Gardner v Northern Territory of Australia [2003] NTSC 113

PARTIES:	KELVIN IAN GARDNER v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Plaintiff:	A. Wrenn
Defendant:	A.H. Silvester

Solicitors:

Plaintiff:	T.S. Lee & Associates
Defendant:	Solicitor for the Northern Territory

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

Gardner v Northern Territory of Australia [2003] NTSC 113
No. SC 91 of 2001 (20107821)

BETWEEN:

KELVIN IAN GARDNER
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 25 November 2003)

[1] In 1995 the plaintiff, along with two of his brothers and his sister, was a joint tenant of land situated at Section 1746 Hundred of Cavenagh, Cox Peninsula Road, Berry Springs. The land is in a relatively remote location and is surrounded by vacant land, including vacant Crown land to the north.

[2] In or about 1987 the plaintiff constructed a rudimentary dwelling on the land. He claims that he holds the entire interest in the dwelling under a constructive trust from the joint owners. He claims sole ownership of the contents of the dwelling. On that basis he commenced these proceedings in

his own name without joining his brothers or sister as parties. An issue arises as to whether he can proceed in his own name in relation to damage to the land and fixtures. The plaintiff was provided with the opportunity to join his joint owners either as plaintiffs or defendants but chose not to do so.

[3] There is no dispute that on 10 September 1995 a fire spread onto section 1746 and destroyed the dwelling and its contents, along with a shed and a bore. It is the claim of the plaintiff that the fire escaped from the adjoining Crown land and that the defendant was negligent in failing to take adequate precautions to prevent the fire from spreading from the vacant Crown land onto section 1746.

[4] The plaintiff claims that the defendant was negligent in failing to take various steps to reduce the likelihood of this fire and other fires spreading from adjoining land onto section 1746. In particular the plaintiff says that the defendant failed to implement and maintain firebreaks, reduce fuel build-up on the adjoining land, take action to reduce the spread of the fire and to monitor or extinguish the fire.

[5] The defendant admits that it owed a duty of care to the joint owners of section 1746 to take such precautions as were reasonable, in all the circumstances then prevailing, to restrain the fire on its land from escaping and causing damage. The defendant denies that it was in breach of any duty as particularised by the plaintiff.

The evidence of the Plaintiff

[6] The evidence of the plaintiff was that section 1746 was, at the relevant time, owned by his brothers, his sister and himself. During 1987 he had built a house on the land and when the house was completed he lived in it with his wife and children. The plaintiff acknowledged through his counsel that the building was an illegal structure under the provisions of the Building Act and was unlawfully erected on the land. Each of his brothers and his sister has confirmed that, whilst they were joint owners of the relevant property, they made no contribution to the cost of building the house and now make no claim arising out of the destruction of the house on 10 September 1995.

[7] At that time the same members of the family also owned the adjacent land to the west, being section 1747, and the land at the south-west corner of section 1746, being section 1742. Each section was 320 acres in area.

[8] Mr Gardner gave evidence that he completed firebreaks around section 1746 each year, including the year of the fire. He said there were never any firebreaks on the adjoining Crown land. However in each year prior to 1995 the Berry Springs Volunteer Bushfire Brigade had attended and back-burnt into the Crown land from the firebreaks on his land.

[9] At the relevant time Mr Gardner was aware of a fire burning in the region of the Blackmore River. He said that on 9 September 1995 he was at a greyhound race meeting at Winnellie Park when he had a conversation with

Roy Baxter who was, at that time, the Captain of the Berry Springs Volunteer Bushfire Brigade. Mr Gardner said that he asked Mr Baxter where the fire was and Mr Baxter told him "the fire is on the other side of the Blackmore River". Mr Gardner assumed that meant the fire was on the eastern side of the Blackmore River and thus on the opposite side of the river to section 1746.

[10] On the day following his discussion with Mr Baxter, Mr Gardner was in a shed adjacent to some stables at section 1742. Following a comment by his son he looked to the north and saw that smoke appeared to be rising from an area near to section 1746. He drove to his house on section 1746, a distance of about 3 kilometres by road, and found that the surrounding land had been burnt and the house was ablaze. The house and its contents were completely destroyed.

