SELBORNE CHAMBERS

Untangling Knotweed

A whole industry has developed around Japanese knotweed ('JK') litigation. But what does the future hold?

Japanese knotweed is an invasive foreign species. It was introduced into the UK in the mid-19th century, whereupon it out-competed indigenous flora and spread rapidly where not kept in check. Since 1981, it has been an offence 'to plant or otherwise cause JK to grow in the wild'[1]. Soil contaminated with JK stalks or rhizomes is likely to be categorised as 'controlled waste' under the Environmental Protection Act 1990.

So, JK gets a very bad press. Mortgage companies and Insurers are wary of it. Property-buyers generally consider it to be a blight, and when an owner finds JK on their land, then some turn to litigation. That litigation can take various forms, but two of the most common are claims in misrepresentation and in nuisance.

The misrepresentation claims are brought against sellers, because JK is deemed so pernicious that it gets its own question on a Seller's Property Information Form ('SPIF'). The seller is asked, "Is the property affected by Japanese knotweed?", and may answer by ticking one of three boxes: "Yes"; "No"; or "Not Known". If a seller ticks "No" but JK is subsequently discovered, then if it can be shown that there was JK present at the time of exchange of contracts, the buyer may attempt to assert that this was an actionable misrepresentation. Stories detailing such scenarios are not uncommon and continue to hit the national press on a regular basis[2].

The nuisance claims are brought against neighbouring landowners. In Davies v Bridgend County Borough Council [2023] EWCA Civ 80[3], the Court of Appeal has recently reaffirmed that in nuisance cases, should JK encroach from a neighbouring property, then this can be actionable as an interference with the amenity of the land. At Para 41, Birss LJ noted:

"This is because there is physical change to the claimant's property as a result of the presence there of knotweed rhizomes. Once that natural hazard is present in the claimant's land (to a non-trivial extent), the claimant's quiet enjoyment or use of it, or putting it another way the land's amenity value, has been diminished. For the purposes of the elements of the tort of nuisance that amounts to damage and it is the result of a physical interference. If consequential residual diminution in value can be proved, damages on that basis can be recovered. They are not pure economic loss because of the physical manner in which they have been caused."

So, is this really the time to ask whether we might be reaching the end of the road for extensive JK litigation? For various reasons, the answer might well be yes.

RICS's position

Much of the JK litigation has emerged in the aftermath of a 2012 RICS Information Paper entitled, "Japanese knotweed and residential property". The Paper does note that whilst there are concerns about the damaging effects of JK, those concerns are often based on misunderstandings and overreactions. However, more people focus on its message that JK can cause serious damage to drains, paths, outbuildings and conservatories; as well as serious implications for owners who want to develop their property. The Paper ushered in a methodology for a 4-catrgory risk assessment using a '7 metre rule' from buildings and boundaries as its defining measurement.

From fairly early on, there were concerns that surrounded the messaging in this Paper. By 2018, a report concluded that Japanese knotweed poses less of a risk of damage to substantial buildings than many trees or woody shrubs. It also led to a general agreement that 3m is a more appropriate measure of typical spread of the root/rhizome network in the soil than the 7m distance previously adopted. In 2020, a DEFRA-sponsored report commented that 'attitudes are currently disproportionate to the physical risk posed by Japanese knotweed'. As a direct consequence, 'the media, and as a result the public, have a disproportionate fear of the problem'.

As a result, effective from March 2022, RICS provided a Guidance Note replacing the Information Paper into the same problem. Discussing the issue of JK in the years since 2012, the Note remarks,

"Regrettably, the impact in the market was also increasingly influenced by exaggerated media reporting, resulting in an adverse public perception out of all proportion to the actual problem. This [Guidance Note] is intended to provide clarity and help to rebalance perceptions."

"Practical experience after 2012 increasingly questioned a widely held assumption that Japanese knotweed posed a structural risk to building foundations."

Under the new Guidance, the focus has moved from eradication to management.

All of this matters because the quantum claimed usually breaks down into the costs of remedy (herbicidal treatment; removal etc); and diminution in value. Therefore, downgrading of the risk (and so what constitutes a reasonable response to a discovery of JK) will affect the headline cost of remedy.

