Williams v Network Rail Infrastructure Ltd
[2019] QB 601

Summary

Each of the (two) claimants in this case owned a bungalow next door to land owned by Network Rail, the defendant. Network Rail's land was infested with Japanese knotweed, a type of weed that is regarded with horror by house purchasers because (i) it is very hard to root out and destroy, and (ii) it is extremely invasive; for example, it can penetrate and grow up through concrete foundations. Network Rail made desultory efforts to deal with the knotweed on its land that did nothing to root it out, and the knotweed spread onto land belonging to each of the claimants, with the result that the value of their parcels of land diminished. It was held at first instance that this diminution in the value of the land belonging to each claimant meant that they had each suffered sufficient damage to sue Network Rail in private nuisance. The claimants were awarded: (i) an injunction, requiring Network Rail to deal properly with the Japanese knotweed on its land; (ii) damages for the cost of eliminating the Japanese knotweed on the claimants' respective parcels of land; and (iii) £10,000 each to compensate them for the fact that even after the knotweed on the claimants' land was eliminated, the claimants' land would suffer a permanent fall in value of £10,000 because of prospective buyers' fears that the knotweed might come back.

The Court of Appeal dismissed Network Rail's appeal against the first instance judge's finding that Network Rail was liable to each of the claimants in private nuisance. However, the Court of Appeal held (with Sir Terence Etherton MR giving the only judgment) that the judge had been 'wrong in principle' (at [46]) to find that a fall in the value of each claimant's land gave that claimant title to sue the defendant in private nuisance: 'The purpose of the tort of nuisance is not to protect the value of property as an investment or a financial asset. Its purpose is to protect the owner of land…in their use and enjoyment of the land' (at [48]). However, the Court of Appeal went on to hold that the claimants had suffered sufficient interference with their use and enjoyment of their respective landholdings as a result of the encroachment of Japanese knotweed from Network Rail's land so as to be able to sue Network Rail in private nuisance for that encroachment. The Court of Appeal held that the presence of Japanese knotweed on someone's land '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' (at [55]). As such, the presence of Japanese knotweed on someone's land affects 'the owner's ability fully to use and enjoy the land. [It is] a classic example of an interference with the amenity value of the land' (at [55]).

Comments

This case deals with an issue which often features in university problem questions regarding the law on private nuisance – so listen up. The issue is: when can a claimant sue in private nuisance for damages to compensate them for the fact that the private nuisance has caused their land to fall in value? The answer given by the Court of Appeal: they cannot, if the *only* effect of the putative nuisance is to diminish the value of the claimant's land, and they have otherwise suffered no interference with the utility (or use value) of their land. But the issue that more often comes up in problem questions is – where the claimant is the victim of a nuisance that has admittedly interfered with their use and enjoyment of land (for example, smoke from the defendant's factory regularly pollutes the claimant's land), can the claimant

sue for damages in respect of a fall in the economic value of their land that has been triggered by the usefulness of the land being impaired?

The Court of Appeal's judgment provides some support for a positive answer to this second question. The Court of Appeal affirmed the first instance decision in the claimants' case, and that decision awarded the claimants damages in respect of the fall in their value of their land that could not be undone by removing the Japanese knotweed that Network Rail had culpably allowed to infest the claimants' respective parcels of land. Furthermore, the Court of Appeal went out of its way to dismiss the second ground of Network Rail's appeal, where that second ground was an appeal against the decision to award the claimants damages in respect of that fall in the value of their land.

Now – it is true that Network Rail was appealing against that award on the ground that the *amount* of damages under that head had been miscalculated, and the Court of Appeal agreed with the claimants that such an appeal against the first instance decision should be dismissed because the ground of that appeal was 'both misconceived and was not raised below' (at [78]). It is also true that the Court of Appeal acknowledged that 'According to NR's skeleton argument, Appeal Ground (2) only arises if Appeal Ground (1) fails' (at [78]) – where 'Appeal Ground (2)' is the appeal against the *quantum* of damages awarded in respect of the fall in the value of the claimants' land, and 'Appeal Ground (1)' is the appeal against the idea that a fall in the value of the claimants' land could support a claim in nuisance – and the Court of Appeal went on to observe that 'Given that I would hold that Appeal Ground (1) succeeds, Appeal Ground (2) would appear not to arise.' This suggests that the Court of Appeal acknowledged that their finding in favour of Network Rail on the *damage* issue *automatically* meant that Network Rail's appeal on the *damages* issue did not need to be considered – that is, *damages* for the fall in the value of a claimant's land should never be awarded in private nuisance if a fall in the value of the claimant's land is not sufficient *damage* to give rise to a claim in private nuisance.

