DAVIES V BRIDGEND COUNTY BOROUGH COUNCIL [2024] UKSC 15

MAY 2024

1. The Supreme Court has recently upheld the appeal of the defendant (supported by Network Rail as an intervener) in *Davies v Bridgend County Borough Council* [2024] UKSC 15.

2. In doing so the Supreme Court has confirmed that the conventional 'but for' test for causation applies to causes of action in private nuisance, including those arising in respect of natural hazards and those involving 'continuing nuisances'.

3. The claim in *Davies* arose from the encroachment of Japanese knotweed ("JKW") from the defendant local authority's land into the claimant's property's garden. The encroachment began before 2004 when the claimant had purchased the property. The local authority could not be blamed for the encroachment at this time, nor indeed for any continuation of this encroachment before 2013. Thus this early encroachment was non-tortious. However, the local authority was held liable in private nuisance for having failed to prevent the encroachment in the later period of 2013 to 2018.

4. The JKW could be treated with herbicide, which would kill the above-ground growth of JKW but leave below-ground JKW rhizomes remaining in the garden's soil. The claimant conceded that he could not claim the costs of the herbicide treatment from the defendant as damages, since the treatment would have been required in any event, regardless of the defendant's breach of duty from 2013 to 2018, because of the earlier non-tortious encroachment. The claimant did, however, claim damages for the residual diminution in his property's value which would persist after the completion of the treatment because of: (1) the continuing presence of JKW rhizomes in the garden's soil; and (2) a resulting stigma attaching to the property in the eyes of prospective purchasers.

5. The defendant defended the claim for the residual diminution in value on the basis of 'but for' causation. It argued that, but for its breach of duty from 2013 to 2018 the value of the property would still have been diminished because of earlier encroachment (which earlier encroachment would have infested the soil with JKW rhizomes and attached the stigma to the property).

6. The Court of Appeal rejected the defendant's argument on causation. It held, on the basis of the House of Lords' decision in *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, that because the defendant was in continuing breach of duty as at 2018, the harm to the claimant's quiet enjoyment and amenity, measured as the diminution in value due to stigma, was continuing at this time and therefore the harm could be said to have been caused by the breach of duty.

7. The Supreme Court held that the Court of Appeal had misunderstood *Delaware*; properly analysed the decision in *Delaware* was that a claimant is entitled to recover the reasonable costs incurred in abating a continuing nuisance. In *Davies* the loss representing the diminution in the property's value was not an aspect of reasonable costs incurred in abating a continuing nuisance. Thus, the decision in *Delaware* was not applicable to assist the Claimant.

8. Instead, the Supreme Court accepted the defendant's argument that conventional principles of 'but for' causation should apply; and on this basis the Court held that the residual diminution in the property's value had not been caused by the defendant's breaches of duty after 2013.

9. The Supreme Court declined to determine a new argument raised by the claimant, holding that it had not been properly pleaded and was unsupported by evidence. This was an argument that: (1) the diminution in the property's value would taper away over time; and (2) the defendant's breach of duty from 2013 to 2018 had caused a five year delay to the start of this tapering process and a resultant loss to the claimant.

10. The Supreme Court also highlighted that its judgment would not address three further issues:
    a. The question of whether the encroachment of JKW is a continuing nuisance;
    b. The impact of recent scientific research, which suggests that JKW's reputation as a pernicious plant is undeserved (or at least overstated), as set out in the RICS Guidance Note 2022 "*Japanese knotweed and residential property*";
    c. The implications of JKW having first encroached into the claimant's property before his purchase of that property.

11. The Supreme Court's decision on causation is to be welcomed. It provides some (much needed) common sense to the burgeoning area of JKW litigation.

12. The Supreme Court's clarification of the decision in *Delaware* is also good news. The House of Lords' judgment in *Delaware* is factually complicated and tricky to follow in places. It is routinely applied in nuisance cases and in particular cases of tree roots subsidence and (until now) has been prone to being misunderstood. A proper understanding of the case is greatly assisted by consideration of the judgment of Pill LJ in the Court of Appeal ([2000] 32 HLR 664), which the Supreme Court had the opportunity to do.

13. The claimant's tapering argument and the three issues, on which the Supreme Court declined to address, are unlikely to go away. It is anticipated that the courts will be required to address them all in the near future.

Howard Palmer KC and **Jack Harris** represented the intervener, Network Rail, in the Supreme Court instructed by Matthew Anderson of DAC Beachcroft Claims Limited.

Howard Palmer KC

Jack Harris