



**GUIDANCE NOTES
for SURVEYORS
acting as
INDEPENDENT
EXPERTS in
COMMERCIAL
PROPERTY
RENT REVIEWS**

1st Edition

The Hong Kong Institute of Surveyors

Note

These Notes are a HKIS Guidance Notes and not an HKIS Statement of Standard Practice. No responsibility for loss occasioned to any person acting or refraining from acting as a result of the material included in these Notes can be accepted by the author, HKIS or the publisher. They give guidance as at the date of publication and will be revised from time to time. Suggestions and comments would be welcome and should be addressed to the Secretary General of HKIS.

The HKIS reminds Members that when they have been appointed to act as an Expert, because of the limited rights of the parties to set aside the determination, they are vested with substantial powers and the ability to affect significantly the financial position of the parties to the dispute. Before accepting an appointment as an Expert, Members therefore need to be satisfied that they have sufficient knowledge of the practice and the law relating to rent review, the subject matter of the dispute and the locality to ensure that they are able to assess the relevance and quality of the valuation evidence presented to them in the context of the hypotheses imposed by the Lease of the property being valued. The law relating to Expert determinations and rent review continues to evolve. There has been a significant number of recent common law cases and Members have a professional duty to keep their knowledge up-to-date.

References in these Notes to an "Expert" means an independent expert appointed to determine a commercial rent review dispute whether by agreement between the parties or by nomination by a third party. References to a "Lease" also means a tenancy agreement or other document under which a commercial rent review dispute is to be determined.

The masculine gender has been used in these Notes for convenience.

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Acknowledgement

As a leading profession in valuation, General Practice Surveyors are often appointed to act as Experts in property rent reviews. In the interest of achieving the high standard of valuation, the Institute believes that there is a need to produce some guidance notes to assist and guide our members who act as Experts in commercial rent review disputes.

The production of this Guidance Notes has been very much the efforts of a number of our members, including George Doran, Paul Dwyer and K. K. Chiu, led by Gordon Moffoot. Without their inputs, it would have been impossible to achieve our objective of producing this comprehensive Guidance Notes. On behalf of the Institute we would like to thank them for their contributions.

We would also like to thank Hilary Cordell, a Partner of Baker & McKenzie for commenting on many of the drafts and bringing to the benefit of this Guidance Notes her great experience as a legal practitioner specialised in rent review disputes.

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Guidance Notes

1. GENERAL INTRODUCTION

1.1 Scope and application of these Guidance Notes

These Notes are designed primarily to assist those who are appointed by the President of the HKIS or directly by the parties to act as Experts in commercial rent review disputes. They are not intended to provide guidance to those acting as arbitrators where other specific procedures will be relevant. They are also intended to assist the parties themselves and those acting for them by making them aware of the procedures likely to be followed.

These Notes are based upon the law and practice in Hong Kong. There is no legislation and little case-law governing the appointment or conduct of a surveyor acting in this capacity. The person appointed must exercise his professional expertise and judgment. These Notes are intended to give general guidance but it must be stressed that 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.

At the time of publication, there are no legal textbooks dealing exclusively with rent review law in Hong Kong nor is there a significant body of case-law. However, the case-law of other common law jurisdictions will, in the absence of Hong Kong case-law decided to the contrary, 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 appropriate commentary on certain cases in other common law jurisdictions. The standard text is Bernstein and Reynolds "Handbook on Rent Review". Clarke and Adams "Rent Reviews and Variable Rents" is also useful. An Expert should have access to library containing these textbooks. Members are advised, however, to bear in mind that leases in other jurisdictions and particularly the United Kingdom are often granted for longer terms and are alienable, factors which clearly have specific valuation consequences. Such texts should therefore be consulted advisedly.

1.2 Characteristics of determination by Expert

A determination of a dispute by an Expert has distinct characteristics setting it apart from arbitration:

- (a) An Expert has a duty of investigation to discover the facts and relevant transactions himself though he may receive evidence of these from the parties.
- (b) An Expert bases his decision upon his own knowledge, investigations and experience but he may be required by the Lease or by the specific agreement of the parties to receive submissions from the parties. He may also in his discretion allow such submissions.