[11] It was the plaintiff's evidence that if he had been informed by Mr Baxter that the fire was actually on the western side of the Blackmore River he would have been fully prepared and on standby to meet the fire. He would have arranged with members of the Berry Springs Volunteer Bushfire Brigade to attend to assist in controlling the fire. He said that he had been "somewhat comforted" by the advice of Mr Baxter that the fire "is on the other side of the Blackmore River". Notwithstanding those statements, it was not his evidence that he in any way slackened his vigilance because of that advice. He said that he was alert to the threat of bushfires during the

dry season and that he maintained a watch for approaching fires by, inter alia, "checking the horizon regularly and being aware of wind and weather conditions". In cross-examination he said he was alert to the presence of this particular fire and that he maintained a watch whilst he was working at section 1742. Included in his watch were visits to the house at section 1746 in order to monitor the fire. He said that he last visited section 1746 between 9 am and 10 am on 10 September 1995 "to see if the fire was anywhere near my house … the fire was nowhere near the house so I went back down the front of the stables". At that time the fire was in the north. At one stage he said the fire was to the north-north-east (markings on exhibit D2) and at another that it came to section 1746 from north-north-west (markings on exhibit D18).

[12] On the occasion of his last visit to the house there was nothing that indicated to the plaintiff that the fire was approaching or constituted a threat to the property. He could not now recall what the weather conditions were like and he said it did not occur to him that the fire might have moved in the time since any discussion with Mr Baxter had taken place. He satisfied himself that the fire was not anywhere near his house and then returned to section 1742. The next occasion on which he visited the area was to discover that the house had been destroyed by fire.

[13] The plaintiff gave conflicting evidence. He initially said that he was vigilant in relation to the fire. He said: "I did not leave my property and I had been vigilantly on watch in case of fire at the time". He also said:

> "I know that if a fire is in the vicinity of the north-western side of Daly's Creek adjacent to the north-western corner of section 1746 it would pose a threat immediately to section 1746 and my house. The potential for spread of fire from the north-western side of Daly's Creek adjacent to the north-western corner of section 1746 would be particularly strong if the wind direction was from the north or north-west."

[14] Subsequently he said that he was not as vigilant as he should have been and "one of the reasons" for this was that Mr Baxter had told him that the fire was on the "other" (meaning, to the plaintiff, the eastern) side of the river. The plaintiff was not asked for any other reasons for his reduced level of vigilance. When his claim to have been vigilant on the day was challenged, he asserted that he had been vigilant and went on to say:

> "I was in the shed, I went outside, I'd already told you I'd been out a couple of times and had a look where the smoke was. You tell me what I was expected to do. Sit outside all day?"

[15] If the evidence of the plaintiff as to his visit to the house on 10 September 1995 be accepted, then he was not lulled into any false sense of security by the advice of Mr Baxter. He had made his own observations of the fire many hours after the suggested discussion with Mr Baxter the night before and some 5 or 6 hours before the fire destroyed the house. Further, it cannot be the case that he was effectively monitoring the fire because, it would seem, he was not aware of the approach of the fire to section 1746 prior to learning of the destruction of the house. Had his monitoring revealed that the fire was approaching he would have called in the Volunteer Bushfire Brigade. He knew that if he called, the Bushfire Brigade would come to his

property to assist. Mr Baxter confirmed that he would have attended the fire had he been called by the plaintiff. The plaintiff did not call until after he found the house had been destroyed.

[16] Had the plaintiff noted the location of the fire and had he called in the Volunteer Bushfire Brigade, he said that one of the necessary steps in preventing the fire approaching his property would have included back-burning from his firebreaks into the oncoming fire. The necessary back-burning would have been undertaken from the boundaries of section 1746 and 1747. Mr Gardner had a truck with fire-fighting equipment and also a tractor and slasher and a grader available to him on section 1742. He did not use that equipment to resist the approaching fire nor to prepare for it by cleaning around his house.

[17] I do not accept that Mr Baxter told Mr Gardner that the fire was on the eastern side of the Blackmore River. That was an assumption made by Mr Gardner based upon the comment that the fire was on the "other" side of the river. Reference to the evidence of Mr Baxter and to the evidence of Mr Piddick (a member of the Berry Springs Volunteer Bushfire Brigade called by the plaintiff) makes it clear that they both thought the fire was on the western side of the river – ie the same side as section 1746. The information obtained from the satellite imagery cast further doubt on the likelihood that there had been any fire on the eastern side of the river at about the relevant time. The evidence of the expert witness, Mr Edwards, was to the effect that it was most unlikely that there had been a fire on the

eastern side of the river in the relevant location at the relevant time. Mr Baxter said that at the time of his discussions with the plaintiff they observed the fire to be "north-west of Daly's Creek" which is to the west of the river. I am satisfied that, if at any time the plaintiff thought the fire was on "the other side" of the river to section 1746, that view can only have resulted from his misinterpretation of information provided to him by Mr Baxter in an informal social discussion at Winnellie Park.

