

Neutral Citation Number CC17 {2018} C2

(General Civil Division)

Case No: CC 17/2018

**IN THE HIGH COURT OF JUSTICE**  
**HOLDEN AT FREETOWN**  
**GENERAL CIVIL DIVISION**

Law Court Building  
Siaka Stevens Street  
Freetown  
Date: 10 January 2023

**Before:****THE HONOURABLE MR JUSTICE FISHER J****Between:**

<b>Native Consortium Think Tank (suing on behalf of 300 plaintiffs)</b>	<b>1<sup>st</sup> plaintiff</b>
<b>Edmond Abu Jnr -and-</b>	<b>2<sup>nd</sup> Plaintiff</b>
<b>Africell (SL) Ltd</b>	<b>1<sup>st</sup> Defendant</b>
<b>Orange (SL) Ltd</b>	<b>2<sup>nd</sup> Defendant</b>
<b>Sierratel (SL) Ltd</b>	<b>3<sup>rd</sup> Defendant</b>
<b>National Telecommunications Commission</b>	<b>4<sup>th</sup> Defendant</b>

<b>MP Sesay, C Hortobah During, FA Gerber of Counsel for the A Showers, II Mansaray for the U Turay, C Taylor-Young for the No Appearance for the TA Jabbie, DH Yokie, M Kenneh, AK Koroma, IF Sawaneh for the</b>	<b>Plaintiff</b>
	<b>1<sup>st</sup> Defendant</b>
	<b>2<sup>nd</sup> Defendant</b>
	<b>3<sup>rd</sup> Defendant</b>
	<b>4<sup>th</sup> Defendant</b>

**Hearing dates: 15 March 2021-16July 2021****.....  
APPROVED JUDGEMENT  
.....****I direct, that copies of this version as handed down may be treated as authentic.****THE HONOURABLE MR JUSTICE FISHER**

**The Honourable Mr Justice Fisher J:****Introduction**

1. This case raises two central issues of significant public interest. The first can be summarised as the failure or otherwise by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, hereinafter referred to as "the defendants", to provide quality telecommunications services in their role as telecommunications service providers in Sierra Leone and the effect of such failures on consumer protection. The second issue is whether the 4<sup>th</sup> defendant, failed or neglected to exercise and perform its statutory functions to enforce compliance by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants of their duty at common law and statute to ensure the provision of quality services to consumers, thereby leading to loss and damage to the plaintiffs as a class of persons, who are subscribers to telecommunications services in Sierra Leone.

**Background facts**

2. These long-drawn-out proceedings arose as a result of complaints by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs allegedly by members of the public to the defendants and the 4<sup>th</sup> defendant about poor services being provided by the defendants in the provision of telecommunications services. Notwithstanding these complaints, it is alleged by the plaintiffs that the defendants failed to take appropriate steps to improve their services and that failure is continuing and that the 4<sup>th</sup> defendant also failed to comply with its statutory duty to regulate the defendants in accordance with those statutory duties and their failure amounts to negligence on their part. The plaintiffs then subsequently commenced an action by way of a

writ of summons dated January 2018 which is now the subject matter of this case. The matter however did not commence until October 2018.

3. The case experienced considerable delays, particularly on the part of the plaintiffs who failed to comply with several directions issued by the court. It is expedient that I set out in some detail the procedural history of the trial, which had previously been presided over by three different judges. A default judgement was entered by the plaintiffs in July 2018, which was later set aside on the 9<sup>th</sup> day of November 2018. The matter was equally characterised by delays and ultimately no progress was made. The matter was only assigned to me in February 2021 for further proceedings.
4. When the matter came before me on the 24<sup>th</sup> day of February 2021, the 4<sup>th</sup> defendants complained that the 2<sup>nd</sup> plaintiff had been calling the 4<sup>th</sup> defendant to settle the matter "under the table" and had been harassing the Director General by various postings on social media. I ruled that the parties should abstain from conduct calculated to interfere with the administration of justice.
5. Mr Showers for the 1<sup>st</sup> defendant also raised a similar concern about the conduct of the 2<sup>nd</sup> plaintiff, Edmund Abu Jnr, and his postings on social media which would cause some embarrassment for the 1<sup>st</sup> defendant. And he prayed for the court to grant an order restraining publication of inappropriate material about the matter on social media by the 2<sup>nd</sup> plaintiff, Edmund Abu, Jnr as well as inappropriate contact with the 1<sup>st</sup> defendant. The matter was sub judice and the 2<sup>nd</sup> plaintiff ought not to make adversarial and prejudicial comments about the matter. He

submitted that the plaintiffs should have confidence in this tribunal that justice will be done. The postings of the 2<sup>nd</sup> plaintiff were unfairly prejudicing the trial of the matter.

6. As a result of these concerns and the nature of the publications emanating from the 2<sup>nd</sup> plaintiff and his conduct in making unwarranted approaches to the defendants, I gave the following orders on the 26<sup>th</sup> day of February 2021:

1. That publications and comments shall be limited to accurate publications of the proceedings in court and no more.
  2. Publications that fall outside of this order may attract both criminal and civil penalties.
  3. Parties should only contact each other through recognised legal representatives with the involvement of the court. Acting contrary to these orders may also attract civil and criminal penalties.
7. Further evidence of the delays in these proceedings was an application filed by the plaintiffs for summary judgement in 2018 as well as another application filed by another solicitor on behalf of the plaintiffs, seeking mandatory reliefs which were never moved by the parties. Mr Showers had applied for an unless order that the matter be struck out unless the solicitors for the plaintiff appeared to deal with the applications they had filed. On the 25<sup>th</sup> day of March 2021, I ordered the plaintiffs to proceed with the matter without delays, failing which the matter would be struck out.

8. On the 2<sup>nd</sup> June 2022, I ordered costs of Le 70,000,000.00 against the plaintiffs for delays in proceeding with the matter. As far as this court is aware the costs remain unpaid. Prior to that I had previously ordered costs of Le100,000,000.00 against the defendants in favour of the plaintiffs on the 22<sup>nd</sup> March 2021, which was paid to the 2<sup>nd</sup> plaintiff Edmund Abu jnr on behalf of all the other plaintiffs. Further issues of delays on the part of the plaintiff can be seen in the several orders made on grounds of non-compliance that are set out in the record of proceedings.

The Plaintiff's case.

9. It is important that I set out the basis of the plaintiffs' claim in order to give greater clarity to this judgement. As I have pointed out in earlier rulings of this court, delays have characterised the prosecution of this claim by the plaintiff. In my ruling of the 22<sup>nd</sup> March 2021, I dealt with the issue of delays at paragraph 31 which I will reproduce here below:

1. "..... That the plaintiffs did not act expeditiously in seeking an interim injunction, having regard to the fact that the defendants had allegedly breached the undertakings they gave at the Bintumani conference in 2017.

10. In my ruling of the 2<sup>nd</sup> June 2021, I again dealt with the issue of delays and non-compliance by the plaintiffs at paragraph 2-7, of that ruling, in the following terms:

(2) " The Orders I gave were directions for the future conduct of the proceedings. These directions were not complied with by the plaintiff and most notably the 4<sup>th</sup> defendant. An extension was sought by the plaintiff which was granted for compliance with Order 1 of the Order given by this court on 22<sup>nd</sup> March 2021 and for further directions on the matter. Having heard the reasons for non-compliance, I considered that the reasons for non-compliance with the orders of the court were wholly unsatisfactory and unacceptable. Nevertheless, in the interest of justice, I granted the said amendments to the original orders.

(3) It was regrettable to say the least that the plaintiff and the 4<sup>th</sup> defendant did not comply with the orders of the court. The 1<sup>st</sup> defendant now prays for an order striking out the proceedings.

(4) Before me, Mr Showers who appeared for the 1<sup>st</sup> defendant submitted that the matter should be struck out as the plaintiff had failed to comply with directions without any reasonable excuse.

(5) Mr STM Navo for the plaintiff submitted that he has only been recently instructed to take over conduct of the case and consequently he was yet to receive the relevant documents from the previous solicitors. I pointed out to Mr Navo that he had had enough time to peruse the file and advised himself as to the situation. I was clear that I was not minded to accept any excuses for non-compliance with the orders of the Court.

