Introduction

The Government’s [Code of Practice](#) for landlords and tenants requires them to act responsibly in negotiating ways forward after the Covid-19 crisis. The code suggests that landlords and tenants use a third-party mediator to help with these negotiations.

RICS has consulted with both landlords and tenants and what emerges is:

- A pressing need from tenants for a ‘safe space’ to articulate their difficulties and to have these recognised by their landlords
- A need from landlords for a dispute resolution process rigorous enough to separate tenants who genuinely cannot pay from those using the crisis as an excuse for not doing so.

The RICS Commercial Rental Independent Evaluation Service:

- Creates the opportunity for a clear, balanced dialogue between landlord and tenant
- Provides a clear structure for the documentary and other pertinent evidence to be presented and examined
- Provides for an incisive analysis of the tenant’s grounds for non-payment and the landlord’s prerequisites for making concessions
- Provides an opportunity for the parties and/or the Evaluator (with the parties consent) to engage external specialist advice to scrutinise the proposals made and the documentation on which they are premised Is refereed by the RICS Evaluator who maintains a balance between the parties in the negotiations and brings with him/her years of real-world experience of dealing with similar negotiations
- Keeps the final decision on how to proceed in the hands of the parties, properly informed by the careful analysis of the evidence and arguments made
- Is conducted online to accommodate the ongoing Covid-19 restrictions
- Is a cost-effective intervention properly matched to the size of the dispute
- Is administered by an impartial third-party service provider.

Contact [drs@rics.org](mailto:drs@rics.org) for more information
Background

The RICS Covid-19 Commercial Rental Independent Evaluation Service is designed to provide an ADR facility for the “Code of Practice for commercial property relationships during the COVID-19 pandemic”, dated June 2020 and issued by the Ministry of Housing, Communities and Local Government. The contents of the Code of Practice should be fully understood by the Evaluator and the parties. Beyond that, there are no specific statutory provisions to draw upon at the present time governing this process. The process is new and does not fall wholly within the more familiar options of Mediation, Arbitration and Independent Expert Determination. However, the process is a consensual process and requires the positive approach of all parties and the Evaluator. At all times, the Evaluator should draw upon their business expertise and negotiation abilities and experience as a dispute resolver.

Independent Evaluation is not a binding determination: it remains a facilitated negotiation with an agreement rather than an imposed outcome. It allows the evaluator to intervene and use their experience and sector expertise robustly to analyse and test the proposals made by the parties, without deciding the matter, but to assist them to make a responsible, commercial settlement as required under the Code of Practice. Nevertheless, a degree of guidance can be found in the principles enshrined in the Arbitration Act 1996 which recognise that:

a. this is the parties’ dispute, and that
b. the parties are seeking a resolution that is fair and appropriate. Hence:
   i. The object of this evaluation process is to obtain a fair resolution of the issues between the parties who are subject to events that have been beyond their control through the COVID-19 Pandemic;
   ii. The parties are free to agree how the dispute is to be resolved;
   iii. The Evaluator must act fairly and impartially between the parties, giving each party a reasonable opportunity of putting their case and dealing with that of their opponent;
   iv. The Evaluator should adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense, and providing an appropriate infrastructure by fair means for the resolution of the issues arising in each case;
   v. The parties are always free to agree on the powers of the Evaluator, but once such powers are agreed, they should be adhered to by each party.
The Process

Day 1 – Either party applies to RICS, providing details of the parties, the property, passing rent pertaining to it and a brief outline of the parties positions

Day 5 – RICS will appoint an independent evaluator within five working days of receipt of the application; and the independent evaluator will contact the parties to set the process in motion.

Day 14 - The Responding party responds, providing reasoned grounds for saying what is acceptable and what is not, and why

Day 7 – The Refering Party provides the landlord and evaluator with reasoned written grounds for the concessions sought

Day 21 – The Refering Party replies only to new issues raised in the Responding Parties’s response

Day 28 - The independent evaluation session takes place

Before the Appointment

You will need to submit a completed Commercial Rental Independent Evaluation Service application form and make payment of the appropriate application fee.

Based on the information supplied, RICS will appoint an appropriate Evaluator, who has confirmed that they are available to act and are free from conflicts of interest.

