SUPREME COURT OF QUEENSLAND

CITATION:	*Beautrans P/L v CSR Ltd* [2003] QSC 004
PARTIES:	**BEAUTRANS PTY LTD** ACN 077 554 851 **and others** (plaintiffs) **v** **CSR LIMITED** ACN 000 011 276 (defendant)
FILE NO:	S10902 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	17 January 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16-19 December 2002
JUDGE:	Muir J
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – Construction and Interpretation of Contracts – whether court can depart from the literal meaning of contractual provisions – rectification *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1972-1973) 129 CLR 99 *Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313-314 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771 *Wickman Machine Tool Sales Ltd v L. Schuler AG* [1974] AC 235 at 251
COUNSEL:	P O'Shea SC with him D Kelly for the plaintiffs S Doyle SC with him D Clothier for the defendant
SOLICITORS:	Phillips Fox for the plaintiffs Allens Arthur Robinson for the defendant

[1] The matters for determination are the construction of a number of provisions in a standard form contract entered into between the defendant CSR Limited and owner

driver members of its concrete truck fleet. The parties, in the alternative, seek rectification of such contracts entered into between the plaintiffs and the defendant. Agreements in the form of those contracts will be referred to as "the Contracts".

[2] In February 1997 the defendant, carrying on the business of manufacturer and supplier of premixed concrete under the name CSR Readymix, had a fleet of around 260 concrete trucks, most of which were owned by contractors. That component of the defendant's fleet consisted of approximately 30 mini trucks, approximately 190 six wheel trucks and, two eight wheel trucks. The mini trucks had a carrying capacity of between $2m^3$ and $2.4m^3$. The six wheel trucks' carrying capacity was between $4.6m^3$ and $6m^3$ and the eight wheel trucks had a carrying capacity of about $6.5m^3$. All these trucks had mixers mounted on them.

[3] In 1996 and 1997 the capacity of a typical agitator (the term I will use to describe the barrel in which concrete is mixed and associated equipment, excluding the truck on which the barrel is seated) mounted on a six wheel truck was between 5^3 and $5.4m^3$.

[4] The trucks known as six wheel trucks have three axles with two wheels on the front axle and four on each of the back axles. Eight wheel trucks have four axles with twelve wheels in total.

[5] The eight wheel trucks were then about 15 years old. In terms of use, there was little material difference between them and the six wheel trucks. The mini trucks, because of their limited capacity, were utilised on jobs requiring smaller amounts of concrete than the jobs on which the six wheel and eight wheel trucks tended to be engaged. In consequence, they were not placed in a roster, loading order or utilisation group with the larger trucks.

[6] At the beginning of 1997 the defendant also had concrete trucks of its own which it was then either reducing or contemplating reducing in number.

[7] In 1996 and early 1997, some of the defendant's competitors in south-east Queensland had eight wheel trucks in their fleets, but there is little evidence about the carrying capacity of the agitators mounted on those trucks or of what understanding the defendant and its carriers had of that matter at the time the standard form contract was being negotiated. From the little evidence given on the point, I consider it probable that these trucks and their agitators were comparable in nature and carrying capacity to the eight wheel trucks in the defendant's fleet. Otherwise, it was likely that the defendant's contractors and, more particularly, the defendant, would have been concerned to study the possibility of competing suppliers deriving commercial advantages through the use of such trucks. That did not appear to have happened and even those representatives of the defendant who were acquainted with the eight wheel trucks of even larger carrying capacity did not seem to have been alive to their commercial possibilities. That may, in part, have been because of the limited loading or batching capacity of the defendant's Queensland plants.

[8] The amount of concrete able to be carried by a truck is limited by factors including the capacity of the agitator, the strength and size of the truck's chassis and statutory limitations on the weight permitted to be placed on roads. The latter was determined by reference to the load brought to bear on each truck axle. In the 1990s, to the knowledge of the parties at relevant times, manufacturers had been gradually reducing the weight of agitators and also of the trucks themselves, thus increasing carrying capacity. At the end of 1996, agitators with a capacity of $6m^3$ suitable for mounting on six wheel trucks were becoming available and the defendant had subjected one to trials at its Albion plant.

[9] There was some controversy about when eight wheel trucks with a carrying capacity of in excess of $7m^3$ came into use. I accept that two employees of the defendant, Mr Richardson and Mr Prior, had been acquainted in Adelaide with the existence of such trucks prior to 1997. Mr Gallagher, a consultant to CSR, also had knowledge of them at the time of his involvement in the subject negotiations. The evidence, however, does not suggest that any of these trucks were operating in Queensland in 1996 or 1997 or that there was publicity in the industry in Queensland in relation to them.

[10] It is probable that the defendant's contractors, or at least the great majority of them, had no knowledge of the existence and use in Australia of these trucks. It is also probable that the officers of the defendant responsible for approving the terms of the Contract and deciding whether it should be entered into gave no consideration at relevant times to the inclusion of such vehicles in the defendant's fleet or to how their inclusion, if it were to occur, would affect the implementation of the terms of the Contract.

The negotiations

[11] The principal negotiators on behalf of the defendant were Mr Richardson, then the defendant's transport manager for the Brisbane and Gold Coast areas and Mr Beattie, the operations manager of the defendant's south-east Queensland concrete business. Messrs Richardson and Beattie reported to the defendant's concrete manager for south-east Queensland, Mr Clements, who was replaced in about June 1996 by Mr Prior. Also involved on the defendant's behalf were Mr Dallimore, the manager of the defendant's country concrete division and Mr Gallagher, a consultant. Mr Gallagher was engaged in about April 1996 by the defendant to assist in the drafting and negotiation of the Contract. He participated in negotiations with contractors' representatives from that time on.

[12] The Contractors, which term I will use to describe the owner drivers of six wheel contract trucks and the two eight wheel trucks in the defendant's fleet, were represented in the negotiations, which commenced in 1994 and concluded in February 1997, by a negotiating committee selected by them. Its composition of approximately six persons varied a little over the negotiating period.

[13] In early 1995, the defendant produced a draft contract which used as its basis a form of contract then used by the defendant in Sydney. The Contractors produced their

own version which the defendant rejected. Subsequently some 16 drafts were prepared by the defendant and considered by the negotiating committee and the defendant's representatives.

