SUPREME COURT OF QUEENSLAND

CITATION:	*Tulloch Brae Pty Ltd v Environmental Protection Equipment Pty Ltd* [2022] QCA 97
PARTIES:	**TULLOCH BRAE PTY LTD** ACN 114 599 585 **AS TRUSTEE FOR THE SARGOOD FAMILY TRUST** (appellant) **v** **ENVIRONMENTAL PROTECTION EQUIPMENT PTY LTD** ACN 155 238 047 (respondent)
FILE NO/S:	Appeal No 11016 of 2021 SC No 6074 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2021] QSC 213 (Dalton J)
DELIVERED ON:	27 May 2022
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2022
JUDGES:	Sofronoff P and Morrison JA and Boddice J
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the appellant and respondent entered into a carriage agreement regarding transportation of waste – where the carriage agreement required the appellant to move containers in a prompt and efficient manner – where the respondent proved the existence of an opportunity that the appellant caused it to lose – where the learned primary judge held that the loss was by reason of breach of contract – where the learned primary judge made an assessment of loss and damage for breach of contract in favour of the respondent – whether the learned primary judge erred in in respect to the findings of the respondent's counterclaim for damages of breach of contract – whether the appeal should be allowed *Badenach v Calvert* (2016) 257 CLR 440; [2016] HCA 18, cited

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64, [1991] HCA 54, cited
Robinson v Harman (1848) 1 Exch 850; [1848] EngR 135, cited
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4, cited
Winky Pop Pty Ltd v Mobile Refining Australia Pty Ltd [2016] VSCA 187, cited

COUNSEL: G Coveny and S Philippou for the appellant
A F Fernon SC for the respondent

SOLICITORS: ENSO Legal for the appellant
Yates Beaggi Lawyers for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA and with the orders proposed by his Honour.

[2] **MORRISON JA:** In 2015 the respondent (**EPE**) was in the business of transporting waste from Sydney to Brisbane by rail. EPE was controlled by Mr Grundy.

[3] Mr Grundy decided he needed a reliable carrier to take the waste by truck from the railway station in Brisbane to the Swanbank Dump.

[4] At the same time the appellant (**Tulloch Brae**) was a company controlled by Mr Sargood. Its business was raising beef cattle. Mr Sargood had some trucks which he used to transport cattle and grain.

[5] In 2015 Mr Grundy and Mr Sargood negotiated a contract under which Tulloch Brae was to provide EPE with the trucking services necessary to collect waste at the Acacia Ridge railway station and take it to the Swanbank Dump. And, once emptied the containers were to be returned to the railway station for transport back to Sydney.

[6] Within a year the contract had been terminated because Tulloch Brae was not performing its contractual obligation to remove containers from the railway station within the time limited by the contract, that is to say, the day after their arrival.

[7] Further, Tulloch Brae was not performing the contract by promptly and efficiently returning containers to the railway station so they could be transported once again to Sydney, and thus recycled.

[8] On this appeal the learned primary judge's finding of breach of the contract was not in issue. Her Honour described it:[1]

> "Having regard to the evidence at [27]-[43] above, I find that the plaintiff was in breach of the carriage agreement. The plaintiff did not remove containers from the railway site within the time required by the contract, and did not provide sufficient trucks and trailers to remove the defendant's containers from the railway site within the time required by the contract. It did not return containers to the

1 Reasons below at [55].

> railway station for transit to Sydney promptly and efficiently; it did not provide sufficient trucks and trailers to promptly and efficiently return the defendant's containers to the railway station. In my view, these breaches involved such a number of containers and were so frequent and so persistent over the time the plaintiff performed the carriage agreement that they entitled the defendant to terminate the contract when it did."

[9] The current appeal concerns only the learned primary judge's findings in respect of EPE's counterclaim for damages for breach of contract.

Unchallenged findings of fact

[10] Prior to the contract being signed, Mr Sargood and Mr Grundy agreed that EPE could send 50 containers a day, starting from a time four to six weeks into the performance of the contract.[2] Tulloch Brae's defence of the counterclaim was not based on the factual assertion that EPE sent an unreasonable number of containers per day to Brisbane.

[11] Both Mr Grundy and Mr Sargood understood that the commercial aim was to make money because of the difference between the high disposal fee which EPE could charge in Sydney, and the relevantly low disposal fee which it would have to pay in Brisbane. They each knew that the more containers that EPE transported to Brisbane, and the more quickly containers were returned to Sydney, the more money EPE would make.[3] The contract called for promptitude and efficiency from the beginning.[4] The obligations were to remove containers within what was called the required or specified time, and to pay any storage fee charged as a result of breach of that obligation.[5] The commercial basis of the bargain was that EPE would be put in possession of its containers promptly so that it could fill them again.