[18] In any event, the inspection carried out by the plaintiff on the morning of 10 September 1995 revealed the location of the fire to be to the north or north-east of his property. These observations were sufficient to alert him to the fact that, on that morning, the fire was on the western side of the Blackmore River. The evidence he gave and in particular the markings he placed on exhibit D2 clearly demonstrated this to be so. I do not accept his assertion that he thought that the fire was on "the other side" of the river in the hours leading up to the destruction of the house.

[19] The plaintiff had lived in the area for many years. Bushfires were an annual occurrence on Crown land throughout the Northern Territory including within the area in which the plaintiff and his family lived. The area beyond where the family lived was remote, uninhabited and generally inaccessible for fire prevention or control purposes. The plaintiff was thoroughly familiar with the land, the direction of prevailing winds at that time of the year and the dangers posed by bushfires. On the basis of his assessment,

conducted on the morning of 10 September 1995, there was no need to call for assistance.

John Bird

[20] Mr Bird was called as an expert on behalf of the plaintiff. I accepted that he had expertise in relation to bushfires. He has had lengthy work experience with the fire service and he has undertaken various courses relevant to matters in issue in these proceedings. In support of the plaintiff's case, Mr Bird expressed the opinion that the fire originated from fires on the eastern side of the Blackmore River when burning embers jumped the river, igniting grass and scrub on the western side of the river and that it then burnt towards Daly's Creek. Mr Bird concluded that the fire jumped Daly's Creek and ignited the grass and scrub on section 1775 Hundred of Ayers. The mouth of Daly's Creek is some kilometres to the northeast of section 1746 and the creek passes through the north-west portion of that section. The basis of Mr Bird's conclusion was information provided to him by the plaintiff as to what had been said by others. The first item of information was that the diary of Mr Piddick recorded that the fire commenced on the eastern side of the river. As has been noted earlier, reference to the evidence of Mr Piddick shows that Mr Piddick in fact said that the fire was on the western side of the Blackmore River. Mr Bird also relied upon advice provided to him by Mr Gardner that, in a conversation with

Mr Baxter, Mr Baxter had said the fire was on the eastern side of the river. A consideration of that information has shown it to be inaccurate.

[21] Mr Bird first investigated the fire in July 2003. He relied upon the observations of the plaintiff and his wife. He did not speak to others because they "were in dispute with Mr Gardner". In particular he did not discuss the matter with either Mr Baxter or Mr Whatley (each of whom gave evidence for the defendant) or Mr Piddick (called by the plaintiff). Had he done so he must have reached different conclusions from those expressed in his report.

[22] Mr Bird attended the property for the purposes of the report on only one occasion. This was some 8 years after the fire had passed through the property. He said that he relied upon scorch marks he observed on trees to trace the path of the fire. However he acknowledged that he did not know whether those scorch marks came from the fire in question in these proceedings or from one or more of the numerous other fires he agreed must have passed through the area in the intervening period.

[23] Mr Bird was quick to leap to conclusions consistent with the information provided to him by the plaintiff and I have little difficulty in finding that his evidence does not assist me in relation to the source of the fire or the course it followed before it got to the house.

[24] Mr Bird gave evidence that a back-burn from the firebreak that existed on the northern border of sections 1746 and 1747 should have been undertaken

on the morning of 10 September 1995. He said this in light of the presence of the fire at an indeterminate distance to the north, the prevailing winds and the consequent perceived threat to the property of the plaintiff. He conceded in cross-examination that it would have been the role of the plaintiff to monitor the fire and to call in the members of the Volunteer Bushfire Brigade at an appropriate time. However, he said that because the fire had been mentioned to Mr Baxter at Winnellie Park on 9 September 1995, Mr Baxter should have assumed a monitoring role himself even though the plaintiff was present in the area. He accepted that the property of the plaintiff and the location of the fire were not within the area for which the Volunteer Bushfire Brigade had responsibility.

[25] In suggesting that a back-burn occur whilst the fire was still a long way off Mr Bird acknowledged the danger that such an exercise posed. With a change of wind the back-burn may create its own front. He said the danger created by such a front could be met by the use of a number of fire units to deal with spot fires and the like. He had made no inquiry and had no idea what fire units or men were available to the Brigade or what other demands upon the services of the Brigade existed at the time. In my view the conclusion of the witness was an ex post facto proposal guided solely by the knowledge that the fire had destroyed property rather than an expert assessment of the situation as it faced the fire authorities and the plaintiff on the day.

