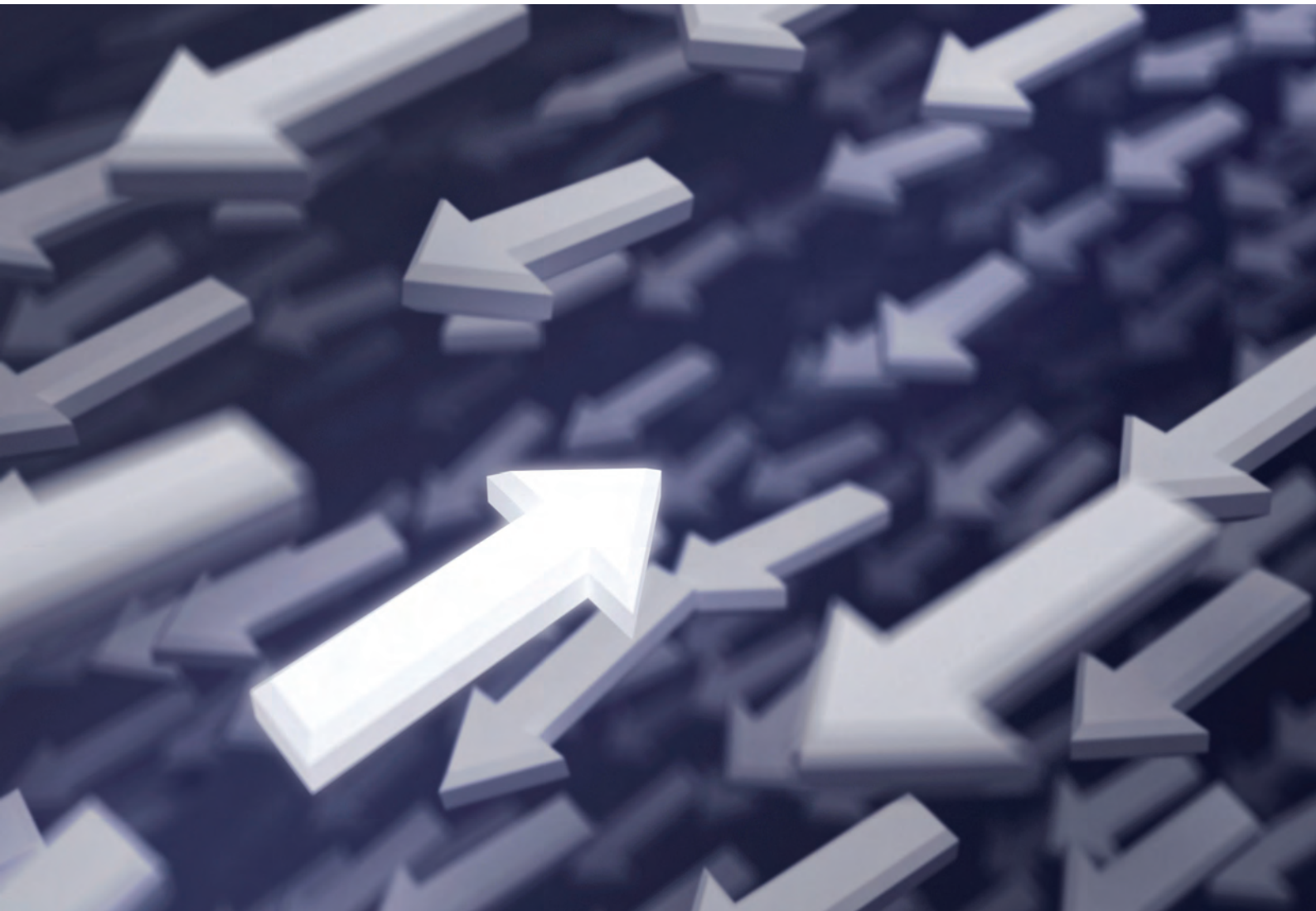




RICS professional guidance, England, Wales and Northern Ireland

Independent expert determination

1st edition, December 2016



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RICS professional guidance

International standards

RICS is at the forefront of developing international standards, working in coalitions with organisations around the world, acting in the public interest to raise standards and increase transparency within markets. International Property Measurement Standards (IPMS – ipmsc.org), International Construction Measurement Standards (ICMS), International Ethics Standards (IES) and others will be published and will be mandatory for RICS members. This guidance note links directly to these standards and underpins them. RICS members are advised to make themselves aware of the international standards (see www.rics.org) and the overarching principles with which this guidance note complies. Members of RICS are uniquely placed in the market by being trained, qualified and regulated by working to international standards and complying with this guidance note.