[14] On 1 August 1995 the defendant, after legal advice that Trade Practices Commission authorisation would be required before it could negotiate cartage rates, applied for authorisation from the Trade Practices Commission, under s 88 of the *Trade Practices Act* 1974, to make and give effect to agreements between the defendant and each of its concrete truck carriers who operated as independent contractors in Queensland. The application stated, inter alia –

> "(a) the persons who would be parties to the contracts with the defendant would be independent contractors who were from time to time engaged in the business of delivery by road of pre-mixed concrete for the defendant;
>
> (b) application was sought for the defendant and the carriers to enter into contracts containing standard and agreed rates and conditions;
>
> (c) the group of carriers might be expanded or contract over time;
>
> (d) the defendant then dealt with 224 independent contractors;
>
> (e) it was both impractical and inequitable for the defendant to enter into separate negotiations and contracts, arrangements or understandings with each individual independent contractor;
>
> (f) there were significant cost savings to be made by increasing the volume of mixed concrete carted by each carrier, and the proposed contract contained financial incentives to achieve that;
>
> (g) by allowing the independent contractors to negotiate with the defendant as a combined body, the parties would achieve:
>
> (i) a more efficient allocation of resources through group acceptance of standard rostering and job allocation procedures; and
>
> (ii) industrial harmony through equality of treatment."

[15] In August 1996 the principal differences between the parties concerned the rate of remuneration and financial security provided to contractors by the current drafts. In particular the Contractors were concerned that –

> (a) The remuneration provided for in Schedule A to the draft was inadequate to offset the purchase price and depreciation of a new six wheel truck; and
>
> (b) A number of Contractors would not receive extensions after two years and there was inadequate provision for a redundancy or termination payment.

[16] The negotiations concluded at the end of 1996. On 20 December 1996 Mr Beattie sent a letter to the Transport Workers' Union advising, in effect, that Contractors

would be offered a contract in the New Year in the form of that then before the negotiating committee. On about 12 February 1997 the defendant nominated 14 February as the final date by which contractors could accept the form of contract. On 14 February 1997 the Transport Workers' Union advised the defendant that the Contractors would sign that form of contract. The Contractors then entered into standard form contracts.

[17] At an early stage of the negotiations it was contemplated that the document would apply to both maxi and mini owners with, in the case of the form of contract to be entered into with mini owners, appropriate variations to accommodate the particular requirements of mini trucks. Also, at that time, the defendant wanted the standard form contract to be negotiated first with carriers in Brisbane and the Gold Coast region and then applied to Contractors throughout the State. After pressure from the negotiating committee the defendant agreed to restore the original position which was that the contract would have statewide application.

Events subsequent to February 1997

[18] After February 1997, the six wheel trucks, and the two eight wheel trucks while they remained in the fleet, were assigned to a particular plant where they were loaded on the basis of a roster designed to ensure, so far as was reasonably possible, equal work distribution between the trucks. Each truck would be loaded to its maximum legal capacity where possible and would be reloaded in order of time of arrival back at the plant. Exceptions to this were where the required load was greater than the carrying capacity of the truck first in line or where the load was within the carrying capacity of an available mini truck.

[19] In about August 2000 the defendant commenced introducing into its fleet eight wheel trucks with a carrying capacity of $7.1m^3$ to $7.4m^3$ of concrete in the belief that their use would achieve economies of scale, offer a better service to customers, and increase the defendant's profitability. It was decided also that the remnants of the defendant's company owned vehicles should be replaced with these trucks. A consultative committee of Contractors was advised at a meeting on 26 July 2000 of the defendant's intention to reduce company owned six wheel truck numbers and to replace them with eight wheel trucks. Formal notice of the decision was given to Contractors by notices placed on plant notice boards in early August 2000.

[20] The defendant uses a different form of contract for its contracts with the owners of the eight wheel trucks. Those contracts require the contractor to provide both truck and agitator but the provisions in respect of remuneration, including Schedule A, are materially the same as those in the Contracts.

[21] After the introduction of the eight wheel trucks, the Contractors complained that the defendant adopted a practice of loading eight wheel trucks in priority to six wheel trucks. This, it was alleged, impacted adversely on the Contractors' earnings. The Contractors alleged that this conduct was in breach of the defendant's obligation under clause 9 of the Contract to load trucks in order of arrival at concrete plants and in breach of the obligation in clause 26 to give each carrier an equal opportunity

to carry the amount of concrete carried on average by all trucks at a particular plant or in a particular area. The defendant's response was to assert that clauses 9 and 26 had no application to eight wheel trucks. In their contention, the expression "Carrier" in the Contract was a reference only to owner drivers of six wheel trucks who had entered into a standard form contract with the defendant. Also, it was contended, "Concrete Truck" in the Contract did not include reference to eight wheel trucks. After negotiations failed the plaintiffs commenced these proceedings claiming declaratory and injunctive relief and damages for breach of contract. As a result of an order that certain questions going to liability be determined separately from the other issues on the pleadings, this hearing does not concern any damages question.

Relevant provisions of the Contract

[22] The relevant provisions of the Contract are as follows:

> **"OBJECTIVE**
>
> a) The objectives of this agreement are to:
>
> i) Ensure that the optimum improvements to the pre-mixed concrete operations of SCR Readymix in the areas of productivity, efficiency and thus effectiveness are realised, so that CSR as well as its Contract Carriers may become and remain competitive in the market place.
>
> …
>
> ii) Provide Carriers with the security of a long term contract which is based on productivity improvement incentives for both the Contract Carrier and CSR.
>
> b) CSR have developed a broad framework to facilitate on-going business improvement based on strategic planning and Total Quality Management (TQM) principles.
>
> c) The parameters which will guide the achieving of these objectives will include but may not be limited to such things as listed below;
>
> i) A culture based on Quality in all the Company's activities including the relationship between CSR and Carriers.
>
> ii) An organisation that is customer service focussed for both external and internal customers.
>
> iii) Continual improvement in all aspects of CSR's activities.
>
> iv) Ongoing consultation between CSR and the Carriers.
>
> v) A safe and rewarding work environment for Carriers.
>
> vi) Market competitiveness
>
> d) The objectives will be achieved using the concept of continuous improvement by:
>
> …
>
> ii) Continuous improvement being monitored through the use of performance indicators developed by CSR with consultation with the Contract Carriers.

iii) Improvement projects being conducted at Plants with the opportunity for Carriers to actively participate in these improvement projects and achievements.

iv) Carriers and CSR management working together as a team knowing that in the long term it is in their best interest.