Roy Baxter

[26] It is also necessary to say something regarding the witness Roy Baxter. Mr Baxter recalled speaking with Mr Gardner at the greyhound meeting on the evening of 9 September 1995 but did not recall speaking to him about the fire at that time. In his affidavit Mr Baxter said that he went to the plaintiff's land both on 9 September 1995 and again on 10 September 1995. On 9 September 1995 he formed the opinion that Mr Gardner was not worried about the fire and he agreed with Mr Gardner's assessment. He thought the fire was not then a threat to the property. He again attended at about midday on 10 September 1995 and spoke with Mr Gardner at the stables which are on section 1742. On that occasion Mr Gardner said, in relation to the fire, words to the effect that it would be "all right" and Mr Baxter responded: "If you think it's safe that's fine by me". Mr Gardner denies that Mr Baxter attended his property on either of the days mentioned by Mr Baxter.

[27] Prior to Mr Baxter giving evidence the defendant tendered by consent a report from Dr Mahajani, who is a Community Geriatrician with the Aged Care Assessment Team at the Department of Health. Dr Mahajani was also called to give evidence. Mr Baxter has been suffering memory loss diagnosed as an early stage of Alzheimer's disease. Dr Mahajani said that, although Mr Baxter suffered from short-term memory loss, his longer term memory was unaffected at this time save for the confusion he may suffer when under pressure. She said Mr Baxter might become confused under the

pressure that would result from giving evidence in a court and that he would find it difficult to provide details in those circumstances. This turned out to be so. He was able to provide a fairly clear picture of what he says occurred at the time of the fire but when pressed on particular matters he either said he did not know or retreated into silence. He said that it was easier for him to remember things when he was in a quiet room during the interview process and was able to take time to think. That was not the case in court. In her evidence Dr Mahajani said such a reaction was what she would have expected.

[28] I found Mr Baxter to be an honest witness doing his best to be helpful. He impressed me as a careful man who was diligent about his duties. Mr Whatley confirmed the view that Mr Baxter was a "most diligent" volunteer. Unfortunately he became confused in cross-examination even though that cross-examination was conducted in a sensitive fashion. I have no difficulty in accepting the evidence contained in his affidavit.

[29] As I have observed, there is some conflict between the evidence of Mr Baxter and that of the plaintiff. I have already discussed the evidence relating to the conversation regarding the location of the fire on 9 September 1995. There was also conflict as to whether Mr Baxter attended at section 1746 on 9 September 1995 and at section 1742 before the fire on 10 September 1995. Mr Baxter recalls that he did so and that the plaintiff had said of the fire on one of those occasions: "It'll be right, mate, don't worry about it", and at a different time: "As far as I can see it will stay on

the other side of the creek". To the contrary, the plaintiff said that Mr Baxter did not attend at the property until after the fire on 10 September 1995 and the only relevant conversation before the fire was that held at Winnellie Park on 9 September 1995.

[30] I prefer the evidence of Mr Baxter to that of the plaintiff on this issue. Both men suffered from the difficulty of giving evidence some 8 years after the event. Mr Gardner demonstrated a capacity to reconstruct his evidence in the face of difficulties that confronted him. By way of example, he changed his evidence as to the degree of diligence with which he monitored the fire on 10 September 1995. He firstly said he exercised a high level of vigilance on that occasion but subsequently modified that to suggest he was lulled into a false sense of security by the earlier conversation with Mr Baxter. Further, he initially said that Mr Baxter had told him that the fire was "contained to the north-east of my property" but withdrew that when pressed. Surprisingly it was in cross-examination that he first thought to mention his visit to the house to check the location of the fire on 9 September 1995. On the other hand, I found Mr Baxter to be a careful and honest witness who was reliable until placed under pressure in the courtroom. As his time in the witness box increased he tended to agree with propositions put to him and to resort to silence or a response that he could not remember. I do not regard him as a less reliable witness for those reasons but rather recognise that as being an expected consequence of the illness from which he now suffers.

[31] In any event, what is clear on the evidence accepted by me is that the plaintiff did hold the view on the morning of 10 September 1995 that it would "be right" and that he thought the fire was sufficiently distant from his property as to not impose a threat. That conclusion follows from his own evidence of having attended at section 1746 and having satisfied himself in that regard. At that time the direction of the fire as described by the plaintiff was such that the fire had to be situated on the western side of the Blackmore River and to the north of section 1746.

[32] In cross-examination Mr Bird agreed that the primary responsibility for monitoring the fire and calling for assistance rested with the property owner. Mr Bird accepted that the system for dealing with bushfires in such areas requires the involvement of property owners and others in identifying, reporting and monitoring fires that may be a threat to their property or the property of others. The plaintiff also acknowledged this to be so and gave evidence that he was alert to the threat of bushfires during the dry season and, along with his family, maintained a watch for the presence of fires.