(6) Mr Navo pleaded for time to obtain the file and apprise himself of the situation, after which he will be ready for trial. Mr Sawaneh on behalf of the 4<sup>th</sup> defendant also conceded that they had not complied with the

*directions of the court and attempted to give reasons for the non-compliance.*

*(7) I have concluded that there was no acceptable reason for the non-compliance with the orders of the court, in the face of nonchalance on the part of the plaintiff and the 4<sup>th</sup> defendant. However, in view of the fact that this is a public interest action, I am prepared to exceptionally grant the final extension for compliance and it must be clear that there will be no further extension granted.*

11. I awarded costs of seventy million Leones against the plaintiffs,

12. As I have stated I will now set out the timetable of these proceedings:

Pleadings filed	January 2018
Proceedings commenced before me	February 2021
Several adjournments, with objections taken by counsel for the plaintiff of an interlocutory nature.	February 2021 to June 2021
Issued an unless order with costs against the plaintiff in the Sum of 70 million leones for non-compliance	2 <sup>nd</sup> June 2021
Several adjournments between June 2021 to July 2021	21 June 2021
Plaintiff's change of solicitor	May 2021

Trial started in earnest	2 <sup>nd</sup> June 2021
Written submissions	September 2021

13. The substantive action was filed in January 2018 some months after the Bintumani Conference, which the plaintiff relies upon. There has been no explanation from the plaintiff as to the reasons for the delay. I concluded there had been an inordinate delay in seeking an injunction in the face of an alleged breach by the defendants, of the undertakings given at the Bintumani conference in March 2017. I declined to grant the injunction.

14. In determining these issues, it is necessary I set out the respective claims of the parties in some detail.

Plaintiffs' claim.

15. By way of a writ of summons dated 26<sup>th</sup> January 2018, the plaintiffs' claims against the defendant can be summarised as follows:

1. A Declaration, that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants breached and/or failed to comply with the requirement to provide free calls by way of compensation in conformity with the 4<sup>th</sup> Defendant's instructions.
2. A Declaration that the 4<sup>th</sup> Defendant failed or neglected to exercise and perform their statutory mandates/functions to

enforce compliance by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup>, Defendants to provide quality services to plaintiffs.

3. A Declaration that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendant have failed in their statutory and contractual duty to provide a quality service to the Plaintiffs.
4. Damages for breach of contract on the part of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup>, Defendants to provide quality service to Plaintiffs.
5. Further or in the alternative, an award of damages for negligent conduct on the part of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to provide adequate quality services to plaintiffs.
6. Further and/or in the alternative, an award of damages for breach of statutory duty on the part of the 4<sup>th</sup> Defendant for failing to perform their statutory functions to provide legal protection, and to enforce compliance by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup>, Defendants to provide quality service.
7. Further or in the alternative, compensation to be paid to the plaintiffs by 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants for breach of the Defendants statutory obligations and damages to be paid by the 4<sup>th</sup> defendant for failure to properly regulate the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the provision of telecommunication services to plaintiffs.
8. Further or in the alternative, an award of punitive damages against all defendants, interest, costs and any further orders the court may deem fit.

16. It is also necessary to set out in some detail the nature of the plaintiffs' claim, as pleaded, in order to properly and fully set out the basis of the claim. I will also separately consider the 1<sup>st</sup> plaintiff's claim from that of the 2<sup>nd</sup> plaintiff.

The 1<sup>st</sup> plaintiff

17. The 1<sup>st</sup> plaintiff is an incorporated company in Sierra Leone registered as a company limited by guarantee and it claims that it is also a leading civil society think-tank organization and an advocacy group on economic justice and human rights in Sierra Leone with thematic focus on pro-poor and protection of consumers.

18. That the 1<sup>st</sup> plaintiff has been authorised to initiate action on behalf of all the other plaintiffs in this case, numbering about 297, against all defendants.

19. That all the plaintiffs are financial subscribers to the services provided by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and to that extent, have authorized the institution of proceedings on their behalf. Further, the subscription to the services provided constitutes a binding contract between the plaintiffs and the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

20. That the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup>, defendants are incorporated and registered companies in Sierra Leone and are at all material times telecommunications operators providing telecommunications services to consumers nationwide including the plaintiffs.

21. That the 4th Defendant is the agency established by the Telecommunications Act No. 9 of 2006 with the statutory mandate to provide for the license and regulation of the 1st 2nd and 3rd defendants, being telecommunications operators.
22. That the 4<sup>th</sup> Defendant's statutory functions are generally to license and regulate the activities of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants being telecommunications operators and to set specific standards of performance in relation to the provision of telecommunications services by an operator as in its opinion, ought to be achieved by that operator and which is consistent with the International Telecommunications Union (ITU) standards and to ensure that where such standards are not met, compensation is paid to those adversely affected. Further, the 4<sup>th</sup> defendant has a statutory duty to make a determination in this regard where poor standards of operators are brought to its attention in any manner whatsoever.
23. That before March 2017 at Bintumani Hotel, there had been public outcry on the part of the Plaintiffs about the poor quality of services provided by 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants and a failure in regulation by the 4<sup>th</sup> defendant which has left the plaintiffs frustrated and consequently, two open letters were written by 2nd Plaintiff on behalf of 1<sup>st</sup> and all the other plaintiffs to the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 2016, to that effect.
24. That as evidence of the poor quality of service provided by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the 4<sup>th</sup> defendant fined the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for failing to provide the expected quality services. Notwithstanding, the

services of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants remained unsatisfactory to the plaintiffs and consumers nationwide.

25. In March, 2017, the 4th Defendant organized a Public Dialogue Forum (PDF), an annual platform set to address the growing concerns amongst the plaintiffs about the poor quality services of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants which had left the Plaintiffs/Consumers frustrated and also to discuss the concerns faced by the defendants. ie 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

26. The 1<sup>st</sup> plaintiff was represented by the 2<sup>nd</sup> plaintiff at the conference at which all defendants, complaints by plaintiffs and consumers nationwide were raised by the 2<sup>nd</sup> Plaintiff at the conference in which 2<sup>nd</sup> Plaintiff even questioned the demands of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to increase the tariff on voice from Le 410 to Le 650 per minute.

27. That at the conference, the following matters were resolved.

- a. That 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as Mobile Companies should provide better quality services to consumers, the plaintiffs forming part of that group.
- b. That the tariff on voice be increased from Le 410 to Le 650 per minutes for four (4) months, which commenced on 1<sup>st</sup> April to 31<sup>st</sup> July 2017.
- c. That failure by the telecommunications operators herein referred to as 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> defendants to provide better quality services, the Telecommunications operators should revert to their previous tariff of Le 410 per minute.

28. That after March 2017, the Plaintiffs continued to experience poor quality services from the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs tried on a number of occasions to report the poor quality of services to said defendants only to face extreme difficulties to get through on the busy telephone lines.

29. That the problem of poor quality of services had earlier been reported to the said Defendants through open letters culminating into a meeting organized by 4th Defendant held at their offices in October 2016 in which the said Defendants allegedly noted the poor quality of services. Subsequently the 4th Defendants asked the 1st 2nd 3rd 4th 5th 6th 7th 8th 9th 10th Plaintiffs on behalf of the other Plaintiffs representing Consumers nationwide to meet with the 1st Defendants. The meeting was held at the offices of the 1st Defendant to look into and address the issues complained of by the 2nd Plaintiff on behalf of the other Plaintiffs and Consumers nationwide. The poor quality of services on the part of the said defendants continued notwithstanding which subsequently culminated into the Bintumani conference.
30. That in compliance with the fines imposed by the 4<sup>th</sup> defendants on the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup>, defendants and in addition to provide plaintiffs with the 3 days (72 hours) free calls to plaintiffs, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants issued out public notices to wit:

Public Notice from AFRICELL:

*"Africell hereby informed it valued customers and the general public that it will be offering free on net calls (that is Africell to Africell only) commencing on Friday 8<sup>th</sup> September to Sunday 10<sup>th</sup> September 2017 from 11:00am to 05:00pm. This is in conformity with National Telecommunication Commissions (NATCOM) instructions to offer our customers free calls. Africell will continue to provide its customers with the best services in Sierra Leone, Africell na we network".*

Public Notice from ORANGE trading as Airtel:

*"Orange SL trading as Airtel hereby informs its valued customers and the general public that it will be offering free on net calls (that is Airtel to Airtel only) commencing on Friday 8<sup>th</sup> September to Sunday 10<sup>th</sup> September 2017 from 11am to 5pm daily.*

*This is in conformity with National Telecommunication Commissions (NATCOM) instructions to offer our customers free calls. We remain committed to providing quality telecommunication services to our customers in Sierra Leone"*

Public Notice from SIERRATEL:

*"Sierratel wishes to inform its valued customer informs its valued customers and the general public that it will be offering free on net calls (that is Sierratel to Sierratel (only) commencing on Monday 11<sup>th</sup> onto Wednesday 13<sup>th</sup> September 2017.*

*This is in conformity with National Telecommunication Commissions (NATCOM) order to compensate our customers. Remember our bonus on incoming calls for local and international calls and our tariff as listed below: still the cheapest in Sierra Leone.*

SIERRATEL TO SIERRATEL -LE 500

SIERRATEL TO ALL OTHER NETWORKS- LE 600

SIERRATEL TO UK ALL OTHER NETWORKS- LE 600

SIERRATEL TO UK LANDLINE, CANADA AND USA - LE 700

SIERRATEL NA WI YONE".

