The Nuisance of Knotweed: Davies v Bridgend County Borough Council [2023] EWCA Civ 80

by Vinesh Mistry and Felix Gibson, Five Paper (March 2023)

Introduction

1. Japanese knotweed (**"JK"**) is an invasive species of plant that has, in recent history, been a scourge for those in the property industry. In the last 18 months, there has been a sharp increase in the number of claims brought by homeowners based on JK being found in their property. The increase is believed to be a result of the property market boom during the stamp duty holiday. The judicial thinking on JK is, therefore, growing.

2. *Network Rail Infrastructure Limited v Williams and Waistell* [2018] EWCA Civ 1514 (**"Williams"**) was the first Court of Appeal judgment on the subject matter. This case, analysed in more detail below, considered the existing principles of nuisance as they relate to the "pernicious weed". JK has bloomed again in the Court of Appeal in the case of *Davies v Bridgend County Borough Council* [2023] EWCA Civ 80 (**"Davies"**).

3. This article examines a loss often brought by claimant homeowners blighted by a JK infestation – residual diminution in value of property (also known as **"DIV"**). This loss is the reduction in value of land due to the (historic) presence of JK, notwithstanding successful treatment. The nature of this loss and its cohesion with the law on nuisance was one of the issues at the root of *Davies*. It is argued that the conceptual foundation for a DIV claim has now been obscured as the Court in *Davies* has blended interference with use / quiet enjoyment with interference based on physical harm. Some of the practical ramifications of this blending are outlined in the plenary of this article.

What happened in *Davies*?

4. Mr. Davies, the owner of a property in Bridgend, was the claimant in the main proceedings. The defendant, Bridgend County Borough Council (**"BCBC"**) owned land that adjoined Mr. Davies' property. Mr. Davies and BCBC were the appellant and respondent in the Court of Appeal respectively.

5. Mr. Davies bought his property in 2004. He became concerned about the spread of JK to his property from BCBC's land in 2017 and raised his concerns to BCBC in 2019. He issued a claim for nuisance shortly thereafter. At trial, before District Judge Fouracre in the Swansea County Court, it was held that BCBC had breached their duty owed to Mr. Davies from 2013 until it started an effective treatment programme in 2018. DIV was claimed in the sum of £4,900. This loss was dismissed by the District Judge on the basis that it was irrecoverable in law following *Williams*.

6. On the first appeal to His Honour Judge Beard, the main issue was the dismissal of the claim for DIV. The Circuit Judge accepted, inter alia, that the DIV claim was consequential on the nuisance identified by the District Judge but held that *Williams* was authority for the proposition that damages for DIV due to JK was irrecoverable in nuisance, and the claim for DIV remained dismissed.

7. Mr. Davies appealed to the Court of Appeal. Birss LJ gave the leading judgment on the second appeal. On the issue of the DIV claim (and in summary terms), it was held that such a loss can be recovered in nuisance pursuant to *Williams* as it is a diminution in the amenity value of land (*Davies* [42]). This article discusses the conclusion of Birss LJ on the issue of DIV.

Does *Davies* develop the law following *Williams*?

8. The Court of Appeal in *Davies* had the opportunity to confirm the conceptual understanding of DIV. However, the judgments of Birss LJ in *Davies* and Sir Terence Etherton MR in *Williams* seemingly differ on how the DIV claim should be framed within the existing principles of nuisance. We investigate this difference of approach.

9. In *Williams* at [41], the Court outlined the three "categories" of private nuisance as follows:

> *"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."*

10. On the third "category" of nuisance, the Court in *Williams* further concluded at [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."*

11. The conclusion that resulted from the Court's analysis was that JK infestations likely fitted into the third "category" of nuisance. At [55] of *Williams*:

> *"[JK] 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… 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."* (Emphasis added)

12. Unfortunately, *Davies* creates tension with the above conclusion of Sir Terence Etherton MR. At [42] of *Davies*, Birss LJ:

> *"Once that natural hazard is present in the claimant's land (to a non-trivial extent), the claimant's quiet enjoyment or use of it, or putting it another way the land's amenity value, has been diminished. For the purposes of the elements of the tort of nuisance that amounts to damage (paragraph 56 last sentence) and it is the result of a physical interference. If consequential residual diminution in value can be proved, damages on that basis can be recovered. They are not pure economic loss because of the physical manner in which they have been caused." (Emphasis added)*

13. The contrast between the two judicial approaches is clear: in *Williams*, the landowner is compensated for their inability to use their land as they so wish but, in *Davies*, the landowner is compensated for harm caused to their financial asset by JK's physical interference with that asset. Therefore, having previously been a nuisance in the third "category", the ratio of Birss LJ blends JK with the second "category" – direct physical injury. That said, the Court in *Davies* did not fully commit to changing the "category" of nuisance caused by JK. The analysis is still very much concerned with *"the claimant's quiet enjoyment or use of it, or putting it another way the land's amenity value"* (*Davies* [42]). The Court, accordingly, has taken the form of the "third" category but imbued it with the content of the "second" category.