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 that in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the guidance 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 acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance 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 member to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this guidance note, they should do so only for 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 Panel.

In some cases there may be existing national standards which may take precedence over this guidance note. National standards can be defined as professional standards that are either prescribed in law or federal/local legislation, or developed in collaboration with other relevant bodies.

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 professional guidance and standards documents. 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
Professional statement		
RICS Professional statement	A document that provides members with mandatory requirements or a rule that a member or firm is expected to adhere to. This term encompasses practice statements, Red Book professional standards, global valuation practice statements, regulatory rules, RICS Rules of Conduct and government codes of practice.	Mandatory
Guidance & information		
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). Usual principles apply in cases of negligence if best practice is not followed.
RICS Guidance note (GN)	Document that provides users with recommendations or approach for accepted good practice as followed by competent and conscientious practitioners.	Recommended best practice. Usual principles apply in cases of negligence if best practice is not followed.
RICS Information paper (IP)	Practice-based document that provides users with the latest technical information, knowledge or common findings from regulatory reviews.	Information and/or recommended best practice. Usual principles apply in cases of negligence if technical information is known in the market.
RICS Insights	Issues-based input that provide users with the latest information. This term encompasses Thought Leadership papers, market updates, topical items of interest, white papers, futures, reports and news alerts.	Information only.
RICS Economic/market reports	A new document usually based on a survey of members, or a document highlighting economic trends.	Information only.
RICS Consumer guides	A document designed solely for use by consumers, providing some limited technical advice.	Information only.
Research	An independent peer-reviewed arm's-length research document designed to inform members, market professionals, end users and other stakeholders.	Information only.

1 Introduction

1.1 Scope and application of this guidance note

This guidance 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 based upon the law and practice relating to expert determinations in England, Wales and Northern Ireland.

Independent expert determination is well suited to construction-related matters (e.g. workmanship and completion issues under development agreements or specific technical disputes) and in the area of dilapidations and service charge disputes.

RICS currently runs the Dilapidations Dispute Resolution Scheme which is designed specifically for the resolution of lease-end dilapidations disputes and which is based on independent expert determination. The principles underpinning the structure of the scheme include putting both parties on an equal footing; allowing disputes to be resolved relatively quickly, and allowing disputes to be resolved economically.

Most disputes are, in fact, capable of being resolved by independent expert determination and ad-hoc agreements to refer a dispute to an independent expert are common.

The majority of appointments of independent experts made by the President of RICS are in commercial rent review disputes and a separate guidance note has been prepared for surveyors working in this field – *Surveyors acting as independent experts in commercial property rent reviews* (9th edition).

Because of the need for flexibility, and the varying disputes which chartered surveyors are frequently appointed to determine, RICS does not produce any 'Rules' for expert determination. However, if the reader wishes to see examples of 'Rules' used in practice, both the Academy of Experts and the Institution of Chemical Engineers have produced 'Rules' which are intended to be adopted by disputing parties and which set out the framework and required timetable for the resolution of the dispute.

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 – see below) 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 further, 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 a dispute.
- **President of RICS:** The President of RICS at the relevant time. It should be noted that appointments are often made on behalf of the President by others, such as a deputy for the President or by DRS (see section 4).
- **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 an independent expert. 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 to best effect 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 an independent expert 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 and adjudication

Although the duties and suggested procedures for independent experts, arbitrators and adjudicators 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.

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. It is also the case that the law develops and surveyors should ensure that they keep up to date with legal developments, especially any which may take place after the publication of this guidance note.

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, for independent experts, would include *Kendall on 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 an agreement intend that disputes 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 surveyor’ or ‘third surveyor’. In this guidance note the single expression ‘independent expert’ is used.

Unlike both judges and arbitrators independent experts determining a dispute bring their own knowledge to bear on the issues, and are entitled to form a view based entirely on their own expertise, without the need for evidence from the parties. However, some of the advantages of independent expert determination, in particular speed, privacy and the ability to choose the decision-maker (or to have a suitable person appointed by a third party) are shared with arbitration.

Expert determination is purely contractual. There is no legislative underpinning, no procedural code 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.