31. That the 72 hours free calls were not complied with in that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants offered the said free calls 6 hours a day which summed up to 18 hours in all the 3 days, with even total free calls falling below the expected standard of performance of service delivery in that Plaintiffs experienced within the said 3 days the following:

- a. annoying unsolicited calls
- b. dropped and failed calls,
- c. Traffic congestion.
- d. Failed attempt to load recharge payments.
- e. Inability to activate the services offered,
- f. Inability to send or receive SMS and calls misdirected to unintentional numbers,
- g. Poor signal strength,
- h. Bad network,
- i. poor customer service, system failure,
- j. crashes.

32. That blackouts and poor voice quality and forced or unauthorized enrolment into services have resulted into financial loss for the following the registered sim cards, to wit: 078-236-513, 078-584-439, 076-617-240, 076-830-732, 078-317-594, 076-524-347, 077-247-493 amongst other plaintiffs were forcefully enrolled leading to financial loss.

33. That the levy of fines by the 4th Defendant on the 1<sup>st</sup>, 2nd and 3<sup>rd</sup> defendants and payments of said fines amount to an admission by the said defendants of the provision of poor quality of services to plaintiffs.

34. That notwithstanding the payment of the said fines, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have failed or neglected to compensate the plaintiffs for the loss and damage suffered due to poor service performance as provided for by section 40(4) of Telecommunication Act 2006 and in that regard, the plaintiffs rely on the letter dated the 13<sup>th</sup> day of September 2017.

35. That the matters relied upon above and the poor services provided by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, amount to a breach of the implied terms of the contract between the parties, thereby causing the Plaintiffs loss and damage. The loss and damage is particularized as follows:

- a. Loss of financial resources in having to purchase additional top up credits in order to make phone calls, notwithstanding the Plaintiffs have paid in full for the service.
- b. Loss of the full benefits of the top up credits already purchased.
- c. Loss of telephony services owing to poor signals strength, inability to send or receive SMS and telephone calls.
- d. Loss of business opportunities.
- e. Other financial loss.

36. The 1<sup>st</sup> plaintiff has also particularised the breaches of statutory duty in the following terms:

1. Failure to provide a quality service to the plaintiffs and other consumers or subscribers of telecommunications services;
2. Failure to compensate the plaintiffs for the poor quality of service provided by the provision of free calls as offered by the defendants and accepted by the Plaintiffs, as well as monetary compensation.

3. Failure to prevent annoying unsolicited messages, thereby disturbing the peace and quiet of the Plaintiffs and other consumers;
  4. Failure to prevent dropped and failed calls;
  5. Failure to prevent network interruption, network congestion, failed attempts at loading recharge payments, inability to activate the services offered, inability to send or received SMS, calls misdirected to unintentional numbers, poor signal strength, bad network, poor customer service, system failure, crashes, blackouts and poor voice quality among others.
37. With respect to the 4<sup>th</sup> defendant, the plaintiffs' claim against the 4<sup>th</sup> defendant is for a breach of their statutory duties and negligence as a regulating agency which are particularized as follows:

1. Failure on the part of the 4<sup>th</sup> defendant to ensure that all affected plaintiffs as users or consumers of telecommunication networks and services in terms of section 9 (1) of the Telecommunications Act No.9 of 2006 are adequately compensated.
2. Failure on the part of the 4<sup>th</sup> defendant to protect the plaintiffs as consumers in terms of section 9 (2) (b) of the Telecommunications Acts of 2006.
3. Failure on the part of 4th defendant to protect the plaintiffs and consumers nationwide.

4. Failure on the part of the 4th defendant to enforce satisfactory standards of performance in relation to the provision of telecommunication services by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in terms of section 40 of the Telecommunications Acts of 2006.
5. Failure on the part of the 4<sup>th</sup> defendant to enforce the provisions of the Telecommunications Act 2006, aforesaid in terms of section 39 (i) of the said Telecommunications Act 2006.
6. That failure of the 4<sup>th</sup> defendant to ensure that the increment in the tariff on voice calls, measures with efficient and effective service delivery.
7. Failure of and non-compliance on the part of 4th defendant to establish a suitable system for receiving complaints from consumers, conduct investigations into the complaints or submit them to any other appropriate body where necessary in terms of section 9A subsection (d) of the Telecommunications (Amendments) Act No 8 of 2009.
8. Breach of and non-compliance with statutory provisions on the part of the 4th defendant to ensure that 1<sup>st</sup>, 2<sup>nd</sup> and 3rd defendants being operators and service providers adopt best practices of other operators in the ECOWAS Region which said best practice include and is not limited to quality of services, calculations of tariff, consumer protection and awareness in terms of sections 9B section (1) (2) (C) of the Telecommunications (Amendments) Act No 8 of 2009.

38. The 1<sup>st</sup> plaintiff also alleges the 4<sup>th</sup> defendant has been negligent and particularised the negligence as follows:

1. The 4<sup>th</sup> defendant owes a duty of care to the Plaintiffs
2. That the 4th Defendant have failed to comply with their statutory duty;
3. That the 4th Defendant have been complacent and have ignored or failed to act on their responsibilities to protect Plaintiffs from the unfair conduct of the 1<sup>st</sup> 2<sup>nd</sup> and 3rd, Defendants.
4. That the 4th Defendants are negligent in that they failed to look beyond the imposition of fines in their effort to get value for money for Plaintiffs as consumers since the fines that had been handed out did not seem to be producing the expected result in terms of section 40 (5) of the Telecommunications Acts of 2006.
5. That the 4th defendant did not exercise reasonable care when they failed to act to prevent the damage, loss and injury suffered by plaintiffs as a consequence of poor services delivered by 1<sup>st</sup>, 2<sup>nd</sup> and 3rd Defendant.

39. The 1<sup>st</sup> plaintiff also relied upon a breach of statutory duty on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to act in line with their statutory obligations under the Telecommunications Act 2006 on account of negligence in the performance of their duties which have caused the plaintiffs loss and damage and which are particularised as follows:

1. That the said defendants failed to give prior notice in the context of a comprehensive awareness campaign to the plaintiffs as

consumers and the wider public regarding their change in tariff from Le 410 to Le 650 per minute which started in April 1, 2017, sufficient enough to discharge efficient and effective service delivery having regard to their poor infrastructure in terms of section 9B subsection (1) (2) (c) of the Telecommunications (Amendments) Act No 8 of 2009.

2. That said defendants provide poor quality of services to the Plaintiffs representing the wider Consumer Public to wit: annoying unsolicited messages, dropped and failed calls, network interruption, network congestion, failed attempt to load recharge payments, inability to activate the services offered, inability to send or received SMS, calls misdirected to unintentional number, poor signal strength, bad network, poor customer service, system failure, crashes, blackouts and poor voice quality among others in terms of sections 37, of the Telecommunications Act No 9 of 2006.
3. Failure by the said defendants to ensure that the increment in the tariff on voice measures up with the expected effective and efficient service delivery.
4. Failure on the part of the said defendants to comply with expected standard of performance in relation to their provision of telecommunication services.

40. The 1<sup>st</sup> plaintiff also alleges that the breach of the statutory duties by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants was as a result of negligence on their part which they particularised as follows:

1. That the said defendants owe the Plaintiffs a duty of care to ensure plaintiffs have efficient and effective service delivery to guarantee value for their money.
2. That the said defendants are negligent in that they did not exercise reasonable care in their contemplation to ensure the plaintiffs get value for their money.
3. That the said Defendants failed in their duty of care to the Plaintiffs when they failed to discharge their duty of care by permitting, due to their prior knowledge of the malfunctioning in their system due to their inadequate infrastructure resulting in poor quality service to plaintiffs in the form of annoying unsolicited messages, dropped and failed calls, network interruption, network congestion, failed attempt to load recharge payments, inability to activate the services offered, inability to send or received SMS, calls misdirected to unintentional numbers, poor signal strength, bad network, poor customer service, system failure, crashes, blackouts and poor voice quality among others.