[12] The contract provided that the agreement would continue for 12 months, subject to the carrier (Tulloch Brae) performing its obligations promptly and efficiently. If Tulloch Brae did not perform promptly and efficiently, EPE could terminate the agreement before the expiry of the fixed term.[6]

[13] The written contract was signed at the end of July 2015. For a period of about one month EPE was satisfied with Tulloch Brae's performance. After 22 August 2015 problems were experienced in having containers returned to Sydney in a timely way.[7]

[14] When Mr Grundy complained to Tulloch Brae's operation manager, Mr Jeffreys, Mr Jeffreys blamed Mr Sargood's failure to provide trucks and other necessary equipment, and his failure to engage subcontract truck drivers when Tulloch Brae did not have enough trucks to handle the work itself.[8]

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2 Reasons below at [9].
3 Reasons below at [18].
4 Reasons below at [22].
5 Reasons below at [21].
6 Reasons below at [23].
7 Reasons below at [25].
8 Reasons below at [25].

[15] Between December 2015 and mid-March 2016, the New South Wales Environmental Protection Agency (**EPA**) temporarily shut down EPE's waste transport scheme.[9]

[16] Tulloch Brae was in breach of its contractual obligation to remove containers from the railway station within the time limited by the contract (the day after their arrival).[10] By the time the contract was terminated in May 2016 over $71,000 had been charged in storage fees, representing 710 "container-days" delay in moving containers from the Railway station in about eight months of operation.[11]

[17] Mr Jeffreys' evidence was that even when Tulloch Brae had five employed truck drivers performing the work, Tulloch Brae could not cart all containers that arrived from Sydney and return an equivalent number on any given day.[12]

[18] Mr Jeffreys attempted to have Mr Sargood employ more subcontractors, but Mr Sargood refused, or at least only employed a limited number of subcontractors.[13]

[19] Tulloch Brae was not returning containers to Sydney promptly and efficiently throughout the course of the carriage agreement. That lack of efficiency caused more than 100 containers to be located in Queensland every day from about the beginning of April 2016 onward, until the agreement was terminated.[14]

[20] At one point, according to Mr Jeffreys, Mr Sargood directed him to deliberately slow the return of containers to Sydney because that would give Mr Sargood bargaining power in his price negotiations with Mr Grundy.[15]

[21] On 2 June 2016 EPE gave notice that it terminated the contract. In response Tulloch Brae, through its solicitors, asserted there were no grounds to terminate and characterised EPE's letter as a repudiation which it accepted, and purported to terminate the contract itself.[16]

[22] Tulloch Brae was in breach of the carriage agreement in that it did not:

(i) remove containers from the railway site within the time required by the contract;

(ii) provide sufficient trucks and trailers to remove the containers from the railway site within the time required by the contract;

(iii) promptly and efficiently return containers to the railway station for transit to Sydney; and

(iv) provide sufficient trucks and trailers to promptly and efficiently return the containers to the railway station.[17]

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9 Reasons below at [26]. The reasons for the shutdown are immaterial to the present issues.
10 Reasons below at [27].
11 Reasons below at [28].
12 Reasons below at [30].
13 Reasons below at [31].
14 Reasons below at [39].
15 Reasons below at [42].
16 Reasons below at [53].
17 Reasons below at [55].

[23] EPE was entitled to terminate the contract when it did.[18]

[24] From 6 June 2016, EPE itself undertook the collection of waste from the railway station and the return of empty containers to the railway station. Mr Jeffreys was no longer employed by Tulloch Brae, but employed by EPE. He was given instructions to engage as many contractors as he needed to perform the work and he did so, using up to 12 subcontractors. Under that system EPE was able to move many more containers than Tulloch Brae had done.[19]

[25] As a consequence of the increasing number of containers moved by rail, Pacific National (the entity controlling the rail bookings) increased the number of daily bookings to the point where there were 50 permanent bookings per day.[20]

Approach of the learned primary judge to the damages claim in contract

[26] The learned trial judge commenced the assessment of loss and damage for breach of contract by observing that the claim was pleaded inaptly. Her Honour first said:[21]

> "So far as the claim in contract is concerned, it pleads that it, "lost the opportunity to increase its turnover by increasing the number of loaded containers it was shipping to [the railway station] … to or approaching", the number it was able to move under the arrangements it effected after it terminated the carriage agreement – paragraph 28 fifth further amended counterclaim. I regard it as a claim for damages for breach of contract assessed by reference to the money it would have made if the plaintiff had performed the contract according to its terms, see paragraph 38 of the document which is the prayer for relief for breach of contract."