Independent expert determination is now classified as a type of Alternative Dispute Resolution (‘ADR’) and is one of the types of ADR suggested by the courts to settle disputes in preference to litigation.

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. The following essential requirements should be stressed:

- a) independent experts are appointed in order to provide a determination of the dispute referred to them 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 determination 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 and/or breach of contract.

3 Powers and duties of the independent expert

3.1 Sources of independent experts' 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 agreement under which they are being appointed 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 agreement (together with any relevant supplemental documents)
- 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 independent experts by agreement between them, and independent experts should comply unless those requirements make it impossible to carry on. Independent experts 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 the necessary qualifications and experience required for undertaking the task (see section 4). Independent experts should pay particular attention to the special requirements set out within the agreement 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 should make any declarations of involvement, and state whether they consider such involvement amounts to a potential conflict of interest or not, in the same way as they would to RICS.

It is important to note that there is nothing to stop the parties agreeing, after a dispute has arisen, to refer their dispute to expert determination, even where there is no dispute resolution clause in the agreement which calls for the appointment of an independent expert.

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 agreement (including any special requirements as to the appointment), and agree a different procedure for the determination of their dispute, which the independent expert should then respect, provided of course that the independent expert agrees to it in the first place.

It is important to ensure there is clarity as to what has been agreed between the parties. Independent experts can seek to clarify any matters if necessary and should obtain, or record, such clarification in writing.

3.6 Duties imposed by common law and statute

The common law and statute (primarily the Supply of Goods and Services Act 1982) impose 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 contract/agreement 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 confidentiality (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. 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 should 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 agreement between the parties. If, for example, this provides that the independent expert should proceed to their 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 input, 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 and may be subject to disciplinary procedures.

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 4.3, sub-paragraph 2). 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 be relaxed or tightened by agreement between the parties, and independent experts should in all cases ensure that they are able to comply with the duty. This is discussed further in paragraph 22.8.

3.10 Duty to conduct independent investigations

The purpose of an independent expert determination is to attempt to ascertain the truth. Independent experts are 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 have a duty to reach a final and binding determination and should ensure that this determination does not include, for example, alternative findings based on different assumptions which will not provide the parties with a conclusive result.

3.13 Duty to maintain confidentiality

Expert determinations are confidential 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 confidentiality 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 should 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 assisting the independent expert with the measurement of buildings or works, 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, 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 experts' function.

However, where problems outside the range of independent experts' expertise and understanding arise, 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.)
- i) Does the agreement require the surveyor to determine the parties' costs (See paragraph 4.5)

If the surveyor is not sent the copy of the agreement (or other document containing the dispute resolution clause) 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 agreement 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 am a chartered surveyor who has been practising as such for more than 20 years'.

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 agreement 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 agreement does validly confer that power. Once the appointment is accepted, independent experts should immediately request a copy of the agreement 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 should 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. Likewise, if the agreement requires independent experts to make a determination of the parties' costs (see paragraph 22.5 and section 25) and they do not consider that they have the necessary experience in dealing with costs, they should either not accept the appointment or should ensure that the parties are aware at an early stage that they cannot deal with this aspect of the dispute and that advice would be taken from an appropriate third party adviser (see paragraph 7.4 and section 14).

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

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 guidance note *Conflicts of interest*, which concentrates on conflicts and involvements for surveyors acting as dispute resolvers. Reference should be made by all independent experts to this guidance note, as well as to any subsequent professional statement.

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 as to the partiality or bias on the part of the independent expert that would be obstructive to 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 which would realistically be affected by its outcome (actual bias). Doubts are also justifiable if a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the independent expert was biased (apparent bias).

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.

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.

Independence can be proved as a matter of fact, while impartiality is a state of mind and reflects an attitude.

Independence can generally be established by showing that an independent expert is not financially dependent upon (a) one of the parties, for example, by way of a contract of employment or a contract for services, or (b) the result of the determination.

Impartiality can be harder to establish. An independent expert may be held to lack impartiality due to their attitude towards a party or due to the conduct of the procedure. This may give rise to real or apparent bias.

An independent expert may be capable of acting impartially, although they may not be independent. However, it is better to avoid this situation by ensuring the independent expert is independent of the parties and has no financial or other interest in the outcome of the determination.

The parties can, of course, jointly agree to waive the requirement for independence but in all cases the independent expert must be impartial.

