12/08; [2008] VSC 10

SUPREME COURT OF VICTORIA

METROLINK VICTORIA PTY LTD v INGLIS

Smith J

6 September 2007; 5 February 2008 — (2008) 49 MVR 331

CIVIL PROCEEDINGS – NEGLIGENCE – COLLISION BETWEEN MOTOR VEHICLE AND TRAM – ECONOMIC LOSS SUSTAINED BY TRAMWAY OPERATOR – OPERATIONAL PERFORMANCE PENALTIES PAYABLE BY TRAMWAY OPERATOR TO THIRD PARTY – CATEGORISATION OF THE LOSS – FEATURES OF 'KIND OR GENUS' – FINDING BY MAGISTRATE THAT LOSS WAS A REDUCTION OF A FINANCIAL BENEFIT PAYABLE BY A THIRD PARTY OR THE IMPOSITION OF A FINANCIAL PENALTY BY A THIRD PARTY – WHETHER MAGISTRATE APPLIED THE WRONG TEST – REMOTENESS OF DAMAGES – FINDING BY MAGISTRATE THAT LOSS WAS NOT REASONABLY FORESEEABLE – WHETHER MAGISTRATE IN ERROR.

Pursuant to a Franchise Agreement with a third party, M. operated tramway passenger services. The Agreement provided for the payment by M. to the third party of certain penalties when its services were delayed. One of M.'s trams collided with a motor vehicle negligently driven by I. When M. subsequently commenced proceedings against I., the particulars of damage included an amount by way of operational penalties said to have been imposed on M. by the third party. In dismissing the claim, the Magistrate identified the kind or genus of loss as a reduction of a financial benefit payable by a third party or the imposition of a financial penalty upon M. by a third party. The Magistrate also found that the loss as identified was not reasonably foreseeable. Upon appeal—

HELD: Appeal dismissed.

1. The test for remoteness of damage to be applied is whether the damage claimed is of such a kind or genus as the reasonable person should have foreseen. Foreseeability is not required of the precise manner in which the particular injury came about or of its extent.

***The Wagon Mound* [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1All ER 404; and**

***NAB v Nemur Varity Pty Ltd* [2002] VSCA 18; (2002) 4 VR 252; [2002] Aust Torts Reports 81-645, applied.**

2. Sufficient detail must always be included in the description to enable the 'kind or genus' of loss to be identified. That detail may also need to include reference to the mechanism of the loss.

3. In the present case, the Magistrate identified as the relevant features of the 'kind or genus' of the loss the reduction of a financial benefit payable by a third party to M. or the imposition of a financial penalty upon M. by a third party. The situation was one where it was not inconsistent with the need to define a 'kind or genus' to do so by reference to the mechanism or manner of the injury. Accordingly, it was not shown that the Magistrate applied the wrong test by his definition of the 'kind or genus' of the loss. What was claimed in the present case was not the loss of use of the tram, but the financial consequences to M. flowing from operation of the incentive scheme with the third party which resulted from the collision between the motor vehicle and the tram.

4. In relation to the Magistrate's finding that the 'kind or genus' of loss as defined was not reasonably foreseeable, this was a decision on a question of fact which was open to the Magistrate to so find.

SMITH J:

The Proceeding

1. This proceeding is an appeal brought by Metrolink Victoria Pty Ltd (Metrolink), against Ryan Inglis (Inglis), seeking orders setting aside the decision made in the Magistrates' Court of Victoria on 10 August 2006 dismissing a claim for damages brought by Metrolink against Inglis.

Background to the Appeal

2. Metrolink commenced proceedings against Inglis by complaint filed on 21 March 2006. It alleged that a motor vehicle driven by Inglis had collided with a tram owned by Metrolink on St Kilda Road, Melbourne on 8 February 2006. It alleged negligence against Inglis resulting in loss

and damage to it. The particulars of damage pleaded were as follows:

> "(i) The collision caused the plaintiff's tram 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 $7000.77 in Operational Performance Penalties as evidenced by the attached document titled "Indicative Unplanned OPR Costs/PWM."

The amount claimed of $7000.77 was later amended to $11,355.75.

3. By his defence, Inglis admitted that he had driven the motor vehicle involved in the collision with the tram and that the collision was the result of his negligence. As to the damages claimed, he denied liability and gave particulars as follows:

> "The Defendant alleges that the operational performance penalties claimed by the plaintiff are not reasonably foreseeable as damages arising as a consequence of the collision on the ground that, *inter alia*, it is based on a contractual obligation between the plaintiff and the Victorian State Government, its servants/agents/instrumentalities.
>
> The Defendant alleges that the operational performance penalties payment is too remote a loss arising as a consequence of the collision.
>
> The Defendant alleges that the operational performance penalties payment is a penalty and is not reasonably foreseeable."[1]

The Franchise Agreement and the Penalty Provisions

4. The Franchise Agreement between Metrolink and the Director of Public Transport (the Director) was tendered in evidence. It is an extraordinarily complex document and contains 433 pages of terms and schedules.