…

e) This objective is a statement of intent of the parties to this agreement in the event of any inconsistency, the body of the agreement will prevail over the preamble.

1. **DEFINITIONS**

1.1 For the purpose of this agreement the following terms will bear the meaning:

…

Concrete Truck means the total mobile unit including the cab/chassis truck, complete agitator unit, together with all other components necessary for the Carrier to perform his duties as required by the Contractor.

…

Maxi Truck means a truck fitted with an agitator which has a mixing capacity of greater than 3.0m³.

Mini Truck means a truck fitted with an agitator that has a mixing capacity of up to 3.0m³ or less.

…

Contract Carrier or Carrier shall mean a single operator owner driver trading as an incorporated body who has entered into a Contract with CSR (The Principal), to provide and operate a truck or mini truck with agitator, for the transportation of loads of concrete.

…

Truck means a truck cab – chassis alone without the Mixer

2. INDEPENDENT CONTRACTOR

2.1 This Contract sets out the rights and obligations of CSR and the Carrier operating a Maxi Truck or Mini Truck, delivering Concrete for CSR from plants in Queensland.

4.3 Haulage Area

The Carrier will deliver concrete from any plant nominated by CSR. The Carrier will normally work for a period of time from a nominated Plant, but will be subject to transfer to other Plants in accordance with the requirements of this Contract. …

4.9 Standby Time

a) Where a Carrier is required by CSR to remain at a plant to take a delivery to a job commencing outside Normal Spread of Delivery Hours, standby time shall be paid at the rate of "B" (Schedule B herein", following the expiration of one hour.

…

9. LOADING

9.1 Size of load

a) CSR has the right to nominate the quantity of Concrete to be carried, subject to the Carrier having the right to refuse a load that is beyond the legal carrying capacity of its Concrete Truck or the manufacturer's rated capacity of the Mixer. The Carrier shall carry any load so nominated provided it is within the legal carrying capacity of the truck and there are no other adverse impacts.

9.2 The Concrete Truck will be loaded to its maximum legal capacity wherever possible except in the case of a single load or message, where a subsequent load would result in less than 3.0m³ being carried, or where CSR consider that 5.0m³ is operationally appropriate in which case the Carrier shall be loaded to 5.0m³.

a) The loading order at a Plant at the start of the day will be in accordance with a list of Concrete Trucks made up of those Concrete Trucks assigned to that Plant and not rostered off, in accordance with Clause 26.

b) Thereafter the Concrete Trucks will be loaded in order of their return to a Plant with the exception of:

(i) Loads of less than 3.0m^3 when a Mini Truck is available;

(ii) Loads greater than the Mixer capacity or legal carrying capacity of the Concrete Truck next in line, and

(iii) …

9.3 CSR may operate a fleet of Concrete Trucks driven by its employees, and undertakes that at Plants where there are both Carrier and CSR employee driven Concrete Trucks, the CSR employee driven Concrete Trucks and Short Term Carriers will not be preferentially loaded and will participate in the loading order described in Clause 9.2

…

11.3 …

d) Should the Carrier wish to replace a Truck currently operating for CSR in Queensland, the replacement Truck must be capable of and adequately powered to take a hydraulic mixer powered from a rear mounted power take-off unit. The limit of the Carrier's responsibility shall end at the provision of an accessible bare power take-off shaft. However, any modification to the truck to accommodate the hydraulic drive connection to the mixer, shall be to the Carrier's cost.

11.8 The Carrier must provide a suitable truck with a legal carrying capacity of 5.0m³ for a maxi truck/agitator combination, and 2.4m³ for a mini truck/ agitator combination, for a determination made under Clause 11.3(d) and;

a) The provision of CSR of a Maxi agitator not weighing in excess of 2,700kgs; plus an allowance of 200kgs for water and oil.

b) The provision of CSR of a Mini agitator not weighing in excess of 1,500kgs, plus an allowance of 200kgs for water and oil
c) The nominal mass of normal class 25Mpa (N25 under AS1379), being 2,340kgs and;
d) The Department of Transport registered mass of the Concrete Truck.

15. PROVISION OF MIXER

15.1 Provision and Fitting of Mixer

a) CSR is responsible for the provision of a Mixer with a rated mixing capacity of not less than 5.0m³ for a Maxi Truck and 2.4m³ for a Mini Truck, and its safe and proper initial fitting to the Carrier's Truck in accordance with the specifications of the Truck and Mixer manufacturers including the supply of "U" bolts, clearance lights, mud flaps and a protective chassis/agitator cover plate mutually acceptable to CSR and the Carrier.

18. CARRIERS REPRESENTATIVE

18.1 A Driver appointed as the Carrier's Representative, will upon notification thereof to CSR by the Carrier, be recognised as the Yard Representative.

22. FLEET SIZE

CSR shall have the absolute discretion to vary its fleet size in any manner and for any reason subject to the terms of this Contract.

26. ROSTERING

CSR undertakes that it shall operate a plant roster to ensure that all carriers shall be exposed to the full plant market and shall have the opportunity to cart a quantity of concrete which is as close as commercially practicable to the average fleet utilisation level applicable during relevant period to a particular plant or area, provided that the level of customer service set by CSR is achieved."

Considerations relevant to a determination of the Meaning of "Carrier"

[23] The terms "Carrier" and "Concrete Truck" are defined in clause 1 of the Contract and are both used in clauses 9 and 26. Clause 9 provides for the basis on which and the order in which concrete trucks are to be loaded by the defendant at its plants. It provides also that trucks owned by the defendant will participate in the order of loading prescribed for carrier owned trucks.

[24] Clause 26 provides for the rostering of concrete trucks at the defendant's plants and from plant to plant. It stipulates, with qualifications, that "all Carriers … shall have

the opportunity to cart a quantity of concrete which is as close as commercially practicable to the average fleet utilisation level applicable to a particular plant or area …".