RICS will send copies of the confirmation of appointment of the Evaluator and the Evaluator’s acknowledgement of the appointment to both parties.
Immediately after the appointment

The Evaluator will email the parties and RICS DRS confirming:

- The appointment

- The fees that will be charged, either in accordance with the scales of fees provided or where above the threshold, the proposed fees for the case.
  - Both sides will bear their own costs unless the parties agree otherwise.
  - There is no provision for costs and fees to be determined by the Evaluator although if the parties agree, such powers could be given to the Evaluator under sections 59-65 of the Arbitration Act 1996.

- Their understanding of the case as submitted to RICS DRS by the parties/party.

- That the objective of the process is to achieve a fair settlement between the parties as soon as possible.

- That the process will be confidential, including any eventual agreements or settlement unless agreed otherwise by the parties

- A proposed timeframe, if not by default that set out in the service documents

- A proposed time and date for the evaluation session, and a communications platform in which to conduct it.

- That either party and/or the Evaluator (with the parties consent) may at any stage in this process engage an external expert, e.g. an accountant, to scrutinise the proposals made and the documentation on which they are premised.

- That the parties shall not be permitted to rely upon any expression of opinion, advice or comment made by the Evaluator in the course of the Evaluation process, for the purposes of any legal or similar proceedings, any form of alternative dispute resolution in relation to the dispute or any matter related to or concerning the subject matter of the Evaluation process.

- Notwithstanding any such agreement, the Evaluator retains the discretion at any time to choose not to express an opinion and is not required to provide reasons to the parties for this decision.

- In formulating an opinion, the Evaluator is entitled to rely on their own knowledge and experience as well as information provided during the Evaluation process.

- Any such opinion expressed by the Evaluator will be non-binding, unless the parties agree otherwise.

- No responsibility is assumed by DRS nor by any of its members, servants or agents nor by the Evaluator for the accuracy or completeness of any advice or opinion proffered (whether intentionally or not) before, in the course of or after the Evaluation process or for any assistance given in or about the content or drafting of any settlement agreement and the Parties acknowledge that, unless they agree otherwise. They are not entitled to rely upon any such advice, opinion or assistance and must seek their own legal or other professional advice.

- That if not otherwise provided for in this email, the default positions as to fees and timetables set out in the service documentation will prevail.

- That each party is required to email their consent to the above to the Evaluator and to RICS DRS before any further steps can be taken
During the next 28 days

Unless agreed otherwise:

The tenant will within seven days of making application to the RICS provide the landlord and Evaluator with reasoned written grounds for the concessions sought, together with the documents upon which it intends to rely in support of these.

The landlord will within seven days thereafter respond, providing the tenant and Evaluator with reasoned written grounds for saying what is acceptable and what is not, and why, together with the documents upon which it intends to rely in support of these.

The tenant will within seven days thereafter provide the landlord and Evaluator with reasoned written replies only to new issues raised in the landlord’s response, together with the documents upon which it intends to rely in support of these.

The evaluation session will take place within seven days thereafter, and will be arranged for the time period specified in the service documents.

Either party and/or the Evaluator with their consent may at any stage in this process engage an external expert, e.g. an accountant, to scrutinise the proposals made and the documentation on which they are premised.

- The Evaluator will seek to establish if as early as possible in the procedures they will require to call upon any expert advice from an independent expert and if a single expert can be appointed to advise both parties and the Evaluator.
- The responsibility for any experts’ costs and liability for fees will need to be established before any expert is appointed.
- If expert evidence is obtained should not be submitted in the format of an expert witness report but in a document should briefly summarise the advice and position of the expert.
The Evaluation Session

Attendees at the meeting

The persons attending the session should be properly authorised to commit the party they represent to any agreement made during the course of the session without the need for further delay or third-party authorisation.

The meeting

The evaluation session will take place with both parties and the Evaluator together unless either of the parties or the Evaluator believe that a private conversation between one of the parties and the Evaluator would be beneficial and all are in agreement for this to take place.

All discussion during the evaluation session will be strictly confidential and will not be disclosed to anyone outside of the session without the consent of the parties.

Any offers or concessions made during the course of the session which are not incorporated in the final settlement will be made on a without prejudice basis and will not be admissible in any subsequent court, tribunal, arbitral or other proceedings between the parties. No offer or concession made or agreement reached during the course of the session will be binding on the parties until it is incorporated into the final settlement agreed at the end of the session.

