Neutral Citation Number: [2010] EWHC 1852 (TCC)

Case Nos: HT-09-195 AND HT-09-395

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st July 2010

Before :

MR JUSTICE AKENHEAD

- -

Between :

NETWORK RAIL INFRASTRUCTURE LIMITED	**Claimant**
- and -	
CONARKEN GROUP LIMITED	**Defendant**
NETWORK RAIL INFRASTRUCTURE LIMITED	**Claimant**
- and -	
FARRELL TRANSPORT LIMITED	**Defendant**

- -
- -

Alain Choo-Choy QC, David Drake and Alexander Polley (instructed by **Hay & Kilner**) for the **Claimant**
Andrew Prynne QC and James Purnell (instructed by **Greenwoods**) for both **Defendants**

Hearing dates: 28-30 June and 6 July 2010

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JUDGMENT

Mr Justice Akenhead:

1. Every year, there are in Great Britain a significant number of road accidents on bridges over and under railways and on railway crossings. In 2008-9, the Court was told that there were 1365 such incidents on bridges affecting railway services and a significant number of other incidents on level crossings. A number of these accidents will involve negligence by one or more drivers involved. Typically, as in the current cases, the accidents will involve physical damage to the bridges, damage to the railway lines, physical remedial work and greater or less disruption to the rail services.

2. In 1996, the railways and the rail track system were privatised, coming out of nationalised public ownership. The privatisation involved the setting up of Railtrack as the body responsible for the rail track system and the introduction of companies who would operate the trains on that system. The system was effectively divided up into different areas or lines such as the East Coast Main Line and the West Coast Main Line, with GNER and Virgin being the companies which respectively secured the franchises; these companies were known as the Train Operating Companies ("TOCs"). There were various checks and balances whereby the interests of the public and the government were sought to be protected. Thus there was the Office of the Rail Regulator ("ORR") which, amongst other things, tried to ensure that Railtrack and the TOCs were encouraged or "incentivised" to do their respective jobs properly. There came a time when Railtrack went back into effective government ownership in 2002 and it is now known as Network Rail.

3. In broad terms, the agreements between Network Rail and the TOCs, which are known as Track Access Agreements ("TAAs"), operate as a form of licence by Network Rail to the TOCs to use the track in return for what are annually often very substantial nine figure sums. However, there is in place in practice pursuant to the TAAs an accounting system whereby, when the track is not available through no fault of a particular TOC, it is compensated by Network Rail through what are called Schedule 8 payments or allowances. Because some parts of the rail track system are used by more than one TOC or some TOCs are affected by the activities of other TOCs on other parts of the system, Network Rail can recover some of the Schedule 8 payments from any TOC which has caused the track in question to be unavailable. There are however some incidents for which other TOCs are not to blame. For instance, the non-availability of the track may be the responsibility of Network Rail. Furthermore, as in the current cases, there may be incidents for which Network Rail can not be said to be at fault, such as damage caused by negligent road users, but for which it assumes responsibility as between it and the TOCs.

4. There are two claims which are being heard together, both brought by Network Rail against the employers of negligent heavy goods vehicle drivers who caused physical damage to a bridge over a railway line and to electrical equipment at a level crossing. Liability is admitted in general and it is agreed that the respective Defendants are liable to pay damages for the costs of and occasioned by the requisite repairs. What is not agreed is whether in principle Network Rail is entitled to recover damages in relation to the sums which it has paid or allowed to various TOCs in relation to the periods for which the tracks upon which they were operating were unavailable by reason of the physical damage and the subsequent remedial works. Quantum in relation to these sums is agreed.

5. The case raises extremely interesting issues relating to the scope of the duty of care owed by the negligent drivers, foreseeability, remoteness and policy. This is very much a test case which is of importance not only to Network Rail but also to motor vehicle insurers who will in most cases ultimately have to bear the costs and losses of and occasioned by these types of accident.

The Facts

6. Network Rail's claim against Farrell Transport Ltd relates to an accident at Bathley Lane, Newark, which took place at about 10:30 am on Saturday 10 May 2003. Mr Farrell was driving a tractor unit across the level crossing carrying Bathley Lane, just off the A1 road across some railway tracks forming part of the East Coast Main Line, route between Doncaster and London Kings Cross; this line comprised two tracks of rail, one carrying traffic north and one south and carried significant levels of passenger and freight traffic. The cab of Mr Farrell's lorry was fitted with a radio aerial and, in going across the level crossing, that aerial made contact with the overhead electrical cables, causing an explosion which led to the detachment of the power cables from the catenary wires on to the railway line. Train services were necessarily suspended whilst remedial work was done; this involved the splicing of a new length of catenary wire, the replacement of "dropper" cables attaching the power cables to the catenary wire and the re-hoisting and height re-setting of the power cables. The whole line was shut for some 4 to 5 hours but work continued on or above one of the tracks, allowing single line working, until 17.20 when the whole line was re-opened. The total admitted cost of the repairs was £4811.27 (which was recently paid to Network Rail by Farrell Transport). There is no suggestion that these works were unreasonable or were carried out too slowly.

7. The other incident took place at Howden in Yorkshire early in the morning on 29 July 2002 on the Howden Bridge which carries, in a south westerly direction, the A614 main road over rail tracks which are part of the Trans-Pennine, Hull and East Coast lines. A lorry with a refrigerated trailer ("the Fridge Unit") made its way towards this bridge approaching from the North East. At the same time a low loader ("the Low Loader"), driven by an employee of Conarken Group Ltd ("Conarken"), which carried a tracked piling rig, was approaching from the other direction. The Low Loader mounted the pavement on the bridge, the piling rig's tracks hit the parapet wall which caused it to pivot on the back of the Low Loader anti-clockwise around its centre of gravity and the far side of the piling rig collided with the front of the tractor parts of the Fridge Unit which then jack-knifed and collided with the other parapet wall. Unsurprisingly the vehicles came to a halt, locked together and blocking the bridge completely. The parapet walls were substantially demolished and large quantities of rubble strewn on the railway track below. The Fridge Unit was partly overhanging the edge of the bridge, as was the piling rig on the other side of the bridge. The emergency services were called as were the local Network Rail representatives. After the injured driver of the Fridge Unit was attended to, the emergency services at least in consultation with Network Rail decided that the vehicles could not simply be winched apart at road level; it was resolved that the appropriate solution, not now challenged as unreasonable, was for a substantial crane to be manoeuvred down onto the track to remove what was considered to be the most precarious part of the melange on the bridge, namely the overhanging piling rig. The track remained closed whilst these not insignificant works were carried out over a period of some five days

during which the line was closed to rail traffic. The cost of the remedial works to Network Rail was £166,661.70, which is accepted as being reasonable and due to Network Rail from Conarken.

8. It is also accepted that Network Rail has paid or allowed to the various TOCs affected by these two incidents the sums of £1,017,144.66 and £127,070.62 for the adverse financial impact in relation to the Bathley Lane and Howden Bridge incidents. These sums were calculated by reference to the delays to the various railway services caused by each incident. I saw and read what was in effect unchallenged evidence as to how the delay attributed to the two incidents was assessed and there was no issue with regard to Network Rail's evidence as to how much delay was caused by the incidents themselves and the need to repair the cable and extricate the vehicles and repair the bridge respectively.

The Issues

9. Although there was until the third day of the trial a mitigation issue relating to the reasonableness of the remedial works done at Howden Bridge, the only outstanding, but by far the most important, issue relates to the recoverability as damages of the adverse financial impact payments made or allowed to the TOCs following the two incidents. This involves a detailed consideration of the scope of the duty of care in tort owed by drivers of vehicles in the circumstances of these two cases, causation, foreseeability and remoteness. Network Rail also in the alternative put their claims against the two Defendants in nuisance and trespass. The outstanding issues have been agreed by the parties as follows:

> "6. Are the Claimant's Schedule 8 losses recoverable, as being directly consequent on physical damage or do they represent pure economic loss?
>
> 7. Are the Claimant's Schedule 8 losses not reasonably foreseeable, or alternatively too remote as falling outside the scope of any duty owed by the Defendants' drivers to the Claimant in tort?
>
> 8. Do the incidents sound not only in negligence but also in trespass and/or nuisance and, if so, is the measure of damages recoverable by the Claimant any different from the negligence measure?"

It was, at one stage, argued that payments made to the TOCs by Network Rail in relation to the incidents might be construed as "penalties" but that argument has been abandoned by the Defendants. There also remain issues relating to interest on any damages to be awarded to Network Rail.

10. Much of the argument between the parties has revolved around the nature of the payments made or allowed by Network Rail to the TOCs in relation to the delays caused by the incidents and the related remedial works. It is said by the Defendants that the payments reflect possible future loss of custom, incentives, policy driven initiatives and the like in consequence of which it can not be the case that either the payments were as such caused by the incidents or, even if they were, they fall into categories which can not be recovered in law.

