



JAPANESE KNOTWEED

The public's awareness of Japanese Knotweed (*Fallopia Japonica*) in the UK has heightened significantly over the last number of years, not only as a result of the increased prevalence but also due to recent media attention, in particular in connection with the proposal to introduce a tiny louse which is one of the few natural enemies of Knotweed. The ease by which Knotweed can be spread, the extent of its underground rhizome system and the damage it can cause are well known in environmental circles. However, less well appreciated, certainly by the general public, are the legal implications which Knotweed brings with it.

There is various legislation in place which regulates and controls the disposal and planting of Knotweed. Section 14 of the Wildlife and Countryside Act 1981 makes it an offence to plant or otherwise cause Knotweed to grow in the wild. However, as stated in the Environment Agency Knotweed Code of Practice, "It is not an offence to have Knotweed on your land and it is not a notifiable weed". It is generally thought that private land and in particular gardens do not come within the definition of wild.

Under the Environmental Protection Act 1990 all Knotweed material (and soil containing Knotweed) is classed as controlled waste and must be disposed of at a licensed landfill site under codes of practice.

There are also powers under the Town and Country Planning Act which empower local authorities to require landowners to treat the land if it detracts from local amenities and that could include situations where Knotweed is present on



Robert Twining is a partner at Warners Solicitors and an acknowledged specialist in his field of litigation.

the land. The Town and Country Planning Act is often used by local planning authorities by way of planning conditions to force developers to treat sites infested with Knotweed.

These and other statutory material give rise to potential criminal prosecutions. However, as between private landowners (or those with a proprietary interest in the land), where Knotweed moves from one parcel of land to another the relevant law is that of private nuisance.

Put simply, a private nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land. The scope of nuisance extends to include encroachment onto neighbouring land such as in the case of overhanging tree branches and tree roots which transgress the boundary.

A nuisance can be abated by self help remedies in simple cases such as lopping and returning overhanging branches. However, given the underground complexity of Knotweed rhizome it is almost certainly going to be the case that a landowner will need to require his neighbour to effectively treat Knotweed on the neighbour's land in order to abate the nuisance and solve the problem. In the event of a neighbour failing to cooperate, a legal action may be commenced seeking various remedies including damages equating to the cost of treatment and possibly diminution in value of his land and injunctions enforcing the neighbour to carry out specific methods of treatment. Indeed, the granting of injunctions (which is a discretionary remedy) in nuisance cases, is generally the appropriate remedy.

In encroachment cases no actual damage needs to be proved in order to bring a claim for nuisance. Damage is presumed but that in itself does not make someone necessarily liable in nuisance. Whilst it is difficult to imagine a claim in nuisance relating to encroachment of Knotweed failing on the basis that its spread to neighbouring property was not foreseeable, it is still necessary for the landowner to have knowledge of the nuisance/encroachment or that he should reasonably be expected to have notice (imputed knowledge). It is therefore important that a landowner puts his neighbour on notice in writing as soon as encroachment occurs. In some cases involving derelict land an owner may not be aware of the presence of Knotweed on his land.

A landowner must take reasonable steps to prevent a nuisance – what those steps are could ultimately be for a Court to decide in any particular set of circumstances. A landowner is best advised to follow closely the guidance set out in the Environment Agency Knotweed Code of Practice. If he does he stands a good chance of successfully defending a claim brought against him on the basis that what he is doing to prevent the nuisance is reasonable.

Whether a party is liable depends on whether there is an omission on their part to comply with their duty to take reasonable steps to prevent the nuisance.

It is unlikely that strict liability would apply under the Rylands v Fletcher principle making the “guilty” landowner liable irrespective of whether the loss is foreseeable or the steps that have been taken to prevent the nuisance from occurring are reasonable, as that principle generally applies to “things” which are dangerous.

In circumstances where the Knotweed is planted by a landowner, and it spreads to neighbouring property, a landowner's liability is very likely to arise simply by reason of the positive act of planting. It follows such claim will probably be much easier to establish, being a simple question of fact rather than the more difficult question of omitting to act reasonably in remedying the problem. Where a nuisance is naturally occurring, and there is a good argument that Knotweed is naturally occurring when it is not intentionally planted, the duty is arguably more subjective and may depend on the capabilities and resources of the landowner.

Factors to be taken into account may include the extent of the spread, the likely damage and the cost of the treatment.

Therefore, if the spread is limited and not likely to affect physical structures or cause financial loss a Court is much more likely to find that herbicide treatment, for example, is reasonable as opposed to offsite removal (“dig and dump”) which could cost very substantially more.

It is also arguable that a landowner's financial means is relevant in determining whether the steps he has taken to deal with the problem have been reasonable and therefore affords him a defence.

Where Knotweed spreads from land A to land B and then to land C, although the owner of land B may be liable to the owner of land C he may be able to claim an indemnity from the owner of land A.

A landowner can be liable for allowing nuisance to continue even if he did not create it and came after it was established. Therefore a purchaser of land should always have the land properly surveyed before buying because although he would not be responsible for past damage he will be responsible for continuing damage and, given the likely claim against him for an injunction, the cost of its treatment.

Equally a seller could remain liable for damage caused prior to the date of sale and further, guilty of a misrepresentation to a buyer if he has not responded correctly to any pre-contract enquiries concerning the presence of nuisance.

Conversely, a buyer can seek remedies for nuisance caused prior to his purchase if the nuisance is continuing, which in the case of Knotweed is likely.

Whilst the expression neighbour/landowner has been used in this article, a person may bring a claim or may be subject to a claim if they have a proprietary interest in the land, generally as a result of them owning the land or

being a tenant of it. As a nuisance is a legal tort, damages do not extend to pure economic loss. Therefore it is probably the case that loss of development value, for example, cannot be claimed. As stated above however, the primary remedy would be injunctive relief and the Court may well take into account the innocent party's intentions with regard to the infected land when specifying what the appropriate treatment to order should be.

In the case of landlords and tenants, depending on the wording of the lease and also on whether Japanese Knotweed was present when the lease was entered into, a tenant may find himself unwittingly liable to his landlord under the terms of the lease to have any Knotweed on the demised property treated or removed. Further, a landlord may remain liable to third parties where he has let a property but retained some control, for example through covenants within the lease but has not taken steps to require the tenant to prevent the spread of any Knotweed.

As is always the case, prevention is better than cure. Knotweed in most cases can be treated effectively and often relatively quickly despite its reputation (and without recourse to the louse – what would it eat once it has had its fill on Knotweed?). Any landowner should therefore seek immediate advice from specialists as soon as they are aware or made aware of the presence of Knotweed to avoid what could turn into an extremely costly and complicated piece of litigation in which the decision of the Court will not usually be easy to predict.