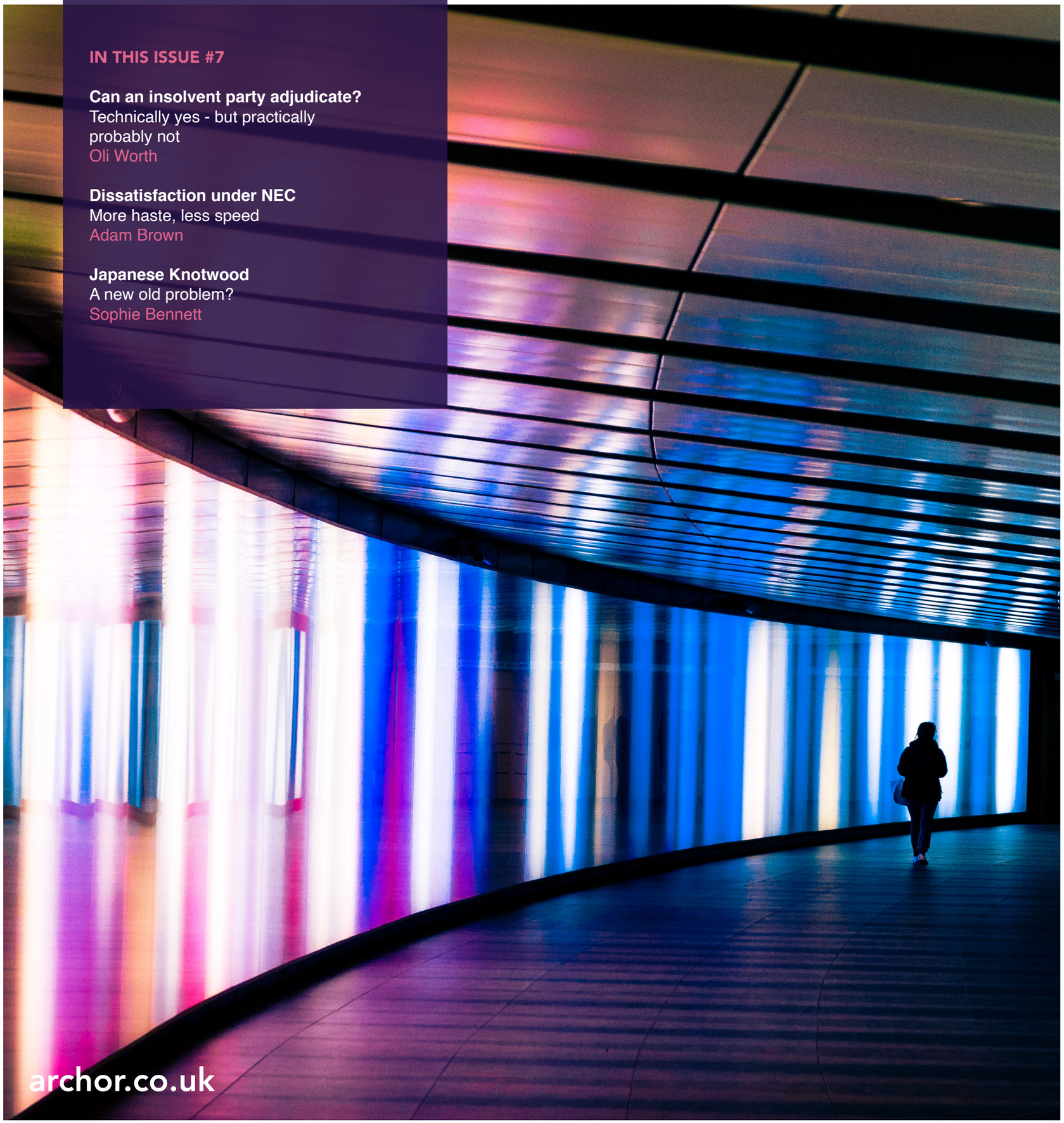
AGGREGATE

EDITION #7 JUNE 23

ARCHOR



IN THIS ISSUE #7

Welcome to the latest edition of **Archor's Aggregate** newsletter.

