CASE COMMENTARY

MORE THOUGHTS ON CALTEX: CANDLEWOOD NAVIGATION CORPORATION LTD V. MITSUI OSK LINES LTD & ANOTHER[1]

When the decision in the *Caltex*[2] case was handed down by the High Court of Australia in 1976 it represented an apparent land mark in the development of the law of negligence pertaining to liability for pure economic loss, that is, economic loss not consequential upon physical damage to the person or property of the plaintiff. As is by now well-known, Caltex was able to recover damages for the increased costs which it incurred in having to transport crude oil by road tanker to the refinery on the opposite shore of Botany Bay instead of via the pipe-line traversing the sea-bed which had been damaged by the defendant's negligence.

The *Caltex* case seems in retrospect to have signalled a general loosening up in those areas of the law of negligence in which recognition of a duty of care has been traditionally limited by policy constraints qualifying reasonable foreseeability as the criterion of such a duty. However, *Caltex* has not been without its problems and in *Candlewood Navigation Corporation Ltd* v. *Mitsui OSK Lines Ltd* the Privy Council has singled them out and, it may be thought, dealt somewhat dismissively with most of the judgments.

The case arose out of a collision between two ships off Port Kembla in New South Wales. Both ships were at anchor waiting for a berth when the appellant's vessel, the "Mineral Transporter", broke free and drifted into the "Ibaraki Maru" owned by the first respondent. Yeldham J. in the Supreme Court of New South Wales found that while no fault attached to the crew of the "Mineral Transporter" for the failure of its anchor they were negligent in failing to take steps in time to avert the collision. The appellant as owner of the "Mineral Transporter" was therefore wholly responsible for the collision. Yeldham J. gave judgment for the two plaintiffs, the respondents to the appeal, founding himself on *Caltex* for his decision in favour of the first respondents.

Prior to the collision the two respondents had entered into charter-parties the effect of which was as follows: the first respondent as owner granted a demise charter to the second respondent who in turn granted the vessel back to the first respondent on a time-charter. The owner therefore became the time-charterer of its own ship.

Since the distinction between a time charter and a demise charter was crucial to the determination of the appeal the following explanation[3] is offered for

[1] (1985) 59 A.L.J.R. 763.

[2] *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willemstad"* (1976–1977) 136 C.L.R. 529.

[3] Derived from *Scutton on Charter-Parties* (19th edition, London, Sweet and Maxwell 1984, by Sir Alan Mocalta, Sir Michael Mustill and Stewart C. Boyd) p. 47 ff.

those unfamiliar with the terminology in this branch of the law: a demise charter, as its name suggests, operates as a lease of the ship with the owner retaining the right to the reversion analogously to a lesser of land retaining the leasehold reversion. The services of the master and crew may or may not accompany the demise; if they do not the demise is sometimes called a "bareboat" charter and it was this kind of charter which the second respondent took from the first respondent. The charterer under a demise or bareboat charter acquires a proprietary interest in the vessel for the duration of the charter. In a charter otherwise than by demise such as a time charter the charterer does not acquire a proprietary interest; what he gets is merely the services of the vessel and the crew, possession of the vessel remaining with the owner. In the present case the second respondent as demise charter was to bear the cost of any repairs required during the period of the charter. The first respondent, although the owner of the vessel and entitled to the reversion, had divested itself of possession under the demise charter and as time charter was simply entitled to the services of the vessel and the crew put on board by the second respondent.

The claim by the first respondent was for the wasted hire which under the time charter it was liable to pay, albeit at a reduced rate, for such period as the vessel should be out of service undergoing repairs together with loss of profits for that period. The claim of the second respondent was for the cost of repairs which it was liable to pay under the demise charter and for the difference between the rate of hire which would have been payable under the time charter had the vessel remained operational and the reduced rate payable in the event which had occurred. Both the respondents were successful as plaintiffs before Yeldham J. The appellant appealed against both the decision in favour of the first respondent and Yeldham J.'s holding that its liability in damages to the second respondent included an additional period of 39 days for which the ship was out of service due to a "black ban" imposed by the Painters and Dockers Union.

