independent expert should notify both parties that it is available to be taken up.

Although there is no statutory basis for the practice (compare s. 56 of the *Arbitration Act* 1996), it is thought that independent experts are entitled to require full payment for their fees (including costs and VAT) before the determination is released to the parties. This has become standard practice among independent experts in the field of rent review. If one party pays the full amount of the independent expert's fee, the determination should nevertheless be issued to both parties at the same time. If the party who has paid all or part of the fee in this way is not required by the terms of the determination to bear such liability, it may obtain appropriate reimbursement (see paragraph 25.4).

Independent experts should supply VAT invoices to the parties if and as requested. In the unlikely event that, having been advised that it is available, neither party takes up the determination within a reasonable time, independent experts should issue the determination to both parties. If necessary, independent experts should eventually sue both parties for recovery of their fees in accordance with the determination, on the basis of joint and several liability.

## 22.10 Correction of mistakes

All tribunals make mistakes from time to time. If the determination contains an obvious error, then it may be possible for independent experts to correct it. This topic is discussed fully in paragraph 26.4.

# 23 Contents of the determination

## 23.1 Unreasoned determinations

Where independent experts are not required to give reasons for their determination, then it will suffice for them to issue to the parties a short document containing a heading, naming the parties to the dispute and the subject property; reference to the method of the independent expert's appointment; the subject matter of the dispute; the decision; and the independent expert's signature and date.

## 23.2 Reasoned determinations

Where the determination is required to be reasoned then it will be good practice to develop a template for use in setting out the determination, to ensure that all the salient elements are covered in a logical, clear and complete way. Reference should be made for convenience to Section 23 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews*, which sets out the ingredients that are relevant to a reasoned award in arbitration.

It should be noted, however, that whereas the task of an arbitrator is to rule on a dispute between the parties in a quasi-judicial manner, the independent expert's task is to arrive at the right conclusion, irrespective of the parties' submissions. There will therefore be no need for the independent expert to recount the parties' submissions, still less to explain why he has accepted or rejected one view. This important point is explained in more detail in the next paragraph.

## 23.3 Independent expert's reasons

In contrast to an arbitrator's award, where it is usual for the parties' cases to be summarised, with the arbitrator then confirming the reasons for preferring or being persuaded by the evidence of one surveyor compared to the other, the position before the independent expert is quite different. Here, the independent expert is essentially carrying out a valuation. As part of that process, the independent expert will find it helpful to list the issues which he or she considers the main aspects which affect the value being determined. In most instances, these issues will coincide with those identified by the parties, but the independent expert has the latitude to add any other points which require to be addressed, in carrying out the rental valuation for review purposes.

The extent to which reasons are developed in writing will vary according to personal preference: in some cases, independent experts may choose to recount the parties' arguments in summary form; in others, independent experts may make little or no reference to the content of the representations, apart perhaps from a brief introduction.

It is to be stressed that it is the independent expert's own reasons for arriving at their final valuation which are paramount, while the evidence and argument supplied by the parties' surveyors are subordinate to this.

Accordingly, in practical terms, it is suggested that the preferred procedure in providing reasons will involve the independent expert identifying a particular issue, detailing his or her thought process, and after stating the conclusion reached, make passing or brief comment only then as to whether that coincides with the view advanced by the parties. The independent expert is not weighing the evidence and stating which side is the more persuasive, as would be done by an arbitrator. On the contrary, the independent expert is evaluating the rental and other evidence, as would be done in carrying out an Independent valuation with or without additional input from anyone.

While in some leases, the review clause may require the independent expert to 'have regard to the representations lodged by each side' nevertheless it is the independent expert's own opinion which is critical, as opposed to an arbitrator's judgment based purely on the evidence submitted.

## 23.4 Commenting on matters not raised by the parties

The question often arises whether the independent expert is obliged to revert to the parties when deciding a point that has not been put forward by either side. It is considered that the independent expert is not obliged to do so. Even if a material comparable has not been tabled by either side, the independent expert is not required to bring this to the attention of the parties and invite comment, which could, depending on the circumstances, lead to counter-comment. If the independent expert did so, it would delay (and quite possibly add to the cost of) the determination, which would be contrary to the point of this form of dispute resolution.

