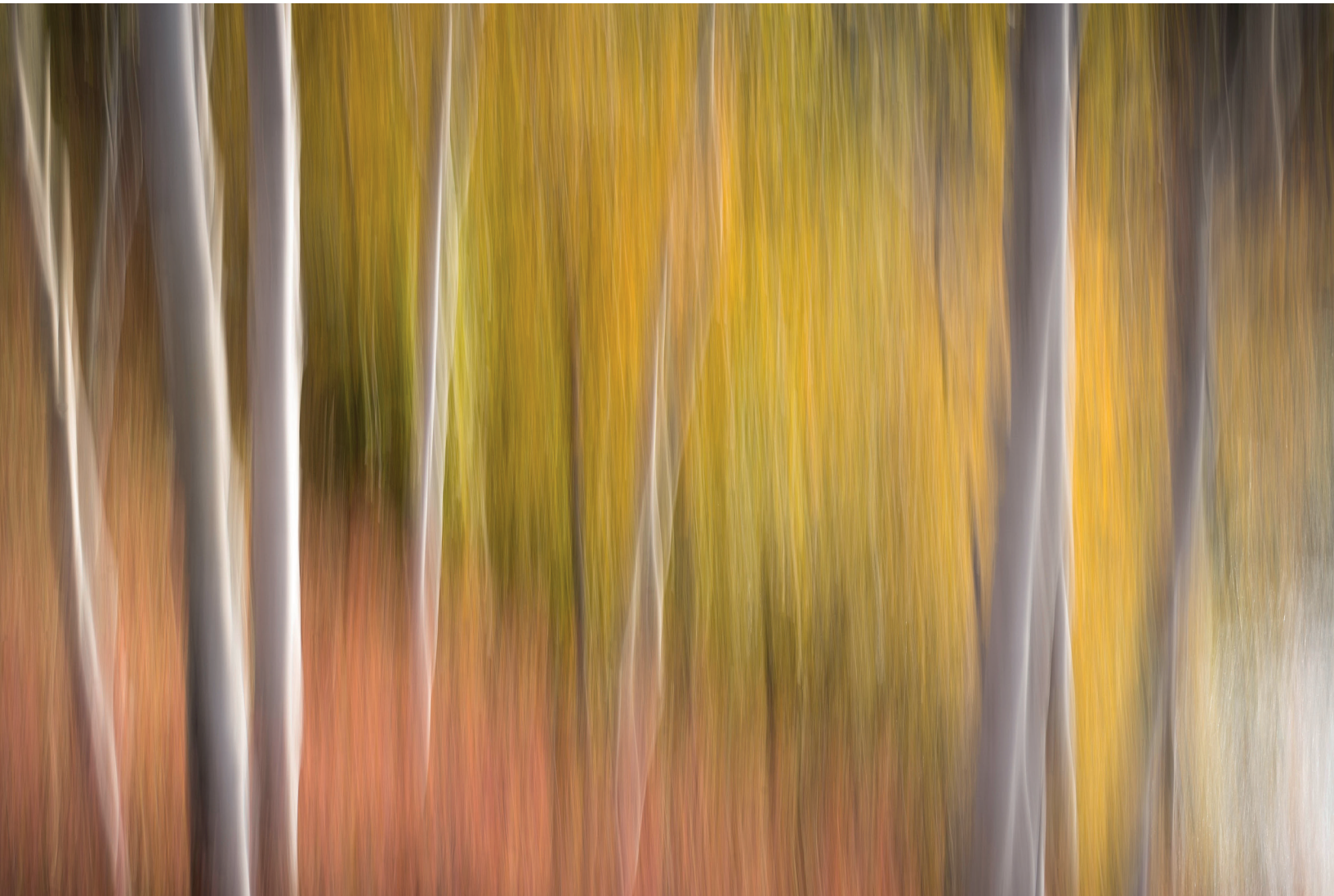




1st edition, June 2015

Surveyors acting as experts in commercial rent determinations

Joint guidance note, Hong Kong; prepared
by The Hong Kong Institute of Surveyors and
RICS Hong Kong



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RICS promotes and enforces the highest professional qualifications and standards in the development and management of land, real estate, construction and infrastructure. Our name promises the consistent delivery of standards – bringing confidence to the markets we serve.

We accredit 118,000 professionals and any individual or firm registered with RICS is subject to our quality assurance. Their expertise covers property, asset valuation and real estate management; the costing and leadership of construction projects; the development of infrastructure; and the management of natural resources, such as mining, farms and woodland. From environmental assessments and building controls to negotiating land rights in an emerging economy; if our members are involved the same professional standards and ethics apply.

We believe that standards underpin effective markets. With up to seventy per cent of the world's wealth bound up in land and real estate, our sector is vital to economic development, helping to support stable, sustainable investment and growth around the globe.

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We are proud of our reputation and we guard it fiercely, so clients who work with an RICS professional can have confidence in the quality and ethics of the services they receive.

About HKIS

Established in 1984, The Hong Kong Institute of Surveyors (HKIS) is the only surveying professional body incorporated by ordinance in Hong Kong. At the time of this publication, the HKIS has over 9,100 members, of which more than 6,000 are professional grade surveyors.

The objects of the HKIS are to secure the advancement and facilitate the acquisition of that knowledge and expertise which constitutes the profession of a surveyor; to promote, support and protect the character, status and interests of surveyors in Hong Kong; and to maintain and promote the usefulness of the profession of surveyors for the public advantage.

As a reputable and responsible professional body of surveyors, the HKIS has always maintained vigorous assessment standards for entry to the profession and has also maintained high professional and ethical standards of member surveyors through the various codes of professional practices, the code of ethics, and continuing professional development.

HKIS has an important and responsive consultative role in government policy making, particularly on issues affecting land, property and construction.

HKIS has established and continues to expand its presence in the international scene through reciprocity relationships with other national surveying bodies and through membership in relevant world bodies and international organisations in order to maintain its professional edge at international level.

Contents

Preliminary note	1
RICS guidance notes	2
1 General introduction	4
1.1 Scope, application and interpretation	4
1.2 Characteristics of determination by expert	5
1.3 Interpretation of lease as to nature of appointment	5
1.4 Authority	6
1.5 Key stages	6
2 Appointment	7
2.1 Appointment by agreement between the parties	7
2.2 Summary of procedure on the appointment of expert	7
2.3 Application to the President for appointment	7
2.4 Suitability, qualification and disclosure	7
2.5 Appointment, and fees and disbursements of the expert ...	10
2.6 Other terms of the contract	11
2.7 Problems after the contract - conflicts of interest and incapacity	11
2.8 Objection by a party after the contract is effective	12
3 Supplementary terms of engagement	13
3.1 General background	13
3.2 Key contents	13
4 General powers and duties	15
4.1 Best practice in the event of uncooperative parties	15
4.2 Delegation	15
4.3 Duty to assemble information	15
4.4 Common ground between parties	15
4.5 Role of expert	16
4.6 Valuation approach	16
4.7 Consultation	16
4.8 Limits of powers	16

5	General procedure and conduct of determination..	17
5.1	Procedure to be appropriate	17
5.2	Initial contact with parties	17
5.3	Preliminary meeting	17
5.4	Directions or procedural instructions	18
5.5	Correspondence with the parties	19
5.6	Representation by one party only	19
5.7	Expert not bound by representations	19
5.8	Points of law	19
5.9	Limited power to enforce agreed procedure	20
6	Evidence	21
6.1	Evaluation and investigation of evidence	21
6.2	Irrelevant comparables	21
6.3	Admissibility of evidence in determination by an expert	21
6.4	Disclosure of documents	21
7	The determination of an expert	22
7.1	Content of determination	22
7.2	Request for a reasoned determination	22
7.3	Slips and clerical errors	22
	Appendix: Conflicts of interest	23

Preliminary note

This guidance note is issued jointly by The Hong Kong Institute of Surveyors (**HKIS**) and the Royal Institution of Chartered Surveyors Hong Kong (**RICS**). It gives guidance as at the date of publication and will be revised from time to time.

Suggestions and comments are welcome and should be addressed to the President of the HKIS or to the Chairman of RICS Hong Kong.

The HKIS and RICS would like to thank a number of their members, including Paul Dwyer, David Faulkner, C. K. Lau and Simon Lynch, whose contributions were invaluable to the production of this guidance note.

We would also like to thank Hilary Cordell and Helen Worth, partners of Cordells, for bringing to the process their valuable experience as legal practitioners specialising in rent determinations, and for their assistance in drafting the guidance note.