5. It commences by identifying the parties and setting out a number of recitals. So far as relevant, the recitals include the proposition that the Franchisee (Metrolink) had agreed to operate tramway passenger services on tram infrastructure subject to a lease and had agreed to use rolling stock under the terms of the Agreement.[2] It also stated that the Director and the Franchisee had agreed to the payment of Franchise Payments and other payments on the terms of the Agreement.[3]

6. Under cl.4.1, the Franchisee agreed

> "to provide Passenger Services and operate the Franchise Business in accordance with, and subject to, the terms and conditions of the Agreement for the Franchise Period".

7. The Agreement contained provisions designed to address Metrolink's performance of the obligation to provide the passenger services. In particular, cl.7.1 provided as follows:

> "7.1 **Adherence to Master Timetable**.
> The Franchisee must use reasonable endeavours to provide the Passenger Services in accordance with the Master Timetable."

It went on in cl.7.2(b) to impose a similar obligation in respect of the Daily Timetable. It then dealt with an incentive regime in the following provision:

> "7.3 **Incentives for Adherence to Master Timetable and Daily Timetable**
> Schedule 7 contains an incentive regime for adherence to the Master Timetable and the Daily Timetable. The Director and the Franchisee agreed to make the OPR incentive payments in accordance with schedule 7."

8. Schedule 7 is to be found in and between pages 216 and 290 of the Franchise Agreement. It contains what is called the "OPR Incentive Regime" A key element appears to be the concept of

"Passenger Weighted Minutes" ("PWMs"). They reflect the effect of any deviation from the timetables calculated with reference to the route, the time of day, the stop at which the deviation is measured and the anticipated passenger usage of the service. Schedule 7 also provides a mechanism by which a financial value is put on each passenger weighted minute. The value varies under the agreement from time to time. By multiplying the values with the PWMs an incentive payment is arrived at, described in the Agreement as "OPR Incentive Payment"[4].

9. The Agreement allows for minor deviations from the timetables at any monitoring point. The schedule also provides for Daily Performance Targets. The incentive programme operated on the basis that if the PWMs when totalled for the relevant period amounted to a figure less than the specified performance target, Metrolink received a bonus payment from the Director. If, however, the PWMs exceeded the target for the relevant period, Metrolink would pay an amount to the Director calculated by reference to the PWMs in excess of the target multiplied by the financial value of each minute.

10. There are further complications. The formula for calculating the OPR incentive payment in fact involved eight defined categories of PWMs each with its own formula. They comprised

- planned cancellations, delays, early arrivals and short shuntings and
- unplanned cancellations, delays, early arrivals and short shuntings.

11. It should be noted that under cl.3.7 of schedule 7 it is provided that:

> "the parties acknowledge that an OPR incentive payment is payable irrespective of whether or not the cause of the OPR incentive payment is a breach of this Agreement."

It should also be noted that what was envisaged under the Franchise Agreement was that there could be a setting off of payments under the incentive scheme.[5]

12. The monitoring of the performance was done by electronic means with the result that information was provided automatically about daily timetable deviations and provided at the same time to both Metrolink and the Director.

13. In this case, the system produced a report relating to the collision on Wednesday 8 February 2006. That report included the following table which set out the number of PWMs involved in respect of each of four categories and the cost of those categories using a value of 16.9552 cents per PWM. It was in the following form:

	Number of Services	**Passenger Weighted Minutes**	**Cost**
Cancellations	1	1,5600.00	$264.50
Shorts	62	22,452.50	$3,806.87
Earlys	7	940.00	$159.38
Lates	115	42,022.50	$7,125.00
Totals	122	**66,975.00**	**$11,355.75**
Target PWM		**25,685.20**	**$4,354.98**
Totals Less Target		**41,289.80**	**$7,000.77**

14. Before the learned Magistrate, Metrolink alleged, and Inglis accepted, that the collision resulted in deviations of various kinds which in turn resulted in Metrolink becoming obliged to pay to the Director under the OPR Incentive Payments Scheme, a sum totalling $10,760.75.

