Neutral Citation Number CC138(2020) K55 (General Civil Division)

Case No: cc 55/2018

IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN
GENERAL CIVIL DIVISION

Law Court Building
Siaka Stevens Street
Freetown

Date: 19 August 2021

Before:

THE HONOURABLE MR JUSTICE FISHER J

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Between:

TRANSCEND INTERNATIONAL RESOURCES LTD Plaintiff

-and-

SIERRA RUTILE LTD Defendant

....

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Mrs B Michael, Mr M Gerber, D Beoku Bette of Counsel for the Plaintiff

Rowland Wright and Anrite Thompson of counsel for the Defendant

Hearing date: 25 May 2021

....

APPROVED JUDGEMENT

I direct that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FISHER J

The Honourable Mr Justice Fisher J:

1. This is the judgement of the court in a dispute between the plaintiff and the defendant, in relation to a contract between the parties, with respect to the provision of equipment that was required by the defendant for dredging operations, in the plaintiff's business.

The procedural history

2. This case has a long history in the courts. The matter was previously before a number of Judges, most recently before the Hon Justice Alhaji Momoh Jah Stevens JA, who had effectively presided over the trial. The matter came before me with respect to an application for a mareva injunction, which was granted by The Honourable Mr Justice Alhaji Momoh-Jah Stevens JA, on the 21st May 2021, by way of an ex parte notice with application number **CC.55/18**. The Plaintiff sought a number of orders against the defendant. In summary the Plaintiff prayed for eight (8) orders as prayed for on the face of the notice of motion.

3. Upon perusal of the file, I discovered an interim injunction and several orders had previously been granted by The Honourable Judge on the 21st day of May 2021, as well as a freezing order up to a value of One Million six hundred and twenty-five thousand United States dollars, four hundred and forty-two cents, which was expressed to be sufficient to satisfy the Plaintiff's claim on the face of the action, and where such funds are found in any of a number of financial institutions and listed on the face of the motion, the court order was to be effected. Further, the orders required the said banks to file returns in respect of the said order within seven days from the date of the order. The court also ordered the application to be served upon the defendant for an inter-partes hearing on Tuesday 25th May 2021 at 3pm.

4. When the matter was mentioned before me for the inter-partes hearing, AC Thompson of counsel, appeared for the defendant and there was no representation for the Plaintiff. I was satisfied that it was expedient to

proceed with the matter as the Plaintiff's counsel who obtained both injunctions before The Hon Justice Alhaji Momoh Jah Stevens JA, was aware of the return date for the inter-partes hearings and there was no explanation for the non-appearance of the Plaintiff at the hearing. I was satisfied that the Plaintiff and their solicitors were aware that the inter-partes hearing had been ordered by Mr Justice Momoh Jah Stevens JA to be heard on today's date and no further notice of hearing was necessary, as it was an order of the court that had to be complied with.

5. Having reviewed the evidence in this case, I was satisfied that the orders granted by the court on the 21st May 2021 could not stand on grounds of irregularities and the Plaintiff had simply not made a case for the grant of such an injunction by way of an ex pare application. I was referred to para 29/L/39 of the white book, Supreme Court Practice, under the rubric hearing of the application. In ***Re All Starr Video Ltd (1993), the Times March 25***, the court took the view that where the parties were engaged in an inter-partes hearing and one party decides to apply for a Mareva injunction against the other, the application should be made in open court in the presence of the Respondent's counsel and not ex-parte.

6. The fact that these matters were initiated by an ex parte notice of motion was considered to be an irregularity, which meant that the orders ought to be set aside. I therefore set aside the relevant orders. Having set aside the orders, I realised that the matter was at an advanced stage and the parties had been required to provide their closing addresses in writing, which they did. Upon receipt of the closing addresses, it then fell to me to decide upon the issues between the parties, which I now do in this final judgement of the court.

The claim

7. By way of a writ of summons dated 3rd April 2018, the plaintiff, prayed for recovery of the sum of $1786,220.00 cumulatively as special damages for various damages and breaches of contract.

8. In response the defendant filed a defence and counterclaim to the action dated 24th day of April 2018. The plaintiff then filed a reply to the defence and counterclaim dated 7th May 2018.

9. I consider it necessary to set out the parties' positions for clarity in the judgement and to simply the case between the parties.

The Plaintiff's case in outline.

10. By a contract dated the 16th day of April 2015, the parties agreed between themselves that the plaintiff being an experienced provider of dredging services for the mining and production of heavy mineral concentrates, would provide its services to the defendant on a number of terms and conditions, set out in the contract.

11. In addition, plaintiff placed its machines and equipment required to perform the dredging obligations on the site of the defendant, under the said contract. The contract came to an end on the 31st day of December 2016.

12. The defendant then sent letters dated 7th March 2017 and 5th April 2017 to the plaintiff demanding that they demobilize their equipment and vacate from the operational site. The plaintiff by letters dated 14th march and 24th April 2018, responded and requested a reasonable time be given to it in order to demobilize and vacate the site. That by letter dated 27th June 2017, the defendants were informed that the plaintiff had demobilized and vacated the site.

13. The plaintiff also had its electrical immiscible pump at the defendant's mineral separation site, which was separate from the area the demobilization was carried out. This pump was used by the plaintiff to service the operations of the defendant, for which they paid the plaintiff up to Q3 of 2016. It is alleged that the defendant failed to make payments for Q4, notwithstanding, they kept hold of the plaintiff's pump. The defendant failed to provide a reason for its failure to return the pump and despite several requests to do so, they did not return the pump.

14. Solicitors for the plaintiff then wrote to the defendant dated 6th October 2017, officially demanding the return of the pump. The defendant failed or neglected to return the pump until December 2017. When the plaintiff's agent went to collect the pump, he discovered it was damaged and incomplete as the pontoon and cutter were missing from the pump. Upon enquiries, an explanation was given that the defendant had been using the pump and they had to dismantle it for transportation to their dredging site as the pump could not be carried in one piece.

15. Upon further enquiries, when further enquiries were made about the pontoon, the plaintiff's agent by the defendant's agent that the pontoon was being used by the defendant at their dredging site which was 30 km away from where the plaintiff's representative was given permission to collect the damaged and incomplete pump. The plaintiff's agent was told to come back some other time to dismantle and collect the pontoon. The plaintiff's representative had no choice but to collect the damaged and incomplete pump given to him by the defendant.

16. The pump was subsequently returned in December 2017, after the pump was no longer functional and was no longer of any use to the plaintiff or his business. The defendant failed to return the pump's pontoon to the plaintiff's representatives on the day he was called upon by the defendant to collect the pump.

17. It is expedient for me to set out the relevant parts of the writ of summons as follows:

   1. The contract was entered into on the 16th day April 2015 between the parties, which granted the plaintiff access to the defendant's site for the purpose of installing machinery and equipment to perform dredging obligations under the said contract.
   2. The contract ended on the 31st day of December 2015.
   3. By letters dated 7th March 2017 and 5th December 2017, the defendant demanded the plaintiff demobilise its equipment and vacate from its operational areas allocated to the plaintiff.