5.6 Role of the president and the DRS

The role of the President of RICS in appointing independent experts 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 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; rather, if and when the facts amounting to a conflict emerge, prospective appointees will 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 should, 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 outside the strict limit.

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 should consider whether it is 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, having 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.

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. This is in addition to any potential liability to the parties.

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 they are 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. In a more complex case, they may 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 which may exist in the agreement; 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).

Where there is a dispute about the jurisdiction of an independent expert, it is not however necessary to refer such a dispute to the independent expert first. A court may take the view that it is appropriate to determine the jurisdiction of an independent expert without reference to him/her.

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 agreement under which they have been appointed, together with any other documents material to the appointment, and setting out their proposed Terms of Engagement (see section 7).

6.5 Checking appointment documents

Once the appointment documents and the agreement 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 agreement 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 agreement lays down a timetable with which compliance will be difficult if not impossible (e.g. that the independent expert must take a particular step by a specified date which has already passed). Such problems will be rare nevertheless independent experts should carry out their own careful checks as soon as they have seen the agreement.

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 agreements may be unclear or ambiguous as to whether the appointment is in the capacity of independent expert or arbitrator. Where an 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 an '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 agreement 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 a surety in a lease) might be able to dispute that agreed interpretation and if this happens legal advice may have to be taken.

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 agreement 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 cladding'); or qualification in a particular way (e.g. 'of not less than 15 years as a practising chartered surveyor'); 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 DRS. 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 agreement 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 agreement 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 agreement 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, for example, a lease that the independent expert is to determine service charge contributions in the event of a dispute, 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 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 be elaborated on as the reference proceeds):

- a) Confirmation of the appointment (date, from whom and capacity for each party).
- 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 agreement.
- 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, they 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 determination (see paragraph 7.6).
- i) An instruction that all correspondence sent to the independent expert should 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 immunity (see paragraph 7.7).
- l) The possible consequences of resignation (see paragraph 8.3).

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.

Difficulties may arise when one party refuses to agree to the independent expert's Terms of Engagement. However, it has been held that where the terms proposed by an agreed expert are reasonable and are consistent with the rights and obligations of the parties under the agreement, a term should be implied in the contract requiring the parties to cooperate by accepting the appointment on those terms (see paragraph 3.7).

The Terms of Engagement should 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
- f) parties to be joint and severally liable for the independent expert's fees; and
- g) independent experts should keep good records of all time spent and how charges have been calculated, as parties may ask for that information.

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. If they have reserved this right and need to exercise it, the parties should be informed in advance.

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 matter 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 matter and again that they may rely on the information contained in it.

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 Independent Expert intend to apply in their determination, unless they are put on notice by the parties otherwise.

7.7 Immunity

Whereas arbitrators are not liable for anything done or omitted in the discharge of their functions as arbitrator unless acting in bad faith, 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. Indeed, RICS strongly recommends that members incorporate liability caps into their client contracts where it is legal to do so and where the cap can be considered to be reasonable and appropriate.

A clause seeking to omit liability in full is likely to be struck down as unenforceable. Accordingly, if independent experts wish to seek to limit or exclude their liability, such a clause should be limited appropriately, for example by providing expressly that they are not liable for damages beyond a capped amount. It may also be possible to agree an immunity from suit, subject to certain exceptions such as acting in bad faith.

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 agreement (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 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 amount to actual or apparent bias (see paragraph 5.3), 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 certain without prejudice correspondence is shown to them, which makes their position untenable), then they may have no alternative but to resign. Such circumstances are 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. Therefore independent experts who intend to resign should first 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.

Independent experts should also consider including reference to the possibility of resignation within their Terms of Engagement and how this would be dealt with (see paragraph 7.2)

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 and at proportionate cost 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 contract/agreement, 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). Most parties will also be keen to limit the costs where possible. In all cases, independent experts are advised, 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 should 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.

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 build up their own standard sets of Directions to serve as an aide memoire. However, the use of such precedents should not rule out 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 15.3. If there is the possibility that some form of hearing could be required, independent experts would be advised to consider the guidance given in the standard arbitration text books.

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 expert's 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 should 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 independent 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 independent 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 put forward.

RICS has for some years issued practice statements and guidance notes for surveyors acting in either role, and independent experts should 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 (see *Surveyors acting as expert witnesses*, RICS PS and GN and *Surveyors acting as advocates*, RICS PS and GN).