After a May full of bank holidays, we foresee a busy few months before the typical summer slowdown. So what better way to get into the working mindset than three articles on construction law?

We start with another look at the landscape for companies adjudicating while insolvent. This has been a lively area for the last few years since the Supreme Court decided that the right to refer matters to adjudication survived insolvency – but since then the Technology and Construction Court has effectively put the brakes on enforcement, which mean in all but the rarest cases a favourable decision for an insolvent company is likely to be a pyrrhic victory. The latest decision on this point reinforces that.

Following that, Adam Brown takes an in depth look at a recent case on NEC contracts and notices of dissatisfaction issued under those. It's another example of an increase in NEC-related cases of late, which is hopefully consistent with its more widespread use rather than a growing tendency to litigate matters under what is, at least in principle, supposed to be a 'friendlier' form of contracting.

Finally, Sophie Bennett digs into the two words that will strike fear into the hearts of any of our green-fingered readers: Japanese knotweed. A Court of Appeal decision earlier in the year presents an interesting opportunity to look at how the problems this causes might impact developments and what prudent developers might do to mitigate their exposure.

We hope you enjoy this edition, and as ever, if you have any ideas for future articles or other feedback, do please get in touch.

Oli, Editor-in-Chief

CAN AN INSOLVENT PARTY ADJUDICATE?

TECHNICALLY YES – BUT PRACTICALLY PROBABLY NOT ?

Oli Worth
Partner

We've written before about the dangers of adjudicating while insolvent. John Doyle v. Erith Contractors, a Court of Appeal decision from October 2021, didn't go quite as far as to say that a company in liquidation could never enforce an adjudicator's decision, but it did show the difficulties. A recent case - J A Ball Limited (in Administration) v. St Philips Homes (Courthaulds) Ltd - has reinforced those.

J A Ball was a main contractor based in Nottingham that went into administration in late 2020. It persuaded an adjudicator to accept jurisdiction – which generally will be the case since the Supreme Court in Bresco decided that insolvent companies have an in-principle right to adjudicate – and to award it a balancing payment from St Philips Homes, its employer.

St Philips resisted enforcement on the basis of a breach of natural justice (the adjudicator had apparently gone off on frolic of their own - a classic ground of challenge), but of more interest in this context were its (unsurprising) references to Ball's financial position. Although the court actually decided against enforcement because of the breach of natural justice, it went on to provide guidance on the insolvency position – guidance which will be very useful given the proliferation of insolvency-related adjudications in recent years.

Court's guidance on insolvent companies adjudicating

The court's first observation was that a company in insolvent liquidation facing cross-claims or set-offs will generally not be entitled to enforce an adjudicator's decision. That is now established law and arises out of the effect of the Insolvency Rules – but doesn't apply to companies in administration unless a 'notice of distribution' is given. Ball therefore argued that this well-settled position didn't apply because rather than being in liquidation, it was in administration. However, the court said that wasn't correct: there was no doubt as to Ball's insolvency in this case and therefore the fact it was in administration rather than liquidation was a technicality which made no difference to the adjudication enforcement.

Administration is a common insolvency procedure for construction companies – often more-so than liquidation. In part, that's because administration allows companies to continue to trade by facilitating pre-pack sales. Strictly speaking the idea of administration is to allow the company to recover as a solvent, trading company, and often that can work – think of a string of high street retail names that have gone into administration and come out the other side. But that almost never happens to construction companies: they usually either fold, or sometimes are subject to quick below value sales (including pre-packs). As such, it's likely that for most construction companies in administration the court would reach the same decision as in this case.

The second useful observation was about the sufficiency of security. Because St Philips had a cross-claim it wished to pursue, Ball accepted that it would have to offer security to ensure that St Philips wasn't at an unfair disadvantage – effectively, by having to pay the adjudication award and face the substantial prospect that, in light of Ball's financial position, it would never be able to pursue those cross-claims. The security offered by Pythagoras – the company that has made its name through pursuing claims on behalf of insolvent companies – was twofold: an offer to 'ringfence' the award pending a final decision, and on offer to guarantee St Philips' costs of proceedings to overturn the decision.

