

Tied in knots

One of the most widely publicised problems in the property market revolves around a pretty and seemingly innocuous plant. But Japanese knotweed can be a real issue for owners, surveyors, lenders and solicitors. **Sarah Dwight** explains

Every so often, conveyancers face an issue that they have never seen before, or some unexpected matter shoots to the top of the agenda. In recent years, hot topics have included building regulations consent after *Cottingham v Attey Bower and Jones* [2000]; the issue of flying freeholds on the sale of ex-local authority houses; and flooding and flood insurance following the widespread deluges in 2007 and 2009.

But one of the most widely reported issues has centred around, of all things, a single plant – Japanese knotweed.

WHAT IS IT?

Japanese knotweed (*Fallopia japonica* var *japonica*) was introduced to Britain in the 19th century as an ornamental plant. And it is quite pretty – a lush green colour with spade-shaped leaves and a bamboo-like stem, and with small white flowers in the autumn around September or October.

What the Victorians perhaps did not appreciate was that this plant would outdo all other native plants and animals. It can grow by 4in or 10cm a day, which is up to 1m a month. Just 1cm of the underground stem (known as the rhizome) can produce a completely new plant within 10 days. However, what can be particularly alarming is that rhizome segments can remain dormant in soil for 20 years before producing new plants. Not only does the plant spread through the rhizome, but also through the crown and the stem, rather

than through its seeds.

All this means that knotweed is now widespread, covering the hedges on roads, river banks and derelict buildings. However, none of us would be too concerned about knotweed if it just stayed in those areas – it is when it starts to encroach on outbuildings, gardens and houses that we start to worry.

WHAT IT MEANS FOR PROPERTY OWNERS AND DEVELOPERS

If you have knotweed on your land, then you may be causing a private nuisance to surrounding properties. You need to control the knotweed in order to prevent further spreading and liability. If there is knotweed on a neighbouring property and this is causing a nuisance to you, then you need to discuss with the neighbour how the knotweed should be controlled.

This latter situation is an issue under common law.

The real bite of the law can be found in the Wildlife and Countryside Act 1981 (WCA 1981), which states that it is an offence to “plant or otherwise cause to grow in the wild” any plant which is listed in schedule 9, part II of the act. The list contains more than 30 plants, one of which is Japanese knotweed.

This means the landowner has to control the plant, but does not necessarily need to remove it. What is surprising is that the police are responsible for investigating any such offences, and each police officer has a wildlife liaison officer.

If the police cannot take action, then a civil action against the landowner would be necessary to ensure that the invasive plants are controlled.

Eradication of knotweed is difficult. On development sites, some developers remove all the affected soil and install barriers beneath the buildings. However, at the point of landscaping a new development, it is important to inspect all materials on-site to ensure that there are no segments of the knotweed remaining.

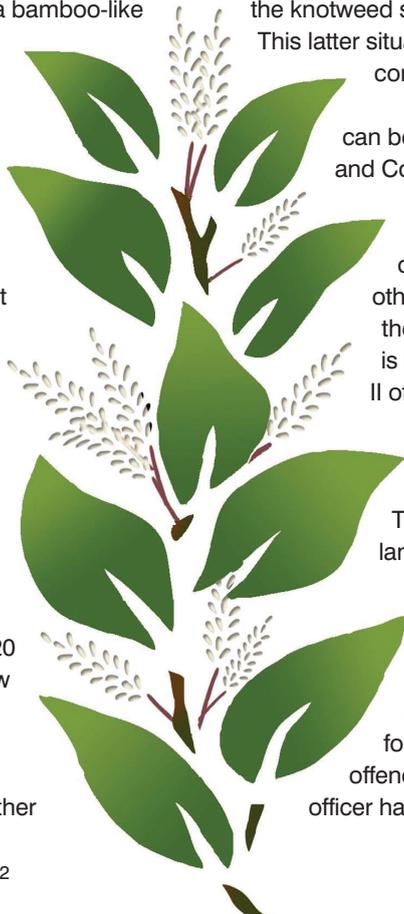
Those who carry out routine maintenance on a site or who are involved in larger development projects could be at risk of causing the spread of knotweed. Under the WCA 1981, only licensed contractors can transport knotweed to designated landfill sites, and it can form controlled waste under the Environmental Protection Act 1990. This places a duty of care on any person who treats or dispose of controlled waste.

