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RICS COVID-19 EMERGENCY MEASURES EVALUATION PANEL

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Administration of the Process

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RICS Evaluation

In the wake of the COVID-19 emergency many tenants are finding it difficult to meet the commitments as set out in their leases. On the other hand landlords as property owners often have commitments to banks, mortgagees or other financial information and in multi tenanted properties, to other tenants. Government has requested of the property industry that Landlords and Tenants establish how they can assist each other in looking at their contracts and establishing ways of shouldering the liabilities and difficulties now arising in the relationship.

RICS has set up an initiative through its Dispute Resolution Service to assist landlords and tenants work together in an effort to settle contractual failings at this difficult time. It is backed by a panel of over 120 experienced chartered surveyors who are at the coal face of business activity and have a wealth of knowledge of leases, the landlord and tenant relationship and dispute resolution. Through an evaluative process the appointment of an evaluator by RICS DRS to mediate with the parties in search of a solution to any differences in approach has resulted in a new and forward thinking process to find the appropriate solutions. The constituent parts and approaches to this evaluative process is set out below:

Administration of the Process

1. PRINCIPLES

1.1. These notes have been prepared in conjunction with those prepared for the Evaluation programme by RICS DRS, Tony Harris and Chris Osmond and should be seen in the context of the overall information provided to the delegates on this initiative.

1.2. There are no statutory provisions or professional standards to draw upon at the present time on this initiative but the approach follows the Governments call upon the commercial property industry to work together with tenants to create sustainable business arrangements in the current crisis.

1.3. This ADR Evaluation is new and does not fall within the options of Mediation, Arbitration, or Independent Expert, although its nature is closer to that of mediation. It is, a consensual process and requires the positive approach of all parties and the Evaluator. The success of any outcome will depend upon the circumstances of the individual case, the willingness of the parties to listen and understand the other side's case and the skill, experience and business acumen of the Evaluator.

1.4. this untried ADR option is designed to provide an ADR facility for the "*Code of Practice for commercial property relationships during the COVID-19 pandemic*", dated June 2020 and issued by the Ministry of Housing, Communities and Local Government.

1.5. The contents of the "*Code of Practice for commercial property relationships during the COVID-19 pandemic*" should be fully understood by the Evaluator and the parties.

1.6. At all times, the Evaluator should draw upon their business expertise and negotiating abilities, experience as a dispute resolver and common sense – "This is about a deal".

1.7. As a starting point it may be sensible to adopt the principles as enshrined in the Arbitration Act 1996 in section 1 and clauses 33 and 40, adopting them in recognition that this is the parties dispute and who are seeking a resolution that is fair and appropriate as follows:

1.7.1. The object of this evaluation process is to obtain a fair resolution of the issues between the parties who are subject to events that have been beyond their control through the COVID-19 Pandemic;

1.7.2. the parties should be free to agree how the dispute is resolved;

1.7.3. the Evaluator is to act fairly and impartially between the parties giving each party a reasonable opportunity of putting their case and dealing with that of their opponent;

1.7.4. the Evaluator should adopt procedures suitable to the circumstances of the case avoiding unnecessary delay or expense and to provide an appropriate infrastructure by fair means for the resolution of the issues arising in each case;

1.7.5. the parties are always free to agree on the powers of the Evaluator but once such powers are granted, they should be adhered to by each party and where possible evidenced in writing (by the use of simple email exchange) or by other recorded agreement.

1.8. It is acknowledged that at the commencement of proceedings there is unlikely to be any agreement between the parties in place or a framework in which the Evaluator and the parties are to work within, other than the RICS DRS Guidelines and the Government Code of Practice (see notes of Tony Harris).

2. FIRST STEPS

2.1. Confirmation of Appointment of the Evaluator and Evaluator acknowledgement to RICS DRS and the parties.

2.2. Email the parties confirming the basis of your appointment and your understanding of the case as submitted to RICS DRS by the parties/party.

2.3. Enquire of the parties if the dispute is still live or if there is the potential for a negotiated settlement.

2.4. The Evaluator must provide the parties to the dispute with a copy of the "Code of Practice for commercial property relationships during the COVID-19 pandemic" at the earliest opportunity and preferably with the first email to the parties.

2.5. The Evaluator must set out the objectives of the process to achieve a fair settlement between the parties as soon as possible.