The Hong Kong Institute of Surveyors

RICS Hong Kong

June 2015

RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'recommended good 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 had acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this guidance note may have at least a partial defence to an allegation of negligence if he or she has 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 a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice.

Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

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

This guidance note is believed to reflect case law and legislation applicable at its date of publication. This note does not however constitute legal advice and it is the member's responsibility to establish if any specific laws or legislation have an impact on the guidance or information in this document.

This section only applies to RICS members.

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		
RICS code of practice	Document approved by RICS, and endorsed by another professional body/ stakeholder, that provides users with recommendations for accepted good practice as followed by conscientious practitioners.	Mandatory or recommended good practice (will be confirmed in the document itself).
RICS guidance note (GN)	Document that provides users with recommendations 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 good practice. Usual principles apply in cases of negligence if technical information is known in the market.

HKIS produces the HKIS Valuation Standards and guidance notes. This document is a guidance note.

1 General introduction

1.1 Scope, application and interpretation

- (a) This guidance note is designed primarily to assist those who are appointed by the President, or directly by the parties, to act as experts in disputes as to rental value for commercial properties. 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 and issues involved. This guidance note is not intended to provide guidance to those acting as arbitrators where other specific procedures will be relevant. A surveyor may also be called upon by the parties to a lease to determine other matters in dispute, such as a valuation in connection with an option to purchase. This guidance note is not intended to cover all such matters but in general terms the basic principles set out would apply.
- (b) Where procedures for specific professional tasks are recommended in this guidance note, it is intended to embody 'recommended good practice', that is, procedures which in the opinion of the HKIS and RICS meet a high standard of professional competence. The person appointed must exercise his or her professional expertise and judgment.
- (c) This guidance note is consistent with the standard practices and procedures adopted by the HKIS and RICS with effect from March 2015. The standard practices and procedures have been carefully considered and revised to deal with common problems that have been encountered in the determination process and to facilitate the determination process for the benefit of both the appointed expert and the parties to a rental dispute.
- (d) This guidance note is based upon the law and practice in Hong Kong. At the time of publication, there are no legal textbooks dealing exclusively with the law relating to rent review and rent determinations in Hong Kong nor is there a significant body of local case law dealing with rental disputes, particularly in the commercial rent context. However, the case law of other common law jurisdictions, in the absence of Hong Kong case law decided to the contrary, will be of highly persuasive authority. Accordingly, much useful guidance can be obtained from the United Kingdom legal textbooks on rent review law, which also contain commentary on certain cases in other common law jurisdictions. The standard texts are Bernstein and Reynolds *Handbook of Rent Review* and Clarke and Adams *Rent Reviews and Variable Rents*. However, leases in other jurisdictions and particularly in the United Kingdom are often granted for longer terms and are alienable, factors that have specific valuation consequences and which may not always be applicable in Hong Kong. Such texts should therefore be consulted advisedly. Surveyors acting as experts will need to have a wider and deeper understanding of the law and procedure than it has been considered appropriate to provide in these pages.
- (e) When members have been appointed to act as experts, they are vested with substantial powers and the ability to affect significantly the financial position of the parties to the dispute, particularly in view of the limited circumstances in which the courts will set aside the determination. Before accepting an appointment as an expert, members must be satisfied that they have sufficient current knowledge of rent review law and practice, the locality of the premises, and the relevant rental market, so that they are able to implement the correct procedures and to assess the relevance and quality of the valuation evidence in the context of the hypothesis imposed by the relevant lease. The law continues to evolve and members have a professional duty to keep their knowledge up-to-date.
- (f) References in this guidance note to an '**expert**' mean an expert appointed to determine a dispute as to rental value (including a dispute relating to the rent payable on a rent review or pursuant to an option to renew or expansion right) in Hong Kong whether by agreement between the parties or by nomination by the President of the HKIS or by the Chairman of RICS Hong Kong. Reference to '**the President**' refers to the President of the HKIS or to the Chairman of RICS Hong Kong, as applicable and includes their respective duly appointed deputies or other officers authorised on their respective behalves to fulfill their functions referred to in this guidance note. Reference to a '**lease**' also means a tenancy agreement or other document under which a dispute as to rental value is to be determined, and includes (where relevant) all ancillary documents such as licences or side-letters that may be relevant to the rent determination.
- (g) Where 'working day' is used, this refers to a day that is not a Saturday, Sunday or public holiday in Hong Kong.
- (h) References to 'paragraphs' are to the paragraphs of this guidance note.
- (i) References to the 'expert's contract' are to the contract as referred to in paragraph 1.4.

1.2 Characteristics of determination by expert

- (a) The judicial view is probably best expressed by Lord Justice Stuart-Smith in *Liddell v Middleton* [1966] PIQR P36, who said:

‘An expert is only qualified to give evidence on a relevant matter, if his knowledge and expertise relate to a matter which is outside the knowledge and expertise of a layman.’

The essence of expertise is experience. It is not necessarily a paper qualification. It is a combination of training, qualification, experience and reputation.

- (b) A determination of a dispute by an expert has distinct characteristics setting it apart from arbitration:
- (i) The expert has a duty of investigation to discover the facts, details of relevant comparable transactions and all other information relevant to his or her valuation (though the expert may receive information regarding these matters from the parties).
 - (ii) The expert’s decision is based on his or her own knowledge and investigations, but the expert may be required by the lease or by the specific agreement of the parties to receive submissions from the parties. The role of the expert is not judicial. Simply put, the expert must exercise personal professional expertise and judgment.
 - (iii) The expert’s appointment is contractual in nature. He or she is jointly appointed by the parties and has a contractual duty to each. There is no legislation governing an expert’s powers or the procedures he or she should undertake. Subject to any requirements in the contract by which the expert is appointed, together with an implied duty to act fairly between the parties, he or she has great freedom with regard to the procedures adopted.
 - (iv) The expert has no power to seek or compel disclosure of documents or the attendance of witnesses.
 - (v) The expert has a duty to use his or her own knowledge and experience in arriving at a decision. However, during the course of the investigation the expert may seek routine administrative or other assistance from any other person provided that the expert is in a position to vouch for the accuracy with which such tasks are carried out. The expert may not delegate any part of his or her functions, for example, to a legal adviser. See also paragraph 4.2.
 - (vi) An expert has no power to make any orders as to his or her fees, or as to the costs of a party, unless such a power is conferred upon the expert by the lease or by the specific agreement of the parties.

- (vii) There is no specific procedure for formal determination of an expert’s fees, although in the absence of specific provision, an expert is generally entitled to be remunerated on a quantum meruit basis.
- (viii) There is no right of appeal against the determination of an expert, although in some limited circumstances the court may set it aside.
- (ix) An expert may be liable in damages if a party is able to show that he or she has been negligent, either in the assembly of material relevant to the valuation or in the application of professional skill and judgment to that material. The expert must make his or her determination with reasonable expedition but in so doing must address all issues referred to him or her. An expert may be liable in damages for negligence even if a court does not set aside a final and binding determination the expert has made.

1.3 Interpretation of lease as to nature of appointment

- (a) Where the lease, with reference to the appointment of a surveyor, mentions ‘arbitrator’, ‘arbitration’ or ‘the Arbitration Ordinance’, even though it may also make reference to a ‘valuer’, ‘independent expert’, ‘expert’ or other such term, it is generally treated as calling for the appointment of an arbitrator to settle the dispute unless it is clear that the parties intend otherwise. Where parties to a lease intend that disputes as to rental value shall be determined not by arbitration but by a surveyor exercising his or her own professional expertise and judgment, they may call that surveyor the ‘independent valuer’ or ‘independent surveyor’ or other such term. In this guidance note the single expression ‘expert’ is used.
- (b) The lease will not always be clear as to whether the appointment is to be of an arbitrator or an expert. For example, if there is a direction in the lease that the appointee is to be bound by written representations, the surveyor may be regarded by the court as acting as an arbitrator even if not described as such. In these circumstances, the appointee should seek to establish by agreement with the parties the nature of his or her appointment. If there is any doubt as to the correct interpretation of the lease, the parties may agree which interpretation is correct, although occasionally there may be a danger that third parties (such as a surety) will be able subsequently to dispute that agreed interpretation. See also paragraph 2.4(d), which may be relevant in case of such ambiguity.
- (c) The appointee should in any event ensure that the nature of the appointment is explicitly stated in his or her letter to the President confirming the appointee’s willingness to be appointed in that role, so that the appointee’s understanding of the nature of the appointment is clear from the outset.

