

*Caddijen Pty Ltd & Anor v Nonpareil Pty Ltd* [2002] NTSC 62

**PARTIES:** CADDIJEN PTY LTD trading as  
KATHERINE NEWSAGENCY  
(ACN 009 623 223)

and

BENMORE NOMINEES PTY LTD  
(ACN 009 602 984)

v

NONPAREIL PTY LTD trading as  
PFITZNER & PARTNERS  
INSURANCE BROKERS  
(ACN 009 611 358)

**TITLE OF COURT:** SUPREME COURT OF THE  
NORTHERN TERRITORY

**JURISDICTION:** SUPREME COURT OF THE  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

**FILE NO:** 14 of 2001 (20101125)

**DELIVERED:** 7 November 2002

**HEARING DATES:** 12, 13, 14, 15, 16, 19 & 20 August 2002

**JUDGMENT OF:** Mildren J

**REPRESENTATION:**

*Counsel:*

Plaintiff: Dr JPM de Koning  
Defendant: Ms J Kelly

*Solicitors:*

Plaintiff: Ward Keller  
Defendant: Cridlands

Judgment category classification: C  
Judgment ID Number: Mil02278  
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Caddijen Pty Ltd & Anor v Nonpareil Pty Ltd* [2002] NTSC 62  
No. 14 of 2001 (201001125)

BETWEEN:

**CADDIJEN PTY LTD trading as  
KATHERINE NEWSAGENCY  
(ACN 009 623 223)**  
First Plaintiff

and

**BENMORE NOMINEES PTY LTD  
(ACN 009 602 984)**  
Second Plaintiff

AND:

**NONPAREIL PTY LTD trading as  
PFITZNER & PARTNERS INSURANCE  
BROKERS (ACN 009 611 358)**  
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 7 November 2002)

**Mildren J**

- [1] The plaintiff, Caddijen Pty Ltd (Caddijen) occupied premises situated at Shop 1, 54 Katherine Terrace, Katherine (the premises) from the plaintiff, Benmore Nominees Pty Ltd (Benmore), the registered owner of the land and building of which the premises formed part and upon which Caddijen conducted the business of a newsagency. On 25 and 26 January 1998, the

Katherine River flooded ("the flood") causing significant damage to the premises and to the contents thereof owned by Caddijen.

- [2] At the time of the flood the premises and contents, including stock, fixtures and fittings, were insured by the plaintiffs through the defendant, which was retained by the plaintiffs to act as their broker, with World Marine & General Insurance Pty Ltd (WMG), pursuant to a "Business Guard" policy. However, the policy did not cover damage due to "flooding" which under the policy was defined to mean "inundation in any way arising from any source outside the premises insured or containing the property insured".
- [3] The plaintiffs sought indemnity from the insurer, which denied liability under the policy on the ground that the losses were not covered under the terms of the policy. Subsequent negotiations between the plaintiffs and the insurer resulted in the insurer making an ex gratia payment of \$57,000 to the plaintiffs.
- [4] The value of the physical damage attributed to flooding within the meaning of the policy (and subject to the limits in the Schedule to the policy), is agreed between the parties as a total sum of \$252,382.14 made up as follows:

|                            |                     |
|----------------------------|---------------------|
| Loss to Caddijen           | \$247,234.72        |
| Loss to Benmore            | <u>62,147.42</u>    |
| Combined total:            | \$309,382.14        |
| Less payment from insurer: | <u>57,000.00</u>    |
|                            | <u>\$252,382.14</u> |

In addition, it is agreed that Benmore lost rent totalling \$25,918.00 and Caddijen lost profits totalling \$5,632.00.

- [5] The plaintiffs bring this claim against the defendant. It is not in dispute that the plaintiffs engaged the defendant to act as their broker in relation to the insurance in question. What is in dispute are the terms of the retainer and whether the defendant breached the terms of the retainer. Further, the plaintiffs allege that the defendant reported to the plaintiff, either falsely or negligently, the true situation concerning the availability and likely cost of obtaining flood cover and that the plaintiffs relied upon the defendant's wrong advice; that in fact flood cover was available for a reasonable premium and that if the true situation had been conveyed to the plaintiffs they would have accepted flood cover. These allegations are denied by the defendant who asserts that it was specifically instructed not to arrange flood cover. Thus the plaintiffs' claims are brought in contract, tort and under the Trade Practices Act, (Cth) ss 52 and 82.

