Tied up in knotweed

It is well established that as a consequence of the common law principle of *caveat emptor* buyers should find out as much as they can about a property before they commit themselves to their purchase. All too often it is not until late in the transaction, perhaps just before they are about to exchange contracts, that the buyer finds out about something which adversely affects the property. It could even be after they have completed their purchase and moved in. At whatever point though that they find out about something they will have heavily invested both financially and emotionally in the transaction. Home Information Packs, before their abolition in 2010, attempted to address this problem by requiring a seller to put together a standardised set of information before they marketed their home. Perhaps now the time has now come again to consider initiatives such as property passports or log books which could improve the conveyancing process. Before looking at these, though, I want to consider one of the issues facing buyers which could ruin the purchase of their dream home and which has recently been considered by the courts, Parliament and academics.

Japanese knotweed (*Fallopia japonica*) is probably the most well-known invasive non-native plant in the UK. Other invasive non-native plants include Giant hogweed, Himalayan balsam, *Rhododendron ponticum* and New Zealand pigmyweed. Schedule 9 to the Wildlife and Countryside Act 1981 lists the invasive non-native plants (as well as non-native animals) which have become established in the UK.[1]

Japanese knotweed is native to Japan, Taiwan and northern China. It was introduced into the UK in the nineteenth century as an ornamental plant. It is a perennial plant that spreads rapidly by its rhizomes and can grow up to ten centimetres a day between the months of April and October. The roots can extend to a depth of three metres and up to seven metres laterally. Its vigorous roots and top growth penetrate foundations, concrete hardstanding and walls, causing considerable damage. Japanese knotweed is estimated to cost the British economy around £166 million per year.[2]

The presence of Japanese knotweed might affect the valuation of a property and mortgage lenders are reluctant to lend on residential properties affected by Japanese knotweed. Those that are willing to lend will usually only do so after remediation works have been carried out. Most building insurance policies do not cover damage caused by Japanese knotweed.

In addition, a property owner with knotweed on his property may face action by the local authority. It is not a criminal offence for a property owner to have the plant growing on their land. However, under s.14(2) of the Wildlife and Countryside Act 1981 it is an offence to plant or 'cause to grow' certain plants, including Japanese Knotweed, 'in the wild'. Anyone convicted of this offence is liable on summary conviction to an unlimited fine and/or 6 months imprisonment, or on conviction on indictment to 2 years imprisonment and/or a fine.[3] A property owner must therefore prevent Japanese knotweed on their land spreading into the wild.

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[1] The Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England and Wales) Order 2010 (SI 2010/609) changed the scientific name by which Schedule 9 referred to knotweed, from '*Polygonum cuspidatum*' to '*Fallopia japonica*'.

[2] F. Williams, R. Eschen, A. Harris, D. Djeddour, C. Pratt, R.S. Shaw, S. Varia, J. Lamontagne-Godwin, S.E. Thomas, & S.T. Murphy, (2010) *The Economic Cost of Invasive Non-Native Species on Great Britain*. CABI Publishing, Wallingford.

[3] Wildlife and Countryside Act 1981 s.21(4).

Local authorities have also been given powers to require the clearance of knotweed. They can serve a notice on an occupier of land requiring it to remedy the condition of land within a specific period where, in the local authority's opinion, the amenity of an area (or adjoining area) is adversely affected.[4] A local authority might use this power for infestation of land by knotweed, particularly where it is at risk of spreading into adjoining land. If the occupier fails to comply with the notice, the local authority can bring a prosecution in the magistrates' court. On conviction the occupier will be liable for a fine not exceeding level 3 on the standard scale (currently up to £1,000).[5] It could also step in to undertake the necessary works itself and recover its reasonable costs from the occupier.[6]

Local authorities, and the police,[7] can issue Community Protection Notices to require someone to control or prevent the growth of Japanese knotweed or other plants that are capable of causing serious problems to communities. Before issuing a notice they must be satisfied on reasonable grounds both that the conduct of an individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality and is unreasonable.[8]

