



Recovering performance costs against non-industry parties

An update on how much can be recovered where a third party causes damage

When someone else's contractor reverses into your train at 7am on a busy commuter morning, or a lorry sheds its load off a bridge as the unit passes beneath and every service for the rest of the day is delayed – how much can you claim back? All your performance losses and costs? Or just the cost of repairing the train?

Damage caused by one industry party to the property of another is often subject to one of a series of detailed contractual compensation mechanisms. For example Track Access Agreements govern property damage and impacts on performance (e.g. Schedule 8) and CAHA allocates the costs of third party claims between industry parties.

However damage caused by third parties or contractors may not always fall within any contract or industry agreement. In this case (subject to any applicable caps in, for example, CAHA) claims for compensation need to be brought under the normal law on the basis of negligence or possibly trespass or nuisance.

Such claims are not straightforward and, in particular, it is not always clear what losses can be claimed.

Network Rail has recently won a test case on recovery of losses which may open the door to wider recoveries than might previously have been expected.

What losses can be claimed?

It is generally clear that the law allows compensation to be claimed for damage to property and assets caused by a third party. Consequently the costs of repairing damage to a train or replacing damaged equipment and plant should be recoverable.

Unfortunately, however, the reality is that these costs may be only a small proportion of the actual costs and losses associated with such damage. When a train is damaged and stranded in a tunnel, additional costs rack up quickly. Recovery costs, and performance payments and

compensation for passengers and lost profits or future farebox may outweigh the actual costs of repair within minutes. Can these be recovered?

The answer is not a straightforward one and is based on the views historically taken by the courts of where the public interest lies (often between a profit making business and the insurers of negligent individuals). Recovery is possible where the loss is sufficiently "foreseeable" and where it is not "pure economic loss."

Network Rail has recently brought a test case to clarify some issues about what can and cannot be claimed in a Railway context (although it has wider application outside the industry). This has helped to understand what industry parties might seek to recover from third parties which have damaged their property.

Loss and damage demonstrably consequential

Network Rail's case involved damage caused to overhead power lines by the aerial of a tractor on a level crossing and - in a separate incident - to a road bridge by crashed lorries preventing operation on the track beneath.

In each case the costs of repair were recoverable. The question was whether Network Rail could also recover the Schedule 8 payments which it had to pay to operators for reduced network performance. The court decided that it could.

Having reviewed the relevant precedents the court concluded that:

- Recovery was possible for any financial losses or costs which were "demonstrably consequential" upon the damage to the assets;
- Network Rail had to pay Schedule 8 payments due to the loss of use of its damaged assets; and
- The fact that they were contractually agreed costs (with the TOCs) and that the TOCs themselves would not be able to claim them from the wrongdoer did not prevent them being recovered.

This confirms a wide scope of recoverability for industry parties and a potentially high value risk for insurers.

Wider implications

This may seem like a technical issue limited to a specific Network Rail issue. It is not.

The implications of the judgment are that contractually agreed compensation within the industry's regulated contractual matrix are foreseeable and recoverable against third parties (subject potentially to caps in CAHA).

This may become relevant whenever a third party damages property or assets and liquidated damages regimes in any of the contacts take effect.

Examples might include drivers or contractors (particularly the contractors of another party or subcontractors) damaging trains or interference by third parties with the operation of stations.

Provided the 'type' of loss is foreseeable (e.g. the inability to provide robust services due to the loss of use of a train) then the implication of this judgment is that all the contractual losses whatever their basis could be reclaimed unless it is against the public interest to allow this.

The width of this liability and the potential impact upon insurance costs for contractors and others may result in it being appealed. In the meantime, however, industry members faced with property damage may expect to recover higher compensation than previously anticipated.

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