CASE LAW

FLOOD DAMAGE: ACTIONS BETWEEN RIPARIAN OWNERS

THORPES LTD. v. *GRANT PASTORAL CO. PTY. LTD.*

It has been regarded as settled law in New South Wales for over fifty years that riparian occupiers were precluded, by statute, from suing each other in respect of damage caused by flooding, even though resulting from the negligence of one of the parties. The practical importance of a decision of the High Court of Australia which upsets this long-standing view, and which introduces a measure of order into a very disordered branch of law, will be apparent in a State so subject to frequent flooding as New South Wales.

The plaintiff and the defendant in *Thorpes Ltd.* v. *Grant Pastoral Co. Pty. Ltd.*[1] were owners of land on the opposite banks of the Belubula River. Dividing the defendant's property was the Emu Creek, which joined the river at a point oppoite the plaintiff's land. Along the banks of this creek the defendant maintained an embankment, which at one point crossed the bed of a natural watercourse. In time of flood, the watercourse formed an escape channel for waters which had overflowed the banks of the river.

In an exceptionally heavy flood, water coming down the river flowed along the natural watercourse, but was unable to escape freely along its full length because of the embankment along Emu Creek. The water was consequently diverted back into the river near the mouth of Emu Creek, with the result that the banks of the plaintiff's land were eroded and damaged. Plaintiff brought an action in the Supreme Court of New South Wales alleging nuisance in interfering with the natural flow of the watercourse and diverting its waters on to the plaintiff's land, and negligence in the construction and maintenance of the embankment. The jury returned a verdict for the plaintiff on both counts. The substance of the plaintiff's case was that the embankment obstructed the flood alveus of the river, so that the floodwaters were diverted back into the river, causing damage to the plaintiff's land. In addition, it was alleged that the embankment conducted the waters of Emu Creek into the Belubula River at such an angle, and in so concentrated a volume, that they caused the erosion of the further bank of the river, with the consequent overflow of water and inundation of the plaintiff's land. On appeal to the Full Court it was contended that the plaintiff had no cause of action in that s. 4A (1) of the Water Act, 1912 (N.S.W.)[2] had abrogated all rights of riparian occupiers of land in respect to the use and flow and to the control of water.

S. 4A (1) of the Act referring to the Water Conservation and Irrigation Commission,[3] reads:

> The right to the use and flow and to the control of the water in all

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[1] (1954) 54 S.R. (N.S.W.) 129; (1955) 29 *A.L.J.* 87.
[2] Act No. 44, 1912—Act No. 28, 1955. [3] Section 4.

> rivers and lakes which flow through, or past, or are situate within or are adjoining the land of two or more occupiers, and of the water contained in or conserved by any works shall, subject only to the restrictions hereinafter mentioned, vest and be deemed to have vested in the Commission for the benefit of the Crown. And in the exercise of that right, the Commission, by its officers and servants, may enter any land and take such measures as may be thought fit, or as may be prescribed for the consevation and supply of such water as aforesaid and its more equal distribution and beneficial use, and its protection from pollution, and for preventing the unauthorised obstruction or change of the course of rivers or the unauthorised erection or use of levee banks.

A majority of the Court (Herron and Kinsella, JJ., Owen, J. dissenting) dismissed the appeal. Herron, J. distinguished between the special rights given by the common law to riparian occupiers, by virtue of their interest in riparian land, to use water and to restrain inconsistent uses by other riparian occupiers, and the general right of all occupiers not to have the enjoyment of their property interfered with, whether from flooding by water, or from any other cause. The Act had taken away the former set of rights, but did not affect the latter class. Kinsella, J. was of the same opinion. He said:

> The complaint in the present case is not of interference with the flow of water in the river, but of inundation of lands by overflow of water which having left the channels has ceased to be part of the flow of the stream contemplated by s. 4A (1). . . . At the common law riparian rights are not and never were the only rights of riparian owners in relation to riparian land, but were of a special class super-added to the ordinary rights incident to the possession of the land. The right to freedom from wrongful diversion of water out of the channel and on to his land is distinct from and independent of the right of a riparian owner to the uninterrupted flow of water in the channel.
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> I am therefore unable to accede to the appellant's contention that this action is a contest in respect only of riparian rights. In my view it is based on the general common-law right of landowners.[4]