[25] The defendant contends that in clauses 9 and 26 "Carriers" or "carriers" mean those carriers who have entered into standard form cartage agreements with the defendant in respect of six wheel trucks. It further asserts that "Concrete Trucks" means those trucks only.

[26] If the defendant's construction is correct the two clauses govern loading and rostering arrangements only in respect of six wheel trucks and do not prevent the defendant from loading eight wheel trucks in priority to six wheel trucks or from giving them a preferential share of available work.

[27] I acknowledge the force of the plaintiffs' submission that the word "Contract" in the definition of "Contract Carrier" should not be give its defined meaning of "the CSR Readymix Concrete Carriers Contract". As the definition encompasses agreements with mini truck owners a Contract cannot mean "a contract with an owner driver of a six wheel truck who has entered into a contract in the form of this contract", as the defendant contends.

[28] It is also the case that the words in the definition after "(the Principal)" would be otiose if "Contract" were to be given its defined meaning.

[29] On the other hand, if the plaintiffs' construction is accepted the definition of "Contract" is very limited in its application. The only provisions in which the word "Contract" is used and where it is capable of having its defined meaning are the subject definition, the definition of "Consultative Committee" and the definition of "Short Term Carriers". Elsewhere in the Contract the word is used in the sense of the agreement between the defendant and the individual carrier or the predecessor of or successor to that agreement.

[30] It is possibly of significance that in the latter definitions the reference is to "the Contract" rather than "a Contract". Also, it is apparent from a perusal of the Contract that it is not always the case that a defined term in a clause is used in the sense of its defined meaning.

[31] In places, the expressions "Concrete Truck", "Truck" or "truck" are used as if they were interchangeable[1] even though "Concrete Truck" and "Truck" are defined terms having quite different meanings.

[32] In sub clauses 5(a) and 5(b), "Carrier" is used to describe the owner driver of a mini truck and the word "Truck" is used in the sense of "mini truck", although a mini truck is a truck equipped with an agitator and the defined meaning of "Truck" is a cab and chassis without a mixer.

---

1 See e.g. clause 11.

[33] It is implicit in clause 16 that a "Mixer" on a "Truck" belonging to a "Carrier" may not always be provided by the defendant.

[34] In clause 9.2 the expression "Concrete Trucks" is used in relation to both mini trucks and maxi trucks, whilst in clause 9.3 it refers to trucks owned and operated by the defendant.

[35] Matters such as these demonstrate the necessity of construing the Contract by considering each of its provisions as part of a composite whole rather than in isolation. It is thus desirable to consider the remaining questions of construction before concluding discussion on this point.

The Meaning of "Maxi Truck"

[36] The meaning of the expression "Maxi Truck" does not impinge, directly, on the construction of clauses 9 and 26 but if the expression, wherever it appears in the Contract, is to be given its defined meaning, it is likely that the scope of the Contract is not, as the defendant contends, limited to six wheel trucks and, in particular, those owned by Contractors who have entered into a standard form contract with the defendant.

[37] For example, clause 2.1 assumes that the contracting party, other than the defendant, who is referred to as "the Carrier" will operate either a "Maxi Truck" or a "Mini Truck". The same assumption is made in clause 15. If the expression "Maxi Truck" encompasses eight wheel trucks, it would be remarkable if "Concrete Truck" and "Contractor" in clauses 9 and 26 had the meanings urged by the defendant. On the defendant's construction, those clauses would apply only in respect of some of the contractors intended to be parties to the Contract and to only some of the trucks the subject of the Contract.

[38] The main thrust of the defendant's argument in this regard is that when using the expression "Maxi Truck" in the definition and elsewhere in the Contract the parties had in mind only six wheel trucks. The definition is, "Maxi Truck means a truck fitted with an agitator which has a mixing capacity of greater than $3.0m^3$".

[39] I can see no good reason for giving the expression "Maxi Truck" a meaning other than its defined meaning. In 1996 and 1997, the defendant's fleet of Contractor owned trucks, with two exceptions, consisted of six wheel trucks and mini trucks. The parties intended, with the qualification I have expressed earlier, to legislate for the whole of the defendant's fleet of Contractor owned concrete trucks. That is plain from the affidavit and oral evidence of witnesses called by both sides and is borne out by the documentary evidence.

[40] Moreover, the definitions of "Maxi Truck" and "Mini Truck" divide concrete trucks into two categories only, those with a carrying capacity of up to $3m^3$ and those with a carrying capacity of greater than $3m^3$. The definition does not and was not intended to describe maxi and mini trucks in terms of the carrying capacities which

those trucks had in 1996 and 1997. The evidence suggests that there were very few trucks known as maxi trucks which had a carrying capacity materially less than $5m^3$. The smallest such truck referred to in evidence had a carrying capacity of $4.6m^3$. Nor does the evidence suggest that there were trucks known as mini trucks which had a carrying capacity greater than about $2.4m^3$.

[41] The parties could have decided to refer to mini trucks and six wheel or six wheeler trucks if they so desired. If they had done so no further definition would have been required. The fact that they did not do so but defined two classes of trucks in the manner just described hardly suggests that the definition of "Maxi Truck" is just a more cumbersome and obscure way of referring to six wheel trucks.

[42] Six or seven witnesses each gave evidence on behalf of the defendant to the effect that, at relevant times, persons in the industry used the expression "maxi truck" to refer to a six wheel truck with a carrying capacity of (variously) between about 5 and $6m^3$ or about $6m^3$ or in the range of 5 to $5.8m^3$ and that 8 wheel trucks were known and referred to as such.

[43] Two of those witnesses were former members of the Contractors' negotiating committee. I note, however, that one of them, Mr Andrieux, used the descriptions "eight wheeler maxi truck" and "six wheeler maxi truck". Neither he nor Mr Harris, the other such member, appeared to consider that it was inappropriate to refer to eight wheel trucks as eight wheel maxi trucks.

[44] Five Contractors or former Contractors gave evidence to the effect that, at relevant times, "maxi truck" was used in the industry to refer to concrete trucks other than Mini Trucks.