At any time during the process the parties will be allowed to withdraw from the Evaluation session to discuss matters arising. This will assist the parties to “evaluate” the position and status of the dispute at that point of time so that any changes in their approach can be established.

Recordings and notes

No recordings will be allowed of the session and any notes made by the Evaluator during the course of the session will be for their own benefit, will not be legally enforceable or discoverable and will be destroyed immediately after the session ends.
Role of the Evaluator

As a first step, the Evaluator will ask each party to set out the basis of their case in simple terms and to explain what they are seeking to achieve through the evaluation process. The Evaluator will work to establish a positive atmosphere by setting ground rules for the parties to adhere to. This will provide a structure that can easily be recognised and understood by the parties and the Evaluator.

The Evaluator will then work with the parties to examine, in increasing detail, the arguments and evidence relied on by each side, to test it against the other party’s arguments and against their own understanding of the market and circumstances of the case. In doing so the Evaluator will draw both on the evidence, documentation and arguments presented by the parties and on their own experience and expertise. The Evaluator will also explore with the parties how the process can be adapted to ensure that a successful outcome can be achieved given the issues in dispute. The Evaluator will ask and invite questions to help the parties explore their underlying interests, choices and proposals and establish areas where compromise and settlement can be reached.

All discussion will be refereed by the Evaluator who will ensure that the parties each have a full and fair opportunity to put their case and scrutinise that of the other. The Evaluator will ensure that the discussion is fair, courteous and does not result in either party being intimidated or prevented from expressing their views fully.

The Evaluator will assist the parties to keep a clear record of what is being discussed, to assist with the negotiation, and will throughout the process, confirm the position of each party as it changes or evolves.
Representation

The parties are entitled to be represented at the session, but there will be no opportunity for the leading of evidence or cross-examination.

External Experts

Further to what is said above concerning the early identification of the need for external experts, where either party and/or the Evaluator with the parties’ consent has engaged an external expert, the findings of the expert will be scrutinised during the course of the evaluation session. If the expert(s) has been invited to attend the session, the Evaluator will allow the experts to express their opinions on the elements they have considered and become involved in the discussion between the parties. If expert evidence is obtained,

The Settlement

Once the parties reach agreement, this will be recorded in writing and signed by each party or their authorised representative. It will be preferable for the parties to draft any agreement, but the Evaluator will be there to assist them.

This agreement will have the status of a fully binding contract between the parties. It should be accepted that settlements may be in the short, medium or long term in respect of the outcome of the evaluation.

Parties should bear in mind that agreements that are documented may necessitate the use of waivers, deeds of variation, licences, or other instruments insofar as they are appropriate for the purposes of recording the settlement. Where this is the case, they may need to rely on specialist legal advice in drafting these.
Administrative Arrangements

Location of the meeting

Where possible meetings should be held by video conferencing using established platforms such as Microsoft Teams, Zoom, or similar platforms. Conference calls by telephone or FaceTime are an alternative, but are likely to be less satisfactory.

Conference calls should, as far as possible, follow the same procedure as virtual or physical meetings, but where differences are essential, these should be discussed and agreed by the Evaluator and the parties.

Only if both parties insist, and it is safe to do so, should physical meetings be held. In which case, all current government regulations, including social distancing, must be adopted.

Documentation in the meeting

All documents should, where possible, be shared in electronic format rather than on paper, and considered during the course of the Evaluation session using share screen facilities.
Deciding the procedure

The Evaluator will determine the procedure for the session in consultation with the parties.

At any meeting (visual or physical) the Evaluator will ensure that all participants are identified and agreed by both sides as being appropriate.

In addition, the virtual meeting platform must be controlled by the Evaluator or a technician engaged by the Evaluator or the parties by agreement, to ensure that the meeting proceeds smoothly and that any documents can be shared by all parties involved. The Evaluator must also ensure that the appropriate people are in the room and that only one individual can speak at a time with control over muting and camera roll.

The Evaluator should set time limits where appropriate and necessary and enforce any timetable appropriately.
Delivering confidence

We are RICS. Everything we do is designed to effect positive change in the built and natural environments. Through our respected global standards, leading professional progression and our trusted data and insight, we promote and enforce the highest professional standards in the development and management of land, real estate, construction and infrastructure. Our work with others provides a foundation for confident markets, pioneers better places to live and work and is a force for positive social impact.

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