Playboy Club, at [10]). Secondly, there are cases in which no “transaction” is contemplated by the defendant at the time of the representation. An example is Caparo Industries plc v Dickman, where the misrepresentation took the form of negligently prepared accounts. Because the misstatement was made as part of a routine audit, the auditor did not contemplate that it would be relied upon in any particular “transaction” (at [10]), and it was not his “known purpose” that it should be (at [11]). Consequently, no duty was owed.

Finally, Playboy Club may be significant in signaling a reversal of the judicial trend of viewing tortious liability for pure economic loss incurred pursuant to “assumptions of responsibility” through a contractual lens. Despite the convergence of certain remedial principles such as contributory negligence (Forsikringsaktieselskapet Vesta v Butcher [1988] 3 W.L.R. 565) and remoteness (Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351) across concurrent duties, Playboy Club suggests that reasoning by analogy between contract and tort has its limits. This is to be welcomed. The reasoning in Withers reflected the fact that (unlike in most torts) parties in concurrent liability cases have the opportunity to contemplate what kinds of losses might be caused in advance and allocate risk accordingly, and the decision in Vesta turned on the wording of the relevant statute; neither was based on the conceptual affinity of “assumptions of responsibility” to contract per se, and they should not be used as building blocks to import contractual doctrines into negligence. However, given the anomalous nature of the undisclosed principal doctrine, the extent to which Playboy Club represents a general change in approach to claims of this kind remains to be seen.

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CLEARING THE GROUND – NUISANCE, DAMAGE AND JAPANESE KNOTWEED

MR. Williams and Mr. Waistell each own a bungalow in Llwydarth Road, Maesteg. Their properties lie back from the street, abutting the railway line between Garth and Ewenny Road stations. The land beside the track belongs to Network Rail, a nationalised company that owns most of the UK’s rail infrastructure. For at least 50 years Japanese knotweed has visibly grown on the railway’s land. Japanese knotweed, as all gardeners know, is a menace, suppressing all other growth where it appears. It can also undermine house and garden walls, overwhelm sheds and block drains. It spreads underground through roots, technically “rhizomes”, and because it can regenerate from small amounts of material, is devilishly difficult to
eradicate, requiring several years of chemical treatment or professional deep digging, drying and burning. Japanese knotweed is counted as “controlled waste” for the purpose of the Environmental Protection Act 1990, and since 2013 sellers of property must declare whether their land is affected by it and, if it is, provide a professional management plan for its eradication.

Mr. Williams and Mr. Waistell complained that Network Rail’s Japanese knotweed had spread into their properties, causing their value to drop. At trial, Mr. Recorder Grubb found that rhizomes had spread into the two properties, but so far had caused no further damage. Nevertheless, the presence of the weed had affected the ability of the claimants to sell their properties at full value. This being a claim for private nuisance arising out of natural events and thus subject to the measured duty, he also found that Network Rail had acted unreasonably in failing to remove the weed. In a careful and sophisticated judgment, Mr. Recorder Grubb concluded that on those findings the claimants had made out a claim for private nuisance (Williams and Waistell v Network Rail Infrastructure Ltd. [2017] 2 WLUK 52). He recognised that Lemmon v Webb [1894] 3 Ch. 1, uncontradicted by Delaware Mansions Ltd. v Westminster City Council [2001] UKHL 55, [2002] 1 A.C. 321, precluded him from deciding for the claimants on the basis of nuisance by encroachment, since the rhizomes had yet to cause further damage, but he decided that he was entitled to find that the claimants had suffered loss of amenity solely because their properties were more difficult to sell than unaffected properties. The defendant appealed, arguing that the recorder’s approach amounted to allowing nuisance claims for “pure economic loss”. The claimants, conscious that the recorder’s approach was novel, sought to uphold his decision on additional grounds: that proof of physical damage was unnecessary in an encroachment claim and that the mere presence of the rhizomes under the claimants’ land was itself damage. The Court of Appeal (Sir Terence Etherton M.R., Sharp and Leggatt L.JJ.) agreed that the claimants should win, but on grounds different from those of the recorder (Network Rail Infrastructure Ltd. v Williams and Waistell [2018] EWCA Civ 1514, [2018] 3 W.L.R. 1105).

Sir Terence began by slaying several nuisance law dragons. Nothing, he said, now should turn on ancient distinctions between actions in trespass and actions on the case or between disseisina, nocumentum and transgressio. The clanking of their mediaeval chains should end. Coming more up to date, Lord Lloyd’s threefold division of nuisance in Hunter v Canary Wharf Ltd. [1997] A.C. 655, at 695, into encroachment, direct physical injury to land and interference in amenity or quiet enjoyment should be treated not as a statute but merely as providing examples of nuisance law carrying out its primary function of protecting real property rights, within the limits of a rule of reasonableness between neighbours. No need exists
to classify every claim into one of the three. Many claims will fall into more than one and some into none.