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

This section summarises the principal duties in each practice statement.

10.2 Surveyors acting as expert witnesses

Where surveyors act in an independent expert determination in the role of expert witness, their overriding duty is to the independent expert (see *Surveyors acting as expert witnesses*, RICS PS and GN). 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 (which contains mandatory requirements).

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 is likely to 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)'. The company's registered number should also be noted as this provides unique identification of a corporate party.
- 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 in the agreement – in the case of a lease, the freehold might have changed hands or the lease might have been assigned, or a collateral warranty may have been assigned to a purchaser. 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, in the case of a lease 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

Unrepresented parties may not be familiar with the process and what to expect. Independent experts are not required to advise them in that regard, but it is good practice to explain the process in broad terms and ensure they understand what to expect and what actions they are required to take.

The independent experts' task is to find the answer to the question put to them, rather than to decide the matter on the evidence put before them by the parties (in obvious contrast to arbitration). Independent experts should therefore 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 consequence of the independent experts' thoroughness.

11.3 Liquidators/receivers and guarantors

There may be circumstances in which others are entitled to act on behalf of the parties, or, more rarely, to intervene in the independent 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.

In the case of a lease, an assignor or guarantor will not be a party to the expert determination unless the independent 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 if 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. 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 may be appropriate, if the matter is complex, or (rarely) if the dispute resolution clause so provides. Such meetings can be helpful to agree the terms of reference and the procedure, for example.

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 are likely to include:

- 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 matter. The parties should also be asked for confirmation that the independent expert may rely on this without recourse to further enquiry.
- c) 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.
- d) A timetable for the production of written documents and procedure for exchange.
- e) No reference to privileged material, and no submission of any material that is not copied to the other party.
- f) 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.
- g) 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.
- h) All correspondence with independent experts to be copied to the other side by the same means and marked accordingly.
- i) 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.
- j) Arrangements for inspection(s).
- k) Release of the determination on payment of the independent expert's fees.
- l) If the agreement grants power to independent experts to allocate costs, a procedure for representations from the parties after the determination on the substantive issues referred.
- m) Whether a reasoned determination is to be made (see paragraph 22.2).

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, independent experts will still be obliged to proceed with the reference. In this connection, independent experts 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, they are nevertheless recommended to ensure that communications to and from the parties, by whatever means, are routinely copied to all.

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.

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 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' representations 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.

Any agreement should be recorded in writing.

13.4 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 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.

13.5 Independent experts' own enquiries

Although the 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.

13.6 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 should 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

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, independent experts 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 they consider could have a material 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, independent experts 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), independent experts 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 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 dispute resolution 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 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 determination

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 dispute resolution clause in the agreement, pursuant to which the independent expert is appointed, may set out a procedure by which this is to happen.

In such cases, independent experts' 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 covered 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 dispute, the wishes of the parties, and any relevant provisions in the agreement.

15.2 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 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.

15.3 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 any without prejudice negotiations or offers or other privileged material, whether oral or contained in correspondence, shall not be referred to in the representations.
- f) Where either party wishes to raise any point of law affecting the dispute, how the point is to be resolved. As to disputes involving issues of law, see section 14.
- g) The timetable and mechanism for service upon the independent expert and each party of their representations.
- h) Whether provision is to be made for cross-representations in reply, and if so the timetable and mechanism for service.
- i) A reminder concerning the duties of surveyors acting as expert witnesses and/or as advocates (see section 10).
- j) The independent expert's requirements for inspecting the subject matter of the dispute (see section 22).
- k) 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).

- l) Whether the parties wish to have a reasoned determination.
- m) Whether the determination will be final, dealing with all matters in issue including costs, or a determination with the costs reserved if not agreed.
- n) That the determination will only be released upon payment of the independent expert's fees and costs.
- o) 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.

Independent experts should also consider the possible use of communications to and from the parties by electronic mail, and the making of representations and cross-representations (with supporting documentation) by the same medium. This should be clarified at an early stage of the reference and agreed by both parties.

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).

15.4 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.

15.5 Exchange procedure

Independent experts should specify in their Directions a suitable procedure for exchange of written representations (see paragraph 15.3(g)). 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.

15.6 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.

15.7 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 are advised to provide a specific instruction dealing with the admissibility of late evidence and the opportunity of the other party to comment upon it.

15.8 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 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 agreement under which they have been appointed, or by the parties by way of written agreement after the dispute has arisen.

