

PARTIES: PROSSER, ROBERT DOUGLAS and
PROSSER, DAWN MARIE

v

AMP GENERAL INSURANCE LTD
(ACN 008 405 632)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: CIVIL

FILE NO: No. 103 of 2000 (20012553)

DELIVERED: 22 JULY 2003

HEARING DATES: 16, 17 JUNE 2003

JUDGMENT OF: ANGEL J

REPRESENTATION:

Counsel:

Plaintiffs: Dr J De Koning
Defendant: J Reeves QC

Solicitors:

Plaintiffs: Ward Keller
Defendant: Paul Maher

Judgment category classification: C

Judgment ID Number: ang200306

Number of pages: 8

ang200306

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Prosser & Anor v AMP General Insurance Ltd [2003] NTSC 80

No. 102 of 2000 (20012553)

BETWEEN:

**ROBERT DOUGLAS PROSSER and
DAWN MARIE PROSSER**

Plaintiffs

AND:

**AMP GENERAL INSURANCE LTD
(ACN 008 405 632)**

Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 22 July 2003)

- [1] At about 6.30 pm on 26 January 1998 the house on the land of the plaintiffs at Lot 4381 Shadforth Road Katherine was inundated with water from the rear of the premises. The water had been pooling to the rear of the plaintiffs' block for some hours previously and the level had continued to rise during the afternoon. When Mr Prosser eventually left the building at about 8.30 pm there was water some 300 mm deep throughout the house. As a consequence the house and contents were damaged. At the time the property and contents were insured with the defendant pursuant to a "Commonsense Farmers Insurance Policy" that insured the dwelling and contents for loss destruction and damage caused by storm or tempest or rain

water “being rain falling naturally from the sky including rain water run-off over the surface of the land” but did not include loss, destruction or damage “by FLOOD being the inundation of normally dry land by water escaping or released from the normal confines of any natural water course or lake whether or not altered or modified or of any reservoir, canal or dam.”

- [2] The plaintiffs sue for indemnity in respect of the damage to their premises and contents which they say was caused by storm or tempest or rain water. The defendant says that any loss or damage to the plaintiffs’ property was caused by flood rather than storm or tempest or rain water, and flood being an excluded event under the policy it is therefore not liable to indemnify the plaintiffs.
- [3] Photos numbered 4 and 5 comprising part of Exhibit P10 depict water pooling amongst mango trees to the rear of the plaintiffs’ property on 26 January 1998 sometime around 1 to 2 pm that afternoon. According to Mr Prosser, whose evidence I accept, the water steadily increased in area extending further and further across the rear of the plaintiffs’ block and towards the house. By 4 pm that afternoon the area of pooling had increased considerably. The plaintiffs were concerned for a neighbour whose property was on lower lying land. Mr Prosser arranged for the evacuation of his neighbour and later at about 6 pm his wife. When he returned home at around 6.30 pm the water level had risen higher and water had started to enter the house. The water, he said, had no movement other than “it was just creeping up”. The water depicted in photographs in Exhibit P10 and as

described by the plaintiffs was clear. It was not turbid, like river water. There was no apparent current or movement; it was still, apart from the “creep”. Mr Prosser remained in the house until about 8.30 pm when he left to assist a neighbour evacuate the neighbour’s 83 year old stepfather from another property. When Mr Prosser left the plaintiffs’ house there was water to the depth of some 300 mm on the floor through the house.

- [4] The plaintiffs’ house is located at the highest point on the plaintiffs’ block of land which slopes downwards north towards the back of the property from Shadforth Road, which abuts the northern river bank of the Katherine River.
- [5] Throughout 26 January 1998, as a consequence of heavy rain in its catchment area, the Katherine River water level rose.
- [6] To the northwest of the plaintiffs’ property there is an area known locally as “Hicky’s farm” or “Hicky’s lake”. The general area of the plaintiffs’ property and Hicky’s farm or lake is limestone country. Underneath the surface are caves and holes. Near the rear of the plaintiffs’ property are sink holes, a feature of Hickey’s farm or lake area as well. These sink holes act as drains of surface water in certain conditions. In the event of heavy sustained rains when the under lying limestone become saturated, the sink holes, rather than acting as drains, expel water to the surface. As a consequence of rains prior to 26 January 1998 the Hicky’s lake area contained pooled water, comprising, one can infer, rainwater run-off and water expelled from sink holes. This water naturally flowed south across

the surface of the land to lower land nearer the Katherine River. At a point northwest of the plaintiffs' property, that water dispersed east and west. The run-off to the east accounted for the pooling of surface water to the rear of the plaintiffs' premises.