A notice can require an individual or organisation to make reasonable efforts to make good the problems arising as a result of Japanese knotweed within a specified period of time and/ or a requirement to take reasonable steps to prevent future recurrence of the problem. Breach of any requirement of a Community Protection Notice would be a criminal offence, subject to a fixed penalty notice (penalty of £100) or prosecution. On summary conviction, an individual would be liable to a level 4 fine on the standard scale (currently up to £2,500). An organisation, such as a company, is liable to a fine.[9] The local authority can also step in to remedy the problem.[10]

An individual or a body can activate a 'community trigger' to request that the local authority deal with a persistent or previously ignored anti-social behaviour problem when their case meets a locally defined threshold. This could also apply to knotweed. The local authority must carry out a case review and consider what action they can take to resolve the problem when someone activates the trigger.[11]

Another approach to dealing with knotweed was introduced by the Infrastructure Act 2015.[12] This allows environmental authorities to agree Species Control Agreements with landowners, under which the owner will agree to take steps to control invasive species. If the owner breaches the agreement, then a Species Control Order can be made, compelling the owner to control the species. Breach of an order carries up to 51 weeks in jail and/or an unlimited fine.

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[4] Town and Country Planning Act 1990 (TCPA 1990) s.215.
[5] TCPA 1990 s.216(2).
[6] TCPA 1990 s.219.
7 In 2017 it was reported that a police force in the north east of England was using a CPN to monitor the activities of an alleged organised criminal whose property was plagued by Japanese knotweed. See Fiona Hamilton, "Police use pest of a plant to weed out criminal activity" *The Times*, 30 October 2017, p.13.
[8] Anti-social Behaviour, Crime and Policing Act 2014 (ABCPA 2014) s.43.
[9] ABCPA 2014 s.48.
[10] ABCPA 2014 s.47.
[11] ABCPA 2014 s.104.
[12] Infrastructure Act 2015 s.23 inserted a new subsection 14(3A) in the Wildlife and Countryside Act 1981 providing for measures relating to Species Control Agreements and Species Control Orders to be contained in a new Schedule 9A.

A property owner should not allow knotweed to spread onto neighbouring land as the owner of the neighbouring land may be able to bring an action for nuisance and could recover compensation for any loss of enjoyment or amenity, the costs of removal, and an injunction against requiring action to control the knotweed. The Court of Appeal considered an action for nuisance in *Network Rail Infrastructure Ltd v Williams*.[13] The claimants were the owners of two adjacent bungalows in Maesteg, South Wales, which back onto a railway cutting owned by Network Rail Infrastructure (NRI). Japanese knotweed from the cutting encroached on their properties and after unsuccessful attempts to eradicate the problem the claimants brought a private nuisance action against NRI. The claimants sought an injunction to require NRI to treat and eliminate the knotweed on their land plus damages under various heads of loss. The claim in nuisance was brought on two alternative grounds. First, the claimants argued that NRI was liable, as occupier of the land where the knotweed was present, for its encroachment onto the claimants' land. Secondly, the claimants argued that the presence of knotweed on NRI's land in close proximity to the claimants' land was a sufficiently serious interference with the quiet enjoyment and amenity value of their properties to constitute an actionable nuisance as its presence affected the ability to sell the properties at market value.

At first instance the encroachment claim was dismissed on the basis that to be an actionable nuisance there had to be actual physical damage, and none was established. However, the quiet enjoyment/loss of amenity claim succeeded on the basis that loss of amenity could include diminution as a result of the claimants' inability to dispose of their properties at a proper value. Therefore, the court found that NRI had breached this duty which had caused a continuing nuisance and damage. Whilst it considered that it was not appropriate to grant an injunction compelling NRI to treat the knotweed it did award damages which included the costs of an insurance backed treatment package, the costs of a knotweed survey, and damages for residual diminution in value once the treatment was completed.

NRI appealed on two grounds. First, they challenged the Court's conclusion that the mere presence of knotweed on land adjoining the claimants' properties was an actionable nuisance simply because it diminished the market value of the respective properties. Secondly, they challenged the finding that there was a causal link between any breach of duty on NRI's part and the residual diminution in value of the properties.