The Statutory Background

11. It was the Railways Act 1993 (since amended) which privatised the railways, albeit that the changeover from nationalised to privatised status took several years to achieve. Section 1 required the relevant Secretary of State to appoint the "Rail Regulator" and the "Franchising Director". Section 4 set out in the general duties of the Secretary of State and the Rail Regulator:

> "(1) The Secretary of State and the Regulator shall each have a duty to exercise the functions assigned or transferred to him under or by virtue of this Part in the manner which he considers best calculated—
>
> (a) to protect the interests of users of railway services;
>
> (b) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that he considers economically practicable;
>
> (c) to promote efficiency and economy on the part of persons providing railway services;
>
> (d) to promote competition in the provision of railway services;
>
> (e) to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;
>
> (f) to impose on the operators of railway services the minimum restrictions which are consistent with the performance of his functions under this Part;
>
> (g) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance."

12. The statute set up arrangements whereby TAAs were to be entered into between the TOCs and what was to become Railtrack and later Network Rail. These TAAs were to be subject to the approval of the Rail Regulator who was clearly to have input into what went into them; he also had a power to review and modify TAAs. These periodic reviews in practice took place every five years. Provision was also made for the Franchising Director to be responsible for negotiating and securing Franchise Agreements with TOCs.

The Contractual Framework

13. The Franchise Agreements not only licensed the TOCs in effect to operate. They also provided for a system of incentives or possibly disincentives passing between the Franchising Director and the particular TOC. These incentives could relate at least in part to the general profitability or un-profitability of the particular railway lines to which the franchise in question related and also to the competence and punctuality with which the railway services were operated. It has not been thought necessary for the Court to be provided with a typical franchise agreement and, indeed, Network Rail is not a party to such agreements.

14. However, a typical TAA has been provided, namely that between Network Rail and GNER in relation to the East Coast Main Line. This agreement was originally dated 1 April 1995 but, by the time of the incidents in question, there had been 31 "iterations"

and the 31st Supplemental Agreement, produced to the Court, incorporated all changes up to 13 February 2002. The Preamble refers to Railtrack being the owner of the Network and to Railtrack's agreement to grant to the Train Operator (GNER in this instance) permission to use certain track comprised in the Network. Clause 1 was the Interpretation clause. "Permission to use" was, except where the contrary was indicated, to be construed as meaning permission:

> "1.2.1 to use the track comprised in the Routes…for the provision of the Services using the Specified Equipment;
>
> 1.2.2 to make Ancillary Movements…
>
> and to the extent reasonably necessary to give a full effect to the permissions in Clauses 1.2.1, 1.2.2 and 1.2.3 subject to Clause 1.3:
>
> 1.2.4 for the Train Operator and its Associates to enter on that part of the Network comprising the Routes, with or without vehicles; and
>
> 1.2.5 for the Train Operator and its Associates to bring things onto that part of the Network comprising the Routes and keep them there…"

By Clause 3, Railtrack granted the Train Operator permission to use the Routes.

15. Clause 6 dealt with the primary obligations of the parties:

> "6.1 Operation and Maintenance of Trains
>
> 6.1.1 The Train Operator shall ensure that the Specified Equipment is maintained and operated to a standard which will permit provision of the Services in accordance with the Working Timetable…
>
> 6.2 Track Charges
>
> Each of the parties shall perform its obligations set out in Schedule 7.
>
> 6.3 Operation and Maintenance of the Network
>
> 6.3.1 Railtrack shall ensure that adequate and suitably qualified personnel are engaged in the operation and maintenance of that part of the Network comprising the Routes.
>
> 6.3.2 Railtrack shall ensure that the Network is maintained and operated to a standard which shall permit the provision of the Services using the Specified Equipment in accordance with the Working Timetable and the making of Ancillary Movements…
>
> 6.6 Possessions
>
> Each of the parties shall perform its obligations set out in Schedule 4"

16. Clause 7 required each of the parties to "perform its obligations set out in Schedule 8". I will return later in this judgement to Schedule 8 which is entitled "Performance Regime".

17. Clause 8 is headed "Indemnities and Liability for Performance". Clause 8.1 amongst other things imposed on the Train Operator an obligation to indemnify Railtrack against the consequences "of any damage to the Network arising from the Train Operator's negligence or failure to comply with its obligations under this Agreement." Clause 8.2 contained a corresponding indemnity by Railtrack through the Train Operator against the results of damage to the Specified Equipment "arising directly from Railtrack's negligence or failure to comply with its obligations under this Agreement." Clauses 8.3 and 8.5 are of importance:

> "8.3 Liability for Late Trains
>
> Save as provided in Schedule 4 and Schedule 8, the parties shall not be entitled as between themselves to any compensation in respect of any damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses arising from cancellations, interruptions or delays to trains.
>
> 8.5 Exclusion of Claims for Consequential Loss
>
> Neither party to this Agreement may recover from the other party any loss of revenue (including fare revenue, subsidy, access charges, Track Charges and incentive payments) or other consequential loss in connection with the subject matter of this Agreement caused to it by the other party, save to the extent otherwise provided in this Agreement or any other agreement between them."

18. Clause 15 addressed payments. The accounting "Period" was 28 days. Provision is made for the payment by the TOCs of various Charges including the Fixed Charge. I was told that at least a number of TOCs pay to Network Rail hundreds of millions of pounds a year. This income is no doubt needed to run, maintain and improve the rail track systems throughout the country.

19. Schedule 4 provides for compensation for what are called "Possessions", whereby, when Network Rail has to take certain types of Possession of parts of the track (for example "Timetabled" or "Major Possessions outside the Possessions Allowance"), it pays compensation to the TOCs; for other types of Possession, Network Rail does not have to pay compensation (for example, "Free Major Possession or Planned Interim Possession"). This is referred to in Clause 2. Various formulae are provided to work out what compensation is available, for instance for Timetabled and Major Possessions in Clauses 3 and 4 where a key constituent element is the time over which the relevant Possession is taken by Network Rail. Schedule 4 provides, sensibly, for Network Rail in effect to do planned maintenance and improvement works, amongst other things.

20. Schedule 7 provides for Railtrack to make and the Train Operator to pay Track Charges in accordance with various formulae. As is apparent from Part 2 of this Schedule, the Track Charges comprise the "Fixed Track", "Variable Track Usage" and

"Traction Electricity" Charges, which are subject to adjustment amongst other things for price increases in the Retail Price or similar Index. Part 5 permits Railtrack to make and requires the TOCs to pay, in addition to the Track Charges, certain "Additional Permitted Charges" which include at Clause 2(e) "such amounts payable to Railtrack as are specified in, or calculated in accordance with the provisions of, Schedule 8 to this Agreement". Part 8 of Schedule 7 refers to a review of the level of Track Charges and of Additional Permitted Charges to be carried out by the Rail Regulator. This is of some relevance as the Rail Regulator did review matters relating to charges and revised charges were brought in following his review in 2002.

21. It is in Schedule 8 that one finds the mechanism by which the charges which Network Rail has had to pay the TOCs in this case in relation to the disruption which occurred to the railway services as a result of the two incidents in question were assessed. Schedule 8 deals with delays to the train services which are the fault or contractual risk or responsibility of both Network Rail and the TOCs. The basis of assessment revolves around the "Minutes Late" and "Minutes Delay" measured (in the GNER TAA) by reference to various Monitoring Points at Edinburgh, Glasgow Central, Newcastle, Doncaster, York, Peterborough and London King's Cross. Clauses 2 and 3 of Schedule 8 identify how the Minutes Late and Delay are to be calculated. Any delay under three minutes is disregarded (see Clause 3(c)(i)). Provision was made by Clause 4 for how Performance Information was to be recorded and by Clause 5 as to how responsibility for Minutes Delay was to be determined. Clause 6 provided for the allocation of responsibility for the delay either to Network Rail or to the TOCs.

22. Clauses 7 and 8 of Schedule 8 in effect provide formulae to determine how "Minutes Late" should be allocated to Network Rail and to the TOCs respectively. Nothing turns in this case on the allocation. Based on that allocation mechanism, Clause 9 addresses what is called the "Network Rail Performance Sum (RPS)" for each 28 day period. The RPS is in effect what Network Rail has to pay or allow to the TOCs or vice versa for delay caused by factors for which it or the TOC is responsible as the case may be. The formula is not an uncomplicated one but it is substantially dependent upon the Minutes Late allocated to Network Rail under the allocation provisions. There is a factor brought into the calculation which is called a Busyness Factor which takes into account how busy the particular railway line is; this probably explains why the Howden Bridge payment was substantially less than the Bathley Lane payment although the latter involved only seven or eight hours disruption to the line. Where the RPS was less than zero, Clause 9.2 provided that Network Rail should pay it to the TOC but where the RPS was greater than zero, the Train Operator was to pay it to Network Rail.

23. To produce a financial result under Clause 9 of Schedule 8, one has to apply the Network Rail "Payment Rate" in Appendix 1 to Schedule 8 which totals £18,925.89. That Payment Rate is divided into a portion (£16,401.77) for the "MRE" (Marginal Revenue Effect) and the "Societal Rate". The MRE is the estimated effect on the TOC's revenue of one minute of average lateness whilst the Societal Rate represents a payment rate per minute of average lateness in the context of the franchise performance regime between the TOC and the franchising authority. It should be pointed out that after 1 April 2004 (after the two incidents in this case) the Societal Rate was removed and no longer applied as such. Clause 13 provided for Retail Price Index adjustments year on year to the Payment Rate.