- (c) The Expert's appointment is contractual in nature. He 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 should undertake. An Expert must therefore settle his terms of engagement with the parties before starting the procedure which he has chosen to adopt because later he will be unable to obtain support from statute. The parties must ensure they comply with any agreed timetable as there is no statutory right to apply for an extension of time-limits.
- (d) An Expert has no power to seek or compel disclosure of documents or the attendance of witnesses.
- (e) During the course of his investigations an Expert may seek assistance from any other person, who can undertake tasks on the Expert's behalf. However, the Expert has a duty to use his own knowledge and experience in arriving at his own decision. He may not delegate any part of his functions, for example, to a legal advisor. (*See further paragraphs 2.9 and 3.4*).
- (f) An Expert has no power to make any orders as to his fees, or as to the costs of a party, unless such a power is conferred upon him by the Lease or by agreement between the parties.
- (g) There is no procedure for determination of an Expert's fees by the courts.
- (h) There is no right of appeal against the determination of an Expert though in some circumstances the court might set it aside.
- (i) An Expert may be liable in damages if a party is able to show that he has been negligent, either in the assembly of material relevant to the valuation or in the application of professional skill and judgement to that material. An Expert must deal with the specific issues referred to him, for a failure to do so may destroy a defence against an action for negligence. The Expert must make his determination with reasonable expedition but in so doing must ensure that he addresses all issues referred to him.

1.3 Interpretation of Lease as to nature of appointment

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 own professional expertise and judgement, they may call him the 'independent valuer' or 'independent surveyor' or other such term. In these Notes the single expression 'Expert' is used.

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, he 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 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 is a danger that third parties (such as a surety) will be able subsequently to dispute that agreed interpretation.

The appointee should in any event ensure that the nature of the appointment is explicitly stated in the terms of his engagement. If it is not, he should clarify the point with the parties before he proceeds with the reference.

2. APPOINTMENT AND ACCEPTANCE

2.1 Application to the President for appointment

Application to the President of the HKIS for the appointment of an Expert should be in writing.

The application will not be processed until the appropriate non-refundable fee has been received together with a copy of the Lease or other document conferring on the President power to make the appointment.

The President will not seek to determine any legal issues incidental to the rent review. If one party applies for an appointment, it will usually be made. If the other party objects, his remedy is to apply to the court for a declaration that the appointment is invalid.

Whether he has been appointed by the President or privately, the Expert should study in detail the Lease so that he is clear as to the precise nature of the dispute and any special provisions that may apply.

2.2 Responsibility and disqualification

The acceptance of an appointment as Expert carries with it a heavy responsibility, and every effort is made by the President to select a person suitable for appointment who has no conflict of interest.

A person considered suitable for appointment shall be approached by the President and asked to confirm amongst other things:

- (a) that the subject matter of the dispute falls within the sphere of his own normal professional practice (not merely that of his firm);
- (b) that he will be able to undertake the task with reasonable expedition;
- (c) that, having made enquiries within his firm, no reasonable possibility of conflict of interest exists;
- (d) that he complies with any special requirements of the Lease;
- (e) that he is not currently engaged as an arbitrator or Expert in another case where his duties and functions to the parties would conflict with his duties and functions to the parties in the case;
- (f) that he has appropriate professional indemnity insurance.

It is essential that Members do not accept appointments where they do not have the necessary personal experience of current market conditions. To do so could undermine confidence in the system and bring the profession into disrepute.

In deciding whether he should accept an appointment the prospective appointee should also take into consideration and disclose all matters which might give rise to the possibility or appearance of bias. He must disclose every matter which could reasonably be considered to create a conflict of interest. If there is any doubt as to whether a connection with the property, a party or a representative of a party might give rise to a conflict of interest it must be disclosed. The test as to what constitutes a conflict of interest is an objective one.

Disclosure of a possible conflict of interest does not mean that the surveyor will not be appointed by the President. The possible conflict may be disclosed to the parties prior to appointment and their views sought. If neither party objects then the appointment will be made. Where a prospective appointee wilfully fails to disclose a conflict of interest, 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 he is not suitable for future appointments.

2.3 Representations to President prior to appointment

President is entirely free to exercise his discretion as to the identity of an appropriate appointee. The President will, however, in specific cases consider representations from the parties regarding the acceptability of specified surveyors. The President will give careful consideration and due weight to any objections or other comments made by the parties. However, he will not be bound by such objections or representations and will reach his own decision as to who should be appointed. A real pecuniary or other interest in the outcome of the dispute would be sufficient to disqualify an appointee.

