Pest Control – Containing Japanese Knotweed claims

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We are still seeing a high number of Japanese knotweed claims against surveyors; the product of much anxiety around JKW, which seems to have steadily increased since the turn of the millennium, reaching fever pitch over the past few years with photographs showing JKW growing through concrete and stories of destruction and loss of value to property.

In addition to the criminal and planning offences, we have seen a spate of claims in nuisance, claims against vendors for misrepresentation and professional negligence claims against surveyors. The main problem with JKW, which differentiates it from other invasive species, is that it is difficult to eradicate.

A number of bodies had provided some guidance on the issue of JKW, starting with the Environment Agency in 2006, which published a best practice paper entitled "Managing Japanese knotweed on Development Sites" and culminating with the RICS Information Paper published in 2012 (now out of date and soon to be replaced).

However it seems that the hysteria is now, finally, being countered. A number of studies have concluded that the empirical evidence does not support the panic associated with the plant. Leeds University carried out one such study in July 2018 that found no evidence to suggest that JKW causes significant damage to buildings, even when it is growing in close proximity to them. In fact, the study concluded that the plant caused "no more damage than other plant species that are not subject to such stringent lending policies" and concluded that the 7 meter rule was not a statistically robust tool for estimating likely rhizome extension.

Swansea University also carried out a study, assessing the efficacy of treatments. The media grossly over-sensationalised the findings as having concluded that JKW could not be eradicated. In fact, the paper concluded that complete eradication did not appear possible until after 3 years and that the use of glyphosate herbicide along with knowledge of the appropriate dosage, timing of application and adequate coverage were the most important factors for successful control of the plant.

On 16 May 2019, the House of Commons Science and Technology Committee ("Committee") published a report entitled 'Japanese knotweed and the built environment'. This noted that there was surprisingly little academic research on the physical effects of JKW on the built environment, notwithstanding the effect that its presence allegedly had on property values and recommended that any new guidance should adopt an evidence-based approach so as to reflect issues such as the size of the infestation, the distance from any building and the potential risk of damage, including soil conditions and possible pathways.

So what does all this tell us? That the physical effects of the plant and the near impossibility to remove it have been hugely exaggerated. However, this exaggeration has influenced public perception, which remains a key factor when considering how JKW might impact property values. As a result, claims are continuing to be brought against surveyors for failing to spot the plant while carrying out pre-purchase surveys and valuation reports.

One can only hope that when new, and arguably long overdue, guidance arrives it will go some way to change public perception and, in turn, reduce the impact that the mere mention of the plant currently seems to have on property values.

In the meantime, what can be done to minimise exposures when PI claims are brought against those accused of failing to report on the presence of JKW in pre-purchase surveys?

Breach of duty in such claims is assessed by reference to the parties' expert evidence as to whether, on the balance of probabilities, JKW would / should have been visible to a reasonably competent surveyor at the date of the original inspection. Scope of duty issues also play a part, dependent on the precise report provided.

However, we are increasingly seeing claims where the type of expert evidence expected is simply absent. This is particularly prevalent where the original inspection was carried out in winter, when the plant is entirely dormant and the garden may have been tidied up by the vendor, meaning that any dead canes and detritus are not present. Absent obvious evidence that the vendor has endeavoured to conceal the issue, through cutting back, concealing or treating the plant with weed killer, the problem goes undiscovered until the spring, when new shoots emerge and the panic sets in.

Naturally owners turn to JKW specialists in the first instance. All too often these specialists will not only confirm the presence of the plant but also opine as to its likely presence at the time of purchase. Some even go as far as recommending certain firms of solicitors who will assist in the pursuit of compensation from either the vendor or, more likely, the surveyor.

Whilst it is clearly unreasonable to expect a surveyor to detect something that has been deliberately concealed, if no

retained photographic evidence exists to prove that concealment, the surveyor will be on the back foot when seeking to rebut 'library' photographs of what the plant would have looked like in winter. This state of affairs is an entirely unsatisfactory one which merely serves to fuel the claim environment; in our view the Courts should be slow to accept 'hypothetical' evidence from protagonists who may even have a vested interest in the process.

As always, the key lies in proper training to aid identification, retained photographic evidence of the outside space, prudently caveated advice when reporting which is coupled with the option of obtaining a specialist JKW expert report to provide definitive clarification.

Quantification of alleged loss, particularly diminution, is another extremely contentious issue. In this respect, we have seen a wide and sometimes perplexing variety of approaches to the calculation of diminution, ranging from the overenthusiastic to the downright bizarre.

There has been some guidance by the Court and there is certainly a general consensus in respect of the appropriate method of assessing quantum, particularly amongst the more experienced expert Chartered Surveyors. What is clear is that the Court is unlikely to agree to a sweeping percentage reduction that cannot be justified by a detailed analysis of the various issues.

Rather, a more considered approach is required, that looks at the estimated cost of remediation, the impact on the use and enjoyment of the property during treatment (if any) and any 'residual' diminution in value that may result upon re-sale of the property at some future point (when the identified presence of JKW will have to be disclosed in the Property Information Form).

The so-called 'residual diminution in value' has been the subject of much debate. The Courts appear willing to accept that there is likely to be some stigma attached to the disclosure of the historical presence of JKW in the garden of a property, however attempts to argue that this is anything more than a modest percentage of the property's value are increasingly more likely to fail.

In the recent case of Davies, the Court took a dim view of the claimant's attempts to argue that a generalised 20% reduction to reflect diminution in value was appropriate. In the end, the claimant withdrew its argument and the Court opined, obiter as the case was dismissed on the basis that the surveyor had not acted in breach of duty (when not detecting the plant outside the property's boundary as it was concealed by a six foot fence), that it would have assessed 'residual' diminution in value at 3% of its unaffected market value plus a further 3% for potential "neighbour co-operation" costs (where the knotweed was on a neighbour's property).

We would even question that conclusion; in our view it is wholly inappropriate to have any standard approach and 3% appears to have been rather plucked out of the air rather than the product of any in-depth comparative analysis. It is also the case that such standardisation quickly becomes disproportionately excessive the greater the property's value.

It must also logically follow that as JKW becomes more widespread in the localities it is known to be present, the lesser impact it is likely to have in value terms. This is particularly the case as academic research serves to diminish the stigma which currently attaches to the plant. We think that absent hard, comparative-based evidence, the overriding consideration should, as the rather dated RICS guidance note itself recognises, be limited to the cost of an insurance-back treatment programme.

In respect of compensating for any interference with the enjoyment of property, this is commonly addressed by a small sum (a few hundred pounds) depending on the facts of the case. Excavation will, of course, cause some inconvenience, as will herbicidal treatment, but a commonly held misunderstanding in respect of the latter is that the garden will not be fit for use due to the chemicals applied. This is not true. The garden should be safe to use after 24 hours of application of the herbicide.

In summary, we welcome the transition to an evidence based approach to categorising risk due to the presence of JKW at a property and the fact that the Courts are applying an ever-increasing sensible analysis of likely diminution in value, which should both go some way to countering the excessive fear of a plant that other countries treat with far less hysteria.

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