Neutral Citation Number: [2023] EWCA Civ 80

Case No: CA-2022-001604

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the COUNTY COURT at SWANSEA
HIS HONOUR JUDGE BEARD Appeal No. SA27/2021
On appeal from DJ Fouracre Case No G23YJ064

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2023

Before :

LORD JUSTICE BAKER
LORD JUSTICE BIRSS
and
LORD JUSTICE SNOWDEN

- -

Between:

MARC CHRISTOPHER DAVIES	**Appellant**
- and -	
BRIDGEND COUNTY BOROUGH COUNCIL	**Respondent**

- -
- -

Tom Carter (instructed by **High Street Solicitors Limited**) for the **Appellant**
Matthew White (instructed by **Dolmans Solicitors**) for the **Respondent**

Hearing dates: 17 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Birss:

1. This case is about the role played by diminution in value in cases of nuisance involving the plant Japanese knotweed ("knotweed"). The appellant Mr Davies owns a property in Nant-y-moel, Bridgend, Wales at 10 Dinam Street. It adjoins land owned by the local council, the respondent. There is knotweed growing on the respondent's land. The knotweed encroached from the respondent's land into the appellant's land.

2. The appellant brought a claim in nuisance against the respondent. The claim was heard by DJ Fouracre in Swansea County Court with judgment given on 8th November 2021.

3. The District Judge found that the stand of knotweed on the respondent's land seemed to have been present for over 50 years. In 2004 the appellant bought the property at 10 Dinam Street as an investment. It is rented out. The District Judge found that it was likely that knotweed had spread from the respondent's land into the appellant's land before 2004.

4. In 2012 a RICS report on knotweed was published, describing the difficulties it can cause. It is fair to point out that more recently the 2012 RICS report was withdrawn and the RICS now says that knotweed is not the "bogey plant" it was once thought to be. Nevertheless neither side before us contended that this means knotweed is not capable of founding a claim in nuisance.

5. The appellant became concerned about knotweed in 2017. He raised it with the respondent in 2019.

6. The District Judge found that the respondent was in breach of the relevant duty in nuisance owed to the appellant as a neighbour, starting from 2013 and on until 2018 when a reasonable and effective treatment programme finally started. There has been no appeal from this conclusion about breach from 2013-2018.

7. The respondent contended that since the knotweed was already present on the appellant's land, any damage arose before the breach of duty and so, since the fact the property is affected by knotweed is not due to any breach, the claim was fatally flawed on causation. The District Judge rejected this argument (paragraph 24), holding that it was answered by the fact that there was a continuing nuisance and breach of duty as a result of persisting encroachment. While the initial encroachment was historic, any loss suffered by the appellant in principle continues and will accrue by the continuation of the breach in the respondent's failing to treat the knotweed. The judge also held (paragraph 27) that unless and until the respondent treated the knotweed on its land, any attempt by the appellant to eradicate knotweed on his own land would have been rendered futile.

8. Turning to damages, all the sums claimed were characterised as aspects of a diminution in the value of the appellant's property. The damages originally claimed were under various heads including a sum for the cost of treatment, a sum for disturbance and inconvenience, and other sums. The only head of damages left is a claim for £4,900 as what is sometimes called the "residual" diminution in value of the property, also called "blight", remaining even after the knotweed has been treated as best it can be. All the other heads have been dropped over the course of these proceedings for various reasons, or they failed and were not appealed.

9. The District Judge held that all the diminution in value damages were irrecoverable in law in a case like this, based on the decision of the Court of Appeal in ***Williams v National Rail*** [2018] EWCA Civ 1514, [2019] QB 601 (Sir Terence Etherton MR, Sharp and Legatt LJJ). Therefore the District Judge dismissed the claim.

10. On appeal, the main point was on diminution in value. The appellant claimed that the damages were losses consequential on the nuisance found. The Circuit Judge HHJ Beard dismissed the appeal on 27 May 2022. He accepted that the diminution in value claimed was consequential on the nuisance identified by the court below, but held that ***Williams*** was authority for the proposition that damages for diminution in value due to knotweed are irrecoverable in nuisance. As the Circuit Judge put it at paragraph 19:

> "The only actual *damage* in this case, which is not physical, is diminution in value. However I consider ***Williams*** is authority that such economic damage is not recoverable. The phrase "the purpose of the tort of nuisance is not to protect the value of property as an investment or a financial asset" could not be clearer. I accept [counsel for the appellant's] argument that this is damage leading to a loss which is consequential on the nuisance found. However, it is not recoverable damage, it is pure economic loss."

