[¶61-066] PROVINCIAL INSURANCE AUSTRALIA PTY LIMITED v CONSOLIDATED WOOD PRODUCTS PTY LIMITED & ANOR
New South Wales Court of Appeal
Judgment delivered 14 August 1991
Judgment below

Insurance — Exclusion clause — Factory flooded — Insurer denies liability due to exclusion clause for flood — Whether a stormwater drain a canal or a natural watercourse — Whether insurance broker negligent.

The insured contacted a broker to arrange insurance against various risks, including property damage and loss of profits. In front of the insured's factory ran a man-made watercourse described as a stormwater channel. The insured made it clear that it wanted a policy that would cover it in all circumstances of water entering the premises. The broker accepted this request. Two policies were ultimately issued by the insurer.

The factory was subsequently flooded when a drain in the stormwater channel was blocked. The insurer denied liability, citing "perils exclusion no 3" which read:

> **"The company shall not be liable in respect of:**
>
> **3. Physical loss, destruction or damage occasioned by or happening through:**
>
> **(a) Flood, which shall mean the inundation of normally dry land by water escaping or released from the normal confines of any natural watercourse or lake whether or not altered or modified, reservoir, canal or dam**
>
> **(b) Water from or action by the sea, tidal wave or high water**
>
> **provided that perils exclusions 3(a) and 3(b) shall not apply if loss destruction or damage is caused by arises out of an earthquake or seismological disturbance."**

The insurer claimed that whether or not the insured's loss or damage was occasioned by or happened through a "flood" in the normal sense of that term, it was occasioned by or happened through a "flood" as defined in the policy as it came from a canal or modified watercourse.

The trial Judge rejected the insurer's argument and decided that the stormwater channel was not a "canal" or a natural watercourse whether altered or modified ((1991) 6 ANZ Insurance Cases ¶61-035).

The insurer appealed and the insured cross appealed against the broker claiming (if the insurer's liability under the policy was denied) that he was negligent.

Held: **the insurer was not liable; the broker was negligent.**

(1) The channel was an altered natural watercourse as it roughly followed the line of the natural watercourse and was now the only watercourse carrying the flow from the catchment area. The essential character of the natural watercourse remained the same and any alterations did not render the natural watercourse unrecognisable.

(2) The term "canal" should be given its ordinary and natural Australian meaning in the context in which it appears. Therefore, the term should not be restricted to navigable canals and includes a stormwater channel.

(3) The broker had a duty of care to the insured to exercise proper care and skill in carrying out the insured's instructions.

(4) Where the default of the broker is rudimentary and obvious, expert evidence as to what a reasonably careful broker would have done is not needed and the Court can reach its own conclusion.

(5) It is especially important that an insurance broker should go through with the insured the list of exceptions in the policy secured.

[*Headnote by the CCH INSURANCE LAW EDITORS*]

CS Sheller QC & CR Hoeben (instructed by Leigh Virtue & Collins) for the appellant, CW Houghton (instructed by Helmrick & Hickey) for the first respondent, AR Ashburner (instructed by Minter Ellison) for the second and third respondents.

Before: Kirby P, Mahoney and Priestley JJA.