This situation is slightly different in regard to legal or technical issues, if the expert identifies any and the point has not been raised by the parties already, but such situations are rare.

## 23.5 The decision

This important part of the determination should set out the independent expert's decision on the dispute. It is always essential that independent experts make an unequivocal and final decision on the amount of the rent and such other issues as may be included in the expert determination agreement (e.g. costs). The wording of their findings and determination and their Directions as to costs must therefore be clear and unambiguous.

Typically, this will start with the independent expert's determination of the rental value. Independent experts will also need to consider whether they are required to make any ancillary decisions, for example, in relation to the payment of costs by one party to another.

## 23.6 Ending the determination

Once the independent expert has written the decision section and dealt with costs to the extent necessary to do so at that stage, the only remaining matters are the closing formalities.

The independent expert should sign and date the determination. There is no need to have the signature witnessed.

Having written the determination and checked it for accuracy, spelling and punctuation, it is always prudent to print it off and put it to one side for at least 24 hours and read it again before signing it off, in order to eliminate errors that survived the initial proofreading.

# 24 Fees

## 24.1 General guidance

Independent experts must decide their fees on the merits of each particular case. In view of their duty to assemble information and their potential liability in negligence, independent experts may be justified in charging a fee higher than if they were acting as an arbitrator. Moreover, the current practice is for independent experts to quote a fee higher than they would charge if acting as a valuer for either party alone, but this will obviously vary according to market conditions.

Independent experts' fees should not be fixed as a percentage of the rental determination. They should be prepared to discuss the appropriate level of fee, whether the appointment is made by the parties or the president of RICS.

Independent experts who proceed to a determination without the agreement of the parties (whether in the lease or separately) as to the payment of their fees and costs, are likely to have a right in law to be paid a reasonable fee for work done at the implied request of both parties under the independent expert's contract with them (see paragraph 3.2). However, independent experts would be most unwise to proceed on this assumption. They should immediately upon appointment, or at the latest at the preliminary meeting (if one is held), not only establish the basis of the fees and costs, but also obtain an express agreement by one or both parties to pay them as part of the contract or Terms of Engagement they have entered into.

The charging basis should be sufficiently flexible to cover not only fees but also disbursements, e.g. for legal advice and travelling costs.

## 24.2 Basis of charge

In fixing their fees, independent experts may properly have regard to the complexity and importance of the matter in dispute, the degree of responsibility, skill and specialised knowledge involved, the amount of time involved, the level of the representation and the amount or value in dispute.

In some cases it will be desirable to fix a fee, especially when the amount at stake is small. However, in many cases it will be impossible for independent experts to name a precise fee at the outset although they should give an indication as early as possible as to the basis they are going to adopt.

Where the amount or rental value of the subject property is small, a fee based on a normal hourly or daily rate of charging may be large in relation to the amount involved. In such cases, it is common for the independent expert to charge a lower fee as part of the service that members of RICS traditionally give to the public. It is therefore suggested that in formulating their proposal, independent experts should:

a) start with the hourly or daily rate that they would charge for other professional work they undertake of average complexity

b) adjust this rate, as they would in any case, having regard to the importance of the matters in dispute, the degree of responsibility, skill and specialised knowledge involved, whether the parties were represented (and therefore the extent to which the independent expert was assisted), and the amount or value in dispute

c) estimate the time reasonably likely to be spent dealing with the reference, reflecting whether or not a reasoned determination is required; and

d) look at the resultant figure and consider whether it is a fair amount to charge, having regard to the interests of the parties who have to pay it, and to the interests of the profession in providing the rent review service to the public.

If the determination is possibly going to become protracted, it may be wise for independent experts to reserve the right to vary their charging rate at some future date.

## 24.3 Recording time spent

Where independent experts charge on a time basis, they should from appointment onwards keep a full log of the time spent and disbursements so as to be able to justify their fees ultimately charged if either party challenges them.

## 24.4 Commitment fees/holding fees

There are many examples of lengthy delays post-appointment during which the parties will be negotiating. While this may be perfectly reasonable, it is not reasonable for independent experts to be prevented from accepting other instructions due to such delays.