4. The plaintiff then responded though its solicitors, by letters dated 14th March 2017 and 24th March 2017, requesting for a reasonable and sufficient time to demobilise and vacate the site. This was then followed up with another letter dated 27th June 2017, informing the defendant's solicitors that the plaintiff has demobilised and removed its equipment from the said site.

5. In addition, the plaintiff also had its electrical immersible pump at the defendant's mineral separation site, an area separate from the site where the plaintiff was asked to demobilise equipment.

6. The pump was used by the plaintiff to service the operations of the defendant on account of which the defendant paid the plaintiff up to Q3 of 2016. The defendant kept hold of the pump for Q4 of 2016 and failed, refused or neglected to make payment, despite several requests for the pump to be returned.

7. Solicitors for the plaintiff wrote to the defendant a letter dated 6th October 2017, officially demanding the return of the pump. The defendant continued to hold onto the pump until December 2017, when the defendant's representatives called the plaintiff's representatives to go and collect the pump.

8. The plaintiff's representative then collected the pump in a damaged condition, and was no longer functional. The defendant failed to return the pontoon to the plaintiff's representative, when he went to collect the pump. The plaintiff has claimed for the damaged pontoon, which he valued at USD $200,000.00.

<u>Evidence led by the plaintiff</u>

18. The plaintiff called one witness Joseph Nanah in support of their case. His evidence was essentially the facts as pleaded. The witness relied upon his witness statement and his oral evidence in chief. The witness concluded his evidence in chief with the statement that they refused to hand over the pump to the plaintiff as they were using it.

19. I consider it necessary in view of the challenges in the evidence to highlight some salient points in the evidence as led by the witness, which include the following:

1. By a contract dated 16th day of April 2015, the parties entered in to an agreement for the plaintiff to have access to site of the defendant for the purpose of placing its machines and equipment required to perform its dredging obligations under the contract.
2. That the said contract ended on the 31st day of December 2016.
3. By letter dated 7th day of March 2017 and 5th day of April 2017 the defendant through its solicitors demanded that the plaintiff demobilise its equipment and vacate from the operational area allocated to the plaintiff on the defendant's site.
4. The plaintiff through its solicitors responded by letters dated the 14th day of March and 24th day of April 2017 requesting a reasonable and sufficient time for the plaintiff to demobilize and vacate from the said site.
5. The plaintiff through its solicitors further wrote to the defendant's solicitors on the 27th June 2017, informing them that the plaintiff had demobilized and removed its equipment from the site.
6. The plaintiff had its electrical submersible pump at the defendant's mineral separation site, an area separate from the site that the plaintiff was asked to demobilise and remove its equipment from.
7. From Q 4 of 2016, the defendant kept in its possession the plaintiff's electrical pump, despite several requests for the defendant to return the same.
8. That the plaintiff's solicitors wrote to the defendant's solicitors on the 6th day of October 2017, officially demanding the return of the pump. Notwithstanding the said letter, and demands form him persistently, the defendant continued to hold on to the pump until

December 2017, at which time the defendant's representative called him to collect the pump.

9. When he went to collect the pump, he was shocked and surprised to see that the pump was damaged and incomplete as the pump's pontoon and cutter were missing from the pump.

10. When he enquired from the defendant's representative as to why the pump was incomplete and in an odd condition when it was presented for collection, with its pontoon and cutter missing, he was informed that the defendant had been using the pump and had dismantled it for transportation to the dredging site for their own use and it could not be carried in one piece to the site.

11. When he enquired about the whereabouts of the pontoon, he was informed by the agent of the defendant that the pontoon is engaged and it is being used at the dredging site approximately 30 km away from where he was given permission collect the damaged and incomplete pump. He was then asked to come back on a subsequent date to dismantle the pontoon from the defendant's dredging site.

12. He had no choice but to collect the damaged and incomplete pump given to him by the defendant and reported the same to the Chief Executive. The defendant only returned the pump to the plaintiff in December 2017 after the pump was no longer functional.

13. The plaintiff did not abandon or fail to remove its equipment. Having made several requests to have the pump returned the defendant failed to return the said pump until it became damaged and then it was returned the pontoon was missing.

14. The witness in his evidence in chief, identified several exhibits, which were identified as Exhibits A1-27, onto exhibits Q1-42.

15. He further testified that the pump was located at the mineral separation site and that the plaintiff never abandoned the pump at the defendant's mining site and most importantly the pump was not

at the mining site but the pump was at the mineral separation site, which the witness never had access to.

16. He testified that the defendant's pleaded defence at para 5 was untrue as the defendant gave instructions throughout as to where to mine and how to mine. In addition, the pump was not in their possession and they had no access to it. When the pump was finally submitted to them for collection, it was at a different site, with parts of it missing.

17. The defendant's pleaded defence at para 13 is also untrue. If the pump was in the possession of the plaintiff, the defendant's wold have not moved it in their absence. To prove that the pump was under the defendant's care, they moved it from their mineral separation site to their dredging area. When he went to collect the pump, it was no longer at the mineral separation site but at their store and when they took the pump out if the store, it was in a skeletal state as it was being used.

18. When he asked one Obafemi Williams of the defendant, who told him the pump was dismantled and taken to the dredging area as they wanted to use it there. He was then taken to the dredging site. At this site, this was further confirmed by a white guy, who confirmed they had dismantled the pump to do some job for them. He further confirmed that after the pump was reassembled, there were voltage issues between the defendant's voltage and the plaintiffs and the defendants had to use some technology to get it working as there a variance in voltage. The skeleton pump was taken to the warehouse and left the pontoon as they had to formulate another system which might need the pontoon. This he alleged caused damage to the pump.

19. With respect to para 16 of the defence, the parties agreed that the defendant provide security for the equipment and machinery that were in the defendant's mining area and not the pump in question. There was no agreement that the defendant would be indemnified for

any loss or damage. The plaintiff agreed for the defendant to provide security which the plaintiff paid for with respect to their machinery on the mining site.

20. With respect to para 18 of the defence, the witness stated that the pump was brand new when it was taken to the defendant's site. He reiterated that he exhibits N1 -2 and M1-2 which are commercial invoices show that the cost of the pontoon and the cost of the electric pump amounted to $200,000 and $300,000 respectively.

20. In cross examination he reiterated his claims in his witness statement and in his evidence in chief. In summary, he makes the following points:

1. That he had worked for the plaintiff for 8 years.
2. That the plaintiff had provide dredging services for the defendant since 10TH September 2014.
3. That the parties agreed that the contract will come to an end on 31st December 2016.
4. That the pontoon and the pump were there 8 months before the termination of the contract and such machinery cannot be dismantled and demobilised within a month. He further confirmed that he met the said pump dismantled.
5. In re-examination, he made references to exhibit A6 at page 26 and with respect to Article 16.4. of the agreement.