41. The 1<sup>st</sup> plaintiff also listed the consumers on whose behalf they act, which can be set out below.

	921815
Patrick Pokawa	078-317-594
Victor Tutu Rogers	076-651-387
John Ngegba	076-768292/077- 641666

Robert Kondema Kargbo	079-021-111
Mohamed Kamara	079-135-659
Alusine B Jabbie	076-993104/088- 576164
Jeremiah J.Mansaray	076-830-732/030- 730187
Emmanuel J. Tevie	078-000-553/077- 445842
Frances L. Kanu	030-473147/076- 776509
Hassan Menjor	078-834785/030- 125972
Edmond L .Sandy	078-406-545/077- 003929
Alhasan B. Jabbie	078-956088/030- 2215539
Isha Kamara	077-639297/076- 444949
Mohamed Kanu	030-615571
Rosaline John	076-831-650
Fatmata Koroma	088-417815/079- 819551
Degauleh Juana	076-607-651
Cyril Harold Smith	077-220611/076- 220611
Fanta Koroma	077-062980
Esmeralda Jah Tucker	079-595-085
Madam Glory Macurley	078-595-338
Joel Jah Tucker	079-682-003
Shaku Tokowa Bally	078-301-226
Alfred Meama Kague	078-879-134

Kasho Holland-cole	079-691-118
Karamoh A.B. Jabbie	077-215789
Sama I. Mansaray	099-132018/076-110771
Isata Sesay	078-417-685
Kelfala Kabbia	079-373-175
Lansana Hassan Sowa	079-136-462
Ebun C. Silla	078-699-165/088-118723
Ibrahim Kanu	076-479147/088-865164
Isha Moriba Allie	078-064-676
Alaji Komba	078-218-881
Kadiatu Koroma	030-881951

Teddy Foday Musa	076-670-459
Ibrahim Sampha	078-236-513
Joselieu Ndoko Abu	076-322-698/099-419014
Prof. Ibrahim Abdullah	076-630-054
Abdulia Sesay	076-202-849
Augustine Sannoh	076-643-117
John Bindi	076-804-087/030-392972
Shaku Putiku Kamara	078-273-019
Abu Mansaray	076-908-551/077-587192
Hassan Fuad Kanu	078-433-485
Theophelous Gbeanda	076-928-623/077-648687
Abdulai Swarray	076-646220
Micheal Fornah	076-928-520
Mary Luba Navo	078-699-

	198/030089518
Emmanuel Saffa Abudai	076-647-456
	076-606-491/077-
Ngollo Katta	330300
Emma Baba Conteh	077-221351
Salmata Bah	076-695-0183
Charles S. Boye	078-235-002
Alfred Jata Dumbuye	078-352-440
Suffian Kamara	076-782-462
Isata Kiki Kamara	076-998-399
	078-417-706/088-
Sally Adams	745777
Lawrence Williams	079-711-198
Daphly Kema	076-718-000
Joseph Dumbuya	078-584-439
Mourice Sowa	076-742-322
Mohamed Jalloh	076-553-548
Alpha Kpakema	078-159-860
Donald Cole	078-862-010
Robert Kundema Kargbo	079-021-111
Christabella Decker	078-442-088
Mousa Massaqio	078-929-875
Sama Gamanga	076-363942
Isata Mbalia	076-633-420
Prof. Thomas B.Yormoh	076-626-488
Chernoh Kabbia	078-897-393
Kuriah Mansaray	076-709-211
Marian Mattia	076-855-944
Charles Lahai	078-133-116
Denis Afotey	078-897-393
Hawa Afotey	078-495-272
Ahmed S Nasralla	076-470-288
Kenneth A. Kabia	078-495-272
Lamin Vanna	079-161-828
Osman B Kamara	078-446-938
Sahr David Pessima	076-985-849 ?
David Banister	078-446-938
Festus J. Lahai	076-985-849

Rachel Bangalie	076-751-567
Alpha Max Jalloh	078-312-266
Unisa P. Kamara	076-524-374
Ahmed Mansaray	076-989-777
Eziekel Duramany Lakko	076-500-576
Aminata Finda Massaqio	076-652-954
Brima Fatoma	078-279-265
Massa Sidibay	076-868-188
Abubakka Mansaray	076-771-053
Peter Beckly	076-404-541
Ethel Parker	076-410-864
Alfred Yevenah	079-967-025
John Bayoh	076-915-723
Lamin Bangura	079-668-160
Ibrahim A. Conteh	076-636-430
Thomas Johnny	076-308-758
Patrick Swarrah	076-636-430
Mariama Sesay Jalloh	078-444-363
Tamba Sengba	078-734-970
Mohamed Sesay	078-300-117
Isata Mbala Kefala	076-633-420
Senisie Amara	076-917-972
Victor Mahoi	078-114-440
Thomas Liegh	076-776-579
Charles Kanu	076-956-969
Steven Lamin	076-803-050
Abiegel Abu	078-862-701
Emmanuel Kargbo	076-406-576
Abdul Karim Sesay	076-662-244
Lilie Isha Thulla	076-359-988
Alimmy J.Koroma	079-335-175
Sax Dixon	076-433-351
Abu Brima	076-645-314
Susan Sesay	076-908-045
Mohamed K. Mansaray	079-000-099/
John B Constantine-Charley	078-608-885
Osman Bundu	076-790-113
Amara Goba	078-630-071

Alusine Kamara	076-308-901
Isha Turay	079-632-418
Mohamed S Koroma	076-441-937
Vandi Massaqoi	079-632-418
Solomon Edwin	076-434456
Alusine Kamara	078-180614
Fatmata Sesay	078-378-446
Sahr Ngaujah	076-689-138
John Ansumana	076-521128
Ernest Jusu	078-859-187
John Bayoh	3 Gabriel St
Cecilia Betts	078-259018
Joseph Rahal	076-601979
Morlai Kamara	077-581606/
Mohamed Sheriff	030-352540
Amidatu Kamara	077-286654/079-498308
Philip Momoh	088-840324
Mohamed Kamara	088-878015
Kadija Fyer	088-173997
Osman Kargbo	077-412084
Mohamed Morlai Koroma	076-875596
Aminata Ebidu Mustapha	030-130298
Dauda Fulla	077-985217
Emma Mansaray	077-040416
Ballu Swaray	030-678899/078-264754
Musa Yamah	078-333-807
Falla Ensah Ndayma	076-600954
Samuel I Kamara	088-874141
Alfred Yevenah	079-967-025
John Bayoh	076-915-723
Lamin Bangura	079-668-160
Ibrahim A. Conteh	076-636-430
Thomas Johnny	076-308-758
Patrick Swarrah	076-636-430
Mariama Sesay Jalloh	078-444-363
Tamba Sengba	078-734-970

Mohamed Sesay	078-300-117
Isata Mbala Kefala	076-633-420
Senisie Amara	076-917-972
Victor Mahoi	078-114-440
Thomas Liegh	076-776-579
Charles Kanu	076-956-969
Steven Lamin	076-803-050
Abiegel Abu	078-862-701
Emmanuel Kargbo	076-406-576
Abdul Karim Sesay	076-662-244
Lilie Isha Thulla	076-359-988
Alimmy J.Koroma	079-335-175
Sax Dixon	076-433-351
Abu Brima	076-645-314
Susan Sesay	076-908-045
Mohamed K. Mansaray	079-000-099/
John B Constantine-Charley	078-608-885
Osman Bundu	076-790-113
Amara Goba	078-630-071
Alusine Kamara	076-308-901
Isha Turay	079-632-418
Mohamed S Koroma	076-441-937
Vandi Massaqoi	079-632-418
Solomon Edwin	076-434456
Alusine Kamara	078-180614
Fatmata Sesay	078-378-446
Sahr Ngaujah	076-689-138
John Ansumana	076-521128
Ernest Jusu	078-859-187
John Bayoh	3 Gabriel St
Cecilia Betts	078-259018
Joseph Rahal	076-601979
Morlai Kamara	077-581606/
Mohamed Sheriff	030-352540
Amidatu Kamara	077-286654/079-498308
Philip Momoh	088-840324
Mohamed Kamara	088-878015

