Neutral Citation Number: [2018] EWCA Civ 1514

Case No: B2/2017/1470

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARDIFF COUNTY COURT
Mr Recorder Grubb
B20YX969, B34YJ849

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2018

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE SHARP
and
LORD JUSTICE LEGGATT

- -

Between :

NETWORK RAIL INFRASTRUCTURE LIMITED	**Appellant**
- and -	
Stephen WILLIAMS (1)	**Respondents**
Robin WAISTELL (2)	

- -
- -

David Hart QC and **Jessica Elliott** (instructed by **BLM**) for the **Appellant**
Tom Carter (instructed by **JMP Solicitors**) for the **First Respondent**
Stephen Tromans QC and **Nicola Atkins** (instructed by **Charles Lyndon**) for the **Second Respondent**

Hearing dates : 12 and 13 June 2018

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Approved Judgment

Sir Terence Etherton MR :

1. This is an appeal from the order dated 2 February 2017 of Mr Recorder Grubb, sitting in the Cardiff County Court, in which he found in favour of both respondents, Mr Stephen Williams and Mr Robin Waistell, in respect of their claims in private nuisance for the effects of Japanese knotweed on their properties which the appellant, Network Rail ("NR"), had allowed to grow on its adjacent land. This appeal raises a range of issues, most of which can be grouped under the overarching question of what kinds of damage give rise to an actionable claim in the tort of private nuisance.

Japanese Knotweed

2. In order properly to understand the effects of Japanese knotweed, it is necessary to set out some background as to its nature. The Royal Institution of Chartered Surveyors ("RICS") published an "information paper" in 2012 ("the RICS paper") on "Japanese Knotweed and Residential Property". This provides information on "The Japanese Knotweed problem", "The scale of the problem", "Effective treatment of Japanese Knotweed" and "An assessment framework for Japanese Knotweed". The contents of the RICS paper, so far as relevant, are not challenged by NR.

3. The RICS paper describes Japanese knotweed as a hardy bamboo-like perennial plant which grows quickly and strongly and spreads through its underground roots or rhizomes. Rhizomes are similar in their effects to roots, being underground stems which themselves produce fine, white, hair-like roots. Its thick clumps and stands can quickly grow to a height of over two metres (at para 2.1.1). The roots can extend up to seven metres horizontally and three metres vertically (at para 5.5.1). The most severe category of risk presented by knotweed is where the knotweed is within seven metres of a habitable space. The RICS paper states that knotweed can affect drains, patios, paths, drives, boundary walls, retaining walls, outbuildings, conservatories and gardens. It can block drains; disrupt drain runs; grow between slabs of concrete drives; disrupt brick paving; undermine garden walls; and overwhelm poorly built outbuildings and conservatories (at para 3.2.1)

4. The RICS paper observes that the Environmental Protection Act 1990 ("the EPA 1990") designates Japanese knotweed as 'controlled waste' that can only be removed and disposed of by licensed organisations (at para 3.2.2)

5. It states that, once it is established, "eradication requires steely determination". Treatment methods include excavation and disposal of knotweed affected soils, installation of a root barrier membrane to encapsulate the knotweed and chemical spraying, although spraying can take more than 3 years to be effective (see Section 4).

6. The Environment Agency have published a knotweed code of practice. This was originally published in 2006 and was amended in 2013 ("the EA code of practice"). This states that greenhouse trials have shown that as little as 0.7 grams of rhizome material (10mm in length) can produce a new, regenerated plant within 10 days. It states that rhizome material may remain dormant for long periods, possibly as long as 20 years (at Section 1.3).

7. The EA code of practice advises that heat treatment cannot be relied upon to kill the knotweed completely. It gives advice on burying on site soil containing Japanese

knotweed material and the burnt remains of Japanese knotweed. It says that in such circumstances it is advisable to apply a non-persistent herbicide to reduce the growth of infective material and that the material must (unless impossible) be buried at least 5m deep and be covered with a root barrier membrane before infilling it with inert filler or topsoil. It advises that there should be expert supervision when the membrane is installed, and that a manufacturer's guarantee of at least 50 years is obtained.

8. The EA code of practice says that, if Japanese knotweed cannot be killed by burying infested excavated soil on site, it must be disposed of at a suitably licensed or permitted disposal facility, but this should be regarded as a last resort. It says that disposing of soil contaminated with Japanese knotweed to landfill uses up valuable landfill capacity, involves large-scale haulage and can be very expensive.

9. The RICS paper states that the restrictions on the disposal of Japanese knotweed contaminated soil, as "controlled" waste under the EPA 1990, which may only be removed from the property by licensed organisations and taken to appropriately licensed waste facilities, can have serious implications for property owners who wish to develop their property. It observes that large amounts of contaminated soil are likely to result from activities such as adding an extension to the main building, redesigning the garden, and maintaining and repairing the property following a knotweed infestation (for example, re-laying paths and drains); and the need for licensed removal of such contaminated soil and any dead plant material will obviously add to the cost of the work.

10. The pernicious ramifications of the presence of Japanese knotweed have prompted a specific published policy of the Council of Mortgage Lenders ("the CML"), which states that the presence of Japanese knotweed might affect the valuation of a property and might be an issue for customers whose property is affected but who find it difficult to afford treatment costs. It states that valuers who inspect property for mortgage purposes are instructed to report to lenders where knotweed is present, that there are legal restrictions on Japanese knotweed and that lenders and customers are therefore likely to need professional help with remedial work.

11. The CML published policy notes that the pre-contract enquiries that conveyancers seek as part of the legal process ask whether Japanese knotweed is present. The Law Society Property Information Form TA6, which is required to be completed by the seller of a residential property, particularly where the parties' solicitors adopt the Law Society's Conveyancing Protocol, has a specific enquiry relating to Japanese knotweed. Enquiry 7.8 asks whether "the property is affected by Japanese knotweed" and, if it is, whether there is a Japanese knotweed management plan in place; it requests a copy of any such management plan to be supplied.