[27] Her Honour then turned to the way in which EPE had calculated its loss. EPE had employed Mr Jeffreys and had him supervise about 12 subcontracted truck drivers "to perform the work which the plaintiff was to provide under the carriage agreement".[22] EPE's case was to calculate its loss by comparing the number of containers shifted during the period the carriage agreement was on foot, with the number shifted in the same period the next year. This was called the "Comparison Period". Effectively the claim was for the extra money (nett of costs) which EPE would have made "had the plaintiff performed during the period of the carriage agreement as the defendant did in the comparison period".[23] In short terms the calculation was based on these components:

1. between 27 July 2015 and 30 April 2016 Tulloch Brae collected, emptied and returned to the railway station an average of 137 containers per week; this was a figure admitted on the pleadings; and

2. in the Comparison Period EPE collected, emptied and returned an average of 193.76 containers per week; this also was agreed during the trial;[24]

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18 Reasons below at [55].
19 Reasons below at [58].
20 Reasons below at [61]-[63].
21 Reasons below at [86]; internal footnote omitted.
22 Reasons below at [90].
23 Reasons below at [91].
24 Reasons below at [91].

3. there was an average of 57 more containers dealt with per week during the comparison period than during the period under which the carriage agreement operated; that is a total of 1,889 more individual container movements achieved in the comparison period; and

4. an accountant, Mr Gwynne, calculated the nett return to EPE per container movement; in that way he came to a figure representing the extra money EPE would have made had Tulloch Brae performed as well under the carriage agreement as EPE did in the Comparison Period; that was a figure of $859,117.20.[25]

[28] Having dealt with the question of causation under Tulloch Brae's claim under the *Australian Consumer Law*,[26] her Honour returned to the question of damages on the contract claim. Her Honour observed that loss was not an essential element of a cause of action for breach of contract, and EPE was entitled to nominal damages on the counterclaim because breach had been established.[27] Her Honour then observed that the loss was pleaded as a lost opportunity namely "it lost the opportunity to increase its turnover by increasing the number of loaded containers it was shipping to [the railway station]". Her Honour continued:[28]

> "In my view this is not a loss of opportunity case at all. The defendant did not contract to buy a chance, such as a ticket in the lottery. In the language of Brennan J in *Sellars*, there was no contractual promise on the part of the plaintiff to 'to afford the [defendant] an opportunity to acquire a benefit or to avoid a detriment' – p 359. The bargain was the exchange of a promise to work, for a promise to pay for that work. The contract was executory; the defendant's business was new and growing, but that does not make this a loss of opportunity case. The defendant is suing for the financial benefit it would have had, had the contract been performed according to its terms."

[29] Her Honour observed in the course of that passage, that at the trial she did not raise with the parties the view that the claim was not a loss of opportunity claim. However, the parties were given an opportunity to address that aspect by written submissions after the trial.[29]

The appellant's case

[30] The appellant's central contention was that EPE had failed to prove the existence of an opportunity which, it said, Tulloch Brae had caused it to lose. Nonetheless the learned trial judge held that the loss was proven by reason of the breach of contract, and proceeded to assess damages on the basis that "the Court will do its best to assess a loss, even when there are difficulties with the evidence proving it".[30] The central contention was that this process involved an error because:[31]

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25 Reasons below at [91].
26 That claim failed at the trial and there was no challenge to the findings in respect of it.
27 Reasons below at [103].
28 Reasons below at [104]; internal footnote omitted.
29 See footnote 22 in the reasons.
30 Reasons below at [106].
31 Amended appellant's outline or argument, paragraph 3.

1. causation was a necessary element for EPE's claim for a substantial contractual damages;

2. EPE failed to prove the existence of a valuable opportunity, or that the opportunity was lost, on the balance of probability; and

3. the court should not have assessed damages on the basis of possibilities where causation was not established on the balance of probabilities.

[31] The main contention was put in a variety of ways, both in the written outline and in oral argument, but it came down to this: that EPE had failed to prove that Tulloch Brae's breach of the contract caused EPE to suffer loss or damage.

[32] The way in which that central argument was developed involved the following propositions:

1. a party who asserts loss of a valuable opportunity must properly identify the opportunity; without that there can be no basis for determining whether a party has established, on the balance of probabilities, the existence of an opportunity which had some value;[32]

2. next, the party claiming loss must establish on the balance of probabilities not only that the opportunity existed, but that it was lost, and that the conduct of the party in breach was causative of the loss; that requires evidence of what the claimant would have done if the opportunity had been afforded;[33]

3. referring to *Sellars v Adelaide Petroleum NL*[34] for the proposition that an applicant show some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value, EPE did not deal directly with the issue of causation in respect of its contract claim;

4. whilst EPE's written closing submissions contended that contractual damages were to be assessed on the basis of the loss suffered by the contract not being performed, nonetheless EPE contended for a lost opportunity to earn profits arising from the performance of the contract;

5. EPE's case in both contract and under the *Australian Consumer Law* depended on proof that it was possible for EPE to have achieved the same profitability from July 2015 as it did from June 2016 onwards;

6. the *Australian Consumer Law* claim failed because EPE did not establish, on the balance of probabilities, that the opportunity to perform the services at an increased level was an opportunity that was available to it as at July 2015; and

7. because EPE "relied on the same counterfactual in support of the Lost Opportunity Case, it follows that causation was not established for the contract claim".