24. Clause 12.1 states:

> "(a) Subject to paragraph 6.3 and 12.2, in respect of any and all Performance Sums for which Network Rail and the Train Operator are liable in any period, the aggregate liabilities of Network Rail and the Train Operator shall be set off against each other. The balance shall be payable by Network Rail or the Train Operator, as the case may be, within 35 days after the end of the Period to which the payment relates.
>
> (b) Subject to paragraph 6.3 and 12.2, and save as otherwise provided, all other sums payable under this Schedule 8 shall be paid within 35 days after the end of the Period in which such payment relates."

The Evidence

25. The evidence is both documentary and witness led. The principal relevant witness was Mr Angus who is currently the Analysis and Forecasting Manager at Network Rail. He is highly qualified both academically and by the experience that he has had working initially for British Rail between 1991 and 1996, including work on the establishment of performance regimes in preparation for the privatisation of British Rail, and from 1996 to 2004 with Price Waterhouse Coopers when he advised Railtrack and later Network Rail on the performance regimes and aspects of the Periodic Review carried out by the ORR. He gave his evidence in a helpful and credible way.

26. His evidence, so far as it dealt with live issues, was concerned with the purpose, principles and history of the performance regimes, and a detailed explanation of the calculation of the payment rates in Schedule 8 together with a description of the review of the performance regimes in the Periodic Review carried out by the Rail Regulator starting in late 1999 with a consultation document. This latter topic was relevant because the product of the Periodic Review was incorporated in Schedule 8 to the TAAs.

27. He gave evidence about the Passenger Demand Forecasting Handbook ("PDFH") used by train operators, government, Network Rail and the ORR. The PDFH, updated from time to time, is and has been the rail industry's guide to forecasting demand for passenger services and considers the research available into how rail demand is affected by various factors, including train punctuality.

28. The main financial consequence to TOCs of poor performance of train services is a loss of custom and fares revenue. It is generally accepted that, when an incident occurs which causes delay or cancellation to trains, TOCs suffer relatively little loss of revenue on the day concerned because most passengers have bought their tickets in advance of the day of travel (such as season tickets, reserved tickets and cheaper fares booked in advance). Mr Angus said that most of the revenue loss from poor performance is not suffered on the day in question; it is suffered in the future as passengers affected by delays or cancellations (or indeed others who have heard about the delays and cancellations) are less likely to travel by rail in the future.

29. The other important financial consequence to most TOCs of poor performance was at the time of these incidents that payment would be made to the franchising authority

arising from failures to achieve targets under the franchise performance regime in some of the Franchise Agreements.

30. Of course, many of the causes of poor performance are not within an individual TOC's control. For instance, a points failure will usually be the responsibility of Network Rail; again, another TOC's delays on or affecting the railway line in question will be the responsibility of the other TOC. As Network Rail contract through the TAAs with all the TOCs, it is from Network Rail that an "innocent" TOC will seek redress where the cause of the poor performance is either Network Rail or another TOC. In the latter case, in effect Network Rail can pass on the financial consequences of the poor performance to the responsible TOC. Essentially the broad effect of Schedule 8 in practice is that TOCs are compensated for the financial consequences of poor performance for reasons outside their control but are financially responsible to Network Rail for their own poor performance.

31. Mr Angus gave evidence about the principles of Schedule 8 which, although no objection was taken, perhaps impinge into an area of legal interpretation of Schedule 8. However he went on to describe the Performance Regime with regard to the franchised TOCs.

32. Mr Angus considered in some detail how the MRE and the Societal Rate operated in practice. In relation to the MRE, he explained that it was effectively a best estimate or assessment of the impact of delay on the revenue of the TOC and in practice Network Rail. There had been considerable research on the impact of delays on rail passengers. Thus, a delay of a few minutes on a single journey, unsurprisingly, has less impact than a delay of 30 to 60 minutes. Based on research, passengers prefer regular delays in effect to be scheduled into the timetables. There was some cross-examination about the reliability of the various research methods (revealed preference, stated preference or stated intentions methods) but ultimately the product of the approach and formulae within Schedule 8 clearly involves a reasonable assessment approach as to what the losses relating to delay are. The process of calculating MRE involves two stages, the first being the estimation of the effect on revenue of one minute added to the timetabled journey time of the relevant rail services and, secondly, the multiplication of this by the appropriate "delay multiplier". This delay multiplier involves the establishment of a factor for how many times worse for passengers' lateness, compared to an equivalent amount of timetabled journey time, is. The effect of timetabled journey time on demand has been well researched and is usually expressed as "a 1% change in journey time leads to a X% change in demand, and a typical value of X is more than 0 so that a 1% increase in timetabled journey time leads to a 0.9% decrease in demand and therefore revenue on the relevant services". In practice the industry uses a concept called Generalised Journey Time rather than using the journey time between two stations; this allows for not only the journey time but also the frequency of services and any need to change trains on a given journey.

33. He accepted that, although the MRE was unlikely to be perfect, it was the best available estimate of the effect of performance on passenger demand. He went on to consider the accuracy or reliability of the MRE in relation to the specific incident and explained, logically, that passengers are different. He described the "tipping point" at which an individual passenger's travelling behaviour begins to change compared with what it would have been if there had been no incident. One passenger might give up travelling on the railways as the result of one incident whilst, for another more

hardened traveller, it might take 10 incidents spread over six months or a year. He said that the widespread belief in the rail industry was that severe incidents caused disproportionately more loss. Thus a single train which is 60 minutes late will cause significantly more loss of future revenue than 30 trains each being two minutes late although the total lateness is overall the same. Schedule 8, he says with justification, adopts the assumption that the loss of demand is simply proportional to the severity of the incident, simply because it is related to the number of minutes late.

34. Mr Angus also considered how the performance regimes were reviewed in the Periodic Review started in 2000 by the Rail Regulator. There was a "re- calibration" of the MRE and Societal Rates which had been done by KPMG on behalf of the Rail Regulator and these were uplifted to reflect Retail Price Index inflation.

35. He concluded that the MRE component of the Schedule 8 payments was designed to compensate the TOC for loss of revenue although only a small proportion of this would relate to a loss of revenue on the day of the incident and most would be expected to occur in the future. He said that "the MRE reflects loss of revenue, loss of fares revenue gain by passengers to the operator". He also accepted that this loss of revenue is to a large extent predicated upon the perception of passengers in effect of the reliability of the rail service as affected by given and in particular the longer delays over and above the timetabled times. It is accepted even by the Defendants that the MRE represents a genuine attempt based upon the findings of market research and economic forecasting methods to place a monetary value upon what is believed to be the commercial damage that may have been suffered by either or both the TOCs and Network Rail following delays to the rail service. The Societal Rate compensated TOCs for what they would have to pay the franchising authority; and there is no doubt that it relates to the TOCs' liability to the franchising authority (now the Department for Transport). This reflects incentives and disincentives imposed for policy and possibly political reasons.

36. There has been a factual debate in the case as to whether the MRE itself contains what Leading Counsel for the Defendants has called a "societal element", which in reality is said to be an additional incentive payment within the MRE figures or calculations. I am simply not satisfied on the evidence, if it is really a matter of evidence at all, that there is such a "societal element" in the MRE. In his Final Conclusions dated 19 October 2000, the Rail Regulator made it clear that the performance points in Schedule 8 (reflecting the average lateness of monitoring points) should be set at the level of expected performance; this does not suggest some incentivisation over and above expected levels of performance (see Paragraph 10.5). KPMG in their Reports on the "re-calibration of rail operational performance regime" and dated 12 July and 30 October 2000 made it clear that:

> "One of the elements of the payment between Railtrack and the TOC is the Marginal Revenue Effect of unscheduled delay on the farebox of the operator. In this way Railtrack compensates the operator for passenger revenue that the TOC is deemed to have lost from unreliability caused by Railtrack and is rewarded by the TOC for any improvement in the farebox which is deemed to arise as a result of its improved root reliability….
>
> MREs should reflect the amount of revenue generated/lost as a result of a reduction/increase in minutes lateness on that service group. The MRE will

> therefore be affected by the type of traveller and the way in which he/she responds to changes in generalised journey time and the way in which he/she responds to unscheduled delay as opposed to additional planned journey time, the overall length of the journey and the yield to the TOC of that passenger journey." (Paragraph 2.5 12 July 2000)

37. It is clear from documents generated during the Rail Regulator's Periodic Review period that detailed consideration was given to improving performance through a combination of financial incentives and enforceable license obligation although the need to consider carefully the interaction between contractual incentives and potential monetary penalties arising from failures to meet enforceable targets was recognised (see example Paragraph 1.29 and 1.30 of the Rail Regulator's Consultation Document dated October 1999). The Rail Regulator indicated that he intended to introduce stronger incentives for improved performance through an increase in the incentive rates which would reflect changes in both the marginal revenue effect and the societal element (see for instance Paragraph 7.15 in his Provisional Conclusions on the Incentive Framework of April 2000).