[33] Mr Bird was of the view that the fire officers, and in particular Mr Baxter, having been aware of the fire on the previous day should have maintained a watch on 10 September 1995. He said a crew should have been sent out to monitor the fire. I find as a fact that Mr Baxter did attend at section 1742 on the day of the fire for that very purpose.

The conduct of the Defendant

[34] The steps or precautions that the plaintiff says the defendant should have undertaken to fulfil the duty of care owed by the defendant to the plaintiff are spelled out in the statement of claim as follows:

> "i) Implementing and maintaining Firebreaks;
> ii) Reduction of fuel build up;
> iii) Advising the Plaintiff of the location of 'the fire';
> iv) Taking action to control and/or reduce 'the fire's' spread;
> v) Monitoring 'the fire'; and
> vi) Extinguishing 'the fire'."

Firebreaks

[35] There is no dispute that, at the relevant time, there was no firebreak on the Crown land side of the boundaries of sections 1742, 1746 and 1747. There never had been. After the fire the plaintiff requested of the defendant that firebreaks be established on the Crown land and about a week later contractors installed a firebreak on the Crown land adjoining the boundary of section 1746 and other sections within the region.

[36] There was much evidence about the nature and purpose of firebreaks. It is not disputed that the term "firebreak" is a misnomer and a more correct description would be a "fire access trail". The purpose of firebreaks is not so much to prevent fires entering a property (except, perhaps, small fires and those occurring in the early part of the dry season) but rather to provide access to those who wish to fight or manage an oncoming fire.

[37] Dr Russell-Smith, a consultant fire ecologist employed by the Bushfires Council NT, discussed different kinds of firebreaks, including bare earth firebreaks, and went on to say:

> "In sum, even well prepared firebreaks of 8 to 10 metres or so width are inadequate barriers to wild fires under late dry season fire weather conditions, even in the absence of major spotting. Firebreaks under such weather conditions are thus not 'breaks' at all but, rather, serve a useful function for permitting ready access for fire control and management purposes."

[38] One of the uses of a firebreak or a fire access trail is to enable back-burning into a fire. The opinion of Mr Bird was that this particular fire could have been stopped at the boundary of section 1746 by back-burning from the firebreak. When asked whether the presence of a firebreak on the vacant Crown land, together with that on section 1746, would have stopped the fire Mr Bird agreed that "it was highly unlikely". He said: "You need your men and equipment to actually back-burn on the fire to successfully extinguish the fire and stop it spreading into any properties from Crown land". He said there was no other way to extinguish the fire.

[39] In the circumstances of this matter, the presence or absence of a firebreak on the Crown land is not a relevant consideration. Although there is some dispute about its quality, there is no dispute that a firebreak existed on the northern boundary of sections 1746 and 1747 and that access was available along those firebreaks for the purposes of back-burning. The presence of a firebreak on the adjoining Crown land would not have prevented this fire entering section 1746.

[40] The way in which the fire may have been controlled was by back-burning from the firebreak on section 1746 and section 1747. Mr Bird was of the view that back-burning should have occurred at an early time and whilst the fire was some kilometres away. He said it may have required burning for a day or two days and that the fire would slowly burn into itself and self-extinguish. He was asked to consider the wind conditions in the hours preceding the fire approaching section 1746. It was suggested to him that starting a fire on such a relatively narrow front as was provided by the firebreaks along the boundary of sections 1746 and 1747, in circumstances where winds were, over the period, coming from different directions ranging from north-west to west, north-east to north and north-north-east and west-north-west, created a danger. It was put that the fire resulting from any back-burning exercise may itself have changed directions and created dangers for properties further to the south-west and south-east of sections 1746 and 1747. Mr Bird acknowledged that the terrain on either side of sections 1747 and 1746 was largely inaccessible, but he thought that 4-wheel drive vehicles could get onto those properties to broaden the front of the back-burn. He said he was not suggesting that the vehicles would go "scrub-bashing off in the bush in the face of a fire" and that they would have to remain on a firebreak. This is to ignore the fact that the firebreak did not extend beyond the borders of sections 1746 and 1747. He said that to meet the risk of the fire escaping it would be necessary to have "more appliances, more men".

[41] The same proposition was put to Doctor Russell-Smith and he responded:

> "So the critical issue I think from my judgment in a professional sense is that if you are going to actually back-burn in these scenarios, you – the fire has almost got to be on the boundary. The timing is critical so that you can actually then use a back-burn that will go towards the other fire and then they will accelerate towards each other. There is no point in doing it, I would suggest, a week earlier in my assessment because then you could be burning out a whole stack of country unnecessarily."