[33] In my respectful view, this part of the appellant's case must be rejected.

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32 Referring to *Winky Pop Pty Ltd v Mobile Refining Australia Pty Ltd* [2016] VSCA 187 at [333].
33 Citing *Badenach v Calvert* (2016) 257 CLR 440 at 454; [2016] HCA 18, [40].
34 (1994) 179 CLR 332; (1994) HCA 4.

[34] Damages for breach of contract follow a formulation which has been established for nearly 200 years. In breach of contract the wrong consists not in the making but in the breaking of the contract, and therefore a plaintiff is entitled to be put in the position he or she would have been in if the contract had never been broken, or in other words, if the contract had been performed.[35] That position was restated by the High Court in *Commonwealth v Amann Aviation Pty Ltd*:[36]

> "The general rule at common law, as stated by Parke B. in *Robinson v Harman*, is "that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed". This statement of principle has been accepted and applied in Australia.
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> The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is created by the contract. Hence, damages for breach of contract are often described as "expectation damages". The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained. That is to say, a plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation.
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> In the ordinary course of commercial dealings, a party supplying goods or rendering services will enter into a contract with a view to securing a profit, that is to say, that party will expect a certain margin of gain to be achieved in addition to the recouping of any expenses reasonably incurred by it in the discharge of its contractual obligations. It is for this reason that expectation damages are often described as damages for loss of profits. Damages recoverable as lost profits are constituted by the combination of expenses justifiably incurred by a plaintiff in the discharge of contractual obligations and any amount by which gross receipts would have exceeded those expenses. This second amount is the net profit."

[35] Where a breach of contract consists of a failure to render services, which is the case here, the basic loss is the price the plaintiff would have to pay in the market in order to obtain such services, always deducting the contract price if that has not been paid. The best example is the contract of carriage, whether of goods or of persons. If the carrier fails to carry, the basic measure of damages is the market rate less the contract rate.[37]

[36] In this particular case EPE did not turn to the market to establish the rate of performance of the services, but rather carried out the services itself. There was no suggestion in the evidence that the cost of doing so had been improperly inflated in

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35 *Robinson v Harman* (1848) 1 Exch 850, at p 855; 154 ER 363 at 365.

36 (1991) 174 CLR 64, [1991] HCA 54 at 80; footnotes omitted. See also *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8, and *Clark v Macourt* [2013] HCA 56 at [26]-[27].

37 McGregor on Damages, 15th ed., paragraph 33.

any way, or was otherwise than what would have been paid to a carrier in the market. Thus, in effect, EPE put its claim on the basis of a classic claim for damages for breach of contract where the contract is for the carriage of goods. In other words, it sought compensation for the loss it suffered as if Tulloch Brae had performed its contractual obligations.

[37] EPE's claim was always for breach of contract and the damages it claimed were such as would put it in the same position as if the contract had been performed. It pleaded its loss (inaptly) as a loss of opportunity. As her Honour correctly observed, that was misconceived. EPE had the benefit of a contract under which Tulloch Brae was obliged to perform in a particular way, ensuring the efficient and prompt transfer of containers from the railhead to the base plant, and then by way of return to the railhead so that they could be promptly sent back to Sydney to be refilled. It did not do so and was found to have breached the contract. That finding, and the facts underlying it, were not challenged in this Court. EPE were not claiming that it lost the chance to perform the contract a different way. All it claimed to show, by the evidence relating to how it carried out the same obligations which fell upon Tulloch Brae, was that if Tulloch Brae had performed its obligations EPE would have made more money.

[38] There being no issue as to the fact that Tulloch Brae breached the contract, the only issue was whether EPE had sustained a loss, namely the extra income it would have earned had the contract been performed in the way that the contract required.

[39] The learned trial judge was alert to the fact that the pleading of the loss by EPE was in a form which inaptly described it as a loss of opportunity. Her Honour disabused the parties of that notion by requiring them to address that issue in submissions advanced after the trial had concluded. That was done, and no suggestion was made before this Court that Tulloch Brae had not had a full opportunity to address that issue.

[40] The appellant's focus on the claim being one of a lost opportunity is misconceived. It flies in the face of the articulation of the real point by the learned trial judge, dealt with by both parties in post-trial submissions.

[41] The unchallenged findings were that Tulloch Brae did not perform the contract in that way, as a consequence of which EPE validly terminated the contract. It flows from that breach that Tulloch Brae could be called upon to compensate EPE by way of damages, to put EPE in the position it would have been in had Tulloch Brae performed the contract according to its terms. The real contest in the case was whether the evidence advanced by EPE was sufficient to discharge the onus of proving the damage sustained by the breach of contract.

Proof of the loss

[42] The assessment of damages by the learned trial judge was attended with some difficulties, particularly caused by the limitations of the evidence on some points. However, it has long been held that difficulty in estimating loss does not excuse the court from that task. As was said in *Commonwealth v Amann Aviation Pty Ltd*:[38]

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38 174 CLR 64; [1991] HCA 54; footnotes omitted.