For residential properties, the only practical option is to treat knotweed with a herbicide, but the treatment can take up to four years to be effective because although the plants die quickly, they regrow from the roots.

WHAT IT MEANS FOR THE INDUSTRY

Although Japanese knotweed is clearly a real and concerning problem, it can be managed, so it need not necessarily be a barrier to the purchase of a property.

The Royal Institute of Chartered Surveyors (RICS) has been working with other agencies to establish a national protocol for the assessment of the risk posed by knotweed in residential mortgage lending. Clearly, it is the surveyor who visits the property who should therefore be the person able to identify whether knotweed is present. RICS has produced an information paper, *Japanese knotweed and residential*



property, to help surveyors consider the implications of knotweed on or near a residential dwelling when doing valuations and surveys of residential properties in the UK.

When knotweed and its associated problems became apparent, the Council of Mortgage Lenders (CML) consulted its members and, although the CML did not issue a formal policy, it was clear that there was a definite reluctance to lend on properties affected by knotweed.

Lenders have responded to knotweed in different ways – some treat each case on its merits, while others refuse to lend on any property where knotweed is present within the boundaries. This variation was partly due to lenders' individual policies, and partly to

previous years' growth. Even when treatment has taken place, the potential for regrowth is high – as I mentioned, rhizome material can lay dormant for up to 20 years, and it is possible for the knotweed to be burned or buried and still return some years later.

The RICS paper notes that it has only been in the past few years that problems have arisen, as lenders review their policies. In June 2010, it was reported that Santander had refused a further advance to one of its customers because the valuer found knotweed in the garden. Santander stated that it had a clear policy of not lending on properties where "Knotweed is found, either currently growing or having been treated...". The lender recommended that specialist advice

structural movement, the presence of radon gas – and these issues do become assimilated into the conveyancing and lending processes over time.

The RICS report makes interesting reading for both surveyors and solicitors. It states that the concerns of many practitioners about the damaging effects of the plant are based on misunderstanding and overreactions – for instance, it clarifies that although knotweed can cause disruption and damage to outbuildings (including conservatories) and boundary walls (*inter alia*), it is unlikely to cause structural problems in houses. Add to these overreactions the lack of agreement about the most suitable and effective method of treatment, and it becomes clear why RICS has spent considerable time and effort in producing its report. Surveyors can recognise the presence of Japanese knotweed, but are in difficulty when recommending remedial action.

Philip Santos, a practising surveyor and valuer, wrote in a recent article that, following the publication of the paper and the involvement of the CML and Building Societies Association, there "will be an agreed mechanism for protecting the financial interests of both lenders and homeowners", while a managed course of repeated chemical treatment is carried out over several years. The paper states that the presence and effects of Japanese knotweed are only one of many considerations that affect the value of a property, and effective control can minimise the plant's impact. There could be a 'management plan' for the control of the knotweed, and this could be transferable to subsequent owners, with the plan being backed by a warranty or guarantee that ensures that the treatment plan will be completed. It is then likely that lenders will begin to specify that the management plan provider is an accredited member of a recognised trade association. ■

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the fact that there had been no official guidance on the issue. RICS was aware of this variation in the approach adopted, and of the additional challenge this presented to its members, especially those surveyors who carry out mortgage valuations for different lenders.

Another issue is the different look of knotweed at different times of the year. During the winter months, there are just bare stems – the leaves fall off the plant as it turns orange and brown in the early part of winter, until eventually the stems become straw-coloured. This makes it difficult to spot during the winter to anything but the trained eye (which could identify the presence of the plant from the stems / canes on the ground). At the start of the growing season in early spring, small red / purple shoots (called spears) emerge, and these can actually grow among the tall 'dead' stems of the

should be sought if it was suspected that the plant was growing in proximity to the boundaries of a property and "it would be appropriate to make a whole advance retention, pending this advice".

WHAT IT MEANS FOR SOLICITORS

As RICS and CML have now put the issue of Japanese knotweed formally on their agendas, now would be a good time for conveyancers to ensure that they also raise the question within pre-contract enquiries. It could also be included as a new question within the TA6 (Property Information Form) that is to be redrafted within the coming few months (the Law Society's consultation on the form closed on 19 April).

WHAT'S NEXT?

Extensive media interest has turned knotweed from a complication that was hard to solve, into an issue that could result in the failure of a sale. However, surveyors (and solicitors) have faced similar issues before – concrete construction houses,