12. We were also shown policies by two lending institutions, Barclays and Nationwide, containing their lending criteria for properties. If Japanese knotweed is within seven metres of a habitable space, in accordance with the RICS paper, Barclays requires that: this is noted in the valuation report together with a valuation of the property; further investigation is undertaken by a registered Property Care Association or similarly qualified firm; and all recommended remedial works must be covered by an insurance backed guarantee which is for a minimum of 10 years, is property specific and is transferable to subsequent owners. Similarly, in such a situation, Nationwide requires

a specialist report in respect of eradicating the knotweed, including an insurance backed 5 year warranty against re-appearance of the plant.

The factual background

13. Mr Williams and Mr Waistell (together "the claimants") are the respective freehold owners of two adjoining semi-detached bungalows located on Llwydarth Road in Maesteg, South Wales. Mr Williams owns bungalow No 1 known as "St Anne's" which he purchased in 2003. Mr Waistell owns bungalow No 2, known as "St Anthony's" which he purchased in 2012.

14. NR owns the land immediately behind the claimants' properties comprising an access path bordered by a post and wire fence leading to an embankment which drops down to an active train line. The rear walls of each of the claimants' properties immediately abut the access path owned by NR.

15. On the embankment is a large stand of Japanese knotweed, which all parties accept has been present on NR's land at this location for at least 50 years.

The proceedings

16. The claimants issued claim forms on 7 May 2015 and 23 February 2015 respectively, in which they brought claims in private nuisance on the basis that Japanese knotweed growing on NR's land had caused damage to their properties. Each sought an injunction to require NR to treat and eliminate the knotweed on its land and damages under various heads of loss. By way of defence, NR alleged that both claimants had failed to establish that the necessary elements of a cause of action in private nuisance were made out on the facts.

17. The proceedings were tried before the Recorder in the Cardiff County Court for three days between 28 and 30 November 2016. The Recorder handed down a substantial, detailed and careful judgment on 2 February 2017.

Judgment under appeal

Private nuisance

18. The Recorder in his judgment noted (at [45]) that the claimants' claims in private nuisance were presented in two alternative ways.

19. First, the Recorder addressed the claimants' "Encroachment Claim", in which they argued that NR was liable as the occupier of the land where Japanese knotweed was present for its encroachment upon their own land without them needing to prove any damage to their properties. He rejected (at [45] and [55]-[84]) their argument that encroachment, in and of itself, amounts to an actionable nuisance. In particular, the Recorder noted (at [55] and [61]) that the claimants' argument went against the grain of legal history, given that private nuisance is a common law tort that originated as an "action on the case", the gist of any such action being "damage".

20. The Recorder then turned (at [86]-[95]) to the factual issues of whether there had been an encroachment and, if so, whether damage had resulted. He concluded that there was clear evidence that Japanese knotweed had encroached on to Mr Waistell's land from

the access path, in the space below the rendering and up to the foundations; and, although there was no direct evidence, he found that rhizomes had encroached further under Mr Waistell's property. Similarly, although there was no direct evidence of encroachment in the case of Mr Williams, the Recorder found that there was no material difference between the arrangement behind Mr Williams' property in relation to the Japanese knotweed growing on NR's land. Therefore, on the balance of probabilities, the Recorder found that the rhizomes had extended below Mr Williams' property in the same way as on Mr Waistell's property. He also found that, on those findings, the encroachments were not trivial or *de minimis* interferences with the claimants' properties.

21. The Recorder found, however, (at [96]-[99]) that no actual physical damage had been caused by the encroachment and so the encroachment did not give rise to a claim in private nuisance. The Recorder noted that neither side's expert had identified any physical damage to the properties or any change in the soil structure. He also held that the fact that the presence of the Japanese knotweed had resulted in a diminution in the value of the claimants' properties did not constitute damage. Although Dr Beckett, the expert witness for the claimants, considered that there was a risk of damage to the properties, the Recorder did not understand counsel for either claimant to put their case on the basis of risk of damage and so did not consider the claims on that basis.

22. The Recorder then addressed the claimants' "Quiet Enjoyment/Loss of Amenity Claim". This was the argument that the presence of Japanese knotweed on NR's land in close proximity to the boundary of the claimants' respective properties was a sufficiently serious interference with the quiet enjoyment or amenity value of their properties as to constitute an actionable nuisance – that it was an unreasonable interference with their enjoyment of their respective properties as its presence affected their ability to sell their properties at a proper market value. After noting (at [101]-[102]) a number of conditions that the claimants had to satisfy under this head, the Recorder held (at [109] and [121]) that the claimants could in principle rely upon this head of private nuisance.

23. The Recorder considered (at [103]-[106]) that, although this head of liability will usually concern a more immediate impact upon the enjoyment of the property, the tort is a tort against land and the gist of the action is damage which is the objective loss of amenity in the property. The Recorder held that the amenity value of a property can, in principle, include the ability to dispose of it at a proper value where the claimed nuisance produces a blight upon the property that leaves the property owner in the position of the uncertainty that his or her property may, no longer, be the valuable asset and home that it was thought to be.

24. The Recorder went on to hold (at [107]) that, objectively viewed, a landowner in the claimants' position would suffer a loss of enjoyment. He considered that the diminution in value of the properties, combined with the fact that any owner would have to live with the concerns and adverse consequences of a devalued property, is properly characterised as an aspect of the amenity of the land protected by the tort of private nuisance.

25. Given that the nature of the loss is one of the key issues in this appeal, it is helpful to quote in full how the Recorder characterised it:

> "108. Ms Creer [counsel for NR] submitted that the only reason that there is a diminution in the value of each of the claimants' properties is because of the position taken by mortgage lenders which, since around 2012, have limited or refused to provide mortgages where [Japanese knotweed] is within seven metres of the property's boundary. The difficulty with this argument is, as both the claimants' and defendant's valuation experts recognise, even when treated there is a diminution in the value of the property. In those circumstances, even though with a treatment-backed guarantee, a loan may be obtained, there remains a residual diminution in value. The only rational explanation of that is that a 'stigma' continues to affect the property's amenity value. The position is no different, in my judgement, from a case where a building has been damaged by a nuisance but, despite its repair, it nevertheless cannot be sold for the same price as would have been obtained if it had never been damaged. There may be many situations in which the amenity value of a property remains affected simply because others do not value the property as highly as might otherwise be anticipated. That, in my judgment, is not a basis for rejecting the claimants' case under this head of nuisance. In any event, it pays no regard to the more intangible effect on the amenity value due to a landowner's 'fix' of having to live on a property that is blighted by the presence of [Japanese knotweed] on adjoining land".