Kadija Fyer	088-173997
Osman Kargbo	077-412084
Mohamed Morlai Koroma	076-875596
Aminata Ebidu Mustapha	030-130298
Dauda Fulla	077-985217
Emma Mansaray	077-040416
	030-678899/078-
Ballu Swaray	264754
Musa Yamah	078-333-807
Falla Ensa Ndayma	076-600954
Samuel I Kamara	088-874141
	088-145982/076-
Farwel Brown	794999
Hassan S. Dumbuya	077-536344
Isata Lamin	078-426896
Musa Samura	088-799625
James Koroma	077-345100
Abdulai B Sankoh	078-604848
Abdul Karim Kargbo	077-610312
Ibrahim M. Kamara	088-046594
Abu Bakarr Sillah	077-578181
Mohamed Conteh	077-778524
	077826028/076-
Mohamed Apeh Koroma	850252
	079-
Miatta Sawi	276480/076890929
	077-519679/076-
John Merzger	519679
	076-332700/077-
Michealla Koroma	916810
	030-540780/078-
Ednietta Kamara	119590
Henry Joe Lahai	077-572728
Isha Samoukor	076-153084
Binta Sall	078684483
Kadiatu Bangura	077-651152
Abibatu Njai Sesay	088-670500
Gibrilla Sawaneh	078-320125/077-

	545332
Marklaw Bangura	030-315746
Jeneba Shyllon	077-338814
Cyphas Williams	076-391978
	076-917818/088-
Patrick J.B Tucker	208143
Lansana K. Bangura	076-767765
Sonnia Goodman	078-336309
Mohamed Sawaneh	030-684579
Ibrahim Hassan	077-856348
Charles Dugba	079-964290
Samuel Wadlow	088-818241
Khalil Kallon	076-425993
	078-291812/088-
Vandi Banya	981220
Nancy B. Yokee	076-414139
Amidu Jalloh	078-400847
Benjamin Samura	076-148-510
Earnes Brima	078-859187
Eddie Yokie	077-795-551
Samuella Goba	088-805-416
Jusu Jaka Yormah	079-666-038
Kamanda Fogbawah	079-334-695
Eva Mansaray	088-474-333
Joseph Lavalie	077-900-776
Unfa Kabba	030-316-399
Alicious Conteh	078-824322
Anthony Fofanah	076-323700
Antony Mie	030-115372
Morie Avasco	076-178-966
Abubakar Kamara	077-511874
Bamidaile Thomson	076-462-397
Mohamed Bello	077-350-890
Mohamed Sillah	099-935-768
Mariama Kallon	079-646-256
Daddy Daffie	078-187-791
Dauda Kallon	076-670-309
Fatmata Kanu	080-249-073

Adamsay Kanu	077-992-406
Malikie Kanu	088-680751
Ibrahim Kanu	088-865-164
Thaimu Kanu	088-977-832
Ishmail Yanbasu	077-916-400
Aminata Kamara	088-867-476
Mohamed Kanu	030-615-571
Salamatu Kanu	099-595-464
Thaimu Kargbo	077-959351
Daddy Suma	030-304-029
Fatmata Turay	077-607-635
Fatamata Bangura	030-574-618
Fatu Sesay	088-628-787
Fatima Kamara	088-627-159
Fredricka Jambai	077-890656
Daniel Giba	078-300-379
Haja Mansaray	077-514-901
Ibrahim Kargbo	077-700285
Mamoud Jabbie	076540884
Mohamed Jalloh	076-329-900
Jatu Bah	088-704912
Jenefa Kallon	078-942-971
John Kargbo	078-571-737
Juliana Emma Lamin	076-625-965
Joseph Konuwa	078-093-231
Kumba Sesay	077-792-544
Isha Thulla	076-359-988
Luiza Moihai	079-992-792
Mohamed Sesay	088-525-020
Momy Sow	077-632-749
Mariama Sillah	076-880-488
Mariama Rogers	077-813-682
Micheal Turay	099-281-782
Momy Koroma	088-884-851
Bintu Daramy	030-413-438
Patricia Kanu	099-669-005
	079-163696/077-
Arthur Lamin	840101

Ntumah Sesay	099-816-287
Osman Kamara	076-790-113
Pa Tucker	076-605-047
Patricia Alpha	030-196-032
Daniel Pewah	076-291-828
Bintu Kabbia	099-651-262
Christian Blake	076-671-057
Mariama Amatay	076-823-503/088-848679
Ramatulai Jalloh	078-277-550
Rose Kallon	077-811-704
Sally Kamara	077-951-407
Salmata Bah	076695183/088-373504
Samba Wurrie	079-578-253
Salamata Bah	079-700-045
John Sandi	088-144-566
Sanfa Sesay	099-891009
Sarrah Samura	076-575-881
Saudatu Kargbo	030-490-705
Tina Sesay	076-173-044/077-719906
Musa Yamah	078-333-807
Francis Charlie	078-667-599/030-267688
Richard Koroma	076-289370
Brenda Edna Rabina Hopkins	078-603354
Abubakarr Conteh	077-628934
Janes Jones	078-732147
Salaiman Kaikai	077-708386
Sax Dixon	079-177339
Ali Sillah	078-132147
James Kamara	076-433251
Nancy Turay	078-765822
Juldeh Bah	030-281552
Kemoh Kamara	077-421617/076-735372
Lansana Koroma	077-795154

Bismark Brewah	088-930726
Hassan Nabieu	080-368066
Nongueh Shar	077-774572
Aminata Jusu	088-525506
Alpha Kabia	078-686179
John Angel Mans-Carew	078-305205
	076-961431/099-
Eric Kamara	681104
Abdul Kay Bah	077-645950
Amara Musa	076-591650
	099-577539/078-
Josephine Fatoma	653848
	079-170703/088-
Edwin Ralph Taylor	206309
Morrison Sonnie	078-215892
Keifa Jaward	079-741920
Josephus Nallo	076-779567
Daborah Thambie	078-985645
Fatmata F. Jalloh	088-087472
Joseph P. Ansumana	078-415378
	088-505765/078-
Fatmata Charles	004773
	099-845361/076-
Donald Thomson	277753

42. That the plaintiffs have a right of action in contract law by virtue of their status as consumers and subscribers to the telecommunication service provided by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

43. The said defendants have failed to comply with their statutory duties. That the conduct of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their noncompliance with statutory provisions has the tendency to offend or injure millions of consumers represented by the Plaintiffs.

44. That 1<sup>st</sup> Plaintiff is also a representative group comprising of public-spirited interest persons compelled in the interest of the general public to bring to the attention of the court to vindicate the rule of law and get the unlawful and unfair conduct of 1<sup>nd</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants stopped.

45. That the plaintiffs can, in law, institute such an action in the public interest to bring to the attention of the court of law for the appropriate remedy. That the unfair conduct on the part of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in failing to provide effective and efficient services to the plaintiffs fits within the description of the public interest.

#### The claim of the second plaintiff

46. The claim of the second plaintiff is to a large extent subsumed into the claim of the 1<sup>st</sup> plaintiff. To that extent the claims are intertwined. However, there are areas where the second plaintiff specifically raise a number of matters as part of the overall claim. The second plaintiff makes the following claims which are set out below.

47. That 2nd Plaintiff is a consumer and also the executive director of the 1st plaintiff company and has been representing the 1st Plaintiff at conferences, seminars, meetings, advocating for the rights of consumers nationwide, and is also a subscriber of telephony services of the 1<sup>st</sup>, 2nd and 3<sup>rd</sup> Defendants.

48. That all plaintiffs, save for the 1st plaintiff, have the same interest in the proceedings together with consumers nationwide and they have authorized the 1st plaintiff to initiate this action on their behalf.

49. That the 2<sup>nd</sup>, plaintiff acting for and on behalf of 1<sup>st</sup> Plaintiff and others were in attendance together with all defendants where complaints by Plaintiffs and consumers nationwide were raised by the 2<sup>nd</sup> Plaintiff at the conference in which the 2<sup>nd</sup> Plaintiff even questioned the demands of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to increase the tariff on voice from Le 410 to Le 650 per minute.

50. After the Bintumani PDF the 2<sup>nd</sup> plaintiff called a joint press conference along with the 4<sup>th</sup> defendant. The plaintiffs were represented by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and some of the 298 plaintiffs which in effect acknowledged the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs as persons or bodies with full mandate to act as representatives of all plaintiffs and consumers nationwide likely to be affected by the poor quality of service.