One way for independent experts to deal with this is to inform the parties at the outset that they will resign after a specified period of months if there has been no substantive progress. Independent experts should then give the parties a reasonable period of notice before carrying out this action in order to give them a chance to consider the consequences of their inaction. Another way is for independent experts to inform the parties

that they will charge a commitment fee if nothing has happened after a specified period of time.

While it is common in expert determinations in spheres other than rent review for independent experts to request a commitment fee, the right to such fees will not commonly be sanctioned by the dispute resolution clause in the lease, and it cannot be said that independent experts are entitled to them as an implied term of the expert determination. Accordingly, if independent experts wish to preserve their right to collect such fees, then they should raise the matter at the outset of the appointment.

If no such fees are agreed and independent experts subsequently seek to charge them, but one of the parties refuses, independent experts cannot refuse to proceed without payment and cannot insist upon payment.

## 24.5 Fees on account

It is also common in expert determinations in spheres other than rent review for independent experts to request payment of their fees in tranches in advance and on account of their work at various stages in the determination. Again, the right to such fees is not commonly sanctioned by the dispute resolution clause in the lease, and it cannot be said that independent experts are entitled to them as an implied term of the expert determination. Accordingly, if independent experts wish to preserve their right to collect such fees, then they should raise the matter at the outset of the appointment (see paragraph 6.6).

If no such fees are agreed and independent experts subsequently seek to charge them, but one of the parties refuses, independent experts cannot refuse to proceed without payment and cannot insist upon payment.

## 24.6 Negotiated settlement is reached before determination

While it is impossible to make specific recommendations (because the appropriate fee must depend on the circumstances of each individual case), the following, read in conjunction with paragraph 24.2 of this guidance note, may provide some assistance. Alternatively, if an hourly charge rate has been agreed, then the appropriate fee can easily be ascertained at any stage.

## 24.7 Repetitive work

Where independent experts are appointed to determine a series of similar disputes (e.g. several units in a parade of shops, or as regards the same premises, between a head lessor, head lessee and underlessee), or where the work is repetitive, a fee on the previously mentioned basis might be appropriate for a selected test unit, with reduced fees for the allied and subsequent expert determinations concerning the adjacent properties or underlet parts of the property.

## 24.8 Objections to charges

As independent experts' fees and disbursements are not directly subject to the court's control, there is no entitlement for either party to apply to the court for the determination of a reasonable expert determination fee (compare s. 28 of the *Arbitration Act* 1996).

However, a party who has paid a fee it considers to be excessive may be entitled to bring an action to recoup an excessive payment if the amount or basis of the fees or disbursements has not been agreed and the payment has been made under protest.

## 24.9 Costs incurred by independent experts

Independent experts' fees and disbursements will on occasion include the cost of taking legal or other specialist advice, but only where this has been sanctioned, expressly or implicitly, by the dispute resolution agreement.

Where such ancillary specialist costs seem likely to arise, independent experts would be wise to obtain the parties' agreement to their payment at the outset, before they are incurred. This is therefore a matter that is best dealt with at the outset (see paragraph 11.5).

## 24.10 Fee upon removal or resignation

On resignation or removal, independent experts may be entitled to a reasonable fee. This will, however, depend upon the terms of the dispute resolution agreement, and upon the circumstances of the resignation or removal. Unlike in arbitration, there is no entitlement for either party (or indeed the independent expert) to have the matter determined by the court (compare ss. 24(4) and 25(3)(b) of the *Arbitration Act* 1996).

| Time of settlement | | Appropriate fee |
|---|---|---|
| a) | After appointment and/or perusal of documents and/or preliminary meeting and/or issue of Directions but before independent experts have done any further work. | No charge or, if work has been done, a fee based on the amount of that work, plus disbursements. |
| b) | After the steps in a) above, and the receipt and perusal of representations but before independent experts have done any further work. | That proportion of the full agreed fee that represents the hours spent compared with the previously expected time requirement, plus disbursements. |
| c) | After the steps in a) and b) and the inspection of the premises, and assembly by independent experts of their own material, and all further work except the completion and issue of the determination. | The full fee, subject to a reduction in respect of work not done, plus disbursements. |
| d) | After the determination has been finalised and notification to the parties that it is available to be taken up. | The full fee, plus disbursements. |

# 25 Costs

## 25.1 Introduction

Independent experts have no authority regarding costs unless the terms of the lease or of their appointment expressly confer such a power on them. If conferred, such power may relate to by whom and in what proportion the independent expert's own fees and disbursements shall be paid, as well as the division of responsibility for the parties' costs. Any uncertainty in this regard (e.g. reference to 'costs' or 'the costs of the determination') should be resolved at an early stage in the procedure.