### **Background facts**

- [6] John Helmore Shepherd and his wife Anne Noreen Shepherd are the directors and shareholders of the plaintiff companies. They have lived at 23 Walter Young Street, Katherine since at least 1970 when they built the house in which they still reside. The Shepherds' residence is very near to the Katherine River but prior to the flood in 1998, Walter Young Street had

no history of ever having been flooded by the river. It was above the one in 100 year flood area.

[7] According to Mr Shepherd, the home in Walter Young Street was insured against flood from the time it was built. Initially he gave evidence that the insurance was with AMP Fire and General Insurance Co Ltd, (AMP) and that it was obtained through Mr John Pfitzner, then an agent of AMP. Later he realised he was mistaken and gave evidence that it was insured through Queensland Insurance Co Ltd. The evidence of Mr Crowhurst who was the Darwin manager of Queensland Insurance Co Ltd from 1971 to 1975, was that such cover was not available through that company except by special request and even then, not at all for a domestic dwelling in Katherine. I accept the evidence of Mr Crowhurst. I think it is more likely than not that Mr Shepherd's memory about this cover is faulty. That is not surprising. It is a long time ago and what records he still had were lost in the 1998 flood. What is of more significance, is that the house was eventually insured against flood and that it was so insured in 1998.

[8] In 1971, Mr Pfitzner moved from Darwin to Katherine where he worked as the sole agent for AMP. According to Mr Pfitzner he traded under his own name until 1977. In that year the business was operated by JF Pfitzner Pty Ltd until 1986 when he became registered as an insurance broker under the provisions of Part III of the Insurance (Agents and Brokers) Act 1984 (Cth), which came into force on 1 January 1986. In 1986 the present defendant

company was formed for the purpose of operating the new brokering business and traded as Pfitzner and Partners, General Insurance Brokers.

- [9] In 1977 the Shepherds purchased the Katherine Newsagency from the previous owners. According to Mr Shepherd, this occurred in September 1977. I note that Benmore Nominees Pty Ltd was first registered on 25 February 1977 and changed its name to Benmore Nominees on 28 September 1977. This company initially ran the newsagency business as trustee for a trust. The business at that stage was located at 6 Katherine Terrace on the opposite side of the street.

#### **Flood insurance for Benmore Nominees**

- [10] At the time of purchasing the business, Mr Shepherd's evidence is that he consulted Mr Pfitzner to arrange insurance for the business. According to Mr Shepherd, he asked Mr Pfitzner to arrange for flood cover over the business, but he was told either that there was no business flood insurance or that it was far too expensive. At that stage, Mr Pfitzner was not acting as the Shepherds' broker; he was an insurance agent for AMP.
- [11] In his original statement, Ext D3, Mr Pfitzner said that he first did business with the Shepherds in about 1977 and he thought their discussions took place at 6 Katherine Terrace. The impression from reading Mr Pfitzner's statement is that he accepted that he arranged the insurance for the business. He said that he could not recall if flood cover was available in 1977 from AMP. When he gave evidence before me, he said he now had reason to

doubt whether he obtained insurance for the business at that time. He was sure that he arranged superannuation insurance. The reason he gave for expressing doubts about the matter was that when the plaintiffs shifted the location of their business in 1983, it would not have been necessary to obtain a fresh proposal, but one was obtained which made it look to him as if the business was "new business" so far as he was concerned.

[12] On the other hand, he conceded that in the 1970s, flood cover was difficult to obtain from an insurer in respect of property located in Katherine. He said that in the late 1970s he arranged a facility with AMP to cover flood. He said this meant that he could propose flood cover in a manner acceptable to AMP. A formula was created which took into account the relevant insurance risks in arriving at a premium. According to Mr Pfitzner, this was first arranged with Mr Nicholson, the Northern Territory manager for AMP, in 1978.