26. The Recorder found, therefore, that, subject to breach of duty and causation, the claimants had a cause of action for private nuisance.

Breach of duty

27. The Recorder noted (at [123]) that NR's duty was predicated upon having actual or constructive knowledge of both the presence of Japanese knotweed on its land behind the claimants' properties, together with having actual or constructive knowledge that Japanese knotweed posed a reasonably foreseeable risk of causing damage by encroachment or an unlawful interference with the claimants' quiet enjoyment of their properties, namely affecting their amenity value that gave rise to their claims. He noted (at [122]-[125]) that it was common ground between the parties that, once the required knowledge of Japanese knotweed was established, NR had a duty to do all that was reasonable in the circumstances to prevent or minimise the interference with the adjoining landowners' use and enjoyment of their properties.

28. The Recorder found (at [127] and [152]-[154]) that by 2008/2009 NR had constructive knowledge of the presence of Japanese knotweed on its land behind both claimants' properties but that actual knowledge only arose in 2013 when the claimants first complained. The Recorder found that NR had constructive knowledge of the risk of damage and loss of amenity to adjoining properties caused by the close proximity of Japanese knotweed from around the time of the publication of the RICS paper in 2012, approximately one year before the claimants first complained to NR about the knotweed.

29. The Recorder found (at [158]-[164]) that NR's failure to treat the knotweed between 2012 and 2013, prior to the claimants' complaints, so as reasonably to prevent interference with the claimants' quiet enjoyment, given NR's constructive knowledge and the foreseeable risk of unlawful interference with the claimants' enjoyment of their property, was not commensurate with NR's duty as a landowner.

30. The Recorder continued (at [165]-[192]) that the treatment that occurred following the claimants' complaints in 2013 was also unreasonable in the circumstances. He noted that a treatment plan is required to deal effectively with Japanese knotweed which, in relation to herbicidal spraying, requires spraying over a number of years to be effective. The Recorder noted a treatment carried out in October 2013, a failure to treat in 2014, and further treatments in 2015 and 2016 and concluded that on no reasonable basis could they be considered adequate or reasonable. The Recorder concluded, on the balance of probabilities, that NR had since 2012 failed to carry out its obligation as a reasonable landowner to eliminate and prevent interference with the quiet enjoyment of both claimants of their properties.

31. The Recorder went on (at [193]-[197]) to reject NR's argument that, because Japanese knotweed is widespread in the Maesteg area, where it is part of the character of the locality and can grow with impunity and affect residential properties nearby, the claimants simply had to tolerate it.

Causation

32. The Recorder found (at [198]-[204]) that NR's breach of duty had caused both a continuing nuisance and damage. He held that the unlawful interference with the claimants' quiet enjoyment of their properties, by virtue of the presence of the knotweed and the impact upon the use and enjoyment of the properties because they were reduced in market value, was caused by the presence of Japanese knotweed on NR's land which amounted to a continuing nuisance. He found that, even if one characterised the loss as flowing from the "stigma" of property containing Japanese knotweed in close proximity to neighbouring property, the fact remained that objectively the amenity value of the claimants' respective properties was affected.

Remedies

33. The Recorder concluded (at [226]-[230]) that it was not appropriate to grant a mandatory injunction compelling NR to abate the nuisance and adequately and effectively treat the knotweed, as such an injunction would be vague and uncertain.

34. The Recorder went on (at [231]-[242]) to grant damages under the following heads: damages of £4,320 to each respondent to cover a treatment package for the knotweed together with an insurance backed guarantee; damages of £300 to Mr Waistell for a survey he commissioned of Japanese knotweed; and general damages of £350 per year over a four year period between 2012 and 2016 (totalling £1,400) to Mr Williams for loss of amenity and interference with quiet enjoyment based on the stature of the Japanese knotweed stand behind his property, the fact that the Japanese knotweed stands sometimes knocked against his windows, the blighted nature of his property and the difficulties as to the saleability of the property.

35. The Recorder then addressed damages for the diminution in value of the claimants' properties arising from interference with their quiet enjoyment of their land. The Recorder held that, given that the claimants were entitled to recover damages to treat the knotweed in order to remove the nuisance, the appropriate diminution in value was the residual diminution in value once the treatment was completed. The Recorder held (at [243]-[259]) that Mr Williams was entitled to £10,500 and Mr Waistell was entitled to £10,000 for that reason.

Grounds of appeal

36. NR was granted permission to appeal on two grounds by order of Lewis J dated 3 March 2017. The first ground of appeal ("Appeal Ground (1)") challenges the Recorder's conclusion that, where a residential homeowner suffers a diminution in the value of their property by virtue of the presence of Japanese knotweed, the pure economic loss which is suffered constitutes an actionable private nuisance on the basis that it interferes with the quiet enjoyment of their property. If NR is unsuccessful in relation to that ground of appeal, NR contends ("Appeal Ground (2)") that the Recorder was in any case wrong to find that there was a causal link between NR's breach of duty and the residual diminution in value of the claimants' properties.

37. Each of the claimants has served a respondent's notice, seeking to uphold the judgment below for the following additional reasons: (1) encroachment without physical damage can give rise to an actionable claim in private nuisance; and (2) the presence of Japanese knotweed roots and rhizomes on the claimants' properties constituted damage in any event.