11. The Circuit Judge also rejected the appeal on causation (paragraph 22).

12. The appellant applied for permission to bring a second appeal and Arnold LJ gave permission because the point of principle about recoverability was important, not least given the number of knotweed cases.

13. As the sole ground of appeal the appellant contends the judges below have erred in that they have misunderstood ***Williams***, whereas, properly understood, ***Williams*** is not an authority against the appellant's case. The respondent contends the judgments below are right, and also advances two points by a respondent's notice: one is a challenge to the causation point which it has lost up to now, and the other is a submission about the quality of the appellant's evidence of diminution in value itself.

14. Before going further, I note that what is in issue in terms of damages here is £4,900. If that was all that was at stake, the proportionality of these proceedings having got this far would be questionable, but the principle is an important one, and no doubt (sadly) the costs are substantial.

The appeal – recoverability of diminution in value

15. ***Williams*** was an appeal concerning two properties in Maesteg, South Wales which were tried together. The claimants (Mr Williams and Mr Waistel) had brought a claim in nuisance against Network Rail Infrastructure Ltd ("NR") the proprietor of neighbouring land. Broadly speaking, the claimants won both at first instance and on the appeal. Notably for what follows, the damages awarded to the claimants included various items but one was damages for the residual diminution in value of the land (or stigma). These were summarised at paragraph 35 in the judgment in the Court of Appeal as follows:

> "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."

16. Before the Recorder at first instance the claims in ***Williams*** had been examined in two ways: a first basis looking at the knotweed encroaching onto the claimant's land from NR's land, and a second basis looking at the presence of knotweed on the NR's land itself. The results were:

    i) On the first basis, characterised as an encroachment claim, there was no tort of nuisance because while knotweed had encroached onto the claimant's land from NR's land, and was not trivial (paragraph 53), nevertheless that knotweed on the claimant's land had caused no actual physical damage. The existence of physical damage was a necessary element of the tort put this way and so the claim put that way failed (see paragraphs 19 to 21). The fact the presence of the knotweed had resulted in a diminution in value of the properties did not constitute damage.

    ii) On the second basis, characterised as a quiet enjoyment/loss of amenity claim, the tort was made out because the presence of knotweed on NR's land was a sufficiently serious interference with the claimants' right of quiet enjoyment/ amenity value of their properties to constitute an actionable nuisance. The recorder found that 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.

17. Before the Court of Appeal there was an appeal by NR and a respondent's notice by the claimants. The appeal was to challenge the second basis of the claim.

18. The leading judgment in the Court of Appeal was given by Etherton MR. It starts with a number of general principles (paragraphs 38-45). The section repays reading in full and in this brief summary I am not intending to say anything different.

19. The first principle identified is that private nuisance is a violation of real property rights, which means either interference with the legal rights of an owner or interference with the amenity of the land, that is to say the right to use and enjoy it.

20. The second is that although nuisance is sometimes broken down into different categories, these are merely examples and rigid categorisation may not easily accommodate new social conditions or may undermine proper analysis of factual situations which have aspects of more than one category but do not fall squarely into any one of them.

21. In dealing with this second principle Etherton MR had identified that in ***Hunter v Canary Wharf*** [1997] AC 655 Lord Lloyd had said that nuisances are of three kinds, encroachment, direct physical injury to land and interference with quiet enjoyment. And of course the Recorder's judgment in ***Williams*** itself was an example of an approach based on treating an encroachment type of claim differently from a claim based on interference with quiet enjoyment.

22. The third principle was that the frequently stated proposition, based on the old forms of action, that damage is always an essential requirement of the tort of nuisance had to be treated with considerable caution. The proposition was not entirely correct and moreover the concept of damage in this context is a highly elastic one. In a case of nuisance from encroachment by an artificial object, the better view may actually be that damage is formally required but damage is always presumed. 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. As Etherton MR put it:

> "43 … 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. *[...]* 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."