[13] Evidence was given by Mr Nicholson that flood was a normal exclusion from AMP domestic policies at that time and it was not offered as an available extension. However, he said that if a client particularly wanted domestic flood cover, it could be accommodated by issuing a "Special Contingency" policy which insured the nominated property for flood only. On the other hand, he said that AMP did offer the option of flood cover as part of its business insurance package. He also said that a formula for calculating flood insurance premiums in Katherine was developed by Mr Pfitzner and himself in the early 1980s. This must have been before

1982 as in that year Mr Nicholson left the Northern Territory to take up a position as Queensland State Sales Manager for AMP. He confirmed that at this time AMP did not actively seek to write flood cover and that it would be more favourably looked upon if the client had a significant account with the insurer.

[14] I am unable to find on the evidence whether or not the business was ever insured with AMP prior to 1983. There are no extent records to indicate that the business was insured with AMP. The fact that Mr Shepherd changed his evidence about which insurer insured his house, causes me to regard his evidence that his business was initially insured with AMP in 1977 with grave suspicion. There is force to the proposition advanced by Mr Pfitzner that if the property prior to 1983 was insured with AMP, there would not have been a need for a fresh proposal in that year. It may be that the subject was at some time discussed between Mr Pfitzner and Mr Shepherd during this period. If it had been raised, it is possible that Mr Shepherd was told that it was not available with AMP. I am unable to find one way or the other on this issue.

[15] In 1983 Mr Shepherd did arrange insurance, both in respect of his home and in respect of the business, through Mr Pfitzner. In 1982, Benmore purchased Lot 1870, Town of Katherine situated at 54 Katherine Terrace. At that stage, the land was a vacant lot. Benmore thereafter constructed a building on the land in which it intended to operate the newsagency

business. The building was completed in 1983 and a certificate of occupancy issued on 12 September 1983.

[16] Mr Pfitzner's evidence is that the Shepherds moved into the new premises on 27 July 1983 and on that date he issued cover notes in respect of the new premises. He said that probably shortly before that date, he visited the new shop and discussed with Mr Shepherd the value of the building and contents and the types of cover required. The cover notes specifically excluded flood. Mr Pfitzner said that the request for cover came from Mr Shepherd and that he needed to be able to satisfy his mortgagees that the building was insured. Mr Pfitzner said he had no authority to issue cover notes which contained flood extensions and he would have told Mr Shepherd of that fact. The cover notes insured the building and contents for the period from 27 July 1983 to 27 August 1983 and in accordance with normal practice, the cover would have been extended on a monthly basis until the new insurance was in place.

[17] Mr Shepherd was unable to recall the cover notes at all and was of the view that the business did not shift to 54 Katherine Terrace until 1985 and 1986. I think Mr Shepherd's recollection is faulty. On this issue I prefer the evidence of Mr Pfitzner.

[18] A proposal for the insurance to AMP was signed by Mr Shepherd at Mr Pfitzner's office on 6 September 1983. The proposal was filled out in Mr Pfitzner's handwriting. In answer to the specific question, "Do you

require this insurance extended to cover loss or damage arising from flood", the answer given on the proposal is "No".

[19] The evidence of Mr Pfitzner is that he carried out a survey of the premises prior to the signing of the proposal. He said that AMP also did their own survey and it was possible that an inspector did a survey of the property before 6 September 1983. In any event, Mr Pfitzner knew that the rate of the premium was to be .35% of the sum insured before 6 September and he also knew that this rate did not include flood cover. Mr Pfitzner explained this by saying that at the time he asked for the rate, he had no instructions to obtain flood cover, but if Mr Shepherd had later told him he wanted flood cover, he would have done his best to arrange it. It is common ground between Mr Shepherd and Mr Pfitzner that the proposal was completed by Mr Pfitzner who filled it in after asking Mr Shepherd questions relating to the proposal. Although Mr Shepherd conceded that he was specifically asked a number of such questions, he denied that he was asked whether or not he wanted flood cover. Counsel for the plaintiffs submitted that I should find that Mr Shepherd asked for flood cover but was told it was not available. I am unable to so find, based on the evidence of Mr Shepherd. I am unable to reject the evidence of Mr Pfitzner. His evidence is supported by the proposal. If Mr Shepherd had asked for flood cover there is no reason why Mr Pfitzner would not have attempted to have obtained it. The defendant obtained such insurance for other businesses in Katherine. Mr Shepherd sought to explain his signature on the proposal by saying that

when Mr Pfitzner completed the proposal, he signed it without reading it. I find that this is unlikely. Mr Shepherd did not strike me as the kind of person who would have done that.

