

Japanese Knotweed... plant or plague?



The term Japanese Knotweed, also known as Reynoutria Japonica, is enough to instill fear into the hearts of any vendor, purchaser or mortgage lender. It has a reputation as egregious and fearsome as any plant save for perhaps the Venus Flytrap. It is legendary for its pernicious character and stubborn nature. It has no natural predators and can outmanoeuvre any other plant. It has even been known to survive volcanic lava. In botanic terms it is the boss.

It was first brought to the United Kingdom via the Royal Botanic Gardens at Kew by a European adventurer who lifted it from a volcano in Japan. In appearance its stems resemble bamboo. In Japan, the young leaves and shoots are considered edible albeit with cooking (not recommended).

The secret of its survival lies in the rhizomes which hide beneath the surface. They are the biological turbines which can lie dormant for decades waiting for more halcyon days to ensue. Any provocation of the rhizome can ignite it into life.

Once in bloom, it towers over smaller saplings depriving them of life-giving light. It also secretes chemicals which impede the fertilisation of other plants. Its only real nemesis is the chemical glyphosphate. It took human engineering to find its Kryptonite.

However, there is an argument to say it has been misunderstood. Whilst it is difficult to stop, it is rare for JKW to do any real harm.

The Wildlife and Countryside Act, in 1981, made it an offence to cause knotweed to grow in the wild, promising a £5,000 fine or six months in prison for the breach. It was like using a towel to stop the tide coming in. By then, it had enjoyed a century of freedom to claim primacy in our forests, gardens and open fields.

In 2010, Santander announced a moratorium on lending against knotweed blighted property. Others followed suit, not through knowledge but through ignorance of what it might do to their security.

In 2012, the Royal Institute of Chartered Surveyors published a report which held that within 7m of any plant there was likely to be an underground network of roots and rhizomes in the soil. Banks began to relax their restrictions but the seven meter rule still caught out many a would-be purchaser.

In January 2022, a further such report was published. The *baddest plant on the planet* mantra was downgraded somewhat. RICS reported that structural damage to buildings was very unlikely indeed. 3m as opposed to 7m was

adopted as the working rule for spread of the root/ rhizome network.

Agricultural experts are now firmly of the opinion that JKW has a reputation for having a reputation. The psychological stigma is there because it is. Misinformation and overreaction is the reason people cannot secure mortgages and vendors cannot sell their homes. The stigma however is real and has genuine economic consequences. This has been recognised by the Court of Appeal in *Williams v Network Rail* and *Davies v Network Rail*.

The rehabilitation of our new found friend will take many years perhaps decades to achieve as long held beliefs can take a generation to shift. Some will cling to the legend, cynical about scientific dogma which blows this way and that. One would hope that mortgage providers will give proper weight to current scientific wisdom.

The Lord Justices have been generous to claimants from the outset in carving out a clear common-law path to success in legitimate cases. Constructive knowledge, Limitation, causation and recognisable loss have all been determined favourably in private nuisance cases. Once the facts are established on the ground (literally) most cases fall into place in this sympathetic legal framework. To the delight of claimant lawyers, standard costs apply

with no imminent change on the horizon.

The Claim is in private nuisance. It is not a Rylands v Fletcher claim, as some think, because once the infestation encroaches onto your land it belongs to you. It is in fact part of your land. If you want to keep it, burn it, smoke it or eat it you are free to do so but not recommended. It is not a poison which has escaped but a natural infestation which nobody caused to be there by any positive action.

The most common claim is against Network Rail the eponymous defendant in the two big cases. Local councils also receive their fair share of letters of claim. Less commonly but still significant is the contractual/ professional negligence claim by the purchaser against the surveyor who neglected to comment on the issue. This is notoriously difficult as surveyors have become extremely adept at providing exclusion clauses for every eventuality. As a profession, this is a defence mechanism that no doubt comes from years of litigious victimhood.

The vendor who neglected to mention JKW in the conveyance documents can also find himself in the firing line. The TA10 document well known to all conveyancers provides specifically for

disclosure of knotweed. This however is also difficult for a host of reasons. The vendor can always argue as a layperson that the information was given in good faith. Ignorance is bliss and buyer beware are the cliches that spring to mind.

Occasionally, people try to sue their neighbours which does not lead to congenial relations. It is also high risk. The best defence is offence in that the neighbour will argue that it traveled the opposite way and bring an identical, symmetrical counterclaim.

The remedy for all this is a herbicidal treatment program on both sides of the boundary and damages for diminution in value of the property. The diminution is there even after herbicide treatment but much reduced if the treatment has been successful. Ideally, the treatment is insurance backed with a 10 year guarantee. Some experts will also recommend a geo-membrane or route barrier to be placed along the border to stop cross-fertilisation. This is a bit like a prophylactic for your garden.

The herbicidal treatment has to be done religiously every year for 3 to 5 years. It has to be done by a competent person

so that the herbicide soaks through to the comprehensive root system beneath the surface. Cutting and chopping at the stems achieve nothing.

There is an expensive and cumbersome alternative which is to excavate the entire ecosystem. The waste then has to be disposed of securely in accordance with the regulations. This is only viable for small patches.

Claimants have a modest entitlement to general damages for loss of amenity of part of the garden and distress et cetera but this is very much an afterthought to the main event.

In summary, *wheelbarrow chasers* as now comically known, have plenty to look forward to. The work is similar in nature to its poor cousin *housing disrepair*. Practitioners in the latter, if they have not already done so, will have no difficulty in transitioning. The clients tend to be educated homeowners. Disclosure is thin on the ground. As ever, good expert evidence is crucial. Thanks as ever must go to the sodden climate of Britain for making all this possible.

Michael Krebs
Barrister

Summer Social on the Wirral

At Royal Mersey Yacht Club, Thursday 06 July

This event is making a return to LLS's calendar after a gap of a number of years. It is designed as an informal event for members and their guests on both sides of the Wirral to catch up with each other over light refreshments.

Wirral members do not always find it easy to attend LLS events in Liverpool during the working day, so hopefully this resets the balance. Royal Mersey Yacht Club was described by Lord Field of Birkenhead on his most recent visit as "Wirral's hidden gem", and so provides a special venue for the event.

Having been a member of RMYC for nearly a decade, as a regular participant in its yacht-racing on the River, I am really delighted to share our facilities with LLS members and guests. There are artefacts and books, model of yachts, paintings, and items connected with RMYC's Royal Patronage, many of which will be of interest to both sailors and non-sailors alike.

I do hope that both Wirral and Liverpool members of LLS – with their guests – will be able to take this opportunity to enjoy a convivial break in a special setting.

Jeremy Myers
President