> "The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can. Indeed, in *Jones v Schiffmann* Menzies J. went so far as to say that the "assessment of damages … does sometimes, of necessity involve what is guess work rather than estimation". Where precise evidence is not available the court must do the best it can. And uncertainty as to the profits to be derived from a business by reason of contingencies is not a reason for a court refusing to assess damages."

[43] The appellant's contentions as to the loss assessed by the learned trial judge had several components. I shall deal with each in turn.

Alternative analysis of container movements and weights

[44] The learned trial judge set out the basic approach of Mr Gwynn, the expert called for EPE.[39] Her Honour then paused to deal with a specific issue concerning Mr Gwynn's analysis leading to his calculation of loss. It is best if that part of the reasons below are set out in full:[40]

> "[92] I will deal with one other matter now before turning to the issue of causation of loss in the defendant's ACL claim. In his address the plaintiff's counsel sought to make a submission that Mr Gwynne's analysis, based on container movements, was irrelevant because the defendant was paid on the amount of waste (by weight) tipped, rather than containers transported. It was said that there was evidence in the tipping records disclosed by the defendant that there was only an average of 170 containers tipped per week in the comparison period. Further, that the weight of the containers tipped during the comparison period was lower than in the period the carriage agreement was on foot. The submission was that a combination of these two things meant that no more waste was tipped in the comparison period, than in the period when the carriage agreement was on foot.
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> [93] None of this was put to Mr Gwynne. It should have been. Further, it should have been anticipated that, as Mr Gwynne was an expert, he may not have had instructions to enable a substantial response to the propositions. The propositions should therefore also have been put to Mr Grundy who had produced the tipping records and the container movement records on behalf of the defendant, and who was the person who, on behalf of the defendant, had provided the factual evidence upon which Mr Gwynne's calculation was made. None of these propositions were put to Mr Grundy. That the defendant calculated loss in accordance with the number of containers moved to and from Brisbane is obvious from the fifth further amended counterclaim. It is nowhere pleaded in

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39 Reasons below at [91].

40 Reasons below at [92]-[93].

> the answer that this is an incorrect basis. Accordingly, I disregard this submission."

[45] Mr Coveney of Counsel, appearing for the appellant, maintained the submission addressed in that passage, and contended that Mr Gwynne had been specifically asked whether, if any of his assumptions were incorrect, the correct number could instead be used in his equation. It was said that he agreed with that proposition.[41] It was also contended that in cross-examination Mr Grundy confirmed that EPE was paid on the weight of waste and that the tipping records were key in that regard.[42] It was said that the analysis of the tipping records (which showed an average of 170 containers at an average container weight of 19.97 tonnes as opposed to the 22.5 tonnes used by Mr Gwynne), was a summary of the evidence relied upon by EPE and that as Tulloch Brae did not seek to impugn that evidence there was nothing to put to Mr Grundy or Mr Gwynne in relation to it.

[46] For a number of reasons I cannot accept this contention.

[47] First, Mr Gwynne's calculations relied upon the tipping records. His report[43] recorded in paragraph 2.10 that he had been provided with "summaries of waste recorded as received by Bio Recycle Australia Pty Limited ("**Bio Recycle**") for the period 28 July 2015 to 31 December 2015 and 16 January 2016 to 15 August 2016". He understood, and it was not in issue, that Bio Recycle operates Swanbank's site. Mr Gwynne then calculated the average weight of waste per container based on those records. In paragraph 2.12 and Table 3,[44] that calculation produced an average of 22.54 tonners per container. That was the average weight which he assumed: paragraph 2.14.

[48] Mr Coveney eschewed any suggestion that he was seeking to undermine Mr Gwynne's report. Instead, he submitted that he wanted to establish through cross-examination of Mr Gwynne that if there was a different input in the assumptions made by Mr Gwynne then that input could simply be put into his equation.[45]

[49] The tipping records were put into evidence through a Mr Burns, the manager at the tipping site. They became Exhibits 94, 96 and 97.

[50] As argument before this Court proceeded, it became apparent that what was done at the trial was that Mr Coveney's instructing solicitor undertook her own analysis, line by line, of the tipping records between the relevant dates.[46]

[51] In his evidence in chief Mr Gwynne explained a table in his report, namely Table 6,[47] as referring to a calculation of container movements during relevant periods. Column A of that table was the number of weeks in each of those distinct periods. Column B was the total number of container movements for that period. Column C was the actual weekly movements of the containers for the relevant period and

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41 Appellant's outline paragraph 37, referring to AB 654-655.
42 Appellant's outline paragraph 37, referring to AB 590.
43 Commencing at AB 893.
44 AB 901.
45 Appeal Transcript T155 lines 38-44.
46 Appeal Transcript T1-56 lines 12-18.
47 AB 909.

column D reflected the expected number of movements that could have been undertaken as calculated in the report. That calculation was 215 container movements per week so that column D revealed the number of container movements by which performance fell short of what was possible. In short, column D revealed the expected additional number of movements per week.