The Reasons for the Decision

15. The learned Magistrate delivered reasons for his decision on 15 August 2006. He briefly recited the facts relating to the collision with the tram and the resulting delays to the progress of it, and other trams, along their respective routes. He noted that it was not disputed that the defendant had breached his duty of care towards the plaintiff and that the only issue was whether the plaintiff was entitled to a particular kind of damage. He referred to the Agreement and the system of financial penalties imposed upon Metrolink if it did not adhere to the timetables. He noted that in this instance the collision had caused delays to the passage of several trams and resulted in a "financial penalty of $10,760.75". He then stated that the issue was "whether the damage claimed by the plaintiff is too remote".

16. He referred to a number of authorities including *The Wagon Mound* [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; [1961] 1All ER 404, *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1966] UKPC 1; [1967] 1 AC 617; [1966] 2 All ER 709 and *National Australia Bank Limited v Nemur Varity Pty Ltd* [2002] VSCA 18; [2002] 4 VR 252; [2002] Aust Torts Reports 81-645. He referred to passages in *NAB v Nemur*[6] where it is stated that

> "with regard to the test for remoteness ... the essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind or genus as the reasonable person should have foreseen ..."

and that

> "Foreseeability is not required of the precise manner in which the particular injury came about or of its extent."

He later posed the following question for determination:

> "Is this damage the kind or genus which would occur to the mind of the reasonable person in the position of the defendant?"

He then stated the argument put by Metrolink:

> "The plaintiff submits that economic loss or economic loss arising from a contract answers the description 'kind or genus' in the above passage. It submits, in effect, that if some form of economic loss to the plaintiff is reasonably foreseeable then it should not be denied this form of economic loss. It relied upon *Hughes v Lord Advocate* [1963] UKHL 1; [1963] AC 837; [1963] 1 All ER 705; [1963] 2 WLR 779; [1963] SLT 150; [1963] SC (HL) 31; 107 Sol Jo 232; [1963] SC 31."

17. The learned magistrate then stated the following:

> "The plaintiff operates the business of running trams. Members of the public use the plaintiff's trams and pay to do so. It would occur to a relevant reasonable person that a collision between a tram and a car would result in damage to the tram; personal injury to the persons riding on the tram; and if the damage was severe enough the replacement of the damaged tram by another with consequent cost. The last circumstance might also sustain a claim for damages for loss of profits. But it would not occur to that person that the interruption of the trip of that tram and others by reason of an accident, not caused by the breach of duty of the plaintiff, its servants or agents, would result in a reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party. That consequence would not be reasonably foreseeable because it is not only unlikely but also far-fetched. It is a kind of damage that would not occur to the reasonable person in the position of the defendant."

He went on to dismiss the complaint.

The Notice of Appeal

18. The amended Notice of Appeal filed 2 November 2006 contained four questions of law supported by four grounds of appeal.

19. They comprised the following:

"The questions of law upon which the appeal is brought are –

1. ...

2. Whether the learned Magistrate erred by unnecessarily restricting the application of the "foreseeability" test by considering only whether the particular contractual arrangement pursuant to which the Appellant operated was foreseeable.

3. ...

4. Whether the learned Magistrate erred in law in finding that the economic loss suffered by the Appellant and which formed the subject of the Appellant's claim was not of a kind or genus which was foreseeable.

5. Whether the learned Magistrate properly formulated the test to be applied in determining whether the damage claim was properly claimable.

> 6. Whether the learned Magistrate properly applied the appropriate test of foreseeability of damage, that is, whether the damage is within a kind or genus of damage which is foreseeable.

The grounds of appeal—

> 1. ...
> 2. That the learned Magistrate erred in that he unnecessarily restricted the application of the "foreseeability" test by considering only whether the particular contractual arrangement pursuant to which the Appellant operated was foreseeable.
>
> 3. ...
>
> 4. That the learned Magistrate erred in law in finding that the economic loss suffered by the Appellant and which formed the subject of the Appellant's claim was not foreseeable.
>
> 5. That the learned Magistrate did not properly formulate the test to be applied in determining whether the damage claimed was properly claimable.
>
> 6. That the learned Magistrate failed to apply the appropriate test of foreseeability of damages, that is, whether the damage is within a kind or genus of damage which is foreseeable."

20. The questions and respective grounds, numbered 2, 5 and 6, raise, in essence, the question of law as to whether the learned Magistrate had failed to apply the correct test of foreseeability of damages, namely, whether the damage is within a "kind or genus" of damage which was reasonably foreseeable either by applying the wrong test or applying the right test incorrectly. Question 4 and ground 4 raised a different issue - whether, assuming he applied the correct test, the learned Magistrate erred in law because, applying that test, it was not open to him to conclude that the damages claimed were not reasonably foreseeable. This involves two questions – whether it was open to his Honour to define the "kind or genus" of loss in the way he did and, if so, whether it was open to him to find that a loss of that kind was not reasonably foreseeable.