21. In closing arguments, Mrs Michael relied upon several passages in clerk and Lindsell on Torts to establish her case. She also relied upon some of the evidence led by the defence. Her central point of argument was that the defence have failed to prove the assertions, contained in the pleaded defence. That contrary to the defendant's defence, the pump was not returned, notwithstanding the fact that the mining equipment was removed from the mining site.

22. With reference to the claim, Mrs Michael considered that the central issue for determination was whether the plaintiff is entitled to recover the claims

made on the basis of tortious liability. She posed a series of questions which are set out at page 9- 32 of her closing address. Her submissions were grounded on these questions.

23. With respect to the defence case, which she set out in outline and in the evidence led by the defence, which she set out at page 28-59 of the bundle of closing address.

24. That the defendant's defence at para 4-7, 9-13, 15 and 19 that the plaintiff abandoned the pump at the defendant's mining site, has not been proved by the defence in their defence. She argued that the defence was not credible as the plaintiff had requested the pump to be returned.

25. That the defence in para 8 of the defence filed that the defendant only became aware of the presence when they were notified by the plaintiff, has not been proven. She relies upon the evidence of DW5 and the defence I a sham as the machines are very big. The defendant could not have been unaware of the presence of the machinery on their site. The plaintiff could not have abandoned its equipment at the site of the defendant as the evidence did not reveal such.

26. That the defence raised in para 14 of the defence that there was no primary agreement on inspection of the equipment and machinery was neither was one requested. There was no agreement on inspection, upon the pump leaving the defendant's site, which would have had the effect of determining the state of the pump prior to collection. This position was dismissed by Mrs Michael in her closing submissions dismissed the defence raised by the defendant in paragraph 14. She makes the point that had the defendant seriously wanted an inspection, they could have insisted that an inspection be done prior to removing the pump from their site.

27. Hat the defence raised in para 15, she argued that the defendant in reality is seeking to argue that they owe no liability to the plaintiff as the pump and pontoon were stored entirely at the plaintiff's risk.

28. With regard to the defence at para 16. She discountenanced the reliance placed on exhibit D in the defendant's bundle. She argues that the

defendant never accepted the plaintiff's offer. The plaintiff simply made an offer to the defendant as a good will gesture to pay for security, as a means of persuading it to grant extension of time, to enable it to vacate the site. It was the defendant who never indicated its acceptance or rejection of the offer, and consequently the offer ought not to be treated as an undertaking. Mrs Michael made the point that Exhibit D was past communications between the parties which relates to the machinery and equipment of the plaintiff which was separate and distinct from the pump and the pontoon. Reliance on Exhibit D is therefore misplaced.

29. With regard to the defence raised in paragraph 19, Mrs Michael made the point that the defendant has not agreed to the price of $200,000.00 but has made the point that the pump had been in use for a while and could not hold its original value, but could only be valued as second hand. She further argued that the defendant did not raise any issues with respect to the claim for $300,000.00. She was of the view the defence raised was a sham defence and no evidence was led to prove what was alleged.

30. I have considered the written submissions of the plaintiff in its entirety. It is a convenient point to address the defendant's claim.

The defendant's case.

31. The defendant in its defence also filed a counter claim against the plaintiff. It is necessary to set out the defendant's defence and counterclaim in some detail.

    1. Paragraphs 1-5 are admitted.
    2. The plaintiff was in breach of their contractual relationship and repeatedly sought extensions to remove their equipment from the site, but they nonetheless admit para 6.
    3. Para 7 is also admitted save for the fact that the plaintiff's solicitors allegedly misled the defendant it had removed its equipment when in fact the pump had not been removed.

4. That the plaintiff actually abandoned its pump in breach of instructions that all machinery and equipment should be removed from the defendant's site. Para 8 is denied.

5. That during the subsistence of the contract, equipment was only stored and operated by authorised employees of the plaintiff and at its sole discretion and any movements of equipment was entirely at the discretion of the plaintiff. The defendant had no say in where the said machinery and equipment were to be stored at all material times, so long as the location was convenient for the plaintiff.

6. The defendant avers that it had demanded that the plaintiff remove its machinery from the site in writing and orally but did not specifically named the areas on the site where the machinery was stored, as it deemed the plaintiff had a record of the various locations where equipment was stationary.

7. Para 9 of the particulars of claim is denied and the defendant avers that it has expressly requested the plaintiff remove its equipment and further claims the pump ought not to have been left behind nor in use as the contract had been terminated.

8. Para 10 of the particulars are denied and the defendant avers they only became aware the pump was left behind when the plaintiff informed them. They also deny using the equipment.

9. Para 11 of the Particulars are also denied and the defendant has averred that it was not under any duty to assist the plaintiff with dismantling its machinery, neither did it have the plaintiff's machinery in its possession.

10. Para 12 is also denied and the defendant maintains it had repeatedly demanded since December 31 2016, that the plaintiff remove its equipment.

11. Para 13 of the particulars are denied save for the fact that the plaintiff's solicitors wrote a letter in connection with the said pump, which they considered to be a request for assistance to facilitate the

removal of the pump, which was entirely at their discretion to decide whether to assist or not.

12. Para 14 of the particulars are denied, save that it is admitted that the defendant's representative called the plaintiff's representative to come and collect the pump from the defendant's premises.

13. The defendant admits that the plaintiff's representative collected the pump from the defendant's premises, but denies para 15,16, 17,18 and 19 of the particulars of claim. The defendant avers that the pump was stored at their premises by the plaintiff at their own risk and was never in the care or possession of the defendant.

14. That there was no prior agreement to inspect the pump jointly at the point of dismantling of the pump.

15. Para 20 of the particulars of claim is denied. The defendant avers that it was under no duty to secure the plaintiff's pump which it stored at its own risk and had mischievously refused to collect the same pump.

16. The defendant avers that the plaintiff had confirmed by letter dated 24th April 2017 confirmed that it would enter into an independent arrangement with security personnel to guard its machinery and equipment stored on the defendant's premises, thus indemnifying the defendant from loss and damage.

17. Para 21,22,23,24,25 and 26 of the particulars of claim are denied and would aver that whatever loss the plaintiff has suffered, would not be as a direct result of an act or omission by the defendant. The plaintiff had indicated by their letter dated 24th April 2017 that whilst their equipment and machinery were onsite they will pay for security guards to guard the equipment.

18. With regard to para 25, the defendant does not admit the price of $200,000.00 claimed but avers that the pump in question having being utilised could not now hold its original value.

19. The defendant avers that it could not be held liable for loss caused to the plaintiff as through its letters dated 7th March 2016, 5th April 2017 and 21st March 2017, the defendant had clearly indicated that it had no use of the equipment as the presence of the equipment represents a significant inconvenience, if not a nuisance, and their removal was most welcome.

20. The defendant also filed a counter-claim to the action, in which it claimed that by the letter dated 7th March 2017, solicitors for the defendant had formally notified the plaintiff that the MOU and service contract had expired on 2nd and 31st December 2016 and had formally requested the plaintiff to remove its equipment from its site on or before 30th April 2018.

