"Eternal Wind"

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The MV "Eternal Wind" Case

Implications for the law of economic loss

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***Fortuna Seafood Pty Ltd (As Trustee for the Rowley Family Trust) v The Ship 'Eternal Wind'* [2005] QCA 405**

***Fortuna Seafood Pty Ltd (As Trustee for the Rowley Family Trust) v The Ship 'Eternal Wind'* [2005] QSC 004**

The decision in the MV Eternal Wind case creates a favourable environment for claims for economic loss by related small business, where while the businesses run may themselves have different purposes and aims, the link between them will be adequate to favour a claim for economic loss so long as it can be shown that those businesses were effectively operating as one or that the businesses are economically dependent or inter-dependent upon one another.

The decision places a heavy onus of defendants in relation to the extent of the knowledge which they are expected to be able to acquire to ascertain a class of vulnerable persons. It opens the law of economic loss up to a wider class than previously. It is now likely to be more difficult to ascertain those circumstances in which a duty will be owed in relation to claims for economic loss, particularly where it has been found that a duty exists on the basis only that there was knowledge that an ascertainable class of vulnerable persons might exist and in circumstances where membership of that class was somewhat difficult to identify.

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1. The Incident

1.1 At around 08.20 hrs on 5 April 1998 the ship "Eternal Wind" ("Eternal Wind"), a 37,663 gross tonne bulk carrier vessel some 224 metres in length and registered in Panama, and the fishing vessel "Melina T" ("Melina T") collided at sea, 48 nautical miles east of Noosa Heads.

1.2 The Eternal Wind was steaming in a northerly direction, the Melina T in a westerly direction. The Eternal Wind was traveling at a speed of 12.5

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[1] I wish to acknowledge the significant assistance given by Rebecca Scott, a solicitor of Ebsworth & Ebsworth, in the preparation of this paper.

knots at the time of the collision and had altered its course to hard to port at 08.14 hrs.

1.3 The Eternal Wind did not otherwise alter its course before the collision, did not take any measures or give any signals to avoid the collision and the Melina T was not observed by radar. Visibility was said to be good with rough seas.

1.4 The bow of the Melina T came into contact with the hull of the Eternal Wind abreast aft end No. 1 hatch on the starboard side, the angle between the ships at the moment of contact being 90° to 95°. The Melina T suffered extensive damage, sank and became a total loss. Fortunately, there was no loss of life.

2. Background

2.1 The owner of the Eternal Wind was Ganta Shipping SA ("Ganta"), a Panamanian incorporated company. The master and crew of the Eternal Wind were all Filipino.

2.2 The owner of the Melina T was Fortuna Fishing Pty Ltd ("Fishing"), a company incorporated in the State of Queensland, Australia. Fishing owned and operated a number of fishing vessels and was a supplier of seafood. It primarily fished for high grade tuna and swordfish.

2.3 Fortuna Seafoods Pty Ltd ("Seafoods"), was a company related to Fishing. It was in the business of processing and selling seafood, with its processing plant located some 30 to 45 kms south of Noosa. No real or personal property of Seafoods was damaged as a result of the incident and nor did Seafoods have any legal or equitable interest in the catch on board the Melina T.

2.4 In respect of the relationship between Fishing and Seafoods:

(a) Fishing was one of the suppliers of seafood to Seafoods, although Seafoods also had other non-related suppliers of seafood;

(b) There was some conflict in the evidence as to the precise relationship between Fishing and Seafoods. It was unclear whether Fishing sold its catch to Seafoods at market rate, and Seafoods in turn packaged and on-sold the catch, the purchase price for the catch reduced by a fee charged by Seafoods for packaging, or whether Seafoods merely sold the catch on behalf of Fishing and charged Fishing a packaging fee.

The trial judge found that Fishing supplied its catch to Seafoods which it then processed and sold acting as an agent for Fishing by selling the catch for fee.

(c) Seafoods accounted to Fishing for the proceeds of sale of the seafood;

(d) According to the company extracts, the shareholders in Fishing were mother and son Frances and Jonathan Rowley and the shareholders in Seafoods were wife and husband Frances and Michael Rowley. Evidence was led at trial by the plaintiffs that in fact Frances and Jonathan Rowley were the only shareholders in

both companies and that Michael Rowley, and possibly Frances Rowley, were directors of both companies at the time of the incident;

(e) Seafoods was the trustee of a discretionary family trust, one of the beneficiaries of which was Fishing;

(f) The trial judge found that the financial records of Fishing and Seafoods were kept separately, but that the proceeds of sale of the processed fish were transferred into the bank account of Fishing through Seafoods' bank account. Also, that on occasion, monies would be transferred between the two companies' accounts to meet the expenditure of each company. Evidence was led by the companies' accountants that part of the overall planning of the group was to allocate profits from Seafoods as trustee to Fishing;

(g) The trial judge found that to some extent the dealings between the companies were at arm's length, with the costs of shipping and packaging calculated at prevailing market rates. There was, however, evidence that the two companies were treated as one company with two bank accounts, with the proceeds of the fishing fed into Fishing's account via Seafoods' account. The financial records were kept separately.