General principles

38. In recent times a number of decisions at the highest level have introduced greater coherence and consistency to the legal principles governing the cause of action for private nuisance. The consequence is that it is neither necessary nor profitable to focus on historic cases of nuisance and the early development of the cause of action. In particular, in view of the clarification of the principles in more modern times, the resolution of the present appeal will not be found simply in an examination of the old forms of action, including the historic distinction between the form of action of trespass, on the one hand, and the action on the case, on the other hand, or in considering the distinction between the three ways in which it was formerly recognised that a person might suffer interference with their rights over land: *disseisina*, *nocumentum* and *transgressio*. Some discussion of such matters may be found in F.H. Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480-490, approved by Lord Goff in *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264, 297-298; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999); M. Wonnacott, *Possession of Land* (CUP 2006); A.W.B. Simpson, *A History of the Land Law* (2nd ed, OUP 1961); P.H. Winfield 'Nuisance as a Tort', (1931) 4(2) CLJ 189-206; as well as the standard modern text books on Torts.

39. I would summarise as follows the present principles of the cause of action of nuisance.

40. First, a private nuisance is a violation of real property rights. That means that it involves either an interference with the legal rights of an owner of land, including a legal interest in land such as an easement and a profit à prendre, or interference with the amenity of

the land, that is to say the right to use and enjoy it, which is an inherent facet of a right of exclusive possession: *Hunter v Canary Wharf Ltd* [1997] AC 655, 687G—688E (Lord Goff citing F.H. Newark, 'The Boundaries of nuisance' (1949) 65 LQR 480), 696B (Lord Lloyd), 706B, 707C (Lord Hoffmann) and 723D-E (Lord Hope). It has been described as a property tort: D. Nolan, ''A Tort Against Land': Private Nuisance as a Property Tort' in D. Nolan and A. Robertson, *Rights and Private Law* (Hart Publishing 2012)**.**

41. Secondly, although nuisance is sometimes broken down into different categories, these are merely examples of a violation of property rights as I have described them. In *Hunter* at 695C, for example, Lord Lloyd said that nuisances are of three kinds: (1) nuisance by encroachment on a neighbour's land, (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land. The difficulty with any rigid categorisation is that it may not easily accommodate possible examples of nuisance in new social conditions or may undermine a proper analysis of factual situations which have aspects of more than one category but do not fall squarely within any one category, having regard to existing case law.

42. Thirdly, the frequently stated proposition that damage is always an essential requirement of the cause of action for nuisance because nuisance is derived from the old form of action on the case must be treated with considerable caution. As to the proposition, see, for example, *Lemmon v Webb* [1894] 3 Ch 1, 11, 21, 24; *Davey v Harrow Corporation* [1958] 1 QB 60, 71; *Hunter* at 695D; and *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, [15] and [33]. It is clear both that this proposition is not entirely correct and also that the concept of damage in this context is a highly elastic one. In particular, interference with an easement or a profit à prendre is actionable as a nuisance without the need to prove specific damage: *Harrop v Hurst* (1868-69) LR 4 Ex 43, 46-47, 48; *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, 349-350. Furthermore, in the case of an artificial object protruding into a claimant's property from the neighbouring land, Mr David Hart QC, for NR, accepted that the claimant has a cause of action in nuisance without proof of damage. Although McNair J said in *Kelsen v Imperial Tobacco Co* [1957] 2 QB 334 that an advertising sign erected by the defendant which projected into the airspace above the plaintiff's shop was a trespass and was not capable of constituting a nuisance, he so held without any reference to the previous authority to the contrary in *Baten's Case* (1610) 9 Co Rep 53b and *Fay v Prentice* (1845) 1 CB 828 and so *Kelsen* must be considered *per incuriam* in relation to that issue. So far as concerns such nuisance from encroachment by an artificial object, the better view may actually be that damage is formally required but damage is always presumed: *Baten's Case*; *Fay v Prentice* at 841. That, in itself, shows both the artificiality and elasticity of any requirement of damage for the purpose of establishing nuisance.

43. It is also well established that, in the case of nuisance through interference with the amenity of the claimant's land, physical damage is not necessary to complete the cause of action. To paraphrase Lord Lloyd's observations in *Hunter* at 696C, in relation to his third category, loss of amenity, such as results from noise, smoke, smell or dust or other emanations, may not cause any diminution in the market value of the land, such as may directly follow from, and reflect, loss caused by tangible physical damage to the land, but damages may nevertheless be awarded for loss of the land's intangible

amenity value. Reflecting the fact that the cause of action is one for interference with property rights, loss of amenity value and the right to claim damages for it does not turn on any exceptional sensitivity or insensitivity of the person entitled to exclusive possession: *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2013] QB 455 at [36]. What is relevant is the objective effect on the amenity value of the land itself, and it is that effect which satisfies any requirement there may be to show damage. Provided, by reference to all the circumstances of the case and the character of the locality, and according to the objective standards of the average person, the interference with amenity is sufficiently serious, there will be an actionable private nuisance.

44. Fourthly, nuisance may be caused by inaction or omission as well as by some positive activity. An occupier will be liable for continuing a nuisance created by another person if, with knowledge or presumed knowledge of its existence, he or she fails to take reasonable means to bring it to an end when they had ample time to do so: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 894. An occupier will also be liable if he or she fails to act with reasonable prudence to remove a hazard, whether natural or man-made, on their land of which he or she was aware and where it was foreseeable that it would risk damaging their neighbour's land and goes on to do so*: Goldman v Hargrave* [1967] 1 AC 645; *Leakey v National Trust For Places of Historic Interest or Natural Beauty* [1980] QB 485.

45. Finally, the broad unifying principle in this area of the law is reasonableness between neighbours (real or figurative): *Delaware Mansions* at [29] and [34].

Appeal Ground (1)

46. The Recorder's conclusion that the presence of knotweed on NR's land within seven metres of the claimants' properties was an actionable nuisance simply because it diminished the market value of the claimants' respective properties, because of lender caution in such situations, was wrong in principle.