21. The defendant had indicated that it accepted no liability for loss or damage to equipment or even death of employees and that by virtue of the failure to demobilise equipment, the defendant will be claiming damages on a daily basis for each day the machinery remained on site.

22. The defendant avers at para 25 of the defence and counterclaim, that the plaintiff was in breach of its contractual obligations by failing to remove its equipment from the defendant's site, by the deadline it was given to vacate the defendant's site. The defendant was therefore constrained to grant further extensions for the removal of the equipment as it represents a hazard and inconvenience by obstructing potential works.

23. The defendant relies upon clause 16.4 of the services contract, which required the defendant to immediately remove its machinery and equipment from the site immediately it was notified to do so. The plaintiff had been in breach of the said contractual provisions by its failure to remove its equipment, which resulted in loss to the defendant at $3000 per day, which was set out in the letter dated 7th March 2017, written by the defendant's solicitors.

24. The defendant also relied on the fact that the plaintiff's solicitors on the 27th day of June 2017, informed solicitors for the defendant that it had removed all its plant, equipment and machinery from the defendant's site. Consequently, the defendant had incurred damages from the 1st day of February 2017 to 27th day of June 2017, at $3000.00 US dollars per day, amounting to a total of $441,000 US dollars which is owed to the defendant by the plaintiff.

Plaintiff's reply to defence and counterclaim.

25. The plaintiff in the said reply, denied para 2 to 17 of the defence and counterclaim and avers that the defence is repetitive. The plaintiff had made several requests to the defendant for the removal of the pump and pontoon, without results. The plaintiff avers that the defence was merely an afterthought geared towards misrepresenting the facts. The plaintiff did not abandon the pump but rather the defendant was using the equipment until it got damaged, and when it was no longer use, it was returned in a damaged state and not fit for purpose.

26. The plaintiff avers that the defence is misconceived in that the pump was placed and utilised in an area, the mineral separation site which is separate and distinct, from the site the plaintiff demobilised and vacated from. Which was an area that had nothing to do with the requests for extension of time to vacate.

27. The plaintiff avers that even assuming they failed to remove the pump from any of the defendant's sites, that failure or omission cannot be relied upon by the defendant to convert the pump to its own use and benefit, without prior permission from the plaintiff, particularly in the letter dated 6th October 2017.

28. The plaintiff avers that the letter dated 24th April 2017 was deliberately twisted and they rely on the contents of the said letter which does not in any way suggest the plaintiff was going to enter

into an independent arrangement with security guards to guard its machines.

29. The plaintiff avers that they only indicated a willingness to do so should it be granted an extension. The defendant never accepted the offer and consequently no undertaking was made as it never heard from the defendant. The plaintiff also denies para 18 to 20 of the defence.

30. The plaintiff further avers that the defence of the defendant is an afterthought and a fabrication geared towards justifying its usage of the pump and pontoon.

31. With respect to the reply to the defence and counterclaim, the plaintiff admits para 22 to 24 but avers the contents of the said letter of 7th March 2017, but avers that the contents of the said letter are irrelevant to the defendant's claim, and does not disclose a cause of action.

32. The plaintiff denies para 27 to 28 of the defendant's counterclaim. In particular, at para 20 of the reply to the defence and counterclaim, the plaintiff avers that it was never notified nor informed that the plaintiff was obstructing the normal day to work of the defendant, resulting in loss at a daily rate of $3000 per day. Such a fact was never clearly spelt out in the letter of 7th March 2017, written by solicitors for the defendant, as alleged at para 28 of the defence and counter claim. The plaintiff relies on the contents of the letter of 7th March 2017.

33. The plaintiff in its reply relied upon the failure of the defendant to respond to the letter of 24th April 2017, causing It to believe that the extension had been granted.

<u>The issues in the case.</u>

32. Having considered the pleadings as advanced by both parties, I consider the issues can be distilled and simplified as follows:

1. Does the plaintiff have a remedy in contract or in tort or both?
2. If there is a remedy in contract, what is the plaintiff entitled to?
3. If there is a remedy in tort, is the plaintiff entitled to damages under the common law of detinue?

33. In relation to the contractual issues I have had regard to the services contract signed and relied upon by both parties. I have had regard to specific areas of services contract which include:

    1. The background to the agreement.
    2. The terms clauses.
    3. Provision of services clauses.
    4. The termination clauses.
    5. The consequences of termination clauses (4.4)
    6. The mine planning clauses.
    7. The services specifications in schedule 1

Relevant findings of fact

34. Having reviewed the said agreement, I have concluded that the contract came into effect on the 16th April 2015 and was expressed to be terminated on the 31st December 2016, in accordance with clause 3.2 of the agreement. It should however be noted that provision is made in clause 3.1 for early termination. In view of the fact that the agreement terminated on the 31st December 2016 as envisaged by the parties, I do not accept there was any breach of the agreement by the plaintiff. It is even more significant to note to that the agreement does not make provision for events that will occur after the contracts comes to its natural life cycle on the 31st December 2016. The termination clauses only make provision for early termination events.

35. The defendants aver in their defence that the plaintiff was in breach of its contractual obligation to remove its equipment from the site upon

termination. Although the defendant has relied upon clause 16.4 as the basis upon which it avers that the plaintiff was in breach of its contractual obligations, I reject unhesitatingly, that interpretation of clause 16.4. Clause 16.4 by its very wording applies to situations where early termination notice is given by either party. In particular, the said clause 16.4(1) provides:

"16. 4.. In the event of either party issuing a notice of termination of this agreement, the supplier shall:

(a) If the customer so directs, immediately cease the performance of the services and vacate the site; and

(b) Comply with any other reasonable directions of the customer.

36. This provision was clearly not intended to apply to a situation where the contract comes to an end by effluxion of time. It is undoubtedly the case that no notice was served by either party to terminate the agreement and the plaintiff was therefore under a duty to provide full service to the defendant up until the 31st day of December 2016. It is therefore unreasonable to expect that the plaintiff would demobilise its equipment and vacate the site on the 1st January 2017. A reasonable time had to be given to the plaintiff to leave, having regard to the nature of the operations. Consequently, I cannot hold that the plaintiff is in breach of contract for failing to remove its equipment, after

37. With regard to the issue of the pump being left behind, I do not accept as credible that the plaintiff deliberately left the pump behind or as the defendant averred that the pump was deliberately left abandoned. It is inconceivable that the plaintiff having being called to collect their equipment from the site would choose to leave behind a valuable pump and pontoon.

38. The defendant also avers in their defence that "any movements of equipment was entirely at the discretion of the plaintiff". This I find to be incredible that the plaintiff who was tasked to provide dredging services would be doing so entirely at its own discretion, on the defendant's site

without their involvement. This averment is contrary to common sense and logic and also contrary to the express provisions of the contract, specifically, the mining clause 5.3 which provides:

"other than as set out above, the supplier shall have the responsibility for the day to day provision of services, subject always to any directions of the customer.