3. The Proceedings

3.1 On 30 April 1998 Fishing commenced an in rem proceeding against the Eternal Wind in the Supreme Court of Queensland for loss of the vessel, consumables, fishing gear and consequential economic loss.[2] Fishing claimed damages in the sum of $1,053,994.80 in relation to the alleged negligence of the Eternal Wind.[3] Fishing alleged in its statement of claim a failure, on the part of the owner, master and crew of the Eternal Wind, to give way to a crossing vessel in breach of rule 15 of the *International Regulations for Preventing Collisions at Sea 1972.* Fishing also alleged, inter alia, that the master and crew of the Eternal Wind had failed to keep a proper lookout in breach of rule 5, failed to make proper use of the Eternal Wind's radar in breach of rule 7(b) and failed to take any or any adequate action to avoid collision in breach of rule 8. In its defence, the owner of the Eternal Wind denied that it or the master or crew were negligent and pleaded contributory negligence in respect of the conduct of Fishing including a failure to keep a proper lookout, a failure to make proper use of the Melina T's radar equipment and a failure to take action to avoid collision with the Eternal Wind.

3.2 On 30 April 1998 proceedings were also commenced in the Supreme Court of Queensland by the master and crew of the Melina T for damages for personal injury, property damage, lost income and special

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2 At an early stage of the proceeding, there appeared to be an issue as to whether the solicitors for the subrogated hull insurers of the Melina T had abandoned any claim for consequential economic loss. This was denied by the solicitors for Fishing and effectively resulted in two firms of solicitors representing Fishing in the proceeding in relation to insured and uninsured components of the damages claim.

3 The further particulars as to the calculation of damages provided in 2003 were loss of the vessel ($570,000), loss of consumables ($38,500), loss of fishing gear ($96,888.88) and loss of profits ($438,095), being a total of $1,143,483.88.

damages. The Eternal Wind filed a counter-claim against the owner, master and a crew member of the Melina T alleging negligence by the master and the crew member and the vicarious liability of the owner of the Melina T for their negligence.

3.3 In or about September 2001, the owner of the Eternal Wind settled the claims of the master and crew of the Melina T in respect of their claims for damages for person injury and property damage for what it regarded were reasonable amounts, with the claims then being discontinued. The Eternal Wind maintained its counterclaim against Fishing, seeking indemnity or contribution in relation to the liability of Fishing for the amounts paid to the master and crew for settlement of their claims. In defence of the counterclaim, Fishing alleged that the settlements were not reasonable as they failed to take into account the negligence, or breach of duty, of the Eternal Wind in the main proceeding.

3.4 On 24 December 1999 Seafoods brought an in rem proceeding in the Federal Court in Sydney against the Eternal Wind. Seafoods claimed damages for loss of profits of $543,702, being profits it allegedly would have earned from processing and selling the seafood that it would have obtained from Fishing had the Melina T not been sunk. The claim was based on the allegation that the Eternal Wind owed Seafoods a duty of care as there was a relationship of proximity between Seafoods and the owner of the Eternal Wind because Seafoods was part of a special and ascertainable class which was vulnerable to economic loss as a result of the collision between the Eternal Wind and Melina T.

3.5 On 9 February 2000 the Federal Court ordered that Seafoods' proceeding be transferred to the Supreme Court of Queensland. On 7 July 2000 it was ordered that Seafoods' proceeding be heard together with Fishing's proceeding and the Eternal Wind's third party proceeding in the proceeding commenced by the master and crew of the Melina T.

3.6 In respect of Seafood's proceeding, the Eternal Wind commenced a third party proceeding against Fishing on 15 July 2003 on the basis that any loss suffered by Seafoods was materially contributed to by Fishing and the master or crew of the Melina T.

3.7 Shortly before the trial of the various proceedings commenced:

(a) The parties reached agreement regarding the apportionment of fault in relation to the collision, in terms of section 259 of the *Navigation Act 1912* (Cth), apportioning two thirds fault to the Eternal Wind and one third fault to the Melina T;

(b) The Eternal Wind and Fishing reached a compromise in relation to the claim for the loss of the Melina T and for other ancillary losses in the Fishing proceeding, as did the Eternal Wind and Fishing in relation to the Eternal Wind's counterclaim in the proceeding commenced by the master and crew of the Melina T;

(c) Seafoods amended its statement of claim reducing its claim for damages for economic loss from $543,702 to $297,210;

(d) The Eternal Wind and Seafoods agreed that the amount of loss suffered by Seafoods, after factoring in the agreed apportionment of fault and the third party proceeding, was $163,256. Quantum was therefore not in issue at trial and, as a result, the third party proceeding brought by the Eternal Wind against Fishing was also not in issue.