The judgment of the Privy Council consisting of Lord Fraser of Tullybelton, Lord Roskill, Lord Brandon of Oakbrook, Lord Templeton and Lord Griffiths was delivered by Lord Fraser of Tullybelton and principally concerned the claim by the first respondent. Their Lordships held, in allowing the appeal on this head, that the damage suffered by the first respondent was in its capacity as time charterer and not as owner of the vessel. As time charterer its loss was pure economic loss flowing from the fact that contracts (that is, the charter-parties) which it had entered into with the second respondent were rendered less advantageous or more onerous than would have been the case if the appellant had not been negligent. There is a long line of authorities holding that where property which is owned by a third party and which is the subject matter of a contract between that third party and the plaintiff is damaged as a result of the defendant's negligence so that the property becomes less productive to the plaintiff under his contract than would otherwise have been the case, the absence in the plaintiff of a proprietary as opposed

to a merely contractual right to the property is fatal to his claim for compensation, since it is the relationship between the owner and his property that constitutes the necessary proximity between the plaintiff's economic loss and the defendant's negligence. This principle is clearly illustrated in the well-known case of *Remorguage à Hélice (Société Anonyme)* v. *Bennetts*[4], where by the defendant's negligence a vessel was sunk while it was being towed by a tug. The tug owner's claim for the towing fees which but for the defendant's negligence he would have earned was dismissed.

In the circumstances of the present case the position of the first respondent was analogous to that of a non-proprietary plaintiff since the loss suffered did not affect its reversion but only its contractual relations with the second respondent in whom the relevant proprietary interest lay.

The present case, therefore, constitutes an affirmation by their Lordships of the principle in *Cattle* v. *Stockton Waterworks*[5] and the line of authorities stemming from it. In the course of that affirmation they considered *Caltex* and it is their comments on that case which have prompted the present article.

Let it be said at once that *Caltex* is distinguishable from *Candlewood*. The plaintiff in *Caltex* had property which was affected by the defendant's negligence – the oil or refined product located at the refinery of Australian Oil Refinery Pty. Ltd. – whereas in *Candlewood* the first respondent had no relevant proprietary interest affected by the collision. Moreover, the five exceptional circumstances listed by Stephen J. in *Caltex* marked a degree of proximity lacking in the present case. One of these circumstances was that the defendant in *Caltex* knew of the pipe-line and of its importance to the operations of the terminal and refinery whereas it does not appear that the appellant in the present case was aware of the somewhat convoluted arrangements between the two respondents. But this aside, it is clear that their Lordships were unhappy with *Caltex*. They were unable to extract any single ratio from the case and they subjected to some firm criticism that ratio which, being common to the judgments of both Gibbs J. (as he then was) and Mason J., has some claim to be the dominant one. This is the principle that the plaintiff may recover damages for pure economic loss if the defendant could reasonably have foreseen or (per Gibbs J.) had the means of knowing that such loss would be suffered by "the plaintiff individually and not merely as a member of an unascertained class."

The Privy Council found it difficult to distinguish "between a plaintiff as an individual and a plaintiff as a member of an unascertained class."[6] They thought that the distinction could hardly depend on whether the plaintiff was known by name to the defendant. However, it may be that their Lordships were exaggerating the difficulty here; in *Caltex* the claim for pure economic

[4] [1911] 1 K.B. 243.
[5] (1875) L.R. 10 Q.B. 453.
[6] *Candlewood Navigation Corporation Ltd.* v. *Mitsui Osk Lines Ltd. & Another* (1985) 59 A.L.J.R. 763, 769.

loss was confined to a single plaintiff because there was and could only be one plaintiff on that claim – there was only one terminal owner. Where in the nature of the case there is and can only be a single plaintiff to a claim for pure economic loss there is no room for speculation about other potential plaintiffs and problems about an indeterminate class therefore seem irrelevant. The Privy Council's doubts have more point in the case where a single plaintiff comes forward but there are or may be other potential plaintiffs. In such a case what is to be avoided is the compromise of principle that would occur if the particular plaintiff who has come forward were allowed to recover on the strength of a fortuitous or casual feature which made him known to or identifiable by the defendant. The proper development of legal principle requires that the law should not attach an arbitrary significance to coincidental circumstances which may happen to be included in the facts of a particular case. What is important in determining whether a particular plaintiff sues as an individual or as a member of an unascertained class is whether there are legally relevant characteristics of his case which he shares with other potential plaintiffs not yet identified. The coincidence that the particular plaintiff is, for example, the defendant's next door neighbour should not per se confer a legal distinction upon him over other possible claimants. In *Caltex* the difficulty of distinguishing between the particular plaintiff as an individual and as a member of an indeterminate class did not arise.

