



## The Knotty Issue of Knotweed

### ***Network Rail Infrastructure Limited v Williams and Waistell***

**By Adam Heppinstall**

1. According to the Crop Protection Association one in ten cases of Knotweed infestation cost property owners more than £4,000, one in five cases see the value of the affected property fall and three in five cause property damage.
2. So, what can you do if your neighbour allows the insidious stuff to encroach onto your property? Sue in private nuisance for damages, is the answer of the Master of the Rolls (Sir Terence Etherton MR) with whom all other members of the Court of Appeal (Sharp and Leggatt LJ) agreed, in *Network Rail Infrastructure Limited v Williams and Waistell* [2018] EWCA Civ 1514.
3. The case raised the now familiar existential questions about the tort of private nuisance, and whilst the Master of the Rolls protested (perhaps too much?) that the case turned on the application of settled principles, it is still clear that the law of private nuisance is far from settled and it will be interesting to see what happens if the Supreme Court gets its hands on this knotty issue.

## **Factual Background**

4. Messrs Williams and Waistell, freehold owners of one each of a pair of semi-detached bungalows in Maestig, South Wales bordered to the rear by a railway line upon which resides and has resided for the last 50 years, a dangerous stand of knotweed, which the Recorder below held, Network Rail had failed to take in hand.
5. The Recorder below found that the weed had made its way from the railway land, through the rendering of the brick dividing wall and into the foundations of the bungalows.
6. Not only does that threaten physical damage of the property (although crucially to what follows, no physical damage had been caused) but it threatens significant difficulties in selling the properties because of the heavy and expensive requirements of mortgage lenders in relation to properties suffering from knotweed infestations.

## **Tied up in Legal Knots**

7. Is a case of encroachment of a natural entity (the weed) causing a diminution in value to the property but not physical damage, actionable?
8. The Recorder (Senior Immigration Judge, Professor Andrew Grubb) had a good crack at the exam question and held that because of the lack of physical damage the Claimants were not entitled to damages for private nuisance by encroachment whereas they were entitled to compensation for private nuisance by reason of an unlawful interference with the claimant's quiet enjoyment of their land. He awarded the costs of

treatment and the diminution of value following treatment (the risk that it might come back, and the stigma attached thereto.)

9. The Master of the Rolls was kind to the Recorder but could not agree and marked him down on legal analysis. The MR was not prepared to hold that you can recover the diminution in value of a property, a species of pure economic loss, just because knotweed is present, but not causing damage. The MR held that the purpose of private nuisance is not protect the value of property, as an investment or financial asset, but to protect the owner of land in their use and enjoyment of it. Pure economic loss is not recoverable in nuisance.
10. Instead, the MR held that the knotweed had caused damage to the properties. He held that it was a natural hazard that, just by its mere presence on another's land, constitutes an interference with the amenity value of the land, and thus damage.
11. The MR pointed out that his decision was consistent with the Court of Appeal's decision in the well-known case of *Hunter v Canary Wharf* [1997] AC 655 that quantities of building dust ground into the carpets of householders amounts to actionable nuisance (which aspect did not reach the House of Lords), as well as with that Court's decision in *Blue Circle Industries PLC v MOD* [1999] CH 289 that the mere presence of plutonium in top soil is actionable.
12. It is interesting that in reaching his conclusion, the MR considered that the notion that private nuisance is only actionable on damage was (a) untrue in several respects (e.g. substantial interference with an easement is actionable without proof of damage) and (b) in any event, the law has developed a very elastic notion of "damage" such that the landowner need not rely on only physical damage. He considered that it is well established

that “*in the case of nuisance through interference with the amenity of the claimant’s land, physical damage is not necessary to complete the cause of action*” (para 43) which provided the answer in this case.

13. Further, it was interesting how the Claimants sought to deploy the recent controversial judgment of the Supreme Court in *Dryden v Johnson Matthey PLC* [2018] UKSC 18 that platinum salt sensation amounts to actionable damage for the purposes of a personal injury claim in negligence and breach of statutory duty. Many commentators have worried that that decision represents a breaching of the dam as far as the requirement to prove damage in tort is concerned, but here the MR refused to take the bait, and did not think that that judgment added anything to the debate in this case.

#### **Recorder upheld, on different grounds.**

14. Accordingly, whilst on different grounds to those he gave, the Recorder’s judgment awarding the costs of knotweed treatment and the residual stigma diminution in value was upheld by the Court of Appeal.

#### **Neighbours of Knotweed Keepers.**

15. So, if knotweed is present on your land, and has come from the land of a neighbour, litigation is likely to follow, unless the neighbour takes steps to remove it from their land. This will be particularly the case if you are trying to sell your property, but the purchaser’s lender is requiring expensive treatment for which the vendor considers the neighbour should pay.
16. Removal is not easy as knotweed is a controlled waste product and you must use a registered waste carrier to remove it from your land. There is

a fine of up to £5,000 or a 2-year prison sentence if you allow such waste to transfer into the wild. See further, *Neil Soil Suppliers v Environment Agency* [2007] EWHC 2592 (Admin).

17. A County Court Judge in Truro issued a mandatory injunction requiring the removal of knotweed in the case of *Smith and Smith v Line* (available on Lawtel, HHJ Carr, 6 November 2017.)
18. Knotweed could be the new *Leylandii* in litigation terms; and in not requiring physical damage for it to be actionable, this case may open the floodgates, but we will have to see whether the MR's analysis goes to the Supreme Court. If so, it will be interesting to see if the Justices concur that the lack of physical damage can be so easily displaced by a loss of amenity constituted by the need to remove the weed as required by mortgage lenders before they will advance funds on a purchase. Is that enough to make knotweed actionable? We'll see.

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