Any prospective Expert having been supplied by the President with all the details of the dispute must disclose any relevant matters. For example, bias would appear possible in the following cases:

- (a) if one of the parties is a company in which the appointee or his partner or his family have substantial shareholdings;
- (b) if the appointee or his firm also regularly acts for one of the parties;
- (c) if the appointee or his firm also acts for the landlords or tenants of nearby properties where rent reviews are due shortly.

It is emphasised that this list is not exhaustive and, if in doubt, the prospective appointee is expected to disclose.

Upon the receipt of such details, the President may take the view that the Member concerned could not be seen to be independent and will seek another prospective appointee. In most cases, however, the President will not find it necessary to take this view initially and will pass on the disclosures to the parties or their representatives, inviting comments within a specified number of days. At that stage, the President will consider and give due weight to any objections but he will not be bound by them and the final decision as to the appointment will be his alone.

2.4 Private appointments

In cases where the parties have agreed to make the appointment, they may also have agreed certain other issues, such as how points of law are to be dealt with. The Expert may wish to consider such requirements with the parties at the preliminary meeting (*see paragraph 4.4*) and may wish to agree with the parties changes to such requirements before accepting his appointment.

2.5 When the appointment takes effect

If the parties themselves make the appointment it takes effect either:

- (a) where the agreed appointee has already told them he would be prepared to be appointed if requested, on the date of appointment; or
- (b) where there is no prior contact with the agreed appointee, on the date of his acceptance letter.

Where the President makes the appointment, the appointment takes effect when, the proposed appointee having been consulted and having indicated that he is prepared to be appointed, the President signs the appointment letter. The appointee may wish to accept the appointment subject to settling with the parties his terms of engagement (*see paragraph 3*).

2.6 Problems after the appointment has been made

Once the President has made an appointment, his jurisdiction in the matter is at an end unless the Lease itself provides to the contrary. If, therefore, after the appointment of the Expert, a party brings to the attention of the appointee a matter claimed to constitute a real pecuniary or other interest in the outcome of the dispute or to give rise to a real danger of bias, the Expert would be expected to:

- (a) obtain full details of the objection in writing;
- (b) notify the other party in writing and invite his comments;
- (c) consider whether the matters disclosed might affect his mind in coming to a decision or would raise a real danger of bias in the eyes of a reasonably-minded person;
- (d) if the answer to either of these questions is yes, offer to resign unless both parties agree in writing that he should continue;
- (e) if the answer to each of these questions is no, continue.

Equally, if the Expert should discover a matter which might affect his mind in coming to a decision or would raise a real possibility of bias in the eyes of a reasonably-minded person, he would be expected immediately to disclose it to the parties and then proceed as in (d) or (e) above.

2.7 Resignation of the Expert

Generally, an Expert may not resign even if he has reasonable cause such as a conflict of interest being exposed. The Expert will need to demonstrate a term in his appointment that he may resign if it is reasonable to do so. It is advisable to express such a provision in the terms of engagement.

An Expert who resigns unreasonably may be found liable to the parties for the consequences. It is therefore prudent that an Expert minded to resign should at least first consult the parties in writing and, if possible, gain their acceptance that his resignation would be reasonable in all the circumstances, with agreement also as to payment of his fees and expenses.

The parties can agree upon the replacement Expert or may apply to the President to appoint a replacement Expert if the Lease so provides or they so agree.

2.8 Challenge to validity following appointment

An Expert has no power to decide a challenge to the validity of his appointment and he should invite the parties to resolve the challenge before proceeding. He does however have a duty to proceed with the reference if the appointment is valid, and any delay should be brief unless the court orders him to stop. In particular, he should conform to any mandatory time limits in the Lease unless the court otherwise orders, or he has agreed variations with the parties in his terms of engagement. Unless there is fraud or collusion or the parties agree, the Expert's appointment cannot be revoked.

2.9 No delegation without parties' consent

An Expert's appointment is personal. In particular his firm is not appointed and it follows that the Expert may not, without the consent of the parties, delegate any of his duties, powers or responsibilities. However where problems outside the range of his expertise arise, for example, where the Expert needs to decide issues of legal interpretation, he may appoint experts, legal advisers or assessors to assist him to reach his own decision. Whether there is a need to do so is within the discretion of the Expert, unless the parties have agreed otherwise. The Expert must give the parties a reasonable opportunity to comment on any information, opinion or advice offered by such third party. (*See also paragraph 3.4 below*).

