

## Party Wall Frequently Asked Questions

By Graham North MRICS MCI Arb,

I am often approached by other Surveyors and members of the public to answer questions or provide guidance on the Act. In addition, the RICS Professional Information Team answer their fair share of similar queries. I have listed below some of the most common questions asked and my answers.

**(Q1) If an Adjoining Owner who has received a notice under the Act sells his property whilst discussions are ongoing between the respective Surveyors, does the Building Owner have to serve a new notice?**

(A) No. If an Adjoining Owner changes prior to the Award being agreed, then the new Adjoining Owner accepts the notice which had been served on his predecessor in title. The Surveyor appointed for the first Adjoining Owner remains appointed and the recitals in the Award should reflect the fact that the Adjoining Owner has changed since the initial notice was served.

A purchaser of an adjoining property should ask the existing owner whether any notices have been served under the Party Wall Act and this will normally be covered by the Solicitor's Enquiries before Purchase.

**(Q2) If a Chartered Surveyor happens to receive a notice in his position as an Adjoining Owner under the Act, can he appoint himself as the Adjoining Owner's Surveyor?**

(A) No. The Act states that a Surveyor can be any person who is not a party to the proceedings i.e. either the Building Owner or the Adjoining Owner.

I am often asked whether an employee of a Local Authority can act as the Surveyor to that Local Authority. In my view an employee can act as the Surveyor to the Local Authority because he is not the Local Authority itself but a paid member of staff. Similarly, a limited company who are Building Owners could appoint an employee of that firm, unless that employee has a large financial interest to the extent that he could be described as a major shareholder.

**(Q3) I act for the Building Owner and the fees submitted by the Adjoining Owner's Surveyor are, in my opinion, too high. What should I do?**

(A) If you are unable to agree on the amount of the Adjoining Owner's Surveyor's fees, then this issue should be referred to the Third Surveyor. The Third Surveyor will want to see a breakdown of the claimed fee from the Adjoining Owner's Surveyor so that he can determine whether the fee is reasonable.

In this situation, there is an element of risk to the Building Owner if the Third Surveyor awards his costs against him. The Building Owner therefore may take a commercial view to pay the Adjoining Owner's Surveyor's fees even though they may be considered high. Unfortunately, it is becoming common for Adjoining Owners' Surveyors to charge high fees for small residential

matters and generally a Third Surveyor is unlikely to be sympathetic to the Surveyor representing the Adjoining Owners.

Both Surveyors should warn their owners that the costs involved in referring a matter to the Third Surveyor may be awarded against them.

**(Q4) An Adjoining Owner is not happy with the Surveyor appointed for them and wants to dis-instruct them. Can they do so?**

(A) No. Under Section 10(5), the only way a Surveyor appointed under the Party Wall Act can be replaced is if he dies or becomes incapable of acting. The first option is best avoided and the second is sometimes necessary because of illness, lack of availability due to holidays etc. An owner cannot “sack” his Surveyor. The reason for this is that an objecting Adjoining Owner could frustrate the process by hiring and firing Surveyors throughout the procedure.

**(Q5) If someone is appointed as the Surveyor under the Act and then leaves their employment to join another firm, does the appointment go with him?**

(A) Yes. The appointment of a Surveyor under the Act is personal and therefore if the Surveyor changes jobs, he retains the appointment. However, that Surveyor should check to ensure that he has adequate professional indemnity insurance in his new firm to cover such work or if he feels he is unable to continue, deem himself incapable of acting any further.

In some instances, firms do not like their employees to take such appointments with them and the employee may reach an arrangement with their soon to be ex-employer on such situations. However, if a Surveyor insists on taking the appointment with him, he can do so.

**(Q6) If an Adjoining Owner is entitled to financial payment for the additional use the Building Owner is making of a party wall, but the Building Owner’s Surveyor fails to realise this, should the Adjoining Owner’s Surveyor bring it to his attention?**

(A) Yes. The Surveyors appointed under the Act have a duty to be impartial and independent and therefore if one’s opposite number misses something which should be covered by the Act, that Surveyor has a duty to bring it to his opposite number’s attention.