3.8 The only issue remaining to be decided at trial was whether a duty of care was owned by Ganta to a company in the position of Seafoods where its claim was simply for economic or commercial loss arising out of the damage to the Melina T, which was owned by Fishing.

4. The Arguments at trial

4.1 Seafoods argued that there was a sufficient relationship of proximity between Seafoods and the Eternal Wind/Ganta based on the following factual matters:

(a) Fishing was a beneficiary of the discretionary trust of which Seafoods was a trustee;

(b) Seafoods and Fishing were related companies controlled and managed as a single economic entity;

(c) Seafoods and Fishing both used the Melina T to conduct the fishing operation as a common enterprise, such that the loss of the Melina T had a direct impact on the processing operations of Seafoods.

4.2 The Eternal Wind argued that it owed no duty to Seafoods and accordingly was not liable for any loss suffered by Seafoods. No evidence was led at trial by the owners of the Eternal Wind.

5. The outcome at Trial

5.1 The trial judge held that, based on the proximity of Seafoods to Fishing, the Eternal Wind owed a duty of care to Seafoods, breached that duty of care and was liable in relation to Seafood's claim for economic loss. Justice Douglas ordered that judgment be entered against the Eternal Wind in the agreed amount of $163,256 together with interest and costs.

5.2 The trial judge examined the case law on economic loss and found that to succeed Seafoods needed to show the following:

(a) reasonable foresight of the likelihood of harm;

(b) that the defendant knew (or knowledge should be imputed to it) that the Melina T was likely, when damaged, to be productive of consequential economic loss to those who relied directly on its use;

(c) that it was not a case of indeterminate liability;

(d) that the implication of a duty would not impair the legitimate pursuit by the defendant of its own commercial interest;

(e) that the damage flowed from the occurrence of activities within the defendant's control;

(f) that the defendant knew or had means of knowing that the plaintiff was a member of an ascertainable class of vulnerable person who were unable to protect themselves from harm.

5.3 In relation to each of these matters Justice Douglas:

(a) Held that reasonable foresight of the likelihood of harm was easily proven as it would be expected that if a fishing vessel was sunk loss might be suffered by those who would profit from processing and selling the catch;

(b) Inferred that the Eternal Wind would have known that if the Melina T was damaged it would result in economic loss to those who relied directly on it as a fishing vessel, including those who processed and arranged the sale of the catch;

(c) The loss was not indeterminate as Seafoods was a "first line victim" whose loss was capable of being ascertained;

(d) Found that placing a duty on the Eternal Wind would not impair the legitimate pursuit by Ganta of its own commercial interest as there was already a duty to avoid collisions;

(e) Found that the damage had flowed from the navigation of the Eternal Wind, which was a matter within Ganta's control.

5.4 The central issue, and the key issue considered in the Court of Appeal on appeal, was whether the Eternal Wind knew or had means of knowing that Seafoods was a member of an ascertainable class of vulnerable persons who were unable to protect themselves from harm. The trial judge held that Seafoods was.

5.5 In coming to this conclusion, the trial judge examined the commercial relationship between Fishing and Seafoods and a number of "salient features" which the trial judge held combined to constitute a sufficiently close relationship between Fishing and Seafoods to give rise to a duty of care in the Eternal Wind. More specifically, Justice Douglas held the relationship between Seafoods and Fishing was of closely related "common venturers" where Seafoods was, for practical purposes, in the same position as the person who owned the damaged property having regard to:

(a) the close relationship between the owners of the shares in the companies, the common control of the companies and their interlinked business operations;

(b) the trust relationship between the two companies by which Fishing received distributions of Seafood's income;

(c) the finding that the owner and/or master of the Eternal Wind had the means of knowing and discovering that a commercial shipping venture in Australia might consist of a number of companies in a group with related shareholders and different functions of individual companies;

(d) Seafood's close association with Fishing, by reason of the family connection of shareholders, common directors, relationship between the two companies as trustee and beneficiary and integrated operation of essentially one business.

5.6 We note that the trial judge rejected the assertion that Fishing and Seafoods were "joint venturers" on the basis that some of the salient features of a joint venture were not present, namely:

(a) there was no precise documented agreement between Fishing and Seafoods;

(b) Fishing and Seafoods did not hold any property as tenants in common;

(c) there was no right to take produce in kind;

(d) there was no division of management between Fishing and Seafoods.