21. In essence, counsel for Metrolink argued that the learned Magistrate erred in applying the test because he did not categorise the loss but described the detail and mechanism of the loss. As to the second aspect, counsel argued that it was not open to him to categorise the loss in the way he did. If it was so open, however, it was not open to him to find that the loss of the kind he described was not reasonably foreseeable. Counsel submitted that in making that finding, the learned magistrate ignored the reality of the commercial world and that there are many cases where a reduction of financial benefit is foreseeable where the party suffering it is not at fault.

The categorisation test, whether it was applied and, if so, applied correctly – the submissions of the parties

22. It was common ground that the test for remoteness of damage to be applied in this case was that spelt out in *The Wagon Mound*[7] and considered in *National Australia Bank Limited v Nemur Varity Pty Ltd*[8] – namely, whether the damage claimed is of "such a kind or genus as the reasonable person should have foreseen".

23. Counsel for Metrolink submitted that the learned Magistrate misdescribed the argument that had been put on behalf of Metrolink by describing it as being

> "in effect, that if some form of economic loss to the plaintiff is reasonably foreseeable then it should not be denied this form of economic loss".

Counsel submitted that this was not an accurate description and referred to the transcript[9] where the following exchange is recorded:

> "His Honour: But your argument is 'kind or genus' identified.
>
> Mr Brett: Yes, economic loss pursuant to some form of contractual obligation is absolutely enough. It probably doesn't even have to be pursuant to a contractual obligation because what we have is, we have a commercial operator running these trams for commercial reasons and suffering a significant disruption to its services.
>
> His Honour: So kind or genus could, on your argument, be any form of economic loss.
>
> Mr Brett: My argument would be twofold. Firstly it could be any form of economic loss. Secondly

> that it could be economic loss pursuant to some form of contractual arrangement, if you prefer a narrow formulation.
>
> His Honour: Yes, OK.
>
> Mr Brett: And that flows from being a commercial operator in my submission."

Thus counsel for Metrolink appeared to be advancing two options:

> (a) any form of economic loss; or
>
> (b) economic loss suffered by a commercial operator arising from a contract.

Bearing in mind the lack of specificity in the description of the loss in the submissions, one can understand that the learned Magistrate summarised the argument in the way he did. It should also be borne in mind that prior to the quoted reference to "some form of economic loss", his Honour stated

> "The plaintiff submits that economic loss or economic loss arising from a contract answers the description "kind or genus" in the above passage."

In any event, whether or not his Honour's summary of Metrolink's position was correct, what is critical on the first issue, is whether the test he applied was the correct test in law and whether he applied that test correctly.

24. Counsel for Metrolink submitted that the learned Magistrate did not apply the "kind or genus" of loss test because he purported to identify the "kind or genus" in the following words:

> "A reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party."

Counsel submitted that this was far too narrow and specific. It was put that his Honour went to the detail instead of categorising the loss. Counsel further submitted that the "kind or genus" of loss description into which Metrolink's claim fell was not "economic loss" but a specific category of economic loss, namely, a reduction in revenue, income or profit occurring in the commercial operation in which it was engaged at the time of the collision. I note that this category of "kind or genus" was not put to his Honour.

25. Counsel further argued that the category formulated by the learned Magistrate was directed to the mechanism by which the loss was suffered. Counsel submitted on the basis of the authorities that this approach was incorrect. Counsel relied particularly on the statement by Batt JA in *NAB v Nemur Varity Pty Ltd*[10] that "foreseeability is not required of the precise manner in which the particular injury came about or of its extent". Counsel submitted that it was not necessary to demonstrate that the way the contract worked was foreseeable.

26. Counsel for Inglis accepted the proposition that the test was whether the damage was of a "kind or genus" that was reasonably foreseeable by a person in the position of the defendant and referred to the same principal authorities. Counsel also submitted that the learned Magistrate applied the correct test and applied it correctly.

Was the correct test stated and applied?

27. I refer to paragraphs 14 to 16 above. Plainly his Honour identified and correctly stated the test to be applied and purported to apply it. The argument that he applied the test incorrectly turns on the features of his Honour's categorisation of the claimed loss. The issue raised is whether his categorisation was inconsistent with the application of the correct test.

28. I note first the alternative categorisations which Metrolink asked his Honour to accept. In particular, Metrolink nominated, as a specific category of economic loss, "economic loss pursuant to some form of contractual arrangement ... that flows from being a commercial operator". That included his Honour's category but was extremely wide. His Honour rejected the purported definition put forward by Metrolink. In my view, he acted correctly in doing so. It was too broad in the circumstances of the case and did not define a "kind or genus" of economic loss. Rejecting it was consistent with a correct application of the test.