Moreover, when an expert surveyor assesses a diminution in value, they look to determine the market's view of the diminution. It is not relevant to that assessment that surveyors appreciate the reduced dangers posed by JK: they cannot 'lead the market' within the hypothetical assessment. But if this knowledge ultimately pervades the market, then this will impact upon the assessment. This will lead to the assessment of loss being lower than is presently the case. The impact on litigation is that for some, the vagaries of litigation outweigh the potential recovery; and so the number of property owners choosing to litigate will reduce.

Obiter comment in Davies v Bridgend

The next reason is a marker put down in the recent Court of Appeal judgment. Claims in nuisance are based upon either an interference with the legal rights of an owner or an interference with the amenity of the land. At Para 4 of Davies, LJ Birss prefaced his judgment thus:

"In 2012 a RICS report on knotweed was published, describing the difficulties it can cause. It is fair to point out that more recently the 2012 RICS report was withdrawn and the RICS now says that knotweed is not the "bogey plant" it was once thought to be. Nevertheless neither side before us contended that this means knotweed is not capable of founding a claim in nuisance."

In order for a nuisance to be actionable, it must be more than de minimis. Given the explanation at Para 41 (set out above), it may well be that over time we move to a position where certain smaller patches of JK or the presence of a small area of JK rhizomes in soil are treated as a de minimis loss of amenity, and therefore not actionable.

Can an answer on the SPIF satisfy all the elements required to be an actionable representation?

Should a claim for negligent misrepresentation be made, then the scope of the resulting losses can be extensive due to the 'fiction of fraud'. This 'fiction' exists due to the manner in which the requirements for negligent misrepresentation are set out in the Misrepresentation Act 1967. Section 2(1) provides:

"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."

Therefore, it is the defendant who must prove reasonable grounds to believe, and that they did believe up to the time that the contract was made, that the facts represented were true. A failure to do so opens up a claim for damages that are then determined as though there had been a fraudulent misrepresentation. The scope of such a claim is more extensive than would be the case for negligence or breach of a common law duty of care.

However, on any claim for misrepresentation, the misrepresentation need not be the only source of information relied upon, but needs to be operative in the 'but-for' sense. It is for the claimant to satisfy the court that the representation induced the contract. The claimant is assisted in this by a strong presumption in cases of fraudulent misrepresentation that the representation induced the purchase, but the legal and policy reasons for the strength of that presumption do not translate to cases of negligent misrepresentation, where the presumption will be weaker and more easily capable of rebuttal.

Within the context of JK litigation, misrepresentation claims that get to trial are rare. However, the County Court has recently handed down judgment a 37-page judgment in one such case. On the facts of that case, as well as receiving answers to the SPIF, the buyers had commissioned a full RICS survey. That report followed a template and therefore commented upon the presence of JK, stating that there was 'none noted'.

The Court decided that it was reasonable for the Claimants to rely on the representation in the SPIF, albeit not to treat it as equivalent to the advice or opinion of a specialist surveyor. The Court rejected the Claimants' contentions that had the buyer answered 'not known', they would have sought a specialist report, because they had by that stage already had obtained a report from a surveyor who held himself out as competent to report on whether JK was present and they would have relied on that report. Therefore, on the facts of this case, those findings were sufficient to rebut any inference of inducement, and the Court was not satisfied that there was any other evidence which demonstrated inducement.

Whilst the case turns on its own facts, a number of misrepresentation claims will share similar facts. Most buyers commission a survey before purchase. Had the surveyor reported that there was JK, then if the purchase proceeded without further enquiry, it would be difficult to show any reliance on the SPIF. If there was further enquiry and then a purchase without a price reduction, then this would also make it difficult to show reliance on the SPIF (the further enquiry either satisfying the purchaser that there is no JK or that there was JK but that this was not a cause of concern). It follows that by parity of reasoning, such arguments may be available in other cases predicated on similar facts.

Conclusions

The RICS Guidance Paper notes:

"the residential property market has faced controversial issues before, which have been largely resolved and assimilated into valuation and survey processes. This standard is the next step in managing the adjustment in the residential property market to the issues posed by Japanese knotweed."

We are at the start of a process by which the general public's perception of the dangers posed by JK will start to shift. With it will come an acceptance that JK is not a 'bogey plant'. Rather more quickly, the range of remedies offered by JK treatment specialists will move from eradication towards management.

Moreover, there are salutary lessons that despite the 'fiction of fraud', proving all the elements of misrepresentation against a seller can be difficult if there is also a surveyor's report involved.

All this leads to the inexorable conclusion that cases in which it is economically prudent to litigate over JK will reduce.

JONATHAN MCNAE