[45] All of this evidence was given with the benefit of hindsight and needs to be treated with considerable caution. There was a discernable tendency on the part of witnesses called by both sides to credit themselves with having had in early 1997 the knowledge they now possess.

[46] In 1996 and 1997, the defendant's fleet consisted of two eight wheel trucks and, as mentioned earlier, the parties were aware of technological improvements which were increasing the carrying capacities of six wheel trucks.

[47] The eight wheel trucks were not regarded as being different from the six wheel trucks for relevant purposes. In fact, there was as much difference in carrying capacity between the smallest and largest of the six wheel trucks as there was between the largest of the six wheel trucks in the defendant's fleet and the eight wheel trucks in the defendant's fleet and in the fleets of its competitors in Brisbane. It is probable that there were no eight wheel trucks with a capacity of over $7.4m^3$ in Queensland and that they were not mentioned in the course of negotiations.

[48] There was thus no need for either the defendant or the Contractors in 1996 and 1997 to give particular consideration to whether the term "maxi truck", in normal

parlance, included reference to eight wheel trucks. When a Contractor or employee of the defendant referred to a maxi truck he would have been referring, in the majority of cases, to a six wheel truck. Where it was necessary to distinguish an eight wheel truck from a six wheel truck, the obvious course would have been to refer to the former as an "eight wheeler". But it does not follow from this that the expression "maxi truck" was not used with reference to eight wheel trucks, or was not capable of being so used. I accept that at least some of the Contractors would have used the term "maxi truck" in the sense of a truck other than a "mini truck".

[49] The word "maxi" does not itself suggest any maximum size limitation and there is evidence that the defendant itself regarded the term as applicable to eight wheel trucks. For example, the definition section of the form of agreement used by the defendant for the newly introduced eight wheel trucks uses the term "8 wheeler Maxi Truck". Cartage rate sheets applicable to these trucks are headed "Maxi Cartage Rates". Whilst these documents came into existence some years after the events in question, the additional carrying capacity of recently acquired eight wheel trucks suggests a greater rather than lesser need to distinguish between six wheel trucks and eight wheel trucks.

[50] I conclude that when the Contract was negotiated and subsequently entered into the expression "maxi truck", although normally used in relation to six wheel trucks, for the reasons I have given, was not incapable of application to eight wheel trucks. The expression was in fact used by the defendant, the negotiating committee and the two owners of the eight wheel trucks in relation to those trucks without arousing comment. The concern in defining "Mini Truck" and "Maxi Truck" was to distinguish between mini trucks and other trucks, not to arrive at any further categorisation of the larger trucks. The whole of the fleet needed to be accommodated by these two definitions.

The construction of clause 9 and the meaning of "Carrier" and "Concrete Truck" in clauses 9 and 26

[51] The expression "Concrete Truck" in subclauses 9.1 and the first paragraph of 9.2 refers to the vehicle provided by the contracting party other than the defendant. In clause 9.2(a) "Concrete Trucks" means "The total mobile unit" as described in the definition of "Concrete Truck".

[52] In that definition, the words "together with all other components necessary for the Carrier to perform his duties as required by the Contractor", upon which the defendant places so much reliance, are merely descriptive of the physical composition of the subject vehicle. The definition does not define "Concrete Truck" by reference to its ownership. To conclude to the contrary would be to approach the construction of the Contract with a degree of pedantry or sophistication which would have occasioned considerable surprise to those engaged in the negotiation of its terms.

[53] Shed of some of its almost Byzantine complexities, the main thrust of the defendant's construction argument is as follows. Excluding minis, at the time the

Contract was negotiated the defendant's owner driver concrete truck fleet consisted of six wheel trucks. The Contract was negotiated by the defendant with the six wheel carriers and some of its terms are plainly drafted only with six wheel trucks in mind. The main examples of such provisions are clause 11 and Schedule A to the Contract. Also relied on is the fact that in preparing the Schedule and considering its effect the parties sought and obtained accounting advice only in respect of the Schedule's application to six wheel trucks.

[54] The defendant points to the definition of Carrier which refers to the entering into of a contract to "provide and operate a truck" i.e., a "chassis alone without the Mixer".[2] Also relied on is clause 11, which, it is said, requires the Carrier to provide a truck which can fit an agitator of no more than 2,700 kgs in weight. That was the standard weight of an agitator fitted to a six wheel truck in 1996 and 1997.

[55] It follows from these matters (and from various other indications in and external to the Contract), according to the argument, that "Carriers" means owner drivers of six wheel trucks who have entered into standard form cartage contracts with the defendant and that references to "Trucks" or "Concrete Trucks" are confined to six wheel trucks.

[56] For the reasons already advanced these arguments, although not without some attraction, cannot be accepted. They are also erroneous because they are based on a false premise. There is no justification for altering the meaning of a defined term of plain meaning, such as "Concrete Truck", because at the time the Contract was negotiated the defendant's maxi truck fleet, with two exceptions, consisted only of six wheel trucks. The fact that the parties failed to address the consequences of a change in the composition of the fleet does not permit the language of the Contract to be adjusted to accommodate what it is now thought, with the benefit of hindsight, one or other of the parties would have provided had it adverted to the problem.[3]

[57] Although the Contract was negotiated on behalf of the Contractors by owner/operators of six wheel trucks with the requirement of six wheel trucks particularly in mind, the standard form contracts were intended to cover the whole of the defendant's fleet (with the exception of mini trucks) as composed from time to time. It regulated and was intended to regulate the rostering of trucks in the defendant's fleet and loading arrangements. These matters, together with the provision for remuneration, were critical in ensuring "a rewarding work environment for Carriers" and to give content to the stated objective that Carriers be provided "with the security of a long term contract".

[58] The Contracts, with extensions, were capable of a maximum life of 10 years. It was obvious to both sides that trucks and agitators were undergoing the evolutionary process described earlier and that, in consequence, the capacities and other characteristics of the subject vehicles would not remain static. That suggests a belief

---

2 Clause 1, definition of "Truck".

3 See the passage from the judgment of Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1972-1973) 129 CLR 99 at 109 quoted later.

by the parties that the Contract was capable of application to changing circumstances.