29. As noted above, however, counsel for Metrolink argues that his Honour's description of the category was inconsistent with the correct application of the test because it was a description of the detail of the loss and the mechanism of the loss and not a description of a "kind or genus" of loss.

30. While it may be said that the categorisation adopted included a description of some details of the loss and its mechanism, it does not follow that the learned Magistrate erred in applying the test. Sufficient detail must always be included in the description to enable the "kind or genus" of loss to be identified. That detail may also need to include reference to the mechanism of the loss. In *Hughes v Lord Advocate*,[11] the House of Lords considered the appropriate categorisation of the physical injuries of the plaintiff, the foreseeability of which was in issue. Lord Reid described the category of the injury as "injury from burns"[12]. The mechanism or manner of the injury was a key feature of its categorisation. Burning, therefore, had to be reasonably foreseeable for the injury not to be remote. The distinction drawn in that case was between the cause of the injury, burning, and, as Lord Morris of Borth-y-Gest put it, "the concatenation of circumstances which led up to the accident"[13], which did not have to be reasonably foreseeable.

31. In this instance, what his Honour identified as the relevant features of the "kind or genus" of the loss were a reduction of a financial benefit payable by a third party to the plaintiff or the imposition of a financial penalty upon the plaintiff by a third party. The situation was one where it was not inconsistent with the need to define a "kind or genus" to do so by reference to the mechanism or manner of the injury. His Honour would have erred in applying the test if he had considered the "concatenation of circumstances". They would have included the combination of the precise cancellations, starts, earlys and lates, the PWMs and their value and the application of the various terms of the franchise agreement. His Honour instead concentrated on the "kind or genus" of loss and described it by referring to what he saw as its key features. I am not persuaded that his Honour has been shown to have applied the wrong test by his definition of the "kind or genus" of the loss.

32. In my view, the learned Magistrate identified the correct test and his formulation of the category complied with the test. What then become critical are the next questions – whether it was open to his Honour to categorise the loss claimed in the way he did and whether, having done so, it was open to him to conclude that a loss of that "kind or genus" was not reasonably foreseeable.

Categorisation of the loss – parties' submissions

33. I have referred to the categorisation now advanced by Metrolink – reduction in revenue, income or profit occurring in the commercial operation in which it was engaged at the time of the collision. Counsel submitted that that was the categorisation to be preferred, not that adopted by the learned Magistrate.

34. Counsel for Metrolink referred to *National Australia Bank Limited v Nemur Varity Pty Ltd*[14] and the discussion in that case of the claim for damages for consequential loss from the alleged negligence of the National Australia Bank. That consequential loss was described as "net loss of business income ..."[15]. In that case, Batt JA commented:[16]

> "[50] During argument there was quite some discussion as to the genus of loss or head of damage which was in question, principally, it is true, in connection with reasonable foreseeability. Several possibilities were suggested such as the loss of opportunity of discovering the fraud, loss by fraud, difficulties between the broker and its customers or the loss of customers. In my opinion the loss or harm must be such as sounds in money, so that the first and third suggestions are inadmissible. Loss by fraud is too wide. With the exception of the ANI cheque, I consider the relevant genus to be the loss of business income. Business interruption (espoused by Mr Williams) and injury to the business might also be acceptable although they are wider. In the case of the ANI cheque the genus is far less clear unless it is simply the loss of the face value of the cheque, for continuing to do business with ANI does not of itself sound in money. ..."

As to the categorisation proffered before his Honour by Inglis, and relied upon by him on this appeal, counsel again argued that it was in fact a description of the way in which the loss claimed was caused.

35. Counsel for Metrolink also submitted that the categorisation of loss advanced by them was the same as that accepted in the *Greta Holme*[17] – namely, loss from not being able to attend to business, for which damages can be recovered, even though there was no specific economic loss identifiable. Counsel submitted that, in the present case, the loss of use of the tram and the line meant that Metrolink was not able to attend to business and for that it was entitled to recover damages. In *Greta Holme* a steam dredger had been damaged in a collision and, as a result, could not be used. It was there held that although the trustees who owned the dredger were not out of pocket in any definite sum, they were entitled to recover damages for the loss of the use of the dredger. Counsel submitted that here, because of the collision, Metrolink had not been able to perform its services on the tram lines and was held up for a period of time. As it happens in this instance, a financial consequence also flowed from that loss of use – namely the penalty that was imposed upon it. That caused a reduction in revenue, income and profit and the economic loss should be so characterised.