However, the court said that these offers weren't good enough. Having to ringfence the adjudication monies was pointless, the court said: it would mean that neither party could use the cash, which was at odds with the whole purpose of adjudication to facilitate cashflow. And it said that the guarantee wasn't wide enough – it was "limited to the extent that the defendant's "proceedings are successful in overturning the Adjudicator's Decision"", and therefore did not give "full costs protection to the defendant to the extent of the action it proposes to bring to defeat the claim based on the award". This wasn't the first time that Pythagoras's offer of security was found to be insufficient: in Meadowside Building Developments Ltd v. 12-18 Hill Street Management Company Ltd [2019], the court found that Pythagoras itself didn't have sufficient assets to stand behind a guarantee, and there was no bank guarantee or bond to assist.

Finally, the court considered Pythagoras's position. As mentioned, it has been at the forefront of trying to carve out a way of insolvent companies recovering monies through adjudication – largely unsuccessfully, it has to be said. The court didn't have to decide this point, but it did express 'reservations' about the position it held as funder and an agent for Ball's administrators, as well as having a close relationship with Ball's lawyers Circle Law (Gregory McMahon was listed at Companies House as a director and controlling shareholder of both entities).

The end of insolvent companies adjudicating?

All in all, this is another blow for insolvent companies seeking to seek a quick win through adjudication – although we have said that before. There will doubtless be some cases where adjudication remains appropriate – but that will only generally be where there's no contested counterclaim or set-off from the solvent party.

Parties facing an adjudication from an insolvent party need to think carefully about how they proceed. Where there is a genuine cross-claim, given the difficulties the insolvent party will face in enforcing it, companies will have to decide whether there is any merit in incurring the cost of taking part in an adjudication. As well as their direct costs, by taking part in an adjudication a solvent party will also assume joint and several liability for the adjudicator's fees – another reason why not taking part, at least without binding guarantees from the insolvent company or its backers, may well be a sensible option.

DISSATISFACTION UNDER NEC

More **haste**, less **speed**

The judgment in Ravestein BV v. Trant Engineering Ltd [2023] is a timely reminder for those who regularly contract under the NEC standard form with Option W2: in the event that a dispute is referred to adjudication and the losing party in that adjudication decides to refer the dispute for a final determination, it is crucial that a valid Notice of Dissatisfaction is served first.

The consequences of failing to serve a valid Notice of Dissatisfaction will be drastic. As noted in the judgment, the losing party will not be able to formally dispute the merits of the adjudicator's decision by issuing Court or arbitration proceedings (as the case may be) and will therefore be stuck with any unfavourable orders that have been made by the adjudicator.

Background

Trant employed Ravestein to carry out engineering works pursuant to an amended NEC3 subcontract, incorporating Option A (Priced Subcontract with Activity Schedule), Dispute Resolution Option W2, and a number of secondary options.

In February 2021, Trant referred a dispute to adjudication where it alleged that Ravestein's works were defective and that Trant was entitled to damages as a result. The adjudication process took place (albeit the judgment notes that Ravestein did not take an active role in that adjudication) and the adjudicator ultimately decided in April 2021 that Ravestein was to pay Trant damages of £454,083.09 plus VAT. Ravestein refused to pay.

Shortly after the decision, Ravestein issued two emails on 12 April 2021, both of which were addressed to the adjudicator and copied to Trant. In the first, Ravestein stated that it did not accept the adjudicator's jurisdiction because it allegedly did not receive the referral notice within 7 days of the notice of adjudication, such that the "the entire process is null and void". In the second, Ravestein claimed that the adjudicator was not entitled "after seven days… to make any rulings" and that, if the adjudicator refused to withdraw his decision, it would file a request to the Institution of Civil Engineers to "reverse the ruling". The adjudicator responded on the same day to note that this jurisdictional challenge had not previously been made but, in any event, he had directed that Trant could serve the referral notice electronically and so he considered it to have been served in time.

