Court of Appeal decision on Japanese Knotweed

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Published February 2023

The Court of Appeal has handed down judgment in the case of *Davies v Bridgend County Borough Council* [2023] EWCA Civ 80. They have overturned the first instance decision of DJ Fouracre, and the first appeal decision of HHJ Beard, to the effect that diminution in value in Japanese knotweed cases is irrecoverable economic loss. The Court of Appeal has also held, effectively, that in the case of a continuing nuisance (such as Japanese knotweed), it does not matter in relation to residual diminution in value after treatment that rhizomes had spread to a claimant's land before the defendant was in breach of duty: the defendant is still responsible for the residual diminution.

BACKGROUND

The claimant owned a terraced house with a garden at the back in South Wales. Beyond his back garden wall was an embankment leading down to a cycle path on an old railway line. As is common on rail corridors, there was Japanese knotweed by the cycle path at the bottom of the embankment, but the evidence was that Japanese knotweed at the top of the embankment had probably not grown up from the bottom. Rather it had probably been dumped over the garden wall by one of the residents. There it had grown, unnoticed by the defendant. Sometime before 2004, when the claimant bought his property, the knotweed had encroached from the defendant's land, underground, such that there were rhizomes on the claimant's land before 2004.

He first became aware that Japanese knotweed might be a problem in 2017. He made no attempt to find out who owned the land beyond the end of his garden until someone

knocked on his door to tell him that he had Japanese knotweed on his property, and that they could represent him in a claim. A letter of claim was sent in 2019.

The case followed what has become a fairly ordinary pattern: the claimant chose its preferred Japanese knotweed and valuation experts, and instructed them unilaterally. Somewhat unusually the claimant decided against using the first 2 experts from whom he obtained reports, and replaced them, again unilaterally, with 2 new experts. At case management stage the court, in the usual way, determined that the value of the claim, which was put at £10,000 to £40,000 on the claim form and about £34,000 in the Particulars of Claim, although the realistic value of what was claimed was closer to £12,000, did not justify separate experts for the parties and required a new single joint Japanese knotweed expert. The defendant lived with the claimant's valuer.

Just before trial the defendant found and disclosed previously undiscovered documents which suggested that it knew about the knotweed well before its evidence showed that it started treating it, in 2018. District Judge Fouracre followed the approach in *Williams & Waistell v Network Rail Infrastructure Limited* [2019] QB 601, and held that date of knowledge of a foreseeable risk of harm was after publication of the RICS paper in 2012, and that from 2013 the defendant ought to have been treating the knotweed. It was held to be in breach of duty from 2013 to 2018. It proved treatment of the Japanese knotweed on its land from 2018. Accordingly there was an actionable and continuing nuisance from 2013 to 2018.

THE FIRST INSTANCE DECISION ON DAMAGES

A claim for general damages for distress and inconvenience was dismissed. The judge rejected the claimant's evidence that he was 'immensely distressed' by the presence of knotweed on his land, noting that from when he first became aware that Japanese knotweed might cause a problem – no earlier than 2017 – he did nothing to discover who owned the land at the end of his garden or contact the defendant.

That left the claim for diminution in value of the property which was made up of various elements, dealt with as follows:

- Cost of treatment. This was claimed at £3,600 on the basis of the claimant's expert upon whom he did not have permission to rely. The single joint expert gave a figure of £1,800. The defendant argued that it was always going to be necessary to spend that money, even before breach, because the knotweed had spread before breach. The claimant accepted that argument and conceded that this sum was irrecoverable.
- Disturbance and inconvenience. The claimant claimed £1,200 for the inconvenience of having knotweed treatment. This faced the problems that there was no knotweed to see on the claimant's land by the time of the single joint expert's inspection, and also that treatment was always going to be required regardless of breach. It was not pursued.
- Neighbour cooperation. The sum of £1,400 was said to reflect the need to secure cooperation from the neighbours in treating the knotweed. Since the relevant neighbour was the defendant, who was actively treating the knotweed – therefore obviously cooperating – this was held to be irrecoverable.
- Temporary loss of land. This was claimed at £1,000, but since there was no visible knotweed in the garden by the time of the single joint expert's inspection, it was impossible to say that there would be temporary loss of use of the land, so this was rejected.