1.4 Authority

- (a) The authority for an expert to act is contractual. There is no statutory framework for the expert to rely on and little specific case law that is of assistance. The contract comprises:
 - (i) the appointment (privately or through the HKIS or RICS)
 - (ii) the lease and
 - (iii) any other terms and conditions agreed with the parties.
- (b) By including in a lease a provision for referral of a dispute to an expert appointed by the President, the parties accept the appointment procedure adopted by the President from time to time, the current procedures being as set out in this guidance note. The President has complete discretion as to whether to make an appointment and who to appoint.
- (c) The parties may agree with the expert additional requirements but these should not make it impracticable for the expert to carry on or exercise his or her professional duties. The expert will, however, be entitled to charge for any additional work involved, unless this is precluded by the fee arrangements.

1.5 Key stages

The key stages in the expert's appointment and the determination process are as follows:

- (a) expert's binding appointment (see paragraph 2)
- (b) agreement of supplementary terms of engagement and initial letter to parties (see paragraphs 3 and 5.2)
- (c) preliminary meeting and directions (see paragraphs 5.3 and 5.4)
- (d) submissions of evidence (see paragraph 6) and
- (e) determination (see paragraph 7).

2 Appointment

2.1 Appointment by agreement between the parties

- (a) The HKIS and RICS encourage the parties to a dispute to agree on the identity of an expert and on the terms of his or her contract. It is only if the parties are unable to reach agreement that an application should be made to the President.
- (b) In the case of a private appointment, the expert will only be bound to do the work when he or she accepts the appointment from the parties. The expert will need to reach a written agreement with the parties as to the basis on which he or she will act, including fees and any relevant limits to the scope of the work.
- (c) The expert must declare any involvement with either party or persons or entities related to them and any other matter that may reasonably be construed to be relevant to the question of whether there is an actual or potential conflict of interest. The expert must also state whether he or she considers such involvement amounts to an actual or potential conflict of interest, in the same way as he or she would to the President were an application to be made to the President for an expert's appointment, as to which see paragraph 2.4(e) and (f).

2.2 Summary of procedure on the appointment of expert

The chart on the following page summarises the procedures that are to be followed in the appointment of an expert by the President. Paragraphs 2.3 to 2.6 give detailed comments on the appointment procedure.

2.3 Application to the President for appointment

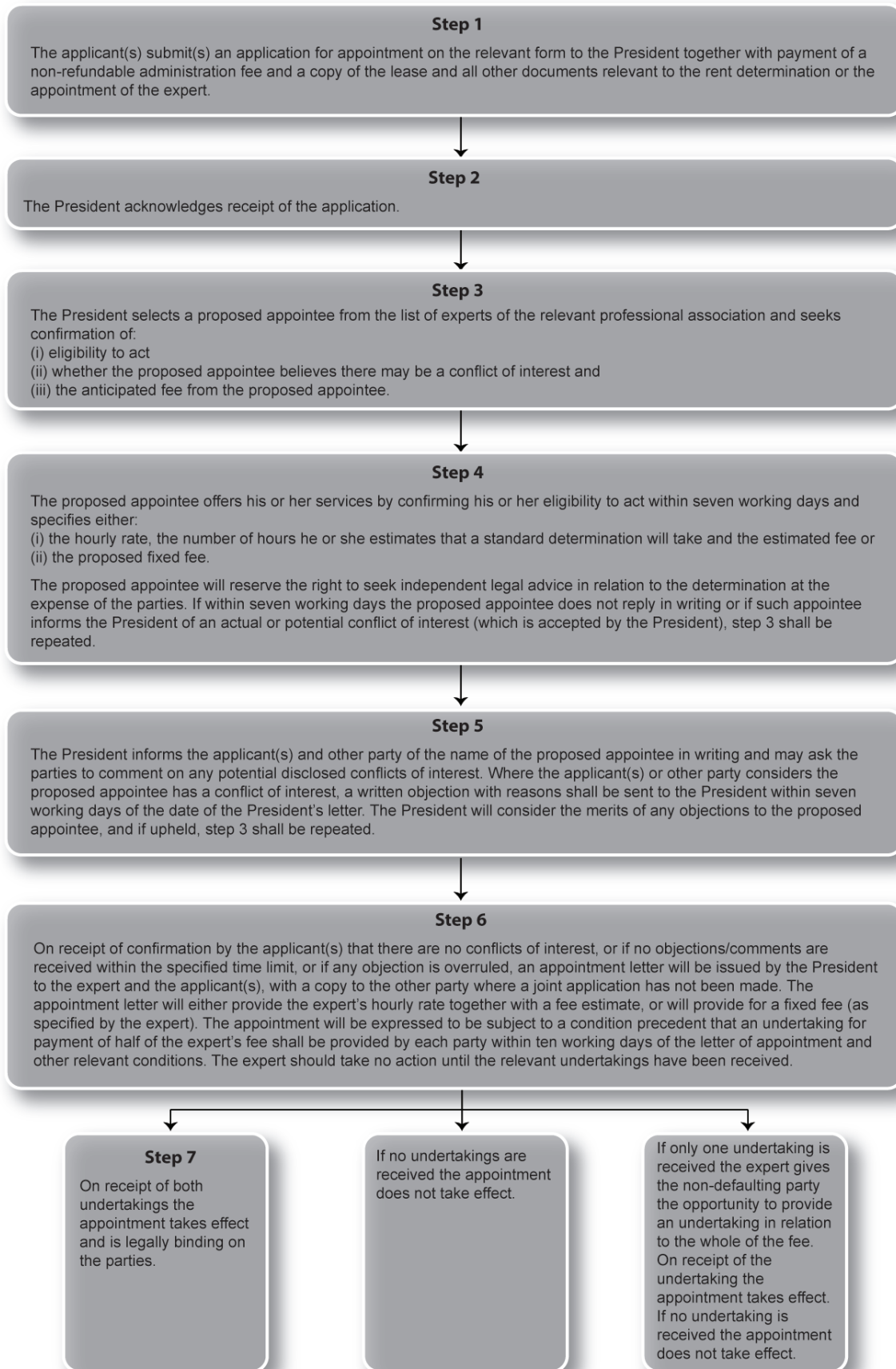
- (a) An application to the President for the appointment of an expert should be in writing and made on the form obtainable on application to the President. A copy of the lease and all other relevant documents should be enclosed with the application. The President acts in an administrative capacity in making the contractual appointment on their behalf but in doing so accepts no liability for the terms upon which or the manner in which the valuation is conducted.
- (b) The applicant(s) should carefully check the lease for entitlement to apply to the President. If the lease does not provide for such an entitlement, the parties to a dispute can still agree on a joint application. The application may be made by the parties jointly or, if the lease so provides, by only one of the parties

to the dispute. If the application is made solely by one party it should be copied to the other party and evidence of the same should be submitted together with the application form.

- (c) The applicant(s) should state in the application form any requirements in respect of the experience and qualifications of the expert as set out in the lease or as agreed between the parties. Where the applicant(s) request(s) an expert with specific experience and qualifications but such request is not in accordance with the lease and has not been agreed with the other party, the President is not bound to entertain such request.
- (d) The President will not seek to determine any legal issues incidental to the appointment or the rent determination. If one party applies for an appointment, it will usually be made. If the other party objects, that party's remedy is to apply to the court for a declaration that the appointment is invalid.
- (e) The application will not be processed until the appropriate non-refundable administration fee has been received by the HKIS or RICS (as applicable), together with a copy of the lease or other document conferring on the President power to make the appointment, and all relevant ancillary documents.

2.4 Suitability, qualification and disclosure

- (a) The acceptance of an appointment as expert carries with it a heavy responsibility; every effort is made by the President to select a person suitable for appointment, while avoiding any actual or potential conflict of interest.
- (b) A person considered suitable for appointment receives a letter from the HKIS or RICS and is asked to confirm that:
 - (i) the subject matter of the dispute falls within the sphere of his or her own normal professional practice (not merely that of his or her firm)
 - (ii) he or she would be able to undertake the task with all reasonable expedition
 - (iii) having made enquiries within his or her organisation, no involvement exists (or has existed in at least the last 12 months), in particular, with the subject property or any of the parties named on the 'case details'. This also relates to any known associated companies, shareholders or related person of the parties ('parties' associates') or any other matter that may lead to an actual or potential conflict of interest. If such an involvement exists, the



Any time periods in the lease specified as running from the date of appointment of the expert shall run from the date the appointment becomes effective.

prospective appointee is asked to state whether he or she believes this involvement to be an actual or potential conflict of interest and to state whether he or she still believes he or she is capable of acting in an unbiased manner

- (iv) he or she can comply with any special requirements of the lease
- (v) he or she is not currently engaged as arbitrator or as expert in another case where his or her duties to the parties would conflict with the duties to the parties in the case and
- (vi) the amount of his or her professional indemnity insurance.