Referral to arbitration

Many months later in October 2021, Ravestein served a notice to inform Trant of its intention to refer the dispute concerning its liability for defects as decided by the adjudicator to arbitration. It relied on its second email of 12 April 2021 as its Notice of Dissatisfaction.

It was agreed between the parties that the arbitrator should first determine whether Ravestein had issued a valid Notice of Dissatisfaction pursuant to clause W2. The arbitrator published their award on that issue in March 2022 finding that Ravestein had not in fact served a valid Notice of Dissatisfaction and, as a result, the adjudicator's decision was final and binding. This meant that the arbitrator did not have jurisdiction to go on and decide the dispute that Ravestein had originally sought to refer.

Ravestein applied for leave from the Court to appeal the arbitrator's decision pursuant to section 69 of the Arbitration Act 1996 (which allows appeals against arbitration decisions on matters of law).

The Court's decison

For leave to appeal to be given, the Court must be satisfied of the following conditions:

1. The determination of the question will substantially affect the rights of one or more of the parties ("Condition 1");

2. The question is one which the arbitrator was asked to determine ("Condition 2");

3. The decision of the arbitrator on the question is either obviously wrong ("Condition 3a"), or the question is one of general public importance and the decision of the arbitrator is at least open to serious doubt ("Condition 3b"); and

4. It is just and proper in all the circumstances for the Court to determine the question notwithstanding that the parties agreed to resolve the matter by arbitration ("Condition 4").

Condition 2 was not in dispute. Accordingly, the Court was required to determine Conditions 1, 3a, 3b and 4 only.

For Condition 1, the Court easily determined that the validity of the Notice of Dissatisfaction would substantially affect the rights of both Ravestein and Trant. If permission to appeal was not granted, Ravestein would be stuck with the decision made by the adjudicator. On the other hand, if permission to appeal was granted, Trant would lose the benefit of the adjudicator's decision and subsequent arbitral award.

It was accepted by the parties that either Condition 3a or Condition 3b needed to be satisfied, i.e. both conditions did not need to be satisfied for leave to appeal to be given.

For Condition 3a, the Court had to consider whether the arbitrator's decision was obviously wrong, namely that no valid Notice of Dissatisfaction had been served. That involved considering clauses W2.3(11) and W2.4(2) of the contract, which were unamended from the standard form. In essence, clause W2.3(11) states that an adjudicator's decision is binding unless and until it is revised by the tribunal (in this case, an arbitral tribunal), whereas clause W2.4(2) states that a party dissatisfied with an adjudicator's decision may not refer the dispute to the tribunal unless, within four weeks of the adjudicator's decision, it notifies the other party of the matter which it disputes and its intention to refer the matter to the tribunal.

Ravestein sought to rely on the earlier judgment of Transport for Greater Manchester v Keir Construction Ltd [2021] which states that "the purpose of [any Notice of Dissatisfaction] was to inform the other party within a specified, limited period of time that the adjudication decision was not accepted as final and binding". Ravestein therefore argued that, properly interpreted, the Notice of Dissatisfaction needed only to have informed Trant that the adjudicator's decision was not accepted as final and binding.

The Court disagreed, finding that Ravestein had misinterpreted O'Farrell's earlier judgment by confusing (a) the purpose of the notice and (b) satisfying the requirements of the notice clause. In order to achieve the latter, Ravestein was required to comply with the two requirements in clause W2.4(2), which were to notify Trant (i) of the matter it disputes and (ii) of its intention to refer the matter to arbitration. The Court agreed with and adopted the arbitrator's analysis, which was that both requirements had not been met. Perhaps most significantly, Ravestein's emails only ever expressed dissatisfaction with the adjudicator's jurisdiction and not the substantive correctness of the adjudicator's decision – parties are often dissatisfied with a decision, but that doesn't also mean that they believe it was substantively wrong.

