FURTHER TALES OF OUR FAVOURITE NON-NATIVE INVASIVE SPECIES

DAVIES V BRIDGEND

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Surveyors and valuers will be familiar with activity in the courts in recent years with regard to the presence of Japanese knotweed (*Reynoutria japonica*). As most readers will know, there have been cases where surveyors have been found to be negligent for not identifying knotweed on site, and not reflecting its presence in a diminution in value, largely associated with the necessary remedial work (e.g. *Ryb v Conways Chartered Surveyors & Ors* (2019) unreported). And, by way of balance, where surveyors demonstrate reasonable care, then negligence claims will, of course, fail (e.g. *Davies v Marshalls (Plumbing and Building Development) Ltd and Connells Survey and Valuation Ltd (2018) Birmingham County Court,* unreported). This article looks, however, at private nuisance, i.e. where a claim is made against a neighbouring landowner.

There has been some interesting County Court activity on nuisance claims (e.g. *Smith and Smith v Line* (2017) Truro County Court, unreported) but it gained wider interest and analysis in *Williams and Waistell v Network Rail* [2018], where the Court of Appeal explored (although was not unanimous) on just how the presence of knotweed fulfilled the requirements of the law of private nuisance. Nuisance is, essentially, founded on alternative terms: simply, either (a) there is physical encroachment which causes damage or (b) there is a disruption to the claimant having quiet enjoyment of their land, i.e. the loss of amenity. It was held that a diminution in value (not disputed) was not, of itself, damage under the first head, but that the loss of value could disturb the quiet enjoyment and was thus recoverable.

The grounds and nuances of nuisance have, again, been recently explored by the Court of Appeal in *Davies v Bridgend County Borough Council*, reported in February 2023. In this

case, Japanese knotweed encroached from land owned by the local authority (being a disused railway, now a cycle path) onto the garden of the claimant's terraced house in Bridgend, South Wales.

Marc Davies purchased the property (which he subsequently let) in 2004. It was deemed likely that the weed encroached onto the land before 2004. Indeed, knotweed was acknowledged to have been in the area for over 50 years. At first instance, the council was found to be in breach of its duty to deal with the knotweed from 2013, taking the date of release of the first RICS guidance on knotweed (2012)[1] plus a 'generous' period to become updated and act. So, the breach lasted from 2013 until the commencement of a treatment programme, a tardy five years later, in 2018.

Arguments asserting a lack of liability due to the weed encroaching before the date of the breach were rejected on the grounds that there was a continuing, persisting nuisance. Damages were claimed under various heads, most of which were dismissed on the facts, and the only item on appeal was for a claim for blight, i.e. a diminution in value persisting after successful treatment and eradication due to the stigma of the property having been associated with Japanese knotweed. Although the claim was only £4,900, modest in terms of court actions, it was felt to raise a significant point of law such that leave was granted to take the matter to the Court of Appeal.

The claim for residual diminution in value had failed in both the County Court and on first appeal. The reasoning in these courts was based on an understanding that the *Williams* case allowed no claim for pure economic loss (as is the accepted position on tortious damages) and that the diminution in value was pure economic loss. *Williams* specifically highlighted that 'the purpose of the tort of nuisance is not to protect the value of property as an investment or financial asset. Its purpose is to protect the owner of land (or a person entitled to exclusive possession) in their use and enjoyment of the land' (at paragraph 48).

Although *Williams* was quoted as a basis for the unrecoverability of pure economic loss, it was held in *Davies* that if nuisance is established on standard grounds (through physical damage or loss of quiet enjoyment) then the consequential losses (including residual diminution in value) can be claimed for. The non-trivial presence, or even proximity, of knotweed rhizomes and roots allowed a finding of actionable nuisance due to interference with quiet enjoyment. Losses stemming from that presence are not, then, pure economic loss, due to the physical nature of the fulfilment of the requirements of private nuisance.

So, in summary:

The earlier hearing and first appeal analysis that *Williams and Waistell v Network Rail* was precedent in support of the established principle of no claim for damages for pure economic loss was overturned to the extent that diminution in value of property was, in this case, *not* an instance of pure economic loss in that it resulted from the physical presence of rhizomes and roots.

1. Current guidance: RICS Professional Standard Japanese Knotweed and Residential Property, 1st ed., January 2022.

Where the nuisance (e.g. knotweed) exists before the defendant owns (or is otherwise responsible for) the property, they will still be liable where a duty of care is established and the nuisance is continuing.

Where the nuisance has been successfully dealt with, there can still be liability for the ongoing, persisting impact on values on the basis of residual damage/blight.

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