23. The fourth principle is that nuisance may be caused by an inaction or omission, and that an occupier will be liable for continuing nuisance if with knowledge or presumed knowledge of the existence of the nuisance they fail to take reasonable steps to bring it to an end when there is ample time to do so. Similarly an occupier will also be liable for failing to act to remove a hazard on their land which they were aware of, and where there was a foreseeable risk it would damage their neighbour's land and it goes on to do so.

24. The fifth and final point is the broad unifying principle of reasonableness between neighbours (citing ***Delaware Mansions*** [2002] 1 AC 321 para 29, 34).

25. Turning to the appeal itself, which was the challenge to the Recorder's decision in the claimant's favour on the second basis, i.e. the quiet enjoyment/loss of amenity claim, the Court of Appeal decided that appeal was well founded. No tort was made out on the second basis because the presence of knotweed on NR's land does not become an actionable nuisance simply because it diminishes the value of the claimants' land (paragraph 46). In rejecting this way of putting the case Etherton MR said the following:

> "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."

26. The first sentence here is the passage quoted by the Circuit Judge in the present proceedings in paragraph 19 of his judgment, quoted above. In the same paragraph 19 the reference to economic damage is I think a reflection of the reference to pure economic loss here.

27. After this, in paragraphs 49 – 51, the ***Williams*** judgment deals with other authorities found not to be germane.

28. The Court of Appeal then turned to consider the respondent's notice relating to the Recorder's rejection of the first basis, i.e. the claim based on knotweed which had encroached onto the claimant's land. The Recorder was found to have erred in requiring there to be physical damage to the property. In essence the Court of Appeal decided that the (non-trivial) presence of knotweed on the claimant's land is an immediate burden. It interferes with amenity /quiet enjoyment. In so far as damage is needed to complete the tort, it is provided by the diminished ability of the claimant to use and enjoy their property. The relevant passages are paragraphs 55-56 of Etherton MR's judgment as follows:

> 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.

29. The judgment went on in paragraphs 57 to 74 to address other related cases. There is no need to examine that section in detail. I will only highlight four aspects.

30. First, paragraph 59 notes that in ***Hunter***, the fact a lawfully built building on the defendant's land interferes with the reception of television signals on the claimant's land does not amount to actionable private nuisance. Moreover paragraph 60 of ***Williams*** also notes that in ***Hunter*** in the Court of Appeal, Pill LJ had found that there was only material interference with amenity when there was a physical change which renders an article less useful or less valuable (excessive dust getting into a carpet).

31. Second and similarly to the first aspect, in paragraph 61, referring to ***Blue Circle Industries*** [1999] Ch 289, Etherton MR noted that Aldous LJ there said that damage occurred if there was some alteration in the physical characteristics of the land which rendered it less useful or less valuable. In that case the land was unsaleable until contaminated soil had been removed and so a cause of action arose because the amenity or utility of the land was impaired until the contamination was removed.

32. Third, paragraphs 63 and 64 address statements made in ***Jen de Nul v AXA Royale Belge*** [2002] 1 All ER (Comm) 767. Paragraph 64 concludes with an important reference to the economic interests of the claimant in a nuisance case, as follows:

> 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'.

33. Fourth and finally Etherton MR compared knotweed and its rhizomes to the branches of roots and trees, citing a number of cases include ***Delaware*** in which physical damage had been identified. At paragraphs 69 and 73 he said;

> "69. In that case [*Delaware*], 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.
>
> *[...]*
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> 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."

34. The concluding paragraph in this section of the Court of Appeal's judgment is paragraph 75. It deals with the submission that the manner in which the claimant's case on nuisance was being put on appeal was not open to them. The germane part of the paragraph is as follows:

> "75. *[...]* 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."

35. Thus the claimant's claim in nuisance succeeded and they were awarded all the damages which the Recorder had awarded below. Of course those included damages for diminution in value. Any lingering doubt that the Court of Appeal might have accidentally overlooked that point is dispelled by the final point in the appeal. The respondent had a second ground of appeal which related specifically to the calculation of the sum claimed for the residual diminution in value. The ground was rejected in paragraph 76–82. These passages include an express reference to these damages as "residual diminution in value" (para 76) and describe them in terms as "recoverable damages" in paragraph 82.

36. I have gone through ***Williams*** in some detail and with longer citations from a judgment than would normally be necessary. However it is necessary in this case because while I can see how it is that the judges below may have understood ***Williams*** in the way they

did, I believe I have shown above that it cannot be summarised in the way the judges did below, particularly the Circuit Judge at paragraph 19 of his judgment.

