IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No. P57 of 2011

BETWEEN:

ALEC PENBERTHY
First Appellant

and

FUGRO SPATIAL SOLUTIONS PTY LTD
Second Appellant

and

AARON BARLCAY
First Respondent

and

NAUTRONIX (HOLDINGS) PTY LTD
L-3 COMMUNICATIONS NAUTRONIX LTD
Second Respondents

and

MALCOLM ANTHONY CIFUENTES
Third Respondent

and

MICHAEL BRIAN KNUBLEY
Fourth Respondent

and

JULIE ANNE WARRINER
Fifth Respondent

and

JANET GRAHAM
Sixth Respondent

and

OZAN PERINCEK
Seventh Respondent

Filed on behalf of First and Second Appellants
SRB Legal
5th Floor, 40 St Georges Tce
PERTH WA 6000

Telephone: (08) 9221 3110
Facsimile: (08) 9221 4453
Ref: Mr Graeme Richards

APPELLANT'S SUBMISSIONS

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II – concise statement of issues:

2. The Court of Appeal held that no duty of care with respect to pure economic loss would be found to be owed by the First Appellant ("Penberthy" or "the pilot") to the Second Respondents ("Nautronix") upon application of common law principles as developed in *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad*[1], *Perre v Appand Pty Ltd*[2] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[3] ([116]-[125]). However, the Court of Appeal held that such a duty was owed because the common law continues to recognise an action by an employer for negligently caused loss of employee services and the existence of this action *per quod servitium amisit* required that a common law duty of care be imposed ([105]-[115]). The issue on the appeal is whether the continuing existence of the action for loss of services requires or justifies the holding that a duty of care is owed, with respect to pure economic loss, where otherwise no duty would be found.

Part III:

3. It is certified that this appeal does not involve any matter arising under the Constitution or involving its interpretation or otherwise requiring that notice of the appeal be given to the Attorneys-General of the Commonwealth and of the States.

Part IV:

4. Internet citation of the reasons for judgment of the primary Court: *Cifuentes v Fugro Spatial Solutions Pty Ltd* [2009] WASC 316.

5. Internet citation of the reasons for decision of the intermediate Court: *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102.

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[1] (1976) 136 CLR 52.
[2] (1999) 198 CLR 180.
[3] (2004) 216 CLR 515.

Part V – narrative statement of relevant facts:

6. On 11 August 2003 a twin engine aircraft operated by the Second Appellant ("Fugro") took off from Jandakot Airport near Perth, Western Australia. The pilot was Penberthy. The aircraft was being flown under charter to Nautronix. It was carrying five passengers who were to test certain equipment of Nautronix during a flight to the west of Rottnest Island and return.

7. Very shortly after takeoff the right hand engine of the aircraft failed. The cause of this was the seizure of a spindle in its bearing sleeve within an engine driven fuel pump. The material of the bearing sleeve was at fault. It had been designed and specified by the First Respondent ("Barclay").

8. As a result of the engine failure the pilot attempted to land the aircraft at Jandakot, within two minutes after takeoff. The aircraft crashed in the attempted landing. One of the passengers died at the scene of the accident, another died some time later as a result of injuries sustained. The remaining three passengers (and the pilot) were severely injured.

9. Nautronix claimed against Penberthy, against Fugro (on the basis of vicarious liability for negligence of Penberthy) and against Barclay damages for pure economic loss. Nautronix alleged it had suffered loss and damage (to be quantified in a later proceeding) as a result of impedance in development of the technology which was the subject of intended testing on the subject flight, through loss of the contribution which might have been made to its business by the personnel who were injured and killed.

10. Upon his Honour's consideration of the principles from the cases referred to in Part II above ([322]-[344]), Murray J concluded that a duty of care with respect to pure economic loss was owed by Penberthy, for whose negligence Fugro was vicariously liable ([345], [346]) but that no duty of care was owed by Barclay ([347]-[355]).