47. The Recorder's analysis was that the gist of nuisance is the objective loss of amenity in the affected property; the amenity value of a property can include the ability to dispose of it at a proper value and that value is affected where the claimed nuisance produces a blight upon the property that leaves the owner with uncertainty that the property may no longer be the valuable asset that it was thought to be; in the present case the claimants' properties have been devalued by the presence of Japanese knotweed on NR's land and, even if treated, their saleable values are below what would otherwise have been their market value; and, accordingly, the presence of Japanese knotweed on NR's land is actionable by the claimants as a private nuisance because the presence of the knotweed has unlawfully interfered with the claimants' "quiet enjoyment" or "use and enjoyment" of their respective properties.

48. The purpose of the tort of nuisance is not to protect the value of property as an investment or a financial asset. Its purpose is to protect the owner of land (or a person entitled to exclusive possession) in their use and enjoyment of the land as such as a facet of the right of ownership or right to exclusive possession. The decision of the Recorder in the present case extends the tort of nuisance to a claim for pure economic loss. Counsel for the claimants did not identify any case in which a similar decision was reached or, more generally, where the amenity of a property has been held, for the purposes of actionable private nuisance, to include the right to realise or otherwise

deploy the value of the property in the financial interests of the owner. Contrary to the view of the Recorder, that would not be an incremental development of the common law by way of analogy but a radical reformulation of the purpose and scope of the tort.

49. In his submissions in support of the appeal, Mr Hart referred us to *Rust v Victoria Graving Dock Company* (1887) 36 Ch D 113, *Blue Circle Industries Plc v Ministry of Defence* [1999] Ch 289 and *West Leigh Colliery Company Limited v Tunnicliffe & Hampson Limited* [1908] AC 27. Those cases turned on their own particular facts, some concerning the non-recoverability of damages for "stigma" attaching to properties which have previously suffered damage and in respect of which it is feared that damage of the same kind has a significant probability of recurring in the future. None of them is directly in point on the first ground of appeal and I do not consider it is necessary or helpful to refer to them in that context. It is sufficient to address, and allow, this ground of appeal of NR on the basis of the well established general principles of nuisance which I have already outlined.

50. Reference was made by the Recorder in his judgment and by Mr Stephen Tromans QC, for Mr Waistell, to *Thompson-Schwab v Costaki* [1956] 1 WLR 335 and *Laws v Florinplace Ltd* [1981] 1 All ER 659. In *Thompson-Schwab* the Court of Appeal upheld an interlocutory injunction restraining the defendants from using premises for the purpose of prostitution. The plaintiffs, who lived nearby, said that the activities of the defendants seriously depreciated the value of their respective houses as residences and seriously interfered with the comfortable and convenient enjoyment of their houses as residences. The Court of Appeal upheld the interlocutory injunction on the ground that it was sufficiently arguable that the conduct of the defendants was actionable as an interference with the plaintiffs' comfortable and convenient enjoyment of their land. This case is of very limited assistance as it is only a decision on interlocutory relief and it was not necessary to take a final view of the law or the facts. Insofar, however, as the case is of any assistance, it is against, rather than for, the claimants. The decision of the Court of Appeal was not based at all on, and did not mention, the allegation that the conduct of the defendants had depreciated the value of the plaintiffs' land. It was based on the entirely conventional principle that a person's conduct becomes a nuisance when (according to Lord Evershed MR at 338) it unduly interferes with his neighbour "in the comfortable and convenient enjoyment of his land" and, on the alleged facts, that (as Lord Evershed said at 339) "the activities being conducted [by the defendants] are not only open, but they are notorious, and such as force themselves upon the sense of sight at least of [one of the plaintiffs]" and "prima facie … constitute not a mere hurt of his sensibilities as a fastidious man, but so as to constitute a sensible interference with the comfortable and convenient enjoyment of his residence, where live with him his wife, his son and his servants". Whether the facts actually gave rise in law to an actionable nuisance would only be determined at a future trial (of which there is no report).

51. *Laws* was another case about the grant of an interlocutory injunction to restrain sex-related activity in the area of the claimants' properties. In that case a large shop sign was erected advertising a "Sex Centre and Cinema Club", the premises of which opened a few days later. Signs were put in the shop window, one of which advertised "Uncensored adult videos for sale or available" and others of which gave a warning that the premises showed explicit sex acts. The judge granted an interlocutory injunction restraining, until trial, the business of the shop, the shop signs and other forms of

advertisement on the ground that there was a triable issue whether the existence of a business of the kind in question, conducted in the way in which it was conducted, so that the nature of the business was evident to the nearby residents and their visitors, was a nuisance. The judge relied upon the decision of the Court of Appeal in *Thompson-Schwab*. As in that case, the basis for the grant of the interlocutory relief in *Laws* was that it was sufficiently arguable that the knowledge by occupants of the plaintiffs' properties of the use of the defendant's premises was a material interference with the comfortable enjoyment of the plaintiffs' properties. Although it appears that the plaintiffs adduced evidence suggesting that property values might suffer adversely if the defendants' activities were allowed to continue, there was no reference in the judgment to that matter as a ground for the grant of the interlocutory injunction. I cannot see that *Law*s is of any assistance to the claimants in the present case.

The Claimants' Grounds (1) and (2)

52. It is convenient to consider together these grounds for upholding the Recorder's decision for reasons different to those given by the Recorder.

53. The Recorder found that Japanese knotweed rhizomes have encroached on the land of each of the claimants and under their respective bungalows. He rejected the submission of NR's counsel that the encroachment was a trivial or *de minimis* interference with their respective properties. He also rejected, however, the claimants' claim in nuisance based on that encroachment for the following reasons (at [96]-[99]):

> "96. As I have already indicated, in order to succeed under this head of private nuisance, the claimants must each establish that they have suffered damage to their property. Neither expert identifies any damage to the property of [the claimants], although Dr Beckett [expert for the claimants] considered that there is a risk of damage to the properties. I did not understand counsel for either claimant to put a case on the basis of risk of damage. Both Mr Carter and Ms Atkins' [counsel for the claimants] submissions were firmly rooted in liability being based upon there being no need to prove damage in encroachment cases but, if damage was a requirement, each of the claimants had suffered <u>actual</u> physical damage to their property.
>
> 97. It is, however, common ground between the parties that the presence of the [Japanese knotweed] has resulted in a diminution in the value of the claimants' properties (although the quantification is not accepted). The latter, however, does not constitute "damage" for the purposes of these claims. There must be <u>physical</u> damage to the property. As I have already said, neither expert identified any damage to the foundations or bungalows. There is no evidence that the roots have affected the soil below the surface of either claimant's property. There is, for example, no evidence as there was in the *Delaware Mansions* case where the tree roots dehydrated the soil affecting its load-bearing qualities. There is simply no evidence of that in these claims.