38. I will return to the conclusions which can be drawn from this evidence later in this judgement.

The Law in relation to Negligence

39. It is axiomatic that a party suing a defendant for negligence must show that it was owed a duty of care by the defendant, that the defendant breached the duty and that the breach caused the injury, loss or damage complained of. However, the law also imposes some restrictions firstly in relation to the scope of the duty of care owed in any given set of circumstances and secondly in relation to the type of injury, loss or damage which can be claimed for. In **South Australia Asset Management Corporation v York Montague Ltd** [1996] UKHL 10, Lord Hoffmann stated:

> "14. A duty of care such as the valuer owes does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605. The auditors' failure to use reasonable care in auditing the company's statutory accounts was a breach of their duty of care. But they were not liable to an outside take-over bidder because the duty was not owed to him. Nor were they liable to shareholders who had bought more shares in reliance on the accounts because, although they were owed a duty of care, it was in their capacity as members of the company and not in the capacity (which they shared with everyone else) of potential buyers of its shares. Accordingly, the duty which they were owed was not in respect of loss which they might suffer by buying its shares. As Lord Bridge of Harwich said, at p. 627:
>
> > "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."

> In the present case, there is no dispute that the duty was owed to the lenders. The real question in this case is the kind of loss in respect of which the duty was owed.
>
> 15. How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: Gorris v. Scott (1874) L.R. 9 Ex. 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. Most of the judgments in the Caparo case are occupied in examining the Companies Act 1985 to ascertain the purpose of the auditor's duty to take care that the statutory accounts comply with the Act. In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking."

40. In broad terms, the law relating to negligence does not have any particular conceptual difficulties with personal injuries or physical damage to property cases. It is in the area of economic loss, the expression "pure" economic loss sometimes being used, that over the years there have been differences of views at all judicial levels. Of course, in many injury and damage negligence cases, claimants recover, in addition to compensation for injuries or to the cost of physically repairing damaged property, some economic losses. Thus, in a personal injuries case, the successful claimant will recover earnings lost or to be lost during the period in which he or she demonstrates that he or she was affected or to be affected by the injuries; that can include the earnings lost whilst spending time in hospital or whilst recuperating and also earnings that will be lost in the future as the provable consequence of the injuries. In a car damage case, the claimant can recover earnings lost (if for instance he or she is a taxi driver) whilst the car is being repaired. In a real property damage case, loss of rent can be claimed whilst the property is being repaired. All these can be described, in one sense, as economic losses, which are, unexceptionably, recoverable.

41. One needs therefore to revert to the approach adumbrated in the **South Australia** case and analyse what, in all the circumstances, is the kind of damage from which the Defendants in this case must take care to save Network Rail harmless. Whilst in principle, and indeed in fact in this case, there can be no doubt that the costs of and occasioned by the repairs to the damaged cable and bridge are recoverable, the issue dividing the parties is whether the sums paid or allowed to the TOCs in relation to the delays to the rail services are within the scope of the duty or not.

42. In a trio of Court of Appeal cases, consideration was given to the limitations on recovery of what is often termed "consequential" losses, where there has been some physical damage. In **SCM (United Kingdom) Ltd v WJ Whittall and Son Ltd** [1971] 1 QB 337, the defendant building contractors negligently damaged an electric

cable by a public road which caused a power failure in the plaintiff's premises which in turn resulted in damage to materials and machines and the consequent loss of production. The Court of Appeal held in principle that the defendant owed the plaintiff a duty of care and was liable for the material damage and the consequent loss of production. Lord Denning MR said:

> "…It is well settled that when a defendant by his negligence causes *physical* damage to the person or property of the plaintiff, in such circumstances that the plaintiff is entitled to compensation for the physical damage, then he can claim, in addition, for economic loss consequent on it. Thus a plaintiff who suffers personal injuries recovers his loss of earnings; and a shipowner, whose ship is sunk or damaged, recovers for his loss of freight. If and in so far as [Counsel for the plaintiff] is entitled to claim for the material damage, then he can claim for the loss of production which was truly consequential on the material damage…" (pages 341G-342A)
>
> [Counsel for the Defendant] said that *British Celanese Ltd v AH Hunt (Capacitors) Ltd* [1969] 1 WLR 959 was wrongly decided. In that case the defendants collected on their premises long strips of metal foil. They negligently failed to keep them safe, and they were carried on the wind on to an electricity sub station owned by the electricity board, thus causing a power failure over a wide area. The defendants ought reasonably to have foreseen this, because it had happened before and they had been warned about it. The plaintiffs were the owners of a nearby factory who suffered physical damage to their materials by the cutting off of the current. They were injured *indirectly* and not *directly*. The *indirect* injury could reasonably be foreseen. Lawton J. held that the defendants were under a duty of care to the factory owners and were liable for the material damage and the loss of profit consequent thereon. I think that Lawton J. was right. I cannot accept [Counsel's] proposition. The distinction between "direct" and "indirect" has been attempted before, but it has proved illusory…" (page 343A-C)
>
> I put on one side, therefore, the distinction between direct and indirect, and ask myself simply: Did the contractors owe a duty of care to the factory owners? I think it plain that they did. They were working near an electric cable which they knew supplied current to all the factory owners in the neighbourhood. They knew that, if they damaged the cable, the current would be cut off and damage would be suffered to the factory owners. Those simple facts put them under a duty to take care not to injure the cable: and this was a duty which they owed to all the factory owners in the vicinity. It comes straight within the principle laid down by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580. Applying that case, I hold that the contractors are liable for all the material damage done to the factory owners and any loss of profit consequent thereon…" (page 343 E-G)
>
> I must not be taken, however as saying that economic loss is always too remote. There are some exceptional cases when it is the immediate consequence of the negligence and is recoverable accordingly…" (page 345H)

43. Lord Justice Winn (at Page 348G) posed the question raised by the appeal as: "What kind of "harm" must be contemplated, or properly be assumed to have been contemplated, before a duty to take reasonable care to avoid it can be said, as a matter

of law, to have arisen?" He talked at Page 346H of the economic loss being recoverable in the context of it being "purely monetary detriment, to any such loss as was truly consequential upon the material damage to machinery and other articles of property…". Lord Justice Buckley applied his mind to "economic loss directly consequential upon" damage to the physical property of the plaintiff (page 354E).

44. The case of **Spartan Steel & Alloy Ltd v Martin & Co (Contractors) Ltd** [1973] 1 QB 27 was another case involving negligent damage to an electric mains cable by contractors, which interrupted a "melt" of metal at the plaintiff's nearby factory. There were three claims, the first being that, because the plaintiff had to pour molten metal out of its furnace to prevent the metal solidifying and damaging the furnace, the metal depreciated in value by £368; secondly they lost a profit from the sale of the metal from that melt of £400. Thirdly, they claimed loss of profit from four further melts which they could have completed during the power cut. The judge at first instance allowed all three claims. The appeal was allowed, by a majority. Liability for the first head of loss was admitted. Lord Denning MR indicated that the contractors "did not greatly dispute that they are also liable for the £400 loss of profit on the first melt, because that was truly consequential on the physical damage and thus covered by [the SCM case]" (page 34I). He went on to say:

> "At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of *duty*, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the *damages* recoverable-saying that they are, or are not, too remote-they do it as a matter of policy so as to limit the liability of the defendant" (page 36C)

> "The more I think about these cases, the more difficult I find to put each into its proper pigeonhole. Sometimes I say: "There was no duty." In others I say: "The damage was too remote." So much so that I think the time has come to discard those tests which proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable, or not." (page 37 C-D)

He then went on anything to look at various policy considerations which he considered applied the fifth of which was:

> "…that the law provides for deserving cases. If the defendant is guilty of negligence which cuts off the electricity supply and causes physical damage to personal property, that physical damage can be recovered…and also any economic loss truly consequential on the material damage …Such cases will be comparatively few they will be readily capable of proof and will be easily checked. They should be and are admitted." (page 39B-D)

45. Lord Justice Edmund Davis disagreed but Lord Justice Lawton agreed with the Master of the Rolls. He agreed (at page 49A-B) that logic could not explain the differences between what damage can be recovered in one type of case and what in another cannot and that the differences have arisen by reason of policy.

46. The case of **Muirhead v Industrial Tanks Specialities** [1985] QB 507 was the well known case involving lobsters which were killed by the negligence of defendants in

supplying electric motors for lobster tanks which cut out because they were of a unsuitable voltage. It was relied upon by both parties. The heads of loss were: (a) cost of pumps, (b) additional labour in boiling and refrigerating salvaged dead lobsters, (c) electrical engineers attending pumps, (d) additional working time and labour for attendance upon pumps to check, correct tripping out, etc (e) loss of interest on capital deployed and/or loss of availability of working capital, (f) loss of profit on intended sales and (g) loss of lobsters. The judge at first instance had found the defendant in question liable for all these heads of loss, which he had classified as economic loss, basing much of what he said on the House of Lords case of **Junior Books Ltd v Veitchi Co.Ltd.** (1983) 1 A.C. 520. Much of the judgments in the **Muirhead** case is concerned with distinguishing it from **Junior Books**. I do not find them helpful generally in this case because it is concerned with issues such as proximity and voluntary assumption of responsibility. Lord Justice Robert Goff however said in dealing with a ground of cross appeal relating to the recovery of loss associated with the death of the lobsters:

> "I therefore conclude that the appellants should be held liable to the respondent, not in respect of the whole economic loss suffered by him, but only in respect of the physical damage caused to his stock of lobsters, and of course any financial loss suffered by the respondent in consequence of that physical damage."