51. That the 4<sup>th</sup> defendants gave the 2<sup>nd</sup> plaintiff ten million Leones (Le 10,000,000) to cover the cost of conducting a press conference and training of focal persons in all the 14 political districts to conduct a Public Perception Survey (PPS) to monitor and assess the quality of services as stated in the press statement issued to the print and electronic media stating the 1<sup>st</sup> plaintiff's position on monitoring the services for the four Months which started in 1st April and ended 31<sup>st</sup> July 2016. The PPS was conducted by the plaintiffs with a view to ascertaining whether the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have improved on the poor quality of services, pursuant to the resolution at the Bintumani agreement aforesaid.

52. That the 2<sup>nd</sup> Plaintiff on behalf of the 1<sup>st</sup> Plaintiff along with other Plaintiffs conducted a Public Perception Survey (PPS) which revealed that the 1<sup>st</sup> 2<sup>nd</sup> and 3rd, Defendants did not measure up to the expected

standard of performance in service delivery and they also failed the key performance indicators (KPI) established at the Bintumani Conference by the 4<sup>th</sup> Defendant culminating to the imposition of fines on 30<sup>th</sup> August 2017.

#### Class/representative actions

53. The plaintiffs, specifically the 1<sup>st</sup> plaintiff have brought this action in a class/representative capacity. The plaintiff makes the point in their closing submissions that "*Class actions are representative suits on behalf of group of persons similarly situated, a class action is nontraditional litigation procedure that permits representative with similar claims to sue or defend on behalf of, and stand in judgment for, a class, when the question is of common or general interest to persons so numerous as to make it impracticable to bring them all before the Court. Courts have exercised the flexibility of a class/representative action as a tool for meeting substantive and procedural carrier to a just decision.*

54. It is necessary at this stage to have regard to the defendants' pleaded defence to this action, starting with the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant entered an appearance dated 14<sup>th</sup> March 2018, through the law firm of Fornah Sesay, Showers, Cummings and Co.

#### The 1<sup>st</sup> defendant

55. The 1<sup>st</sup> defendant subsequently filed a defence to the action dated 3<sup>rd</sup> December 2018. In summary the 1<sup>st</sup> defendant denied paragraphs 3, 8-12, 13 & 14, 15-17, 19, 20-21, 24, 26, 27, 29, 30-31, 34 and 35 of the particulars of claim and put the plaintiff to strict proof. The 1<sup>st</sup>

defendant in the same vein admits paragraphs 1, 2, 3, 5, and 18 of the particulars of claim.

### The 2nd Defendant

56. The 2<sup>nd</sup> defendant entered appearance in this action through the law firm of Alhadi and Gordon Harris Solicitors on the 16<sup>th</sup> February 2018. They filed a defence to the action dated 5<sup>th</sup> March 2018. In summary, the 2<sup>nd</sup> defendant denied the averments in paragraph 17, 19, 20, 24, 26, 28, 29 and 30.

57. The 2<sup>nd</sup> defendant could not admit or deny paragraphs 1, 2, 3, 4, 5 and 7 of the particulars of claim. In response to paragraph 5, the 2<sup>nd</sup> defendant avers that it is a registered telecommunications company operating in Sierra Leone and that in response to paragraph 6 of the plaintiffs' particulars of claim, the 2<sup>nd</sup> defendant obtained its license from the 4<sup>th</sup> defendant. The plaintiff is put to strict proof with regard to the averments at paragraph 7 and cannot admit or deny the same.

58. That in response to paragraph 8 of the particulars of claim, the 2<sup>nd</sup> defendant cannot admit to public outcry but would state that the 2<sup>nd</sup> defendant was invited to a meeting by the 4<sup>th</sup> defendant and most specifically with regard to paragraph 9, the 2<sup>nd</sup> defendant refutes the averment of poor-quality service as stated by the plaintiffs but admits they were fined by the 4<sup>th</sup> defendant.

59. The 2<sup>nd</sup> defendant admits to the invitation by the 4<sup>th</sup> defendant as stated in paragraph 10 but cannot admit to providing poor quality service to the plaintiffs. The defendant further admit to having conference with certain

stakeholders about the increase in voice tariffs mentioned in paragraph 11 of the particulars of claim but cannot admit to being questioned about the same by the plaintiffs personally or by representatives of the plaintiffs.

60. The 2<sup>nd</sup> defendant admits paragraph 12 of the plaintiffs' particulars of claim but avers that the 2<sup>nd</sup> defendant did convey to the 1<sup>st</sup> plaintiff in its personal and representative capacity the need to channel all complaints to the 2<sup>nd</sup> defendant's call centre which is in line with the complaint's mechanism prescribed by the Telecommunications Act 2009. None of the plaintiffs provided any factual complaints to the call center.
61. The 2<sup>nd</sup> defendant cannot admit or deny the averments contained in paragraph 13 of the plaintiff's claim and puts the plaintiff to strict proof. Similarly, the 2<sup>nd</sup> defendant cannot admit or deny the averments contained in paragraph 14,15, and 16 of the particulars of claim and puts the plaintiff to strict proof.
62. The 2<sup>nd</sup> defendant denies the averments contained in paragraph 17 of the particulars of claim and puts the plaintiff to strict proof. The 2<sup>nd</sup> defendant further admits paragraph 18 of the plaintiff's particulars of claim. The 2<sup>nd</sup> defendant further denies the averments contained in paragraph 19, 20 and 21 of the particulars of claim and puts the plaintiffs to strict proof.
63. That contrary to the averments contained in paragraph 22, section 40 of the Telecommunications Act 2006, indicates that it is the 4<sup>th</sup> defendant that has the powers to levy fines and compel service providers to

compensate aggrieved consumers of telecommunications operators in Sierra Leone.

64. The 2<sup>nd</sup> defendant denies receiving a letter dated 13<sup>th</sup> September 2017 as indicated in paragraph 23 of the particulars of claims and puts the plaintiffs to strict proof.

65. The 2<sup>nd</sup> defendant denies paragraph 24, 26, 27, 28, 29, 30, 31, 32 and 33 puts the plaintiff to strict proof, and further the 2<sup>nd</sup> defendant cannot admit or deny the averments in paragraph 25 of the particulars of claim and puts the plaintiffs to strict proof.

66. In furtherance of the denials of paragraph 28, 29, 30, 31, 32, and 33 of the particulars of claim, the 2<sup>nd</sup> defendant avers that section 40 sub sections 1, 2, 3, 4, 5 and 6 of the Telecommunications Act 2006, provides:

1. That the 4<sup>th</sup> defendant may determine the standard of performance of telecommunications service providers in Sierra Leone.
2. That the 4<sup>th</sup> defendant may levy penalties on service providers who operate below the required standard.
3. That the 4<sup>th</sup> defendant may assess the gravity of the damages done by the defaulting service provider to consumers and may demand to be made by the service provider to the consumers as and when the 4<sup>th</sup> defendant deems it necessary.

67. The 2<sup>nd</sup> defendant cannot admit nor deny paragraph 34 and puts the plaintiff to strict proof.

68. The 2<sup>nd</sup> defendant denies the claims made by the plaintiffs.

The 3<sup>rd</sup> Defendant

69. The 3<sup>rd</sup> defendant did not enter an appearance and filed no defence to this action.

The 4<sup>th</sup> defendant

70. The 4<sup>th</sup> defendant filed a defence dated 15<sup>th</sup> March 2021. The said defence can be summarised in the following manner.

1. That the 4<sup>th</sup> defendant cannot admit or deny paragraphs 1-5 of the statement of claim.
2. That the 4<sup>th</sup> defendant admits paragraph 6 of the plaintiffs' claim in so far as it is the commission set up by an Act of Parliament with regulatory powers established pursuant to the Telecommunications Act 2006.
3. That with regards the averments in the plaintiffs' claims, the 4<sup>th</sup> defendant avers the following:
  1. That since its establishment, it has the powers to regulate mobile companies and other telecommunications service providers as well as receive and act on complaints by consumers as provided by law.
  2. That as part of its mandate the 4<sup>th</sup> defendant has been regulating the operations of mobile companies including the defendants.
  3. That on occasions the 4<sup>th</sup> defendant had levied fines to those it regulates when there was a breach of the regulations and or law.