37. In the section of ***Williams*** which refers to the purpose of the tort of nuisance and to economic loss (paragraphs 46-48), the key word is "simply" in paragraph 46. This part of the judgment is about the elements necessary to complete the tort of nuisance. The *ratio* of ***Williams*** here is that there is no actionable nuisance caused by knotweed on a defendant's land simply because it diminishes the market value of the claimant's land. The reason why not is a policy reason which characterises such a claim as one of "pure economic loss". That phrase does not mean that in a case in which the elements of the tort of nuisance are satisfied, the claimant cannot recover for damage to their economic interests (paragraph 64 of ***Williams*** says the opposite). What the phrase is referring to is the mechanism by which the harm or loss has been caused. As Clerk & Lindsell puts it at paragraph 1-44:

> "'Pure Economic Loss' is the term used to describe an economic loss to the claimant which does not result from any physical damage to or interference with his person or tangible property."

38. In a case in which the knotweed is on the defendant's land, even if it is close to the boundary and at risk of invading the claimant's land, ***Williams*** holds that the reduction in market value of the claimant's land which this causes does not result from physical damage nor from physical interference with the claimant's property and therefore does not amount to a nuisance. Putting a small gloss on the opening words in paragraph 48 of ***Williams***, I would say that the purpose of the tort of nuisance is not *simply* to protect the value of property. After all ***Williams*** itself later recognises that if the value of the claimant's property is diminished as a result of an interference with the claimant's quiet enjoyment or amenity, due to physical encroachment of knotweed from the defendant's land into the claimant's land, damages including diminution in value of the property will be available. Putting it another way, the reasoning in paragraph 48 of ***Williams***, which the judges below relied on, is nothing to do with recoverability of damages in a case in which the tort of nuisance is complete.

39. Subject to one further point I would therefore allow the claimant's appeal and turn to the respondent's notice. The reasoning at the end of paragraph 19 of the Circuit Judge's judgment is flawed because once it is accepted that there was damage leading to a loss (the diminution in value) which was consequential on the nuisance, there is no authority that consequential damage to the claimant's economic interests is irrecoverable.

40. The further point is a submission by the respondent that even if this analysis of ***Williams*** is right in general terms, ***Williams*** is not authority which goes as far as saying that any encroachment of knotweed into the claimant's land amounts to material interference with quiet enjoyment or amenity and thereby to actionable nuisance. In oral submissions it was said that what is necessary to complete the tort is "encroachment plus". In other words the materiality aspect of the required interference demands an examination of the impact of the encroaching knotweed. This submission is based on paragraph 55 of ***Williams*** (cited above). Counsel drew attention to the second sentence which refers to knotweed constituting a future risk to structures, and to the third and fourth sentences which are focussed on an increased difficulty in developing the land if the owner wished to do so. The submission is that at least one of these two features has to be present (or something like them) in order for knotweed on the claimant's land to

be an actionable interference with amenity. The point is that in the present case on the evidence no risk to structures was identified, and there was a specific finding that there is no prospect of developing the property.

41. I would agree that a trivial or de minimis encroachment of knotweed would not be actionable on this basis, but that is not what this argument is about. There was no finding in the present case that the knotweed in the claimant's land was merely trivial. The submission is that proving a non-trivial encroachment of knotweed into land is not enough, and that to establish nuisance the claimant also has to prove that the knotweed is also a risk to structures on the land, or that there is a prospect of improving or altering the property which the knotweed interferes with, or something similar.

42. I reject this submission. As I read paragraph 55, the two points – future risk and increased difficulty in development – are given simply as examples of interference with amenity in order to illustrate why knotweed can fairly be called a "pernicious weed" and a "natural hazard". Reading ***Williams*** as a whole, the point being made is a distinction between "pure economic loss", i.e. loss without physical damage or physical interference which is not actionable, and cases in which there is physical change to the claimant's property as a result of the presence there of knotweed rhizomes. 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.