[59] The confining of the defendant's obligations in clauses 9 and 26 to only six wheel trucks would always have had the potential to negate much of the benefit of the Contract insofar as the Contractors were concerned. Nor does the Contract prevent the defendant from entering into different forms of contract with other contractors it might engage in the future. Thus if the Contract were to be given the defendant's construction, the benefit of the Contract to the Contractors would be further eroded or negated if the defendant entered into non standard forms of contract with other owner operators. Commencing in late 1997 the defendant did in fact enter into such contracts with persons formerly employed by it and also with others.

[60] Clause 9.2 lends support to the conclusion that "Concrete Truck" and "Carrier" do not have the restricted meaning for which the defendant contends by suggesting that the contractual intention was that no trucks of any description would be given preferential treatment.

[61] The existence in the fleet of the two eight wheel trucks poses a difficulty for the defendant's construction. Certainly, those trucks were quite old and due to be replaced within two years. The fact remains, however, that the Contract had application to those trucks. That was understood by the parties who also understood the contract to require no alteration in order to achieve this purposes.

[62] Much reliance is placed by the defendant also on the fact that Schedule A was formulated by reference only to the characteristics of six wheel trucks. But that point loses much of its force once it is appreciated that the parties did not apprehend any difficulty in the application of the schedule to the two eight wheel trucks or resulting from the differences between the six wheel trucks then in the fleet, or which would join the fleet in the future. Furthermore, the subsequent use of the schedule without material alteration in the defendant's contracts for eight wheel trucks does not support the view that the parties to the Contract, at the time it was entered into, must have understood that it was capable of application only to "Maxi Trucks" in the sense of six wheel trucks.

[63] Clause 11.8 adds some support to the defendant's argument but the clause cannot be construed literally. The obligation to provide a truck with a carrying capacity of $5m^3$ must mean a minimum such capacity. As both parties were aware that the weight of agitators was being reduced and the carrying capacity of trucks increased, it may well have been assumed that if lighter trucks and agitators with improved carrying capacities came on the market they would be acquired automatically by carriers when replacing their vehicles.

[64] The defendant seeks to rely also on the argument that if the plaintiff's construction is accepted, the Contract is so commercially impractical and disadvantageous that such a result could never have been intended. There is ample authority for the

desirability of construing commercial documents so as to make commercial sense of them.[4]

[65] In *Wickman Machine Tool Sales Ltd v L. Schuler AG*[5] Lord Reid said –

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

[66] In *Antaios*[6], Lord Diplock expressed even stronger views concerning the imperative to make business sense of commercial contracts, stating -

> "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

[67] There are, however, limits to a court's ability, in construing a written contract, to avoid an inconvenient, improbable or harsh result.

[68] In *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*[7], Gibbs J expressed the limitations on a court's powers in construing a written contract as follows –

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. *If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust.* On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke v Dunlop* (1888) 39 Ch. D. 387, at p 393, which, although spoken in

---

4 *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313-314; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771; *Wickman Machine Tool Sales Ltd v L. Schuler AG* [1974] AC 235 at 251.

5 [1974] AC 235 at 251.

6 [1985] AC 191 at 201

7 (1972-73) 129 CLR 99 at 109.

> relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's Case* (1880) 16 Ch. D. 681, at p 686. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument."

[69] It seems to me that any argument the defendant may be able to advance in reliance on unreasonableness and lack of commerciality is negated by a contrary argument of at least equal force available to the plaintiffs. Moreover, I am unable to accept that the construction of the Contract I have arrived at produces a result which, although now unattractive to the defendant, would have been regarded as unreasonable or uncommercial when the contracts were entered into.

[70] The parties did not turn their minds to the difficulties, if any, which might result from the application of the Contract's provisions to a fleet with a markedly changed composition. And it is not in the Court's power to now rewrite the Contract.

[71] For the above reasons and for the considerations advanced under the heading "The meaning of 'Maxi Truck'", the defendant's construction cannot be accepted.

[72] In summary, in clauses 9(2) and 26 "Concrete Trucks" encompasses both six wheel trucks and eight wheel trucks. All references to "Carrier" in clause 9 are prefaced by "the" and are references to the contracting party other than the defendant. Whatever is meant by the word "Carrier" in clause 26, it encompasses a group of carriers employed by the defendant which group includes the plaintiffs and does not include carriers with mini trucks. The obligations in the clause are not to be qualified so as to produce the result that terms such as "the full plant market" and "average fleet utilisation level" are to be determined without reference to eight wheel trucks and their operation. Any such qualification is contrary to the language of the clause.

Clause 9.1 – The scope of the "right to nominate"

[73] The plaintiffs contend that the right to nominate conferred on the defendant by clause 9.1 does not permit the defendant to nominate a load greater than the carrying capacity of the truck the subject of the nomination. The object of clause 9, according to the plaintiffs, was to ensure that trucks were loaded to maximum capacity and that drivers were prevented from equalising incomes amongst the trucks.

[74] In order to arrive at the construction favoured by the plaintiffs, it is necessary to qualify the right of nomination conferred by clause 9.1(a) by inserting the words "being not more than the Concrete Truck's legal carrying capacity" or by implying a term to that effect.

[75] The language of clause 9.1(a) is not ambiguous and its plain meaning cannot be altered to avoid a result which is detrimental to one of the parties and, possibly,

unforseen at the date of the Contract. Moreover, the conferral on Contractors of the right to refuse a load beyond the legal carrying capacity of their trucks assumes that a load greater than such capacity can be nominated. Were it otherwise, the clause would simply provide that the defendant had the right to nominate any load up to but not exceeding a truck's legal carrying capacity.

[76] It is conceded by the plaintiffs that in the case of a single load required to fulfil a single order the defendant has the right to nominate that load even if it exceeds the carrying capacity of the truck at the head of the queue. Once this is recognised, it becomes difficult to see how clause 9 can be construed so as to limit the right of nomination to these circumstances. It is not difficult to conceive of reasons why the parties may have thought it appropriate to confer such a general right of nomination on the defendant.