[52] In respect of the figure shown in column D of Table 6, namely the expected additional number of movements per week, Mr Gwynne agreed that if the learned trial judge found that the figure 215 should be some different figure, then that different figure could be inserted into column D and the resultant figure recalculated.[48]

[53] Table 6 then calculated the expected additional number of containers, being the product of calculating the number of weeks for each period by the expected additional weekly containers for that period. Finally, Table 6 calculated the total of what would have occurred adding the actual to the amount by which performance fell short of what was possible.

[54] In cross-examination Mr Gwynne was asked about Table 6. The exchange is as follows:[49]

> "The calculation is based on a multiplier of net weight dumped times the applicable contract rate where it was set rate for so many times and then additional. That's correct, isn't it? --- There's – that's correct … on the revenue side of things it's based on weight … and on the dumping costs it's based on waste weight not container weight.
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> All right, yes? --- Yes.
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> Yes. So just talking about that revenue – and the dumping costs, I guess? -- The dumping costs, that's right.
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> So they're both dependent on weight? --- Yes.
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> And so if – any assumption you might have been asked to make or summarise is out, well, we can put a different number in – if we have a different number – and that will just wash through the equation, is that right? --- That's correct, yes."

[55] Whilst it is true to say that Mr Gwynne was an expert working upon assumptions that had been given to him, it is nonetheless the case that in his report he said he used the tipping records to obtain a net average weight per container as well as the container movements. Each of those things is reflected in Table 3[50] which, Mr Gwynne noted, contained his calculation of the average weight of waste per container. Insofar as Tulloch Brae sought to contend that the same tipping records showed an average container weight of 19.97 tonnes,[51] that should have been raised with Mr Gwynne. His figure of 22.54 tonnes per container was not an assumption made by him, but a calculation from the same tipping records which were said to be used by the instructing solicitor on Tulloch Brae's side. It was not put to him, and

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48 AB 650 lines 20-27.
49 AB 654 line 35 to AB 655 line 5.
50 AB 901.
51 The figure for which the appellant contended in paragraph 37(a) of its outline.

all that was asked of him was the question at the end of the passage cited above. When questioned on this matter Mr Coveney explained that his instructing solicitor had done a detailed examination of the tipping records and calculated an average container weight of 19.97 tonnes, not 22.5.[52] However, that figure was not put to anyone, as Mr Coveney conceded.[53]

[56] Before this Court, as the submissions continued, it became clear that at the trial the calculation done by the instructing solicitor, based on the tipping records, was not put into evidence. An affidavit by the solicitor had been prepared and served but after EPE had closed its case. Apparently, the learned trial judge said that she would not receive it as evidence if all it did was to summarise existing evidence, in which case she would simply hear it as a submission.[54]

[57] The necessity to put the solicitor's calculation to Mr Gwynne becomes clearer when one understands, as Mr Coveney made clear, that the solicitor's calculation was over a time period different from that used by Mr Gwynne. If the solicitor's calculation was to be advanced as correct, given that the selection of the time period was a matter for Mr Gwynne, as a matter of fairness he should have been given a chance to answer the counter-proposition, namely that he had the wrong time period or that another time period was more accurate. That was not done.

[58] Nor were those propositions put to Mr Grundy so that he might, if he could, offer his comments on whether they were right or wrong. Mr Coveney accepted that it was not put to Mr Grundy and that all that was relevantly done in cross-examination was to have Mr Grundy confirm that EPE was paid on the basis of weight of waste, and that the tipping records were key in that regard.[55]

[59] In my respectful view, the learned trial judge was correct to reject the propositions being put as to the average number of containers and average weight of containers, in essence because they were based upon an alternative opinion as to what the tipping records revealed and that opinion was not put to the two witnesses who might have been able to make a comment about it.

Increase in railway slots

[60] The appellant contended that there was an error in the learned trial judge's conclusion that available rail slots would have increased from 20 to 35 by 14 September 2015, and to 50 by the beginning of November 2015.[56] It was contended that there was no evidence to support that finding.

[61] The basis of this attack was that Mr Gwynne assumed that sufficient places would be available on the train, so as to make as many container movements during the period of the carriage agreement for the defendant's use, had it performed the contract. The learned trial judge summarised the position leading up to April 2016 in this way:[57]

1. the commencement point was an assumption that travel by rail took place six days a week;

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52 Appeal Transcript T1-63 lines 3-6.
53 Appeal Transcript T1-64 line 10.
54 Appeal Transcript T1-69 lines 24-30.
55 AB 590 lines 30-42.
56 Reasons below at [119].
57 Reasons below at [117] and [118].