47. There are a number of other authorities relied upon in addition to those set out above which establish that in negligence a claimant can recover not only for the physical damage or injury caused by the defendant's carelessness but also for the economic loss consequential upon it. There was some discussion about what "consequential" meant and in some dicta it is qualified by various words such as "truly", "immediate", "directly" and "flowing purely and simply from"; in a number of dicta, it is not qualified at all. I conclude that, to be recoverable in cases involving physical damage, economic loss can be recovered if it is demonstrably consequential upon the physical damage. However, an essential quality of the economic loss is that it must be closely associated with the physical damage and the work done to repair or replace the damaged property.

48. The case of **Ehmler and another v Hall** [1993] 1 EGLR 137 involved a negligent defendant crashing his car into a car showroom owned by the plaintiffs, which had been let. The plaintiffs retained the insurance risk against damage from impact by road vehicles and the tenant was relieved (by Clause 6(3)) of his obligation to pay the rent so long as the premises were unfit for use by reason of an insured risk. The plaintiffs were held entitled to recover the loss of rent. Lord Justice Nolan (as he then was) said at Page 138M:

> "The loss of rent arising out of the damage to the building was consequential upon the damage: it was not pure economic loss."

He went on to deal with another argument:

> "Finally, [Counsel] suggested that, although the defendant could reasonably be expected to foresee that the showroom was being put to commercial use and that accordingly he might have to compensate the tenant for loss of profits whose computation would include any rent which the tenant might have to pay during the period of repair, the defendant could not have been expected to foresee the

effects of clause 6(3), this being an unusual clause in a lease. Therefore, he said, the loss to the plaintiffs lay beyond the limits of reasonable foreseeability and was too remote to be recovered. In my judgement however, this suggestion falls foul of the principal stated by Lord Reid in *Hughes v Lord Advocate* [1963] AC 837, at p845, that a negligent defendant "can only escape liability if the damage can be regarded as differing in kind from what was foreseeable". Thus, it is clear that the defendant could not be expected to foresee the precise terms of the lease, but he could reasonably be expected to foresee that his negligence would cause physical damage and consequential financial loss to the owner or tenant of the premises. That was enough, in my judgement, to make him liable in damages to which ever of those parties, under the contractual arrangements between them, in fact suffered from the particular loss to which damages are claimed."

49. There has been no English case, and certainly none cited before the Court, about the recovery of economic loss in connection with damage negligently caused to railway tracks. There is however a case in the New South Wales Court of Appeal, **Rail Corporation New South Wales v Fluor Australia Pty Ltd** [2009] NSWCA 344 which has some factual resonance with the current case. A passenger train owned by the State Rail Authority of New South Wales ("SRA") left the rails on a section of a line in Sydney that was owned by the appellant, Rail Corporation New South Wales ("RailCorp"), the accident being caused by faulty work carried out by Alpcross Pty Limited ("Alpcross"), on the track at the site of the derailment. Alpcross was a subcontractor engaged by Fluor Australia Pty Ltd ("Fluor"), which had in turn been engaged by RailCorp to do work on the track. As a result of the derailment, track and overhead lines owned by RailCorp were damaged, three carriages of the train owned by SRA were seriously damaged and some relatively minor injuries were suffered by a small number of passengers travelling on the train. The issues on the appeal related to the entitlement of RailCorp to recover from the respondents an amount of $5,207,299 paid by RailCorp to SRA in relation to the damage caused to SRA's train and to the injuries to its passengers. Macfarlan JA who gave the lead judgement said at Paragraph 129:

> "…the damage to the train and SRA passengers, the resulting claim by SRA on RailCorp and payment in respect of the claim by RailCorp to SRA, were consequent on damage to the track caused by the faulty work of Alpcross. Prior to that work being done, the relevant part of the track was in a state such that trains could safely pass over it. The work was not done because the track was defective but because it was desired that the GIJs be replaced. After the work was done however the track was unsafe for trains to travel over it. In physical terms, the track was…buckled and displaced laterally. These physical defects in the track were negligently caused by Alpcross which became, prior to the derailment, liable in tort for the cost of repair of the track. Before the damage was repaired (or indeed detected) that damage to the rail caused the train to derail, with consequent economic loss being suffered by RailCorp. RailCorp's loss constituted by its payment to SRA was not, therefore, "pure" economic loss, but was loss consequent upon negligent damage to RailCorp's own property. As a result, ordinary principles of remoteness of damage are applicable to determine its recoverability from Alpcross and the principles as to recovery of "pure" economic loss (see [126] above) are inapplicable. It has not been contended that in these circumstances the loss is not recoverable."

The facts are not wholly on all fours with the present case because the sum paid by Railcorp to the SRA was for material damage to the derailed train and injuries to passengers.

50. It is rightly common ground that simply because otherwise recoverable consequential loss (that is consequential upon the culpable physical damage) is paid through the medium of a contract between the claimant and a third party is no bar to recovery (see for instance **Messer UK Ltd v Thomas Hardy Packaging Ltd** [2002] EWCA Civ 549 per Lord Justice Mance at Paragraphs 31-2).

51. In principle, this type of consequential loss can include a loss of use or loss of profit. In **Shell UK Ltd v Total UK Ltd** [2010] EWCA Civ 180, the Court was concerned with explosion and fires caused at the Buncefield Oil Storage depot caused by negligence. The appeal related in one major respect to the extent to which loss of profits from the destruction of or damage to the tanks or pipelines was recoverable by Shell. Part of this involved an argument that only a legal owner or someone with an immediate right to possession had the right to claim damages for economic loss the consequence of damage to property. In the Court's judgement, the following appears:

> "137. These authorities [Obestain Inc v National Mineral Development Corporation (The Sanix Ace) [1987] 1 Lloyds Rep 465 and HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd [2006] 1 WLR 643] do indeed show that a legal owner can usually recover the value of damaged or lost goods, but they do not assist on the question whether a beneficial owner of personal or real property can sue for damages for loss of use. It is clear that the legal owner can do so provided the loss of use is reasonably foreseeable; it is clear that the beneficial owner can sue if he joins the legal owner. The fact that the loss of use has accrued to the beneficial owner should make no difference to recoverability once the legal owner has been made a party to the suit.
>
> We…would be prepared to hold that a duty of care is owed to a beneficial owner of property (just as much as to a legal owner of property) by a defendant, such as Total, who can reasonably foresee that his negligent actions will damage that property. If, therefore, such property is, in breach of duty, damaged by the defendant, that defendant will be liable not merely for the physical loss of that property but also for the foreseeable consequences of that loss, such as the extra expenditure to which the beneficial owner is put or the loss of profit which he incurs."

52. In the case of **Metrolink Victoria Pty Ltd v Inglis** [2009] VSCA 227, the Court of Appeal in Victoria in Australia was concerned with a collision between a tram owned by Metrolink and a motor vehicle driven by Mr Inglis. Liability for negligence was admitted as was the cost of repairs. As a result of the collision the passage of the damaged tram was blocked until the motor vehicle was removed. In consequence of this, the operation of a number of trams also operated by Metrolink was delayed. The only issue related to damages claimed to arise from the loss which Metrolink alleged it had suffered pursuant to a franchise agreement with the State of Victoria. The particulars of damage pleaded were in these terms:

> > "(i) The collision caused the plaintiff's train services to be significantly delayed.

> (ii) Pursuant to its Franchise Agreement with the Director of Public Transport, the plaintiff is required to pay Operational Performance Penalties when its services are delayed. A copy of the Franchise Agreement can be inspected at the office of the plaintiff's solicitors by appointment.
>
> (iii) As a result of the collision the plaintiff paid the Director of Public Transport $7,000.77 in Operational Performance Penalties…."