[20] The evidence of Mr Pfitzner is that he and Mr Shepherd did discuss the flood situation in Katherine, in general terms, in casual conversations from time to time and how it may or may not affect the business. During these discussions, they made comparisons with the flood levels in 1957 which was commonly considered to be a 1:100 year occurrence. He said that Mr Shepherd had said that he could cope with the minimal inundation from a 1:100 year flood and that he believed that less than 30 centimetres of water would go through the property in such an eventuality and he spoke of the difficulty in getting the contents off the floor. Mr Shepherd gave evidence that he understood that the 1957 flood did not result in water inundating 54 Katherine Terrace and he believed that his shop was only prone to flooding by a few inches. Mr Shepherd denied discussing this in casual conversation with Mr Pfitzner, but admitted that he may have said something to the effect that he could cope with a 1:100 year flood because no more than 30 centimetres of water could ever go through the shop. Mr Pfitzner denied ever being asked his opinion by Mr Shepherd as to whether he should arrange for flood insurance on the shop, but he said that his standard reply to such queries was to ask "How much water do you think you're going to get through your business?"; "How deep is it going to go?",

and "Do you think there'll be a problem – can you get that stuff up off the floor?"

[21] In the result, I am unable to find that Mr Pfitzner advised Mr Shepherd either in 1983 or before 1983 that he was unable to arrange flood insurance for the plaintiff's business, or that it would be too expensive. I am also unable to find that Mr Shepherd ever requested Mr Pfitzner either in 1983 or prior to 1983, to arrange for flood insurance for Benmore's business or premises.

#### **Flood insurance on the Shepherds' home**

[22] There is no doubt that Mr Shepherd wanted flood insurance on his home and that Mr Pfitzner arranged this in September 1983. The proposal for this cover was signed on 6 September 1983, the same day as the proposal for the cover for the business. Counsel for the plaintiffs submitted that this was consistent with Mr Shepherd's case that he wanted flood cover for the business as well, but I do not accept this submission. According to Mr Shepherd, he obtained a certificate from a Commonwealth department concerning the soil on which the house was subsequently erected, which stated that the soil was sandy loam with a small percentage of clay laid down by floods. He said that the report indicated to him that flood insurance for the house was a necessity. Mr Shepherd therefore had a strong reason for believing that there was a need for flood cover for the house; but

on the other hand, the evidence discloses that he thought he could cope with a 1:100 year flood so far as the business was concerned.

### **Flood cover for the business and building 1983-1991**

[23] During this period, the existing insurance was renewed annually. On 6 March 1984, Mr & Mrs Shepherd formed the plaintiff Caddijen which took over the newsagency business from Benmore; the latter remained the owner of the premises. According to Mr Shepherd, he received renewal notices annually and usually went to the defendant's offices to discuss any alterations that were needed. In 1984, Mr Shepherd said that he told Mr Pfitzner that the insurances for the business should now be in the name of Caddijen. He subsequently received renewals showing that Caddijen was the insured, not Benmore. He agreed in cross-examination that he never advised Mr Pfitzner or anyone else at the defendant's office that the premises remained the property of Benmore. Mr Pfitzner's evidence was that he was aware that Benmore owned the premises and despite the renewal notices and schedules from his office, Benmore was an insured under the policy. I am unable to make any finding to the contrary. Mr Shepherd asserts, somewhat vaguely, that he repeatedly asked Mr Pfitzner about flood cover and was told it was either not available or too expensive. Mr Pfitzner denies this. I am unable to find that Mr Shepherd ever requested flood insurance for the business or the building during this period.