A further difficulty which the Privy Council found with the language of the Gibbs/Mason test lay in what may be called its "undistributed middle". The marked terms in that test are "the plaintiff individually" (per Gibbs J.) or "a specific individual" (per Mason J.) on the one hand and, "unascertained class" (Gibbs J.) or "a general class" (Mason J.) on the other. The term left uncovered is "ascertained class". Although the Privy Council appeared in its judgment to regard the test as depending upon the plaintiff being a "single individual"[7], which it found illogical, it is open to question whether the test is to be so narrowly confined. Yet if it extends to more than one plaintiff what limit is to be imposed on the size of the class of ascertained plaintiffs?

It may be that the underlying problem with the Gibbs/Mason test, which was not enlarged on further by the Privy Council, is that the language in which it is expressed begs questions and is in fact misleading. It is misleading because it suggests that the determinant of whether a class of plaintiffs – and I here assume that the test extends to more than one plaintiff – is qualified to sue is that the class is ascertained. In other words, according to this test, it appears that the fact in itself of the plaintiff or plaintiffs being known to or identified by the defendant is the significant thing. But what, surely, is of primary importance is not this fact itself but the circumstances in which the plaintiff or plaintiffs came to be known to or identified by the defendant. If the class is defined by reference to its being ascertained the question is begged whether legal significance should attach to the circum-

[7] Ibid. 769.

stances in which the plaintiffs came to be identifiable by the defendant. If the fact of being known or ascertained is to be legally relevant it must be, on the view of the test which I have adopted, because it is a function of some other legal value which excludes merely casual or fortuitous reasons for that fact. Clearly, this underlying legal value or parameter must be something more than foreseeability because once a plaintiff is known to a defendant damage to him would be foreseeable however fortuitous the circumstances which brought him to the defendant's notice. Surely, this underlying value must be none other than proximity. The Gibbs/Mason test appears to me to be based on proximity but to be articulated in such a way as to identify that principle with a particular form of its manifestation.

The above gloss on the Gibbs/Mason test hardly removes the difficulties associated with it. There is, for example, the problem of determining whether the circumstances in which the plaintiff or plaintiffs constituting an ascertained class came to be known to the defendant were legally significant or merely fortuitous. The phrase "legally significant" presupposes a governing principle or criterion of significance. But if it is perceived that the governing principle underlying the Gibbs/Mason test is proximity it should be possible to avoid the element of arbitrariness inherent in a test applied as through the mere fact of the persons claiming being known to or identifiable by the defendant were sufficient to constitute them a relevantly ascertained class.

As far as the Privy Council in *Candlewood* was concerned, however, there is no sufficient proximity in a case where the plaintiff's financial loss flows merely from disturbance to his contractual relations with a third party caused by the defendant's negligence without injury to any proprietary interest of the plaintiff. Their Lordships stressed the certainty of this rule and the difficulty with which practitioners would be faced in advising their clients if it were disturbed. In so far, therefore, as the Gibbs/Mason test goes beyond this rule – as it does – it has been disapproved by the Privy Council.

The one judgment in *Caltex* that did receive approval from the Privy Council was that of Jacobs J. who propounded the test of "physical propinquity". By that test the plaintiff would be entitled to recover if his person or property were in such physical propinquity to the place where the defendant's wrongful act or omission took its effect that a physical effect was foreseeably transmitted to his person or property as a result of that act.[8] The relevant passage from Jacobs J.'s judgment is as follows:

> "The relevant duty of care in the present case is the duty of care owed to those whose persons or property are in such physical propinquity to a place where an act or omission of the defendant has its physical affect that a physical effect on the person or property of the plaintiff is foreseeable as the result of the [defendant's] act or omission. The damages for the breach of such a duty of care are those which result from the physical effect on the plaintiff's person or property of the defendant's act or omission."[9]

[8] (1976–1977) 136 C.L.R. 529, 597.
[9] Ibid. 597.

It is not necessary that the physical effect amount to actual injury or damage to the plaintiff or his property; it is enough if, for example, there is a loss of physical mobility or use. In *Caltex* the relevant property of Caltex was its oil at the refinery of Australian Oil Refinery Pty. Ltd. The physical effect on that oil of the defendant's negligence in severing the pipe-line was to immobilise it at the refinery. Therefore the defendant owed Caltex a duty of care. On Jacobs J.'s test the operative question is not whether the plaintiff's loss is physical or economic but whether such loss as occurs is due to a foreseeable physical effect on the plaintiff's person or property as a result of the defendant's act or omission.