11. In the Court of Appeal both Penberthy and Barclay were held liable to Nautronix for pure economic loss upon the reasoning summarised in Part II above.

Part VI: Appellants' argument

Elements of the action per quod servitium amisit

12. The action for loss of services as recognised by this Court in *Commissioner for Railways (NSW) v Scott*[4] involves only these elements:

    (a) that the person injured (servant) provided services to the plaintiff (master) under a relationship of master and servant;

[4] (1959) 102 CLR 392.

(b) that the servant was injured wrongfully by the defendant and

(c) that by the said injury the plaintiff/master suffered loss of the services which otherwise he or she would have had from the servant.

13. As to (a), there are conflicting statements in the authorities as to whether it is necessary that a contract of service exist or that the plaintiff have an enforceable legal right to the services which were being supplied up to the time of the injury to the servant. It has been said that no more is required than that the plaintiff was in fact receiving service from the injured person. See the attached schedule in which are collected examples of the various ways in which this element has been expressed.

14. As to (b), the injury might be wrongful by reason of it having been a trespass or a negligent breach of a duty of care owed by the defendant to the servant.

Differences between the action per quod servitium amisit and the action in negligence

15. Notable differences between the cause of action *per quod servitium amisit* and the action in negligence for economic loss caused by injury to another are as follows:

15.1. It is not required for the action *per quod servitium amisit* that there should exist any duty of care owed by the defendant to the plaintiff/master to exercise reasonable care to avoid causing damage to the latter by injuring the servant.

15.2. A point subsidiary to 15.1: it is not required for the action *per quod servitium amisit* that the master should be vulnerable (in the sense expounded in *Perre v Appand Pty Ltd* and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*) to loss flowing from deprivation of the servant's services through act or omission of the defendant.

15.3. Nor is it required, for the purposes of the older cause of action, that the defendant should have foreseen that the injured person would or might have a master who would suffer loss by reason of injury to the servant.

Error in allowing availability of the action per quod etc to influence the finding of common law duty

16. The question before the Court of Appeal in the present case was whether a duty arose from the circumstances of the case, requiring Penberthy to exercise reasonable care not to cause Nautronix economic loss through injury to its personnel. That question had nothing to do with – and its answer could not logically be affected by - the circumstance of Penberthy being liable to Nautronix (if he were) on the action *per quod servitium amisit.* That was

because the elements of the two causes of action, respectively, differ so markedly.

17. The question whether the elements of the action *per quod servitium amisit* had been proved was not separately, or in its own right, before the Court of Appeal. The primary judge had not decided this and Nautronix had not sought a finding upon it by notice of contention.

18. In many hypothetical fact situations all of the elements of the action for loss of services could be proved without there being present factors which would be required (according to the modern law of negligence) to support a duty of care with respect to pure economic loss. The continuing availability of the action *per quod servitium amisit* thus has the potential to undermine or circumvent this Court's development of principles by which the occasions for recovery of pure economic loss are deliberately restricted – through caution in finding a duty of care.

19. Having regard to the overlap between the two causes of action and the potential for the older action to constitute an anomalous, historically based exception to the limited circumstances and criteria under which pure economic loss will be recoverable under the newer action, it was wrong in principle for the Court of Appeal to have treated the action *per quod servitium amisit* as dictating the incidence of a duty of care with respect to pure economic loss.

20. Once there is put aside the Court of Appeal's erroneous reasoning from consideration of the action *per quod servitium amisit*, what remains is McLure P's analysis of the factors relevant to the existence or otherwise of a duty of care, according to the principles stated in the cases cited in Part II above. That is, her Honour's reasoning in [116]-[125]. Upon this the Court of Appeal concluded no duty of care was owed by either Penberthy or Barclay. That finding should have been operative in the Court of Appeal's disposition of this part of the case.