3. CONDITIONS ATTACHED TO APPOINTMENTS

3.1 Terms of engagement

The terms for the engagement of an Expert may consist of nothing more than a direction in a Lease that he is to carry out an independent valuation. However, it is essential that he establishes clearly his terms of reference for the appointment, including the basis of his fee. If he does not, he increases both the risk of losing his fee and the risk of a claim against him for negligence. The possibility of a claim for negligence is higher where a surveyor is acting for two parties with conflicting interests than where he is acting for a single client. He should therefore define the extent of the obligations he is undertaking. Of particular importance is the extent of the Expert's remit to determine questions of legal interpretation. (*See paragraph 3.4*)

Certain specific items may need to be covered in the terms of engagement agreed with the parties. For example, the Expert may be asked to accept the floor areas agreed between the parties and to base his valuation on them, in which case he will need to confirm the basis upon which he is able to compare the floor areas of the subject property with those of the comparables. This may have some bearing on his fee. The Expert may wish to exclude certain matters from his brief, for example, by agreeing with the parties that the premises are to be assumed to comply with the Building Regulations.

The appointment will inferentially incorporate conditions contained in the Lease, except to the extent the parties agree otherwise. The Expert is free to agree with the parties his terms of engagement. Thereafter he will be bound to comply with those terms, but otherwise he may proceed wholly in accordance with his own judgement.

Unless his terms of reference, either under the Lease or by specific agreement, stipulate that the Expert is both to receive and be bound by written representations, he may be justified in finding a figure outside those which may have been put before him by the parties.

3.2 Request for reasoned determination

If it is not provided in the Lease, the Expert should establish at the outset whether or not both parties wish him to provide a reasoned determination and, if so, whether and on what fee basis he is prepared to give this. If a reasoned determination is to be given, this should be set out in his terms of engagement which should also define the degree of detail required (for example, basis of calculations, comparables to which weight is attached, legal assumptions/interpretations adopted). If reasons are not to be provided, there is no obligation to respond to a later request for reasons. Certainly no such response should be made unless both parties agree (in which case an adjustment to the fee may be appropriate).

3.3 Costs and expenses

The agreed terms of engagement must deal with the recovery of disbursements and expenses generally (*see paragraph 5*).

It is important that the Expert's terms of engagement should provide for the parties to bear the costs of taking legal or other forms of specialist advice even if the Expert, through no fault of his own, is unable to proceed further. If no such provision has been made, he may have to bear such costs himself to avoid negligence suits or face the prospect of an action for breach of contract for failing to complete the reference.

3.4 Points of law and other specialist areas

The terms of engagement should set out the circumstances in which the Expert has the right to take advice from an appropriately experienced lawyer or other specialist consultant if either he or one or both of the parties reasonably considers it necessary. They may provide that the lawyer or other specialist consultant may be appointed by the Expert in his discretion. Alternatively, they may require the Expert to consult with the parties on the selection of a suitable lawyer or other specialist consultant in which case the Expert should have the ultimate discretion. Where the Expert exercises a discretion, he must satisfy himself that the appointed person has sufficient relevant experience.

4. PROCEDURE AND CONDUCT OF DETERMINATION

4.1 Procedure to be appropriate for the circumstances

The procedure to be adopted by the Expert should be appropriate for the nature of the property, the wishes of the parties and the amount of the rent.

4.2 The role of the Expert

An Expert's task is to carry out the valuation in the ordinary way but with the difference that he is jointly instructed by the parties and that the parties will regard themselves as bound in adversarial proceedings. They may therefore put before him additional information.

The parties, through their surveyors or otherwise, may jointly agree to submit to the Expert an agreed statement of facts covering, for example, such matters as floor areas and the existing use of the various parts of the premises. Each party may also decide to send to the Expert details of transactions of which they wish him to be aware, representations as to the matters which he should take into account, their own valuations and legal submissions. Nevertheless, it is still the duty of the Expert to ensure that he has any additional information that is necessary for him to arrive at his own conclusions based on his own opinions and calculations. In a valuation dispute this may include, for example, data relating to market conditions including present and forecast supply of space, Government leases, planning and building restrictions, restrictive covenants, the condition of the premises as found and as they are to be valued under the terms of the Lease, the adequacy and efficiency of the services and all allied matters.