The Court went on to consider Condition 3b and concluded that the question posed was not one of general public importance nor was the arbitrator's decision open to serious doubt. While it was accepted by the Court that the interpretation of standard clauses was often of general public importance, the meaning of clauses W2.3(11) and W2.4(2) had already been considered recently in the Transport for Greater Manchester case. In any event, the point to be decided here was whether an individual email was a valid Notice of Dissatisfaction and that could not be said to be a question of public importance.

For Condition 4, the Court did not accept that it was just and proper for it to determine the question posed to it. Part of its reasoning for that was because one of the main objectives of the Housing Grants, Construction and Regeneration Act 1996 is to 'pay now, argue later' and Ravestein's refusal to pay plainly went against that objective.

The Court therefore refused to grant the permission to appeal sought by Ravestein.

Conclusion

It has always been known that a party seeking to appeal an arbitrator's award pursuant to section 69 of the Arbitration Act 1996 will have an uphill battle and this case is yet another reminder of that.

The main take-away though is that any notice should be issued in strict compliance with the requirements of the underlying construction contract. For those that regularly use the NEC standard form with Option W2 (which should be the case if the Housing Grants, Construction and Regeneration Act 1996 applies), any losing party to an adjudication should not only be mindful of the time limit for issuing a Notice of Dissatisfaction but also the substance of that notice. A failure to meet either requirement will result in it having no further recourse to challenge the adjudicator's decision.

The case also serves as a warning of what can happen when a party buries its head in the sand rather than actively participating in an adjudication. By failing to participate, in addition to Ravestein being held liable to Trant in the principal amount of £454,083.09 plus VAT (as decided in the adjudication), Ravestein will now likely be facing hefty cost bills from the failed arbitration and subsequent court action. Who knows what would have happened if it had just taken part in the adjudication to start with rather than what appears to have been a meritless jurisdictional challenge…

Adam Brown
Senior Associate

JAPANESE KNOTWEED: A NEW OLD PROBLEM??

The words “Japanese knotweed” will send a chill through even the most seasoned developer, and it is, indeed, a headache to remove from site, what with the transport and disposal regulations and the seemingly endless rounds of herbicide.

But is it really the subsidence-causing, foundation-destroying shrubbery that some expect it to be?

What’s all the fuss about?

According to a 2019 report by the House of Commons Science and Technology Select Committee’s this may not be the case. Latest research suggests that the physical damage caused by Japanese knotweed may be no greater than native trees or shrubbery. It is, however, still notoriously difficult to get rid of as it is incredibly resilient and capable of returning many years down the line if its rhizomes or fragments of its vegetation remain left in the soil.

So, if it isn’t as dangerous to our foundations and concrete hardstanding as perhaps expected, why should we be so concerned about it?

Like any plants and trees, it can cause damage to foundations but, unlike others, it is subject to a host of regulation – so remediation isn’t a simple process. Further to this, and the subject of the article, a recent Court of Appeal case (Davies v. Bridgend County Borough Council [2023]) has held that in the case of continuing nuisance, those who have ignored the nuisance of Japanese knotweed will be responsible for any residual diminution in the value of affected neighbouring land. This has not previously been seen, as prior cases regarding Japanese knotweed and the diminution in value of neighbouring property ruled that such loss was pure economic loss only and was therefore generally irrecoverable. In a legal shake-up, however, Davies is distinguished from that notion.

What happened in Davies?

In brief, the defendant (a local authority) had Japanese Knotweed on their land and the knotweed had encroached, unnoticed, onto the claimant’s neighbouring land, stretching its rhizomes underground across the boundaries between the two. The claimant was then put on notice that they could make a claim for such an encroachment and first did so in 2019. In this first instance, the judge dismissed the claim for diminution in value of the property as it was held to be pure economic loss and therefore irrecoverable, as it is a well-known legal concept that the tort of nuisance does not protect purely economic interests.

However, the Court of Appeal disagreed. They based this decision on the fact that the original judge had used the case of Williams & Waistell v Network Rail Infrastructure Limited [2019] to show that diminution in value of the property was pure economic loss. In Williams, there was no active encroachment of Japanese knotweed, rather it was being argued that the mere presence of knotweed next door devalued the property. It was held as such that diminution in value of the property was pure economic loss and therefore irrecoverable.