2.6. Speed will be of the essence so the Evaluator must ensure that responses from the parties are made as quickly as appropriate in any given circumstance. Momentum and engagement without excessive interruption or time delays will be essential for success.

2.7. If the parties believe a negotiated settlement is possible establish with them a likely time frame. If a settlement is not deemed possible the Evaluator must proceed immediately (see notes of Tony Harris on timetable provisions withing RICS DRS guidelines).

2.8. The Evaluator should set out what is initially required of the parties and the fees the Evaluator will charge plus any comment on liability of costs (see section 4 below and notes of Tony Harris).

2.9. Once the parties are engaged the next step is for the Evaluator to require of each party to set out the basis of their case in simple terms with their requirements as to the terms they are seeking to achieve (see Tony Harris notes).

2.10. The parties must be made to feel comfortable, emphasise that the evaluation process seeks to identify a solution to the issues that have arisen but at all times is confidential including any eventual agreements or settlement (see notes of Chris Osmond).

2.11. At all times, the Evaluator should be prepared to ask and invite useful questions, particularly in the initial stages so that the full extent of the issues in dispute can be identified (see Tony Harris Notes).

2.12. Explore what the parties expect to achieve through the evaluation process and correct and expand as appropriate (see notes of Tony Harris and Chris Osmond).

2.13. the Evaluator should be prepared to explore with the parties how a successful evaluation can be achieved given the issues in dispute, at any stage of the process and to identify what happens next (approach to continue from appointment to finalising of the process – see notes of Tony Harris and Chris Osmond).

3. THE ADMINISTRATIVE ARRANGEMENTS

3.1. Where possible meetings should be held by video conferencing using established platforms usually available to most individuals and corporates such as Microsoft Team, Zoom, Webex or Opus etc.

3.2. Conference calls by telephone or FaceTime are an alternative but are likely to be less satisfactory. Conference calls must adopt appropriate protocols as for virtual meetings and physical meetings and there will be differences.

3.3. How the meetings are conducted will reflect on you as the Evaluator, the RICS and the initiative. It is a considerable burden which will require thought, careful planning, and the agreement/support of the parties. Failure to bring both parties with you will result in failure of the event, process and objective to come to an agreement.

3.4. Initially all correspondence to the Evaluator should be copied to the other side but this may have to be relaxed if there is good reason to do so. The Evaluator should lead or respond on this issue as appropriate.

3.5. At the earliest opportunity provide the parties with protocols for the administration of the dispute electronically both for email communications and document transfer.
3.6. Only if both parties insist and it is safe to do so, should physical meetings be held in which case all current government regulations at the time including social distancing must be adopted.

3.7. At any meeting (visual or physical) ensure that all participants are identified and agreed by both sides as being appropriate
3.8. The virtual meeting should be controlled as described above (see Tony Harris notes).

3.9. The Evaluator should establish a positive atmosphere by setting ground rules for the parties to adhere to so there is a structure that can easily be recognised and understood by the parties and the Evaluator. It should be one that is capable of memory as well as being referenced in writing. Anything that is over complicated will be brushed aside or avoided.

3.10. In addition, the virtual meeting platform, as a technical medium, must be controlled by the Evaluator or a technician appointed by the Evaluator or the parties, by agreement. The Evaluator must ensure the meeting proceeds smoothly and that any documents can be shared by all parties involved, if they are subject to any consideration at the point of discussion.

3.11. Where possible documents should be issued in advance to the Evaluator and copied to the other side with the Evaluator using share screen facilities to produce documents under discussion.

3.12. During virtual meetings ensure the appropriate people are in the room, including the decision makers) and that only one individual can speak at a time with control over muting and camera roll.

3.13. Set time limits but only if appropriate and necessary but in any event to respect the RICS DRS Guidance (see Tony Harris Notes). Enforce any timetable as best you can even though the Evaluator has limited/no powers other than those agreed by the parties.

3.14. The Evaluator should always take notes for their own benefit. They are not, nor should be, legally enforceable or discoverable and this should be made clear to the parties.

3.15. At the hearing each of the parties will explain to the other party and the Evaluator an account of the facts as they see them and their view as to what they believe will be an appropriate outcome. (see Tony Harris notes).

3.16. At all times both parties must be encouraged to listen and understand the case of the other side.

3.17. The Evaluator will help the parties to explore their underlying interests , choices and proposals and establish areas where compromise or settlement can be reached (see notes of Tony Harris and Chris Osmond).