The action per quod servitium amisit should be considered absorbed into the law of negligence

21. The proposition in this subheading is initially directed in support of Penberthy's/Fugro's appeal grounds. The absorption of *per quod servitium amisit* into the law of negligence is another reason why this old cause of action should not have been permitted to dictate the finding of a duty of care. The proposition will also be relied upon in response to the first ground of Nautronix' Notice of Contention in this Court. That is, to resist the contention that the Court of Appeal's order against Penberthy/Fugro should be upheld on the foundation of the action *per quod* etc.

22. When the action *per quod* was held by this Court to have survived, in *Commissioner of Railways v Scott* (supra), the common law had not yet come to recognise that a duty of care might be owed with respect to pure economic loss. An exclusory rule operated to preclude claims for economic

loss unconnected with damage to the plaintiff's property or injury to the plaintiff's person.

23. One aspect of the exclusory rule was that damages could not be recovered for purely economic loss which might flow to the plaintiff as a result of personal injury to another. In *Commonwealth v Quince* Rich J had said:

> *"The mere fact that the injury prevents a third party from getting a benefit from the person injured does not invest the third party with a right of action against the wrongdoer"*[5].

24. In *Attorney General for NSW v Perpetual Trustee Co Ltd*[6] and in *Commissioner of Railways v Scott*[7], Fullagar J was able to repeat the above quoted statement without reference to any principled exception upon which pure economic loss might in some circumstances be recovered. There was no principled exception, only the unprincipled one of the action *per quod servitium amisit,* recognised as anomalous[8] and as a remnant of very early English legal history.

25. Only following *Hedley Byrne & Co Ltd v Heller and Partners Ltd*[9], five years after this Court's decision in *Commissioner of Railways v Scott,* did there commence the development of principles for the recognition in appropriate cases of duties of care with respect to pure economic loss. *Hedley Byrne* has often been recognised as the point of departure in this respect[10].

26. Through the cases cited in Part II of these submissions, the common law in Australia has developed a body of principle, capable of application to any given set of circumstances, upon which a Court may determine whether a duty of care was owed by a defendant so as to permit recovery of damages for pure economic loss which the plaintiff may have suffered as a result of personal injury to a third party or damage to the property of a third party. That body of principle, all of it having been expounded post *Commissioner of Railways v Scott* (supra), should now be recognised as having absorbed the older action *per quod servitium amisit.* It provides a principled (as opposed to historical) basis for determining when a cause of action (namely negligence) will lie for damages for the loss of services of an employee (or, for that matter, of a person in some other relationship to the plaintiff).

27. The English Court of Appeal effectively terminated the use of the action *per quod servitium amisit* by holding that it was limited to cases of injury to domestic or menial servants[11]. In *Commissioner of Railways v Scott* (supra)

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[5] *Commonwealth v Quince* (1944) 68 CLR 227 per Rich J at 240; cited by Fullagar J in *Attorney General for NSW v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 286.
[6] (1952) 85 CLR 237 at 276.
[7] (1959) 102 CLR 392 at 407.
[8] Per Fullagar J in (1952) 85 CLR at 286-288 and in (1959) 102 CLR at 406-407.
[9] [1964] AC 465.
[10] For example in *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529 per Gibbs CJ at 544, 549, Stephen J at 563, Mason J at 584, 585.
[11] *Inland Revenue Commissioners v Hambrook* [1956] 2 QB 641.

the majority considered that this restriction could not be justified, having regard to precedents in the history of the action. Dixon CJ, in the minority, also thought that the restriction was not supported by the authorities but considered himself bound by the recent English decision (or perhaps by his Honour's interpretation of the Privy Council's advice in *Attorney General for NSW v Perpetual Trustee Co Ltd*[12]).

28. Continued recognition of the action *per quod servitium amisit* as a separate basis of claim in Australia is unsatisfactory on many grounds and is no longer supportable:

28.1. It has been limited to the point of complete in-utility in England and must have fallen out of use, entirely, there.