53. The majority was prepared to allow Metrolink to recover these losses. Redlich JA said:

> "94 Seeking to draw support from this decision, counsel for the appellant suggested that the category of 'loss of business income', is analogous to the kind of loss in this case, namely 'loss of revenue' relating to the Franchise Agreement.
>
> 95 It is not always easy to discern the basis upon which the breadth of the relevant category is determined in the individual case. It does appear, however, that in the ordinary case a broad categorisation of the kind or genus of the loss will be appropriate…The adoption of a broad categorisation is consistent with the principle that it should not be necessary that the exact course of events which produced the injury was predictable or likely so long as the injury was foreseeable…
>
> 96 It is important to bear in mind that the appropriate categorisation of the loss in a given case will be, in essence, a question of policy. In a case which involves an uncommon kind of damage, it may be useful to narrow the category of damage beyond simply 'economic loss' or 'physical injury', so as to require that the tribunal of fact be given the opportunity to consider its reasonable foreseeability.
>
> 97 In the present case, the narrow category chosen by the learned Magistrate is not appropriate as the loss alleged to have been suffered by Metrolink is not that which is of an unusual kind. I observe that much has been made by the respondent before this Court, and before the judge below, of the complexity of the Franchise Agreement. In the modern world, however, complexity of contracts, and the provision of items such as key performance indicators and other performance targets, could hardly be said to be unusual.
>
> 98 There is nothing unusual about the expectation that Metrolink would receive remuneration for the operation of its part of the tram network or that it would lose revenue in the event that it could not operate a part of its service. There is no reason of policy that compels a different approach to the recovery of losses calculated by reference to targeted performance obligations which have not been met because of the inability to conduct the service, and losses arising from the same cause which are to be calculated under a different remuneration structure. That this remuneration might be reduced or increased depending upon the operator's ability to provide the service is unremarkable. That the mechanism by which remuneration for this service is determined

> might be complex, and be calculated according to a number of key performance indicators, is similarly neither unusual, nor is its complexity a reason to treat it differently from a more simple form of remuneration. For this very reason, the respondent was compelled to concede that it was reasonably foreseeable that fares would be lost as a consequence of interruption to the operation. For liability to be dependent upon foreseeability of 'a reduction in benefit' or the 'imposition of a penalty', is to lose sight of the fact that these are contractual mechanisms which are part of the manner in which the overall remuneration for the provision of the service is calculated. To require foresight of this is to require what was described in Hughes as foresight of 'the concatenation of the circumstances which caused the loss' or as in Cambridge Credits, as 'the precise manner of its occurrence'.
>
> 99 For these reasons I conclude that the learned Magistrate erred in defining too narrowly the kind or genus of the loss suffered by Metrolink. The appropriate categorisation was simply one which required foreseeability of 'revenue lost as a result of the inability to operate the tram service'…
>
> 103 I consider in the present case, that it is in no way 'far-fetched' that the collision of a car with a tram, causing an inability to operate trams on the network, might result in a loss of revenue. It is in fact highly likely, or at least a real risk, that the disruption of the provision of any service might result in a loss of revenue to the person who is responsible for the provision of that service."

Neave JA disagreed with Redlich JA. The third judge merely agreed with Redlich JA. I find myself substantially in agreement with Redlich JA's approach.

54. Thus it is that one can safely conclude that there is no reason in principle why loss of use, loss of profit or loss of revenue can not be recovered as damages for physical damage negligence, subject to causation being established and provided that it is demonstrably consequential upon the physical damage in question and closely associated with the physical damage.

55. It almost goes without saying that all losses recoverable in negligence must be of the kinds or types, which, judged objectively, would be reasonably foreseeable by a person in the position of the tortfeasor as the result of the negligence.

56. Additionally, concepts of reasonableness, justice and fairness, together with policy can assist in the determination of whether any, and if so what, duty of care is owed. Cases like **Caparo Industries plc v Dickman** [1990] UKHL 2 reveal that these concepts arise when a new tortious situation has arisen. Where, as here, this is a case involving physical damage to the claimant's property and precedent of authority has established that loss consequential upon that physical damage is recoverable, it is unnecessary to re-apply these concepts. Lord Justice Hobhouse in **Perrett v Collins** [1998] EWCA Civ 884 reviewed what Lord Steyn said in **Marc Rich v Bishop Rock** [1996] 1 AC 211:

> "He thus confirms an over-arching formula within which can, and he would say must, be found all cases of recognised duties of care. However he appears

> to recognise that for some categories of conduct, as for example where it creates a risk of harm (by which I take him to be referring to personal injury), "it is obvious that as a matter of common sense and justice a duty should be imposed". Furthermore, he (like Balcombe LJ in the Court of Appeal, [1994] 1 WLR at 1088-9) appears to be prepared to treat the three factors as interlinked. If this understanding is correct, and it ties in with what Lord Bridge said about attaching greater importance to the more traditional categorisation of established situations of liability (see above), no problem arises. The over-arching formula does not affect the outcome. Established categories, with or without the assistance of 'common sense and justice', provide the answer. The certainty provided by the previous authorities is not undermined. Indeed it would be surprising if Lord Steyn had, by his decision of what he described as a *novel* question relating to property or economic interests, intended to depart from or call into question established decisions and principles relating to personal injury. It is a truism to say that any case must be decided taking into account the circumstances of the case, but where those circumstances comply with established categories of liability, a defendant should not be allowed to seek to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be re-made for every case. Indeed, the previous authorities have by necessary implication held that it is fair, just and reasonable that the plaintiff should recover in the situations falling within the principles they have applied. Accordingly, if the present case is covered by the decisions in or the principles recognised by previous authorities - and it is - *Marc Rich* does not require us to depart from them; indeed, we remain bound to follow them."

57. Drawing all these threads together, the following is established in the context of the current case:

> (a) in negligence cases which involve physical damage to property owned by a claimant, loss of use, loss of profit or loss of revenue can be recovered as damages, subject to causation being established and provided that it is demonstrably consequential upon the physical damage in question and closely associated with the physical damage and the work done to repair or replace the damaged property.
>
> (b) Causation is established on the facts and the evidence.
>
> (c) The fact that the loss of use, profit or revenue arises because a contract between the claimant and a third party makes the claimant liable to pay or allow it to the third party does not stop it being recoverable.

Discussion on Negligence

58. There can be no doubt that the Schedule 8 sums paid or allowed to the TOCs arose as the direct result of the railway lines in question being closed as a result of the physical damage caused by the Defendants' respective negligence and by what is accepted by all parties as the necessary or reasonable time taken to repair and replace what was required to be remedied. There was some discussion about whether all that is required is a "but for" test of causation in these circumstances; reference was made to Lord

Nicholls' opinion in **Kuwait Airways Corp v Iraq Airways Co (Nos 4 and 5)** [2002] UKHL 19 in which he said about tort generally:

> "The first of these enquiries, widely undertaken as a simple 'but for' test, is predominantly a factual inquiry."

I do not consider it necessary in this case to address what may be a purely academic point because it is clear that, whilst all loss recoverable in law in tort cases would not have arisen "but for" the tort, not all loss which would not have happened "but for the tort" is recoverable in law. It is academic here for two reasons:

(a) There is a direct causal connection between the acts of negligence and the physical damage in both cases, the need to put right such damage and the time taken to put it right.

(b) There is thus a direct causal connection between the acts of negligence and the losses or sums which Network Rail paid out or allowed to the TOCs based as they were simply on the time during which the damage was, necessarily and reasonably being investigated, cleared and remedied. A higher test is established than the "but for" test.

59. One then needs to analyse what the scope of the duty of care was in this case. Given that this is a negligence case involving physical damage to a claimant's property, the scope of the duty is to exercise reasonable care and skill in and about driving the heavy motor vehicles concerned so as not to cause physical damage to the property of others on or by the highway. The scope must cover all those heads of loss and damage which are and have been accepted judicially in the past as recoverable; that includes the costs of and occasioned by reasonable and necessary repairs and the loss of profit, use or revenue demonstrably consequential on the damage and concomitant repair of the damaged property.

60. The Defendants have through their Counsel argued strenuously, and with no little skill, that, to determine whether the scope of any duty of care covers consequential losses and whether the sums paid or allowed to the TOCs were demonstrably or truly consequential upon the two sets of carelessness and physical damage, one must analyse and determine with precision what those sums represent. If, they argue, those sums represent categories of loss which are not consequential, they can not be recovered and are not within the scope of any duty of care.

61. I said earlier in this judgement that I would return to reach conclusions on the evidence, particularly that of Mr Angus and the documentary evidence. I can summarise those conclusions as follows:

(a) The bulk of the formula in Clause 9 of Schedule 8 of the TAA involves the determination of the delay for which Network Rail was responsible to the TOC in question in a given Period. The result is applied to the Payment Rate set out in Column E of Appendix 1.

(b) There is no evidence as such about how the MRE and Societal rates which make up the Payment Rate were themselves calculated.

(c) It is probable that the product of research and experience on a best assessment basis was put in to the calculation of the MRE rate so that some elements of the loss of fare revenue on the day or days when the railway lines in question were closed or had a restricted use were allowed for. It is probable that a larger element was for the loss of future revenue from passengers' future unwillingness to travel on particular lines affected by any incident which had disrupted travel times.

(d) There is no doubt that the Societal rate part of the Payment Rate was designed to compensate the TOC for what it would have to pay the Franchising Authority.

(e) Again, there is no doubt that the MRE and the Societal rates were in place in a broad sense to provide incentives or corresponding disincentives to Network Rail and to the TOCs to avoid or limit disruptions to the rail services. The better that Network Rail performed, the greater was the chance that the TOCs would pay them under the Performance Regime in Schedule 8; the better that the TOCs performed, the greater was the chance that Network Rail would pay them. Of course, as between Network Rail and the TOCs, Network Rail took the risk and responsibility under this Performance Regime for damage to its bridges caused by the negligence of drivers which in turn cause disruption to the rail services.