4. That contrary to the averments in the statement of claim, so far as the regulatory functions of the 4<sup>th</sup> defendant are concerned, the 4<sup>th</sup> defendant denies it failed in its regulatory duties to regulate the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant.
  5. The 4<sup>th</sup> defendants have the power to hear complaints against service providers under its regulatory framework and compensation provided where necessary. The plaintiffs did not file any complaint to the 4<sup>th</sup> defendant seeking compensation.
  6. The plaintiffs ought to have filed any complaint, if any, to the 4<sup>th</sup> defendant with regard to poor quality services and had the plaintiffs done so, the matter would have been dealt with and necessary remedies applied. The plaintiffs did not file any complaint to the 4<sup>th</sup> defendant which resulted in a failure of the 4th defendant to perform its statutory function by law.
  7. The 4<sup>th</sup> defendant is not liable for any breach of contract alleged as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant. The plaintiffs claims can therefore not be attributed to the 4<sup>th</sup> defendant and they cannot attribute the alleged loss, injury or damage to the 4<sup>th</sup> defendant.
  8. The plaintiffs cannot legitimately seek declarations which touch and concerns the 4<sup>th</sup> defendant.
71. Pursuant to directions I had given earlier, the parties filed court bundles and skeleton arguments in support of their respective cases. The 2<sup>nd</sup>

defendant also filed a supplementary bundle in support of its case. The 3<sup>rd</sup> defendant did not enter any appearance or file a defence to the claim.

### The 3<sup>rd</sup> Defendant

72.Upon consideration of the plaintiff's case, it is evident that the plaintiff has led no evidence against the 3<sup>rd</sup> defendant neither has its pleaded case included any references to the 3<sup>rd</sup> defendant. In those circumstances, the claim against the 3<sup>rd</sup> defendant ought to be struck out.

### The law

73. The legal provision upon which the plaintiffs rely are set out in the Telecommunications Act 2006 and its amendment in 2009. The plaintiffs rely upon section 40 of the Telecommunications Act 2006 and The Consumer Protection Act 2014. The plaintiffs rely specifically upon section 40(4) of the Telecommunications Act 2006, which provides as follows:

*"(4) If the operator fails to meet any required standard, he shall pay to any persons who is adversely affected by the failure such compensation as may be determined by the Commission."*

74.Having set out the statutory provisions of law relied upon by the plaintiffs, it must be recognised that notwithstanding the issue of the statutory law relied upon by the plaintiffs, there are other issues of law that have been raised in this case. One such key issue is one of capacity of the parties which is a legal issue that ought to be properly and fully considered. This is an issue that has been raised specifically by the 1<sup>st</sup>

defendant and it merits consideration prior to the issues raised in this case being fully considered.

75. The 1<sup>st</sup> defendant submits that in order to participate in a lawsuit as a Plaintiff or as a Defendant, a party must have the capacity to sue or be sued and must be a "proper" party (i.e., have standing before the court). Standing to sue, in law, is the requirement that a person who brings a suit be a proper party to request adjudication of the particular issue involved. The test traditionally applied was whether the party had a personal stake in the outcome of the controversy presented and whether the dispute touched upon the legal relations of the parties having adverse legal interests.

76. The 1<sup>st</sup> plaintiff avers that it is acting in a representative capacity with respect to 300 plaintiffs. This averment requires consideration of the capacity of the 1<sup>st</sup> plaintiff to represent the 300 plaintiffs. The starting point is to determine whether the writ of summons commencing the action is instituted in a representative capacity. This requires further consideration of the rules that determine representative proceedings.

### The High Court Rules

77. Order 18 of the High Court Rules provides for the role of parties in the proceedings before the court. Order 18 rule 13 provides:

13. (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 15 the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

78.In this case the 1<sup>st</sup> plaintiff has held itself out as representing all of the 300 plaintiffs in this action. The question for the court to consider is whether the 1<sup>st</sup> plaintiff has the capacity to do so. I have reviewed the plaintiffs' bundle of compliance and it is noted that save for the three plaintiffs who testified in the proceedings, there is no indication that any of the other plaintiffs gave the 1<sup>st</sup> plaintiff written authority to act on their behalf. This is a matter I will deal with in due course. However, as a class action claim, the plaintiffs claim to represent a class of persons who are consumers of telecommunications services in Sierra Leone.

79.These proceedings are collective proceedings, and they may be brought on either an "opt-in" or "opt-out" basis. "Opt-out" collective proceedings are proceedings brought on behalf of each class member except any member who opts out by notifying the class representative that their claim should not be included in the proceedings, as one of the plaintiffs did in this case. Collective proceedings where permitted, includes a situation where a person may therefore have a claim brought on their behalf without taking any affirmative step and, potentially, without even knowing of the existence of the proceedings and the fact that he or she is represented in them. Some plaintiffs have opted in whilst others may have the claim brought on their behalf without them knowing about its existence.

80.The starting point with respect to the compliance with procedural rules is consideration of whether these proceedings include proceedings conducted under Order 15 of the High Court Rules 2007. Having regard to the present application, I am satisfied that the provisions of Order 15 do not apply to these proceedings and that these proceedings are purely

representative proceedings which are conducted in accordance with the provisions of Order 18 rule 13 of the High Court Rules 2007

81. Where an action is instituted in a representative capacity, the provisions of order 6 rule 4 sub rule 1 (b) of the High Court Rules 2007, also applies. The said rules provide as follows:

4. (1) Before a writ is issued it shall be indorsed -

(b) where a defendant is sued in a representative capacity, with a statement of the capacity in which he is sued.

82. Consideration must be given to the issue of whether there has been compliance with the said provisions of the rules. The writ of summons is dated 26<sup>th</sup> January 2018 and is indorsed in the following terms:

*"A civil society think-tank organisation, representative body of consumers nationwide that have been affected by poor quality of service through Edmond Abu Jnr Executive."*

83. At the end of the writ of summons, the writ is indorsed in the following terms:

*"Representatives of consumers and consumers nationwide in terms of section 1 of the Telecommunications Act 2006 to Africell SL Ltd, Orange SL Ltd (formerly airtel SL Ltd) and Sierra Tel SL Ltd being Telecommunication Operators, in terms of the provisions of the Telecommunications Act No 9 of 2006)".*

84. Section 1 of the 2006 Act describes consumers as meaning "a user or customer of telecommunications services".

85. The question for consideration is whether there has been compliance with order 6 rule 4. I have reviewed the writ of summons and I am prepared to accept that it was properly indorsed in a representative capacity.

The law on representative capacity

86. In *Alhaji Unisa Alim Sesay v Anthony Kamara CIV.APP.72/2006*, the Court of Appeal, making reference to the decision of the Court in *Re Tottenham (1896) 1 Ch.628*, made reference to the fact that the endorsement of the representative capacity is a very crucial matter.

87. The 1<sup>st</sup> plaintiff in its particulars of claim alleges that it is an incorporated company, registered as a company limited by guarantee and a leading civil society think tank. The 1<sup>st</sup> plaintiff avers it has a certificate of incorporation dated the 12<sup>th</sup> day of August 2015. I have had cause to review exhibit PB 1-7 which is certificate of incorporation issued by the Office of the Administrator and Registrar General, which demonstrates that the 1<sup>st</sup> plaintiff was incorporated under the Companies Act 2009, on the 12<sup>th</sup> day of August 2015. This makes the 1<sup>st</sup> plaintiff a company incorporated by registration, pursuant to the provisions of an Act of Parliament.

88. I have had regard to the provisions of section 531 (2) of the Companies Act 2009. The certificate of incorporation was issued by the office of the Administrator and Registrar General. I am however satisfied that the 1<sup>st</sup> plaintiff has standing to institute the action in a representative capacity, notwithstanding the absence of written authority given to him by any of the plaintiffs. However, the basis and scope of such action need to be clarified.

The scope of class actions

89. Large class action suits are relatively new in the Sierra Leone legal jurisprudence. Quite recently, the English High Court and the Court of Appeal for England and Wales had to determine a class action claim in the case of *Kadie Kalma & ors v African Minerals Ltd & ors 2018]EWHC 3506 (QB) and [2020] EWCA Civ 144* respectively.

90. In *Lloyd v Google LLC UKSC 2019/0213*, the Supreme Court of the UK had cause to deal with the scope of representative class actions. In that action, Mr Lloyd was not just claiming damages as the 2<sup>nd</sup> plaintiff in this case is doing, He claimed to represent everyone resident in England and Wales who owned an Apple iPhone at the relevant time and whose data were obtained by Google without their consent, and to be entitled to recover damages on behalf of all these people. It is estimated that they numbered more than 4m.

