



# Party politics

*With residential extensions becoming more popular, conveyancers are more likely to encounter works authorised under the Party Wall Act 1996. Andrew Smith explains how the act works and offers some practice points*

**I**ncreasing property values and transaction costs are tempting many property owners to delay selling their homes and, instead, maximise the size of their properties by building basements and extensions. In most cases (at least in urban settings), such work can only be lawfully conducted if it is authorised by an award under the Party Wall etc Act 1996 (PWA 1996); if work which engages the act is conducted without the authority of an award, it will constitute a nuisance, and possibly also a trespass. Broadly, work engages the PWA 1996 if it involves: the erection or alteration of a structure which stands astride the boundary; work which directly affects a party wall; or conducting excavations within three metres of a structure on the neighbour's land (or six metres, in the case of deeper excavations), and the excavations go deeper than the bottom of the structure's foundations.

## HOW THE LEGISLATION WORKS IN PRACTICE

The person wishing to conduct work (the 'building owner') must first serve a notice on the neighbour (the 'adjoining owner') giving details of the works proposed. The adjoining owner might simply consent to those works being carried out. If so, the statutory procedure comes to an end; the works will be conducted by consent, and there will be no need for an award.

However, it is generally not advisable for an adjoining owner to give consent (save in the simplest of cases), so it is far more usual for the process to move on to the next stage: the appointment by the owners of party wall surveyors. If they wish, the owners can appoint a single surveyor, who will then make the necessary award authorising the work. However, it is far more common for

each owner to appoint their own surveyor and for the two surveyors to work together towards agreeing an award. The surveyors must select a third surveyor to act as umpire to decide any issues which the appointed surveyors cannot agree upon. The central purpose of the award is to ensure that the manner and timing of the proposed works is satisfactory in the light of the interests of both owners, and that the adjoining owner's position is adequately protected by the safeguards enshrined in the PWA 1996. Where appropriate, these will include an obligation on the part of the building owner to give 'security for expenses': security in respect of their potential liabilities to the adjoining owner. The owners have no right to influence, much less direct, what the surveyors award; the surveyors' role is to perform a quasi-judicial statutory function, independent of the owners' desires or demands. Once the award has been made, the work can lawfully proceed.

If either owner is dissatisfied with the terms of the award, they are entitled to appeal it in the county court within 14 days of its being served. Such appeals are becoming increasingly common. If fully contested, they can take a year or more to resolve. An appeal does not automatically suspend the effect of an award, but interim injunctions are frequently granted to prevent the building owner from implementing the award until after the appeal is heard. Where

an award has been appealed, it can be very difficult to predict how matters will ultimately be resolved.

## CHALLENGES FOR THE CONVEYANCER

The PWA 1996 has evolved incrementally since its genesis in part III of the Metropolitan Building Act 1855, and it is wholly unsuited to current conveyancing practice.

Conveyancers face a difficult task when acting for buyers and sellers where a party wall award is involved, particularly

if the works are still being conducted at the time of the transaction. The standard textbooks on the subject contain very little practical guidance and the online facilities are less than comprehensive. There are no HM Land Registry (HMLR) guides covering the topic. Conveyancers must therefore frequently resort to common sense and an understanding of the facts and the basic underlying principles.

A party wall award does not grant an interest in land capable of registration at HMLR, and cannot be protected by entering a caution, so it can be difficult in practice to establish whether or not an award exists. A purchaser may therefore acquire a property in ignorance of potential obligations under the PWA 1996. An appeal



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against an award is registerable as a pending land action, but this is of no assistance where the award has not been appealed. The conveyancer's difficulties are exacerbated by the fact that the PWA 1996 completely fails to address the standing of successors in title, and there are very few decided cases which deal with a successor's rights and obligations. Some general guidance can nevertheless be provided, as follows.

#### Acting on a purchase from a building owner

Someone purchasing from a building owner who has built a basement with reinforced concrete foundations (known as 'special foundations') may be particularly exposed, because section 11(10) imposes on the building owner an obligation to indemnify the adjoining owner in respect of any building costs incurred by the adjoining owner, to the extent that those costs are increased by reason of the existence of the special foundations. This is an obligation which expressly runs with the land, and which will be inherited by the purchaser.