That left the claim for residual diminution in value after treatment. Whilst claims are sometimes put on the basis of diminution in value ignoring the effect of treatment, the correct measure of loss, if recoverable, would be cost of treatment and the residual diminution in value. That residual diminution arises due to an enduring stigma or 'blight' associated with Japanese knotweed.

District Judge Fouracre found, and this was upheld by HHJ Beard on first appeal, that the residual diminution in value was irrecoverable because it was pure economic loss, and the tort of nuisance did not exist to protect economic interests.

THE COURT OF APPEAL ON DIMINUTION

The Court of Appeal overturned the decision on residual diminution. They held that the ratio of *Williams* is that there is no nuisance in the absence of encroachment of rhizomes merely because having Japanese knotweed next-door reduces the value of a claimant's property. To hold otherwise would be to allow a claim for pure economic loss. However, if there has been encroachment, there has been physical interference with the claimant's property, and consequential losses, including diminution in value, are recoverable.

THE COURT OF APPEAL ON CAUSATION

Whilst the claimant accepted that the treatment cost was always going to be necessary (regardless of breach), he also contended that the residual diminution was recoverable. The nuisance was a continuing nuisance. The defendant argued that but for the breach the claimant would have had a property affected by (value diminished by) knotweed, and given the breach he has a property affected by (value diminished by) knotweed, such that the breach had made no difference. Put another way, the rhizomes had, on the evidence, spread by 2004, so it made no difference that the defendant failed to treat the knotweed from 2013 to 2018: the problem had arisen before the breach. The defendant's proposition was that loss which precedes breach cannot have been caused by the breach.

The Court of Appeal rejected that argument. They drew an analogy with *Delaware Mansions* [2002] 1 AC 321. In that case tree-roots caused damage to a property in 1989, and the property was sold to new owners in 1990. The new owners spent over £1/2m on underpinning and sued the tree-owner. At first instance the claim failed on the basis that the damage was said to have occurred during the original owner's ownership. The Court of Appeal and House of Lords disagreed with that decision, holding that the cost of

underpinning arising from the tort could be recovered by the owner who had to incur the cost.

In *Davies* Birss LJ summarised this (judgment paragraph 47) as "*The fact the encroachment was historic was no answer when there was a continuing breach of duty as a result of persisting encroachment.*"

This analogy was not proposed by the claimant, and it was not ventilated by the Court at the hearing, appearing for the first time in the judgment. It seems to me that it is an inappropriate analogy. In *Delaware Mansions* the loss came after breach, and only arose because of breach. That case is authority for the proposition that a tortfeasor should pay for the consequences of its breach, regardless of change of ownership. It is not authority for the proposition that a tortfeasor should pay for losses that were sustained before the breach.

It is fair to observe that the causation issue was a secondary issue on this appeal. This decision will surely not be the last word on causation.

FOR THE FUTURE

There are some crumbs of comfort for defendants.

Firstly, this decision relates to post-treatment residual diminution in value only. The claimant accepted that the cost of treating the knotweed was not recoverable because that cost would have been required if the breach of duty had not happened. That does not mean that a claimant will never be able to recover the cost of treatment. If a claimant can prove that treatment would have cost *less* were it not for the breach (for example if the breach allowed knotweed to cover a larger area necessitating more expensive treatment), the extra cost would be recoverable.

Secondly, defendants will have to seek evidence on the depletion of residual diminution in value over time. I have yet to see this question addressed in detail in an expert report, although I have spoken with experts about it, and, anecdotally, there is a range of views. For the sake of illustration, if an expert were to opine (for example) that treatment could be expected to last 5 years, with property value being affected for 5 years after that, such that there was a diminution in value for 10 years, it would then be open to the defendant to run various arguments.

