

IN THE HIGH COURT OF AUSTRALIA  
PERTH OFFICE OF THE REGISTRY

No 957 of 2011

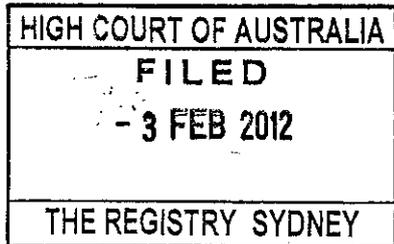
BETWEEN:

ALEC PENBERTHY  
First Appellant

and

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FUGRO SPATIAL SOLUTIONS PTY LTD  
Second Appellant



and

AARON BARCLAY<sup>CL</sup>  
First Respondent

and

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

and

MALCOLM ANTHONY CIFUENTES  
Third Respondent

and

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MICHAEL BRIAN KNUBLEY  
Fourth Respondent

and

JULIE ANNE WARRINER  
Fifth Respondent

and

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JANET GRAHAM  
Sixth Respondent

and

OZAN PERINCEK  
Seventh Respondent

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Filed on behalf of First and Second Appellants

**SRB Legal**  
5<sup>th</sup> Floor, 40 St Georges Tce  
PERTH WA 6000

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

## APPELLANTS' REPLY SUBMISSIONS

### Reply to Second Respondents' Argument on the appeal, in Part VI

- 10 1. The Appellants ("Penberthy" and "Fugro") read the Second Respondents' submissions as not going beyond joinder of issue with the Appellants' submissions in chief. There is therefore no occasion for the Appellants to make any additional submissions in reply.

### Argument in answer to Second Respondents' submissions on Notice of Contention and Cross Appeal, in Part VII

#### *Ground of Contention 1: The action per quod servitium amisit*

- 20 2. So far as the Second Respondents invoke the action *per quod servitium amisit* as a basis for supporting their claim for loss, alternative to common law negligence, the Appellants rely on their submissions in chief at paras 21-30. That is, submissions to the effect that this cause of action should no longer be separately recognised in the common law of Australia.

#### *Ground of Contention 2: No duty of care according to orthodox principle*

- 30 3. Although included as a ground of contention, the Second Respondents' claim that their judgment for damages for pure economic loss should be upheld on the alternative basis that a common law duty of care was owed to them would require that the contrary finding of the Court of Appeal at [116]-[125] should be overturned. It is therefore only open to the Second Respondents to seek to uphold the outcome below upon this basis if they first obtain leave to cross appeal the Court of Appeal's holding that, "*on the basis that the common law action for loss of services has not survived or alternatively does not require the imposition of a duty of care in negligence*" [116], neither Penberthy nor Mr Barclay "*owed Nautronix a duty of care to avoid the pure economic loss the subject of the claim*" [125].
4. Such leave should be refused because:
- 40 4.1. consideration of whether the circumstances of the parties' relationship supported a duty of care according to the principles stated in *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad*<sup>1</sup>, *Perre v Appand Pty Ltd*<sup>2</sup> and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*<sup>3</sup> ([116]-[125]) is highly fact dependant;

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<sup>1</sup> (1976) 136 CLR 52.

<sup>2</sup> (1999) 198 CLR 180.

<sup>3</sup> (2004) 216 CLR 515.

- 4.2. the relevant facts in the present case were fully considered in the reasons of the Primary Judge at [322]-[330], [338]-[340] and [345]-[355] and then again by the Court of Appeal at [116]-[125];
- 4.3. no uncertainty in this area of the law is thrown up by the case, such as would warrant this Court examining any question of principle regarding the incidence of a duty of care in order to provide clarification;
- 10 4.4. the Court of Appeal's application, to the facts of the present case, of the received principles upon which the duty question is to be determined was, on the face of the reasons of McLure P, orthodox and unexceptionable and
- 4.5. there is not sufficient prospect of the Court of Appeal's decision in this respect being disturbed to warrant a grant of special leave.
5. Even if leave were granted the Second Respondents' submissions at paragraphs 50-60 would not persuade this Court to reverse the unanimous conclusion of the Court of Appeal, at least with respect to Penberthy. Whilst accepting that this Court has not adopted "*vulnerability*" as a single or conclusive test, it is clear from the decisions cited in paragraph 4.1 above, that this criterion is of considerable significance. As held by McLure P at [118], the Second Respondents were not vulnerable to the purely economic consequences of any negligence on the part of Penberthy because, as charterers of the aircraft, it was open to them to negotiate a term of their contract with Fugro to provide indemnity against economic loss.
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6. The mere fact that Fugro had in use at the relevant time a set of standard terms and conditions for chartering aircraft did not preclude Nautronix from negotiating a departure from those terms – in particular, an indemnity against purely economic loss in the event of pilot negligence. As it happened, his Honour concluded that neither the standard terms of Fugro nor those of Nautronix were incorporated in the charter contract: [423]-[432].
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Cross Appeal Grounds 2 and 3 – The rule in *Baker v Bolton*

7. The rule that "*in a civil Court, the death of a human being cannot be complained of as an injury*"<sup>4</sup> was unambiguously and emphatically laid down in 1808 by Lord Ellenborough CJ. It has equally clearly been accepted as part of the common law of Australia<sup>5</sup>.
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8. There has been no relevant development of the common law which may be said to have qualified, negated, overtaken, absorbed, subsumed or otherwise detracted from the rule. There has not been any development by which it could be said that the subject matter of the rule has come to be dealt with by

<sup>4</sup> *Baker v Bolton* (1808) 1 Cam 493; 170 ER 1033.

<sup>5</sup> *Woolworths Ltd v Crotty* (1942) 66 CLR 603.

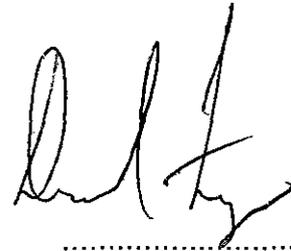
some different principle or rule which has rendered the original rule no longer supportable.

9. The Court of Appeal was correct to apply the rule in circumstances where it was upholding Nautronix's claim in negligence for pure economic loss. If, contrary to the Appellants' submissions, this Court should hold that Nautronix is entitled to recover, on some basis, its purely economic loss flowing from the consequences of the air crash, that would not extend to loss flowing from the deaths of Messrs Warriner and Protoolis, both of whom died as a result of the crash.

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Dated: 3 February 2012

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**D.J. Fagan SC**

Telephone: (02) 9221 2519

Facsimile: (02) 9233 7416

email: [fagansc@wentworthchambers.com.au](mailto:fagansc@wentworthchambers.com.au)