28.2. The action was apparently developed to meet the social needs of English society in the 13th and 14th centuries. The precise social and legal setting in which it developed does not appear to be completely understood, probably because of the sparsity of the historical record. See also Professor Milsom's observations on the difficulties of divining the meaning of plea rolls and Year Books[13], which have been resorted to by past members of this Court and by scholars such as GD Jones[14].

28.3. These obscurities in the origins of the action make it very difficult for a modern Court to justify and rationalise continued adaptation and currency of the action, in the social and legal setting of Australian society in the 21st century. This difficulty is confirmed by a review of the strenuous scholarship in the judgments of this Court in *Quince v The Commonwealth, Attorney General for NSW v Perpetual Trustee Co Ltd* and *Commissioner for Railways v Scott.*

28.4. The obscurity of the origins of the action *per quod servitium* and the difficulty of mutating it to suit modern social and economic relations has also led to uncertainty of its precise elements. This is notably so in respect of the nature of the *"master and servant"* relationship which will support the action. See the Schedule of references attached to these submissions.

28.5. Generally, exposition of the common law in Australia by this Court has been directed to establishing unifying principles of liability, not merely upholding historical classifications or miscellaneous causes of action: eg *Australian Safeway Stores Pty Ltd v Zalunza*[15]. Unifying principles have now been developed, through the line of cases culminating in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[16],

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[12] (1955) 92 CLR 113.
[13] *Historical Foundations of the Common Law*, S.F.C. Milsom, London, Butterworths 1969 at 253-261.
[14] *Per Quod Servitium Amisit* (1954) 7 LQR 39.
[15] (1987) 162 CLR 479.
[16] (2004) 218 CLR 515.

which are capable of resolving claims for damage in the nature of pure economic loss flowing from injury to a person other than the plaintiff. The exclusive use of these principles is a course preferable to that of continuing to recognise the merely exceptional and historically based rule constituted by the action *per quod servitium amisit*.

28.6. The Court has on other occasions recognised that isolated miscellaneous rules of liability have been absorbed by the common law of negligence: *Burnie Port Authority v General Jones Pty Ltd*[17], *Brodie v Singleton Shire Council*[18].

29. Should the Court hold in this case that the action *per quod* etc no longer lies and that instead a duty of care with respect to pure economic loss must be established by a plaintiff in the position of Nautronix, then no loss or injustice will have been inflicted on Nautronix by this modification of the common law. Nautronix has pursued its claim in the expectation that it would need to prove Penberthy and Barclay owed it a duty of care to avert pure economic loss. The case progressed through trial and to the conclusion of the hearing of the appeal in the Court below without Nautronix' legal representatives apparently having intended that the claim for economic loss should rest upon the action *per quod* etc.

30. Indeed, the possibility that the facts they had pleaded might invoke this old cause of action appears to have been first recognised by counsel for Barclay - who adverted to it at trial and on appeal. Even then, in Closing Submissions at trial Nautronix addressed the action *per quod* etc only to repel a suggestion that authorities in connection with it precluded recovery of losses flowing from the death of, rather than injury to, an employee. See paras 211-216 of the Closing Submissions. There, no attempt was made to support Nautronix' economic loss claim as an action *per quod* etc; the necessity for Nautronix to prove that a duty was owed to it continued to be assumed.

Part VII:

31. No constitutional provisions, statutes or regulations are relevant to the appeal.

Part VIII – orders sought:

32. Appeal allowed with costs.

33. Set aside paragraph 2 of the orders of the Court of Appeal of the Supreme Court of Western Australia made on 10 June 2011 and in its place order that:

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[17] (1994) 179 CLR 520.
[18] (2001) 206 CLR 512 at [107]-[129].

33.1. orders 5 and 6 of the orders of Murray J in proceedings CIV.1223 of 2008 be set aside;

33.2. in place of order 5 of the orders of Murray J, order that the Sixth Plaintiffs' claim for pure economic loss be dismissed;

33.3. order 3 of the orders of the Court of Appeal of the Supreme Court of Western Australia made 10 June 2011 is to stand in place of order 6 of the orders of Murray J.