Further, the trial judge held that the concept of a "joint venture" was too ill defined in Australia and capable of too many different meanings to be a sound basis for a rule of general application in the law of tort.

5.7 It is of relevant to note that there was no direct evidence of what Ganta or the master of the Eternal Wind knew of commercial arrangements likely to apply to the ownership and operation of fishing vessels in Australia. The trial judge was, however, willing, if light of there being no evidence to the contrary, to draw the inference that the owner and/or master of the Eternal Wind could have discovered that commercial fishing ventures in Australia may consist of a number of companies in a group with related shareholders and different functions for the individual companies. That was deemed to be sufficient to make the class ascertainable.

5.8 Adopting *Perre v Apand*[4] it was held not to be necessary for Ganta or the Eternal Wind to know the individual person/s or companies who or which were in danger of suffering harm, but only necessary that there by a specific class whose identity could have been ascertained.

6. The outcome in the Queensland Court of Appeal

6.1 On 11 February 2005 the Eternal Wind appealed the trial judge's decision to the Court of Appeal of the Supreme Court of Queensland.

6.2 On appeal the Eternal Wind argued:

(a) There was no direct evidence of what the owner or master of the Eternal Wind knew of the commercial arrangements likely to apply to ownership and operation of fishing vessels in Australia or that they knew of those matters;

(b) There was no evidence that the owner or master of the Eternal Wind had means of knowledge that commercial fishing ventures in Australia may consist of a number of companies in a group with related shareholders and different functions for individual companies and that such knowledge should not have been inferred;

(c) No loss was actually foreseen by the Eternal Wind or was reasonably foreseeable;

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4 *Perre & Ors v Apand Pty Limited* (1999) 198 CLR 180.

(d) The Eternal Wind had no knowledge of a risk of loss to any onshore processor of Fishing's catch;

(e) No evidence existed that the Eternal Wind knew of the existence of Seafoods;

(f) Actual foresight of the likelihood of harm and knowledge of an ascertainable class of vulnerable persons is required and did not exist;

(g) The closeness of the relationship between Fishing and Seafoods did not say anything about the relationship between Eternal Wind and Seafoods;

(h) The decision in *Fiji Gas*[5] was persuasive authority and should have been applied and followed;

(i) There was no established category of case where liability would be shown in this case.

6.3 By a two to one majority the appeal was dismissed with President McMurdo and Justice Dutney concurring (with separate judgments) and Justice Jerrard dissenting.

6.4 In response to each of the matters raised by the Eternal Wind on appeal the majority found:

(a) It was not necessary that there be direct evidence of what the Eternal Wind knew of the commercial arrangements likely to apply to ownership and operation of fishing vessels in Australia or evidence that the owner or master of the Eternal Wind had means of knowledge that commercial fishing ventures in Australia may consist of a number of companies in a group with related shareholders and different functions for individual companies. It was appropriate for the trial judge, on the facts, to infer that the Eternal Wind was able to obtain knowledge in that regard;

(b) It was foreseeable that loss would occur to processors of Fishing's catch;

(c) It was not necessary that the Eternal Wind knew of the existence of Seafoods, so long as it had the means of knowledge of ascertaining that a class of vulnerable persons existed, and that means of foresight was available;

(d) The decision in *Fiji Gas* was no longer authoritative in Australia given the decisions in *Perre v Apand*[6] and *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"*[7], and that the principles in those cases were the correct principles to be applied.

Judgment of President McMurdo

6.5 *Based on Perre v Apand* and *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"* President McMurdo identified the following factors as being determinant of whether a defendant owes a claimant a duty of care not to cause economic loss:

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5 *Christopher v MV "Fiji Gas"* (1993) Aust Torts Rep 81-202.

6 *Perre & Ors v Apand Pty Limited* (1999) 198 CLR 180.

7 (1975- 1976) 136 CLR 529

(a) Reasonable foresight of the likelihood of harm;

(b) The defendant's knowledge or means of knowledge of an ascertainable, determinate class of persons who are at risk of foreseeable harm;

(c) The claimant's vulnerability or whether they are unable to protect themselves from foreseeable harm;

(d) Whether the implication of a duty would impair the defendant's legitimate pursuit of autonomous commercial interests, including the existence of any contracts between the claimant and the defendant;

(e) Whether the damage flowed from the occurrence of activities within the defendant's control;

(f) The closeness of the relationship between the parties;

(g) The existence of any other special circumstances justifying compensation.

6.6 The President noted Justice McHugh's comments in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* that constructive knowledge could only be used to identify that class of persons who were primarily affected by the negligence. The President also noted Justice McHugh's comments that while the defendant might reasonably foresee that the first line victims might have contractual and similar relationships with other, it would usually be stretching the concept of determinacy to hold that the defendant could have realistically calculated its liability to second line victims.