[24] At some stage between 1983 and 1986, Mr Pfitzner ceased acting solely as an agent for AMP and practised as a broker. Mr Pfitzner's personal view at that time was that the risk of flood to the premises was low. Premiums were calculated on the basis of the risk. The inference is that if he had been asked to effect flood insurance, he would not have expected that the premiums would have been uncommercially expensive. Mr Pfitzner said he never calculated the additional premium for flood cover for the business and could not have asserted it was too expensive unless he had done so. I prefer the evidence of Mr Pfitzner which is supported by the insurance proposal taken out in 1991 to which I will now come.

#### **Change of insurer in 1991**

[25] Mr Cielens originally joined the defendant, or its predecessor in business in 1986. Subsequently, he became a director of the defendant company and in that capacity he took over the plaintiff's insurance business when the time came for renewals at the end of August 1991.

[26] On 29 August 1991, Mr Cielens sought quotations from WMG concerning the plaintiffs' insurances, including insurance for the newsagency business and the premises. It is not clear why, but Mr Cielens recommended to Mr Shepherd that the insurer should be changed from AMP to WMG. At the time of obtaining the quotations, Mr Cielens understood that he was arranging the insurance for Caddijen and he claims never to have been told that Benmore owned the land and buildings, however nothing, in my

opinion, turns on this because WMG did not rely on this in any way and it was not the cause of any loss to the plaintiffs. It is clear that the quotation which Mr Cielens obtained did not provide for flood cover.

[27] I am unable to find whether or not Mr Cielens spoke to Mr Shepherd about his renewals before or after the quotation was obtained. The evidence is consistent with both possibilities. In the event, as the insurance with AMP expired on 31 August and a new proposal would be required from any new insurer, on 30 August Mr Cielens accepted WMG's quotation by fax dated that day. A final proposal was completed and signed by Mr Shepherd on 3 September 1991. The proposal was for a "Business-guard" policy which covered, inter alia, fire and specified perils for the building and contents, including machinery and plant and the stock in trade at Lot 1870 Katherine Terrace. The proposal asked whether flood cover was required as an "optional additional events/cover" and this was answered "No".

[28] Mr Cielen's evidence was that the proposal was filled in at his office – Mr Shepherd agreed. It was common ground that Mr Cielens asked Mr Shepherd a number of questions and recorded his answers in the proposal form, filling out the form as they went through it in this fashion. Mr Cielen's evidence is that he asked Mr Sehpherd whether he wanted flood cover and he said "No". Mr Shepherd's evidence in Ext P4 (8/7/02), was that he could not recall being asked about flood cover and if he had been asked, he would have answered "Yes". In cross-examination, he was more

emphatic and denied that the question was asked at all. In relation to business interruption insurance, in his statement Ext P4 (8/7/02) he said:

I recollect Mr Cielens asking me if I wanted 'business interruption insurance', on one occasion. To the best of my recollection, I replied "No".

In cross-examination, he said initially that he did not recollect any discussion about business interruption insurance. When shown his statement Ext P4 of 8 July 2002, he conceded he must have been asked about this. It is interesting to note that Mr Shepherd does not assert that in 1991 he specifically asked Mr Cielens to arrange flood cover. I find that Mr Shepherd's evidence about this meeting is unreliable. He clearly does not have a good recollection of the circumstances under which the new insurance was taken out. I prefer the evidence of Mr Cielens which is supported by the proposal signed by Mr Shepherd.

### **Renewals of the WMG policy 1992-1997**

[29] The evidence is that the policy was renewed each year and was current at the time of the flood. Two of the renewals were effected by Ms Glenda Campbell who was employed with the defendant for thirteen years during the period from 1982 to 1997. Her evidence was that she attended at the premises on each occasion to obtain instructions. She said that on at least one of those occasions and possibly both, she specifically told the Shepherds that the business was not covered for flood and that she specifically asked whether they wanted it. She is unable to recall what the Shepherds' exact

response was, but she said that if she had been told that they were interested in flood cover, she would have obtained a quotation from the underwriter WMG and possibly from Territory Insurance Office as well. She said she cannot recall obtaining any quotations for flood cover for the plaintiffs. She denied ever saying to John or Anne Shepherd, or to anyone else on behalf of the plaintiffs, that they could not have flood cover, or that it was not available for their business, or that it was too expensive. Mr Shepherd denies ever being asked by her about flood cover, but does not assert that he asked her for flood cover as his evidence is that he cannot specifically recollect whether he did or not.