[42] Dr Russell-Smith pointed out that if the prevailing winds were coming from the north and early back-burning occurred in the region then there would be no control over fires heading further south. He said there may be repercussions for other landholders and "you may cause more problems than you actually set out".

[43] Mr Whatley, who is a Regional Fire Control Officer with the Bushfires Council, said that he would not have started a back-burn at 6 o'clock on the morning of the fire. He explained his reasons as follows:

> "We wouldn't start a back-burn at 6 o'clock for the simple reason that you are going to have to tie up resources for the full day to conduct blackout once you have actually conducted the burn and by that I mean we have to go actually physically into the – into the scrub on the edge of the fire line that we have – the edge of the burn that we have initiated and extinguish everything and if that means we need to take a loader in there and flatten trees that are burning at the top or whatever then so be it but it's just – it ties up too many resources and in a situation where there is no access and apart from Mr Gardner's residence etcetera, etcetera out there. We have got to remember too that these brigades have their own gazetted area of responsibility and they are based on fairly well developed subdivisions so we can't afford to tie resources up on a – on an occupied bush block basically."

[44] The difficulty is that the region is remote and largely inaccessible and the length of firebreak from which a back-burn to the north could take place was relatively narrow. In my view, in the conditions that prevailed, it is clear that the setting of an early back-burning fire would be likely to create a danger for other property to the south-east and south-west of sections 1746 and 1747. In addition an early back-burn would unnecessarily tie up resources that were required elsewhere. I accept the evidence of Dr Russell-Smith that whilst a back-burn would be the appropriate approach to such a fire, it would be necessary to leave it to a time when the approaching fire was much closer than suggested by Mr Bird. Indeed, at the time that Mr Bird suggested the back-burn should have occurred, the fire was located well to the north of section 1746 and it could not have been known whether it would at any time move to the south and, if it did, at what location. Mr Bird agreed that when the fire was situated on the northern parts of section 1826 it was not, at that time, a threat to any property.

[45] I conclude that the failure of the defendant to create its own firebreaks on the northern boundary of sections 1746 and 1747 did not, per se, contribute to the fire entering section 1746. Such a firebreak would not have stopped or hindered this particular fire. The firebreaks created by the plaintiff allowed appropriate back-burning to occur. That back-burning did not occur because no-one was aware of the approach of the fire to section 1746 at a time that would have permitted an effective back-burn to take place.

Reduction of fuel build-up

[46] It is the case that there had been no controlled action taken to reduce the build-up of fuel on the Crown land immediately to the north of section 1746. It seems there may have been such a reduction in years preceding 1995, although whether that was in a controlled situation or, alternatively, by back-burning into oncoming fires is not entirely clear. Controlled burning is an important management tool. However, in the circumstances of this particular fire the fact that a controlled burn of the area had been undertaken earlier in the year would not necessarily have prevented the fire spreading southward. The longer the period between the initial controlled burn and any subsequent fire, the greater the likelihood that the fire will have sufficient fuel to spread through the same area. In this case any reduction in intensity of the fire in the areas to the north of section 1747 and 1746 resulting from earlier fuel reduction is unlikely to have saved the house on section 1746. This is because section 1746 had itself not had a fuel reduction program during the course of 1995. Once the fire reached the northern border of that section (which is some distance from the house) it would have had the fuel available to it to pick up intensity and proceed as it did.

[47] The plaintiff was aware of the need to reduce the fuel load around his buildings. There is evidence that he undertook some fuel reduction measures in relation to part of the area immediately surrounding the house at an earlier time. After the fire, it was obvious that there remained sufficient

fuel present to carry the fire to the house. Dr Russell-Smith expressed the opinion that there was "fuel … continuous up until the building. It may well have been, in part, slashed in some areas previous to it but there was still dry fuel that, you know is continuous right up to the house". This opinion was formed by reference to photographs taken shortly after the fire.

[48] The presence of the fuel provided a path for the fire to enter and destroy the building. It was the evidence of Mr Whatley that if the fuel surrounding the house had been removed it was unlikely that the fire would have entered the building. The amount of fuel remaining around the house permitted an intense fire to burn. According to Mr Whatley, had that not been present the house would not have been destroyed. Given the evidence that such fires can leap significant distances, there must have been a danger that the house would be burnt in any event, however the immediate cause of the fire reaching the house in this case was the failure of the plaintiff to clear fuel from the area surrounding the house. The plaintiff had the experience, the equipment and the capacity to carry out the work. He failed to do so.