- [7] It was the plaintiffs' case that the still clear water pooled to the rear of the plaintiffs' property which rose and eventually inundated the house damaging its contents was rain water run-off for the purposes of their insurance policy with the defendant.
- [8] Both parties called expert evidence from hydrologists. The defendant called Dr Ian Joliffe, the principal water resources engineer with GHD Pty Ltd. He, like the plaintiffs' expert Dr Weeks, has impressive qualifications and experience in respect of hydrologic studies for flood assessments. Dr Joliffe prepared Exhibit D22, a colour rendered topographic map with section locations of relevant areas of land north of the Katherine River including the plaintiffs' property and land adjacent to the river both east and west of the plaintiffs' property and land to the north thereof. Dr Joliffe also prepared Exhibit D23 showing the surface profiles along a long section taken through the land depicted in D22 and the surface profiles of certain cross-sections A to F inclusive of portions of that land. Cross-section A is through the low lying caravan park which abuts the river front to the east of the plaintiffs' property. Section B runs from the river front through the plaintiffs' property to the north west. Section E runs from the river front, which at that point runs almost north-south, west to some high ground some 105 metres

above sea level. As is evident from the ground levels through the various sections water running south from Hicky's farm or lake across the ground would naturally run east and west over land and eventually drain into the Katherine River to the east from the caravan park and to the west near cross-section E of Exhibit D22 in the vicinity of the new railway line. As Dr Joliffe explained, that is what would occur assuming the level of the Katherine River was below the level of the water draining across the land surface. The river bank at cross-section E is some 101 metres above sea level. The lowest river bank level in the vicinity of the caravan park is not altogether clear – cross-section A on Exhibit D23 shows a river bank level slightly more than 103 metres above sea level though that does not represent the height of the whole river bank abutting the caravan park. The level of the road between the caravan park and the river was estimated by Dr Joliffe to be approximately 101 to 102 metres above sea level. There was a 900 mm pipe below the road at that location and the pipe had an inverted level of approximately 100.8 metres above sea level.

- [9] Heavy rain fall preceded the inundation of the plaintiffs' property, the greatest intensity of which was during the period from 1 am to 9 am 26 January 1998. It was common ground between the parties' experts that the rain fall in isolation of other factors would have been insufficient to have inundated the plaintiffs' dwelling. In particular there was no sufficient rain fall and local run-off to have inundated the plaintiffs' property as it did at 8.30 pm without some external influence. That external influence, the

experts agreed, was the swollen Katherine River. Water measurements measuring the rise of the Katherine River established that water would have initially started overflowing from the Katherine River into the caravan park through the 900 mm pipe at an inverted level of 100.8 metres under Shadforth Road before mid-day 26 January 1998. The evidence also established, I think, that at least by early afternoon the river level had risen such that surface water could not drain into the river at cross-section E on Exhibit D22, the western drainage point of the water collected in the depression west of section D which had originally emanated from the Hicky's farm or lake area. The conclusion is inescapable, I think, that the water which inundated the plaintiffs' property as described by Mr and Mrs Prosser was a combination of accumulated surface rainwater and sink hole ground water dammed up by the flooding Katherine River. The conclusion of Dr Weeks was that at least at the time of peak water level at the plaintiffs' premises there would have been an influence from the Katherine River flood level. I accept Dr Joliffe's conclusion that the Katherine River flood level was an effective cause of the plaintiffs' dwelling being inundated on 26 January 1998.

- [10] The defendant's case is that the Katherine River flood level was the only, or alternatively, a concurrent proximate cause of the inundation of the plaintiffs' dwelling and that the defendant was therefore excluded from indemnifying the plaintiffs.

[11] The evidence discloses that there were a number of concurrent effective or proximate causes of the inundation of the plaintiffs' property, namely:

- (a) rain water run off and discharged sinkhole groundwater flowing from the Hicky's lake or farm area and other areas north of the plaintiffs' property according to the level of the land down to the rear of and on to the plaintiffs' property and also into the large depression west of the plaintiffs' property;
- (b) water from the rising Katherine River overflowing through the 900 mm pipe into the caravan park east of the plaintiffs' premises and over the road adjacent to the caravan park as seen by Mrs Prosser when returning from town at about 11 am to a depth of some 200 mm which prevented still accumulating water on the plaintiffs' property otherwise draining to the east;
- (c) Katherine River water west of the plaintiffs' property near the railway bridge rising to a level of some 101 metres above sea level in the early afternoon which prevented still accumulating water on the plaintiffs' property otherwise draining to the west.

[12] The plaintiffs have established that their loss was caused by an event within the terms of the policy viz. "rain falling naturally from the sky including rainwater run-off over the surface of the land". The defendant has established a concurrent cause was the Katherine River overflowing its

banks both east and west of the plaintiffs' property trapping the rainwater and groundwater accumulating on the plaintiffs' property.

- [13] There being concurrent effective or proximate causes, one covered and the other excluded by the policy, the defendant insurer is not liable on the policy: *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57; *Peterson v Union des Assurances de Paris IARD* (1995) 8 ANZ Insurance Cases 61–244; on appeal (1997) ANZ Insurance Cases 61–366 at 77,034; *HIH Casualty & General v Waterwell Shipping* (1998) 146 FLR 76 at 83, 84.
- [14] The plaintiffs' claim is dismissed.
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