

# STREET WISE

I hope it will be a happy and prosperous new year for everyone. Not for the first time, the content of this issue is inspired by things that have cropped up for business clients.

Christine Oxenburgh

## The Snow

**Sorry, I could not resist it. Emerging from 2009 with a sprained thumb and a black eye from snow related incidents and a sore back from shovelling snow, this white stuff is playing a big part in my life right now.**

To clear or not to clear? Most businesses have premises and customers, suppliers and employees have to get in and out of them. There is a myth that if you clear away the snow and someone falls, you are liable. Not true. Well, mostly not true. To make itself liable a

business has to do something that our old friend the man on the Clapham omnibus (or in our case, the Metrolink) would say was foreseeably likely to make matters worse not better. The example I heard was pouring boiling water on the snow, which would then freeze, making an icier surface that was more dangerous. A definite no no that I would expect to lead to a successful claim. I suppose if instead of removing snow, you deliberately compacted it and made it slippier, you could be liable. And in both cases I would be concerned that public liability insurers may seek to avoid liability under the policy. If you just shovel it away you are highly unlikely to incur any liability at all. Your visitors will love you for making their lives easier and you may get more business or be able to negotiate a discount from a happy supplier.

# Japanese Knotweed; the creeping invader

I recently had the great pleasure of getting a quick and good result for a business that removes the stuff. Co-incidentally, a client complained that the business that backed onto his property had an infestation that invaded his land every year. He wanted to know if he could do anything apart from complain every year. One of my colleagues has a similar case. There must be a lot of it around.

A tort is a civil wrong, such as negligence or defamation. There is a funny little tort called *Rylands v Fletcher* (because that was the name of the case that decided that the wrong was actionable as a tort) that grew out of Nuisance. If a person keeps something dangerous on his land and allows it to escape he is liable to the landowners whose properties are adversely affected. You do not need to prove negligence; just those two elements. The knotweed is the "something dangerous". It is dangerous because it is damaging your property. It has escaped because it is now on your property. My

annoyed client can make a claim for the cost of removing the knotweed on his land and for an order that the source of the problem is removed.

I remember years ago representing a business that was in dispute with the contractor who had carried out extensive rebuilding works during the course of which the contractor had allowed knotweed to take a hold on the site. Removal techniques were not so successful in those days. My client did nothing when the contractor failed to remove the knotweed. Then I was brought in. One of the heads of damage in the claim against the contractor was the cost of removal or the diminution in the value of the land because of the infestation. My client was very disappointed when I had to advise that because he had taken no action for so long, this part of his claim was hard to recover on. He could have tackled the problem sooner. Moral of the story, get on with it.

## Experts

I move now to a completely unrelated topic, namely expert evidence in resolving disputes. I have just had the privilege to win for a client a multi-million pound settlement of a partnership dispute. During the course of our claim, we used a (fantastic) forensic accountant to value the business which led me to think about experts generally.

Expert witnesses now owe duties to the court as well as to their client. They are not at liberty to favour the party who pays them. Their evidence should be the same whoever they represent. The reality is that because they are asked to look at the case from a perspective that their client's team considers helpful, they look at different issues and their initial views are likely to depend on the source of their instructions. In every case I have been in for longer than I care to remember, the experts meet and see what they can agree. Each must look at the view of the other and the evidence available and come to his own conclusion on that issue. Very often a good measure of agreement is reached. Some experts are wily foxes. The skills is to persuade his opposite number that his point of view is right.

I frequently get asked to employ an expert early on in the piece. Sometime the client has instructed an expert before I get the case. Every one wants to know where they stand. However, early instruction may be a waste of money. The court can insist that the parties use one jointly employed expert between them for whose fees they are equally responsible. If one party has already spent money on his own report, that expert will not be used jointly and the fees will not be recovered as costs even if his client wins.

As a rough rule of thumb, individual experts will be used when the case is very complex or when the outcome of the expert evidence decides the major issues in the case leaving little for the Judge to

determine. Otherwise the courts are reluctant to let the parties incur the substantial cost of the expert. (In my recent case, the experts fees were higher than our fees).

If it is pretty obvious that it is a joint expert case, a party can of course get his own report. There is no guarantee that the joint expert will come to the same conclusion but your guy can help with questions to be put to lead the joint expert in the right direction. You would not want to do that in anything other than a substantial case because of the cost. Otherwise, the thing to do is sit tight and get the joint report as soon as is practicable. There is not point spending more than you have to.

**And one word of warning. By and large: -**

1. if your expert comes to a conclusion that the Judge does not accept
2. if he changes his mind when he gets to the without prejudice meeting
3. you do not like the conclusion of a joint expert; or
4. when you ask a joint expert questions he changes his mind

he probably cannot be sued even if you chose a course of action that flows from the first view. As a witness he is what is called "immune from suit". The position is changing to some extent but there is a long way to go.

**Choose your expert with care, with advice and at the right time.**

**Christine Oxenburgh**  
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