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 agreement stipulates that there should be a hearing (which would be rare), then a hearing should take place unless both parties agree otherwise
- b) if the agreement 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 should take place
- c) if the parties cannot agree, and the agreement 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 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 agreement) provides for the expert determination to proceed by way of an oral hearing, much of the guidance contained in the standard arbitration text books will be of assistance, 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 independent experts and arbitrators is that independent experts 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 independent experts are proceeding to a determination without input from the parties, they will form their 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), independent experts should 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 independent experts 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 agreement 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 should be familiar (in order to be able to understand whether to apply or dis-apply 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 rules concerning the admissibility of independent experts' determinations; and
- e) the without prejudice rule (see paragraph 17.5).

These rules are explained in detail in various standard text books on arbitration 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 most 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.

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. 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 direct (and the parties will often consent to) the fourth option, a practical and cheap solution tailored to the facts of their dispute.

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 something which happened during a contract, and these are hotly disputed and, the independent expert has been unable to unravel the factual matrix by their 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.

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 should 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 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. In the first place, they should invite the offending party to comment on the admissibility of the information, with opportunity for the opposing party to comment. If the independent expert decides that the material was indeed privileged, they should then decide whether it is of such import that it would be impossible to proceed with the determination, in which case they should resign. However, depending upon the circumstances and the value of that information, they could equally decide that it would be possible to dismiss it, and still be able to proceed fairly.

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 and proportionate with regard to costs. 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 agreement between the parties, the powers will include evaluating the evidence (see paragraph 18.3) and conducting their own enquiries (see paragraph 13.5).

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

18.4 Where there is little or no evidence

Even where independent experts are presented with little or no evidence, they should carry out the requisite investigation themselves (see paragraph 13.5).

18.5 Use of independent experts' own knowledge

Again, by contrast with the position of arbitrators, who should not deploy a piece of evidence drawn from their own experience that neither party has had an opportunity to deal with, independent experts are free to deploy their own knowledge and experience to reach a decision on each issue referred to them. They are not obliged to revert to the parties for their comments.

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 between employer and contractor and between contractor and sub-contractor) 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 confidentiality 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. As a result the expert determinations may become out of step with each other, and 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 should 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, there will be little that independent experts can 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 should follow any procedural requirements laid down in the contract/agreement, even if these vary one from the other
- b) independent experts have no power to order combined representations unless the parties so consent
- c) independent experts should 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.

19.6 Uncooperative procedure

The ideal solution for overlapping determinations is for independent experts to issue all determinations simultaneously. Where this cannot be done, then the expert determinations should 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.

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 agreement 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 should use great care in ensuring that any relevant facts disclosed to them by the other are both full and accurate.

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

Where the dispute relates to a building or site, independent experts are recommended to make a brief preliminary inspection, particularly on high value disputes, before any meeting is held. However, they should certainly carry out a detailed inspection after having received the parties' representations.

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 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 independent experts have arrived at their decision on the one or more issues referred, 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 agreement between the parties stipulates that reasons are required. It is a matter of personal preference whether they raise the question of reasons at the outset, or leave the parties to raise it. However, most independent experts usually endeavour to clarify the giving of reasons as early on in the process as possible.

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, independent experts are not entitled to give reasons unless both parties agree that reasons should after all be given. If, notwithstanding this, one party asks an independent expert to give reasons, it would be good practice for the independent expert to ask the other party whether or not they were in agreement. If that party says they disagree then independent experts 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 instructions 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 independent experts should ask the parties to confirm whether they wish for reasons to be given. If the parties cannot reach agreement, independent experts should consider whether it is appropriate to include reasons in the determination, depending on the circumstances of the dispute.

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 any calculations and legal assumptions or interpretations adopted, etc.) should be considered carefully.

Reasons given by independent experts in a reasoned determination are 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 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. Independent experts may however exceptionally agree to give reasons after the determination if requested by both parties, but if so an additional fee would almost certainly be justified.

Since independent experts are potentially liable in negligence, they should keep detailed notes and a written explanation of how they have arrived at their conclusions. These documents should be retained for an appropriate period.

22.4 Types of determination

A dispute may have only one issue but will often have many issues for the independent expert to determine.

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', etc., or 'First Determination', 'Second Determination', and so on.

22.5 Determination as to costs

The first question is to define what the draftsman of the agreement 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? If there is any doubt about the

extent of the independent expert's jurisdiction this should be raised at the outset of the proceedings.