39. I find this averment in the defence to be unarguable. With respect to the request to remove the pump, I have considered the following letters:

1. Letter from the defendant's solicitors, addressed to the plaintiff dated 7th March 2017.
2. Letter from the plaintiff's solicitors addressed to the defendant dated 14th March 2017.
3. Letter from the defendant, addressed to the plaintiff dated 5th April 2017.
4. Letter from the plaintiff, addressed to the defendant dated 24th April 2017.
5. Letter from plaintiff's solicitors addressed to the defendant dated 27th June 2017.
6. Letter from plaintiff's solicitors addressed to the defendant, dated 6th day of October 2017.
7. Letter from defendant, addressed to plaintiff dated 14 December 2017.
8. Letter from defendant's solicitors addressed to the plaintiff's solicitors dated 21st March 2018.
9. Letter from plaintiff's solicitors addressed to the defendant's solicitors, dated 26th March 2018.
10. Letter from defendant's solicitors addressed to plaintiff's solicitors dated 21st December 2018.

11. Letter from defendant's solicitors addressed to plaintiff solicitors dated 9th January 2019.

12. Letter from the plaintiff's solicitors addressed to the defendant's solicitors dated 11th January 2019.

13. Letter from the defendant's solicitors addressed to the plaintiff's solicitors dated 16th January 2019.

14. Letter from the defendant's solicitors addressed to the plaintiff's solicitors, dated 11th February 2019.

15. Letter from the plaintiff's solicitors addressed to the defendant's solicitors dated 4th March 2019.

16. Letter from the defendant's solicitors addressed to the plaintiff's solicitors dated 1st April 2019.

17. Letter from the plaintiff's solicitors, addressed to the defendant dated 2nd April 2019.

40. It is significant to note that neither of the parties have admitted any of the facts. The court therefore has to reach its own conclusions on the facts, in the light of the available evidence before it. Having so considered the letters referred to at para (39) above, I make the following findings of facts.

1. That the letter of 7th March 2017, constituted a formal notice to the plaintiff to vacate the mining site. That letter relied upon clause 16.4, which as I have found cannot be read or interpreted in the manner contended for by the defendant neither can it be relied upon to suggest that the plaintiff should immediately vacate the site in reliance on that clause. In the absence of such a specific clause, the court has to consider whether the notice to vacate the site is reasonable having regard to all the circumstances of the case. I do not consider that a notice to immediately vacate the mining site by relying on clause 16.4, was reasonable in all the circumstances of the case. The letter also makes reference to several notices issued by the defendant, requiring the plaintiff to demobilise and dismantle its

equipment. None of these notices between the 1st January 2017 and 6th March 2017 were ever exhibited by the defendant. At para 9 of the said letter, the defendant contradicted the claim in the letter that the plaintiff had refused to dismantle its equipment and vacate the site. At that said para 9, it acknowledged that demobilization activities were ongoing as at the 24th February 2017. Further at para 11, the defendant confirmed again that demobilisation by the plaintiff had been ongoing since 1st January 2017 and was ongoing. It was the defendant itself that informed the plaintiff that they were to dismantle their equipment and vacate the site on or before the 30th day of April 2017. Failure to do as requested, would lead to action in the High Court, seeking authority to dispose of the equipment. This is itself an acknowledgement that despite being aware that demobilization had commenced since January 1 2017, a time frame of at least three months was needed for the demobilisation exercise to be completed. The letter also advised the plaintiff that liability was excluded for any loss or damage including death, should the equipment remain on the defendant's site. Formal notification was also given that the defendant would be claiming damages for each day that the plaintiff's equipment remained on the defendant's site. I also find it interesting to note that he defendant had employed a project manager to since January 2017 to oversee the demobilisation exercise and to ensure that this was done safely as a "commitment" to ensure this was done safely. To claim in the light of these established facts in their own letter that the plaintiff was refusing to remove its equipment from the site is rather incredible.

2. That the letter dated 14th March 2017 from the plaintiff's solicitors informed the defendant that there were unavoidable and unexpected factors that caused their inability to vacate the site much earlier. They made it clear that they were not in a position to vacate the site by the deadline due to circumstances beyond their control, citing the absence of the manager who was in Hong Kong and had fallen ill. They pleaded for an extension of time to the 30th day of September

2017. They cited safety reasons that needed to be adhered to. They undertook to ensure that the demobilisation exercise is competed by the end of September 2017, by which time the managing director would have recovered and an alternative space would have been found to relocate the machinery.

3. That the letter dated 5th April 2017, responded that they do not consider the illness of one person as a reasons for not complying with instructions to vacate the site, as they are being denied access to their own site. A final deadline was given to the 31st day of May 2017 for the plaintiff to vacate the site or action will be instituted in the High Court.

4. That the letter dated 24th April 2017 from the plaintiff, put the defendant on notice that they are not simply relying upon the medical situation but the physical impossibility of removing equipment within the stipulated time. They further advised the defendant that all machinery had been stored within a separate enclosed area so as not to affect the activities of the defendant. They further requested a revised extension of time to the 31st July 2017, and further suggested they will undertake to employ security guards to guard the equipment on site.

5. That the letter dated 27th June 2017, informed the defendant that they had removed the equipment and vacated the mining site.

6. That the letter dated 6th October 2017, informed the defendant that they had not been able to recover their pumping machine from the site, despite several attempts to do so. They further advised the defendant's solicitor that despite attempts in August 2017 to recover the pumping machine, the defendant refused to hand it over and requested the solicitors to facilitate the return of the pump.

7. That letter dated 14th December 2017, did not adequately address the issues raised in the letter of 6th October 2017. The letter only addressed the issue of an outstanding payment owed to the

defendants. The letter also erroneously claimed that they were only advised by the plaintiff of the missing pump, on or around 24th November 2017, when as a matter of fact, the issue was raised in the letter from the solicitors in October 2017. The defendant's raised the issue of the plaintiff's letter of 27th June 2017, which confirmed all equipment had been removed from the site. The letter failed to fully address the issue of the missing pump or confirm or deny that the pump was still with the defendant.

8. That the letter of 21st March 2018, referred to previous correspondence in which the plaintiff had been advised to remove all equipment from the defendant's site and that they were surprised to learn on the 6th October 2017 of the missing pump, albeit not responding to that letter or otherwise dealing with the issue. They denied that they would not refuse permission to remove equipment as the equipment was a nuisance and an inconvenience to them. They further alleged that the plaintiff abandoned the pumping machine and they further alleged that the plaintiff only complained about the pump after demands for payment were made for a separate transaction.