Owen, J., dissenting, was of opinion that s. 4A (1) was intended to do away with all the rights of riparian owners. In his view, the purpose of the legislation was to stop all litigation with respect to water rights by vesting these rights in the Crown. He sought support for that view in the decision of the Full Court, consisting of Stephen and Cohen, JJ. in *Hanson* v. *The Grassy Gully Gold Mining Co.*[5] In that case the defendant penned back the waters of a creek within the bed of the creek so that they did not flow past, through and away from the plaintiff's land. As a result, the water flowed into the plaintiff's mine-shaft, causing damage. The court held that the plaintiff did not have a cause of action in that his rights had divested under a section of the Water Rights Act, 1896 (N.S.W.)[6] which was for all present purposes identical with s. 4A (1) of the Water Act, 1912 (N.S.W.). This decision was followed by Owen, J. in *Dougherty* v. *Ah Lee.*[7] In that case the defendant had penned back the waters of a creek which had consequently burst its banks and flooded the plaintiff's land. The Court held the plaintiff did not have a cause of action.

On appeal to the High Court, the decision of the Full Court in *Thorpes Ltd.* v. *Grant Pastoral Co. Pty. Ltd.* was unanimously affirmed.[8]

The decision raises a number of interesting points, and will undoubtedly have an important effect on litigation with respect to water rights in New South Wales. This note will examine the position at common law having regard to

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[4] (1954) 54 S.R. (N.S.W.) at 145.

[5] (1900) 21 N.S.W.L.R. 271.

[6] 60 Vic. No. 20, s. 1.

[7] (1902) 19 W.N. (N.S.W.) 8. See also *Attorney-General* v. *Bradney* (1903) 20 W.N. (N.S.W.) 247.

[8] (1955) 29 *A.L.J.* 87, affirming (1954) 54 S.R. (N.S.W.) 129.

the two main allegations in the plaintiff's declaration, and then consider the effect of the Water Act, 1912 (N.S.W.) s. 4A (1), upon the law.

Obstruction of the Alveus of a Natural Watercourse

It will be recalled that the first count alleged that the defendant obstructed a natural flood channel in the flood plane of the river, so that the floodwaters were diverted back into the river causing the damage alleged.

The rule in relation to the obstruction of the alveus of a natural watercourse was first laid down in *Farquharson* v. *Farquharson*.[9] It was stated as follows:

> It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground; but it was found not lawful to use any operation in the alveus.[10]

In *Menzies* v. *Breadalbane*[11] the defendant attempted to build an embankment on the side of a river which would have had the effect of interfering with the old course of the flood-stream, and throwing the flood waters on to the land of the plaintiff in time of ordinary flood. The Court of Session (Scotland) held that a flood channel is as much a part of the river as the alveus, and the rule in *Farquharson* v. *Farquharson*[12] would accordingly operate to make the interference unlawful. The statement of the rule in *Farquharson* v. *Farquharson*[13] was approved by the Privy Council in *Gerrard* v. *Crowe*.[14]

It would appear that the liability imposed by these rules is strict. Coulson and Forbes state the position as follows:

> Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief thereby accrues to his neighbour, he will not be liable for damages; but where for his own convenience he *diverts or interferes with the course of a stream*, or where he brings upon his land water which would not naturally have come upon it, even though in so doing he acts without wilfulness or negligence he will be liable for all direct and proximate damages, unless he can show that the escape of the water was caused by an agent beyond his control, or by a storm, which amounts to *vis major*, or the act of God, in the sense that it is practically, if not physically, impossible to resist it.[15]

In *Fletcher* v. *Smith*,[16] Lord Penzance expressed as *obiter dicta* the tentative view that the defendant was bound to construct the new channel in such a manner that it would be capable of carrying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality.

The question of the appropriate standard of liability was directly raised in *Corporation of Greenock* v. *Caledonian Railway Company*.[17] In that case a municipal authority constructed a paddling pool for children in the bed of a stream and altered the course of the stream. Owing to an extraordinarily heavy rainfall the stream overflowed at the pond and damaged the property of the plaintiffs. The House of Lords held that the extraordinary rainfall was not a *damnum fatale* which absolved the authority from responsibility. Lord Finlay, L.C. said:

> It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to

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[9] (1741) Mor. 12779, cited in (1921) 1 A.C. at 397.
[10] *Ibid.*
[11] (1828) 3 Bli. (N.S.) 414.
[12] (1741) Mor. 12779 cited in 3 Bli. (N.S.) at 421, and (1921) 1 A.C. at 397.
[13] *Ibid.*
[14] (1921) A.C. 395 (P.C.).
[15] Coulson and Forbes, *The Law of Waters* (6 ed. 1952) (italics supplied); *Rylands* v *Fletcher* (1868) L.R. 3 H.L. 330; *Nichols* v. *Marsland* (1875) L.R. 10 Ex. 255; *Fletcher* v. *Smith* (1877) 2 A.C. 781; *Corporation of Greenock* v. *Caledonian Railway Company* (1917) A.C. 556.
[16] (1877) 2 A.C. 781.
[17] (1917) A.C. 556.