2. as at July 2015, Pacific National[58] would not grant EPE more than 20 permanent bookings a day because there were too many cancellations and too many empty spaces returning to Sydney;

3. Mr Andriano[59] said this concern with reliability prevented any increase in the number of permanent slots in the second half of 2015;

4. based on 20 containers per day, and a six day working week, that meant 120 containers were in fact arriving in Brisbane each week; one explanation for that might have been provision of container movements on an *ad hoc* basis; and

5. in March and April 2016, Pacific National increased EPE's permanent bookings to 35 and then to 50 spots per day; Mr Grundy suggested those increases were due to his push to get a boost in business after the EPA shutdown.

[62] The learned trial judge then made the critical finding:[60]

> "[119] Had the plaintiff not breached the contract as it did, I find that Pacific National would have granted more permanent bookings earlier than it did. This was not explored in evidence with Mr Andriano. Taking a conservative approach to this matter, I find it likely that there would have been an increase to 35 container spots a day after about six weeks of reliable performance by a contract hauler, i.e. by about 14 September 2015, when the new containers became available. Further, that the increase to 50 would likely have occurred six weeks after that, i.e. at the beginning of November 2015."

[63] In my respectful view, the appellant's contention that there was no supporting evidence for that finding should be rejected. There was evidence which would support the conclusion reached by the learned trial judge.

[64] Mr Andriano's statement included these aspects concerning performance of the carriage agreement:[61]

1. EPE wanted as many bookings on the railway as were possible, going in both directions;

2. Pacific National's problem was that numerous bookings on the southern run (Brisbane to Sydney) were either cancelled or returned emptied;

3. at the Brisbane end not all of the containers that arrived on any given day would be collected;

4. as a result of the poor performance, Pacific National was unable to provide a permanent allocation of rail slots or additional rail slots on demand;

5. in the latter part of 2015 or early 2016, he had a discussions with Mr Jeffreys concerning collection of containers, with Mr Jeffreys saying that he did not have enough trucks to collect all containers delivered;

6. by August 2016 EPE's issues and problems had wholly resolved;

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58 The operator of the rail carriage.
59 The relevant officer of Pacific National.
60 Reasons below at [119].
61 AB 424-425.

7. Pacific National were able to allocate a minimum of 300 weekly rail slots, traversing both ways;

8. that was an average of 50 rail slots each day with additional slots allocated on a demand basis; and

9. he was "confident that had EPE had a permanent demand of 300 or more rail slots each week both ways, [he] could have made those arrangements and EPE could have been provided with the same permanent allocation and availability of additional slots as needed as it received in the later part of 2016 and onwards".

[65] Mr Andriano said that the increase in booking slots, which increased from 20 a day in the middle of 2015 and progressively increased as time went on to 50 per day, was "through demand".[62] He explained that when the request for additional bookings came in, the way he would provide for them was by increasing the number of trains that could be run on the railway corridor, and, with the proviso that it could not be sporadic movement, he had the ability to provide permanent bookings to EPE.[63]

[66] In cross-examination Mr Andriano made the same point, saying that additional train services would make additional slots available and provided a booking was made, the numbers could increase. As he explained, "Wherever it was – wherever we had the ability to achieve that, we would, yeah, definitely take it on".[64]

[67] What was not explored in evidence was whether further slots would have been made available if Tulloch Brae had not breached the contract. However, Mr Andriano's evidence provided an adequate platform for the conservative conclusion reached by the learned trial judge, namely that had demand for railway slots increased, Pacific National would have met it.

Inclusion of the period mid-March to mid-April 2016

[68] The appellant contended that the learned trial judge was wrong to include the period of mid-March 2016 through to mid-April 2016 in her assessment of damages. It was submitted that Mr Grundy's evidence was that Tulloch Brae was not falling behind until the end of that period. Further, it was said that damages were assessed for the whole of the period of the carriage agreement, rather than limiting the assessment to the periods of breach pleaded by EPE.

[69] There are difficulties confronting acceptance of this contention.

[70] First, it is not evident that this was a contention raised at trial.

[71] Secondly, and in any event, Mr Grundy's statement does not support the proposition advanced as a basis for this contention. The EPA shutdown extended from late December 2015 to mid-March 2016. In respect of the period immediately following the recommencement of operations (mid-March through to mid-April 2016) Mr Grundy's evidence was:[65]

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62 AB 624 line 31.
63 AB 624 lines 30-44.
64 AB 627 lines 17-34.
65 AB 400, paragraphs 138-142.

1. a shutdown was beneficial for Tulloch Brae as it was able to empty and return all containers in that period;

2. about three to four weeks after EPE recommenced operations, Tulloch Brae was sending back "significantly less containers … than EPE were sending to Acacia Ridge";

3. in mid-April 2016 Mr Grundy discussed the failure to empty containers efficiently, and the incurrence of storage charges, with either Mr Sargood or Mr Jeffreys;

4. Mr Grundy could recall sending a text to Mr Jeffreys requesting that containers be urgently sent back; and

5. during those discussions it was agreed that a face-to-face meeting would be beneficial "to address those issues".

