Japanese Knotweed – what a nuisance

There has been considerable media coverage in recent times in relation to the prevalence of Japanese knotweed and other Invasive Alien Plant Species (IAPS) in building sites and in close proximity to dwellings and the risks associated with this. From a legal perspective this could have a considerable impact on the owner’s liability under the owner of the property where the Japanese knotweed has arisen in particular in relation to the law of private nuisance.

What is Japanese knotweed?

It was originally introduced in the nineteenth century as an ornamental plant. It has the potential to spread underground through its roots or rhizomes. It can cause physical damage to buildings and land because of its spreading roots which can affect the value of property. It is expensive and time-consuming to eradicate, remove, treat and dispose of.

What is “Private Nuisance”?

Private nuisance is “an unreasonable interference with another person in the exercise of his or her rights generally associated with the occupation of property and in relation to the use and enjoyment of land in particular.”

An occupier of land is entitled (as against his neighbour) to the comfortable and healthy enjoyment of the land to the degree that would be expected by an ordinary person whose requirements are objectively reasonable in all the particular circumstances.
Recent Development

The position has traditionally been that there has to be actual damage to a neighbour’s land in order for a neighbour to recover from a landowner in respect of an actionable nuisance. However there has been a recent decision in the United Kingdom which constitutes a significant change to this long held principle.

On 2 February 2017 the Cardiff County Court decided in two cases\(^1\) that the defendant, Network Rail Infrastructure Limited, had caused an actionable nuisance by failing to take reasonable steps to prevent an IAPS (Japanese knotweed in this case) from affecting domestic properties next to a railway embankment owned and operated by the defendant.

This is a significant departure from the earlier position. The Court indicated that the Japanese knotweed was an actionable nuisance as it affected the amenity value of the claimants’ land and caused a diminution in its value even though no physical damage was caused.

The defendant was deemed to have constructive knowledge of the potential impact of the IAPS due to the publication of guides by the Royal Institute of Chartered Surveyors (RICS) and Property Care Association (PCA) in the UK highlighting potential property damage from knotweed.

The Court found that no damage to the foundations or the bungalows had been proven nor had any damage to the soil been noted. It further found that even if the knotweed was treated the saleable value of the properties was below market value.

The claimants made their nuisance claim in two ways:

**Encroachment**

They argued that the knotweed encroached onto their lands and as such the defendant was liable as the occupier. The Court indicated that in terms of the encroachment argument that was made that it failed because there needed to be physical damage to the property in order for such an argument to be successful.

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1. Williams v Network Rail Infrastructure Limited 2017 UK CC (2 February 2017)
2. Waistell v Network Rail Infrastructure Limited 2017 UK CC (2 February 2017)
Presence

They argued that the presence of the knotweed on the defendant’s land was an interference with the quiet enjoyment/amenity value of the land as it affected their ability to sell them at market value. The court found that the presence of the knotweed on Network Rail lands was effectively causing a blight on the claimants’ land by interfering by their quiet enjoyment of the land and they had proven that this affected the amenity value of the property. The court indicated that a landowner has a duty in respect of naturally occurring hazards or dangers to a neighbour’s property.

The claimants had to show that:

- the interference was reasonably foreseeable;
- that the landowner had failed to do all that was reasonable in the circumstances to prevent the interference;
- that the landowner had constructive knowledge of the risk of knotweed spread and the consequential damage from around the time of the publication of the RICS and PCA guides; and
- the landowner had failed to carry out its obligation as a reasonable landowner to get rid of the problem and to prevent interference.

Evidence was given that the owners had sprayed the knotweed but the spraying was inadequate. The court found that the claimants had satisfied the tests outlined above.

The claimants received damages for:

- the cost of knotweed surveys;
- treatment programmes;
- insurance backed guarantees for residual diminution in value of the property after the treatment had occurred; and
- general damages for loss of amenity and interference with quiet enjoyment.

Irish Position

A simple Google search will reveal a number of publications related to the prevalence of IAPS in this country. We are not aware of any Irish specific publications published by the professional bodies here similar to those referred to in the decisions outlined above. However, Dublin City Council has
prepared a draft *Invasive Alien Species Action Plan for Dublin City 2016-2020* which is readily available.

**Regulation (EU) 1143/2014 on invasive alien species** (the IAS Regulation) entered into force on 1 January 2015. This sets out a set of measures to be taken in relation to IAPS across the European Union.

It does seem clear that the impact of and dangers associated with IAPS are easily discoverable from the wealth of publications available in the area.

**Issues for Consultants**

Consultants should not be fixed with any liability in respect of IAPS in relation to clients. Carefully worded letters of appointment should assist in excluding any liability. However there may be some scenarios where an issue with IAPS may be so glaringly obvious that a consultant has no option but to highlight it to the client. The issue as to who is responsible for dealing with the issue will be a separate issue but it is clear that specialist advice in relation to treatment, removal and disposal will need to be obtained by the owner.

**Outcome - The Future**

The decisions have been appealed to the UK Court of Appeal and the appeals are scheduled to be heard on 12 June 2018.

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