6.7 The President stated that she would not find that a duty of care existed unless satisfied that the Eternal Wind's master or owner had the means of knowledge that Seafoods was a member of a determinate and ascertainable class of persons or entities who were at risk of foreseeable economic harm if the Eternal Wind acted negligently. Her Honour was concerned to avoid a ripple effect in relation to economic loss claims.

6.8 On examination the evidence, however, the President accepted the trial judge's findings of fact. She accepted that the trial judge was entitled to draw an inference that the master and/or owner of the vessel could have discovered Fishing may have been part of a related group of companies with another company marketing its catch. She also found that the trial judge was entitled to accept of the uncontradicted evidence that vertically integrated commercial operations were, by 1997, common in the Australian fishing industry and that such information was within the means of knowledge of the master and/or owner of the Eternal Wind.

6.9 The President held that Seafoods could be said to be a member of a determinate and ascertainable class of persons or entities who were at risk of foreseeable economic harm having regard to the following:

(a) The closeness of the relationship between Fishing and Seafoods, which limited the class to which Fishing and Seafood belonged so

that floodgate issues and policy questions would not suggest it unwise to find a duty of care was owed to Seafoods;

(b) That while the exact arrangements between Fishing and Seafoods may not have been expected to have been within the means of knowledge of the master and/or owner of the Eternal Wind, it was within their knowledge that if they collided with the Melina T that vessel would unlikely be able to operate as a commercial fishing vessel leading to loss to the owning entity of the vessel and also any closely associated marketer and processor of the commercial fishing catch;

(c) That the group to which Seafoods belonged was a relatively small and determinate class of fishing processors and marketers closely affiliated through integrated company structures with owners of fishing vessels;

(d) That the close relationship in the makeup and directors and shareholders of both Fishing and Seafoods and their integrated commercial relationship was a special circumstances justifying the imposition of a duty of care;

(e) That there was physical propinquity where there was an inevitable and foreseeable effect of the sinking of Fishing on Seafood's ability to process and market Fishing's catch.

Judgment of Justice Dutney

6.10 Justice Dutney likewise found that Seafoods was a member of a determinate and ascertainable class of persons or entities who were at risk of foreseeable economic harm. He did so on the basis that in his view:

(a) There was sufficient commercial integration between Seafoods and Fishing for Seafoods to be considered a member of a determinate and ascertainable class of related companies conducting business of catching and marketing as related entities rather than as single entities based on a desire to circumvent marketing restrictions;

(b) The purpose for which the two entities were created (to circumvent marketing restrictions) was seen by Justice Dutney as being a key factor in creating a separate ascertainable category of finite membership such that the companies really only operated as one business;

(c) It was possible to distinguish the integration of subsidiaries of multi-national companies to the relationship between Seafoods and Fishing by the fact that the catching and selling of fish were necessarily related activities and because without both there would be no commercial activity;

(d) Fishing retained an interest in the resale by Seafoods of the fish as the fish were not sold by Fishing to Seafoods but only sold by Seafoods as Fishing's agent;

(e) The companies marketed themselves as a single entity, being Fortuna Australia.

Judgment of Justice Jerrard

6.11 Justice Jerrard accepted that it was open to the trial judge to find that it was a relatively common experience that separate legal entities conducted different aspects of a business enterprise and that the Eternal Wind had the means of learning that information.

6.12 He refused, however, to find that Seafoods was a member of a determinate and ascertainable class of persons or entities who were at risk of foreseeable economic harm on the basis that:

(a) There was an absence of clear evidence as to Seafoods' relationship with Fishing other than that Seafoods was involved in the process of selling the catch and derived income from it, which relationship was not on its own adequate to establish Seafoods was a member of an ascertainable class of vulnerable persons such that the likelihood of harm to Seafoods should have been foreseen;

(b) It was not sufficient that the owner or master of the Eternal Wind knew that fishing ventures in Australia "may" consist of number of companies with related shareholders and different functions and that Fishing "might" form part of such a group with another company. Actual foresight of harm was required in accordance with *Perre v Apand*. Further, such a class that "might" exist was not ascertainable and was indeterminate;

(c) By imposing liability on the basis that the class "might" exist, imposed liability merely because the class of victim was a related entity with intermingled corporate owners and controllers when a duty would not exist in respect of unrelated corporate entities who regularly bought and sold the catch;

(d) It was not sufficient that Fishing had a management agreement with Seafoods and was a tiered supplier of seafood to Seafoods creating a contractual relationship;