4.3 Establishing the procedure

In some cases, where it is clear that the sole issue is one of valuation and the parties have agreed that the determination shall be conducted by written representations only, the parties may be able to agree a timetable and that a preliminary meeting can be dispensed with. However, in most cases it is important to hold a preliminary meeting before proceeding. This enables the Expert to establish (preferably by consent) the procedure to be followed, including many of the matters suggested in these Notes.

If there is a significant legal issue involved, it is desirable that the parties' solicitors be present at the preliminary meeting. In such cases, it is helpful to the parties if the Expert, when convening the meeting, sends them a draft showing the directions that he is minded to give. This may help to shape an early agreement and in any event will draw the attention of the parties to the points that have to be considered and they may be able to agree all or most of the directions necessary.

Where an Expert has been notified that a party intends to be represented at the preliminary meeting by a solicitor, he should notify the other party a sufficient time in advance to enable that party, if so minded, to instruct a solicitor.

4.4 The preliminary meeting

A preliminary meeting is the most convenient way of identifying the scope of the valuation, agreed matters, the procedures and format for submissions (if any) which the parties may wish to make including a timetable. Unless all the terms of his engagement have been clearly established in writing, or the parties agree between them that a preliminary meeting is not necessary, the Expert should call the parties and their advisers to a preliminary meeting.

At the meeting, the Expert should explain that its purpose is to settle procedural matters and emphasise that no reference to negotiations must be mentioned at that meeting. The matters on which he will require confirmation will include the following:

- (a) The name of the present landlord and tenant and who is representing each.
- (b) That the lease documents provided to the Expert are the relevant ones and that there are no supplemental deeds of variation, licences, side-letters etc.
- (c) That there is no dispute on the procedures relating to the notices and counter-notices implementing the rent review and those leading to the appointment of the Expert.
- (d) That the parties agree the Expert has been correctly appointed and will act as an Expert.
- (e) The rent review valuation date.
- (f) The facts concerning the subject property.
- (g) The agreed comparables and who is to supply a statement and full details of such comparables.
- (h) Whether the parties want more time to negotiate a settlement. If so, the Expert should record the request in his directions and state that he will suspend the reference will liberty for either party to apply at any time for him to proceed.
- (i) His terms of engagement and who will be responsible for his fees. It will probably be appropriate to provide that the parties will be jointly and severally liable for fees and disbursements.
- (j) Whether the parties wish to make representations to the Expert and, if so, the detailed procedure and timetable.
- (k) Whether or not there appears to be any dispute on the interpretation of the Lease or any other legal matter and how the dispute is to be dealt with.

- (l) The date by which the parties are to agree and send to the Expert a list of the issues he has to decide. Alternatively, if they cannot agree, the date each party should send to the Expert his own list of the issues to be decided.
- (m) Whether the award is to be reasoned.
- (n) Whether there are any other matters relevant to the valuation and if so, how they are to be dealt with.
- (o) Whether time is to be of the essence in matters pertaining to the determination timetable.

Before closing the meeting, he should enquire whether the parties have any questions or further points to raise. All the above matters should be confirmed to the parties in writing as Directions.

4.5 Information and representations

It is desirable to invite the parties to make available to the Expert any relevant factual information known to them as this may produce evidence of which the Expert himself is unaware and is often of assistance.

Whether the Expert should invite representations (that is to say, arguments) as distinct from factual information is a matter for his discretion unless his appointment either expressly or inferentially requires otherwise. In some circumstances, for example, where the parties are grossly unequal in financial or technical resources and the weaker party asserts that he does not wish to incur the expense of a professional valuation, it might be justifiable for him to invite factual information only, but whether or not either or both parties submit valuations for consideration, the Expert is still under a duty to make his own valuation.

4.6 Evidence

The Expert must exercise great caution in ensuring that the full facts have been disclosed to him and that they are wholly accurate. For example, he will need to ensure, as far as possible, that the facts behind the comparable under discussion are truly comparable to the subject property and Lease. He will also need to be satisfied that there are no confidential side-letters, licences and other agreements affecting the validity of the comparable.

An Expert may receive evidence submitted by the parties but he always has a duty to make his own investigations into details of transactions he considers relevant and all matters of fact affecting the rental value of the property, including service charges, Government rent and rates. There is no duty upon the Expert to inspect all the properties said to be comparable, if he does not consider them to be relevant.