The Court of Appeal clarified that the purpose of the tort of nuisance is to protect the landowner in their use and enjoyment of the land and not to protect the value of property as a financial asset. The first instance decision was wrong in so far as it effectively extended the tort of nuisance to a claim for pure economic loss. However, while allowing that part of the appeal, the Court of Appeal went on to find that the first instance outcome, i.e. the award of damages, was nevertheless justified albeit for different reasons than originally given. NRI had actual knowledge of the presence of knotweed on its land in 2013, it was (or ought to have been) aware of the risk of damage and loss of amenity to adjoining properties caused by the proximity of the knotweed no later than some time in 2012,[14] and it failed to reasonably prevent the interference with the claimants' enjoyment of their properties.

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[13] *Network Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514.

[14] Following the publication of the now withdrawn Environment Agency code of practice *Environment Agency: The knotweed code of practice* and an RICS information paper on how to assess risks and costs associated with the presence of Japanese knotweed on residential property.

That was sufficient to give rise to a cause of action in circumstances where, in addition to the risk of future physical damage to the buildings, the presence of the knotweed imposed an immediate burden on the claimants. This was a classic example of interference with the amenity value of the land as it clearly affected the claimants' ability to fully use and enjoy their properties. This outcome meant that the second appeal ground fell away and the Court of Appeal was not prepared to admit fresh evidence as to the precise impact on value that was not adduced during the first instance hearing.

A buyer should attempt to discover the presence of Japanese knotweed either through the seller's replies to his preliminary enquiries and/or a survey which the buyer commissions. A seller is not under a duty to tell a buyer that the property is affected by knotweed. The standard residential conveyancing enquiries ask whether the property is affected by Japanese knotweed, but the seller does not have to answer the question. A seller will be liable to a buyer for misrepresentation if they say there is no knotweed, when they know that there is. So, the seller may decide not to reply to this question if there is any doubt, leaving the buyer to make his own inspection and survey. If there is any question over the presence of an invasive species on the property, then a survey should be carried out by a suitably experienced residential surveyor and/or a specialist invasive species consultant.

The duty of a surveyor in relation to Japanese knotweed was recently considered in *Ryb v Conways Chartered Surveyors*.[15] In the summer of 2014 Mr Ryb viewed a ground floor flat in Highgate, London. The flat was part of a larger building which had been divided into flats and this particular flat came with a garden. Mr Ryb commissioned Conways to carry out a Level Three RICS Building Survey (formerly called, and still often referred to as, a structural survey). Such a survey is the highest level at which such surveys can be undertaken and provides a report which describes in detail the form of construction of the property and gives guidance on repairs, maintenance and other remedial works which are considered necessary. Mr Ryb is partially sighted and is registered as severely visually impaired. He was therefore not able to inspect the property as thoroughly as someone with good eyesight and the surveyors knew that he was therefore relying on their report.

The surveyor reported the property "to be in an excellent condition both internally and externally and very few defects were noted" and recommended the property as "a worthwhile investment which should prove to be a comfortable and pleasant residence". It is worth noting that whilst such a survey requires the surveyor to conduct a thorough visual inspection of the grounds, there were no photographs, no plans and no measurements taken for this report. Nevertheless, Mr Ryb proceeded with the purchase and completion took place in October 2014 with him paying £1,275,000 for the property.

In 2015 Mr Ryb's gardener told Mr Ryb that he had found what he believed to be Japanese knotweed in the garden. Mr Ryb then commissioned Environet UK Ltd, a firm of Japanese knotweed specialists, to carry out an inspection. The firm found knotweed visibly present in three locations in the garden and in their report stated that the maturity of the plant proved it had been present for at least three years. The report proposed a number of different options for the eradication of the knotweed. Mr Ryb decided on a 'physical excavation, dig and dump' option at a cost of £10,620. He also obtained an insurance backed guarantee from

[15] *Ryb v Conways Chartered Surveyors* Unreported 27 February 2019 Central London County Court. The Practice and Precedents Editor is grateful to Rodger Burnett of Charles Lyndon solicitors, who acted for the Claimant, for providing him with a copy of the judgment.