The specific wording of this letter and the required professional indemnity insurance may be changed over time ^(Note 1).

(Note 1: There is a separate instruction by the HKIS and RICS that the minimum level of PI cover is HK\$30M.)

- (c) It is essential that a prospective appointee does not accept an appointment where he or she does not have the necessary personal experience of current market conditions applicable to the relevant premises. To do so could undermine confidence in the system and bring it into disrepute.
- (d) Whether the expert is to be appointed by the President or privately, the prospective appointee should study the lease in detail so that he or she is clear as to the precise nature of the appointment, the dispute and any special provisions that may apply. If there are any ambiguities in the lease, such as liability for the expert's fees, the expert's role, the right to extend the time for delivery of the expert's decision if reasonably required, or processes the expert may adopt, the prospective appointee may wish to decline the appointment or make his or her acceptance conditional upon these matters being agreed. Generally the HKIS and RICS do not recommend appointments being conditional but in certain circumstances where the lease is not sufficiently well-drafted, this may be desirable to protect the expert's position. If the expert does wish the appointment to be conditional, the time for satisfying the condition and manner in which it is to be satisfied should be specified. The expert may also wish to provide that the determination will not be released until the fees have been paid so that the expert has in effect a lien on the determination pending payment. Where an appointment is being made by the President, the standard form letters prepared by the HKIS and RICS for use during the appointment process cover certain of these issues, but the expert should always review the letters in the context of the lease and particular circumstances to ensure that his or her position is adequately covered.
- (e) In responding to the President's letter, the prospective appointee must disclose to the President all known

involvements with either of the parties or the parties' associates, including without limitation any related companies, shareholders, directors, partners, employees and (if applicable) any of their relatives ('parties' associates') after making suitable checks within his or her organisation. The definition of involvement is wide ranging and is not restricted to matters that might give rise to conflict of interest. Many involvements are not conflicts of interest. The issue is whether an involvement may, or may not, give rise to the possibility or appearance of bias, or will in any way affect the potential determination. The decision as to this is a matter for the President, not the prospective appointee. Under no circumstances should the prospective appointee make any contact with the parties or their representatives at this stage.

- (f) For these purposes an involvement of the firm, its shareholders, directors, partners, employees and (if applicable) any relatives of the prospective appointee ('appointee's associates') is as just as important as an involvement of the prospective appointee him or herself. A prospective appointee must, therefore, have an appropriate system for undertaking involvement checks within his or her firm, which is both 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 the prospective appointee's associates accepting instructions from the parties, or the parties' associates, that might create an actual or potential conflict of interest. Examples of instances where a conflict of interest would appear possible include, but are not limited to:
 - (i) if one of the parties, or a party's associate, is a company in which the prospective appointee or the appointee's associates have substantial shareholdings
 - (ii) if the prospective appointee or the appointee's associates have acted, are acting or regularly act for one of the parties or a party's associate
 - (iii) if the prospective appointee or the appointee's associates also act for the landlord or tenant of nearby properties where a lease grant or rent review is due shortly.

The above list is not exhaustive and, if in doubt, the prospective appointee is expected to disclose the relevant circumstances. See the Appendix for further discussion of conflicts of interest.

- (g) Disclosure of an involvement to the President does not mean the prospective appointee will not be appointed. However, where a prospective appointee fails to disclose an involvement, or accepts an appointment and subsequently purports to resign on the basis that instructions accepted after his or her appointment give rise to a conflict (which may constitute a breach of contract), the President may conclude that he or she is not suitable for future

appointments and remove that person from the list of experts.

- (h) The President may decide that, in his or her view, the matters disclosed are remote and/or do not raise a real possibility of a conflict of interest in the eyes of a reasonably minded person. In these circumstances the President may appoint without disclosure to the parties. Alternatively, the President may disclose a declared involvement to the parties prior to appointment and seek their views. If neither party objects, the appointment is likely to be made. While the President will give careful consideration and due weight to any objection made, he or she will not be bound by it, and the decision whether to appoint will be the President's alone.
- (i) Once appointed, in the interest of openness, the appointee may consider it appropriate again to disclose all involvements to the parties. This is particularly so with any involvements with the parties themselves. However, the appointee should not allow a party to use this information in an attempt to persuade him or her to resign. By this stage, assuming he or she had been furnished with all the facts, the President will have been satisfied that the appointee is suitable. Only the parties by agreement or the courts can decide otherwise. See paragraph 2.7 as to problems that may arise after the appointment has effect and the expert's contract is formed.

2.5 Appointment, and fees and disbursements of the expert

- (a) If the parties themselves make the appointment, the contract generally takes effect when the three parties have signed a formal letter of engagement. A contract may also be formed by a series of letters, or even orally, in certain circumstances.
- (b) Where the appointment is made by the President, the procedure is more complicated. In order to provide certainty that the appointment made by the President is binding from the date it is made and so as to prevent a recalcitrant party defeating or delaying the rent determination, the HKIS and RICS have adopted the following procedure:
 - (i) The prospective appointee should specify the following in the letter confirming his or her offer of services:
 - The expert's hourly fee and an estimate of the time involved. The hourly fee may reflect the complexities of each particular case, the duty to assemble information and the potential liability in negligence bearing in mind the expert acts for two opposing parties. Alternatively, he could specify a fixed fee although the fee should not be fixed as a percentage of the rent determination.

- The proportion of the expert's fee that is payable if the determination does not proceed for any reason including a settlement being negotiated once he or she is appointed. This will usually be the time costs incurred up to the date of termination of the contract less a discount of between 10–15% to take account of the fact that there is no risk factor.
 - That the expert is entitled to take legal advice (both in relation to the valuation hypothesis and procedural and other matters) and other technical advice, and to recover the expenses of doing so even if he or she is unable to proceed further (see paragraph 2.7 below). If no such provision is made, the expert may have to bear such costs him or herself or risk making a decision without such advice.
- (ii) The President will not comment on the fee or other financial provisions. Following clearance of any declared involvement by the prospective appointee, the President will write to the parties confirming the appointment and setting out the fee and other financial provisions as set out in the appointee's offer letter and requiring the parties to provide undertakings to the expert in respect of payment of the fee. A binding contract will only be formed between the expert and the parties once the expert has received the requisite undertakings as provided for in paragraph (iii) below. The President and the HKIS or RICS (as applicable) are not parties to the contract and once the President has issued the letter referred to in this paragraph the President has no further role to play in the appointment process. Any further correspondence should be addressed to the expert and if the parties do not provide the required undertakings but want to proceed with an expert determination where the expert is appointed by the President, they will be required to submit a new application to the President for the appointment of an expert and will be required to pay a further application fee.
 - (iii) On receipt of the President's appointment letter, the parties can then decide if they are prepared to accept the financial provisions set out in the appointment letter. If they are, each party must undertake to pay a half share of the expert's fee within ten working days of the President's appointment letter. On receipt of the last of the undertakings within the stipulated period, a binding contract will be formed.
 - (iv) If the undertakings are not received by the expert within the stipulated period, the expert shall inform the non-defaulting party in writing and shall offer the non-defaulting party the opportunity to provide a further undertaking in

relation to the whole of the expert's fee within ten working days of the expert's letter. This gives the non-defaulting party the ability to ensure that the determination is not frustrated by the actions of the other party. On receipt of the further undertaking, a binding contract will be formed.