[72] Shortly after that, in late April 2016, Mr Sargood and Mr Jeffreys flew to Sydney to speak to Mr Grundy in respect of the incurring of excessive storage charges for containers that were not being efficiently collected from Acacia Ridge, and, more generally, Tulloch Brae's costs to perform the transport operations.

[73] Thirdly, in respect of this point the appellant made the submission that the assessment of damages was for the whole period of the carriage agreement, rather than being limited to the assessment of the periods of breach pleaded by EPE. The submission was that the pleaded allegations of breach were limited to two discrete periods, being 19 October 2015 to 24 December 2015;[66] and 15 March 2016 to 2 June 2016.[67]

[74] In my view, this submission mistakes the nature of the pleading and the finding of breach. Paragraph 23 of the counterclaim pleaded that Tulloch Brae breached the terms of the contract by not performing the services promptly or efficiently. Particulars of that assertion were contained in Schedule A of the counterclaim as well as in specified items including those referred to in the appellant's submission. The two selected periods were but part of the particulars of the more general allegation. Schedule A to the counterclaim, which was also a particular of the allegation of breach, comprehended the entire period of the carriage contract.

[75] Further, the appellant's approach does not give sufficient weight to the finding that performance by Tulloch Brae under the contract was unsatisfactory from as early as one month into the contract period.[68] Moreover, the finding made by the learned trial judge in respect of breach was not confined to particular breaches and any particular time period. The finding was that Tulloch Brae did not remove containers from the railway site within the time required by the contract, and did not provide sufficient trucks and trailers to remove the containers from the railway site within the time required by the contract. It did not return containers to the railway station for transit to Sydney promptly and efficiently, or provide trucks and trailers to do so. Her Honour's conclusion was expressed in this way:[69]

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66 Paragraph 23(I) of the counterclaim; AB 114.
67 Paragraph 23(J) of the counterclaim; AB 115.
68 Reasons below [25].
69 Reasons below at [55]; emphasis added.

> "In my view these breaches involved such a number of containers and were so frequent and so persistent **over the time the plaintiff performed the carriage agreement** that they entitled the defendant to terminate the contract …."

[76] There was no error in the learned trial judge's approach.

Assessment by rail movements, not tipping weight

[77] The contention advanced here is essentially the same as that concerned with the failure to put the alternative damages case to Mr Gwynne. As to that, see paragraphs [44] to [59] above.

[78] Mr Gwynne's report proceeded on the basis that EPE was paid on the basis of the weight of material dumped, not on the numbers of containers moved. However that was only the revenue component in the calculation. Having ascertained from the tipping records an average tonnage per container,[70] namely 22.5 tonnes, the calculation of lost revenue, that is to say, lost because the contract was not performed as it should have been, required a calculation of the number of containers that could have been moved, multiplied by the average weight of the containers. That is what Mr Gwynne did. No attack was made upon his methodology, nor was the challenge based upon the present contention put to him. No alternative expert evidence was led by Tulloch Brae.

[79] There is, therefore, nothing in this point that requires further analysis.

Conclusion on damages

[80] The assessment of damages by the learned trial judge followed an entirely conventional course. Based on the analysis of Mr Gwynne, whose methodology was not challenged, that assessment looked at the following factors:

1. how many containers would have been available for the performance of the contract, and at what particular time; in this respect her Honour found that the number of containers available would have been the same as were available to Tulloch Brae until 200 new containers arrived in September 2015;[71]
2. a finding as to whether, had more container movements been possible, they could have been accommodated on the railway; the finding was that more spaces would have been made available to meet the demand;[72]
3. whether sufficient waste was available to fill the extra containers; the finding was that there was sufficient evidence to satisfy this component;[73]
4. whether there would have been the resources to empty the containers at Swanbank, based on the increased carriage of containers; the finding was that there were resources available, but because of the exigencies a reduction should be made;[74]

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70 Paragraph 2.12 of Mr Gwynne's Report, AB 901.
71 Reasons below at [111]-[115].
72 Reasons below at [116]-[120].
73 Reasons below at [122].
74 Reasons below at [124]-[127].

5. the loss should be adjusted because, in accordance with the finding that extra containers would not have been available until 14 September 2015, there was no loss to EPE until that point;[75] and

6. adjustments had to be made for various costs and unpaid invoices.[76]

[81] In my view, the appellant has not demonstrated that the assessment of damages was affected by error.

Conclusion

[82] For the reasons given above the appeal lacks merit and should be dismissed. I propose the following orders:

1. Appeal dismissed.

2. The appellant pay the respondent's costs of and incidental to the appeal.

[83] **BODDICE J:** I agree with Morrison JA.

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75 Reasons below at [129].
76 Reasons below at [130].