[30] The evidence is that the renewal in 1997 was attended to by Mr Cielens. I note that Mr Shepherd did not assert in his affidavit of 31 January 2002 that he specifically asked Mr Cielens to effect flood cover in 1997. There is no pleading to that effect and I would have expected the plaintiffs to have pleaded and relied upon such a request if it had been made in 1997. It was not until the affidavit of 8 July 2002 that Mr Shepherd said, for the first time, that he made such a specific request. The relevant part of Mr Shepherd's affidavit is this:

I specifically recollect in September 1997 asking Mr Cielens to obtain a quote for me in respect of flood cover. I asked him at about the time that we completed the renewal proposal. I thought perhaps if he was required to get a quote, that might "force the issue". ... A few weeks after I made the request Mr Cielens came into the newsagency to purchase some items. I said to him words to the effect, "Have you got the quote for flood cover?" To the best of recollection (sic), Cielens replied "No, you can't have it".

[31] Mr Cielens denies this conversation. He says that if such a request had been made of him it would have been a simple matter of a telephone call to WMG to obtain a quote. He says that he had arranged flood cover for a number of other Katherine businesses, mostly with Territory Insurance Office.

[32] Evidence was called by both parties in an endeavour to show that Mr Cielens had or had not effected flood cover for other clients of the defendant. The evidence is relevant in so far as it shows that Mr Cielens knew that flood cover was available from certain insurers in respect of business premises in Katherine. However, the risks vary considerably from property to property depending on where the property is located and whether or not it is a rural property, domestic property or business premises. For example, the witnesses Geoffrey and Rosamund Rowlands were called by the plaintiffs to say that Mr Cielens had told them that they could not have flood cover. Their property was a rural property which was insured by a different type of insurance cover. Mr Cielens maintains that he said that cover was not available with the Rowlands' then insurer, CIC, but may have been available through Territory Insurance Office in certain circumstances. He says there was a lengthy discussion between he and Mr Rowlands about this, which included the need to satisfy the insurer that the property was above the 1:100 flood level, and that after this conversation he received no further instructions from Mr Rowlands. Mr Rowlands agreed that a conversation like this occurred, but says it was in the following year (1998), ie, after the flood. I do not consider that it is helpful to the decision I have to make to

resolve this issue. Even if I accepted Mr Rowlands' evidence, it does not throw any light on what Mr Cielens's state of mind was in respect of the availability of flood insurance for business premises in the town and the only basis upon which I admitted the evidence in the first place was that it may throw some light on that subject.

[33] In the end result, I do not accept the evidence of Mr Shepherd, nor that of Mrs Shepherd, to the effect that Mr Cielens was asked to obtain a quote for flood cover in 1997, or for that matter, at any time. The evidence of Mr & Mrs Shepherd is inherently implausible. It is difficult to believe that Mr Shepherd would continuously ask various representatives of the defendant about flood cover for his business over such a long period of time and would have been fobbed off by answers of the kind alleged, and yet they themselves made no other enquiries with anyone else. It is inherently implausible that Mr Cielens would have told Mr Shepherd that flood cover was unavailable when it plainly was available through the plaintiffs' current insurer and, as Mr Cielens said, it would not have been particularly difficult to obtain a quotation. It is implausible that Mr Shepherd would not have followed up the alleged suggestion that he "cannot have it" without asking why and without any further enquiries. I prefer the evidence of the defendant's witnesses Mr Pfitzner, Mr Cielens and Ms Campbell to that of Mr & Mrs Shepherd. The proposal forms which Mr Shepherd signed clearly indicated that he did not want flood cover. The policy annexed to Mr Shepherd's statement, Ext. P4, shows that flood is an available

extension. I consider that it is more probable that Mr Shepherd elected not to obtain flood cover for the plaintiff companies because he thought that the business was unlikely to be flooded and that if it was, it would cause little damage to the property. This disposes of the main grounds upon which the plaintiffs relied to establish liability.