> 98. There is no evidence, therefore, of any change in the soil structure (other than the mere presence of the rhizomes) which could amount to the alteration or adverse changes of the kind present in the *Delaware Mansions* case and also as contemplated in the *Blue Circle Industries* case or by Pill LJ in *Hunter* when that case was in the Court of Appeal.
>
> 99. For these reasons, therefore, I find that neither [of the claimants] have established that, even though the [Japanese Knotweed] rhizomes have encroached upon their respective properties, that as a consequence they have suffered damage to their land so as to give rise to a claim in private nuisance under this head of liability."

54. I do not agree with the analysis and decision of the Recorder rejecting the claim in nuisance based on the spread of the knotweed rhizomes on to the claimants' respective properties from NR's land.

55. Japanese knotweed was rightly described by the Recorder (at [5]) as a pernicious weed. It does not only carry the risk of future physical damage to buildings, structures and installations on the land. Its presence, and indeed the mere presence of its rhizomes, imposes an immediate burden on the owner of the land in terms of an increased difficulty in the ability to develop, and in the cost of developing, the land, should the owner wish to do so. As the RICS paper observed, any improvement or alteration of the property requiring the removal of contaminated soil would require disposal of the soil either on site or, more likely, off site by special, and probably expensive, procedures. For all those reasons, Japanese knotweed and its rhizomes can fairly be described, in the sense of the decided cases, as a "natural hazard". They affect the owner's ability fully to use and enjoy the land. They are a classic example of an interference with the amenity value of the land.

56. The Recorder found that: (1) NR had actual knowledge of the presence of Japanese knotweed on its land behind the claimants' respective bungalows in 2013; (2) NR was, or ought to have been, aware of the risk of damage and loss of amenity to adjoining properties caused by the close proximity of knotweed no later than some time in 2012 with the publication of the EA code of practice and the RICS paper; and (3) NR failed reasonably to prevent the interference with the claimants' enjoyment of their properties. That is sufficient, on the well-established principles I have outlined earlier, to give rise to a cause of action in nuisance: *Goldman v Hargrave*; *Leakey v National Trust For Places of Historic Interest or Natural Beauty*. If**,** and insofar as, damage is required to complete that cause of action, it is constituted by the diminished ability of the claimants to use and enjoy the amenity of their properties.

57. I cannot see why that analysis should be thought to be precluded by, or inconsistent with, any authority, including, in particular, the decisions in *Hunter*, *Blue Circle Industries* or *Delaware Mansions*, which were specifically mentioned by the Recorder in this context.

58. *Hunter* involved two sets of proceedings arising out of the Canary Wharf development. In the first action, the plaintiffs claimed damages against the defendants for negligence and nuisance in respect of interference with the reception of television broadcasts in

their homes allegedly caused by the presence of a building 250 metres high and over 50 metres square erected by the defendants. In the second action, the plaintiffs claimed damages for negligence and nuisance in respect of deposits of dust on their properties caused by the construction of a link road.

59. On a trial of preliminary issues, the House of Lords upheld the dismissal by the Court of Appeal of the plaintiffs' first action on the ground that an owner is entitled to build on his land as he wishes, subject to planning control, and is not generally liable, in the absence of an easement or agreement, if his building interferes with his neighbours' enjoyment of their land. Since the interference with the plaintiffs' reception of television signals was simply the result of the presence of the building on the defendants' land, no action in private nuisance lay in respect of such interference.

60. In the Court of Appeal in the second action, Pill LJ, with whose judgment the other members of the Court agreed, said (at 676) that the deposit of dust was capable of giving rise to an action in negligence if there was proof of physical damage. He said that dust is an inevitable incident of urban life but that the claim arose on the assumption that the defendants had caused excessive deposits. He gave as an example that if, in ordinary use, excessive deposit is trodden into the fabric of a carpet by householders in such a way as to lessen the value of the fabric, an action would lie. Similarly, he explained, if it follows from the effects of excessive dust on the fabric that professional cleaning of the fabric is reasonably required, the cost is actionable and if the fabric is diminished by the cleaning that too would constitute damage. He said that excessive dust might also be shown to have damaged electrical apparatus. He said that the damage is in the physical change which renders the article less useful or less valuable. In short, the Court of Appeal held that: (1) the dust was actionable when it caused damage to the claimants' carpets; and (2) it was only at that point that it constituted a material interference with the claimants' enjoyment of the amenities of their properties. I assume that it is to that passage in the judgment of Pill LJ to which the Recorder was referring at [98] of his decision. There was no appeal to the House of Lords from that part of the judgment of Pill LJ.

61. In *Blue Circle Industries* the Court of Appeal dismissed the appeal of the defendants from the order of the trial judge awarding the plaintiffs damages for the breach of duty imposed by section 7(1)(a) of the Nuclear Installations Act 1965 on the licensee of a nuclear site to ensure that no occurrence involving nuclear matter caused damage to any property of any person other than the licensee. The facts were that land owned by the plaintiffs, which joined the land of the Atomic Weapons Establishment ("the AWE"), was contaminated, following a storm, by radioactive material containing plutonium from an overflowing pond on the AWE's land. It was contended by the defendants that the plaintiffs' land had not been physically damaged by the radioactive properties of the plutonium. They said that it was physically the same as before, albeit it had been mixed with a very small amount of plutonium. Aldous LJ, with whom the other members of the Court of Appeal agreed on this point, said (at 300) that damage within the Act occurred if there was some alteration in the physical characteristics of the land caused by radioactive properties which rendered it less useful or less valuable. He said that the addition of plutonium to the topsoil rendered the characteristics of the marshland different and, further, that the result of the addition was that the marshland became less useful and less valuable. The plaintiffs' land was less valuable because the estate was unsaleable until the contaminated soil had been removed and less useful

because the level of contamination was such that the topsoil of the marsh had to be excavated and removed from the site because the level of radioactivity exceeded that which was allowed by the regulations. In short, the cause of action arose because the amenity or utility of the plaintiffs' land was impaired by contamination from the plutonium.