36. As to this argument, counsel for Inglis submitted that a distinction had to be made between direct loss of use and indirect loss of use and a loss of business through loss of use category would not extend to loss of the revenue of the business or profit as alleged for Metrolink. To emphasise the distinctions, counsel for Inglis submitted that it would be unremarkable for Metrolink to claim compensation from a negligent driver in respect of any loss flowing from its inability to attend to business arising from loss of the use of the particular tram involved in the collision. This would involve the cost of replacing the tram and the potential profit loss as a result of having one less tram in circulation for a period of time. That, however, is not the kind of economic loss sought in this case by Metrolink.

37. In response to the general argument, counsel for Inglis submitted that the loss claimed in this case flowed from private arrangements between Metrolink, operator of the form of transport, and the entity on behalf of which it operated that transport. Counsel submitted that the loss arose by reason of the peculiar, complex and unique provisions of the franchise agreement.

38. Counsel for Inglis submitted that the details of the incentive regime in the Franchise Agreement are extremely complex. In essence, it involves the Director paying to the appellant at the end of a reporting period a sum of money depending on the appellant's compliance with timetabling. The closer to the timetabling requirements the greater the amount payable and the greater the departure the smaller the amount payable by way of incentive. If the departure was great enough, it could result in a negative figure and, so, result in a penalty to be paid by the appellant to the Director. Counsel submitted that identifying a "kind or genus" is not an easy matter but submitted that in describing the category of loss as either a reduction of a financial benefit payable by a third party or the imposition of a financial penalty upon the plaintiff by a third party, his Honour was appropriately highlighting the remoteness of the loss to the respondent.

39. Counsel for Inglis also submitted that the learned Magistrate, by his categorisation was trying to make an appropriate distinction between direct business losses of the enterprise and ancillary business losses, the losses claimed in this case coming within the latter category.

40. Counsel submitted that the alleged loss arose by reason of an ancillary agreement and not the tortious event and, by his definition, was categorised by his Honour as a creature of the Franchise Agreement. They argued that it only tenuously related to the tortious event. Counsel submitted that what was being claimed in this case was a loss which flowed from a private arrangement by the operator of the transport and the entity on behalf of whom the transport was operated. The loss arose because of the peculiar provisions of the Franchise Agreement, the terms of which were complex and unique to that agreement. Counsel submitted that the range of obligations which might attach to such an agreement was infinite and the terms of such contracts were beyond reasonable foresight. Counsel also submitted that there was no evidence adduced as to any alleged notoriety of the subject contractual incentives/penalty regime and no other evidence relevant to the issue of foreseeability.

41. Counsel submitted that the categorisation was sound and was open to the learned Magistrate and was to be preferred to the others advanced below and on this appeal. Counsel submitted that the category of economic loss suggested below was too broad and submitted that those now proffered by counsel for Metrolink were also too broad.

42. Counsel for Metrolink disputed the distinction between an ancillary agreement, arguing that there was nothing ancillary about the agreement provisions relating to incentives for the timely performance of the agreement. The arrangements may not be standard but that did not make the loss flowing from them ancillary.

43. Counsel for Inglis also submitted that, if the loss was characterised in the way Metrolink had sought below, it would mean that a person negligently damaging a tram would be obliged to pay any cost causally connected with the incident depending upon the terms that had been negotiated between the Franchisee and Franchisor. By way of example, he argued that if there was a term in the franchise agreement that required Melbourne trams to be repaired in Geelong (motivated by a Government desire to help local industry) that would be an enforceable term but could add significantly to the cost of repair and, if Metrolink was correct, would come within the boundaries of a reasonably foreseeable loss. Counsel submitted that the learned Magistrate was directing his mind to that sort of problem and seeking to find a limit.

44. On this issue, counsel for Metrolink commented that such issues can be addressed by the law on damages — whether the quantum of the claim was reasonable. It should be noted, however, that while that might be so if the claim was for damage to property, if the claim was for economic loss under an incentive scheme, different considerations would apply. It was not argued by either party that the reasonableness of such a scheme could be considered if the economic loss was reasonably foreseeable.