Jacobs J. went on to stress that no duty of care is owed to a plaintiff whose economic loss arises from the disruption of his contract with a third party due to the defendant's negligence.

The Privy Council approved Jacob J.'s test as being in line with the "traditional" criterion. But the traditional test in cases of economic loss caused by negligent conduct is whether such as loss is *consequential upon* physical damage to the plaintiff or his property. The test of physical propinquity as propounded by Jacobs J. represents a considerable modification of the traditional formula as illustrated in for example *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*[10] The scope given by Jacobs J. to the concept of "physical effect" is in fact sufficiently large for there to be a certain irony in the Privy Council's approval of it. Take for example, a case with facts similar to those in *Union Oil Co.* v. *Oppen*,[11] an American case where commercial fishing grounds off the Californian coast were polluted by a negligent spillage of oil and the plaintiff fishermen were allowed to recover compensation for their economic loss in being unable to fish the affected area. Suppose, in our example, that off-shore fishing grounds were damaged by a negligent oil spill from a tanker. On Jacob J.'s test all those who suffered economic loss by reason of their property being in such physical propinquity to the locus where the defendant's act had its physical effect that a physical effect on that property was foreseeable would be entitled to damages. The relevant property would be fishing boats and tackle which would be unable to put to sea in the affected area lest they be fouled by the oil.[12] Clearly the number of potential plaintiffs in this situation could be very large and problems may arise concerning the determinability of the class.

As the above example illustrates Jacobs J.'s test does not necessarily avoid the problem of widespread liability. It would, however, if applied to the present case, have resulted in a rejection of the first respondent's claim since although the "Ibaraki Maru" was immobilised during the period of repairs

[10] *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.* [1973] 1 Q.B. 27.
[11] 501 F. 2d. 558 (1974).
[12] Jacob J.'s test clearly requires that the reason for the immobilisation be a physical one. If the fishermen were able to put to sea in the affected area without risk of fouling but there was no inducement to do so because there were no fish in that area than the reason for the immobilisation would be economic rather than physical and the fishermen's claim would fail.

the first respondent could not in its capacity as time charterer base its claim upon a relevant proprietary interest in the vessel in that period. Its chances were much better under the test of Gibbs and Mason J.J. and it was the application of this test at first instance in favour of the first respondent which largely gave rise to the appeal. At the same time some of the elements of proximity present in *Caltex* were lacking here, most notably the degree of particularised knowledge as to the identity of and commercial arrangements between the two respondents which the defendant in *Caltex* possessed as to the relationship between Caltex and Australian Oil Refinery Pty. Ltd.

The situation produced by the present case is that we have a Privy Council decision at odds with the dominant ratio of all earlier High Court decisions. The Privy Council has affirmed the authority of *Cattle's* case and the line of authorities flowing from it asserting that economic loss resulting from loss of the benefit of a contract between the plaintiff and a third party is not recoverable in the absence of a proprietary interest held by the plaintiff in property the subject of the contract. To regard the Privy Council's observations on *Caltex* as made obiter would be somewhat unrealistic given the tenor of the judgment.

Australian State courts have now, therefore, to assess the degree, if any, to which the Gibbs/Mason ratio has been weakened. The High Court in *Viro v. R.*[13] laid down guidelines to be followed in cases of conflict. According to Mason J.[14] state courts should as a general rule follow High court decisions in such cases. An exception to this rule would occur where, as in the present case, the High Court decision was earlier than that of the Privy Council and was considered by the Privy Council before delivering its divergent judgment. In such a case the state court should follow the Privy Council decision unless that decision appears to be based on considerations inappropriate to Australian circumstances and conditions. In assessing the appropriateness of those considerations state courts would no doubt take into account any constitutional preference in the legal and wider community for the homegrown product balancing it where necessary against the relative merits of the respective decisions.

The decision on the second head of appeal, which is added for completeness, was that the second respondent was entitled to damages for the extra time taken to effect repairs due to the "black ban" imposed on the ship by the Painters and Dockers Union. The fact that the black ban may have had a political as opposed to an industrial motivation was not sufficient to differentiate the case from well-established authorities holding a defendant liable for delays caused by industrial strikes.*

[13] (1978) 18 A.L.R. 257.
[14] Ibid. at 295.
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