A purchaser from a building owner who has recently installed a basement may also be concerned that concrete might have unlawfully overspilt into the adjoining owner's land, giving rise to a claim in trespass. Generally speaking, however, a purchaser will not be liable for such acts of trespass; the concrete was not installed by the purchaser, but by the seller who carried out the work, and the liability will not pass with the land. The adjoining owner might be entitled to bring a claim against the seller in respect of the continuing trespass represented by the overspilt concrete, but that is a different matter, and should be of no concern to the purchaser.

Finally, where the building owner has, with the consent of the adjoining owner, built a wall astride the boundary, the purchaser will be liable for the cost of maintaining that wall, jointly with the adjoining owner. This will very rarely prove to be a serious concern in practice, however; it is simply a reflection of the fact that the jointly owned wall must be jointly maintained.

Apart from the above examples, a person who purchases a property from a building owner, either before the award is made or afterwards, need generally have no great concerns. They will not be liable in respect of works previously conducted by the seller, because such liability is purely personal in nature. They might become liable under section 1(3)(b) or section 11(10) as mentioned below, but it is relatively unusual for those contingent liabilities to arise.

#### Acting on a purchase from an adjoining owner

A purchaser from an adjoining owner will be rather more exposed: they will be buying into a statutory dispute which they have no power to control and, once the award has been made, they will be bound by the building owner's right to enter the land for purposes associated with the works and (less usually) will also be bound by the clawback provisions in section 1(3)(b) and section 11(11).

#### Acting for a seller

A seller who fails to disclose the existence of a notice or an award (whether deliberately or by inadvertence) faces a potentially serious difficulty: it was held by the Chancery Division as long ago as 1906 that an award which could prejudicially affect a purchaser can constitute a defect in title which the vendor is obliged to disclose even in the absence of any specific preliminary enquiries on the point. The seller's failure to disclose the award in that case entitled the purchaser to rescind the contract and recover the deposit.

#### SUCCESSORS IN TITLE

One of the most unsatisfactory elements in the PWA 1996 is around the standing of successors in title. The most acute example

arises where a property (belonging either to the building owner or adjoining owner) is sold after a notice has been served and surveyors appointed, but before the award is made. Must the process begin all over again under those circumstances? Views differ and there is no binding authority on the point. A conveyancer dealing with a transaction where this is the case will need to ensure that the client fully understands the nature of the works proposed and the future impacts which might follow. In many cases, the party wall surveyors will be the most appropriate people to furnish this information, provided that they are prepared to cooperate. If not, it may be necessary to instruct another party wall surveyor to consider the situation and give an opinion as to the practical effect of the works.

#### PRACTICE POINTS FOR CONVEYANCERS

Under the circumstances, it is difficult to present any practical approaches which will solve the problems faced by practitioners when dealing with transactions with a party wall element. The best advice is to consider each situation on its own facts, and err on the side of caution. However, below are a few general practice points.

- Raise preliminary enquiries to establish whether the property in question has ever been subject to a notice or an award under the PWA 1996 (including an award to which consent has been given).
- Establish whether any security for expenses has been paid and the terms on which such security may be released.
- Where acting for the seller, disclose the existence of any notices or awards in order to protect against any suggestion that their existence constitutes a defect in title.
- Enquire specifically whether any awarded works involved the use of special foundations.
- If notice has been served but no award has been obtained, establish so far as possible the nature of the award which is likely to be made, and the rights and obligations which this will impose. Depending on the circumstances, it may then be appropriate for the seller and purchaser to agree on appropriate indemnities.
- Ensure that the property is conveyed subject to and with the benefit of any notices and awards (though, in the case of registered land, it may be more appropriate for this to be contained in a document separate from the transfer).
- If either property is subject to an award which is in the course of an appeal, it will generally be sensible to defer the transaction until after the appeal has been determined; the uncertainties as to the outcome of the litigation would represent a significant risk for a purchaser.