(e) It was not sufficient to place Seafoods in the same position as Fishing (as the owner of the Melina T which sunk) on the basis that there was a close relationship between the controlling minds and ownership of Fishing and Seafoods. On the evidence, Seafoods was only a purchaser, or processor and agent for sale, which meant that Seafoods' and Fishing's position could be distinguished;

(f) Seafoods merely had a contractual and no proprietary interest in what Fishing caught;

(g) Seafoods and Fishing were not in a joint venture relationship or one akin to joint venture; the mere interlocking of directors and shareholders and intermingled finances did not transform those companies' dealings into a joint venture;

(h) If a duty was owned to Seafoods, there is no reason why a duty would not be owed to other purchasers of seafood who always, routinely or intermittently bought some or all of Fishing's catch and sold it;

(i) It could only be ascertained whether Seafoods was a member of a class of vulnerable victims by careful analysis of the documents or facts. Further, there was uncertainty as to the evidence of the relationship between Seafoods and Fishing which meant it would be difficult to ascertain with accuracy the class which existed, with the result that if a class did exist it needed to include all potential

purchasers and processors as it was never clear which Seafoods was. That would result in an indeterminate class which was too wide.

7. The application for special leave to appeal to the High Court

7.1 On 2 December 2005 the Eternal Wind filed an application for special leave to appeal to the High Court.

7.2 The special leave questions were whether a duty of care:

(a) Was owed to Seafoods to permit it to recover relational economic loss;

(b) Arose by reason of the fact that there were overlapping shareholders and officers of Seafoods and Fishing;

(c) Arose by reason of the fact that Fishing and Seafoods conducted their business using separate bank accounts but making use of inter-company loans from time to time so that the bank account of one company would be used to discharge the debts of the other;

(d) Arose by reason of the fact that there was a processing contact between Seafoods and Fishing pursuant to which Seafoods packaged Fishing's product for a fee;

(e) Arose by reason of the fact that Fishing was a beneficiary of a trust of which Seafoods was trustee.

7.3 Various submissions were made by Senior Counsel for the Eternal Wind including that:

(a) By his finding, the trial judge had produced a general class of related corporations with an integrated business operations which would be able to claim for economic loss and that this was inappropriate;

(b) It was an error to find, in circumstances where the Eternal Wind did not know Seafoods individually or as a member of an unascertained class, that Seafoods was likely to suffer loss;

(c) On the facts Seafoods and Fishing were only two related enterprises in different areas of business where the catch of one was supplied to the other, and that they were no more;

(d) Merely because Seafoods and Fishing had common or overlapping shareholders and directors or were one was a beneficiary in a trust of which the other was trustee, that was not sufficient to create a duty of care in the Eternal Wind

7.4 It was submitted on behalf of the Eternal Wind that the adoption of the test propounded by the majority of the Court of Appeal with a class described at such a high level of generality, would itself promote indeterminacy in this area of the law and the ease with which the majority inferred that the Eternal Wind would have known of the existence of this class and membership of this class shows how significant the case could be in the law of economic loss. In relation to the decision of the High Court in *Woolcock Street Investments Pty Ltd v*

CDG Pty Ltd[8], it was submitted on behalf of the Eternal Wind that vulnerability should have been found to be absent in the present case, it having proceeded in circumstances where no evidence was called at all about the matter and presumptions being applied to the very opposite result as was considered in *Woolcock*.

7.5 Despite these submissions, special leave was refused by the High Court (per Justices Gummow, Kirby and Crennan). The High Court stated:

> *The Queensland Court of Appeal applied the principles stated by this Court in Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad" (1976) 136 CLR 529 and in Perre v Apand (1999) 198 CLR 180. The relationship between the relevant companies is very close and integrated. In effect, they were vertically integrated, and it appears that this is now quite a common practice in the relevant industry. In these circumstances, we are not inclined to consider that the Court of Appeal erred.*

8. Broader Implications of the Eternal Wind decision

8.1 The decision of the majority of the Court of Appeal gives rise to the question of whether the case of the Eternal Wind has had the effect of creating a broader ascertainable class of claimants for economic loss than that which was recognised previously.

8.2 Arguably it has. Justice Jerrard's decision is a good starting point for identifying the difference in the application of law to this and earlier cases and the extension of the law. It is also useful, however, to examine a number of earlier cases on economic loss in Australia by way of comparative analysis.

Caltex Oil v the Dredge Willemstad[9] *("Caltex")*

8.3 While *Caltex* remains authoritative, the law postulated by the judges in that case has now, in some respects, been superseded by *Perre v Apand*.

8.4 In an endeavour to limit the possible claims for economic loss, the judges in Caltex limited those able to recover for economic loss to those specific persons or entities of which defendant had actual knowledge or the means of actual knowledge. It was held not to be sufficient that an unknown and unidentified person or entity was a member of an unascertained class, likely to suffer prejudice as a result of negligence for that entity or person to recover for economic loss.