[49] Mr Bird, who gave expert evidence on behalf of the plaintiff, did not address the issue of the failure to reduce fuel to the north or around the house and the impact that such a reduction may have had. His conclusion was limited to stating that the failure of the defendant to create firebreaks on the Crown land and to attend the fire to effect a back-burn contributed to the loss of the plaintiff's home and possessions.

[50] The plaintiff has not established that any action on the part of the defendant to reduce the availability of fuel to the north of sections 1746 and 1747 would have prevented the fire from entering section 1746. In all probability the fire would have followed the same path, driven by the same winds and, once on section 1746, have achieved the same or a similar intensity before reaching the house even if fuel loads had been reduced to the north of section 1746.

Advising the Plaintiff of the location of the fire

[51] The plaintiff was aware of the location of the fire having observed it on 9 September 1995 and having paid particular attention to its location on the morning of 10 September 1995.

Taking action to control or reduce the fire's spread

[52] The evidence of all relevant witnesses was that the fire was unable to be controlled when it was to the north of section 1746 and in particular as it travelled through section 1826 and those sections to the west. The area was effectively inaccessible for fire management purposes and, in any event, there was no immediate threat to life or property. Mr Whatley said that it was not feasible to extinguish or control a fire in such a location. The philosophy of the Bushfires Council was, and remains, that in such areas fire is regarded as a natural part of the environment and will be left to burn if there is no threat to life or property. The only way in which the fire may

have been controlled was, at a later time, back-burning into the fire as it approached the northern boundary of sections 1747 and 1746. That action had to take place when the fire was relatively close to the boundary. Earlier back-burning in the days leading up to the destruction of the house would have been an imprudent and premature step in all the circumstances and have risked damage to other properties. It would also have unnecessarily tied up resources.

Monitoring the fire

[53] In 1995 there existed a regime for dealing with bushfires in the rural areas outside Darwin. The Bushfires Council had been established as a land management organisation. The Bushfires Council employed regional fire control officers whose duties included co-ordinating the activities of the various Volunteer Bushfire Brigades in the region, advising landholders on fire prevention activities and overseeing suppression activities where bushfires occurred. The rural area was divided into various regions and the Volunteer Bushfire Brigades had responsibilities for areas within those regions. The land on which the plaintiff and his family lived was not within the boundaries of a gazetted Volunteer Bushfire Brigade area.

[54] The plaintiff agreed that fire management in rural localities depended upon residents maintaining a high level of awareness of the risk of fire and conducting themselves in a co-operative way with the Bushfires Council and any relevant Volunteer Bushfire Brigade to limit and meet that risk. In

effect, the Volunteer Bushfire Brigade relied upon the information fed to it by rural property owners, residents and the general public in order to maintain an effective fire service. The plaintiff himself gave evidence that he was alert to the threat arising from bushfires and he and his family were vigilant in this regard and co-operated with the Bushfire Brigade.

[55] The evidence of Mr Baxter, which was not challenged, was:

> "A fire burning in the vacant Crown land in that area would be left to burn unless it appeared likely to burn back towards the property or other properties in the vicinity. The landholder is in the best position to make that judgment and call for assistance from the fire brigade if necessary. That has been the customary approach taken to fires burning in a large area of vacant Crown land such as this. The Volunteer Bushfire Brigades in the vicinity are on call if assistance is required by landholders, but must attend to other tasks in their own and neighbouring brigade areas, and cannot be in constant attendance at a fire which is not considered an immediate threat to life or property."

[56] The real issue in this case is who should have monitored the fire so that the path of the fire could be known and a back-burn conducted at an appropriate time. In the circumstances responsibility rested solely with the plaintiff. He had been alerted to the presence of the fire and was aware that it was burning to the north of his property. He was also aware that the winds were travelling generally from the north which may bring the fire in the direction of his property. He checked the area around the house on section 1746 between 9 and 10 am on 10 September 1995 and concluded there was no risk to his property. He did not then check the fire again but rather returned to the stables on section 1742 where he remained inside. He was only alerted

to the presence of the fire on section 1746 when one of his children came to him within the building and reported the presence of soot in the air. There is agreement between the plaintiff and the defendant that had the plaintiff observed the fire approaching his property and called the relevant fire services, they would have attended. The appropriate step to be undertaken would have been to burn back into the fire as it approached the boundary of sections 1746 and 1747.

[57] During the course of 10 September 1995 Mr Baxter and Mr Piddick were carrying out duties as members of the Berry Springs Volunteer Bushfire Brigade within the area for which that body had responsibility. Both gave evidence that had they been called they would have abandoned the controlled burn which was being undertaken and would have attended at the plaintiff's property. They were in contact via radio. I accept that Mr Baxter in fact attended on Mr Gardner as soon as he was called immediately after the fire destroyed the house on 10 September 1995.