> time. It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of a *damnum fatale*, but is the direct result of the obstruction of a natural watercourse by the defender's works followed by heavy rain.[18]

Lord Wrenbury went further:

> The responsibility to provide a substituted channel is not limited to providing a channel sufficient to meet all demands which might reasonably be anticipated, or even all demands (in excess of the ordinary) short of the act of God. The corporation must provide a substituted channel which will be equally efficient happen what will. Assuming an act of God, such as a flood, wholly unprecedented, the damage in such a case results not from the act of God, but from the act of man in that he failed to provide (as there was before) a channel sufficient to meet the contingency of the act of God. But for the act of man there would have been no damage from the act of God.[19]

Applying these principles to the case under review, it seems clear that the defendant was strictly liable for his wrongful obstruction of the flood channel. It appears that the act of God would not have been a defence even had the defendant sought to raise it. It may be added that the further plea that the defendant was taking protective measures against extraordinary flood, which the defendant sought to raise at a late stage of the proceedings in the High Court,[20] would not have availed him even had the court considered it. For the rule as to defence against extraordinary flooding, the "common enemy", has no application where the work is done in the alveus of a recognised flood-channel.[21]

Concentration of the Flow of Water

The plaintiff's other allegation was that the embankment conducted the waters of Emu Creek into the Belubula River at such an angle, and in so concentrated a volume, that they caused the erosion of the further bank of the river, with the consequent overflow of water and inundation of the plaintiff's land. On this head the authorities regard the maxim *sic utere tuo ut alienum non laedas* as being the general basis of an action such as the present. The maxim is, however, of indeterminate application, and is of little assistance in deciding in what particular circumstances an occupier may, or may not, disregard the interests of his neighbour in the enjoyment of his own property.

In *Whalley* v. *The Lancashire and Yorkshire Railway Company*[22] a railway embankment caused an accumulation of flood-water, and in order to get rid of this accumulation the defendant railway company pierced the embankment, and so caused the flood-water to escape in a concentrated volume, and with destructive violence into the adjoining land of the plaintiff, causing damage. It was held that the company was liable for the damage so caused. The defendant was liable, not merely because it removed the artificial embankment, but because it had discharged the water in a concentrated and destructive stream doing more damage than would have been caused in the ordinary course of gravitational flow, unobstructed by the embankment.

In *Hurdman* v. *The North Eastern Railway Company*[23] the defendant by moving earth and raising the level of its land, had caused rainwater to flow onto the plaintiff's land in a manner in which it would not otherwise have

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[18] *Id.* at 572.
[19] (1917) A.C. 583-84.
[20] (1955) 29 *A.L.J.* at 90.
[21] *Farquharson* v. *Farquharson* (1741) Mor. 12779 cited in 3 Bli. (N.S.) at 421, and (1921) A.C. at 379; *Menzies* v. *Breadalbane* (1828) 3 Bli. (N.S.) 414.
[22] (1884) 13 Q.B.D. 131.
[23] (1878) 3 C.P.D. 168 (C.A.).

done, causing damage to the plaintiff. The Court of Appeal held that the maxim *sic utere tuo ut alienum non laedas* was applicable, and laid down the rule that, subject to certain qualifications not here relevant, if anyone by artificial erection on his own land causes water to pass onto his neighbour's land, and thus substantially interferes with the latter's enjoyment, he will be liable to an action at the suit of the person so injured. It will be observed that this portion of the plaintiff's case in no way depended on the fact that the embankment was erected beside a river. Rather it relied on common law principles which are of general application, and which apply irrespective of whether the water was in a natural watercourse or was merely draining rainwater.

It is thought that the decision in *Thorpes Ltd.* v. *Grant Pastoral Co. Pty. Ltd.*[24] is in line with the previous authorities on this subject. The case, however, does not contribute a great deal to this aspect of the law, since the nature of the common law liability of the defendant was not argued in the High Court, the only question disputed being whether the Act had divested the plaintiff's common law rights, whatever they were.

Effect of the Water Act, 1912 (N.S.W.), S. 4A (1)

The effect of s. 4A (1) largely depends on the meaning of the words "right to the use and flow and to the control of water" in the section. Fullagar, J., with whose judgment most of the members of the High Court expressed their agreement,[25] regarded the section as referring only to what has been termed the special riparian rights of occupiers.