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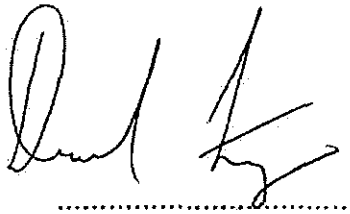
Dated: 4 January 2012



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D.J. Fagan SC

Telephone: (02) 9221 2519
Facsimile: (02) 9233 7416
20 email: fagansc@wentworthchambers.com.au

SCHEDULE

JUDICIAL STATEMENTS ON THE "MASTER AND SERVANT" RELATIONSHIP

1. The nature of the relationship which is required in order to found the action *per quod servitium amisit* was considered in *Commonwealth v Quince*[1] as follows:

   1.1. Per Rich J at p.241:

   > *"...except in [Attorney General v Valle Jones*[2]*] it [the cause of action] appears never to have been applied except to persons serving under a contract of service or in fact rendering services such as would be given under such a contract".*

   1.2. Per Rich J at p.242:

   > *"But a defacto relationship of master and servant is essential (Admiralty Commissioners v SS Amerika*[3]*), and the real question is whether the service which was in fact being supplied, and was interrupted, was of the kind supplied under a contract of service".*

   1.3. Per Starke J at p.245:

   > *"...it is not necessary to establish a contract of service, but that proof of some defacto relation of service is enough".*

   1.4. Per Williams J at p.252:

   > *"It is clear from the authorities that the action per quod servitium amisit only lies where a relation of master and servant exists, so that, as the result of the defendant's tort, the master loses the benefit of the services of his servant. ...Service at will is sufficient: an actual binding contract of service is not necessary...".*

2. On the other hand, Latham CJ (at 237-238) considered it essential to the cause of action that the Plaintiff *"has a right to the services of another and can command that person in the doing of such services".* That led his Honour to consider that the action was available to the Crown in respect of an injured member of the armed forces. It may be said that the only situation in which one can postulate a right to command services is where there exists an enforceable contract of service.

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[1] (1944) 68 CLR 227.
[2] [1935] 2 KB 209.
[3] [1917] AC 38 at 43.

3. McTiernan J considered that in modern law the relation of master and servant could only be created by contract and that *"there is very great difficulty in saying that the master's proprietary right [to the services] could arise from anything except a contract or supposed contract creating the relationship of master and servant"* (at p.250). This view is fully supported by the speech of Lord Sumner in *Admiralty Commissioners v SS Amerika* (supra) at 55:

> *"It is the loss of service which is the gist of the action, and loss of service depends upon a right to the service, and that depends on the contract between the master and the servant".*

4. In *Attorney General v Perpetual Trustee Co (Ltd)*[4] the following statements were made with respect to this element of the action *per quod servitium amisit*:

   4.1. Per Dixon J (as his Honour then was) at 245-256:

> *"But the master's right to recover for the services did not depend upon a retainer of the servant. 'Trespass for beating his servant per quod servitium amisit lies although he was not retained but served only at will [citation omitted]'...This has remained the law, notwithstanding occasional dicta as to the need of a contract to continue serving. ...But clearly a master could recover in trespass for the loss of services without making out any contractual right to them... In each form of action the master's right was to recover for the loss of services, not for the loss of the performance of a contract of service".*

   4.2. Per Williams J at 268:

> *"It is clear that the action does not require that there should be a contract of service. Defacto service is enough. It is sufficient if the service is being rendered gratuitously".*

   4.3. Per Fullagar J at 276 and 285: At 276 his Honour accepted as correct the statements of Rich J on this subject in *Commonwealth v Quince* (supra) (see paras 1.1 and 1.2 above). At 285 his Honour said:

> *"...when a master brings an action for a tort committed against his servant...the only relevant questions (apart from damages) are (1) whether services were in fact being rendered to him by the injured person, and (2) whether he had a reasonable expectation, because of the existence of a contract or otherwise, that that person would, if the tort had not been committed, have continued to render services to him".*

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[4] (1952) 85 CLR 237.