Whether the categorisation was open – analysis

45. As to the supporting argument advanced by Metrolink which characterises the loss as business loss flowing from loss of use, the loss claimed in this case goes far beyond loss associated with the loss of use of the tram that was damaged. It includes the losses flowing from the loss of use of all aspects of the tram network affected by the incident. Economic loss from loss of use of damaged equipment such as a tram would normally only encompass loss of income which might have been earned during the period in which the tram was unable to be used as a consequence of the collision. The loss of use damages that would be regarded as reasonably foreseeable would include a loss of income or profit that might have been derived during the period in which the tram itself was incapacitated or the cost of engaging another vehicle but what is in fact claimed here is the loss of the use of other parts of the tram system which flowed from the inability to use the particular line on which the tram was running when it collided with the car. This resulted in the claim for cost penalties imposed upon Metrolink for "cancellations" (1), "shorts" (62), "earlies" (7), "lates" (115), most of which were not attributable to the inability to use the tram but to various indirect consequences upon the use of various tram lines in the city and regardless of whether Metrolink itself otherwise lost money as a result of difficulties caused to the system. Thus, while loss to the business from loss of use might well be a preferable analysis, it does not seem to me to assist the appellant to challenge the decision of the learned Magistrate on the basis of losses of the business resulting from the loss of use flowing from damage to the tram. In any event that was not the basis upon which the claim was made below and, if it had been made the basis of the claim below, different issues would have had to be argued and other evidence may well have been relevant and admissible. What was complained of, in essence, was not the loss of use of the tram. Rather it was the financial consequences to Metrolink flowing from operation of the incentive scheme with the Public Transport Authority which resulted from the collision with the tram.

46. Returning to the issue, it being one of fact,[18] the question of law to be determined is whether the categorisation adopted by the learned Magistrate was open to him. In defining the "kind or genus" of an economic loss, the features of the loss claimed need to be identified and a decision made as to which of those features best define the "kind or genus" of the loss and which do not. The content of the definition will turn upon the choices made. Reference should be made, for example, to the analysis of Batt JA referred to above in *NAB v Nemur Varity Pty Ltd*[19] as an example of the making of such choices.

47. The descriptions advanced by the parties in the original pleadings and argument below,[20] and on this appeal, of the "kind or genus" of the economic loss suffered, identify different features and highlight a number of possible ways of characterising the loss claimed. Ultimately, his Honour had to make a judgment as to how the "kind or genus" of loss claimed would be best defined.

48. I suggest that the features of the loss that needed to be considered when defining the "kind or genus" of the loss claimed in this case included the following;

> • The loss claimed was a penalty imposed on the business.
>
> • The penalty's immediate impact on Metrolink was a direct loss. It also had the consequential effect of reducing revenue, income or profit.
>
> • The penalty was the result of the special terms negotiated between Metrolink and the Director, terms of the most detailed and complex character. The terms formed part of a performance incentive system and a penalty was incurred irrespective of any fault on the part of Metrolink and whether Metrolink otherwise suffered any loss. It may be typical of the sort of agreements entered into between governments and businesses for the provision of what were once government services[21], but it is relatively new and very specialised and not something within ordinary experience.

49. A judgment had to be made by his Honour as to the relative significance of the features and the relative weight to be given to them. For example;

> • should the loss be seen as predominantly the special creature of the Franchise Agreement?
>
> • should the focus be on the immediate impact of the penalty or on its consequent effect on the revenue, income or profit of Metrolink?

50. In making such judgments, it would be relevant to consider the way the loss was described by Metrolink in its pleading. It chose to emphasise the imposition and payment of the operational performance penalties and did not describe the loss as a loss of revenue, income or profit. It also advanced before his Honour the most general of descriptions of the "kind or genus" of loss – firstly, any form of economic loss and, secondly, economic loss pursuant to some form of contractual arrangement.

51. The situation was one where views might vary as to the correct categorisation of the "kind or genus" of loss. One can well understand, however, that his Honour would have rejected the Metrolink suggestions as far too broad and open-ended and not adequately reflecting the salient features of the "kind or genus" of loss actually claimed. His Honour's choice of categorisation was plainly open to him and, in my view, is to be preferred to those put to his Honour at the original hearing and on this appeal on behalf of Metrolink.

was the kind of loss described reasonably foreseeable?

52. Counsel for Metrolink submitted that the loss categorised by his Honour was of a kind reasonably foreseeable. Counsel referred to the discussion in *New South Wales Land and Housing Corporation v Watkins* [2002] NSWCA 19; [2002] Aust Torts Reports 81-641. That case involved a claim in negligence for loss and damage suffered as a result of the complainant fainting in the shower. The fainting was the result of sudden changes in temperature of the hot water. Counsel referred to the discussion[22] that, on the issue of whether the kind of damage suffered was foreseeable, the rarity of the injury and the circumstances did not deny the foreseeability of an injury of the class of which it formed one example. The issue was whether the injury came within a class of injury that was reasonably foreseeable.