[34] The question then remains whether the plaintiffs have established any other basis for establishing a breach of duty by the defendant. There is no basis for a finding that the plaintiffs failed to obtain flood cover because they were not advised of its availability. I find that Mr Shepherd was specifically asked on three occasions if he wanted the cover and indicated that he did not. There was no duty to recommend flood cover in the circumstances. The plaintiffs, through Mr Shepherd, knew as much about the risk of flood as anybody else. Mr Hoffman, the defendant's expert witness, did not consider that there was any duty on the part of a broker to do more than draw to the proposed insured's attention the nature of the risk not being covered, but in this case, the risk which was not being covered was known to the plaintiffs. The plaintiffs' expert witness, Mr Thomson, accepted that there was no further duty, although he considered that the risks associated with business interruption should have been explained. However, business interruption would at the most have lasted for only a few days as the result of a flood. I think this is so self-evident that it was not necessary to explain this to Mr Shepherd. In any event, business interruption cover was of no use without cover against flood, for the simple reason that

business interruption cover depends upon a defined event occurring, which in this case was flood: see for example, the WMG policy under the heading "Business Interruption". There is no evidence from Mr Shepherd that had some further explanation about business interruption been given to him this could have made any difference to him.

[35] There is evidence that after the flood the plaintiffs secured flood cover with QBE through a broker in Adelaide. The premium for this policy was \$2,956.89. The premium for the policy with WMG was, at the time of the flood, approximately \$2,793.30. The policy with QBE also covered loss of rent and provided some cover for business interruption. There is no evidence as to the cost of the increase in premium if the plaintiffs had sought flood cover, loss of rent and business interruption insurance from WMG. The assumption made by Mr Shepherd was that the increase would have been minimal, having regard to the differences in the premiums sought by QBE and WMG.

[36] The QBE policy was an "industry policy", ie. a policy made available to newsagents throughout Australia through the relevant newsagents' association. Only one broker, Stuart Mortimer & Associates Pty Ltd, offered the policy, although it could have been obtained through any broker if the latter dealt with Stuart Mortimer & Associates Pty Ltd. Whilst industry policies are fairly common, there is no evidence that the defendant was aware of the existence of the QBE policy and no evidence that they ought to have been aware of its existence. There is also no evidence that the

policy was available in 1997. I accept the evidence of Mr Hoffman that if the defendants knew about this policy in 1997, the defendants should have told the plaintiffs of it, but I also accept Mr Hoffman's evidence that a country broker is most unlikely to become aware of its availability unless his own client (who is more likely to hear of it through industry circulars) asks about it.

### **Lost rental**

[37] The evidence is that in 1996 part of the premises were leased to a business called NT Technology. This resulted in obvious changes to the layout of the Caddijen's newsagency business. There is evidence that Mr Pfitzner and Mr Cielens were both customers of the newsagency and must have become aware of the possibility of a lease of portion of the premises. Assuming that Mr Cielens should have raised loss of rent cover with Mr Shepherd and assuming that Mr Shepherd had indicated he wanted loss of rent cover, the difficulty is that under the WMG policy (and for that matter, any policy), loss of rent was only claimable upon loss or damage at the premises by an "insured peril", which in this case was flood. Thus, for the loss of rent claim in this case to succeed, the plaintiff Benmore would need to prove that it would have insured against flood but for the defendants' negligence or breach of duty. I consider that Mr Shepherd may well have decided to obtain loss of rent cover which would have insured the plaintiff Benmore if the building was damaged by fire, but not if the building was damaged by flood. I am unable to conclude that, had loss of rental insurance been raised

with Mr Shepherd, it would have caused him to change his instructions to the defendant concerning flood cover. As the plaintiffs' claims for damages based on the lack of flood cover must fail, so therefore must the claim for damages for loss of rent.

[38] There will be judgment for the defendant, the plaintiffs to pay the defendant's costs to be taxed.

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