

Court of Appeal decides that railway track access payments are recoverable from negligent motorists

CONARKEN GROUP LTD V NETWORK RAIL

Network Rail is entitled to recover damages from negligent motorists for contractual payments made to Train Operating Companies (TOCs) under its various Track Access Agreements

On 27 May 2011, the Court of Appeal handed down judgment in the Conarken Group Ltd v Network Rail [2011] EWCA Civ 644, a decision eagerly anticipated by the motor insurance industry. The claim arises out of motor accidents causing damage to Network Rail infrastructure, at points where roads meet railways – such as level crossings and road-over-rail bridges.

The Court of Appeal, upholding Akenhead J's decision at first instance (see [2010] EWHC 1852 (TCC); [2010] B.L.R. 601; 132 Con. L.R. 143), have unanimously decided that Network Rail is entitled to recover damages from negligent motorists for contractual payments made to Train Operating Companies (TOCs) under its various Track Access Agreements, triggered by the closure of track as a result of motor accidents.

Schedule 8 payments estimate the financial damage caused to TOCs

The contractual payments at issue (referred to by the rail industry as "Schedule 8" payments) are calculated in accordance with a specifically designed formula which seeks to estimate the financial damage caused to TOCs as a result of unplanned service disruption. The TOCs cannot themselves bring claims against the negligent motorist, because their loss is not consequent upon any physical damage to their property (the infrastructure is owned by Network Rail). Consequently, the contractual matrix entitles the TOCs to receive contractual payments from Network Rail in the event of unplanned service disruption. Network Rail, as the owner of the damaged infrastructure, is then entitled to recover those payments from the negligent motorist as losses consequential to property damage. That way, the TOCs circumvent the rule against recovery for pure economic loss under which they would otherwise suffer irrecoverable loss.

The two components of Schedule 8

The first element (“the Marginal Revenue Effect”) is calculated to compensate the TOCs for the effect of the accident with regard to knock-on consequences over the entire rail network and their contribution towards the “tipping point” of passengers abandoning the railways at some point in the future. The second element (“the societal rate”) compensated the TOCs for payments they would have had to make to the Rail Franchise Director as a penalty for poor performance – incentive payments imposed upon train operators in circumstances where the market (often a monopoly on each track) did not create sufficient incentive.

The motor insurers had argued that what the two elements of the Schedule 8 payments represented were irrecoverable.

The insurers did not dispute that they could have been liable for “on the day” losses such as compensation paid to passengers as a result of disruption, loss of ticket revenue on the day of disruption, and the cost of providing alternative methods of transport. However, the Schedule 8 payments did not reflect such losses. Instead, the MRE element was based on a loss of reputation, causing loss to the TOCs as some future point, resulting from the index accident. The insurers sought to argue that this was akin to the types of long-term stigma loss that were rejected in cases such as Rust v Victoria Graving Dock and West Leigh Colliery v Tunncliffe. The societal element was an incentive imposed as a matter of government policy where the market did not otherwise do so. The insurers sought to argue that such losses were unforeseeable and did not fall within the scope of a motorist’s duty.

Court of Appeal decide that the claim is simply loss of income

The Court of Appeal decided that the action should be characterised as a simple claim for loss of income a well established category of recoverable economic loss. The decision of the Court of Appeal is over 150 paragraphs, with each Lord Justice (Pill LJ, Moore-Bick LJ and Jackson LJ) delivering judgments. It provides a detailed exposition on the recoverability of economic losses in the law of tort with examination of the familiar concepts of “scope of duty”, “reasonable foreseeability”, “remoteness”, “reasonableness between the parties” and “pure economic loss”.

Claimants can recover damages for loss of income caused by a fear of future events

The decision was unanimous that in appropriate circumstances claimants can recover from a tortfeasor damages for loss of income caused by a fear of future events. However, insofar as such damages can be recovered as a result of a contractual matrix with a third party, there were differing degrees of caution expressed by their Lordships regarding recoverability. Pill LJ, giving the leading judgment, expressly stated that

it is not open to a party to dictate to the whole world the extent of tortious liability and what is reasonably foreseeable and not too remote in order to achieve what it regards as a satisfactory contract with a third party. He warned that otherwise this could lead to ever more ingenious attempts to attribute possible losses to a tort and would be inimical to the simple solution desired. In Pill LJ's estimation an analysis of Schedule 8 would be required to determine the extent of tortious liability.

How much analysis is required of the contractual payments?

Moore-Bick LJ considered that it was irrelevant to enquire into the precise nature of the loss incurred by the TOCs provided that the compensation to be paid by Network Rail to the TOCs represented a genuine estimate of its amount. Jackson LJ took a similar approach holding that absent some exceptional circumstance or obviously unreasonable feature in the claimant's business arrangements, it is not appropriate for the court to explore in details the build-up of any loss of revenue following damage to revenue generating property. He warned against expensive legal inquiry upon categories of case where there is an established entitlement to recover economic loss.

Schedule 8 recoverable because a genuine estimate of third party losses

All the members agreed that the tortfeasors should be liable for each of the heads claimed. Schedule 8 was considered to have been drafted responsibly and with a view to achieving a fair result in the public interest (for a punctual and reliable train service). The incentive payments from TOCs to the franchising authority (the societal component) were deemed to be reasonably foreseeable and not too remote. The loss of future custom to TOCs (the MRE component) was also deemed recoverable, in circumstances where the calculation was a genuine attempt to assess future loss of income from the accident.

Noteworthy conclusions:

- *Making a contract with a third party does not confer a licence on an injured party to charge to a tortfeasor whatever type of financial loss, and whatever quantification of financial loss, is included in the agreement, even if it is reasonable between the contracting parties (per Pill LJ at para 70).*
- *Loss caused by a reduction in value of property resulting from physical damage can be recoverable in appropriate circumstances (following Muirhead v Industrial Tank Specialists).*
- *Losses claimed to result from fear of the risk of future events can be recoverable in appropriate circumstances (following Andreae v Selfridge). An estimation of the loss of future business calculated by reference to the psychology of customer fears of a repeat of the index*

event is recoverable against a tortfeasor as a result of damage to a profit earning chattel (per Pill LJ at para 83).

- *In choosing the appropriate measure of damages for the purposes of assessing recoverable economic loss, the court seeks to arrive at an assessment which is fair and reasonable as between the claimant and the defendant (per Jackson LJ at para 145).*
- *However, there is no independent or overriding principle that damages must be reasonable as between the claimant and the defendant (as had been contended by the insurers). Damages should be assessed by identifying the true measure of the loss suffered by the claimant, which does not depend on broad notions of how much the defendant should be called upon to pay (per Moore-Bick LJ at para 118).*

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