



The myths untangled:

► A critical appraisal/review of the UK Japanese knotweed industry by MAXIME JAY, Managing Director of Musketeers Group Ltd

Japanese knotweed is a never-ending subject of incomprehension, fear and nonsense. To illustrate this statement, I give you one example: Isn't it curious to read on the one hand information about the knotweed stating that it can grow through foundations, while on the other hand we are advised to use a geo-textile membrane to remediate the knotweed? So how come Japanese knotweed is able to penetrate through 20cm of concrete and not be able to grow through a 3mm-thick piece of plastic!

When the knotweed legislation came into force about a decade ago, it shook the construction industry as a whole. While common sense prepared us to provide remediation techniques for chemical pollutants (for instance, hydrocarbons, cyanide and the like) because they smell, have an unusual colour and affect human health and the environment, suddenly we had to consider into the equation a "vegetation" threat.

At the time, there was no knowledge available, consequently no knotweed experts and, in order to provide support to the construction industry, we had to resort to making assumptions.

As often happens in such conditions, the assumptions did not capture the realistic threat of the knotweed and it is under those circumstances that a new knotweed remediation industry emerged hiding behind a screen of fear, inconsistency and myths.

A QUESTION OF GUARANTEE

Probably the most recurrent pitfall in the knotweed industry is the sensitive issue of guarantee. It is perfectly understandable for a developer to seek some kind of re-assurance. After all, they are taking a large amount of risk to see their projects through.

Fundamentally, there are currently no insurance companies willing to cover works associated with Japanese knotweed, yet it is not uncommon to be offered guarantees/warranties as they represent obvious powerful marketing tools. So what are those guaranteed schemes proposed by most of the knotweed industry?

Well, if we scrutinise the various schemes, we can classify them into predominantly three categories. They are:

PROFESSIONAL INDEMNITY (PI)

A PI policy is commonly obtained for organisations and individuals that provide advice to their clients. Therefore claims arising following a survey where it is alleged that due to negligent advice the client has suffered a financial loss are covered by a PI policy.

However, in the circumstances that a knotweed re-growth is identified following a remediation exercise, the insurance company will declare the defect as outside the scope of the PI policy as this would be classed as defective workmanship.

PUBLIC LIABILITY (PL)

A PL policy will cover third-party property damage &

bodily injury claims. The so called knotweed guarantees under PL offered by contractors are probably the most ludicrous guarantee of all. The intention of the Public Liability Insurance is to provide an indemnity in the event of a negligent act of the contractor which can be tied to a specific event/act within the period of insurance which results in property damage/bodily injury. No cover is provided for property being worked upon or the actual contract works.

PERFORMANCE BOND

A Bond Contract, Performance or Surety Bonds are guarantees to pay the direct loss suffered by a party (the Employer) as a result of a breach of contractual obligations by the other party (the Contractor). In essence, this means that in the event of default by the contractor, usually as a result of insolvency, the Employer will be able to recover the necessary additional costs they incur from the Surety up to the level of the bond. It is not the intention of these types of bonds to guarantee the works carried out by the contractor.

ARE WE BEING MISLED?

Darryl Smith, Senior Insurance Broker for COL Direct, says: "We have carried out in-depth investigations with the insurance market as a result of an increasing number of enquiries from our clients. In our opinion due to the lack of understanding of the ►

knotweed-removal industry no insurer is prepared to underwrite a guarantee following a removal project at the present time”.

Taking into consideration the above, one could wonder if misleading practice pre-contract could lead to poor site knotweed management. Worst of all, there are knotweed contractors that do not hesitate to provide guaranteed remediation techniques, which do not meet the statutory requirements. We are talking here about methods involving solely the use of herbicide where it is claimed that the knotweed will be eradicated within one growing season.