Even in a straightforward case 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 agreement 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 should 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 agreement between the parties. This will sometimes specify that the determination is to be produced by a specified 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, consistent 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 so they 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 may 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 independent experts should notify both parties that it is available to be taken up.

Although there is no statutory basis for independent experts having a right of lien over its determination and withholding the issuing of the determination until payment of their fees (the *Arbitration Act 1996* gives this power to an arbitrator), 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, although, it is advised that this be brought to the attention of the parties by way of the independent experts' Terms of Engagement.

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 can sue both parties for recovery of their fees in accordance with the determination, on the basis of joint and several liability (which should have been agreed as part of independent experts' Terms of Engagement).

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.

The determination should comply with the requirements of the expert determination clause and should refer to or set out:

- the name of the expert
- the names of the parties
- the issue(s) they asked the expert to determine
- the relevant contract and expert determination clause
- the manner by which the expert was appointed
- the terms of reference
- the procedural directions
- compliance (or otherwise) by the parties with those directions
- the decision itself
- any reasons
- the principal amount of money to be transferred from one party to another (if any)
- the timetable (if appropriate) for compliance with all or part of the determination
- interest (if any)
- the fees and expenses; and
- any other costs dispositions.

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

23.3 Independent experts' 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 party compared to the other, the position before independent experts is quite different. Here, independent experts are essentially carrying out their own investigations and using their own expertise to determine the dispute which has been referred to them.

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 independent experts' own reasons for arriving at their determination of the issues 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 independent experts identifying a particular issue, detailing their thought processes, 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. Independent experts are not weighing the evidence and stating which side is the more persuasive, as would be done by an arbitrator.

While in some agreements the dispute resolution clause may require independent experts to 'have regard to the representations lodged by each side' nevertheless it is independent experts' own opinions which are 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 independent experts are obliged to revert to the parties when deciding a point that has not been put forward by either side. It is considered that independent experts are not obliged to do so. Indeed, if they did bring this to the attention of the parties and invite comment, this could, depending on the circumstances, lead to counter-comment and this could delay (and quite possibly add to the cost of) the determination, which would be contrary to the point of this form of dispute resolution.

The situation is slightly different in regard to legal or technical issues where independent experts have taken advice (see paragraph 14.1(d)).

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 all issues as may be required by the expert determination agreement (e.g. costs).

The wording of their findings and determination and their Directions as to costs should therefore be clear and unambiguous.

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 (assuming the agreement so provides), 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 should 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 or for one of the parties alone, but this will obviously vary according to market conditions.

Independent experts 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 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 likely sums involved are 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 independent experts 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 bear in mind the amount or value in dispute.

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 comprehensive and contemporaneous log of the time spent and disbursements so as to be able to justify their fees 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 not uncommon in expert determinations 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 agreement, 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 not uncommon in expert determinations 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 agreement, 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 7.2).

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.

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.

24.7 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.

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. A party may also refuse payment, which will lead to the independent expert bringing an action to be paid at which time the party may argue the fees are excessive or unjustified.

24.8 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 are advised to obtain the parties' agreement to their payment at the outset, before they are incurred (see paragraph 14.1).

24.9 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.

25 Costs

25.1 Introduction

Independent experts have no authority regarding costs unless the terms of the agreement, or of their appointment, expressly confer such a power on them. If conferred, such power may relate to by whom and in what proportion independent experts' 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 should 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 the standard textbooks on arbitration, including *Costs in Arbitration Proceedings*.

In practice, independent experts 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

It is 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):

- 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 (or required by the agreement) 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.

In dealing with the allocation of costs, independent experts should 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 should 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 a decision which deals with all the points requiring to be dealt with has been issued to the parties, the decision is binding on the parties and the expert is *functus officio*.

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 independent experts have no power to correct the determination, unless the error is merely a slip or clerical error, or minor ambiguity, 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 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 should listen to what the parties have to say on the matter and, in cases of doubt, 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 the determination contains a clerical mistake or error arising from an accidental slip or omission, it is perhaps wise to simply clarify or remove any ambiguity in the determination to 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 jointly 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. If that involves substantial work, the independent expert may wish to agree the liability for any further fees in advance.

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

Unlike arbitration, 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. 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 *Kendall on Expert Determination*.

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, independent experts 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 independent experts 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).

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