62. The issue arises however whether any of this really matters. I have formed a clear view that it does not, for the following reasons:

(a) One has to analyse what the loss to Network Rail actually is.

(b) On any proper analysis, the sums payable to the TOCs were payable for the loss of use or availability of the rail tracks in question. This was the price, contractually agreed between Network Rail and the TOCs, which was payable in circumstances amongst others in which the rail tracks could not be used by reason of the negligence of drivers who damaged bridges or electricity cables over those rail tracks. One of the main uses to which Network Rail put the rail tracks was to license the TOCs to operate them.

(c) It cannot be said, and indeed it has not been argued as such, that the sums payable to the TOCs pursuant to the TAAs represented a penalty or were unreasonable or did not represent anything other than a best assessment basis of the loss to the TOCs of the use of the rail tracks for the period in question. It is a material fact that the Rail Regulator approved and endorsed not only the TAAs but also during the review process the Payment Rates, and their constituent elements, the MRE and Societal rates. Obviously, if the sums payable to the TOCs under Schedule 8 were a penalty, unenforceable in law pursuant to such authorities as **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd** [1915] AC 847, the law would find an appropriate way to ensure that the Defendants were not liable for them; that way could be for example that the loss does not flow from the breach or that the scope of the duty of care does not extend to the avoidable payment of unenforceable penalties. Similar considerations would apply if the sums claimed were otherwise demonstrably unreasonable.

(d) The loss of use can also legitimately be considered as a loss of revenue because in reality, by having to pay or allow the licensee TOCs the Schedule 8

sums, Network Rail's revenue from the TOCs was being reduced by the exactly the same amount.

(e) A key factor in the calculation under Schedule 8 is the amount of rail track or train delay caused in these cases by the negligently caused damage. That delay is made of the times reasonably taken for initial assessment by the emergency services and Network Rail of the accidents and damage and for the necessary and reasonable associated remedial works. There are no mitigation arguments left in this case as to whether Network Rail acted anything other than reasonably in these regards.

(f) The Defendants' negligence (that is, their breaches of duty causing physical damage and the need for the concomitant remedial works) therefore directly caused the delays which directly led to Network Rail not being in a position to make available the rail tracks in question for the periods of the delays, the direct financial consequence of which was that Network Rail had to pay or allow their licensees the Schedule 8 sums.

(g) The fact that within the calculation of those allowances there may have been or were included sums which the TOCs could not have claimed in negligence as against these Defendants is immaterial because it is necessary to consider in this case the position of Network Rail which clearly did have the right to sue for negligence in respect of the physical damage to its property. The reality is that, under the law as it now stands and has stood for many years, these Defendants would never have been liable in negligence to the TOCs for those losses because no property of the TOCs was physically damaged. The losses would therefore never have been recoverable directly by the TOCs. If the Defendants' arguments are right, the one innocent party, Network Rail, cannot recover its very real losses incurred directly in consequence of the Defendants' carelessness.

(h) It is irrelevant to consider what for instance the old British Rail, that is the organisation that historically owned the rail track and ran the train services before privatisation, would have been able to sue for. One needs to look at the position of Network Rail which only owns the rail track. The United Kingdom is one of a number of countries in the world which has moved from a nationalised and unified railway system to a privatised one. It would be unfortunate, at least, if the law was not able effectively to give redress to reflect the changed state of affairs of ownership and responsibility in relation to the organisation which owns the track (and bridges over and under it and level crossings). The law can give such redress consistently with established principle.

(i) Where one has, as here, a duty of care the scope of which includes losses demonstrably consequential upon the physical damage, it must, objectively speaking, have been reasonably foreseeable by tortfeasors in the position of these defendants that, if they seriously damaged bridges over rail tracks or overhead electric cables providing electricity to the railways, the railway services could or would be disrupted for a period of time whilst remedial work was being done. Thus, a loss of use and of revenue was a reasonably foreseeable consequence of the negligence in this case. It is argued that objectively speaking the tortfeasors in this case could not reasonably have foreseen either that payments would be due to the TOCs for the loss of use or that the payments would include incentives.

However, this is not material in circumstances where a loss of use is reasonably foreseeable and the loss of use is readily quantifiable in money terms. It is not necessary for the precise loss or machinery by which the loss is ascertainable to be foreseen or foreseeable. In any event, it can hardly be said that a loss of use or indeed a loss of revenue was not objectively speaking reasonably foreseeable by tortfeasors in the position of these Defendants; as was said in the **Metrolink** case, there was nothing unusual about the facts that Network Rail would receive payment and revenue for providing the rail track for use by rail companies or that it would lose revenue if it did not provide the track. The fact that Schedule 8 provides a somewhat complex formula for determining the value or cost for the non-provision of the rail track is immaterial.

(j) There is nothing as a matter of policy which can readily be deployed to gainsay either a duty of care existing or the scope of that duty extending to compensation for the loss of use, particularly in circumstances in which previous cases establish an entitlement to loss demonstrably consequential upon the physical damage. The innocent party here is Network Rail; there is no suggestion for instance that it was contributorily negligent in causing or allowing this damage to occur, not that this would impact on the existence or scope of a duty of care. The fact that the consequential losses were, for the Bathley Lane and Howden Bridge incidents respectively, £1,021,957.93 and £127,070.62 should not give rise to a material policy consideration. It is argued that, because the Road Traffic Act 1988, Section 44, requires drivers to be insured in respect of third-party damage for £1,000,000, this should somehow be a reason for denying or limiting the duty of care in this case. There is no evidence as such, however, one way or the other, as to how many claims in excess of £1,000,000 arise as a result of similar damage or whether heavy goods vehicle drivers usually only carry the minimum statutory cover. I was told, albeit not as part of the evidence, that the average claim by Network Rail was considerably less than £1,000,000. It may of course turn out to be the case that insurers will in future offer higher cover as against this particular risk.

(k) It is argued by the Defendants that in effect the parties to the TAAs agreed to forego any entitlement by Clause 8.3 and 8.5 to exclude liability for loss of revenue or for losses and liabilities arising from interruptions or delays to trains and that therefore the type of loss, whatever it was, encompassed by Schedule 8 could not have included any (what would otherwise have been) recoverable heads of loss. That in commercial terms ignores the fact that Clauses 8.3 and 8.5 clearly envisage that all such losses shall or may be encompassed within Schedule 8 (or elsewhere in the contract). The parties have agreed that there shall be no freestanding claims for loss of revenue or train disruptions but have effectively agreed that all such entitlements are to be mutually considered as being covered by the entitlements and financial adjustments set out in Schedule 8 and elsewhere. Schedule 8 is either or akin to a liquidated damages or demurrage clause which relates to certain types of delays on the rail tracks to the train services. The rates payable where there is delay attributable to one party or the other were negotiated to reflect what the parties thought realistically represented the likely losses which each should reasonably bear in the case of delay.

(l) I can not see any or much significant difference in principle between the current case and the negligent driver who drives into a building which houses a shop which is licensed by the owner to a third person. The owner can sue the negligent driver for damages which would include the loss of the sums due from the licensee or compensation payable for the licensee not being able to trade from the premises whilst the requisite reasonable remedial works are done.

(m) In my view, the Defendants too often in their arguments have confused the losses actually suffered by the TOCs with the losses actually suffered by Network Rail. The former are substantially immaterial in the context of cases brought by Network Rail against the defendants such as those in this case. It is necessary to analyse the losses actually suffered by Network Rail and to determine whether they are truly consequential upon and closely associated with the physical damage which these Defendants negligently inflicted upon Network Rail.

63. It follows from the above that, in my judgement, the losses representing the sums paid or allowed to the TOCs in relation to the delays caused by the two accidents in question are recoverable by Network Rail from these Defendants. The type of loss was within the scope of the duty owed by both these Defendants and was the reasonably foreseeable consequence of the negligence in these cases; the loss was certainly not too remote. The losses were actually caused by and otherwise demonstrably consequential upon the physical damage to the electrical cables and the bridge respectively and upon the remedial works carried out to put that damage right.

The Law and Discussion on Nuisance and Trespass

64. Strictly speaking, in the light of my judgement on the case in negligence, it is unnecessary for me to address the issues as to whether causes of action arose in nuisance and trespass and if so whether the measure of damages materially differs from that in negligence. For completeness sake, I do however address these issues, albeit relatively briefly.

65. So far as trespass is concerned, the first question is whether or not a non-deliberate but negligent encroachment onto someone else's property is or can be a trespass. The editors of the current edition of **Clerk and Lindsell on Torts** (19th Ed) say:

> "19.06. **Intention or negligence in the defendant** It is no defence that a trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary…Similarly, in *League against Cruel Sports Ltd v Scott* [1986] QB 240, it was held that a master of hounds was liable for the entry of his pack onto prohibited ground since, knowing of the risk of entry, he negligently failed to prevent an entry.
>
> 19.07 **Entry without intention or negligence** If the entry is involuntary-that is, if it is committed unintentionally and without negligence-no liability is incurred, the High Court of Australia has held that falling onto railway tracks in an epileptic fit is no trespass."