> Here the plaintiff is not asserting any right to the use or flow or control of water, or any right dependent upon, or in any way connected with, the fact that its land abuts upon a river. Its action is an ordinary action of nuisance. . . . The plaintiff's position would be precisely the same if the nearest point of its land to the river were miles away from the river.[26]

The question arises as to the consistency of this view with the previous decisions on this, or analogous, statutory provisions. In *Hanson* v. *The Grassy Gully Gold Mining Co.*[27] it appears that action was brought on the basis of the plaintiff's right to have the water flow past his land, and in fact it did not appear that the water broke the river banks. It would thus seem that the plaintiff was relying on his special rights as a riparian occupier, which rights had been divested by statute. In *Dougherty* v. *Ah Lee*,[28] however, it was argued that the plaintiff's claim was not based on his rights as a riparian occupier, but was a claim in nuisance. As the water had broken the bank of the river and flooded the plaintiff's land, this would seem to have been a good argument. Notwithstanding, it was held that the plaintiff's rights had been divested by statute. Since Fullagar, J., in his judgment in *Thorpes Ltd.* v. *Grant Pastoral Co. Pty. Ltd.*[29] thought that *Dougherty* v. *Ah Lee*[30] was probably incorrectly decided for this reason, it may now be confidently asserted that s. 4A (1) of the Water Act, 1912 (N.S.W.) does not affect the ordinary common law right of all occupiers (as distinct from the special rights of riparian occupiers) to enjoy their land without lawful interference from others.

It seems that s. 4A (1) is limited in its operation to special riparian rights, and that the right to "the use and flow and to the control of water" only refers to those rights which riparian occupiers have as an incident to their property in riparian land. These rights include, for example, the right to have the water flow in its natural state of flow, quantity and quality, neither increased nor diminished, the right to take water for all ordinary purposes, and, subject to

[24] (1955) 29 *A.L.J.* 87.
[25] *Id.* at 87,88 and 90.
[26] *Id.* at 89.
[27] (1900) 21 N.S.W.L.R. 271.
[28] (1902) 19 W.N. (N.S.W.) 8.
[29] (1955) 29 *A.L.J.* 87.
[30] (1902) 19 W.N. (N.S.W.) 8.

certain conditions, the right to erect dams or divert the water for the purpose of irrigation.[31]

Hanson v. *The Grassy Gully Gold Mining Co.*[32] is authority for the proposition that the effect of s. 4A (1) is to divest the riparian occupier of all such rights, and to vest them in the Water Conservation and Irrigation Commission. And in *Thorpes Ltd.* v. *Grant Pastoral Co. Pty. Ltd.*[33] it was not doubted by any of the judges in the Supreme Court that this was the effect of the section. However, certain remarks by Fullagar, J. in the High Court indicate that even this limited construction is not beyond question. Fullagar, J. based his actual decision on the broad distinction, referred to above, between the special rights of riparian owners, and the general rights of all occupiers not to have the enjoyment of their property interfered with. He added, however:

> The view which I am disposed to take is that the Act does not directly affect any private rights, but gives to the Crown new rights—not riparian rights—which are superior to, and may be exercised in derogation of private riparian rights, but that, until those new and superior rights are exercised, private rights can and do co-exist with them. However, the question of the correctness of *Hanson's Case* was not fully argued, and it is perhaps better not to express a concluded opinion upon it in a case in which it is not strictly necessary to do so.[34]

It is clear that Fullagar, J. favours an entirely new approach to s. 4A (1). This approach would undoubtedly be of considerable importance since it emphasizes that the riparian occupiers are not automatically divested of any of their rights by the Act, and that the rights of the Water Conservation and Irrigation Commission will only operate in derogation of the rights of riparian occupiers when the Commission acts to exercise its rights.

This construction is open to a number of difficulties and objections. Firstly, it does not seem to be supported by the words of the section which, on their face, appear to be clear. The right to the use and flow and to the control of water is, subject only to the restrictions mentioned in the Act, to vest and be deemed to have vested in the Commission. S. 7 appears to be the main restriction on those rights which are to vest in the Commission. This section provides that a riparian occupier is to have the right to the use of water in a certain limited class of case. The implication from the two sections read together seems to be that a riparian occupier is to have the right to the use and flow and control of water in a limited class of case only, and not in any other case, where the right would vest solely in the Commission. This was clearly the view which Herron, J. took of the section, and it does appear to be a more natural interpretation.