- (v) As between the parties, their liability for payment of the expert's fees will depend on the wording of the lease and if one party pays the whole of the expert's fees when it was not obliged to do so under the lease, it will need to seek redress under the lease from the other party. Accordingly, any party undertaking to pay, or paying, the whole of the expert's fees should consider the lease to ascertain whether there is clear liability for the expert's costs and disbursements. It is likely that the parties are jointly and severally liable if the lease is silent on this matter, but this is a matter of interpretation for the courts.
- (vi) If no undertakings are received within the deadlines set in the President's and expert's letters referred to in paragraphs 2.5(b)(iii) and (v), the appointment shall not take effect.
- (c) The expert should consider whether he or she is entitled to determine by whom and in what proportion the expert's costs and disbursements are to be paid and whether he or she can award that one party pay the other's legal and surveyors' costs. The expert has no authority regarding these matters unless the terms of the lease expressly confer such a power on him or her, and this is not a common provision in leases. There are two points on this:
 - (i) If there is any uncertainty as to the expert's powers, he or she may wish to consider a conditional appointment as referred to in paragraph 2.4(d) above. Alternatively, the expert may be prepared to leave this to be resolved after this appointment but in this case, he or she will be reliant upon the agreement of the parties and may need to take legal advice in the event of a dispute. Usually the parties will agree that the expert's costs and disbursements are to be borne equally and that each party will bear its own legal costs.
 - (ii) Even if the expert can make an award as to costs, any party who has provided an undertaking to the expert will still primarily be liable for his or her fees as provided for in such undertaking. If the other party refused to pay an amount for which it was responsible, but which was covered by an undertaking, the non-defaulting party would still need to make payment to the expert in accordance with the undertaking and would then need to seek redress under the lease.
- (d) In exercising any power in relation to the award of costs and disbursements, the expert must act fairly in

the matter and follow the rules of natural justice. Any division should be on a reasonable and just basis in all the circumstances, the expert having given the parties the right to make submissions.

- (e) As the expert's fees and disbursements are not directly subject to the court's control, they cannot be 'taxed' or assessed. However, this would not prevent a party who has paid the required fee bringing an action to recoup an excessive payment if the amount or basis of the fees or disbursements has not been agreed or has been wrongly charged.
- (f) Once the contract has been made, it can only be terminated with the agreement of the parties or if performance of the contract has been frustrated (which is a highly unusual circumstance). Any purported termination in breach of contract may render a party liable in damages for breach of contract. See also paragraphs 2.7 and 2.8.

2.6 Other terms of the contract

- (a) The more detailed terms upon which the expert shall act shall be set out by the expert in the manner described in paragraph 3.2. There will usually be a range of matters that the expert will wish to agree with the parties and these should ordinarily be settled before the substantive work takes place. However, failure to agree upon these matters does not invalidate the contract, which continues in full force and effect. At this point the expert is obliged professionally to carry out an independent valuation as stipulated by the lease and the common law and in the same manner as other similar valuations. Thus the expert may be entitled to rely on limitations to his or her valuation that can be shown to be ordinarily excluded in the course of normal practice.
- (b) Unless the lease stipulates otherwise, the expert will conduct the process as he or she considers appropriate. The expert may seek the applicants' comments on the process but the expert's decision will be final, subject to it not being contrary to the lease or the law.

2.7 Problems after the contract – conflicts of interest and incapacity

- (a) Once the President has made an appointment, his or her jurisdiction in the matter is at an end unless the lease itself provides to the contrary or the parties agree that a further application should be made. However, a serious conflict of interest may arise or the expert may die or become incapacitated, and thus be incapable of fulfilling his or her obligations.
- (b) If, therefore, after the expert's contract has been formed, a party brings to the attention of the expert a matter claimed to constitute a real pecuniary or other interest in the outcome of the dispute, or to give rise to a real possibility of a conflict of interest, the expert would be

expected to:

- (i) obtain full details of the objection in writing
- (ii) notify the other party in writing and invite that party's comments
- (iii) consider whether the matters disclosed might affect his or her mind in coming to a decision or would raise a real possibility of a conflict of interest in the eyes of a reasonably minded person
- (iv) if the answer to either of these questions is yes, offer to resign unless both parties agree in writing that he or she should continue or
- (v) if the answer to each of these questions is no, continue.

Equally, if the expert should discover a matter that might affect his or her decision, or would raise a real possibility of a conflict of interest in the eyes of a reasonably minded person, he or she would be expected immediately to disclose it to the parties and then proceed as in (iv) or (v) above. A party would be ill-advised to try to force an expert with a clear conflict to continue, because of the risk that the determination may subsequently be set aside by the court.

- (c) An expert may also wish to resign if he or she is incapacitated and as a result unable to complete the determination within the contractual timeframe. In such a case he or she should write to the parties and should offer to resign. If feasible, the expert may wish to set out a date by which he or she will be able to complete the determination and ask the parties if they agree to the revised timetable.
- (d) If the expert dies before making his or her determination, the contract has clearly been terminated, for it is a personal contract.
- (e) If one party accepts the expert's offer to resign and the other party declines, the expert is in a difficult position in that he or she has no legal power to resign unilaterally and a refusal to proceed may be a breach of contract for which either the landlord or the tenant could bring an action in court. Before contemplating such action the expert should take legal advice.
- (f) The HKIS and RICS are of the view that if there is a serious conflict of interest that would prevent an impartial determination as envisaged by the lease, or if the expert is incapacitated and unable to perform his or her obligations by the contractual deadline, the contract should properly be seen to have been frustrated and therefore at an end. Any party is entitled to apply to the court for a declaration that the contract has been frustrated. The President will not make such a determination as this is properly the role of the court.
- (g) If the parties agree that the contract has been terminated and that a new expert should be appointed, or if the court determines that the contract has been frustrated, then either party may apply to the President for a new appointment to be made. The President will also make

a further appointment in the event that the expert dies before making a determination.

- (h) In light of the difficulties outlined in the preceding paragraphs, if the lease does not cover the ability of the expert to resign, it is advisable that the expert should include in the supplementary terms of engagement a term that he or she may resign if it is reasonable to do so. However, an expert who had so included such a term may be still found liable to the parties for a breach of contract if he or she had resigned unreasonably. It would therefore be prudent for an expert minded to resign on this ground first to consult the parties in writing and, if possible, gain their acceptance that such resignation would be reasonable in all the circumstances, with agreement also as to payment of the expert's fees and expenses.

2.8 Objection by a party after the contract is effective

- (a) There is no statutory remedy in respect of an objection by either party to the appointment of an expert. An expert has no power to decide a challenge to the validity of his or her appointment once it has been made and the expert should invite the parties to resolve the challenge before proceeding. If one party disputes the expert's jurisdiction but the other asserts that he or she has been validly appointed, the expert is again in a difficult position as he or she has a duty to proceed with the reference if the appointment is valid. The expert should seek legal advice.
- (b) To avoid being in breach of contract, the expert should therefore continue with the determination unless he or she is satisfied that the appointment is invalid or an application to the court raising some ground of substance will be promptly made and any delay in waiting for such an application should be brief. In particular, the expert should conform to any mandatory time limits in the lease unless the court otherwise orders, or the expert has agreed variations with the parties in the preliminary meeting that are recorded in his or her directions.

3 Supplementary terms of engagement

3.1 General background

- (a) When the expert is privately appointed his or her contract may include a variety of conditions. These may direct that the expert is to hold an inquiry or to receive representations from the parties' representatives.
- (b) Where the expert is appointed by the President, the process outlined in paragraphs 2.2 to 2.8 establishes the expert's fee and the fundamental terms of his or her contract: the contract will inferentially incorporate conditions contained in the rent determination provisions in the lease. However, there are other important terms that the expert should establish to reduce the risk of negligence; the possibility of a claim for negligence is higher where a surveyor is acting for two parties with conflicting interests than where he or she is acting for a single client.
- (c) It is therefore important that the expert should agree with the parties appropriate terms of engagement that define the extent of the obligations he or she is undertaking. The terms of engagement will be attached to the expert's initial letter following his or her appointment and will set out contractual terms between the parties and the expert. They supplement the fundamental terms already established upon the expert's appointment.
- (d) The terms of engagement are therefore not the same as the procedural directions, which set out how the expert will conduct the reference, see paragraphs 5.3 and 5.4. However, if the terms of engagement and/or procedural directions are agreed with the parties, the expert will be bound to comply with them.
- (e) It is recommended that the expert use the HKIS and RICS standard terms of engagement, although it is not mandatory to do so.

3.2 Key contents

The initial letter from the expert following his or her appointment (see paragraph 5.2) should attach terms of the engagement, which should include the following:

- (a) *Fees.* While the fee arrangements are settled upon the expert's appointment (as referred to in paragraph 2.5), it is recommended that the financial provisions are reiterated in the terms of engagement. Where relevant, the expert will need to issue invoices in relation to any upfront fee payment that he or she may require.
- (b) *Reliance by expert on facts agreed by parties.* The expert should specify that the parties will supply him or her with:
 - (i) legal documentation relevant to the subject

premises and that the expert may rely on such information as being complete

- (ii) an agreed statement of facts in relation to the subject premises, including such matters as the floor areas (and the basis of the calculation), specification, permitted use of the various parts of the premises, service charge, rating assessments, details of services, etc. and that the expert may rely on the information contained in it.

