CHILD & CHILD

PARTY WALL ETC ACT 1996

SECURITY FOR EXPENSES

Q	If the building owner has borrowed money from the bank on the security of the property, can the adjoining owner take comfort from the expectation that the bank will have to pay the adjoining owner out of the proceeds of sale in the event that the property is re-possessed and sold?
A	No, the bank would sell as mortgagee in possession would be obliged to pay the net proceeds of sale (after repayment of the secured loan) to the mortgagee, i.e., to the building owner. The building owner may owe a debt to the adjoining owner as a result of damage done by the works but that would be an ordinary unsecured debt like any other. The mortgagee is not under any obligation to pay off the mortgagor's unsecured debts. Its obligation is to pay the net proceeds of sale to the mortgagor.
Q	Does the building owner's liability transfer to the bank or a purchaser of the property as successor in title?
A	Not an interest under a party wall award is not an interest in land. This would confirmed in *Observatory Gardens Ltd v. Camtel Investments Ltd*. A mortgagee or assignee of the building owner's interest would not therefore generally inherit the building owner's liabilities.
Q	What if the building owner's project is half finished when the bank re-possesses and must be completed before the bank can sell?
A	The bank will only be concerned with its own interests. It would no doubt therefore ensure that such work is carried out to the building owner's property as is necessary to enable a sale to proceed. It would not have any concern, however, about discharging the building owner's unsecured liabilities to third parties such as the adjoining owner. If the bank wants to conduct new works under the Act, it may be necessary for a fresh notice to be served in which case the adjoining owner could ask for security for expenses pursuant to that fresh notice.

Q	Is an adjoining owner's surveyor obliged to notify the appointing owner about the ability to ask for security for expenses?
A	This depends on the circumstances. At one end of the spectrum, there will be cases where it is blindingly obvious that security is not appropriate. In those cases, the adjoining owner's surveyor would not be acting carelessly by failing to tell the appointing owner about the right to request security for expenses. At the other end of the spectrum, there will be cases where it is blindingly obvious that security would be required. If, under those circumstances, the adjoining owner's surveyor failed to raise the point, then he would probably be acting in breach of his duty.
Q	What if the letter of appointment does no more than effect a statutory appointment under the Act without imposing any additional obligations on the adjoining owner's surveyor?
A	This would not make any difference. The appointment of the adjoining owner's surveyor would be subject to an implied term that the surveyor will not act negligently. In the example above, it would be negligent for the surveyor not to mention the possibility of requesting security.
Q	How should security money be held?
A	Where professionals have been instructed, they can hold the money in their client account subject to their undertaking not to use the money save on the authority of two of the three surveyors or, in some circumstances, the authority of the contract administrator or on the issuing of interim certificates. This can be done by surveyors or by solicitors. It makes no difference whether it is the surveyor or the solicitor for the adjoining owner or for the building owner. It is the terms of the undertaking given by the professional which confer the protection.
Q	Can solicitors be instructed to hold the money as security?
A	Solicitors are not these days allowed to take on a job purely for the purpose of receiving and paying out money. The use of the solicitors' client account must be ancillary to some substantive transaction or matter. Solicitors will not therefore generally accept instructions simply to receive the money. If solicitors have already been instructed by one of the parties, however, there should be no difficulty at all in their agreeing to receive the monies and to provide the required undertakings.
Q	What about banks?
A	It is possible to open a bank account in the joint names of the building owner and

	adjoining owner with a mandate requiring signature by two of the three surveyors, as above. This would be complicated and expensive and the disadvantages need to be weighed against the question whether it is really necessary.
Q	What if there is an award providing for security and the building owner simply cannot get hold of the cash?
A	If the effect of the award is to disable the building owner from doing the work because the security requirements are so Draconian, then it may be necessary to appeal the award. Such appeal would be on the basis that the purpose of the Act is to enable work to be done, not to prevent it from being done and that the effect of the award would be contrary to that purpose. It is possible to conceive of circumstances, however, where it would be reasonable to prevent a building owner from carrying out certain building operations in circumstances where there exists inadequate security for the protection of adjoining owners. Those examples would probably be rare.

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