43. I would uphold the appellant's sole ground of appeal.

The respondent's notice causation point

44. Turning to the respondent's notice, I will deal with the causation argument first. The submission is that the residual diminution in value, which is the reduction in value left even after knotweed has been properly treated, cannot have been caused by the nuisance because the knotweed encroachment had already happened before the breach of duty. I have mentioned already the manner in which the District Judge rejected this point. The Circuit Judge addressed the issue in a slightly different way. Paragraph 16 of that judgment (and see also paragraph 22) approaches the issue as an exception to the "but for" test for causation drawing analogy with trespass as a tort of strict liability. However, as the respondent pointed out, rightly in my judgment, the duty in nuisance which arises in this case depends on actual or presumed knowledge on the part of the defendant of knotweed on its land and the risk it represents. It is not a tort of strict liability.

45. We were provided with a copy of ***Delaware*** in the authorities bundle although not for the purpose of causation. Nevertheless I believe it is instructive. In ***Delaware*** tree roots encroaching under a property had caused desiccation of ground, leading to cracking. The tree was on land owned by the highway authority. However this had all happened in 1989 and the property was sold to new owners in 1990. The new owners did not take an assignment of any cause of action. The new owners undertook £½ million of underpinning work and sued the highway authority. The claim failed at trial on the

basis that the judge found that the damage had occurred during the previous ownership and the claimant had failed to prove that any remedial work had been necessitated by any new damage caused after they became owners. The Court of Appeal allowed the appeal and that was upheld in the House of Lords.

46. Lord Cooke gave the leading judgment. The extracts relevant for present purposes are these:

> "29 *[...]* I think that the answer to the issue falls to be found by applying the concepts of reasonableness between neighbours (real or figurative) and reasonable foreseeability which underlie much modern tort law and, more particularly, the law of nuisance. *[...]*
>
> *[...]*
>
> 31 In both the second *Wagon Mound* case and *Goldman v Hargrave* the judgments, which repay full rereading, are directed to what a reasonable person in the shoes of the defendant would have done. The label nuisance or negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it."
>
> […]
>
> 33 Approaching the present case in the light of those governing concepts and the judge's findings, I think that there was a continuing nuisance during [*the claimant's*] ownership until at least the completion of the underpinning and the piling in July 1992. It matters not that further cracking of the superstructure may not have occurred after March 1990. The encroachment of the roots was causing continuing damage to the land by dehydrating the soil and inhibiting rehydration. Damage consisting of impairment of the load-bearing qualities of residential land is, in my view, itself a nuisance. This is consistent with the opinions of Talbot J in the *Masters* case [1978] QB 841 and the Court of Appeal in the instant case, although neither Talbot J nor Pill LJ analysed specifically what they regarded as a continuing nuisance. Cracking in the building was consequential. Having regard to the proximity of the plane tree to Delaware Mansions, a real risk of damage to the land and the foundations was foreseeable on the part of [*the defendant*], as in effect the judge found. It is arguable that the cost of repairs to the cracking could have been recovered as soon as it became manifest. That point need not be decided, although I am disposed to think that a reasonable landowner would notify the controlling local authority or neighbour as soon as tree root damage was suspected. It is agreed that if the plane tree had been removed, the need to underpin would have been avoided and the total cost

> of repair to the building would have been only £14,000. On the other hand the judge has found that, once the council declined to remove the tree, the underpinning and piling costs were reasonably incurred, despite the council's trench.
>
> [*at 35-37 Lord Cooke considered authorities from Australia and the USA*]
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> 38 In the end, in my opinion, the law can be summed up in the proposition that, where there is a continuing nuisance of which the defendant knew or ought to have known, reasonable remedial expenditure may be recovered by the owner who has had to incur it. *[...]*

47. Although the District Judge did not name the ***Delaware*** case itself, I believe this is essentially the logic which he applied in finding for the claimant on the issue of causation. The fact the encroachment was historic was no answer when there was a continuing breach of duty as a result of persisting encroachment.

48. Although there is attractive simplicity about the respondent's point on causation, I believe it is wrong. Viewed at 2018, after five years of breach of duty on the part of the respondent failing to treat the knotweed on its own land adequately, the knotweed was still encroaching on the claimant's land and any treatment by the appellant would have been futile unless and until the respondent complied with its duty as a good neighbour and dealt with its own knotweed. This is not an exception to the "but for" test. The harm to the quiet enjoyment and amenity suffered by the appellant persists in 2018 precisely because the nuisance is continuing one. The harm then has been caused by the breach of duty.