If relying on floor areas agreed by the parties, the expert must ensure that he or she is comparing the subject premises on a like-for-like basis with the floor areas of the comparable transactions.

- (c) *Reliance by expert on legal and technical advice.* The expert should specify that he or she is entitled to take independent legal or other technical advice, and to rely upon it.
- (d) *Evidence.* The expert should specify that he or she can request the parties to provide any information in their possession or confirmations in relation thereto that he or she considers requisite for the determination, and that if a party fails to provide any such information or confirmations the expert will be entitled to draw an adverse inference from such failure.
- (e) *Exclusions and limitations.* The terms of engagement should also record any assumptions or limitations that the expert intends to apply in his or her valuation, unless put on notice otherwise by the parties, for example, that:
 - (i) the property is free from defects (inherent or otherwise)
 - (ii) there is no contamination or deleterious materials
 - (iii) there is proper legal title
 - (iv) no statutory notices have been served and there has been compliance with statutory requirements
 - (v) all services and other such matters are in working order and
 - (vi) no structural survey is required.
- (f) *Limitations on liability.* Any expert appointed by the President will be required to hold an appropriate level of professional indemnity cover, such level being specified by the HKIS and RICS (as applicable) from time to time. If an expert does wish to cap his or her liability, the level of the cap that it may be appropriate to set will depend on the value of the relevant rent determination. In relation to an expert who is to be appointed by the President:

- (i) The expert will be required to confirm to the President that he or she holds the minimum level of professional indemnity insurance required by the HKIS or RICS (as applicable) and provide the President with a copy of his or her policy.
 - (ii) If the expert wants to cap his or her liability, he or she should inform the President of the level at which the cap will be set.
 - (iii) The President will inform the parties of the amount of the cap. RICS and the HKIS accept that an expert is entitled to cap his or her liability and that such cap on liability may form part of the terms of the expert's appointment. If the landlord or tenant would like the cap on liability to be increased, such party should approach the expert to discuss and may elect to pay for an increase in the expert's professional indemnity (if the same is available in the market) to cover the rent determination in question.
- (g) *Conditions.* Where the expert has decided to make the appointment conditional upon certain ambiguities in the lease being agreed between the parties, the expert should specify how he or she expects these to be dealt with and request the parties' confirmation of the same. See paragraphs 2.4(d) and 2.5(c).
- (h) *Ability to resign.* The expert should include an ability to resign if it is reasonable for him or her to do so. See paragraph 2.7(h).
- (i) *Procedures.* The expert should include a provision that it is a term of the contract that the parties comply with the procedural matters in the lease. This may be modified by agreement between the parties at the preliminary meeting and recorded in the expert's directions.

4 General powers and duties

4.1 Best practice in the event of uncooperative parties

The expert's contract with the parties may only be varied or extended with their agreement. This is not possible if one or both parties do not cooperate. The expert is, however, obliged to carry out the valuation – see also paragraph 2.6(a). In the event of non-cooperation, it is appropriate for the expert to write to the parties setting out a statement of any reasonable steps, procedures or assumptions that he or she intends to incorporate. The expert's position will be strengthened if the parties make no specific objection.

4.2 Delegation

- (a) An expert's contract is personal. In particular, the expert's firm is not appointed and it follows that the expert may not, without the consent of the parties, delegate any of his or her duties, powers or responsibilities. Any such delegation may result in the expert being found liable for breach of contract and/or negligence.
- (b) An expert is chosen for his or her own expertise. Accordingly, unless the contract permits otherwise, the expert must carry out the whole of the determination him or herself. Failure to do so may vitiate the determination, and may again render the expert liable for breach of contract and/or negligence.
- (c) This does not, however, preclude the expert from making use of routine administrative assistance, provided that the assistance is given under the expert's supervision, and he or she can vouch for its accuracy. The distinction that has to be drawn is between the delegation of responsibility, which is not permitted, and the assignment of the performance of routine, time-consuming tasks, such as arranging inspections or helping the expert with the measurement of buildings, which is permitted.
- (d) The expert may find it necessary or helpful to take advice, including legal and technical advice, from external sources. Note, however, that:
 - (i) the expert may not do so if he or she has not reserved the right to do so and has been informed by the parties that they both do not want him or her to do so. However, the expert should not make decisions that are beyond his or her remit (such as deciding certain points of law) unless as a minimum the parties have absolved him or her of liability in doing so
 - (ii) the expert will not be able to charge the cost of the advice to the parties unless he has reserved the right to take advice and charge the parties

for the cost of doing so in addition to the expert's own fees - see paragraph 2.5(b)(i)

- (iii) the expert should form his or her own view of the issues upon which he or she requires advice
- (iv) the expert 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 expert may rely on and adopt the advice – see paragraph 3.2(c))
- (v) the expert should also consider whether to invite the parties to comment upon any advice received.

Advice should be obtained on the basis that it will or may be disclosed to the parties. The expert should consider whether to include the advice within the determination.

4.3 Duty to assemble information

- (a) Unless limited by previous agreement, the expert should assemble all such information and carry out all such investigations that a reasonable surveyor acting as an expert might be expected to carry out. The expert should verify such information. Matters to be considered and verified include:
 - (i) comparable evidence, the details of the relevant comparable lease and any relevant circumstances in which that lease was concluded
 - (ii) the effect of the terms of the lease
 - (iii) measurements/floor areas
 - (iv) the condition of the subject premises as found and as to be valued under the terms of the lease and
 - (v) any planning and user restrictions, including under any government grant and any applicable deed of mutual covenant.
- (b) Even if the parties have produced a statement of agreed facts and agreed that the expert may rely on it, it is still the expert's duty to ensure that he or she has all the information necessary to reach his or her own conclusion based on his or her own opinions and calculations.

4.4 Common ground between parties

The expert should assume that he or she cannot rely on any apparent common ground in the parties' submissions unless they have mutually agreed that this common ground can be adopted in reaching the decision.

4.5 Role of expert

- (a) A surveyor appointed as an expert should not treat the procedure as being similar to an arbitration. The expert should regard the task as being that of carrying out a valuation in the ordinary way, with the difference that he or she is jointly instructed by the parties and that the parties may therefore wish to present additional information.
- (b) In most cases, the parties themselves require the opportunity of submitting an agreed statement of facts and also representations and counter-representations. Provision should ordinarily be made for this in expert's directions.
- (c) Subject to any special terms forming part of the contract, the expert is not constrained by the limits of value set by the parties' representations. It is important to note that the expert is not judging the parties' respective representations, but is making his or her own determination and may use those representations or not as he or she decides. Any representations made do not absolve the expert of his or her responsibility to gather all relevant comparable evidence.

4.6 Valuation approach

The expert should be satisfied that any valuation approach adopted in reaching his or her decision (e.g. zoning or valuing overall) is supported by a respectable body of opinion within the appropriate area of expertise.

4.7 Consultation

In most cases, seeking views and opinions from peers and acknowledged experts in the relevant field will be desirable. Full notes should be taken of all enquiries made and responses received.

4.8 Limits of powers

The expert has no power to order disclosure, allow witness summonses or compel production of information or documents. The expert may wish to secure the parties' agreement to cooperate and comply with his or her requests (see paragraph 3.2(d)).

5 General procedure and conduct of determination

5.1 Procedure to be appropriate

The procedure to be adopted by the expert should be appropriate for the nature of the subject premises, and the provisions of the lease or other agreement of the parties.

5.2 Initial contact with parties

- (a) Upon his or her appointment, the expert should take two immediate steps:
 - (i) read the documents sent to the expert by the HKIS or RICS (or the parties, if appointed privately). Although this includes the lease, it is normally not necessary (and will incur unnecessary costs) to read the entire lease at this stage. It is important, however, to check for mandatory time limits and that the expert has been properly appointed in the correct capacity and
 - (ii) write his or her initial letter to the parties.
- (b) Where the expert has been appointed by the President, it is recommended that the expert use the standard form for the initial letter but this is not mandatory. The standard form letter can be adapted by the expert where he or she has been appointed privately. If he or she does not use the standard form letter, the expert should consider including the following points in the initial letter:
 - (i) confirmation of the contract (date, parties and capacity) and confirmation of any conditions to that contract
 - (ii) request confirmation of the respective authorised representatives of the parties
 - (iii) confirmation of documents received. Although a copy of the lease together with other relevant ancillary documents will be supplied by the relevant body, this will usually have been sent to that body by one party only and the other party may not have seen what was sent. It is good practice to ask the parties to include in due course an agreed copy of the lease (with any plans properly coloured) and any other relevant ancillary documents in the statement of agreed facts
 - (iv) propose a date for a preliminary meeting (see paragraph 5.3)
 - (v) if relevant, request agreement to any necessary or desirable extension of any timetable laid down in the lease

- (vi) if considered appropriate by the expert, request that the parties write to him or her within a stated timetable to confirm if they wish him or her to proceed immediately or if they agree that the expert should allow more time for negotiations. The expert should confirm that if one party, or both, wishes the expert to proceed he or she will do so.