Mark Heggie, Senior Waste Officer from SEPA, says: “SEPA’s guidance recognises the threat of knotweed rhizomes and their ability to remain viable for long periods of time following the application of herbicide. The invasive and combative nature of the plant means that treatment with herbicide alone is unlikely to provide a quick-fix solution and it takes several years to achieve successful eradication.”

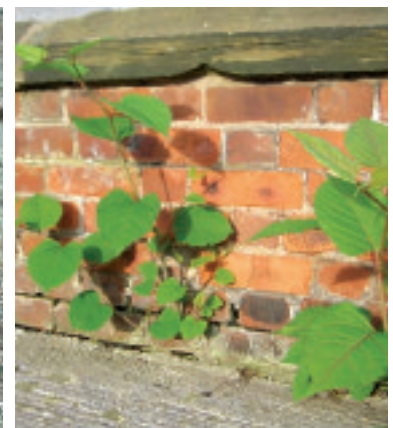
A CASE IN POINT

In order to understand how exponential the liabilities for a developer could become when commissioning a six-months guaranteed spraying/stem injection eradication programme or similar, let’s consider the following example:

Developer A is commissioning a six-month guaranteed herbicide programme. After six months, developer A is advised that his/her site is free of knotweed. A decides to sell the surplus of top soil from his site to Developer B, which also included the treated knotweed area. After a few weeks, the knotweed reappears at Developer B site. The liabilities for Developer A will be as follows:

1. The commercial relationship that A has nurtured with B is likely to be severed;
2. Since bad news travels fast, the commercial relationships that A has with other stakeholders in his/her industry could also be severed;
3. B will request prompt action, which is likely to result in the most expensive and often cost-prohibitive method, for instance landfill site disposal, as B will be extremely vigilant and for peace of mind will require the duty of care process to be followed as per the legislation;
4. Should the incident be recognised by the Environmental Regulator or should B not be satisfied by the remedial action proposed by A, it could be that the issue gets referred to a court proceeding. Obviously, the statutory requirements were not met and because:
 - i) the knotweed has escaped from the A site; A may under the Wildlife and Countryside Act 1981 be faced with criminal prosecution;
 - ii) the duty of care was not followed, A may under the Environmental Protection Act 1990 be subjected to unlimited fines in addition to the cost of cleaning up;
5. Obviously, any court proceedings are in the public domain, and as a result A’s profile may be affected further.

As per the fate of the knotweed contractor, his solicitors will likely successively argue that his client is not responsible for the above as it is not possible to ascertain whether the knotweed cross-



contaminations are the result of his client works or the consequence of other site activities that occur at A site.

CRITICAL EVALUATION

Greig Honeyman, Senior Partner for Fyfe Ireland LLP says: “Solicitors require to be alert not only to the presence of Japanese knotweed in development sites but also whether the eradication of Japanese knotweed in such sites has been effective. Given that Guarantees are not available we need to examine critically who has carried out eradication works and the manner in which eradication has been done. The Environmental Regulators could provide additional re-assurance that the eradication methods used was adequate. The days of assuming that these matters have been taken care of by any Developer at the time of site clearance have gone. Certainty is the order of the day.”

Trevor Renals, Invasive Species Adviser for the Environment Agency, adds: “It is very hard for a developer to evaluate the diverse methods and success claims on offer for knotweed management.

The knotweed code of practice provides information that would allow a developer to make an assessment of the technical claims made by a potential contractor. However, it is notoriously hard to prove that a treatment has been unsuccessful and that subsequent regrowth isn’t due to either neighbouring untreated ground or imported topsoil. Companies are understandably often reluctant to raise awareness of contractors that have failed to provide good knotweed management. I would encourage developers who despite being able to demonstrate good environmental practice on their sites are the victim of disreputable knotweed contractors, to pursue legal action against them.” ◻

The article was written by Maxime Jay, Managing Director of Musketeers Group Ltd a specialist contractor dedicated to provide ethical solutions for the remediation of invasive plants. For further information, please contact: E: m.jay@musketeers-group.com T: 01475 745390