3.18. the Evaluator should always, throughout the process, confirm the position of each party as it changes or evolves.

3.19. the Evaluator should attempt to identify common ground and the areas not agreed on a rolling basis and to make sure these are communicated to the parties as appropriate.

3.20. the Evaluator must focus on the issues and avoid being side-tracked particularly on personal attacks which should always be avoided and discouraged.

3.21. it will usually be necessary for the Evaluator to empathise with both parties' cases, but this should not deter the Evaluator to press the need for compromise or to question the appropriateness of any proposal or its viability in commercial terms both from each parties perspective and in the market place generally.

3.22. the Evaluator must always be non-threatening, use simple language and be prepared to separate fact from opinion and even fiction. In addition, the Evaluator should demonstrate they are a good listener and be prepared to lead with suggestions, especially if negotiations slow or fail to create the right type of dialogue.

3.23. At any time during the process the parties should be allowed to withdraw from the evaluation hearing to discuss matters arising. This will assist the parties "evaluate" the position and status of the dispute at that point of time so that any changes in their approach can be established.

3.24. The Evaluator should always be sensitive to the behaviour of the parties and individuals, procedural arrangements and any deviation from the agreed approach and communications whether positive or negative and the need to establish any changes in approach.

3.25. It should be accepted that settlements maybe in the short term, medium term, or long term (see notes of Tony Harris and Chris Osmond).

3.26. It will be preferable for the parties to draft any agreement without delay and preferably at the time of settlement. The Evaluator should be there to assist, and appropriate references made in the Evaluator's notes, although as stated above, these should not be issued to either party (see notes of Tony Harris and Chris Osmond).

3.27. It must be remembered that the Evaluator is likely to become involved in areas outside of their expertise such as accounts, financial records and legal issues. The evaluator should attempt to deal with these matters without external advice by ensuring the parties are aware of any limitations and encouraged to explain the issues in these areas carefully.

3.28. As early as possible in the procedures the Evaluator should establish if they will be required to call upon any expert or specialist advice from an independent expert and if a single expert can be appointed to advise both parties and the Evaluator.

3.29. If expert evidence is called for this should not be submitted in the format of an expert witness report but should briefly summarise the advice and position of the expert.

3.30. Any agreement, because of the evaluation process should be documented legally as appropriate so that it is enforceable under usual contractual arrangements. (see notes of Chris Osmond).

3.31. Agreements that are documented may necessitate the use of waivers , deeds of variation, licences, or other instruments insofar as they are appropriate for the purposes of recording the settlement (see notes of Chris Osmond)

4. FEES

4.1. The Evaluators fees must be identified to the parties at the earliest opportunity and agreed in writing by all parties to the dispute.

4.2. The Evaluator should set out their fee basis on the hourly rate they feel appropriate and in accordance with the RICS DRS protocol at the time of appointment and secure the agreement of the parties before the process is progressed (subject to timetable issues set out in the notes of Tony Harris).

4.3. Given the nature of the evaluation process it is probably unwise to agree to a set fee, although later during the process, the Evaluator may be prepared to finalise or cap their fee charges.

4.4. Any contingency fee arrangements should not apply to the Evaluator who should charge on a time and expenses incurred basis.

4.5. Both sides will bear their own costs unless there is agreement between the parties for costs to be assessed on an alternative basis.

4.6. There is no provision for costs and fees to be determined by the Evaluator although if the parties agree such powers could be given to the Evaluator adopting the provisions of the Arbitration Act 1996, Sections 59-65.

4.7. The responsibility for any Evaluator appointed expert costs and liability for fees must be established before the specialist is appointed.

Identifying the Issues
1. Refer to the Code and RICS Scheme

When terms of business are settled Evaluator should request each party to set out their initial position if this is not apparent from the application but expansion on that statement may be needed. Formal directions or instructions not appropriate but a timetable is needed as set out in the RICS scheme. The rules of evidence do not apply.

When dealing with unrepresented parties you may find this quote for the Judicial College Equal Treatment Bench Book of assistance:

Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party

2. Scheme Timetable

Day 7 *Tenant provides Landlord and Evaluator with reasoned written grounds for concessions sought*.

The quality of these and of backup information is likely to depend on the nature of the tenant and resources available.

Day 14 *Landlord responds providing reasoned grounds for saying what is acceptable and what is not and why.*

Likewise for the Landlord.