- (c) The expert's terms of engagement should be attached to the initial letter as referred to in paragraph 3.2.

5.3 Preliminary meeting

- (a) A preliminary meeting is the most convenient way of identifying the scope of the valuation, agreed matters, and the procedures and format for submissions (if any) that the parties may wish to make, including a timetable. Unless the terms of the contract have been clearly established in writing, or the parties agree that a preliminary meeting is not necessary, the expert should call the parties or their advisers to a preliminary meeting.
- (b) The objective of a preliminary meeting is that it will result in agreed directions or procedural instructions by which the expert will conduct the reference. It will also allow the expert to discuss the key terms of engagement attached to the initial letter with the parties if necessary.
- (c) It is good practice for the expert to send draft directions to the parties before the preliminary meeting. This will enable the parties to be better prepared for discussion at the preliminary meeting.
- (d) At the preliminary meeting, the expert will explain that the purpose is to settle procedural matters and emphasise that no reference to negotiations must be mentioned at that meeting. The matters on which the expert will require confirmation include the following:
 - (i) the name of the present landlord and tenant and who is representing each
 - (ii) whether there is any dispute on the procedures relating to the notices/counter-notices implementing the rent determination and those leading to the appointment of the expert
 - (iii) whether the parties agree that the expert has been correctly appointed and that no objection is then raised
 - (iv) agreement on the valuation date for the rent determination
 - (v) whether the parties want more time to negotiate

a settlement. If more time is requested the expert should record the request in his or her directions and should say that he or she will suspend the reference with liberty for either party to apply at any time for the determination to proceed

- (vi) the expert's terms of engagement and treatment of any ambiguity regarding fees and the award of costs (see paragraph 2.5(c))
- (vii) whether or not the parties wish to make representations and counter-representations to the expert and, if so, the detailed procedure and timetable
- (viii) whether or not there appears to be any dispute on the interpretation of the lease or any other legal matter and if so, how the parties propose that the dispute is to be dealt with
- (ix) whether the expert is to give a reasoned or unreasoned decision and
- (x) the date by which the determination shall be made.

Before closing the meeting, the expert should enquire whether the parties have any questions or further points to raise.

5.4 Directions or procedural instructions

- (a) The preliminary meeting should be followed by directions or procedural instructions from the expert to the parties. If the terms of engagement have been modified, a copy of the modified terms of engagement should be included.
- (b) Typical directions will:
 - (i) set out the identities of the parties and their representatives
 - (ii) require a statement of facts to be agreed between the parties in relation to the subject premises. This could include agreed copies of the lease and other relevant legal documents; a description of the subject premises and agreement of the basis of valuation; agreed floor areas including the basis of measurement; floor plans; rating assessment; service charge; details of services and any other relevant and helpful matters
 - (iii) set out the information that the expert wishes to see in relation to the comparable evidence. In this connection it is helpful if the parties can agree as much factual information as possible (see also paragraph 4.8)
 - (iv) establish the form of written material to be submitted. Most experts will wish to receive an initial submission from each party with a right of each party to make a counter-submission to the other party's submission. These documents

will normally be exchanged within a specified timetable, which is either agreed between them or determined by the expert

- (v) set out the timetable for the production of written documents and procedure for exchange. If the lease contains a timetable that has been varied, this should be made clear and recorded in the directions. The parties must ensure they comply with any imposed or agreed timetable as there is no statutory right to apply for an extension of time limits
- (vi) state that the expert is entitled to continue with his determination regardless of whether the parties make the agreed submissions and counter-submissions (see paragraph 5.9)
- (vii) stipulate the date by which the expert will publish his or her decision, which should be in accordance with any provisions in the lease or as may be agreed. If the parties agree to vary the timetable in the lease this should be made clear and recorded in the directions. In particular, the expert should consider and provide for his or her ability to extend the date by which he or she is to deliver the determination in the event that he or she needs to take independent legal or other technical advice (where provided for in the terms of engagement)
- (viii) require that no privileged material relating to the negotiations between the parties, whether or not marked without prejudice, be made known to the expert during the course of the reference
- (ix) require compliance by the parties with the expert's directions and requests in relation to evidence, and that he or she will draw an adverse inference if parties do not so comply
- (x) specify that all correspondence with the expert be copied to the other side at the same time and by the same means and marked accordingly
- (xi) confirm that any submissions or counter-submissions will not bind the expert and that he or she will carry out such investigations and make such enquiries as he or she considers appropriate given the duties of an independent expert
- (xii) make arrangements for inspections
- (xiii) confirm whether the decision is to be reasoned or unreasoned and the extent of the reasons to be given (e.g. basis of calculations, comparables to which weight attached, legal assumptions/interpretations adopted, etc., see also paragraph 7.2)
- (xiv) if the lease grants power to the expert to allocate costs, a procedure for representations from the parties after the determination in respect of the costs allocation.

- (c) Unlike an arbitrator, the expert cannot force the parties to accept his or her directions. If they do not, the expert is still obliged to proceed with the reference in accordance with the lease. In this connection the expert should point out that a failure by the parties to agree any facts will require him or her to carry out more extensive investigations and will increase the cost of the reference. See also paragraph 1.4.
- (d) The expert should also consider whether to prohibit receipt of confidential material from either party on any basis that would preclude him or her from showing it to the other party.
- (e) Experience has shown that the expert and the parties frequently require extensions of the timetable. If an extension is requested by both parties, then the expert should agree. If this revision is going to cause difficulties for the expert (e.g. a further delay in finalising the determination due to other commitments), he or she should advise the parties. If the request is made by one party alone and the other either resists or remains silent then the decision of the expert must be seen to have been exercised fairly, taking into account all relevant circumstances. If the expert him or herself requires an extension, the terms of the contract need to be considered to ascertain whether the expert is entitled to this – see also paragraphs 2.4(d), 2.7(c), 3.2(f) and 5.4(b)(vii).

5.5 Correspondence with the parties

Experts should not enter into correspondence with the parties on the merits or otherwise of their evidence other than to establish the correctness of the information presented. All correspondence from the expert should be sent to both parties, and a copy of any document received by the expert from one party should be sent to the other. In order to avoid the impression of acting unfairly, the expert should as far as possible avoid any oral discussion with one party in the absence of the other.

5.6 Representation by one party only

- (a) If only one party wishes to make representations or to submit facts and the other party refuses or is silent, then (unless the terms of the lease preclude them) the expert should make it plain that he or she 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 that party the opportunity to comment on them. If he or she does so, then the party making the original representations should be offered an opportunity to respond. Thereafter no further representations should be allowed unless in response to a request by the expert.

- (b) If one party remains silent throughout, the expert must use great care in ensuring that any relevant facts disclosed to him or her by the other are both full and accurate. The expert is under a duty to make his or her own investigations and therefore is likely to require copies of any correspondence relied upon and to have confirmation of the rental evidence cited.

5.7 Expert not bound by representations

Unless the expert's contract stipulates that the expert is to receive written representations, he or she could be justified in finding a figure outside those that may have been presented by the parties. If there is a direction in the lease that the expert is to be bound by written representations, it is possible that he or she may be regarded by the court as acting as an arbitrator even if not described as such. See also paragraph 1.3.

5.8 Points of law

- (a) The standard terms of engagement provide not only for those matters that are dealt with in all references to an expert, but also for those that occur occasionally. The determination of a point of law falls into the latter group and is included to encourage the parties to address the method of resolving the problem.
- (b) Where no procedure to deal with a contested point of law has been agreed but it is likely to affect the expert's determination and he or she considers the point merits taking advice, the expert should ask the parties to consider whether:
 - (i) they will agree what is the correct answer to the point of law or
 - (ii) one of them will commence proceedings in the courts to decide it, before the expert proceeds with the determination or
 - (iii) they would instead prefer the expert to take, and proceed on the basis of, legal advice on the point, which he or she incorporates in the determination. If the parties agree that the expert may rely on the legal advice received then the expert is entitled to do so.
- (c) If all these courses are rejected, the expert should proceed to decide the point him or herself on the basis that it forms part of that group of issues referred to him or her for determination and should advise the parties that he or she is so doing. The expert must reach the best decision that he or she can and, if it is appropriate within the context of the determination, state how he or she has determined the legal issue involved. The expert should record carefully in his or her file of working papers the reasons which led him or her to decide the issue in that particular way and the steps that he or she took as referred to in

paragraph 5.8(b) to allow the parties an alternative route for determination of the point of law. These will be relevant in the context of any later claim of negligence or application to the court to set aside the determination.