Here, the Court of Appeal distinguished Davies from Williams as there was clear encroachment of the knotweed and therefore a physical interference with the claimant’s property resulting in consequential losses – the diminution in value of the property. Those losses were, therefore, not pure economic loss and were recoverable. The cost of treating the knotweed, however, was not recoverable because treating the knotweed would have been required regardless of whether there had been a breach of duty on behalf of the defendant or not.

There was also an important point to note that limitation periods didn’t really apply in the traditional sense to such Japanese Knotweed nuisance claims. Encroaching knotweed was a continuing, persistent nuisance that affected the owner’s quiet enjoyment and amenity of the property, caused by a breach of duty on the part of the defendant. This means that there is, theoretically, no limitation period for encroachment claims, opening everyone, even new purchasers of a property, to them.

What relevance does this have to construction?

Japanese knotweed is not, per se, a construction law issue; but the ramifications of mishandling it could be, as Davies shows, widespread and costly. If a local authority (often hard to win cases against as courts can seem reluctant to rule against governmental bodies for public policy reasons) can be considered in breach of duty for allowing the continuing nuisance of knotweed as in Davies, then it could open the doors for developers being at risk of similar claims, regardless of when they bought the site.

Although there haven’t been any precedents set (yet!) by negligent developers in their handling of Japanese knotweed, there are some obvious potential issues for those working under standard construction contracts:

1. Firstly, it is clear that any contract with a contractor or consultant hired to be responsible for the removal or management of Japanese Knotweed needs to be robust in addressing nuisance. The JCT suite is silent on the subject of nuisance, and notably any indemnity protecting the employer in the event of nuisance is also absent. Consideration should go into the inclusion of an indemnity or protection for the employer, and contractors themselves may have to amend their pricing if they are expected to take on such an indemnity. This is further compounded by ground risk – who is taking it and, if it is the contractor, are they able to rely on any reports that may or may not tell them of Japanese knotweed contamination? If a contractor is expected to take on ground risk next to a railway for example (where the rate of Japanese knotweed existing may be higher) then the employer should also expect that the contractor will be pricing for this risk.

2. This then feeds into the second point of liability – not only have we seen that physical encroachment by Japanese knotweed can lead to successful claims, putting the owner of the site at risk, but the mishandling of knotweed can even result in criminal conviction. Knotweed is so heavily regulated that, for peace of mind, the employer may not want to push full responsibility of knotweed onto the contractor and instead approach it more collaboratively. Letters of reliance or warranties from any knotweed specialists become an absolute must-have, and there may come a point where a local authority becomes aware of knotweed contamination, resulting in specialist orders being issued. If this is mid-remediation and the contractor is working on-site elsewhere, then consideration may have to be given towards cooperation and collaboration clauses with external third parties and those statutory requirements clauses take on a whole new importance.

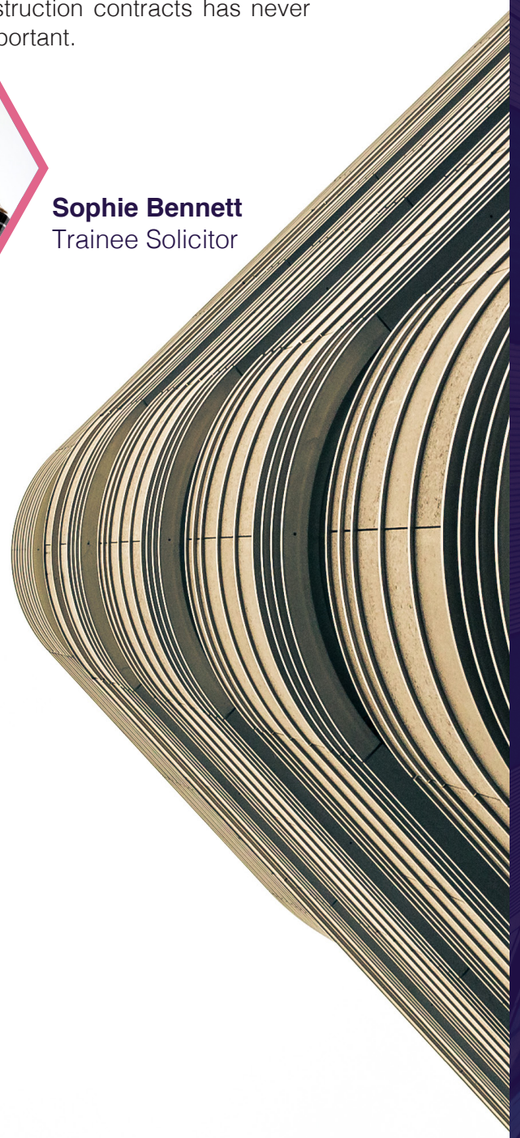
Thirdly, the owner of the brand-new site, ready for construction but now slapped with the problem of knotweed, may want to consider its own claims against a seller. Were there any misrepresentations in the sale? When buying, developers may want to consider an extra query regarding the presence of Japanese knotweed. Conversely, when selling completed sites that have been contaminated with knotweed, even when treated, it may be wise to make any buyer aware of such contamination as to not be accused of misrepresentation.