Day 21 *Tenant replies only to new issues raised in landlord's response*.

3. At this point it may be helpful for the Parties to prepare a Scott Schedule, if appropriate, before the meeting (or perhaps during).

4. These statements do not limit the scope of the meeting but are a starting point only.

5. The Meeting

6. Evaluator needs to be sensitive to the parties' skill sets and familiarity with dispute resolution language. Look at their relative strength. Is big Landlord "bullying" small tenant or vice versa. Small parties with limited resources.

7. Is the motivation of the parties clear? Eg Landlord wants all rent. Tenant can't pay but would like to if given help etc, Tenant can pay but trying to take advantage.

8. What is the alternative? CVA, winding up orders, forfeiture, statutory demands, CRAR when allowed. Tenant shuts down. Vacant premises.

9. In initial statements the parties are unlikely to reveal their full thinking so evaluator may find a checklist useful for the meeting and to be ready to raise other possibilities during the meeting.

10. What payments are being considered?
- Rent payments
- Drawing from deposits and timing for replenishment
- Service Charge
- Insurance
- Rates
- Interest
- Anything else

11. Has the tenant had any government assistance towards these costs? (See Code)

12. Is there a rent review or lease renewal due during the period?

13. Are there other lease terms which can be changed?
- Break dates
- Length of term
- Anything else

14. Is there an opportunity to revise the demise or repurpose the property in the short term or longer term? Eg department store floors to office or residential. Obsolescence. Possible early Surrender of all or part.

15. Other market changes eg Brexit, internet shopping. Is the economic base for the use viable in the longer term? Is a deal just putting off the inevitable? Does deferring rent simply create a problem down the line when enforcement measures are available. Cashflow implications. Tax eg VAT SDLT.

16. Financial

17. Landlord
- Who is it and what is the corporate structure etc
- Cashflow,
- Strength of capital position eg Pension fund, individual etc
- Gearing and debt payments eg INTU
- Is there a mortgage

18. Tenant
- Trading/not trading
- Cashflow positive or negative
- Capital position and ability to strengthen balance sheet
- Government assistance towards rent
- Structural changes in the market
- Is there a guarantor

19. What is the timescale being considered?
• eg March to September,
• rolling concession,
• linked to profit or turnover.
• Extension if local lockdown eg Leicester.
• End point of any concession.

Outcomes of the Evaluation Process

• Generally, the parties should be strongly encouraged to sign off "heads of terms" on any agreement reached in the meeting. This goes some way to avoiding any "overnight" re-think on minor issues which might cause delay. The aim is to get a settlement on the day.

• Justifiable reasons for a delay in signing off might be:

    • Further information not available at the meeting is required
    • A future meeting is agreed to gather more information
    • People in the room are not "decision makers" and sign-off from a higher authority is required
    • Agreement simply cannot be reached in which case the process might come to an end there

• Ideally the people in the room should be decision makers, or have direct access by phone or email etc to higher authorities. The ability of people in the room to make decisions should be confirmed beforehand.

• If there is no signed agreement at the end of the meeting, there should be a firm agreed timetable for future steps, eg if sign-off elsewhere is required, this should be done within 24 hours, etc.

• RETAIN CONTROL! The parties will expect you to be in charge and not to allow matters to drift or remain outstanding without a firm future plan of action being agreed.

• Common outcomes from the meeting might be as follows:
    • How much rent is to be paid from agreed dates (which might well be in the past)
    • How long any rent agreement lasts before it is to be reviewed, with an agreement as to how that review might take place.
    • Any agreed lease variations should be documented, eg alterations to lease length, changes to the review cycle and dates, amendments to troublesome clauses, the insertion of turnover rent provisions, lease break clauses etc
    • Future plans for the property, eg future possession by the landlord, redevelopment plans that can be facilitated etc

• Don't forget that a further meeting can be agreed.

• A continuing relationship might also be agreed with a succession of meetings planned, or updates to be provided at regular intervals. This might be a very helpful outcome for all concerned.

• Make sure your fee position is squared off at the end of the first meeting, particularly if no further contact is planned.

• You should consider offering a written summary of the meeting and any agreements reached, always bearing in mind the golden rule that the you must not be seen to be making any decisions, or imposing anything on the parties, and be careful to make this clear in any written document.

• Inform the DRS when your involvement has ended.

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