

An unwanted visitor

Nic Seal provides an expert's perspective on Japanese knotweed encroachment & misrepresentation



© Geoff Moore/REX/Shutterstock

Japanese knotweed was first introduced into the UK from Japan in the 1850s as an ornamental plant, but it is now number one on the Environment Agency's list of the UK's most invasive plant species. Growing up to three metres in height, it spreads rapidly and can push up through asphalt, cracks in concrete, driveways, cavity walls and drains in its quest for light and water.

Awareness of the threat of knotweed has grown among the general public in recent years due to increased media attention and the 2013 inclusion of a specific knotweed related question on the Property Information Form (TA6) completed by the seller. Yet, research which Environet carried out this spring in conjunction with YouGov, suggested that homeowners are unaware of their legal obligations and rights where Japanese knotweed is discovered on their land or adjoining land.

Legislation is in place to regulate and control the disposal and planting of knotweed. Section 14 of the Wildlife and Countryside Act 1981 makes it an offence to plant or cause knotweed to grow in the wild, and the Environmental Protection Act 1990 classifies any material containing Japanese knotweed as 'controlled waste'. However, people are often surprised to learn that it is not an offence to have knotweed on their land and it is not a notifiable weed, therefore local authorities do not need to be told of its presence.

It is when knotweed spreads from one parcel of land to another, that potential civil litigation can arise between landowners through the law of 'private nuisance'. The success of a claim will depend on a number of factors, first and foremost being able to prove that the knotweed originated in the defendant's land. Some cases are

simple, others not, particularly where the alleged encroachment occurred a number of years ago. The normal defence where encroachment is proven is that all reasonable measures have been taken by the defendant to mitigate the nuisance. Ultimately, what is considered "reasonable" is a matter for the court, but any treatment will be viewed more favourably if it has been carried out by a reputable, specialist firm.

“Conveyancers should be particularly careful where the property is new-build”

The owner of the affected property should of course, in the first instance, notify in writing the owner of the land causing the nuisance and request that action be taken to treat the knotweed to prevent the nuisance now and into the future. If this fails to illicit action a 'private nuisance' claim may be the only option available.

Environet is experiencing an increase in the number of misrepresentation enquiries and claims since the addition of the specific Japanese knotweed related question on the TA6 form, where the seller has given false information to the buyer. These claims tend to be for the cost of treatment which includes an insurance backed guarantee (IBG) and for any residual diminution in the value of the property resulting from the knotweed blight. Many claims are being settled out of court. Perhaps intentionally, the wording of the question is somewhat vague with no reference to any known historical knotweed

problems. Since it is recognised that the plant can lie dormant for up to 20 years, especially after poor herbicide treatment, perhaps the question should be rephrased to ask: 'Are you aware of the presence of Japanese knotweed on the subject property and/or an immediately adjoining property at any time during your occupation/ownership of the property and of your predecessors in title?'

New build alert

Conveyancers should be particularly careful where the property is new-build, as generally there is no requirement for the TA6 form to be completed by the seller. Mark Montaldo from Cobleys Solicitors Ltd comments: 'When buying from a developer we always recommend that the equivalent of the TA6 knotweed question is asked of the developer. If presence is declared then the appropriate insurance backed guarantees can be requested. If not, then Japanese knotweed Indemnity Insurance can be provided at a modest cost to mitigate any risk for the buyer. We have a current case where the buyer asked their conveyancing solicitor to ask the developer about historical knotweed issues on the site. They failed to do so, the buyer now owns a property covered in knotweed, and is suing their solicitor for professional negligence.'

Buyers who find themselves the victims of knotweed may also wish to consider whether their surveyor was professionally negligent in not identifying and reporting the presence of knotweed on the premises. The success of any such claim would lie in being able to prove that the knotweed was obviously visible at the time of the surveyor's survey, and not intentionally concealed by the seller or others.

Where Japanese knotweed is not declared as affecting the property on the TA6 form or elsewhere, there is of course still a risk that it is present. A specialist Japanese knotweed indemnity insurance policy will protect the buyer for 10 years and their lender for the duration of the mortgage. The policy covers the costs of treatment, repairs, legal costs for third party claims and any proven diminution of the property's value as a result of a claim, when the property is sold.

Wherever knotweed treatment or removal works are carried out it is important to ensure that appropriate insurance backed guarantees are provided. They should be for a minimum of five years, preferably 10. A word of warning, not all knotweed IBGs are the same, read the small print and check whether the insurer is rated by one of the main credit agencies.

NLU

Nic Seal is the managing director of Environet UK, which specialises in the removal of Japanese knotweed. Nic also acts as an expert witness in knotweed disputes & litigation (www.environetuk.com).