[77] No doubt the power of nomination was not intended to confer on the defendant an arbitrary power to prefer trucks of large capacity to trucks of smaller capacity as a matter of course. But at the time the Contract was negotiated the parties would have understood that any substantial inequalities which might have been produced by the exercise of the power of nomination would be redressed by operation of clause 26.

Clause 26 – Rostering – the defendant's arguments

[78] The defendant seeks to avoid the consequences of a literal construction of this clause by reliance on the proviso to the first paragraph to permit it to give preference in order of loading to eight wheel trucks.

[79] The arguments it advances on this point are as follows.

[80] Whilst clause 9 deals with the method of loading concrete trucks at a particular plant within a particular day, clause 26 deals with the exposure of the fleet over a period of time to the full array of plant in the relevant utilisation area with a view to ensuring that each truck has the *opportunity* to cart a quantity of concrete which is as close to the average as is "commercially practicable".

[81] Clause 26 contains the qualifications that equal exposure must be undertaken within the confines of commercial practicability and that equal exposure is subject to the overriding qualification of the achievement of the level of "customer service" set by the defendant.

[82] The plaintiffs recognise that precision cannot realistically be achieved and encompasses the notion that the opportunity to which clause 26.1 of the Contract refers need only be made available "in the ordinary conduct of the defendant's operations to monitor, assess and make available that opportunity". Nothing in the language contained in clause 26 or in the negotiations leading to the Contract justifies reading the words "commercially practicable" to mean something akin to "administratively practicable" or even just "practicable".

[83] The plaintiffs' construction of clause 26.1 is a contradiction in that it recognises that it may not be commercial for the defendant to operate rosters which provide for complete precision in the rostering process. What they seek to do is to draw some distinction between types of commerciality in terms of the operation of a rostering system and commerciality in terms of the defendant's operations generally as if the two can be neatly divorced. There is no basis for drawing such a distinction. Either the parties had in mind the defendant's commercial interest or they did not. The language of clause 26 indicates plainly that they did.

[84] The plain intent of clause 26.1 is to introduce a level of equity into the treatment of the defendant's carrier fleet, but subject to legitimate qualifications. Carriers are not to be discriminated against or treated capriciously. From the defendant's perspective they are to be treated equitably subject only to the intrusion of its legitimate commercial interests.

[85] If the Contract applies to the whole fleet including (8 wheelers) the plaintiffs must assert that the Contract requires the defendant to retard the 8 wheelers in some way at some point.

[86] The defendant has no power to do so. It is expressly prohibited from rostering off a truck for the reason it is exceeding the average. The roster identified in clause 9 is cyclical, and each truck is to be loaded to its maximum (save in limited circumstances). So the only place left for retarding these trucks is via the operation of clause 26. Yet it presents as a clause designed to achieve the opposite effect: equality of treatment.

[87] Moreover, whatever else clause 26 means it does not require the defendant to retard trucks just because they have bigger barrels.

[88] The plaintiffs contend that "customer service" was directed to satisfaction of each individual customer's needs and expectation in relation to the service to be provided by the defendant through the efforts of the Carriers: Amended Reply, para 4.3.2. If this merely means that the notion of customer service is not related to notions of price the submission is perhaps understandable. However, if it is meant to covey that "customer service" must be considered on a particular occasion in the context of a particular customer it is not. It would be unreal to consider that clause 26.1 requires the piecemeal approach that the defendant manage its fleet to meet customer's requirements on a case by case basis and did not encompass the notion that the defendant could manage its fleet in a holistic manner. So, for example, if was necessary to make a particular use of its fleet to ensure the fulfilment of a number of concurrent orders or even a number of sequential orders, clause 26.1 clearly encompasses that.

[89] At a minimum the notion of customer service in clause 26.1 must encompass delivering to customers the type and quantity of concrete which they require in the manner and time frame which they require. Given that the reference to customer service is contained in a proviso, clause 26.1 can only be read as meaning that the defendant may depart from the standard rostering system where it is necessary to do

so in order to provide that level of service to its customers. In other words the defendant is entitled to prioritise customer service over the achievement of average utilisation.

Construction of clause 26

[90] The object of the clause is to ensure that a Contractor is treated equitably by being given the same opportunity as other Contractors and carriers to share in the cartage of concrete within the location in which that Carrier operates. The qualification that "the quantity of concrete" carted need only be "as close as commercially practicable" to "the average fleet utilisation level" does not permit the defendant, as it contends, to avoid equalising Contractors' opportunities where that course would be contrary to the defendant's commercial interests.

[91] Moreover, there is nothing in the clause which supports the defendant's restrictive construction. Clause 26.1 requires "Carriers" to be exposed to" the full plant market". It is difficult to see how that could be achieved if part of that market was to be set aside, in effect, for eight wheel trucks. It is also difficult to see how "fleet" in "average fleet utilisation level" means the "part only of the defendant's fleet which does not include eight wheel trucks". The "average fleet utilisation level" must be calculated by reference to "the full plant market". "Fleet" is undefined but it is plain from clause 22, amongst other provisions, that the word was intended to cover more than the defendant's fleet in the form in which it existed when each contract was entered into. The Contract contemplated that proposed alterations to its fleet by the defendant would be the subject of consultation.[8] That is not surprising as any such alteration could be expected to affect the results produced by the operation of some of the Contract's provisions.

[92] "Commercial practicability" is directed to the steps to be taken by the defendant to give a Contactor the opportunity to cart a quantity of concrete commensurate with "the average fleet utilisation level". The word "practicable" is used in its normal sense of "feasible" or "capable of being carried out".[9] "Practicable" is qualified by "commercially" to limit the extent of the obligation by ensuring that the defendant does not need to spend a disproportionate amount of time or money in implementing relevant actions and procedures. In other words the defendant is required to do that which is practicable from a commercial perspective but no more.

[93] The extent to which the defendant may look to its own commercial interests in implementing the clause is stated in the proviso which makes the defendant's undertaking subject to achievement of "the level of customer services set by CSR". The plaintiffs contend that the proviso "is reflective of objective D(v) of the objects of the Contract, in that it is directed to the satisfaction of each individual customer's needs and expectations in relation to the service to be provided by the defendant through the efforts of the Carriers".