In exercising any such power granted, independent experts must act fairly in the matter and follow the rules of natural justice. The process is analogous to an arbitrator dealing with costs, and reference should therefore be made to the full treatment of this topic in Section 25 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews*.

In practice, the independent expert may wish to encourage the parties to agree on how costs should be dealt with (for example, that each party should bear their own costs).

## 25.2 'Rules' relating to costs

The costs of a closely fought rent review expert determination may be formidable, and may in some cases eclipse the amount at issue. It will therefore be important for independent experts to understand the 'rules' relating to the allocation and recoverability of the costs of the expert determination, and the matters that should inform the way in which they exercise their discretion as to costs, where they are empowered to decide on the responsibility for costs.

The rules, which are themselves little more than presumptions or guidelines, may be summarised as follows (with a fuller treatment set out in Section 25 of the guidance note *Surveyors acting as arbitrators in commercial property rent reviews*):

a) the parties are free to agree how costs should be allocated

b) if the parties do not so agree, the allocation of costs is a matter for the independent expert, provided that the parties have agreed that the independent expert should determine costs

c) costs should follow the event

d) costs may be determined on an issue-by-issue basis

e) although the independent expert has a discretion as to costs (where the parties have agreed that he or she is to determine them) that discretion should be exercised judicially; and

f) the determination on costs should be reasoned, if that is what the parties have agreed.

## 25.3 Assessment of costs

Generally, if independent experts are asked to deal with the parties' costs, they will only be asked to deal in the first instance with the allocation of the costs of the expert determination (i.e. who should pay whom), leaving the assessment of the actual amount of the costs until later. Indeed, independent experts should encourage the parties to agree the recoverable costs between themselves. It is best to deal with the parties' legal and other costs and the independent expert's fees and expenses separately. In dealing with the allocation of costs, independent experts will need to state the basis upon which the amount of the costs is to be assessed and how, when and by whom that assessment is to be carried out.

If the parties are unable to agree on the assessment of the amount of the costs, then the independent expert must do so.

# 26 Events after the determination

## 26.1 Closing the case

With the exception of the matters discussed in paragraphs 26.2 to 26.6, once independent experts have made their final determination, they have completed their task – they are *functus officio*, to use the legal expression.

It follows from this that independent experts have no further jurisdiction in relation to the expert determination, and are not at liberty to entertain any requests by the parties for anything else.

## 26.2 Correction of determinations by agreement

Where it appears to the parties that the determination contains an error of any kind, independent experts should entertain an agreed application by them to correct the determination. The error may be of any kind, large or small. It is, however, essential that the parties agree. If they do not, then the independent expert has no power to correct the determination, unless the error is merely a slip or clerical error, in which case it should be rectified, and both parties informed immediately.

The fact that the parties may have agreed that the determination contains an error that must be corrected does not of course mean that independent experts are bound to accede to the application by the parties. They may take the view that the parties themselves are mistaken, and that the determination needs no correction. Before making up their mind, however, independent experts would be prudent to hear what the parties have to say on the matter and, in cases of doubt, to take legal advice.

## 26.3 Correction other than by agreement

Where the parties are not in agreement, then independent experts will have no power to correct their determination, even if it is apparent to them that it contains a mistake. However, if there is a manifest error, e.g. transposition of floor area figures, it is perhaps wise to simply correct the error and save the parties the cost and time of having the determination set aside.

## 26.4 Requests for further reasons

Where the determination appears to the parties to be insufficiently reasoned, they may agree to approach the independent expert to ask for further reasons, in the shape of an additional determination, which the independent expert would be prudent, if not positively obliged, to make.