The parties' surveyors therefore act as representatives of the parties and not as expert witnesses, this latter concept being inapplicable to an Expert's determination. As such, the Expert will have to decide the weight to give to any evidence found by him or passed to him by the parties.

The rules of law as to the admissibility of evidence do not apply to determinations by an Expert. An Expert can therefore pay attention to any information he thinks relevant. It is advisable, however, unless there are cogent reasons to the contrary, for Experts generally to follow the ordinary rules of evidence.

The Expert should accordingly adopt the following approach:

- (a) Any matters which have been proposed or agreed during the review negotiations on a "without prejudice" basis should not be admitted in evidence. However, other offers made or matters agreed on an "open" basis may be admitted.
- (b) Hearsay evidence, that is evidence of statements made by a third party in support of the truth of that statement, should generally not be admitted. However, any such statements made by the opposing party or his representatives, may be admitted. If the Expert does decide that hearsay evidence is admissible by one party, the Expert should give notice to the other party and must weigh up this evidence. If possible, the Expert in these circumstances should seek confirmation of that evidence from the person who originally made the statement.
- (c) Evidence can be either factual or an opinion. The weight to be attached to any piece of evidence, whether of fact or of opinion, is a matter of judgement for the Expert. He may decide to give it little weight or indeed to disregard it all together. Where there is little or no factual evidence, evidence may be unsupported by evidence of comparable lettings.
- (d) The burden of proof of an assertion should lie upon the party making the assertion.
- (e) As a general matter, evidence of rents in open market lettings will be the most relevant comparables as the Lease will normally require the rent to be assessed on an open market basis.
- (f) Rent review and renewal evidence will generally be of less weight than open market lettings as there may be additional subjective factors which caused the parties to agree the rental amounts. The weight to be given to such evidence is a matter for the Expert.

- (g) Evidence of rents determined by arbitrators and Experts will generally be of less weight than review and renewal evidence, as this may depend upon the quality of the relevant Expert and the factors considered by him which may well be unknown. Such an award is only an opinion of what would have happened in the market had the hypothetical letting been an actual letting. Again, however, the weight given to such evidence is for the Expert to decide.
- (h) Evidence of transactions occurring after the review date may be considered. The longer the period between the valuation date and the date of the transaction, the less weight the evidence is likely to carry with the Expert.

4.7 Submissions and correspondence

Subject to any special terms attached to his appointment, an Expert is not constrained by the limits of values set by the parties' representations.

The Expert 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 or submissions received by the Expert from one party should be sent to the other. He should as far as possible avoid any oral discussion with one party in the absence of the other.

4.8 Representations by one party only

If only one party wishes to make representations or to submit facts and the other party refuses or is silent, then (unless the terms of the Lease plainly preclude them) the Expert may wish to stipulate that he will still be prepared to receive representations. This will depend upon whether he considers he has the necessary evidence himself to give his determination. He should always be aware of the potential for negligence actions. If he does agree to take representations, a copy should be sent to the other party to give him the opportunity to comment on them. If he 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.

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

4.9 Points of law where no agreed procedures

Where no procedure to deal with a contested point of law has been agreed in the terms of engagement but it is likely to affect the Expert's determination and he considers the point merits taking advice, the Expert should ask the parties to consider whether:

- (a) they 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 he proceeds with his determination; or
- (b) they would instead prefer him to take, and proceed on the basis of, legal advice on the point, which he incorporates in his determination. If he wishes to seek the advice of counsel he may now do so direct.

If both these courses are rejected, the Expert should proceed to decide the point himself on the basis that it forms part of that group of issues referred to him for determination. He must reach the best decision that he can and, if it is appropriate within the context of his determination, state how he has determined the legal issue involved. He will then be wise to record carefully in his file of working papers the reasons which led him to decide the issue in that particular way. He may prefer to seek legal advice at his own cost in view of potential negligence actions. This highlights the need for the Expert to cover this situation in his terms of engagement (*see paragraph 3.4*).

4.10 Limited power to enforce agreed procedure

The Expert has no sanction to compel the parties if they fail to honour the terms of the agreed procedure for determining the dispute. In these circumstances he should point out that there is an agreed contract between himself and the parties and that failure to comply with the agreed procedure would be in breach of that contract. In practice, if one part or other parties fail to co-operate, the Expert will proceed with his determination after due notice to both parties but without the assistance of information from him or them.