4.4. Per Kitto J at 297:

> *"[The] action depends, not upon the existence of a personal right in the master as against the servant to have the agreed services rendered, but upon a supposed real right in the master in respect of the services themselves which are the fruit of the relationship of master and servant. Its origin, as has been mentioned, is to be found in the status of a servant in older times, and accordingly it is available if the relationship exists, whether or not it was created by binding contract; in other words whether or not the master has any legally enforceable right against the servant to have the services performed".*

4.5. However his Honour went on to consider at pp. 297-300 the variable meaning of the words *"master and servant"*; concluding at 299-300 that it involved three elements – an obligation of obedience, authority in the master extending to the manner of performing work and, lastly, that the doing of the work must be for the benefit of the master. It is difficult to envisage how these requirements could be satisfied without a contract of service.

5. In *Attorney General v Perpetual Trustee Co (Ltd)* (supra), McTiernan J (at 256-257) adhered to the view he had expressed in *Commonwealth v Quince*:

> *"The action per quod servitium amisit comes down from an epoch when the master's right to the service of his servant depended on status: the master was considered to have an interest of a proprietary nature in the service. The action survived the change from status to contract or free service, remaining as an incident peculiar to the relationship of master and servant... perhaps the statements made in Admiralty Commissioners v SS Amerika (supra) about the action....contain the most authoritative account of it [and his Honour cited the passage from Lord Sumner's speech, as quoted at para 3 above]".*

6. The holding of Webb J on this point, in *Attorney General v Perpetual Trustee Co (Ltd)*, was equivocal (at 272):

> *"The action...originated at a time when the relationship of master and servant...to which it has always been confined, was based on status and not on contract..... The right of action did not depend on the payment of wages by the master to the servant. ...the action did not disappear with status, but continued when a relationship of master and servant became contractual".*

7. In the advice of the Privy Council on the same case[5], Viscount Simonds stated (at 123):

> *"It is clear too from the cases cited from the Year Books and elsewhere in the learned judgment of Dixon CJ[6] that the action did not depend on any contract of service between master and servant but on the single fact of service... the law could indeed hardly have been otherwise as the form of action in trespass was established before the concept of contract had been developed in our jurisprudence".*

8. On the basis of that pronouncement and extensive historical research cited, GH Jones concluded in his Article *"Per Quod Servitium Amisit"*[7] that the action did not and still does not depend on any contract of service but only upon the fact of service.

9. In *Commissioner for Railways (NSW) v Scott*[8] the following statements on this topic appear:

   9.1. Per Fullagar J at 409-410:

   > *"...the old action did not depend at all on the existence of the relation of master and servant as we know it today. It depended on the defacto rendering of services. On the one hand, it would be available in many cases where no one would say that the relation of master and servant existed. On the other hand, I do not think it ever occurred to anyone until very recently that it should be available in every case where the de jure relation of master and servant existed".*

   9.2. Per Kitto J at 413: his Honour accepted that the advice of the Privy Council in *Attorney General v Perpetual Trustee Company (Ltd)* (supra) was binding – see the quotation of Viscount Simonds' words at paragraph 7 above.

   9.3. Per Taylor J at 422: his Honour also accepted, relying upon Viscount Simonds' speech, that *"the cause of action was concerned with the loss of defacto services and not with injury to contractual rights to service".*

   9.4. Per Menzies J at 434-435: his Honour expressly adopted the view of Kitto J on this topic, as it had been expressed in *Attorney General for NSW v Perpetual Trustee Co Ltd* (supra) (see paragraphs 4.4 and 4.5 above.

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[5] (1955) 92 CLR 113.
[6] (1952) 85 CLR at 243-253.
[7] (1958) 74 LQR 39 at 51.
[8] (1959) 102 CLR 392.