Sir Terence’s abandonment of the importance of the distinction between trespass and case led him to a further act of dragon-slaying. The proposition that nuisance requires damage to be actionable “must”, he said, “be treated with considerable caution” (at [42]). Instead, “the concept of damage in this context is a highly elastic one” (ibid.), pointing to the fact that nuisance to an easement requires no proof of further damage and nuisances that reduce the amenity of land (noise, smells, dust etc.) need not involve any physical damage to the land.

As an aside, Sir Terence declared unsound the idea that artificial protrusions from the defendant’s land over the claimant’s land should not be treated as nuisance, but only as trespass. He treated Kelsen v Imperial Tobacco Co. (of Great Britain and Ireland) Ltd. [1957] 2 Q.B. 334, sometimes cited for the proposition that protrusion is not a nuisance, as decided per incuriam for failing to mention Baten’s Case (1610) 9 Co. Rep. 53b and Fay v Prentice (1845) 1 C.B. 828. A better interpretation of Kelsen is perhaps that McNair J. never said that protrusions were not nuisances. He said only that protrusions could be trespasses whether they were nuisances or not. But either way, it is clear from Fay that protrusions can be nuisances in themselves without proof that the protrusion caused further damage.

Having cleared the ground, Sir Terence turned to the case at hand. He agreed with the defendant that nuisance cannot consist solely of causing a fall in the market price of land, and so declared the recorder wrong to have treated the ability to sell a property at full value as a part of its protected amenity. But that did not mean, Sir Terence continued, that no loss of amenity had occurred. He treated statements in Lemmon that encroaching branches and roots are only actionable if they cause further damage as unnecessary for the court’s decision and similar remarks in Delaware Mansions as equally obiter dicta: the roots in that case had in fact caused damage. Sir Terence also distinguished Delaware Mansions on the ground that in that case the roots were not, unlike Japanese knotweed rhizomes, themselves a hazard. As a result, he was able to find that the mere presence of rhizomes under the claimants’ land amounted to actionable damage. But even if the case had arisen before the rhizomes had spread to the claimants’ land, Sir Terence would have been prepared to grant a mandatory quia timet injunction, on the ground that the interference, although not, as some cases appear to require, “imminent” (rhizomes grow at a stately pace), was sufficiently probable and grave.

Sir Terence’s judgment justified the tactical decision by counsel for the claimants to seek to support the decision below on grounds additional to those given by the recorder. Sir Terence declared, “[t]he purpose of the tort of nuisance is not to protect the value of property as an investment or a financial asset”, and he characterised Mr. Recorder Grubb’s approach
as “a radical reformulation of the purpose and scope of the tort” (at [48]). In defence of the recorder one should mention that he reached an obviously just outcome without needing to reinterpret four centuries of case law, welcome as that reinterpretation might be.

Sir Terence’s view reflects economic research on property values that models house prices as an interaction between demand and supply for the services property provides, such as shelter and recreation, and, separately, demand and supply for houses as investments (see e.g. I. Mulheirn, *Forecasting UK House Prices and Home Ownership* (London 2016)). The former is reflected in rents, but the latter responds to, inter alia, mortgage interest rates, returns on other assets and financial regulation. Sir Terence’s position that nuisance is not designed to protect the part of property values created by the financialisation of housing seems a necessary correction for modern conditions.

But one should also issue a word of caution. Prompted by defendant’s counsel, Sir Terence characterised the recorder’s error as “extend[ing] the tort of nuisance to a claim for pure economic loss” (at [48]). The term “pure economic loss” is slippery. At home, in negligence, it usually means loss flowing from a reduction in value of existing contractual relationships. Contrary to Lord Denning’s infamous, and confused, judgment in *Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27, the physicality or otherwise of the damage is irrelevant. The damage to the embankment in *Cattle v Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453 and to the steel coils in *The Aliakmon* [1986] A.C. 785 was physical, but the loss was purely economic because the plaintiffs only had a contractual interest in them. What matters is the nature of the legal relationships, not the physicality of the harm. In *Williams*, the claimants undoubtedly had more than a contractual interest in their properties. None of their loss was “purely economic” in the negligence sense. The issue was instead what kinds of property damage nuisance protects against. Mr. Recorder Grubb went too far only in implying that nuisance might apply to reductions in property values unrelated to impairments to the usefulness of a property. He was not wrong that nuisance protects the value of property rights.

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FURTHER NARROWING THE SCOPE OF UNJUST ENRICHMENT

THE law of unjust enrichment continues to be shaped by the long wave of cases in which restitution is sought from the Revenue for unlawfully levied taxes. While earlier cases in the wave liberalised the scope of unjust