CHARLES LYNDON

# Waistell v Network Rail Infrastructure

Rodger Burnett

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# Waistell v Network Rail

## Background

- Mr Waistell owns a property in Maesteg, South Wales.
- Network Rail ("**NR**") owns the land immediately behind the property. There is no back garden. The rear wall of the property forms the boundary with Network Rail.
- On the railway embankment there is over 600 square metres of Japanese knotweed that experts agreed had been present for at least 50 years.
- The case was unusual because there was no obvious sign of encroachment.
- Mr Waistell had been trying to sell his property to return to Spain from May 2013, but could not because of the presence of knotweed.
- The property was valued by Mr Waistell's expert at £130,000 without knotweed but only £65,000 with knotweed.
- After failing to get Network Rail to address the issue Mr Waistell brought a claim against Network Rail along with his neighbour.

Image 1: Affected railway embankment

Image 2: Front of Mr Waistell's property

# Waistell v Network Rail

## Encroachment

- Mr Waistell argued that once encroachment has been established then there is no need for physical damage. NR argued that encroachment alone was not sufficient to found liability and there had to be physical damage.
- The judge found that Mr Waistell had established encroachment and by inference and on the balance of probabilities there was encroachment under his neighbour's property. However, citing Delaware Mansions the judge found that damage to the land had to be proved. In Delaware Mansions, damage was established by the dehydrating effect the roots had on the soil.

## Quiet enjoyment

- Mr Waistell's neighbour had not pleaded quiet enjoyment and had to rely upon Mr Waistell's claim in this respect.
- The judge found that the right of an individual to use and dispose of a residential property at market value is "so important a part of an ordinary householder's enjoyment of his property that such an interference should be regarded as a legal nuisance."

# Waistell v Network Rail Court of Appeal

## Appeal

- NR appealed the decision on two grounds:
  - that the mere presence of knotweed on their railway embankment was incapable of causing an actionable nuisance to neighbouring properties; and
  - even if there was encroachment there was no causal link between NR's breach and the damage suffered.

- Mr Waistell cross appealed on the basis that the judge at first instance had taken too narrow a view of what constituted physical damage.

# Waistell v Network Rail Court of Appeal

In a judgment handed down on 3 July 2018 the Court of Appeal unanimously dismissed NR's appeal.

## Quiet enjoyment/pure economic loss

- The Master of the Rolls delivering the lead judgment found that diminution of value was not in and of itself sufficient and "*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*."
- He added that the purpose of the tort was "*not to protect the value of land as an investment or financial asset*" but rather to "*protect the owner of land (or person entitled to exclusive possession) in the use and enjoyment of the land*".
- Although the Court of Appeal found that the mere presence of knotweed on adjacent land was not an actionable nuisance they did find that a landowner would be entitled to an injunction where there was a threat of encroachment and that the imminence was probably less important than the actual damage if there was encroachment.

# Waistell v Network Rail Court of Appeal

## Physical damage/loss of amenity

- Court of Appeal held that encroachment of knotweed was a "*classic example of interference with the amenity of land*" and that "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".

- It was on this basis the Court of Appeal was able to distinguish knotweed as being different to encroachment cases involving tree roots and branches.

# Contact details


Rodger Burnett

Email: rodger@charleslyndon.com

Dorothea Antzoulatos

Email: dorothea@charleslyndon.com

Donna Dewberry

Email: donna.dewberry@charleslyndon.com