Environet which proved a good investment as the Japanese knotweed returned twice, once in 2017 and again in 2018.

Mr Ryb then brought proceedings against the surveyors for the cost of the remediation works and for the reduction in value of the flat. Applying the dicta in *Network Rail Infrastructure Ltd v Williams* [16], the judge awarded £50,000 in damages, representing the diminution in value.

As the knotweed had been treated, the experts instructed by each of the parties had to base their reports largely on the survey produced in 2015 by Environet UK Ltd. They agreed that one of the stands of knotweed, the largest and closest to the building, was at least 3 years old. Based on its maturity and the dead stems present in photographs taken in 2015 , they also agreed that it would have been visibly present at the time the building survey was carried out in 2014.

The question for the Court was whether a reasonably competent surveyor would have identified the knotweed and included it in his report. The surveyors argued that had there been knotweed on the property, it would have been identified and reported to Mr Ryb. They also relied on the absence of any mention of knotweed in any inspections or reports when the seller had constructed an extension to the property in 2013. The judge dismissed this as none of the inspections or reports in 2013 had been tasked with looking for knotweed and so it was unsurprising that none of them mentioned it.

One of the most damning pieces of evidence was from Mr Ryb's expert who said that had the surveyor carried out a thorough inspection in 2014, he would have had to push past the knotweed in order to do so.

In March 2012 the RICS published an information paper for surveyors on Japanese knotweed.[17] This sets out a methodology for assessing the risks and quantifying the costs associated with knotweed on residential property when carrying out a survey. Despite this, the surveyor could not point to any relevant training he had undertaken which would have enabled him to identify the knotweed.

As in most surveyor's negligence claims, the measure of damages was the difference in value between the price paid and the market value of the property. In this case that was the difference a hypothetical buyer would be willing pay with and without knowledge that the property was affected by Japanese knotweed.

The judge was unable to accept the surveyor's expert's contention that the likely buyer of the flat would have been a developer, who would have only sought to discount the price by the cost of the treatment works (which would have been less than 1% of the purchase price). Instead he decided that the hypothetical buyer would have been a residential buyer.

The judge endorsed a framework approach which, instead of using a broad-brush percentage reduction, looked at the particular characteristics of the property to reach a likely figure for the impact of the knotweed on the market value. This framework considered factors such as the desirability of the property, the extent of the infestation and its size relative to the amount

[16] *Network Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514

[17] *https://www.rics.org/uk/upholding-professional-standards/sector-standards/real-estate/japanese-knotweed-and-residential-property* [Accessed 27 July 2019].

of garden, the likely use for the affected land, the proximity to a built structure and the risk the plant spreading to neighbouring land.

Interestingly there was no mention in the judgment of whether the seller had disclosed the presence of knotweed in the replies to the Law Society Property Information Form (TA6). Had the presence of knotweed been disclosed, then it would have been difficult for Mr Ryb to have argued that he had relied on the surveyor's report.

Question 7.8 on the TA6 form asks if the property is affected by Japanese knotweed and, if the answer is yes, whether there is a Japanese knotweed management plan in place and for a copy to be supplied. This question was considered by the House of Commons Science and Technology Committee in its report *Japanese knotweed and the built environment*.[18] In evidence it received it was told that 'the wording of the TA6 form is somewhat ambiguous, leaving scope for different interpretation of appropriate answers'. The Committee reported that, for instance, whether or not a property is 'affected' by the plant could perhaps be disputed if all material had been removed by excavation, and the use of the word 'eradicate' is unclear given that treatment by herbicide leads to dormancy.[19]

The Committee recommended that the Law Society review the wording of the question in consultation with the Royal Institution of Chartered Surveyors and others. In particular, the Committee recommended that it should consult with experts to determine whether the need to declare previous Japanese knotweed problems should expire if the plant has been treated by appropriate excavation and there has been no re-growth within a certain period.

