Japanese Knotweed and the Law of Nuisance

TOM CARTER

We give every single case the care and attention it deserves.

ROPEWALK CHAMBERS

+44 (0) 115 947 2581 - www.ropewalk.co.uk

1. The Court of Appeal handed down its judgment in the case of *Williams & Waistell -v- Network Rail Infrastructure Ltd* [2018] EWCA Civ 1514 on 3 July 2018.

2. The Court of Appeal dismissed Network Rail's appeal and held that it was liable in nuisance for allowing Japanese Knotweed to encroach onto the claimants' properties from its land adjoining a railway line. As a result, the Court of Appeal upheld the Recorder's decision at trial to award the claimants damages, including damages for the diminution in value of their homes.

3. I appeared for Mr Williams at trial and on appeal.

4. The ultimate question on the appeal was whether physical damage is required to establish a cause of action in nuisance. Mr Williams argued that the mere presence of Japanese Knotweed rhizomes on or near to his property amounted to a nuisance. Further, he argued that a diminution in value of his home in itself amounted to an interference with his quiet enjoyment of the property.

5. At trial, the Recorder held that the mere presence of Japanese Knotweed was not enough to establish a cause of action in nuisance, but that a diminution in value itself did amount to a nuisance.

6. The Court of Appeal held that the diminution in value itself was not a nuisance, but that the presence of Japanese Knotweed *was*, and that the consequential diminution in value was recoverable in damages.

7. The aim of this article is to consider the implications of this decision for future cases involving the tort of nuisance.

8. The Court of Appeal's conclusion on the interference with quiet enjoyment of a property caused by Japanese Knotweed can be seen at para 55:

> *"Japanese knotweed was rightly described by the Recorder (at [5]) as a pernicious weed. It does not only carry the risk of future physical damage to buildings, structures and installations on the land. Its presence, and indeed the mere presence of its rhizomes, imposes an immediate burden on the owner of the land in terms of an increased difficulty in the ability to develop, and in the cost of developing, the land, should the owner wish to do so. As the RICS paper observed, any improvement or alteration of the property requiring the removal of contaminated soil would require disposal of the soil either on site or, more likely, off site by special, and probably expensive, procedures. For all those reasons, Japanese knotweed and its rhizomes can fairly be described, in the sense of the decided cases, as a "natural hazard". They affect the owner's ability fully to use*

and enjoy the land. They are a classic example of an interference with the amenity value of the land."

9. Further, diminution in value is recoverable as a consequence of such a nuisance. The Court of Appeal held that the Recorder had approached the question the wrong way round: it was not the diminution in value that was the nuisance, it was the interference with the amenity value of the land. But where diminution in value flowed, it was recoverable, as seen by the fact that the Court of Appeal upheld the awards for diminution in value for both claimants.

10. The Court of Appeal rejected the Appellant's argument that the House of Lords case of *Delaware Mansions* [2002] 1 AC 321 was authority that physical damage is required to establish a nuisance, and not mere encroachment.

11. In *Williams*, the Master of the Rolls said the following about *Delaware* at para 69:

    "In that case, however, physical damage to the buildings had actually occurred. It was not necessary to analyse the situation, and nor was the situation in fact analysed, on the basis of loss of amenity value prior to the physical damage of the buildings. Furthermore, unlike Japanese knotweed and its rhizomes, the branches and roots of a tree are not in themselves a hazard."

12. Two points emerge from this: firstly, that *Delaware* is not in fact authority that physical damage is required. Secondly, that the presence of something hazardous per se (like Japanese Knotweed) will amount to damage in any event.

13. On the second point, it is clear that the Court of Appeal viewed the presence of Japanese Knotweed as inherently different to that of tree roots. This can be seen from para 73:

    "In short, there is no reason why the legal position concerning nuisance caused by the encroachment of the branches or roots of trees should undermine the right of the claimants in the present case to claim damages for nuisance by reason of the encroachment of Japanese knotweed and its rhizomes from NR's land."

14. The decision in *Williams* also loosens the distinction between different categories of nuisance. The common starting point for identifying types of nuisance is the statement of Lord Lloyd in *Hunter -v- Canary Wharf* [1997] AC 655 that nuisances are of three kinds: (1) nuisance by encroachment on a neighbour's land, (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land.

15. Discussing that statement, the Master of the Rolls said as follows in *Williams* at para 41:

"The difficulty with any rigid categorisation is that it may not easily accommodate possible examples of nuisance in new social conditions or may undermine a proper analysis of factual situations which have aspects of more than one category but do not fall squarely within any one category, having regard to existing case law."

Conclusion

16. The decision will be an important one. The finding in para 55 (quoted in para 8 above) that the mere presence of Japanese Knotweed rhizomes on a person's land will amount to an interference with their quiet enjoyment of it, because of the increased burdens if they were to develop their land, is not dependent on any particular claimant actually intending to develop it.

17. There is no real basis that I can see to distinguish any other case involving the encroachment of Japanese Knotweed. The logic of the decision in *Williams* will apply equally where the defendant is a public body, a company or a private individual. The effect is the same: the presence of Japanese Knotweed amounts to an interference with quiet enjoyment and is actionable in nuisance without physical damage.

18. Finally, diminution in value is recoverable as a consequence of the nuisance. It is just that a claimant needs to establish a nuisance before recovering for diminution in value as a consequence of a loss of amenity. But given the presence of Japanese Knotweed *will* constitute a loss of amenity, it is simply a question of evidence, rather than legal principle, as to whether there has been a diminution in value and if so, how much.

19. At the time of writing this article, the Court of Appeal has refused Network Rail permission to appeal to the Supreme Court but it has until 31 July 2018 to file an appeal notice requesting further permission.

Tom Carter

July 2018

Connect with me on LinkedIn