9. That the letter dated 26th March 2018, maintained its positon that the defendant had refused to hand over the pump. A number of issues were raised by the plaintiff's solicitors including the fact that since August 2017, the pump had been requested for and the defendants have always given excuses as to why the pump could not be returned. The plaintiff made the point that when they collected the pump it was damaged and parts were missing from it. It was important to note that the plaintiff clearly informed the defendant that the pump was initially left at the mineral separation site. It was subsequently discovered by the plaintiff that the pump was dismantled and its pontoon and other parts were missing from it. When the plaintiff enquired from the representative of the defendant about the odd condition of the pump and its pontoon and other parts missing, the

representative informed him that the defendant was using the pump and consequently they had to dismantle it for transportation to their dredging site for their own use as the pump on its whole could not be carried in one piece to their dredging site, which was 30km away from the original site and from where he was given permission to pick up the damaged pump. The plaintiff raised the issue that if the pump was of significant inconvenience or a nuisance why did the defendant not persistently call upon the plaintiff to go and collect the equipment as it did for the rest of the other equipment? They simple truth as far as the plaintiff was concerned is that they were utilising the pump for their own use until the pump became damaged and was no longer in a good condition. The plaintiff further averred that the defendant since December 2016, without the knowledge and permission of the plaintiff, until December 2017, when it handed it over as the pump was of no use to them any longer as it had been damaged. The plaintiff demanded the sum of USD$1,625,442.50 as replacement for the damaged pump, including the missing parts. I believe the plaintiff's version of events. Had the pump been at the site where the other equipment was stored, I have no doubt that they would have been removed at the same time as the other equipment. The defendant itself has acknowledged that despite its earlier denials it was only in December 2017, that it returned the pump to the plaintiff. On the basis of the admissions by the defendant's representative that the pump was 30 km away without the permission of the plaintiff, coupled with the fact that the pump was not stored with the other equipment at the site where it was left, I am left with the inevitable conclusion that the return of the pump to the plaintiff in December 2017, despite earlier denials, could only be attributable to the pump being used by the defendant, without permission from the plaintiff. I am reinforced in this conclusion by the fact that the defendant did not produce evidence to show that it contacted the plaintiff and asked them to remove their pump from its site for almost one year after the contract ended.

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10. That the letter of 10 December 2018, confirmed that the pump was in the possession of the defendant and insisted that the pump be removed from the site by 31 December 2018. This is significant, as in this letter the defendant accepted liability for the security of the pump and reiterated that they will not be held liable for the state and condition of the pump after that deadline. It is even more significant that the defendant referred in that letter to the area where the pump was as an "active operational mining area of our client's usual conduct of business. The obvious question to ask was what was the plaintiff's pump doing at "an active operational mining area of the defendant's usual conduct of business, one year after the contract ended if the pump was not in use?

11. That the letter of 9th January 2019 was rather surprising in the light of the defendant's own admission that the pump was handed over in December 2018, for which there is ample evidence. The pontoons were however not handed over. The attempt to hand over the pontoon to the police was rather odd.

12. That the letter dated 11th January 2019, made it clear that removal of the pontoon and handing over to the CID would constitute interference with evidence.

13. That the letter dated 16th January 2019, made clear that the defendants had repeatedly asked the plaintiff to remove the pontoon. This letter expressly requested the plaintiffs to immediately remove the pontoons from the site, even though they were aware that there was an allegation that the pontoon had been damaged.

14. That the letter dated 11th February 2019, requested the plaintiff to remove the pontoon from the mining site by the close of business the next day. They claimed the loss as at that day amounted to $124,000.00, although no evidence was provided to prove the actual loss.

15. That the letter dated 4th March 2019, reiterated its position that the pontoons remain the subject of police investigation.

16. That the letter of the 1st April 2019, reiterated the defendant's position.

17. That the letter of the 2nd April 2019, reiterated the plaintiff's position in relation to the pontoon.

The evidence of witnesses

41. The evidence of PW1 was clear on the point that when he saw the skeletal state of the pump, he enquired from Obafemi Williams, the representative of the defendant who told him that the pump was taken from the mineral separation site and taken to the dredging area, where it was being used. He then asked a white guy who was in charge of the dredging area, who also confirmed the pump was taken to do a job for the defendant. That after they dismantled the pump and reassembled it, the voltages did not match up. They then took the pump to their warehouse and left the pontoon behind to use it on another system for which the pontoon was needed. When he queried this further, he was asked to contact the CEO. This evidence was not controverted in cross examination.

42. I have also had regard to the evidence of witnesses for the defence. DW1's evidence has no direct relevance to the case she does not have direct evidence of the matters that are in dispute. Taking into account DW2's evidence, it is surprising that with all the problems he observed, he never mentioned that the plaintiff was informed of the developments. The evidence was as a matter of fact contradictory to the pleaded case. I have not considered the effect of order 30 of the High Court Rules 2007 on the evidence in order to get to the bottom of the matter.

43. The evidence of DW3, I am satisfied was directed to aligning with the defendant's pleaded case. It again raises the issue as to why the plaintiff who is the rightful owner of the pontoon was not informed. The evidence of DW4 only sought to confirm that the demobilisation process but the crux of his evidence did not shed light on the issues in dispute. Leaving aside the

technicalities attached to his evidence, i.e. not having being notarised, I reject the evidence. It is rather surprising that Obafemi Williams was not called as a witness to rebut the evidence of PW1. Thus I conclude that PW1'S evidence remains unchallenged.

Counter claim

44. The defendant's counterclaim is rather troubling to say the least. As I have pointed out, there is no provision in the contract that provides for termination on effluxion of time. I fail to see the legal basis of the defendant's counter claim of $441,000 for the period of 1st February 2017 to 27th June 2017, when they have been extending the deadlines to the plaintiff, without a demand for compensation. The evidence as I have analysed in the various letters and in the pleadings do not support a counter claim, having regard to the absence of any proof of loss, or entitlement to claim damages or storage charges or provision in the contract for damages, post contract. The counter claim must therefore fail in its entirety. I do not consider the defence has any merits in relation to the contractual claim of breach of contract.

The claim for damages by the plaintiff

45. I have concluded that the plaintiff is not entitled to damages for breach of contract as per the contract agreement. However, having regard to the evidence adduced and the findings of fact, I am satisfied that the plaintiff did not abandon the pump but on the available evidence, the pump was withheld by the by the defendant as it was clearly being used at their site. This raises the issue of unjust enrichment and whether the plaintiff is entitled to special damages, loss of income and interest.

Unjust enrichment law.

46. In *Banque Financiere v Parc(Battersea)* the House of Lords held that the requirements for an unjust enrichment claims are:

1. The defendant has been enriched.
2. The enrichment was at the expense of the plaintiff.

3. The retention of the enrichment is unjust.

4. Does the defendant have a defence?

47. Where the plaintiff establishes the 1st three elements of an unjust enrichment claim, the claim for restitution will succeed unless the defendant can show that he has a defence. As I have indicated the defendant's defence lacks merit. There is clear evidence that the defendant was using the pump at its dredging site since the termination of the contract. Is the plaintiff entitled to restitution?