However, the difficulties in Fullagar, J.'s position do not end here. On his view it must be determined how the rights of riparian owners have, in fact, been affected since the enactment of s. 4A (1). This, in turn, will depend on the Commission having chosen to exercise its rights. How does the Commission exercise its "superior" rights? The most obvious answer would seem to be by a formal declaration of its intention to exercise such rights. It is, perhaps, significant that the Commission has never formally declared any such intention.

Could the Commission exercise its rights in any other way? Can it exercise its rights by granting a licence, under Part II of the Water Act, 1912 (N.S.W.), thereby indicating an intention to exercise its superior rights in so far as might be necessary to give effect to the licence, and to that extent derogating from the common law rights of the other riparian occupiers. It will be seen, however, that this interpretation would involve a piecemeal exercise of the Commission's rights, which would hardly seem consistent with the wording of the section. In addition, it would involve the likelihood of disputes

[31] 33 Halsbury's *Laws of England* (2 ed. 1939) 593 *et seq.*
[32] (1900) 21 N.S.W.L.R. 271.
[33] (1955) 29 *A.L.J.* 87.
[34] *Id.* at 90.

as to whether or not a proposed work could be carried out in pursuance of an occupier's common law right, or whether it fell within the licensing provisions of the Act. But the whole framework of the Act is directed toward preventing litigation with respect to water rights. It would entirely defeat this purpose if the applicability of the licensing provisions of the Act to a particular work, was to be decided on the basis of pre-existing and uncertain common law rights.

How else could the Commission exercise its rights? Possibly the fact that there is a Water Conservation and Irrigation Commission constituted under the provisions of the Irrigation Act, 1912 (N.S.W.),[35] and having and exercising certain powers under the Water Act, 1912 (N.S.W.), would itself be an exercise of its rights under s. 4A (1) of the latter Act. In this case, the Commission would presumably, from its inception, have exercised its rights over all rivers and streams in New South Wales. In this case, the difference between Fullagar, J.'s interpretation and the previously accepted interpretation of the section would be purely academic, since the rights of private riparian owners would have been long since superseded.

At the other extreme it could well be argued that Fullagar, J.'s view would lead to the conclusion that it is only in those cases where the Commission has actually exercised its other powers under the Act, for example by constructing works, or by constituting Trust Districts under Part III of the Act, that it can be said to have exercised its superior rights in derogation of private riparian rights.

It will be seen that it is a matter of very considerable difficulty to say what is to be regarded as an exercise of the Commission's rights within the meaning of Fullagar, J.'s rule. It is not improbable, on Fullagar, J.'s view, that it has, in fact, never exercised its rights in respect of many streams over which it has acted as if it had rights, in derogation of the rights of private riparian occupiers, for many years. Fullagar, J.'s view, if accepted, could place the exercise of many of the Commission's functions on a doubtful basis, and would defeat the presumed intention of the legislature in enacting the section.

It is to be hoped that future litigation in this field will clarify the position, and in the light of the above considerations the further hope may be expressed, with respect, that the clarification will consist in a rejection of Fullagar J.'s views. The opposing view that s. 4A (1) of its own force completely divests the special rights of riparian owners is clearer and more certain in its application. Moreover, there can be no doubt that Fullagar, J.'s remarks were *obiter* and that, therefore, a Court approaching the matter in the future will be free to give effect to the countervailing authority in New South Wales and to the countervailing policy considerations.

M. J. McKEOWN, Case Editor—Fifth Year Student.

POWER TO VARY TRUSTS

CHAPMAN v. *CHAPMAN*

Since it was considered by the Court of Appeal in *In re Downshire Settled Estates*,[1] the power of a Court of Equity to vary a trust instrument in exercise of its inherent jurisdiction has been reviewed and its scope defined by the House of Lords in *Chapman* v. *Chapman*.[2] The decision of the Court of Appeal in *In re Downshire Settled Estates*[3] involved three appeals, one of which was dismissed by that Court and the other two allowed. The appeal which was dismissed was the subject of the House of Lords' consideration in *Chapman* v. *Chapman*.[4] The House concurred in the dismissal of this appeal by the Court

[35] Act No. 73, 1912—Act No. 27, 1955.

[1] (1953) Ch. 218. For a note on this case see G. J. Needs, "Power to Vary a Trust: *In re Downshire Settled Estates*" (1954) 1 *Sydney L.R.* 253.

[2] (1954) A.C. 429.

[3] (1953) Ch. 218.

[4] (1954) A.C. 429.