The Expert is advised to protect himself from any alleged breach of contract by:

- (a) ensuring that all his terms of engagement are included in the contract with the parties; and
- (b) providing himself with the ability within that contract to continue with his determination whether or not the parties make submissions.

4.11 Disclosure of documents

An Expert has no power to direct any party to disclose documents but he can request a party to supply documents or any other information. If his request is refused, he can consider what inference can properly be drawn from the refusal.

5. FEES AND DISBURSEMENTS

5.1 General guidance

The Expert must decide his fee on the merits of each particular case.

In view of his duty to assemble information and his potential liability in negligence, the Expert may be justified in charging a fee higher than if he were acting as an arbitrator. His fee should not be fixed as a percentage of his rental determination. Experts should be prepared to discuss the appropriate level of fee whether the appointment is made by the parties or the President.

The Expert has no authority to apportion the responsibility for his own fees and disbursements or the costs of the parties unless the terms of the Lease or of his appointment expressly confer power on him to do this.

If he is required to deal with "costs" he should establish at the preliminary meeting whether this embraces only his own fees and disbursements or alternatively whether he is required to decide also on the division of responsibility for the parties' own legal costs. Normally the parties will agree the award should be limited to the Expert's own costs, disbursements and legal fees. The division of such costs by the Expert should follow the event but if the determination lies in-between the parties figures, then the Expert should divide them equally. Any other division should be on a reasonable and just basis in all the circumstances, the Expert having given the parties the right to make submissions.

5.2 Establishing the right to and amount of payment

If the Expert has accepted an appointment by the President, he will be have a contractual relationship with the parties but may not have agreed fees with them.

An Expert who, after appointment, proceeds to a determination without any agreement of the parties (whether in the Lease or separately) as to the payment of his fees and costs, may have a right in law to be paid a *quantum meruit* fee for work done at the implied request of both parties. However, he would be most unwise to proceed on this assumption.

The Expert should immediately upon appointment, or at the latest at the preliminary meeting (if one is held), not only establish the basis of his fees and costs but also obtain the express agreement by one or both parties to pay them.

Current practice is for an Expert to quote a fee higher than he would charge if acting as a valuer for either party alone, but this is tempered by the air of commercial reality and the general competition which exists.

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

5.3 Fees where a negotiated settlement is reached before determination is issued

It is impossible to make specific recommendations because the appropriate fee must depend on the circumstances of each individual case, but the following may provide some guidance.

Time of Settlement

Appropriate Fee

- | | |
|--|--|
| (a) After appointment and/or perusal of documents and/or preliminary meeting and/or issue of directions but before the Expert has 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 the Expert has done any further work. | That proportion of the full agreed fee, which represents the hours spent compared with the previously expected time requirement, plus disbursements. |
| (c) After the steps in (a) and (b) above and the inspection of the premises, and assembly by an Expert of his 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. |

Alternatively, if an hourly charge rate has been agreed, then the appropriate fee can be easily ascertained at any stage.

5.4 Excessive fees and disbursements

As the Expert's fees and disbursements are not directly subject to the court's control (as are those of an arbitrator) they cannot be taxed. However, a party who has paid would be entitled to bring an action re 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.

6. DETERMINATION OF THE EXPERT

6.1 Clarity of decision

When his determination on the matter is made, the Expert should set it down clearly in writing and make it available to the parties once his fees have been paid. It is suggested that the determination should cover the following:

- (a) A heading, naming the parties to the dispute and subject property.
- (b) Reference to the Expert's appointment covering:
 - (i) the document (usually the Lease) containing the parties' agreement to submit the dispute to an Expert;
 - (ii) the method of the appointment (for example, whether by the President or by the parties direct);
 - (iii) the date of the appointment;
 - (iv) the terms attaching to the appointment and any adopted procedure.
- (c) The subject matter of the dispute.
- (d) His decision on the subject matter of the dispute.
- (e) The reasons for his award, if a reasoned determination is required under this terms of engagement.
- (f) Fees and disbursements if appropriate.
- (g) His signature and date.

6.2 Clerical errors

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

6.3 Retaining papers

Since the Expert is liable in negligence, it will be prudent for him to make, and retain for an appropriate period, full notes on the materials and texts that he has used, advice taken and discussions made in the course of arriving at his valuation and also his working notes on how he has arrived at his conclusions.