Where the parties do not agree, then independent experts have no power to give additional reasons, and must decline any request to do so, no matter how compelling the case might be.

## 26.5 Legal challenges to the determination

A party to an expert determination is not entitled to apply to the court to set aside the determination on the ground of an irregularity or error of law (compare ss. 68 and 69 of the *Arbitration Act* 1996). The only circumstances in which a determination may be challenged are a) where it is evident that the independent expert has departed from their instructions in a material respect (as opposed to carrying out that task in a deficient way, in which case although the independent expert may be sued for negligence, the determination will stand); b) where the dispute resolution clause allows a challenge in the case of manifest error, and the determination displays such an error; or c) in the cases of fraud, collusion or partiality. These circumstances are examined in Chapter 11 of the *Handbook of Rent Review*.

## 26.6 Reaction to legal challenge

It follows from the discussion above that independent experts have no role to play in any legal challenge to their determination, unless they are required by the court to provide reasons.

Accordingly, frustrating though it might be, the independent expert must resist the temptation, for example, to put in a witness statement explaining the reasons for making the determination. There is of course no reason for not replying courteously to the parties' correspondence, but the independent expert should not provide any substantive reply unless both parties agree that the independent expert should do so (and it was agreed in the first place that the determination should be reasoned).

# Appendix: Comparison of arbitration with determination by independent experts

The main differences in the duties and suggested procedures for independent experts and arbitrators as regards commercial rent reviews may be summarised as follows:

| Arbitrators | Independent experts |
|---|---|
| a) Arbitrators act (as do judges) only on evidence and arguments submitted to them, but they are able to draw the parties' attention to matters of which they may not be aware. They are also able to take the initiative in ascertaining facts and the law (see paragraph 13.7). Their award must lie between the extremes contended for by the parties. Arbitrators are, however, expected to use their expertise in assessing the relevance and quality of the evidence and arguments submitted to them. | a) Independent experts have the duty of investigation to discover the facts, details of relevant comparable transactions and all other information relevant to their valuation (though they may receive information regarding these matters from the parties). |
| b) Arbitrators cannot decide without receiving evidence from the parties, or from one of the parties when they are 'proceeding in default' by the other, except where proceeding on their own initiative (see paragraph 13.7). | b) Independent experts base their decision upon their own knowledge and investigations, but they may be required by the instrument under which they are appointed to receive submissions from the parties. |
| c) The procedure for arbitration is regulated by the *Arbitration Act* 1996. | c) There is no legislation governing procedure for independent experts, and they must therefore settle their own contract with the parties. |
| d) A party to arbitration can seek and (through the courts) compel disclosure of documents or the attendance of witnesses. | d) Independent experts have no such powers. |
| e) Arbitrators may not delegate any of their duties, powers or responsibilities, although they can seek assistance. | e) Independent experts have a duty to use their own knowledge and experience in arriving at their decision. However, during the course of the investigation, independent experts may seek routine administrative or other assistance from any other person. This is always provided that independent experts are in a position to vouch for the accuracy with which such tasks are carried out. |
| f) In an arbitration, arbitrators can award that one party shall pay all or part of the arbitrator's fees and all or part of the other party's costs. They can also assess the quantification of those fees and costs. | f) Independent experts have no power to make any orders as to their fees, or as to the costs of a party, unless such a power is conferred upon them by the lease or by agreement between the parties. |
| g) Arbitrators' fees can be determined by the court under the *Arbitration Act* 1996. | g) There is no procedure for formal determination of independent experts' fees. |
| h) There is some (albeit limited) right of appeal against the award of an arbitrator on a point of law. An arbitrator's award may also be challenged in the courts on the basis that the arbitrator did not have jurisdiction or on the grounds of 'serious irregularity'. If a serious irregularity is shown, the court may (in whole or part) remit the award, set it aside or declare it to be of no effect. | h) There is no right of appeal against the determination of an independent expert, though in some very limited circumstances the court may set it aside. |
| i) Providing they have not acted in bad faith, arbitrators are not liable for negligence (see s. 29 of the Act). | i) Independent experts are liable in damages for any losses sustained by a party through their negligence. This is so notwithstanding that the court will not interfere with a final and binding determination that they have made. |

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