

DEKA
CHAMBERS

Japanese Knotweed Claims

Conor Kennedy

28 September 2023



Introduction

- Invasive species
- Moves by
 - Railways and watercourses
 - Moving earth
- Can lie dormant for years, 10 feet under, then be reactivated
- Significant impact on value of land



Introduction

- Caveat emptor the usual rule, but most property transactions now involve completion of a TA6
- 3 Answers:
 - Yes
 - No
 - Don't Know



Negligent Misrepresentation

*“Where a person has **entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.**”*

Misrepresentation Act 1967, s.2(1)



Fraudulent Misrepresentation

“... fraud is proved when it is shown that a false representation has been made:

(1) knowingly; or

(2) without belief in its truth; or

(3) recklessly, careless whether it be true or false.”

Derry v Peek (1889) 14 App. Cas. 337, 374.



Purchaser vs Vendor; Surveyor; Solicitor; Neighbour

Vendor

- Vendor generally the easiest target.
- Mistakes in handling a claim before instructing solicitors
- Mistakes in choice of knotweed expert
- Mistakes in choice of valuer



Purchaser vs Vendor; Surveyor; Solicitor; Neighbour

Surveyor

- Surveyor a more difficult target
- 2 ways to seek to limit liability
 - 1st, by limiting class of people who can rely on survey;
 - 2nd, by limiting the scope of the survey.
- RICS branding is significant

Surveyor Case Strategy

1. Restricting class of person

- *Smith v Eric Bush* [1990] 1 A.C. 831

“The valuer knows that 90 per cent of purchasers in fact rely on a mortgage valuation and do not commission their own survey. There is great pressure on a purchaser to rely on the mortgage valuation. Many purchasers cannot afford a second valuation. If a purchaser obtains a second valuation the sale may go off and then both valuation fees will be wasted. Moreover, he knows that mortgagees, such as building societies and the council ... are trustworthy and that they appoint careful and competent valuers and he trusts the professional man so appointed. Finally the valuer knows full well that failure on his part to exercise reasonable skill and care may be disastrous to the purchaser”

(Lord Templeman)



Surveyor Case Strategy

1. Restricting class of person

- *McCullagh v Lane Fox & Partners Ltd* [1996] P.N.L.R. 205

Court of Appeal rejected an attempt by a claimant to avoid a written disclaimer by a surveyor by reference to UCTA 1977. Hobhouse LJ noted that the claimant put himself forward as a sophisticated and experienced member of the public, that he had had ample opportunity to read the particulars and was aware that it would contain a disclaimer, that he had ample opportunity to regulate his conduct in the light of the disclaimer and could have checked on the area of the grounds. Sale price obtained an independent was £875,000.

Surveyor Case Strategy

2. Limiting Scope

- Consumer Rights Act 2015 controls exclusion clauses, and requires that they be reasonable clear, well sign posted and easily accessible.
- Distinct from limiting scope of the work, by saying surveyor not qualified to comment on JK and that any survey of JK will need to be done by an expert.



Solicitor Case Strategy

- Solicitor
 - Duty to warn client of obvious risks
 - Will include adverse Q.7.8 answer, or complete absence of TA6



Neighbour Case Strategy

- Neighbour

“a private nuisance is a violation of real property rights. That means that it involves either an interference with the legal rights of an owner of land, including a legal interest in land [...] or interference with the amenity of the land, that is to say the right to use and enjoy it”
– Sir Terence Etherton in *Network Rail v Williams* [2018] EWCA Civ 1514

“nuisance may be caused by inaction or omission as well as by some positive activity. An occupier will be liable for continuing a nuisance created by another person if, with knowledge or presumed knowledge of its existence, he or she fails to take reasonable means to bring it to an end when they had ample time to do so”

– at paragraph 44

Case Strategy

Pleading fraud

- Significant in terms of enforcement against bankrupts, including against pensions: see *Bacci v Green* [2022] EWHC 486 (Ch)
- S.2(1) MA 1967 gives most of the advantages of a finding of fraud in terms of damages, but recent caselaw suggests that defendants can defend a claim on the basis of the hypothetical contract the claimant would have entered into but for the misrepresentation (considered by Leggatt J in *Yam Seng v International Trade Corporation* [2013] EWHC 111 (QB)).



Witnesses

- Be clear on requirements for pleaded case:
 - E.g. for a claim in misrepresentation the key date is the exchange of contracts.
 - Need to address inducement, reliance, and causation.
- Beware identikit witness statements.



Relief

- Treatment: usually £5-10k.
- Excavation: tens of thousands, appropriate where purchaser has development plans (and another reason to plead fraud)
- Damages for distress and inconvenience
- Injunctive relief for nuisance claims where encroachment is anticipated, but has not yet occurred (*Quia timet* injunction)



Other points to remember

- Part 18s
- Applications for specific disclosure

Recent Developments

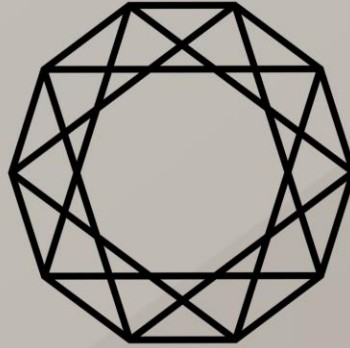
- New RICS Guidance effective from March 2022
 - Your valuation expert can comment on this, but essentially nothing has changed. New guidance diminishes threat posed to buildings, but the stigma remains, so diminution, treatment, disturbance losses remain the same.
- *Davies v Bridgend County Borough Council*
 - Confirmed that damages recoverable for Diminution in Value resulting from JK encroachment;
 - Confirmed that JK was a “continuing nuisance”, and that as such, a defendant neighbour cannot defend on the basis of “but for” causation.
 - Supreme Court appeal pending



DEKA
CHAMBERS

Thank you for your attention.

Questions?



DEKA
CHAMBERS

www.dekachambers.com

Conor Kennedy

28 September 2023