

Japanese knotweed may seem like something more appropriate for discussion on Radio 4's "Gardners' Question Time" rather than in the offices of a firm of solicitors but you would be surprised. Japanese knotweed has been reported on more and more by the mainstream press which has led to a greater public understanding and awareness of it. For example there was a significant infestation discovered during the building of the Olympic stadium in Stratford. Together with an increasingly litigious society, where knotweed is to be found in someone's garden, the matter can often end up on a solicitor's desk.

Japanese knotweed is an invasive plant: it grows and spreads quickly from deep underground "rhizome" structures and can penetrate brick work and concrete. It is difficult to eradicate (chemical treatments can take a number of years) and digging it out is not only very expensive, but relies on you catching it all in order to be completely effective. As a result, Japanese knotweed can, depending on the extent of the infestation, seriously affect the value of any property or land where it may be found.

When selling a residential property it is typical for the seller to complete what is known as a Property Information Form (PIF). The answers given are important as they form part of the contract insofar as the buyer relies on the answers which are given. In legal jargon they are known as "representations". Within the PIF there is a question relating to Japanese knotweed and whether or not there is any at the property. If a seller answers "no" but it subsequently turns out that: there is and the seller knew (they lied); or at the very least ought to have known (they were careless and did not have a reasonable belief for saying there was none); or in some cases the answer was given innocently, the seller may well face a legal claim from the buyer.

A claim would most likely be for misrepresentation. This is where:

- A statement (i.e. a representation) is made by one party of a contract to the other;
- The other party relies on that representation and enters into the contract (i.e. they were induced into entering it);
- The statement turns out to be wrong and as a result of entering into the contract the other party has suffered some sort of loss.

In cases involving Japanese knotweed the representation would be the seller's answer in the PIF that it was not present at the property. The buyer would enter the contract for sale relying on this

answer and if it turns out there was knotweed present, the loss would most likely be the effect on the value of the property.

In some claims in misrepresentation the aggrieved party may be able to “rescind” the contract. This effectively rips up the contract and put the parties back into their original position as if the contract had never been entered into. The property would be returned to the seller and the buyer would get his money back. But if the right to rescind does not exist – for example if there has been a lapse of time – what is the loss? This is crucial to determine the level of damages to which the innocent party may be entitled as a result of the misrepresentation and ultimately depends on the extent and seriousness of the infestation.

In Japanese knotweed cases there is a tension between the traditional measure of damages in misrepresentation cases involving the sale of land – what is known as the “diminution in value” calculation – and the cost of getting rid of it: what would amount to the “cost of cure”. These two calculations may differ wildly and result in protracted legal wrangling.

What should you do? Answer any questions in the PIF truthfully. The maxim “caveat emptor” or “buyer beware” is not a defence to deliberate or reckless untruths given by one party. If there is Japanese knotweed at a property you must get professional advice and assistance on its treatment or disposal as there are criminal law implications for disposing of it incorrectly. If the infestation remains (whether treated or not) or has been removed and you might be selling the property then you should nevertheless tell your buyer. This may result in some negotiation over the contract price, but if you put in place a recognised treatment programme it should mean that the property is still saleable and, most importantly, acceptable to high street banks over which to grant a mortgage.

What you can be sure of, however, is that the cost of defending a claim for misrepresentation aside from the money which may have to be paid by way of damages would be significant and run well into the tens of thousands. It would be necessary to obtain expert evidence from a Japanese knotweed specialist as well as a surveyor as to the effect on the value of the property.

If you find Japanese knotweed at your property and you believe you were misled as to its existence at the time you purchased the property, or if you receive a claim from a buyer, then contact the Commercial Litigation and Dispute Resolution Team at Taylor Walton LLP. We have experience of dealing with misrepresentation claims (including ones relating to Japanese knotweed) and other property related claims.

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