8.5 If the law postulated in *Caltex* remained the accepted law of the day, Seafoods would have been unlikely to recover for economic loss. There was no evidence that the Eternal Wind knew of Seafoods and no evidence that the Eternal Wind had the means of ascertaining that

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8 (2004) 78 ALJR 628.

9 (1975-1976) 136 CLR 529.

Seafoods was a specific entity which may suffer economic loss, particularly given that there was no commercial link between Fishing and Seafoods, other than that Seafoods was a company to which Fishing supplied its catch, and that the evidence regarding the link between the companies was vague to say the least.

Christopher v MV "Fiji Gas"[10] *("Fiji Gas")*

8.6 While the judges in the Eternal Wind found that *Fiji Gas* was no longer the correct and applicable law in Australia, being superseded by *Perre v Apand*, it is nevertheless, still somewhat difficult to reconcile the two decisions. The similarities between the two cases and the claims made in them make it evident that the law on economic loss has taken a new direction.

8.7 The focus in *Fiji Gas* was on 'proximity" between the plaintiff and the defendant. There the plaintiffs were the members of the crew of the damaged vessel who had been remunerated by sharing in the catch or proceeds of its sale from the vessel. Their remuneration was calculated by reference to a percentage of the sale price of the produce caught and sold.

8.8 There was no evidence that the plaintiffs were contractually engaged or otherwise engaged as joint venturers with the owners of the vessel. Further the plaintiffs had no possessory or proprietary interest in the vessel and were far removed from any proprietorial role and they had no interest in the vessel or business other than that they were employed under an incentive system.

8.9 It was found that the plaintiffs were not known to the master or owner of the defendant vessel or within their contemplation as specific individuals who would suffer economic loss or that there was any evidence that there should have been knowledge of the identity of the members of the crew by way of constructive knowledge, so that the plaintiffs were only known as members of a class. It was held that not only the group by who loss would be suffered needed to be foreseeable, but that their identity of the individual plaintiff needed to be known. No duty of care was found to exist to the crew members of the damaged vessel.

8.10 Arguably, on the principles enunciated in the *Fiji Gas*, the Eternal Wind would not have been found to have owed a duty to Seafoods given the identity of Seafoods was not known to the Eternal Wind. Further, Seafoods was not contractually engaged or engaged as a joint venturer with Fishing, had no possessory or proprietary interest in the Melina T and had no interest in the vessel or in Fishing other than that Fishing was a means by which it derived income.

Perre & Ors v Apand Pty Limited[11] *("Perre v Apand")*

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10 (1993) Aust Torts Rep 81-202.

11 (1999) 198 CLR 180.

8.11 *Perre v Apand* expanded the law of economic loss.

8.12 There the respondent supplier of potato seeds (Apand) supplied seeds to a grower of potatoes in Western Australia. Those seeds were infected with a form of potato disease with the result that Western Australian regulations prohibited the importation into that State of potatoes grown on infected land or within 20 km of any affected land.

8.13 The majority held that Apand breached duties of care to a company growing potatoes within 20km of the infected land, to the family members which owned that company and to the processing facility for the potatoes which was situated within the 20 km radius of the infected land. They did so on the basis that there was actual foresight by Apand of the likelihood of harm, and on the basis that Apand had knowledge of an ascertainable class of vulnerable persons, being those persons within 20km of any infected farm (although recognising that means of knowledge of that class would be adequate).

8.14 There was a focus on Apand's knowledge that there was a class of persons who availed themselves of the right to sell potatoes in Western Australia and used their property and equipment to produce potatoes and who could have their rights impaired of diseased potatoes. It was held that the class was ascertainable and that liability was not indeterminate and could be calculated (having regard to what the defendant knew or ought to have known of the number of claimants and the nature of their claims) although not necessarily the individuals.

8.15 It is of interest to note that it was stated that claims of indeterminacy most frequently arise where the defendant cannot determine how many claims might be brought against it or their general nature, and where liability can not be realistically calculated. That will depend on what is know or what ought to be known about the number of claimants and the nature of their claims, not the number or size of the claims. Further, that indeterminacy can be overcome where the defendant can foresee a specific individual and not a class will suffer financial loss. The court also cautioned the use of constructive knowledge to extend the class to who a duty is owed, and against using constructive knowledge in identifying those within a class primarily affected by the defendant's negligence (first line victims) and those who suffered economic loss merely because of economic loss to the first line victims.

