PROPERTY DAMAGE BRIEFING: ARTICLE 1

Japanese Knotweed: Liability in Nuisance.

Japanese knotweed (Fallopia japonica) was introduced into the UK from Japan in the 19th century as an ornamental plant, but has proved to be anything but an ornament in its non-natural environment. A rhizomatous perennial (i.e. one that produces underground stems), it is extremely invasive, vigorous and tenacious. The rhizomes can extend to a lateral distance of 7m from the parent crown, grow by up to 40mm a day, and penetrate through the smallest flaws in tarmac, concrete, paving and mortar, causing cracking and structural damage to buildings. Eradication usually requires persistent treatment with glyphosates or other herbicides over a period of at least 3 years. Disposal of the plant away from site can only be carried out under permit, as the plant and its soil constitute controlled waste for the purposes of Part II of the Environmental Protection Act 1990.

Such is the plant's fearsome reputation that the Law Society's current standard Property Information Form contains an enquiry specifically devoted to it: "7.8 Q: Is the property affected by Japanese knotweed? A: Yes/No/Not known" and "If Yes, please state whether there is a Japanese knotweed management plan in place and supply a copy". For their part, mortgage lenders "will normally require evidence of treatment that will eradicate the plant as a condition of lending if knotweed is present on or near the site of a property" (Council of Mortgage Lenders online guidance, September 2015).

Unsurprisingly, therefore, landowners who cause or permit Japanese knotweed to spread across and beyond their land may find themselves on the receiving end of civil proceedings from aggrieved neighbours. As with the somewhat analogous cases of tree root encroachment, the cause of action will be in the tort of private nuisance (and/or in negligence, though it has been doubted whether there is any real difference between the two in this context: see Robbins v Bexley LBC [2013] EWCA Civ 1233).

The ingredients of the nuisance are as follows:

- The claimant neighbour has a right to sue. The claimant must have an interest in the land, whether freehold or leasehold: a licence to occupy does not qualify (Hunter v Canary Wharf Ltd [1997] 2 All ER 426 (HL). But the claimant need not have owned the interest at the time when the damage occurred: if the need to undertake remedial work remains then the nuisance is continuing and the claimant can sue for it (Delaware Mansions Ltd v Westminster CC [2001] UKHL 55).
- The defendant landowner is or was responsible for maintaining control over the knotweed. That requires proof both that the knotweed emanated from the neighbouring land and that the defendant had legal responsibility for that land at the relevant time. Emanation may be in issue because of the propensity of knotweed for surfacing above ground in more than one place: where it is found growing on the boundary there may be uncertainty as to whether the knotweed has migrated from the defendant's to the claimant's land, or vice versa – not an issue that usually arises in tree roots cases. Where the neighbouring property is let, legal responsibility should reside with whichever person is treated under the terms of any tenancy as having been in control of the relevant part of the land at the relevant time (c.f. L E Jones v Portsmouth CC

- [2002] EWCA Civ 1723 at 12).

- The knotweed has physically interfered with the neighbour's land or with his enjoyment of it. The most obvious manifestation of physical interference is actual damage to the man-made structures on the land: here the claimant must show that the knotweed was 'an effective and substantial', rather than 'the sole or predominant', cause of the damage (Loftus-Brigham v London Borough of Ealing [2003] EWCA Civ 1490). Encroachment which impairs the load-bearing qualities of the land is also itself a nuisance (Delaware Mansions at [33]). Even in the absence of physical damage, however, a claimant should still be able to establish liability if he can show that the rhizomes have physically encroached over the boundary into his subsoil, and that their presence there interferes with the amenity value of the land – e.g. by reducing its capital value, by making the land more difficult to sell or use as security by way of mortgage, or by obliging the claimant to undertake exploratory investigations and/or preventative measures. The element of physical interference differentiates the situation from one of pure economic loss (see Jan de Nul (UK) Ltd v Axa Royale Belge SA [2000] LlR IR 327 at [73], approved [2002] EWCA Civ 209).

- The defendant knew of, or ought reasonably to have foreseen, the risk of harm to the neighbour. The risk of harm must be one that either was actually known to this particular defendant, or would have occurred to a reasonably prudent person in the position of owner of the defendant's land (see Khan v Harrow [2013] EWHC 2687, another tree roots case). In the case of knotweed the issue is likely to be whether the landowner knew he even had that species on his land: anecdotal evidence suggests that most people do not know what it looks like. If on the other hand he is well enough informed to know of its presence, he will almost certainly also know of its reputation for causing harm to neighbours. In tree roots cases, by contrast, where the defendant will generally be assumed to know both of the presence of large trees on his land and generally of the risk to physical structures posed by tree roots, the issue is likely to be whether he had sufficient knowledge of a particular risk to the claimant posed by a particular tree on his land (Khan v Harrow at [34-58]).

- The defendant has failed to take reasonable steps to prevent the interference. This and the previous point go hand-in-hand. Even where some risk of damage is reasonably foreseeable, it is justifiable not to take action if the risk is small and if the circumstances are such that a reasonable person, careful of the safety of a neighbour, would think it right to neglect it (The Wagon Mound No 2 [1967] 1 AC 617). So the court must consider what is fair, just and reasonable as between the two neighbouring landowners. It must have regard to all the circumstances, including the extent of the foreseeable risk, the available preventive measures, the cost of such measures and the resources of both parties. Where the defendant is a public authority with substantial resources, the court must take into account the competing demands on those resources and the public purposes for which they are held (Vernon Knight Associates Cornwall CC [2013] EWCA Civ 950 at [49]).

Once liability is established, the claimant's remedies may consist of an award of damages, an injunction, or both. Recoverable heads of damage include: diminution in the amenity value of the land, which will usually encompass the cost of reinstatement of the land to its former condition, and the cost of repairing any damaged structures (see Hunter v Canary Wharf), but may also extend to residual diminution in value resulting from stigma (Bunclark v Hertfordshire CC [1977] 2 EGLR 114 and Raymond v Young [2015] EWCA Civ 456); initial exploratory and investigative costs; the cost of alternative accommodation during remedial works; the cost of any further works necessary to prevent future encroachment; and general damages for physical inconvenience suffered during remedial works or relocation. The court may also grant a permanent injunction requiring the defendant to undertake work on his own land to ensure there is no recurrence. Flanagan v Wigan MBC, still the only widely reported

case on knotweed liability known to this author, the defendant council was sued by a private landowner whose garden was being invaded by Japanese knotweed from neighbouring council-owned land. The defendant was ordered to treat a 1-metre strip of Japanese knotweed plants along the boundary of the property with glyphosate for a 3-year period, to install a reinforced concrete boundary wall to prevent further encroachment, and to pay the claimant's costs.

Finally, a concerned claimant does not necessarily have to wait for the knotweed to encroach before taking action. He may proactively seek a quia timet injunction to require the defendant to act to remove or neutralize the knotweed on his own land. If so, he must show that harm to his land is sufficiently 'imminent and certain' to justify the relief. As in the tree roots cases, the court will have to assess not just the imminence of the threat, but also the cost to the defendant of averting it, the degree to which the defendant has been intransigent in complying with the claimant's request for co-operation, and whether damages would be an adequate remedy if the nuisance materialised. In principle, only where the risk of danger is so imminent and the intransigence of a defendant so obvious should the court be prepared to grant an injunction for a nuisance that does not yet exist (see generally London Borough of Islington v Elliott [2012] EWCA Civ 56 at [27-38]). If the matter is one of special urgency, and the claimant can satisfy the American Cyanamid balance of convenience test, an interim as well as a permanent injunction may be granted.

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