It is, fairly clearly, the editors' view that a non-deliberate but negligent incursion onto somebody else's property is a trespass. That, at the very least, appears to be a respectable view which is consistent with logic and principle and it is one to which I

subscribe. It would be different if the incursion was involuntary and unavoidable. If X bodily throws Y onto someone else's land, Y will not be committing a trespass (although X probably will be). If Y in an effective state of automatism, say, a blackout from an unknown medical condition, drives his or her car onto someone else's land, that would be unintentional and non-negligent and no trespass.

66. Reliance is placed on the well-known case of **Letang v Cooper** [1965] QB 232, in which the defendant drove his car over the plaintiff's legs while she sunbathed on a piece of grass used as a car park. For limitation purposes, she pleaded a cause of action in trespass to the person. It is abundantly clear however that this case and judgement were not expressed or intended to apply to trespass to property. Lord Denning at page 239 considers some of the old law to confirm that trespass to the person is in effect "assault and battery", which unsurprisingly requires intention. Those considerations do not apply logically or historically to trespass to property. The Defendants also relied on the case said **Braithwaite v South Durham Steel Co Ltd** [1958] 1 WLR 986, which was a negligence case, albeit an issue arose as to whether the injured employee plaintiff had briefly strayed from an area on which he was licensed to be. Mr Justice Edmund Davies had to address an argument that a different duty arose if a trespass to land was involved and merely said this:

> "Even so, the submissions of learned Counsel…appears to me to be unrealistic when it is thought to be applied to the facts of this case, namely, that (a) the plaintiff was a licensee in the walkway, and (b) his encroachment of a few inches over or upon the sleepers of the commission's line was only inadvertent and involuntary and the result of his startled turnabout as a result of the warning shout…"

This is simply not authority that "inadvertent and involuntary" incursion onto another's land is or is not trespass. The judge was simply dealing with the facts in that case. In any event, it is difficult to see that negligence can be described as "involuntary" behaviour, given that the essence of negligence is a failure to exercise reasonable care and skill, which necessarily implies the failure to do something properly or at all which is within the control of the particular Defendant.

67. I conclude therefore that a negligent incursion on to and damage of a claimant's land or property can in law be a trespass.

68. I now turn to consider the extent to which, if at all, an unauthorised incursion onto someone else's land or property can amount to nuisance and, if it can, whether negligence is a constituent element. The editors of **Clerk and Lindsell** suggest at Paragraphs 20-01 and 20-02 some definition:

> "20-01 **Nuisance defined** The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land…An actionable nuisance is incapable of exact definition and it may overlap with some other heading of liability in tort such as negligence...Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a)…or (b) his ownership or occupation of land… or other rights used or enjoyed in connection with land, when it is a private nuisance,

> 20-02 **Nuisance and trespass** The distinction between trespass and nuisance is the old distinction between trespass and case. Trespass is a direct entry on the land of another, and is actionable *per se*, without proof of special damage, but nuisance is the infringement of the claimant's interest in property without direct entry by the defendant, and generally actionable only on proof of special damage…"

There is a suggestion here that the same act complained of can not generally or usually be both a trespass and a nuisance.

69. The editors go on at Paragraph 20-08 to consider the scope of private nuisance in the context of the defendant doing something on his own land which may or may not itself be inherently unlawful but which results in consequences to a neighbour's land. They then define the conduct in question by the defendant in three categories:

> "(1) causing an encroachment on his neighbour's land, when it closely resembles trespass;
>
> (2) causing physical damage to his neighbour's land or building or works or vegetation upon it; or
>
> (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land." (Paragraph 20-06)

70. One has to bear in mind that the Defendants' drivers were lawfully using the highways, the bridge and the level crossing in question. I would very much doubt that in the case of Mr Farrell his, albeit careless, act of driving over the level crossing with an excessively long aerial could easily or readily in common parlance fall into any of these above categories. Negligence it certainly is and damage there certainly was to Network Rail's electricity cables but it was hardly an encroachment on to Network Rail's land. The examples given at Paragraph 20-07 (relating to the first two categories) all involve activities by the defendant on his own land; the Defendants were not on their own land but through their drivers simply exercising a common law or statutory right to pass and re-pass on the public highway. The undue interference with enjoyment category of nuisance is wholly inapt to describe what happened here.

71. I conclude therefore that there was no actionable nuisance committed by these Defendants. Even if there was, they were nuisances committed only as a result of the negligence of the Defendants.

72. There is no absolute or single measure of damages for trespass to land, apart possibly from nominal damages. Paragraphs 19-62 to 19-67 of **Clerk and Lindsell** address this. Where there is no damage to the land, damages can be assessed on a value basis. Where there is damage to the land, capital diminution or restoration or remedial work may be the appropriate measure of damage. Different considerations may apply when things attached to the soil are severed or removed.

73. It would be an odd and illogical state of affairs if in practice the measure of damages for a negligently caused trespass was any different from that for the negligence which caused the trespass. The same thought process applies to a negligently caused nuisance. I cannot see therefore that there is likely to be any material difference in

practice, at least on the facts of this case, if at all, between the measure of damages recoverable simply for the negligence as opposed to the trespass or the nuisance. There can be no bar in principle, subject to proof of causation, for damages to be recovered for nuisance or for trespass in respect of loss of profits or income. In **Rust v Victoria Graving Dock Co** (1887) 36 LR Ch D 113, Mr Justice Chitty was concerned at first instance with a flood caused by the negligence of the neighbouring defendants to a building estate belonging to the plaintiff. It is not absolutely clear from the report what the cause of action was because judgement on liability had already been, given that the case at this stage was concerned with the recoverability of elements of quantum which had been found by a special referee to have been incurred, but there are strong hints that it was a case in nuisance (see page 122). The report of the appeal follows; Lord Justice Cotton said:

> "Now one principle to be borne in mind is that the damages can only be granted to injuries which are the direct result of the act of omission or commission complained of…" (page 129)

He then went on to reject a particular claim which was in effect in relation to a reduction in the rental value of houses even when put into repair, which these days might be called a stigma diminution, in these terms:

> "It is not damage which is the natural result of nor directly caused by the flood. It is entirely different from injury to the structure of the houses, and in my opinion…that sum…must be struck out" (page 131)

I do not consider that in practical terms these thought processes exclude or indeed widen the basic entitlement to damages adumbrated in this judgement for negligence of the types with which this case is concerned.

74. So far as nuisance is concerned, the issue of the scope or extent of damages in this case is immaterial because nuisance does not apply and, even if it does, in practical terms, at least here, there is no material difference between the damages awardable in negligence and nuisance. Indeed, neither Network Rail nor the Defendants argue that there is any material difference.

75. So far as the measure of damages for trespass is concerned, directly consequential losses must in practice be recoverable. If X in trespassing on Y's land ruins Y's wheat crop, Y must be entitled to recover the loss of profit or revenue in relation to that crop. It is wrong in principle in effect to say, as the Defendants do, that damages must be limited to a capital diminution or reasonable reinstatement cost basis. Logic suggests however that the test broadly at least involves and is limited to losses which are demonstrably consequential upon the trespass and which are closely associated with the physical damage caused by the trespass; if that is right, the test is similar to physical damage negligence cases at least in that regard. The latest edition of **McGregor on Damages** (18th edition) elides consideration of consequential losses to torts affecting land generally (Paragraph 34-023 and following) and many of the cases referred to are nuisance cases. There is an analysis at Paragraphs 34-025 to 34-028 of losses grounding a separate cause of action which involves consideration of a number of 18th and 19th century trespass authorities, which, whilst interesting, are not particularly germane to the current case. But the conclusion is this:

> "Taking all these cases together, therefore, it would appear that consequential losses will be recoverable either specifically or by way of aggravation, subject as always to their not being too remote in the causal sense."

I endorse that approach. It will, at least in practice, be a rare case in which a wholly and objectively unforeseeable financial consequence of a trespass will give rise to a valid claim. I can only comment that this particular area of the law of trespass to land does not appear obviously or recognisably to have raised its head since the common law began to emerge 900 to 1000 years ago and I doubt that it will need to emerge in the future.

76. It follows from the above that, in my judgement, at least in relation to these cases, there is no material or practical difference in the measure of damages recoverable in trespass or nuisance (if applicable) to that recoverable in negligence.

Decision

77. As the quantification of the losses is totally agreed between the parties, it will follow from the above that Network Rail is entitled to judgement:

> (a) as against Conarken, in the total sum of £293,742.32 made up of £127,070.62 and £166,661.70 in relation to the Schedule 8 losses and remedial works costs respectively.
>
> (b) as against Farrell Transport, in the sum of £1,017,144.66 in relation to the Schedule 8 losses. There need be no judgement in relation to the cost of remedial works, the agreed sum for which was paid by Farrell Transport in mid-June 2010.

78. I will deal with any argument about interest or costs, unless agreed, at the handing down of this judgement.