62. The conclusions reached in both of those cases are therefore entirely consistent with my analysis of the facts of the present case.

63. Mr Hart also referred to *Jan de Nul (UK) Ltd v AXA Royale Belge SA* [2002] EWCA Civ 209, [2002] 1 All ER (Comm) 767, which concerned claims arising out of the claimant's failure to take reasonable care in carrying out certain dredging operations in an estuary to ensure that the operations did not result in the deposit of excessive amounts of silt causing interference with the land of adjacent owners, including the nature reserve of the Hampshire Wildlife Trust ("the HWT"). Mr Hart drew our attention to the statements in the judgment of the Court of Appeal, delivered by Schiemann LJ (at [78]-[80]), that the claimant was liable in nuisance because HWT had a right to be left to use its nature reserve for breeding purposes without having to worry whether the silt, which the claimant by its negligence had put there, would interfere with their breeding programme; that worry could only be avoided either by carrying out a study, as was in fact done, and finding out that there was no need to do anything, or by dredging out the silt; the property was physically significantly affected in as much as large amounts of salt were deposited on it; and HWT suffered further damage by reason of the claimant's activities in as much as HWT paid for the investigation.

64. Again, I cannot see anything in those statements which is inconsistent with a finding of liability in the present case on the basis of interference with the utility and amenity of the claimants' properties from the presence of the Japanese knotweed rhizomes. On the contrary, consistently with the elastic concept of damage in this area of the law and with a finding of liability in the present case, Schiemann LJ said (at [77]):

> "The underlying policy of the law is to protect a claimant against what Markesinis and Deakin in their book on *Tort Law* (4th ed, 1999) describe at p.422 as 'unreasonable interference with the claimant's interest.' Phrases such as 'physical damage to land' are portmanteau phrases which embrace the concept of land being affected and this resulting in damage to the economic interests of another".

65. Reference was also made by both sides in the present case to the *Cambridge Water Co* case. In that case a chlorinated solvent used by the defendant leather manufacturers seeped into the ground below the premises and was conveyed in percolating water in the direction of the plaintiff's borehole, the water from which was used for providing a public water supply. The solvent contaminated the water in the borehole, which could not lawfully be supplied as drinking water as it did not comply with regulations issued pursuant to an EEC Directive. It appears that the regulations came into force after the relevant spillage on the defendant's land but before the contamination of the water in the borehole. The House of Lords held that there was no actionable nuisance because the plaintiffs were not able to establish that pollution of the water supply by the solvent was foreseeable. Lord Goff said *obiter* (at 295) that there could only be an actionable nuisance by virtue of the spillage of solvent on the defendant's land when such spillage

caused damage to the plaintiff – i.e. when water available at its borehole was rendered unsaleable by reason of breach of the regulations. At that point the utility of the plaintiff's land for carrying on its business was impaired.

66. That is entirely consistent with a finding that a nuisance was committed in the present case when the encroachment of the Japanese knotweed rhizomes diminished the utility and amenity of the claimants' respective properties.

67. Mr Hart placed heavy reliance on cases concerning encroachment by the branches or roots of trees, which stated or assumed the need to show physical damage to the claimant's property. There are statements to that effect in the judgments of the Court of Appeal in *Lemmon v Webb* at 11-12, 21 and 24. It is to be noted, however, that none of those statements were necessary for the decision in that case that, pursuant to his right of abatement, the defendant was entitled to cut off boughs of the plaintiff's land that overhung the defendant's property.

68. Mr Hart placed particular reliance on *Delaware Mansions*, which concerned encroachment of tree roots and which was one of the cases expressly mentioned by the Recorder in support of his ruling against the claimants on this part of their case. In that case the House of Lords, upholding the decision of the Court of Appeal, held that the claimant, which was owner of a group of terraced mansion blocks in which the individual flats were sold on long leases, was entitled to damages for the encroachment by roots of trees owned by the defendant highway authority. The encroachment caused cracking in the building. One of the issues was when actionable damage from the encroachment first arose. The leading speech was given by Lord Cooke, with whom the other members of the appellate committee agreed. Lord Cooke assumed that the claimant needed to prove damage and held (at [33]) that, even before the cracking of the superstructure, encroachment of the roots had caused continuing damage to the land by dehydrating the soil and inhibiting rehydration. He said that the damage consisting of "the impairment of the load-bearing qualities of residential land" was itself a nuisance.

69. In that case, however, physical damage to the buildings had actually occurred. It was not necessary to analyse the situation, and nor was the situation in fact analysed, on the basis of loss of amenity value prior to the physical damage of the buildings. Furthermore, unlike Japanese knotweed and its rhizomes, the branches and roots of a tree are not in themselves a hazard.

70. The roots of a tree may become a hazard when it is clear that they will damage a building or structure; and in such a case an injunction may, depending on the exact circumstances, be obtained. In an appropriate case, the owner of the affected land may obtain a mandatory *quia timet* injunction or damages in lieu: *Leeds Industrial Co-Operative Society Ltd v Slack* [1924] AC 851. No doubt such an award of damages could be accompanied by an order authorising the claimant to remove the nuisance by carrying out work on the defendant's land or by carrying out work on the claimant's own land or by both, as in the present case.

71. It is usually said that there must be proof of imminent physical injury or harm for a *quia timet* injunction to be granted: *Fletcher v Bealey* (1885) 28 Ch D 688, 698; *Birmingham Development Company Ltd v Tyler* [2008] EWCA Civ 859, [2008] BLR 445 at [45]; *Islington London Borough Council v Elliott* [2012] EWCA Civ 57, [2012] 1 WLR.