53. How far that proposition can be applied where the claim is for economic loss is unclear. In this context, counsel for Inglis drew my attention to a passage in *Clerk and Lindsell on Torts*, 17th edition, 1995 at 394, where it was commented:

> "In the case of physical damage, the result has been to return towards the pre-*Wagon Mound* position but with a degree of obscurity produced by the tension between the original foreseeability principle and its subsequent application. Where the damage has been economic rather than physical, courts have accepted the moral case for limiting the defendant's responsibility and taken a more discriminating approach to remoteness issues, stressing the importance of whether the particular kind of economic loss suffered fell within the risk created by the negligence."[23]

54. Counsel for Metrolink argued that the learned Magistrate overlooked the reality that people who have entered into service contracts will suffer revenue loss through the non-provision of the service and do so commonly where there is no breach of duty. Counsel drew an analogy

with a building contract where penalties will be suffered in the form of liquidated damages if the building is not provided on time. Counsel submitted that this was merely a consequence of not providing the service agreed to be provided. They argued that there must also be other contracts of a similar sort. A person who agrees to do something by a particular time has to comply with his agreement. Counsel, therefore, submitted that there will be cases where economic loss of the kind described by the learned Magistrate is reasonably foreseeable.

55. Counsel for Inglis relied upon the statement of McHugh J in *Kenny & Good Pty Ltd v MGICA* (1992) Ltd [1999] HCA 25; (1999) 199 CLR 413 at 437-8; (1999) 163 ALR 611; (1999) 73 ALJR 901; [1999] ATPR 41-711, a case concerning a negligent valuer. After stating the principles of causation and remoteness, his Honour stated:

> "[54] The valuer is not liable for every loss that flows from his or her breach of duty. Although it is true in one sense that losses and general market declines are within the reasonable contemplation of the party to valuation contract or arrangement, I do not think that the notion of reasonable contemplation of loss extends to such generalisation concerning the course of future events.
>
> [55] Many kinds of losses or damage that are reasonably foreseeable in the general way are outside the area of recoverability in the law of torts and the law of contract."

Counsel for Inglis submitted that these comments applied to the appellant's attempt to argue that the loss claimed was reasonably foreseeable. Counsel again submitted that the question was whether the loss claimed could be characterised as one suffered in the operation of the business or whether it was an ancillary loss arising out of an agreement. Counsel argued that if a claim was made in respect of fares lost, then that sort of loss was one suffered in the operation of the business and was reasonably foreseeable.

56. Counsel submitted that the contract entered into between the Franchisor and Franchisee was not directly related to the actual business but was an arbitrary relationship between the parties to the contract under which Metrolink was enabled to conduct the business. This was one step removed and losses suffered under its particular terms should be regarded as outside the range of reasonable foreseeability.

57. Counsel submitted in conclusion that, if the learned Magistrate had categorised the genus correctly, then the appeal must fail. Whether the kind of loss was reasonably foreseeable was very much a factual decision for the learned Magistrate and while views may differ, it could not be demonstrated that his Honour's decision was wrong.[24]

Foreseeability of the loss as defined – Conclusion

58. The learned Magistrate's decision that the "kind or genus" of loss as defined by him was not reasonably foreseeable was a decision on a question of fact.[25] To succeed, Metrolink has to demonstrate that it was not open to his Honour to find that that "kind or genus" of loss was not reasonably foreseeable. While it can maintain, as it has, that the conclusion is open to argument and point to examples in other situations, it cannot demonstrate that it was not open to his Honour to find in the circumstances of this case that the "kind or genus" of loss that he categorised was not reasonably foreseeable.

59. For the foregoing reasons, I am not persuaded that any error of law has been demonstrated in the learned Magistrate's decision. Accordingly, the appeal should be dismissed.

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[1] Note: the issue of causation was not raised: cf *Esso v Hall Russell* [1989] AC 643; [1989] 1 All ER 37; [1989] 1 Lloyds Rep 8.
[2] Recital D.
[3] Recital G.
[4] Part 2.
[5] See cl.14.3.
[6] At [43].
[7] See above.
[8] See above.
[9] At 34.
[10] Above, at [43].
[11] At 845.

[12] Above at 845.
[13] Above at 853: "The particular chain of events" – *MacPherson v Proprietors of Strata Plan 10857* [2003] NSWCA 96, [29].
[14] Above.
[15] Per Batt JA at [49].
[16] At [50].
[17] [1897] AC 596.
[18] *Richards v State of Victoria* [1969] VicRp 16; [1969] VR 136, 145-6
[19] Above, at [50].
[20] The argument has proceeded on the basis that the appellant is not confined to the description of the loss in the pleading or given in argument below.
[21] There was no evidence before his Honour on that issue.
[22] For example, at [87].
[23] At page 394-5.
[24] Citing *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317 at 397; 191 ALR 449; (2002) 76 ALJR 1348; also *Ericcson Pty Ltd v Popovski* [2000] VSCA 52; [2000] 1 VR 260 at 265.
[25] *Richards v State of Victoria* above.

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