(a) By the time a claim comes to trial, time has passed, and often the defendant (at least) has been treating their property. They are often well advised to offer to treat the claimant's property too, on a without prejudice basis. That would get the clock started on depletion of diminution such that the damages might be reduced. If, following through the above hypothetical (and I stress that it is hypothetical) evidence, the expert's view was that the diminution in value post-treatment reduced by 10% every year over the 10-year period from the start of treatment then if, by the time of trial, there had been 3 years of treatment, the defendant would be looking to save 30%.

(b) It might also be necessary to argue that a claimant failed to mitigate loss by refusing to allow the defendant to treat the knotweed on the claimant's property. My experience is that claimants are usually advised by their solicitors not to allow the defendant to treat knotweed on the claimant's property. When a reason is given (it usually isn't), it is typically that the defendant's treatment does not come with an insurance-backed guarantee. Whilst it is correct that the defendant's treatment usually (although not inevitably) does not come with an insurance-backed guarantee, it is hard to see that as a sound justification for refusing free treatment. The claimant who genuinely wanted to be rid of the knotweed would no doubt engage a contractor who would provide the necessary guarantee after the litigation had finished. That person would have less to do (because the defendant would already have undertaken treatment over however many years).

(c) In a case in which the diminution depletes over time, the loss only crystalises if the claimant sells the property before the diminution in value has depleted away. If, for

example, by 5 years after the trial there would be no remaining diminution in value, then unless the claimant sells her property in that 5-year period, she will suffer no loss. In *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), referred to at paragraph 54 of *Davies*, the nuisance (noise from Harrier jump jets) was expected to cease in 2012, 9 years or so after trial. The claimant had no intention of selling his stately home before then, but the court awarded him 7.5% of the diminution in value that would be suffered if he did sell, in case he was forced to sell. That was a sum of £300,000 (with full diminution being £4m). If a similar approach were taken to the rather more modest figures for diminution seen in Japanese knotweed cases, the damages would shrink to a very low level. My view is that defendants should start asking, early on, what the claimant's intentions are in relation to disposal of the property.

Thirdly, it is worth defendants noting paragraph 41 of the decision in *Davies*: a trivial encroachment of Japanese knotweed is not actionable at all.

Fourthly, the decision underlines the fact that there is no actionable nuisance caused by knotweed on a defendant's land merely because it diminishes the value of neighbouring land. Rather it is necessary for a claimant to prove encroachment.

Separately from what arises from *Davies,* defendants should continue to seek the engagement of single joint experts rather than turning up the heat (and cost) in litigation with separate experts. They should continue to resist those claimants who seek the full diminution (rather than the post-treatment residual diminution). They should continue to consider whether the *realistic* value of the claim is such that it ought to be allocated to the small claims track. Claimants routinely overstate the realistic value of the claim and use that as a way to seek allocation to the multi-track, but courts are wise to that in my experience. Depending on the evidence in the case it might be that a court strips out sufficient unrealistic claims for damages to suggest that allocation should be to the small claims track, or potentially delays allocation until appropriate single joint expert evidence has been obtained.

I feel confident in saying that claims for the spread of Japanese knotweed are not going away any time soon. Any local authority who does not yet have in place a plan for responding to claims and a system for dealing with knotweed should take action without delay.

MATTHEW WHITE

8th February 2023

Matthew represented the defendant in the Court of Appeal. He advises and deals with claims relating to the spread of Japanese knotweed for defendants, particularly local authorities, housing associations, and bodies with large land holdings. Other members of St John's Chambers deal with claims relating to the spread of Japanese knotweed for claimants and defendants. Our Real Estate team is pre-eminent in the area of real estate litigation on the Western Circuit and in Wales, and deals with all areas of real estate law. Visit https://www.stjohnschambers.co.uk/areas-of-law/real-estate for more details.