49. The respondent made a rhetorical point here and below about what would have happened if the period of breach had only been one month. The short answer is that that is not this case. Moreover it is worth pointing out that in principle the breach was not found to occur the moment the respondent was aware of the problem. The District Judge explained in paragraph 30 that 2013 was after what he called a "generous amount of time" for consideration of the problem (the 2012 RICS report) and after implementation of a process he found to be "insufficient". No doubt if the respondent had acted properly within one month of being on notice, there would be no breach of duty.

50. I would therefore dismiss this ground of the respondent's notice.

The respondent's notice point on quality of evidence

51. Turning to the second ground of the respondent's notice, the respondent criticises the quality of the evidence given in support of the claim for £4,900 residual diminution in value. This figure was part of the evidence given by the claimant's expert Mr Raine. No evidence to the contrary was called by the respondent. Although the District Judge did at paragraph 32 of his judgment helpfully address aspects of the damages claimed, in case his conclusion that no damages were recoverable was wrong, as it turns out the one head he did not quantify was this one.

52. The claimant's expert Mr Raine was subject to some criticism by the District Judge in that paragraph 32. That included a general observation that the valuation was of limited use, albeit that it was then qualified by reference to a separate aspect of the valuation (neighbour cooperation) which has now been dropped. However I do not read paragraph 32 as a conclusion that Mr Raine's evidence was so poor that it could not be relied on at all. Therefore before this court there is evidence in support of the figure of £4,900 and this court can in these circumstances decide the quantum for itself. To remit this aspect of the claim in these circumstances would be a counsel of despair. This court has the power on an appeal to decide this issue since it has all the powers of the lower court (CPR Part 52 r52.20(1)) and it would plainly be in accordance with the overriding objective for us to do so. We canvassed this option at the oral hearing and neither side objected.

53. The respondent submitted that there were three other flaws in the evidence. First the right time to assess the damages was at the point of the breach (2013 or 2018) but the figure given was the expert's opinion at the date of his report (February 2020), second in this case the actual interference with amenity, even if it is actionable, is very minor for the reasons already addressed above, and third if, as the respondent contended was the appellant's case, the degree of residual diminution in value would itself reduce over time ,then the sum should also be reduced because of passage of time. There was no challenge to the theory of the first point but I do not believe on the facts of this case it justifies a change from the figure stated by the expert as at Feb 2020. The second point does not support a change either since, as the District Judge noted in paragraph 32, the expert was aware that there was no prospect of development and no visible knotweed in the garden. The problem with the third point is that there is no evidence about timescale. If the respondent wanted to advance this as a basis for materially reducing the figure claimed, it was incumbent on the respondent to provide that evidence at trial. There is none. I do note that in ***Williams*** itself, paragraph 12 refers to knotweed insurance policies, one with a minimum 10 year period and another with a 5 year minimum.

54. Finally I refer to the judgment of Buckley J in ***Dennis v MoD*** [2003] EWHC 793 (QB), [2003] Env. L.P. 34 which counsel for the respondent handed up. In that case the nuisance in question was noise disturbance caused by Harrier jump jets operating at the RAF Wittering airbase which was near the claimant's property. The claim in nuisance succeeded as a claim for interference with the claimant's enjoyment of their property. Damages were awarded under three heads, past and future loss of amenity, past and future loss of use and loss of capital value. In other words the third head is a diminution in value of the property itself. The claimant had accepted that he did not wish to sell (and realise the capital loss) and had no intention of selling before 2012 when the evidence was that the nuisance was going to come to an end because the use of Harriers at RAF Wittering was to cease. Buckley J decided that a sum of about 5 to 10% of the figure given for the actual diminution should be awarded to take account that although he did not wish to sell, there was nevertheless a 5 to 10% chance that the claimant might be forced to sell before 2012. The figure for the diminution in value was £4 million and so the judge awarded £300,000 on that ground.

55. The facts of ***Dennis*** are a long way from the present case. Nevertheless what happened in that case illustrates another avenue which the respondent could have explored at trial, to examine how likely Mr Davies was to realise the capital loss in the period the

diminution persisted. However while I accept the principle that an approach of this kind could be taken, it would have needed some evidence, and there is none.

56. In my judgment taking all these points into account £4,900 would be a fair figure for the residual diminution in value in this case.

Conclusion

57. I would allow the appeal and dismiss the grounds of the respondent's notice.

Lord Justice Snowden:

58. I agree.

Lord Justice Baker

59. I also agree.