**(Q7) Can the appointed Surveyors determine the position of the boundary between two properties under the Act?**

(A) This is a difficult one. It is generally accepted that the Surveyors cannot decide where the boundary lies, this is a matter for the owners. However, the Surveyors have the authority to determine the *right to execute any work*. The Surveyors may need to decide whether a wall is party i.e. astride the boundary, to establish whether a Building Owner can exercise this *right* under the Act. For the Surveyors to decide that a Building Owner does have such a *right* is in effect stating that the boundary is within the thickness of the wall in question. They are therefore determining the position of the boundary and confirming this in their Award.

In the County Court case of *Kremer v Loost 1997* (a case under Part VI of the London Building Acts (Amendment) Act 1939), his Honour Judge Cowell heard an appeal on a Third Surveyor's Award (which happened to be mine) concerning the appointment of a Surveyor, whether the freeholder of a property should be named on a notice if the lessee wishes to carry out works, and as a late point, whether the wall was a party wall. His Honour Judge Cowell was clear that the Third Surveyor could deal with matters which arise from a dispute (in this case under the London Building Acts) when he stated:-

*"A number of cases have been cited to me which show what a third surveyor cannot do, and of course it is quite clear in all those cases that he could not decide on matters which were not in any way within the sections of the Building Act. But it seems to me that the matter really could not start without a decision on those two fundamental matters (whether the Surveyor was properly appointed and whether the freeholder should be enjoined in the Notice) and he was bound to decide it and, as I have indicated, it seems to me that he was simply right."*

The fundamental issue here, I believe, is that if the Surveyors believe that a matter must be decided before other discussions can proceed, they should decide the matter by way of an Award. The Award can then be published to the respective owners and they can appeal against it if they so wish.

In this case, the first point concerned whether the Surveyor (who happened to be the Architect for the project), could fulfil the role of an appointed Surveyor under the Act. As Third Surveyor, I held that he could and His Honour Judge Cowell agreed. As long as that Surveyor recognises that he is acting in an independent and impartial way under the Act, he is free to fulfil the role of the Architect and therefore it follows, Structural Engineer, Contractor and tea maker if he so wishes.

On the second point, Mr Loost contended that the freeholder of the Building should be named on the notice but the Judge also agreed with my view that it is the lessee (in this case Mr Kremer) who was the Building Owner *desirous* of building and the freeholder simply granted her consent to the works within her property.

**(Q8) Should Security for Expenses for an Adjoining Owner under the Act include Surveyors' fees and VAT?**

(A) Yes. If the Security for Expenses is found to be necessary, the costs making up that security should include the work which may need to be undertaken in the event of a Building Owner failing to honour his responsibilities and include all professional fees and VAT associated with that work.

The amount for Security for Expenses should not be so high as to prohibit a Building Owner from carrying out the work because this would simply frustrate the process, which is not the intention.

**(Q9) If a Building Owner causes damage to an Adjoining Owner's property, and that Building Owner subsequently sells his development, who is liable for making good the damage to the adjoining property?**

(A) The liability for making good the damage remains with the original Building Owner even if he has sold his development.

**(Q10) If development work requires the service of notices under Sections 1, 2 and 6 of the Act, can all the work be dealt with under one Notice or should three separate notices be issued?**

(A) Either would be correct as long as each element of the Notice (if one is to be used for all three) contains the correct information. This information is clearly stated in the Act.

It is common practice for the standard forms to be used as published in the RICS Guidance Note and other publications but this is not obligatory. What is essential is that the notice contains the correct information. It is sensible to use the standard forms because the gaps in the draft Notices have to be filled in and that way one can be certain of including all the information that should be on the Notice.

In some instances, notice is issued in a letter form but not accepted as notice by the Adjoining Owners or their Surveyor. This would not be correct if that letter contains the information required under the Act, namely who the Building Owners are, description of the works, when it is intended to carry out the works etc.