- (d) Note that the valuation guidelines of the relevant professional bodies may supplement the lease where it is silent on issues specified in the guidelines. However, in case of any conflict the lease will prevail – the expert must follow the valuation hypothesis set out in the lease.

5.9 Limited power to enforce agreed procedure

- (a) The expert has no sanction to compel the parties if they both fail to honour the terms of the agreed procedure for determining the dispute. In these circumstances the expert should point out that there is a contract between him or herself and the parties and that failure to comply with the agreed procedure would be in breach of that contract.
- (b) In practice, if one party or both parties fail to cooperate, the expert will proceed with the determination after due notice to both parties but without the assistance of information from them. The expert is advised to protect him or herself from any alleged breach of contract by:
 - (i) ensuring that the terms of engagement includes all terms agreed with the parties and
 - (ii) providing him or herself with the ability within that contract to continue with the determination whether or not the parties make submissions.

6 Evidence

6.1 Evaluation and investigation of evidence

- (a) The question of how far the expert should rely upon factual information in relation to comparable evidence presented by an obviously interested party is a problem that may face any surveyor making a valuation, whether for a single client or for two parties. It clearly calls for great caution in ensuring that the full facts have been disclosed and that they are wholly accurate, e.g. including but not limited to seeing the correspondence and lease or documentation concerning the comparable under discussion. It is helpful to request that the parties agree the facts of all the comparable transactions on which they are relying.
- (b) The expert will have to decide the weight to give to any evidence found by him or her or passed to him or her by the parties. The expert should make his or her own investigations into details of all transactions that he or she considers might be relevant and all matters of fact affecting the rental value of the property. If an expert is put on notice that a comparable exists which reasonably would be considered to be relevant to the determination, the expert has a duty to investigate and to try to verify the data in order to be able to use the comparable evidence in the valuation process. As a general rule it is considered to be good practice that even when the parties have produced agreed comparable evidence the expert should still make his or her own enquiries of persons with first-hand knowledge of the transaction.

6.2 Irrelevant comparables

There is no duty upon the expert to inspect all the properties said to be comparable, if he or she does not consider them to be relevant.

6.3 Admissibility of evidence in determination by an expert

The rules of law as to the admissibility of evidence do not apply to determinations by an expert, who can pay attention to any information he or she reasonably thinks relevant. However, there is good reason underlying the rules and procedure concerning evidence and before ignoring those aspects of evidence the expert should consider whether it is sensible to do so.

6.4 Disclosure of documents

- (a) Unless the contract provides otherwise, an expert has no power to *direct* any party to disclose documents but can *request* a party to supply documents or any other information. If such a request is refused, the expert can consider what inference can properly be drawn from the refusal. See also paragraph 3.2(d).
- (b) There is an argument that privilege does not automatically attach to 'without prejudice' material in an expert's determination, on the ground that technically there is no adversarial dispute. However, it is preferable for the expert to seek to facilitate the parties resolving their differences by compromise and it would run counter to this for the expert to take 'without prejudice' material into account, at least without the agreement of both parties. Accordingly, it is considered best practice for the expert to state in the directions that he or she will not take into account such material and that it should not be disclosed to him or her.
- (c) 'Without prejudice' material that has not been considered in fixing the rent should not (unless both parties agree) be taken into account in the event that the expert also has the authority to determine his or her costs and/or the parties' costs. However, Calderbank offers can and should be taken into account on any question of costs determined by an expert.

7 The determination of an expert

7.1 Content of determination

- (a) The expert should set down his or her determination clearly in writing and make it available to the parties once the fees have been paid.
- (b) It is suggested that the determination should cover the following:
 - (i) a heading, naming the parties to the dispute and the subject property
 - (ii) reference to the expert's contract covering:
 - the lease
 - the method of the appointment (e.g. whether by the President or by the parties direct)
 - the date of the contract
 - the terms of the contract and any adopted procedure and
 - the subject matter of the dispute
 - (iii) the expert's decision on the subject matter of the dispute
 - (iv) the expert's signature and date.

7.2 Request for a reasoned determination

- (a) The expert is only contractually obliged to provide reasons as to how he or she reached his or her decision if the lease or the contract stipulates this.
- (b) Reasons given by an expert in a reasoned determination will be less extensive than those written by an arbitrator in a reasoned award. An expert need not deal with all the arguments put forward by the parties but should set out the reason for his or her decisions on those matters, including comparable evidence, which are relevant to and underpin the determination. The expert's directions should set out the matters that he or she proposes to cover in the reasoned award (see paragraph 5.4(b)(xiii)).
- (c) If reasons have not been agreed to be given prior to the determination, no explanation or justification should be given subsequent to the determination unless the expert agrees at the request of both parties, in which case an additional fee may be justified. It may be prudent for an expert not to accede to such a request.
- (d) Since the expert is potentially liable in negligence, it will be prudent for him or her to make proper working papers supporting the valuation, including notes on the information on which the valuation is based, and a written explanation of how he or she has arrived at the conclusions. These documents should be retained for an appropriate period.

7.3 Slips and clerical errors

If the expert becomes aware of a slip or clerical error in the determination, he or she should rectify it and immediately inform both parties. The expert probably cannot, however, change his or her mind even if a fundamental mistake has been made.

Appendix: Conflicts of interest

A1 The overriding principle regarding conflicts of interest

The overriding principle is that every expert should be, and be seen to be, impartial at the time of accepting an appointment and must remain so during the entire proceeding until the final decision has been delivered or the proceedings have otherwise finally terminated. Accordingly, an expert must decline to accept an appointment or, if the reference has already been commenced, bring to the attention of the parties the circumstances, if he or she has any doubts as to his or her ability to be impartial. This overriding principle does not, however, mean that an expert cannot accept any appointment where there has been an involvement with one of the parties, as paragraph A2 explains.

A2 Conflicts distinguished from involvements

An involvement is simply any relationship between the expert and one of the parties, or the property, while a conflict of interest is an involvement that raises justifiable doubts concerning the fair resolution of the dispute. Justifiable doubts necessarily exist as to the expert's impartiality if he or she has a significant financial or personal interest in the dispute. Doubts are also justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the expert might be influenced by factors other than the merits of the case in reaching a decision.

A3 Mere involvement not a disqualification

It follows from the distinction drawn in paragraph A2 that the mere fact that a prospective appointee has a relationship with one of the parties or the property is not an automatic ground for disqualification. Indeed, such a relationship may be seen instead to demonstrate market knowledge, and therefore to be a part of the rationale for his or her selection as the expert in the first place. This is all the more so where the rent review clause requires that the expert be sufficiently qualified and have experience in dealing with the market sector within which the property falls. Accordingly, the mere fact that an involvement may exist is not reason enough for the prospective appointee to disqualify themselves; the prospective appointee must apply the overriding principle (see paragraph A1) and consider whether:

- the involvement is such as to give rise to justifiable doubts as to his or her impartiality, in which case it will be a conflict of interest, with the result that the invitation must be declined or

- there is an involvement, but the involvement is not such to be a ground for disqualification (in which case the prospective appointee should give the President full details and say why he or she considers there to be no conflict).

A4 Impartiality distinguished from independence

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

Surveyor experts take evidence from the parties and are in a better position to assess the weight to be given to that evidence if they are experienced in the type of property (or type of dispute) in question. This experience with the market will take the form of a number of involvements that may in some cases be said to amount to a lack of independence. Provided, however, that the expert does not allow his or her judgment to become affected by the lack of independence – provided that the expert remains impartial – there is no need for the expert to be disqualified. Better an expert who is acquainted with the subject matter of the dispute, even if dependent in some way, than an independent expert who has no relevant knowledge or experience. Thus, the expert must be impartial but need not be independent (unless the dispute resolution clause expressly requires this). Accordingly, while parties are usually concerned to ensure that their expert is independent, they are not entitled to insist on this unless their contract so provides. This is because such concerns may sometimes lead to attempts to exclude from consideration a large number of prospective appointees, on the grounds that they have, or in the past have had, some connection, no matter how remote, with one of the parties; and in some specialist fields it could be found that every specialist is requested to be disregarded.