2375 at [29]. It is possible, however, that that is too prescriptive and that what matters is the probability and likely gravity of damage rather than simply its imminence: *Hooper v Rogers* [1973] 1 Ch 43 at 30; *Islington LBC v Elliott* at [31], quoting Chadwick LJ in *Lloyd v Symonds* [1998] EWCA Civ 511, and at [33]-[34], [36]; D. Nolan, 'Preventive Damages' (2016) 132 LQR 68-95.

72. Although the point has not been considered before in the cases I see no reason why, in appropriate circumstances, as in the present case, a claimant should not be able to obtain a final mandatory injunction where the amenity value of the land is diminished by the presence of roots even though there has not yet been any physical damage.

73. In short, there is no reason why the legal position concerning nuisance caused by the encroachment of the branches or roots of trees should undermine the right of the claimants in the present case to claim damages for nuisance by reason of the encroachment of Japanese knotweed and its rhizomes from NR's land.

74. During the course of his oral submissions Mr Tromans referred to *Dryden v Johnson Matthey Plc* [2018] UKSC 18. In that case the Supreme Court held that the claimants, who had developed platinum salt sensitisation due to the defendant employer's breach of health and safety regulations and common law duty, had a cause of action for personal injury. Platinum salt sensitisation is, in itself, an asymptomatic condition but further exposure to chlorinated platinum salts is likely to cause someone with platinum salt sensitisation to develop an allergic reaction involving physical symptoms such as running eyes or nose, skin irritation, and bronchial problems. Lady Black, with whom the other Justices of the Supreme Court agreed, said (at [27]) that, as well as the usual reference to pain, suffering and loss of amenity, personal injury has been considered to consist of a physical change which makes the claimant appreciably worse off in respect of his or her health or capability and as including an injury sustained to a person's physical capacity of enjoying life. She concluded (at [40]) that what had happened to the claimants was that their bodily capacity for work had been impaired and, therefore, they were significantly worse off: they had suffered actual bodily damage, or personal injury, which, given its impact on their lives, was more than negligible. I do not consider it is necessary or appropriate to deploy the facts and reasoning in that case, which concerned a very different area of the law, in order to reinforce the claimants' claims for actionable nuisance. Those claims are, for the reasons I have given, a straightforward application of established principles of property law.

75. Mr Hart, who had not appeared before the Recorder but had read the transcript of the closing submissions at the trial, submitted that the claimants had not argued the case before the Recorder in the way I have analysed. I see no reason why the claimants should not be able to argue and succeed before us on the ground of an unlawful interference with their enjoyment of the amenity of their properties due to the impairment of their right to use and enjoy those properties. They have not relied upon any evidence that was not before the Recorder, and the characteristics and damaging nature of Japanese knotweed have always been at the very heart of this litigation.

Appeal Ground (2)

76. This ground of appeal is rather obscure. It concerns the Recorder's award of £10,500 damages to Mr Williams and £10,000 damages to Mr Waistell in respect of the residual diminution in the market value of their respective properties even after treatment of the

Japanese knotweed has been carried out. That residual diminution in market value reflects the possibility of a future return of the knotweed despite appropriate treatment. So far as I have been able to understand this ground of appeal, it concerns the calculation of this continuing residual diminution in value – due to a kind of enduring stigma – rather than an objection in principle to the recovery of such stigma damages.

77. Accordingly, cases such as *Rust* (especially the observation of Cotton LJ at 131), *West Leigh Colliery Company Limited*, and observations of Aldous LJ in *Blue Circle Industries* at 308-309 , to which reference was made during oral submissions on the appeal and to which I have referred at paragraph [49] above, are irrelevant to this ground of appeal.

78. According to NR's skeleton argument, Appeal Ground (2) only arises if NR's Appeal Ground (1) fails. Given that I would hold that Appeal Ground (1) succeeds, Appeal Ground (2) would appear not to arise. In any event, the claimants object to Appeal Ground (2) and say it should be dismissed because it is both misconceived and was not raised below. I agree.

79. Mr Hart explained in his oral submissions that this ground of appeal arises as a result of the Recorder's statement (at [244]) that:

> "The claimants' expert, Mr Hardie and Mr Inman do not agree upon the respective market values of the properties if JKW had never been present and the respective values of their properties after the treatment has been carried out."

80. As I understand NR's point, that statement of the Recorder failed to take into account that there had been Japanese knotweed in the general area for many years. On the issue of the market valuation of the claimants' properties, the Recorder had preferred the evidence of Mr Neil Inman, NR's expert, but, according to Mr Hart, the problem was that Mr Inman's valuation does not appear to have taken into account the fact that Japanese knotweed existed for many years not only within the immediate vicinity of the claimants' properties but also within a much more extensive area in the locality.

81. Mr Hart submitted that it should be remitted to establish whether or not Mr Inman would adjust his view of the market value having regard to the full extent of the Japanese knotweed in the area for many years. Mr Hart acknowledged that he was unable to say whether or not Mr Inman would make any adjustment to his open market valuation of the properties on remission, let alone what the amount of such adjustment, if any, would be.

82. It would be quite wrong to remit the matter for that purpose. Mr Inman was NR's expert. The issue of residual value was one on which the experts were instructed and which was included in their expert evidence. It was a matter for NR to ensure that its expert was properly instructed and was prepared for all the issues in the case. NR cannot now have a second opportunity to depress the recoverable damages because NR failed to carry out those steps and in circumstances where the outcome of any such remission would be entirely speculative. Furthermore, the cost of that exercise would be out of all proportion to the amount of damages in issue, and it would place an unjustified burden on both the claimants and the judicial system, bearing in mind that there has already been a three-day trial of the action.

Conclusion

83. For all those reasons, I would uphold the decision of the Recorder but for different reasons to those which he gave.

Lady Justice Sharp :

84. I agree.

Lord Justice Leggatt :

85. I also agree.