Restitution

48. This is a remedy which can operate alongside or distinct from contractual or tortious claims, and which can be available in a claim which arises either as a matter of law or in equity. It restores the claimant to the position it was in before the defendant had been unjustly enriched at its expense. For a claim in restitution to succeed, the plaintiff must show that:

1. The defendant has been enriched. This could be in terms of money, but can also be other benefits, whether direct or indirect, and includes saving from expense and discharging obligations.

2. The enrichment was at the claimant's expense; and

3. The enrichment was unjust. There may be one or more of a number of reasons why enrichment may be unjust, including (non-exhaustively) mistake, duress, undue influence, failure to provide consideration for a benefit, illegality, and so on.

49. In *Benedent v Sawiris 2014 AC 938 and in Menelaou v Bank of Cyprus, 2016 AC 176*, Lord Clarke had this to say:

"It is now well established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant? See *Banque Financière de la Cité v Parc (Battersea)* [1999] 1 AC

221, 227, per Lord Steyn; *Investment Trust Companies v Revenue and Customs Comrs* [2012] STC 1150, para. 38, per Henderson J."

50. I have concluded that this is a "*services*" case for which assuming the four questions posed in *Benedetti* have been answered in favour of the claimant, the court must then proceed to value the defendant's unjust enrichment. What then is the defendant's unjust enrichment in this case? The plaintiff has claimed for seven quarters. The defendant had paid up to Q3. I have seen no evidence by way of demand notices or unpaid invoices under the contract that that payment for the use of the pump was only made up to Q3. The plaintiff was under contract to deliver services until the 31st December 2016.

51. The issue of the pump was not raised until Mrs Michael's letter of the 6th October 2017. Whilst I recognise the plaintiff's assertion that the issue had been raised since August 2017, there is no evidence of that before me for the first three quarters of 2017. In any event, the defendant as I have found was using the pump at another site and could not have known that they were using the pump without the authority of the plaintiff. The plaintiff informed the defendant on 27th June 2017 that the machinery and equipment had been removed. All throughout, the defendant had been using the pump. Any award of restitution with respect to the usage of the pump can only be for four quarters of 2017 and not seven quarters as claimed by the plaintiff, after the termination of the contract in December 2016.

The claims in Tort

52. I have had to consider on the facts in this case, whether there is an argument that the defendant is liable for trespass to chattel belonging to the plaintiff, and conversion. Trespass to Chattel is a direct and unlawful injury done to the chattel in possession of another person. It is actionable per se; proof of direct and unlawful application of force is enough, there is no need to prove damages. However, the direct application of force does not have to be physical.

53. Conversion consists of the wilful and wrongful interference with the goods of a person entitled to possession in such a way as to deny him such right or in such a manner inconsistent with his right.

54. The right to immediate possession is the determining factor. That is, if the right exists, actual possession is unnecessary. At the expiry of the contract, the plaintiff was entitled to possession of the pump albeit stored at the defendant's premises. In the case of ***North Central Wagon and Finance Co Ltd vs Graham***, the defendant bought a car from the plaintiff on a hire purchase agreement. However, the defendant defaulted in payment. According to the terms of the contract, upon default, the plaintiff would be entitled to reclaim the goods. The defendant, without informing the plaintiff, auctioned the car. Thus the plaintiffs sued the auctioneer for conversion. The court held that the plaintiffs could sue in conversion regardless of the fact that the plaintiff didn't have actual possession of the car at the time. Since the right in the goods were already vested in the plaintiff, there was no need for actual possession.

55. In considering whether there is liability for conversion, consideration needs to be given to the legal test of conversion which include wrongful detention of goods. This must be accompanied by an intention to keep the goods from the person entitled to possession of the goods. Hence it would not be regarded as conversion if the finder of goods merely refrains from returning such to the owner. It would only be conversion in a situation in which when asked for the goods by the owner, he refuses to release it.

56. In the case of *Howard E Perry and Co Ltd vs British Railway Board. (1980)* 1 WLR 1375, the defendant, who were carriers, held the plaintiff's steel in depots. Subsequently, there was a strike by steelworkers and due to this, the defendants refused to release the plaintiff's steel to them. It was held that this amounted to conversion on the defendant's part. For conversion to be committed there has to be some positive denial of possession towards the person entitled to possession.

57. In *Kangama v Alexandria 1952, SLSC 4, CIVIL CASE 107 of 1951* a decision of the Sierra Leone Supreme Court by which this court is bound, Luke CJ had this to say:

"A licensee whose licence is revocable is entitled to reasonable notice of revocation to afford him sufficient time to remove his property from the land, and he therefore cannot be a trespasser on the land until such notice has been given..... intended conversion of goods to another's use or destruction of goods to prejudice of owner: In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, either by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner (page 171, lines 13-17). In an action in detinue, the damages awarded to the plaintiff in the event of the defendant's failure to return the goods are the market value of the goods assessed as at the date of the judgment in his favour and not at the time of the defendant's refusal to return them; and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason (page 173, lines 8-14).

58. It is not in doubt that the pump was damaged upon collection by the plaintiff and by the time it was recovered, the pump had changed its identity by the missing pontoon. Destruction of goods would amount to conversion in the following situations:

    1. One person wilfully destroys the chattel of another.
    2. If the chattel either ceases to exist or changes its identity.

59. There are defences to the tort of conversion which are recognised by law. One such defendant is abandonment which has been relied upon by the defendant. The evidence does not support the defendant's claims that the pump and the missing pontoon were not abandoned goods. The plaintiff has refuted any such claims and in any event, the evidence in the letters clearly showed that the goods were not abandoned. The defence of abandonment must fail.

60. The question now for consideration by the court is what damages, if any, the plaintiff is entitled to, taking into account those articles which have been lost or destroyed through the defendant's act. One of the leading cases on this subject is that of Rosenthal v. Alderton & Sons Ltd. (3) which states in the headnote in the Law Reports ([1946] K.B. at 374): "[I]n an action of detinue, the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendant's refusal to return the goods, and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason.

61. The plaintiff in this case had returned to them the goods but at the time of return, the goods were damaged and not fit for purpose. The plaintiff in this case has prayed for damages for loss of income at a rate of USD 160,777.5 from Q2 2018 per quarter, up to the time of judgement.

62. Compensatory damages are intended to compensate a claimant for losses suffered as a result of the other party's (wrongful) conduct. See H McGregor, *McGregor on Damages* (20th ed Sweet & Maxwell, London 2017), Section 2-002, citing *Livingstone v. Rawyards Coal Co* [1880] 5 App Cas 25 at 39. a distinctive feature of English law is the emphasis on mitigation of loss. The claimant is expected to take all reasonable steps to minimise its loss resulting from the defendant's breach of its obligations. Loss that could have been avoided through reasonable action or inaction by the claimant will not be recoverable. By corollary, if the injured party takes reasonable steps to minimise the loss incurred, the cost of these steps is recoverable and the damages owed by the defendant are reduced by the amount of the reduction of loss. Failure to take mitigating steps will likely result in the claimant's entitlement to damages being reduced.