However, it seems clear that the Court of Appeal *affirmed* the first instance judge's decision to award the claimants damages to compensate them for the irreversible fall in the market value of their respective parcels of land that they suffered as a result of those parcels of land being contaminated with Japanese knotweed. This is because the Court of Appeal said at [82] that it would be quite wrong to order a new hearing to determine whether Network Rail's own expert had arrived at the right figure – on which the first instance judge relied – as to how much the market value of the claimants' land would be affected in future by the fact that it had been contaminated by Japanese knotweed: 'the cost of that exercise would be out of all proportion to the amount of damages in issue, and it would place an unjustified burden on both the claimants and the judicial system, bearing in mind that there has already been a three-day trial of the action' (at [82]). None of this would be relevant, *unless* the Court of Appeal *was in favour* of awarding the claimants damages in respect of the falls in the market value of their respective landholdings, because the claimants had suffered sufficient damage (in respect of interference with their use and enjoyment of their land) to sue the defendants in nuisance, and the fall in the market value of their land was a consequence of their suffering that damage.

I think the Court of Appeal was right to hold that a claim in private nuisance cannot be made where the only damage that the claimant has suffered is a fall in the value of their land, as opposed to some kind of physical damage to their land or interference with the use-value of their land. But on the question that examiners like to torture students – Can someone who *has* suffered damage that would allow them to sue for damages in private nuisance sue for damages to compensate them for the fact that the market value of their land has fallen as a result of their suffering that damage? – I think my answer would normally be 'no'.

Take the case where *Belcher* operates a factory that regularly pollutes *Ashen*'s land. In the absence of that pollution, *Ashen*'s land would be worth £200,000; but as it is, it is worth £50,000. *Ashen* sells the land for £50,000 to *Hardy*. Can *Ashen* sue *Belcher* for £150,000, on the basis that 'But for your pollution, I would have been able to sell my land for £200,000, not £50,000'? My answer is: 'No – all *Ashen* can sue *Belcher* for by way of damages is a reasonable sum to compensate her for the day-by-day, week-by-week, interference with the use of her land that she suffered as a result of *Belcher*'s pollution.' My reason for thinking that *Ashen cannot* sue *Belcher* for £150,000 is that if she can, what happens if *Hardy* subsequently sells the land in its still polluted state to *Happy* for £50,000, and then sues *Belcher* in nuisance, saying 'But for your nuisance, I could have sold the land for £200,000, not £50,000'. *Belcher* will not be able to respond, 'You can't sue me – you knew the problem with my polluting your land when you bought it': there is no defence of 'coming to the nuisance'. So if *Ashen* can sue *Belcher* for £150,000, then it would seem to follow that *Hardy* can as well; and so can *Happy* if *Happy* also sells the land to *Lucky* for £50,000; and so can *Lucky*, and so on ad infinitum. This cannot be the law. My own solution to this problem would be to say that *Ashen* cannot sue *Belcher* for the £150,000 she has theoretically lost as a result of *Belcher*'s nuisance on selling her land to *Hardy* because *Ashen* has unreasonably failed to mitigate that loss. Before selling the land she could have got an injunction against *Belcher*, and that would have levered up the value of her land back to £200,000.

The facts of the *Network Rail* case were very different, and that perhaps made it justifiable to award the claimants damages in respect of the fall in the market value of their land. First of all, there was nothing the claimants could have done to avoid the fall in the market value of their land. Even after the Japanese knotweed infesting their land was cleared away, the market value of their land would still be diminished because of the potential for the Japanese knotweed to return. Second, Network Rail was required to clear the Japanese knotweed from its land and to pay for the Japanese knotweed to be cleared from the claimants' land. Assuming these remedies were implemented, any claims in private nuisance would stop dead with the claimants: any subsequent purchaser of a bungalow belonging to one of the claimants would not be able to claim that *they* had suffered a private nuisance as a result of which the land they had purchased was worth £10,000 less than it would otherwise have been, because the private nuisance would have been eliminated before they purchased the land. So the problem of a defendant being subjected to an infinity of claims for the fall in the market value of the land triggered by a nuisance for which the defendant was responsible could not have arisen on the facts of *Network Rail*.

So the award of damages for the fall in the market value of the claimants' properties in *Network Rail* can be reconciled with my generally negative stance towards such damages being awarded in private nuisance, and I continue to believe – in the absence of further and better arguments to the contrary – that my generally negative stance is the correct one, and the one that should be adopted by students in dealing with problem questions analogous to *Ashen* and *Belcher*'s.

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