Despite the hysteria surrounding Japanese knotweed, it may well be that it is not such a menace as people, including the courts, think it is. Research by Swansea University in 2018 concluded that knotweed could not be eradicated by conventional herbicide treatments.[20] After five years of intensive research they defined a patent on a potential Japanese knotweed control treatment known as 'The 4-Stage Model'. This applies a far more scientific approach, which according to Dr Dan Jones, links "herbicide selection and application with the seasonal surface-rhizome flows in the knotweed plant."[21] This has been complemented by research carried out by Leeds University.[22] Their survey of 51 contractors and 71 surveyors, reporting on 122 properties where Japanese knotweed was present, showed that reports of defects or structural damage to residential properties were rare. In addition, a case study looked at 68 pre-1900 residential properties located on three streets in northern England, chosen because they had been abandoned for at least ten years, were already in a state of disrepair, and so represented a 'worst case' scenario in terms of susceptibility to damage from unchecked plant growth. While knotweed was identified within seven metres of 18 of the properties, it was linked to less damage than the trees, climbers and shrubs also found there. It concluded that

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[18] House of Commons, Science and Technology Committee, *Japanese knotweed and the built environment Seventeenth Report of Session 2017-19*, HC Paper No.1702.

[19] House of Commons, Science and Technology Committee, *Japanese knotweed and the built environment Seventeenth Report of Session 2017-19*, HC Paper No.1702 para 40.

[20] D. Jones, G. Bruce, M.S. Fowler, R. Law-Cooper, I. Graham, A. Abel, F.A. Street-Perrott, & D. Eastwood, "Optimising physiochemical control of invasive Japanese knotweed" *Biological Invasions*, 2018, Volume 20, Number 8, Page 2091

[21] *https://www.swansea.ac.uk/press-office/news-archive/2018/swanseauniversityscientistsleadthewayintacklingjapaneseknotweed.php* [Accessed 29 July 2019].

[22] M. Fennell, M. Wade, & K.L. Bacon, 2018, *Japanese knotweed (Fallopia japonica): an analysis of capacity to cause structural damage (compared to other plants) and typical rhizome extension*, PeerJ 6:e5246 *https://doi.org/10.7717/peerj.5246* [Accessed 29 July 2019].

whilst knotweed is capable of damaging buildings, "it is usually because an existing weakness or defect has been exacerbated" and knotweed in fact "poses less of a risk to buildings and other structures than many woody species, particularly trees".[23]

So could initiatives such as property passports or log books assist buyers with early indications of problems such as the presence of Japanese knotweed and thereby improve the conveyancing process The average time from offer to completion is somewhere between 8 to 12 weeks, with around 40% of buyers and sellers stating that it took longer than they expected.[24] Could this be improved by technological improvements? One possibility is a digital property passport or logbook which would ensure that a seller provides information about their property when it goes on the market. The aim of such an initiative would be to make the home selling and buying process quicker and less stressful.[25] The passport or logbook would be held digitally on a secure web-based platform and would be linked to the property rather than the owner which would make it easier to find when the property is next sold.[26]

A property passport or logbook could contain:

- Copies of the register, title plan and documents referred to in the register
- Copies of searches and enquiries
- A copy of the lease where the property is leasehold
- Share certificates
- Planning permissions
- Building control approvals
- Guarantees such as NHBC
- Indemnity insurance policies
- Certificates and guarantees covering damp proofing, new windows, boilers, electrical work, etc

It could go even further and provide a management tool for home owners during their ownership. It could provide project plans for home improvement projects, access to utility accounts, an inventory of contents for insurance purposes, access to emergency information as well as social information such as residents groups and local organisations. It could also provide a timeline showing the history of the property through photographs, online records, maps and census reports.

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[23] *https://www.leeds.ac.uk/news/article/4262/japanese_knotweed-not_such_a_knotty_problem* [Accessed 27 July 2019].

[24] *https://www.gov.uk/government/publications/buying-and-selling-homes-consumer-experience-study* [Accessed 27 July 2019].

[25] See for example the Law Society's response to the Government call for evidence on improving the home buying and selling process at *https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/improving-the-home-buying-and-selling-process* [Accessed 27 July 2019].

[26] There are already commercial organisations offering such products, see, for example, the Home Log Book at *https://etive.org/the-home-log-book* [Accessed 27 July 2019].