8.16 Arguably, the trial judge and majority of the Court of Appeal in the Eternal Wind have gone further than in *Perre v Apand*:

(a) They have identified a category of case in which only a means of knowledge in the defendant rather than actual knowledge of the defendant of a class of vulnerable persons will be sufficient to create a duty to avoid economic loss;

(b) In this regard, they have placed a heavy obligation on defendants in relation to the information which defendants are expected to have access to and knowledge of in order to ascertain if a class of vulnerable and ascertainable persons exists and what that class is

(for example, a means of knowledge was found to exist even though information as to the relationship between Fishing and Seafoods and, more generally, businesses operating in the fishing industry was not be easily accessible);

(c) Further, it was held to be enough to create a duty in the Eternal Wind that there was means to ascertain that a vague class of claimant might exist, but whose number and the general nature of their claims could not be defined until future extensive investigations were carried out into the business operations of Fishing and the purchasers of its product, and that even in those circumstances, where the class of ascertainable person is vague, the defendant need not have knowledge of the specific vulnerable person/s;

(d) Further, because of the integrated business operations of Fishing and Seafoods, Seafoods was found to be a first line victim, despite it not having an interest in the damaged vessel, and as a result it was found that constructive knowledge was sufficient basis on to establish knowledge in the Eternal Wind of the class of vulnerable persons despite the caution as to the use of constructive knowledge issued in *Perre v Apand.*

Discussion

8.17 The following factors referred to by the Court in making a finding of economic loss in the Eternal Wind case combine to broaden the situations in which a class of ascertainable people will be found to exist:

(a) There was no contract between Seafoods and Fishing, and Seafoods had no proprietary or equitable right in the Melina T of its catch. Having regard to these factors Seafoods was effectively in the same position, or possibly a worse position, than any other purchaser and processor of fish caught by a fishing vessel;

(b) The dealings between Fishing and Seafoods were carried out at arms length and at market rates. Seafoods, like any other processor, was not bound to purchase seafood from Fishing and could have purchased seafood from other operators in the event that the Melina T or Fishing's other vessels were damaged. Seafoods therefore, aside from the close relationship with Fishing by way of membership and directorship, stood in the same position as any other processor;

(c) It is foreseeable that there are large businesses which are operated and run by the same or similar groups of shareholders and directors and for related purposes. Their relationships would only be distinguishable from that between Fishing and Seafoods on the basis of the size of the business;

(d) The court did not require the Eternal Wind to possess the means of ascertaining that there was a class of integrated business operations related to Fishing which were vulnerable. It only required knowledge that there might by such a class. The size, membership and nature of the claims of that class therefore was not required to be known (e.g. Fishing may have had a number of other related business entities other than Seafoods);

(e) Previously the law required that a defendant know or have the means of knowing a plaintiff was a member of the ascertainable class or the class to be ascertainable and indeterminate. Here neither existed. There was no knowledge of Seafoods. There was no clear and easy way for the Eternal Wind to gain knowledge that such a class existed, only that the class might exist. Even then, because the class was only identified as a possibility, it could not be said to be ascertainable or indeterminate except in a very broad and ill-defined way.

8.18 In those circumstances, the decision places a heavy onus on defendants in relation to the extent of the knowledge which they are expected to be able to acquire to ascertain a class of vulnerable persons. It opens the law of economic loss up to a wider class than previously and it is now likely to be more difficult to ascertain those circumstances in which a duty will be owed in relation to claims for economic loss.

8.19 Further, while the judges of the Court of Appeal, attempted to limit the law of economic loss, in fact they may not have succeeded in doing so. For example:

(a) It was held to be enough that there was foresight that any closely associated marketer and processor of a commercial fishing catch would suffer loss, and that the exact arrangements between Fishing and Seafoods or the precise size of the class need not have been known. It is arguable that foresight of such situations will often be available to a defendant;

(b) It was held that the relationship between Fishing and Seafoods could be distinguished from a multi-national company by the fact that without the catch and selling of fish there would be no commercial activity. However, it could be said for many commercial processes that supply and sale can not occur without the other.

8.20 Aside from the particular industry practice in relation to the creation and operation of businesses in the fishing industry, there really was little different in the relationship between Seafoods and Fishing than what might ordinarily be expected to be found in respect of small, family run businesses or other businesses with joint aims. Many businesses are established with similar aims and purposes, are run by the same shareholders and/or directors and share the proceeds of work carried out.

8.21 It is arguable then, that the decision in the Eternal Wind creates a favourable environment for claims for economic loss by related small business, where while the businesses run may themselves have different purposes and aims (for example, the catch of seafood as opposed to the sale of seafood), the link between them (for example, mutual shareholders and/or directors) will be adequate to favour a claim for economic loss so long as it can be shown that those businesses were effectively operating as one or that the businesses are economically dependent or inter-dependent upon one another.