[58] On the last occasion that Mr Baxter observed the fire prior to the house being destroyed, it was well to the north of section 1746 and neither he nor the plaintiff thought it posed a threat to section 1746. Thereafter it was the case that both men expected the plaintiff to maintain a watch on the fire. This is evident from their actions. Mr Baxter did not return to the scene and the plaintiff in fact kept a form of watch by visiting the house. The plaintiff did not suggest in his evidence that he thought Mr Baxter or any other person would monitor the fire, either closely or at all. He did not reduce his

vigilance in the expectation that anyone else was monitoring the fire. Each man was familiar with the system for bushfire control that was in place at the time. The plaintiff, as the property occupier, was expected to monitor the fire. He did so to some extent but failed to observe the approach of the fire to section 1746.

Extinguishment

[59] The extinguishment of the fire was not an available option, save by the method of burning back into the fire as it approached the boundary of section 1746. That did not occur because no-one was aware of the approach of the fire to section 1746. There was no failure on the part of the defendant or its servants or agents to monitor the fire.

Conclusion

[60] Whilst it is clear that the defendant owed a duty of care to the plaintiff, it has not been shown that any relevant breach of that duty occurred. The failure of the defendant to place firebreaks on the land adjacent to sections 1746 and 1747 and the failure of the defendant to reduce the available fuel on the Crown land to the north did not cause or contribute to the destruction of the house or other property. The defendant was entitled to rely upon the plaintiff to monitor the fire for his own protection and was entitled to expect him to seek the assistance of the Volunteer Bushfire Brigade when required. Had he done so, an appropriate back-burn could have been employed to

protect the property. I find that was the general understanding within the relevant community and in particular it was the understanding between the plaintiff and Mr Baxter in relation to this fire. The plaintiff failed to adequately monitor the fire and he also failed to remove fuel from around his house. As a consequence of those failures the fire which entered onto section 1746 swept south and destroyed the house and its contents, along with the shed and the bore. The defendant is not responsible for those omissions.

[61] The plaintiff's claim is dismissed.

The Plaintiff

[62] The standing of the plaintiff to sue was an issue raised in the course of the proceedings. It is unnecessary for me to deal with this issue in light of the conclusions I have reached. In deference to the submissions presented, I should say something as to the matter.

[63] There is no dispute that the plaintiff has standing to bring the proceedings seeking damages in relation to the loss of the chattels destroyed in the fire. Those chattels belonged to him. However, there is a challenge to his standing in relation to the land and fixed improvements that were also the subject of a claim for damages. The plaintiff was one of four joint tenants in relation to section 1746. Joint tenants are jointly seised of the whole estate they take in land and no one of them has a distinct or separate title, interest or possession: *Wright v Gibbons* (1948-1949) 78 CLR 313 at 329.

Because joint tenants have no separate distinct title, interest or possession in actions relating to their joint estate, one joint tenant cannot sue or be sued without joining the other or others: *Commentaries on the Laws of England;* William Blackstone (Vol II at 182). It was the contention of the plaintiff that, by virtue of his unilateral action in constructing the residence on the land, the joint tenancy had been severed and the land was held by himself and his brothers and sister as tenants in common. He was not able to identify the proportions of the holding of the individual tenants in common. There was no evidence on the part of the plaintiff of an intention to sever. There was no evidence of any agreement by the joint tenants to the action of the plaintiff in constructing the residence. There was no evidence on that matter at all.

[64] If I had been called upon to resolve this issue I would have determined that the unilateral action of the plaintiff, without more, would not, in these circumstances, have brought about the severance of the joint tenancy. The plaintiff did not have standing to sue without joining his fellow joint tenants. If necessary the rights of the plaintiff in relation to the additional contribution he made to the value of the land by constructing the residence were likely to have been preserved by seeking a declaration that the joint tenants held the legal estate in trust for themselves as tenants in common in shares proportionate to their contributions: *Calverley v Green* (1984) 155 CLR 242 at 258; *Corin & Another v Patton* (1990) 169 CLR 540 at 572. The creation of a trust is a remedial institution that provides a remedy as

between the joint tenants. It does not create a right against a stranger such as the defendant in these proceedings. It does not create in the plaintiff any right to proceed in relation to the joint estate without joining his fellow joint tenants as parties to the action. In my opinion he had no individual standing in relation to the claims regarding the house, the shed and the bore. These were the assets of the joint tenants.

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