

Ask an expert

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Kevin Woudman explains how independent experts can offer an effective way of resolving disputes

In November 2016, [RICS](#) published its [Independent expert determination](#) UK guidance note. This provides detailed guidance to all surveyors involved in independent expert determinations and includes sections on terms of engagement, case management, evidence, points of law and technical issues, as well as the determination itself and costs.

Independent expert determination is well suited to construction-related matters, such as quality of work and completion issues under development agreements or specific technical disputes, and in the areas of service charge disputes and dilapidations as well.

Indeed, RICS runs a [Dilapidations Dispute Resolution Scheme](#) designed specifically for the resolution of such disputes at lease end and based on independent expert determination.

Most disputes can, in fact, be resolved by the independent expert determination route, and ad hoc agreements to refer a dispute to an independent expert are common.

Unlike either judges or arbitrators, an independent expert determining a dispute brings their own knowledge to bear on the issues, and is entitled to form a view based entirely on this expertise, without the need for evidence from the parties.

However, independent expert determination shares some of the advantages of arbitration ? in particular speed, privacy and the ability to choose the decision-maker, or have a suitable person appointed by a third party.

Expert determination is purely contractual, though, and it should be remembered that there is no legislative underpinning, no procedural code and little case law governing the appointment or conduct of a surveyor acting in this capacity.

Key requirements

It is therefore vital that surveyors appointed to act as independent experts recognise that there are important differences between an arbitrator and an expert, and the following essential requirements should be stressed:

- independent experts are appointed to determine the dispute referred to them based on their own investigations, knowledge and experience
- they may be liable for damages if either party is able to show that an expert has been negligent, either in the assembly of material relevant to the determination or in the application of their professional skill and judgement to that material

- experts must ensure that they settle terms of engagement with the parties in writing before commencing the procedure, if any, that they have chosen to adopt, because they will be unable to obtain support from statute at a later stage
- independent experts must deal with the specific issues referred to them.

Powers and duties

Parties who include in their agreement a clause for settling by expert determination any dispute within the scope of that clause are thereby referring those disputes to private determination rather than to a court of law or processes that are overseen by the courts such as arbitration.

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Since it is the parties who give the independent expert the authority to act, they can also agree the principles and procedure that are to apply in any dispute that may arise.

The first rule for independent experts is therefore to look at the agreement under which they are being appointed to see what it provides, given that there is no statutory framework on which to depend and little case law that is of assistance.

Because expert determination is a consensual procedure, the parties are free to agree how their dispute is to be determined. Therefore, they could also override the mechanism that is laid down in the agreement ? including any special requirements pertaining to the appointment ? and agree a different procedure for the determination of their dispute.

Conflicts of interest

The overriding principle is that every independent expert should be impartial at the time of accepting an appointment and must remain so during the entire proceedings until the final decision has been rendered, or the proceedings have otherwise terminated.

Accordingly, if they have any doubts as to their ability to be impartial, independent experts must decline to accept an appointment or, if the reference has already been commenced, bring the new circumstances to the attention of the parties.

The guidance is designed primarily to assist those who are appointed either by the RICS President or directly by the parties to a dispute to serve as an independent expert to determine that dispute. It is, however, also intended to assist the parties themselves, and those acting for them, by making them aware of the procedures likely to be followed.

Independent expert determination is now classified as a kind of alternative dispute resolution (ADR) and is one type of ADR suggested by the courts in preference to litigation. It is, therefore, a dispute resolution route of which all building surveyors should be aware.

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Further information

- Related competencies include: [Legal/regulatory compliance](#)
- This feature was taken from the [RICS Building surveying journal](#) (July/August 2017)
- Related categories include: [Dispute resolution](#)