---

8 Clause 22.

9 See "The Shorter Oxford English Dictionary".

[94] That, in my view, imposes a limitation not expressed or implicit in the proviso. "Customer service" is a common expression with a plain enough meaning. In this context it encompasses a range of matters such as speed of supply, quality of the product supplied, invoicing and documentation generally. The method of supply may also be an aspect of "customer service", for example, the provision of specialist vehicles to sites with restricted access. The defendant's profitability and convenience, however, are not relevant considerations.

[95] The proviso contemplates that a level of customer service be set by the defendant. That assumes the prescription of a regime capable of application to various circumstances as they occur. It contemplates also that there be a conscious act or acts by the defendant which bring into existence something recognisable as "the level of customer service set by [the defendant]", to which the parties may have reference in order to apply the terms of clause 26.1 and to ascertain whether there has been compliance with those terms.

[96] Whether or not something purporting to be a "level of customer service" is one within the meaning of the clause will need to be determined from time to time by reference to the facts existing at the time of determination.

Rectification

[97] The plaintiff's allege that at the time of signing each of the Contracts it was the common understanding of the parties that the words "Contract Carrier" or "Carrier" in the Contract, unless the context otherwise required, meant and referred to each of the defendant's carriers of pre-mixed concrete operating as independent contractors within Queensland. The defendant alleges that at the time the Contracts were entered into the parties had the common understanding that the Contract applied to and regulated the use by the defendant of only six wheel carriers.

[98] Generally, for the reasons already advanced, I do not accept the existence of the common intention for which the defendant contends. Members of the negotiating committee and many of the plaintiffs would have been aware at the time of entering into the Contract that it was intended to apply, without alteration, to the two eight wheel trucks. Most, if not all of them, understood that a standard form contract had been negotiated for the defendant's fleet of owner operated trucks (with the exception of mini trucks) and that it would be used for subsequent owner operators with trucks joining the fleet. They further understood that it was proposed that a separate but materially different standard form contract for mini trucks was to be negotiated.

[99] The majority of the Contractors probably did not give any conscious consideration to whether the expression "maxi truck" applied to eight wheel trucks as that question did not arise.

[100] That being the case the defendant cannot establish that the Contractors had the intention necessary to ground its rectification case. Moreover, if the Contractors had

turned their minds to the matter I think it probable that the majority, on considering the terms of the Contract and, in particular, clauses 9 and 26, would have concluded that in those clauses "Concrete Truck" meant any agitator mounted concrete truck, other than a mini.

[101] The defendant's rectification case has other difficulties such as the problem of proving the state of mind of each of the plaintiffs, the adverse evidence of some of the plaintiffs as to their respective states of mind and its failure to show that the parties did not intend to use the words the contract contains[10]. In view of my findings, however, it is not necessary for me to address these matters.

[102] In view of my findings on the question of construction, there is no scope for the rectification of the Contract sought by the plaintiffs. The evidence, in any event, does not reveal an intention on the part of the defendant that "Carrier" means, unless the context otherwise requires, "each of [the defendant's] carriers of pre-mixed concrete operating as independent contractors within Queensland".

[103] The word "Carrier", as the relief sought by the plaintiffs implicitly acknowledges, does not have the same meaning throughout the Contract. Thus the rectification sought leaves open the meaning of "Carrier" wherever it appears in the Contract. Whether rectification is open in such circumstances is doubtful. Whether, if open, it should be ordered, in my view, is less doubtful. Rectification should not be ordered where, as here, the order would lack utility. I consider it probable that the defendant's representatives did not have an actual understanding that large eight wheel trucks which became part of the defendant's fleet would not be Concrete Trucks within the meaning of those words in clauses 9 and 26 or that they and their operations could be disregarded for the purposes of applying those clauses. This, however, would not be sufficient to justify the rectification sought, even assuming that the plaintiffs all held the requisite state of mind.

Summary of conclusions

1. The expression "Maxi Truck" when used in the Contract has its defined meaning of "a truck fitted with an agitator which has a mixing capacity of greater than $3.0m^3$. It is not confined in its meaning to six wheel trucks.
2. The finding on the meaning of "Maxi Truck" makes it difficult to reach the conclusion that in clauses 9 and 26 "Concrete Trucks" refers only to the six wheel trucks of carriers who have entered into standard form agreements with the defendant in respect of such trucks. It also poses difficulty for the argument that "Carrier" in those clauses means only carriers of the type just mentioned.
3. The expression "Concrete Truck" in clauses 9 and 26 is capable of meaning both six wheel trucks and eight wheel trucks.
4. Clauses 9 and 26 were intended to have application to the whole of the defendant's fleet (excluding "Mini Trucks" except to the extent expressly provided) irrespective of how that fleet was composed and, as worded, do have such application.

[10] cf. *Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410.

5. "Carrier" in clause 9 refers to the contracting party other than the defendant. In clause 26 its meaning encompasses the plaintiffs.
6. The right of nomination in clause 9.1 is not limited to the carrying capacity of the truck next in line to receive the load the subject of the nomination. Nor is it the case that the right to nominate a load greater than the carrying capacity of such a truck is limited to circumstances in which a customer's requirements are capable of being met by a single truck.
7. There is no warrant for construing clause 26 so that the terms "full plant market" and "average fleet utilisation level" can be determined and applied as if eight wheel trucks were not part of the defendant's fleet.
8. "Commercially practicable" in clause 26 describes and qualifies the degree to which the quantity of concrete offered to a carrier for carting must accord with the average fleet utilisation level. "Practicable" is used in the sense of "feasible". The word "commercially" qualifies "practicable" so as to require the defendant in making its relevant calculations and in conducting its operations to do only that which is feasible from a commercial point of view. In other words, the defendant is not obliged to expend a disproportionate amount of time or incur disproportionate costs in fulfilling its obligations under the clause.
9. The proviso to clause 26 concerns service to the defendant's customers and not the defendant's convenience, preference or profitability. It assumes that from time to time the defendant will prescribe a "level of customer service", the content of which will be ascertainable by the parties.
10. Neither the plaintiffs nor the defendant have made out a case for rectification of the Contract.

[104] I invite the plaintiffs' counsel to submit minutes of order which reflect these reasons and which give directions for the further progress of the action. I will entertain submissions on costs.