63. Damages in tort are in general compensatory i.e. they aim (subject to the rules of remoteness and mitigation) to make the claimant whole—i.e. to put the claimant in the position they would have been in had the tort not been committed—but no more than that.

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64. In **Bunge SA v Nidera BV [2]**, a case involving an anticipatory breach of contract, the Supreme Court has confirmed that it is just and necessary to consider post-breach events known at the date of assessing damages, to the extent that they are relevant to and affect the claimant's loss.

65. As in this present case before me, the Supreme Court was of the view that:

    1. The particular Default Clause in the contract did not cover the entire range of possible damages and neither addressed nor excluded the consideration of subsequent events.

    2. It is necessary for the court to consider post-breach events known at the assessment of damages if they are relevant to and affect the claimant's loss.

    3. The compensatory principle is fundamental to the assessment of damages such that damages must reflect the loss, if any, that the innocent party has suffered.

    4. Default/damages clauses which attempt to provide a prospective formula for calculating damages in the event of breach may produce a different result from the common law. However, in the absence of very clear words, such clauses may be assumed not to operate arbitrarily, for example by producing a result unrelated to anything which the parties could reasonably have expected to approximate the true loss.

    5. Default/damages clauses should not, in any event, necessarily be regarded as complete codes for the assessment of damages. It will rarely be possible or appropriate for a contract draftsman to achieve a clause which could be correctly interpreted and applied in such an all-embracing way. In this case

66. Having regard to the evidence I found in this case, it is appropriate that judgement is given for the plaintiff, I so hold.

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Assessment of damages

67. In relation to the damages I intend to award at this stage, I shall hear further submissions on the issue of the current costs of the pontoon and the pump in line with the decision of the Supreme Court in ***Kangama v Alexandria 1952, SLSC 4, CIVIL CASE 107 of 1951***, which requires the assessment of damages to be assessed in accordance with market value of the goods assessed as at the date of the judgment in his favour and not at the time of the defendant's refusal to return them. I shall therefore adjourn these proceedings shortly to enable the plaintiff to submit an accurate market value for the goods as at today's date.

68. After the adjournment, as per my orders, the plaintiff filed a supplementary affidavit, through Yeung Wing Kwong, its director, sworn to on the 5th August 2021, with exhibits attached. I have had regard to para 5 of the affidavit which avers that the price of the pump and pontoon have increased since 2015 when it was first purchased. The plaintiff relied upon exhibit WTL 5 and 6, which quotes the price at $414,000.00 for the electric immerscible pump and $345,000.00 for the pontoon, respectively.

69. I have given several opportunities to Mr Thompson to provide an up to date invoice to ensure that the price of the pumps is as current as we possibly can. I have given several adjournments to enable them to do so. Mr Thompson called me on Monday 16th August 2021, to advise me that due to a medical emergency in their chambers he was requesting for an adjournment to the 19th August for the matter to proceed. He further indicated that he would provide the quotation to me by email if necessary, before the adjourned date.

70. On today's date, 19th August 2021, I have received a letter from the firm of Wright and Co Solicitors, informing the court that Mr Thompson is indisposed by reason of severe ill health and a further adjournment of one week is sought, within which another solicitor would be sought. The letter also suggested that other key members of the firm are also indisposed.

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71. Whilst I sympathise with Mr Thompson, and members of the firm who are indisposed, arrangements should and ought to have been made to get replacement counsel, having regard to the seriousness of the issues. The plaintiff has judgment in its favour and fairness dictates that they should be able to enjoy the fruits of the judgement. There is no indication from Mr Thompson or the firm that they have sought the quotation, for which I granted them the adjournments. If they had, the company could have been asked to forward a copy of the quotation to the other side and directly to me, which I consider would have been appropriate. To simply rely on being indisposed without evidence of compliance with the orders given by the court, is unacceptable.

72. Further, Miss Tengbe is also on the record for this case and is the in house solicitor, who swore to an affidavit in this case. She is a qualified barrister and solicitor of the High Court with rights of audience in this court. There is no explanation as to why she has not continued handling this matters, in compliance with the court order. In the circumstances, I am satisfied that any further delays in disposing of this matter would be prejudicial to the plaintiff who has judgement in its favour.

73. The invoice for $117,000 provided by the defendant as the current price for the replacement pump and pontoon is not credible. The prices pleaded in the writ of summons were at 2015 levels. It cannot be credible that the pumps and their pontoons have decreased in costs by at least 50%, six years later. The defendant must take their victim as they find them. There is nothing before me to show that the price of the pump provided by the plaintiff is not credible neither has it been challenged with credible evidence by the defendant. I am therefore satisfied that the current price of the pump and pontoon are as depicted in the invoices provided by the plaintiff.

74. I initially delivered judgement in favour of the plaintiff on the 4th August 2021 and as at the 19th August 2021, nothing has been done by the defendant to provide evidence before the court as to the current price of

the pump and pontoon. I shall now deal with the damages the plaintiff is entitled to and I make the following findings.

1. The plaintiff is entitled to the cost of replacing the damaged pump and the pontoon which are put at $759,000.00.
2. The plaintiff is further entitled to damages for unjust enrichment as from the 27th June 2017 until April 2018, assessed at $482,332.50, representing the period of time the defendant was holding on to the pump and pontoon. Whilst the pump was handed over in December 2017, it was not useful without its pontoon.
3. The plaintiff has not been able to establish loss of income for seven (7) quarters. As I have concluded earlier, the plaintiff was liable to the defendant under the contract up until 31st December 2016. Further the plaintiff is only entitled to damages and loss of income from June 2017 when the equipment was removed from the defendant's site minus the pump and the pontoon to April 2018, when action was commenced which represents 3 quarters assessed as at (2) above.
4. The plaintiff is entitled to damages from April 2018 to the date of judgement for loss of income assessed at 12 quarters assessed at $1,929,306,00
5. Pursuant section 4 of CAP 19 of the laws of Sierra Leone, interest is awarded on the judgement debt at a rate of 25% per annum until full payment is made.
6. Costs to be taxed if not agreed.

75. In the circumstances, I make the following orders:

1. That the defendant shall pay to the plaintiff, the sum of seven hundred and fifty-nine thousand United States dollars ($759,000.00), its equivalent in Leones at the prevailing Bank of Sierra Leone exchange rate, forthwith.

2. That the defendant shall pay to the plaintiff as damages for unjust enrichment, the sum of Four hundred and eighty-two thousand, three hundred and thirty-two US dollars and fifty cents, (**$482,332.50**), its equivalent in Leones at the prevailing Bank of Sierra Leone exchange rate, forthwith.

3. That the defendant shall pay to the plaintiff as damages for loss of income, the sum of One million, nine hundred and twenty-nine million, three hundred and six thousand US Dollars, (**$1,929,306.00**), its equivalent in Leones at the prevailing Bank of Sierra Leone exchange rate, forthwith.

4. That interest is awarded at a rate of 25% on the judgement debt from the date of judgement, until full payment is made.

5. Costs to be taxed, if not agreed.

The Hon Mr Justice A Fisher J.