14. *Williams* at [41] was clear that the "categories" were "*merely examples of a violation of property rights"* and rigid categorisation was cautioned against. So, does this blending actually matter?

15. We still place value in identifying the "category" of nuisance in JK claims as the (pecuniary) remedies to be sought should fit hand-in-glove with a "category" of nuisance.

16. For example, where a claimant has incurred the cost of repairing property / chattel, it would be quite proper to plead and prove that the nuisance has caused direct physical injury to that object - this is plainly the second "category". Economic loss that has flowed directly from the physical damage would properly not be "pure" economic loss in those circumstances (*Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27). We suspect this was the intended direction of Birss LJ in *Davies* at [42]. Conversely, if a claimant wishes to recover (general) damages for loss of use, amenity, enjoyment or inconvenience, it would be quite proper to plead and prove that there was an interference with a legal or equitable right or interest in the property to an unliquidated measure. Hence, the "category" of nuisance is part and parcel of the overall framing of the claim.

17. The next question to ask, therefore, is: in which "category" of nuisance should a JK infestation fall? No doubt the answer to this question will still be debated in the appeal courts of England and Wales for years to come, not least as the scientific understanding of JK is changing (see below). We, bearing in mind the purpose of this article, offer only a simple answer. If the claimant has incurred (or will incur) the cost of eradicating the JK from its land (a head of loss common to the vast majority of JK claims), this is restoring the physical nature, composition or condition of the land to its original state. If the value of the land cannot be restored to its original state following treatment, this would not be a "pure" economic loss for the reasons set out above. The glove to this hand is, accordingly, the second "category".

What should litigators do following *Davies*?

18. For those at the coal face of litigating JK claims, this blending will have practical ramifications as the conceptual basis for DIV remains unsettled.

19. Claimant litigators will need to take extra care when drafting pleadings. Particulars of Claim must be abundantly clear on the basis of the loss being claimed and they should couch claims for DIV as both physical interference and interference with use and enjoyment. Those defending such claims will less likely be successful in arguing that DIV is "pure" economic loss.

20. The battlefield for DIV claims will likely be the quality of the expert valuation evidence and consideration of the latest technical understanding of JK: it must be (dis)proven that the infestation affects the use of land.

21. The Royal Institute of Chartered Surveyors (RICS) revised its 2012 report on JK in January 2022, concluding that *"[JK] is not the "bogey plant" it was once thought to be"* (*Davies* [4]). However, it is entirely foreseeable that the updated report will be used to challenge some of the current fundamental legal principles.

22. For example, the 2022 Report found that the ability to sell property (and so DIV by extension) is attributable to adverse public perception which is now self-perpetuating (page 11). As public perception does not dovetail with the "*owner's ability fully to use and enjoy the land" (Williams* [55]), it would follow that the 2022 Report provides an evidential challenge to DIV following *Davies*. Expert valuation evidence for both claimants and defendants will likely have to consider the impact of uncontrolled public perception and the Courts will have to determine if adverse public perception should be recoverable.

23. Ultimately, DIV is likely to fall away as a head of loss in the future. The 2022 Report found that JK cannot break through concrete and thus poses little to no risk to normal building foundations. There is no risk from JK after a 3-5 year treatment plan (page 7). As such, the Report recommends that mortgage lenders end their reluctance to lend against JK-affected properties. If this message is taken up by lenders and the general public, then the stigma that causes DIV will disappear. Nevertheless, cultural shifts like this take time — so DIV, and the stigma that causes it, will likely remain for the foreseeable future.

Conclusion

24. This article has argued that *Davies* has created discourse in the law of nuisance insofar that it relates to DIV and JK. Having previously been compensation for the inability to use land, DIV is now blended with compensation for harm caused to a financial asset by of physical interference with that asset. Litigators will need to cover all bases in their pleadings and arguments on "pure" economic loss will likely be redundant. The real battle will probably be between the valuation experts following the new RICS guidance.