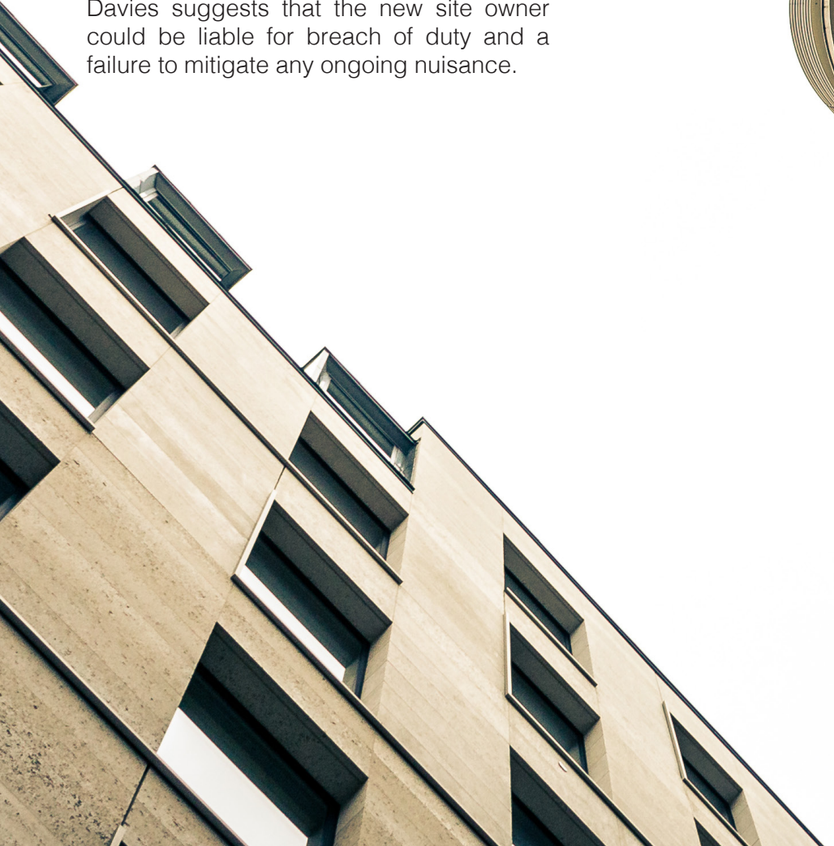
Conclusions

At its core, Davies highlights the need to be vigilant regarding knotweed, regardless of how long someone has owned a site for and whether they were the cause of any ongoing nuisance or not. If a disgruntled neighbour finds knotweed in their garden and it seems to be coming from the developer's site, Davies suggests that the new site owner could be liable for breach of duty and a failure to mitigate any ongoing nuisance.

Added to the existing problems that Japanese knotweed can cause a development, the need for comprehensive site investigations and careful allocation of risk in construction contracts has never been more important.

Sophie Bennett
Trainee Solicitor





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