91. It is necessary for me to analyse the issues raised in that case as the laws of Sierra Leone do not have any statutory provisions dealing with class actions save for the procedural rules identified in the High Court Rules 2007 above. The Supreme Court confirmed that a claim for damages for the unlawful processing of data under the Data Protection Act 1998 ("DPA 1998") UK, can only be made if the data subject has suffered some form of material damage (such as financial loss) or mental distress. The damage could not be the unlawful processing itself. This avoids a floodgates situation, where data controllers could have faced opt-out class actions for breaches of data protection law where the claimant had suffered a "loss of control" of data but no actual loss.

92. The Supreme Court also found that, in order to advance such a claim, it would be necessary to assess the extent of the unlawful processing in each individual case and damages could not be sought on a "uniform per capita" basis, without proof of individual circumstances. However, in certain respects the judgment expands the circumstances in which the representative action device can be used.

93. The first instance judge in the High Court found as follows:

1. Mr Lloyd had failed to identify any harm caused by the alleged breach, which was required in a claim for compensation under the DPA 1998. Compensation could not be awarded merely for the reason of the infringement itself and associated loss of control over the personal data.
2. Even if Mr Lloyd could establish the requisite level of harm, the "same interest" test was not met because the impact was not uniform across the class.
3. Regardless, in exercising his discretion, the Judge would have refused to allow the claim, taking into account a number of different factors (which included likely costs, the inability to identify class members and the fact that class members had not authorised the claim).

94. The Court of Appeal reversed the decision of the lower court, opening the door to large opt-out class actions for non-de-minimis data protection breaches without the need to show loss. The Supreme Court reversed the decision of the Court of Appeal and held as follows:

1. Lord Leggatt noted that the representative action mechanism is a "flexible tool of convenience in the administration of justice" and that it should be "applied to the exigencies of modern life as occasion requires."
2. English courts have traditionally applied the "same interest" test rigorously, particularly in light of the Court of Appeal's key ruling in *Markt & Co v Knight Steamship* [1910] 2 KB 1021.
3. The purpose of requiring the representative to have the "same interest" in the claim as the persons represented is to ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all members of the represented class. That plainly is not possible where there is a conflict of interest between class members". "*So long as advancing the case of class members affected by the issue would not prejudice the position of others, there is no reason in principle why all should not be represented by the same person.*"
4. That there is no requirement of consent. There is no need for a member of the class to take any positive step to be bound by the result. Although the rule does not confer a right to opt out of the proceedings, a judge managing the case has the option to require the representative to "*notify members of the class... and establish a simple procedure for option out of representation*".
5. The adequacy of the definition is a matter which goes to the court's discretion in deciding whether the claim should be allowed to continue, rather than being a precondition for the application of

the rule. Nevertheless, it is plainly desirable that the class of persons should be clearly defined.

6. *The limits in the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded.*" Significantly, the judgment stated that "*there is no reason why damages or other monetary remedies cannot be claimed in a representative action if the elements can be calculated on a basis that is common to all members of the class.*" This means the representative must put forward a class definition and methodology that enables assessment of losses on a compensatory basis. Mr Lloyd was unable to meet this test in the circumstances of his claim, but other claims will attempt to meet this test.

95. The central feature of the court's decision was that what the claimant was seeking to do was to claim for each member of the represented class a form of damages the rationale for which depends on there being a violation of privacy, while avoiding the need to show a violation of privacy in the case of any individual member of the class. This is a flawed endeavour."

96. The tort of misuse of private information is a strict liability tort, not a tort based on a "want of care". Data protection legislation, on the other hand, is "*similar to an allegation of negligence in that it is predicated on failure to meet an objective standard of care rather than on any intentional conduct.*" To permit compensation for a failure to take reasonable care to protect personal data without requiring proof of

material damage or distress would be "*anomalous*" when failure to take care to prevent personal injury or damage to tangible moveable property does require such proof. In conclusion, the analogy between the privacy tort and data protection legislation was "*positively inappropriate*".

97. In this case the 1<sup>st</sup> plaintiff claims to represent consumers at large, who use telecommunications services in Sierra Leone. The key issue is compensation is not available without proof of financial loss or distress at common law. As in the UK, the compensation provision is wider under the Act and provides for redress in respect of both material and non-material damages and specifically referring to loss of control of data as an example of the type of damage which may flow from a personal data breach.

98. Where such claims are brought, a plaintiff suing in a representative capacity, can bring the claim by (or against) one or more persons as representatives of others who have "*the same interest*" in the claim. This procedure cannot however be used to claim compensation on behalf of other consumers where the compensation recoverable by each user would have to be individually assessed. A "*uniform sum*" of damages can properly be awarded in relation to each person whose rights have been infringed without the need to investigate any circumstances particular to their individual case, provided there are no statutory provisions regulating the same. The amount of damages recoverable per person would be a matter for argument by both sides.

99. In this instant case, the compensation provided under the Telecommunications Act 2006, is wider than that provided for under the

common law which requires proof of damages or loss. This matter involves the telecommunications industry which is regulated by statute. The Telecommunications Act 2006 needs to be properly considered. Section 37 of the Telecommunications Act 2006 provides:

*37. (1) Every customer to a telecommunications service, on payment of the prescribed tariffs, is entitled to - ....*

*(d) a compensation in case service is denied or interrupted due to an act or omission of the service provider.*

100. There is therefore a statutory provision as set out in sub section (d) of section 37 for compensation to be paid, in the case of service denial or interruption, and to that extent such entitlements are included in every licence agreement with telephone service providers, without the need to prove loss in the civil jurisdiction. Further, section 39 gives the Commission, ie the 4<sup>th</sup> defendant the power to adjudicate disputes and complaints and most importantly to establish procedures for the adjudication of such disputes or complaints.

101. In addition, section 40 subsections 4 and 5 provide as follows:

*40. (1) The Commission may determine such general or specific standards of performance in relation to the provision of telecommunications services by an operator as in the opinion of the Commission ought to be achieved by that operator consistent with the International Telecommunications Union standard, and arrange for the publication of the standards in such form and in such manner as the Commission considers appropriate....*

(4) If the operator fails to meet any required standard, he shall pay to any persons who is adversely affected by the failure such compensation as may be determined by the Commission...

(5) The requirement for payment of compensation under this section in respect of any failure to meet the required standard does not preclude any other remedy at law which may be available or any other measure that may be taken or sanction that may be imposed by the Commission in respect of the act or omission which constituted that failure.

(6) Any dispute arising from the application of this section may be referred to the Commission by either party for determination by the Commission

102. Section 41 also provides the enabling powers to the 4<sup>th</sup> defendant commission to collect data in relation to compensation payments made and the level of overall performance by the operators in relation to the provision of telecommunications services. In the light of the statutory remedies available for claiming redress for poor telecommunication services, this court needs to consider whether the procedural law for claiming collective redress and in particular the representative procedure which the plaintiff is seeking to use, is available to him.

103. In representative proceedings like these, the plaintiffs are seeking to take advantage of the significant advantage for plaintiffs particularly where many people have been affected by the defendants' conduct but the value of each individual claim is small, or is impossible for one reason or the other to quantify. A second significant feature of the collective claim is that it enables liability to be established and damages recovered

without the need to prove that members of the class have individually suffered loss. it is sufficient to show that loss has been suffered by the class viewed as a whole, where such loss can be proved.

104. As I have pointed out above, representative proceedings are relatively rare in Sierra Leone and I regard the UK jurisprudence as persuasive in Sierra Leone not only because of the greater experience of their courts in the conduct of class actions but also because of the substantial similarity of purpose underlying both their legislation and ours. Nonetheless in the analysis which follows I base myself firmly on the true construction of the UK legislation, set against the background of the common law and civil procedure against which it falls to be construed and most importantly from a statutory point of view, the Common Law of the UK is part of the laws of Sierra Leone, by virtue of section 170 (1)(e) of the Constitution of Sierra Leone, Act no 6 of 1991.

105. In civil proceedings such as this, the plaintiffs need to establish a cause of action. This is separate and distinct from the success or otherwise of the litigation. As plaintiffs, they only need to establish that the breach of the statutory duty has caused them some more than purely nominal loss. In order to be entitled to a trial of that claim they would (again individually) need only to be able to pass the strike-out and (if necessary) summary judgment test: ie to show that the claim as pleaded raises a triable issue that they have suffered some loss from the breach of duty.

106. Where in ordinary civil proceedings a claimant establishes an entitlement to trial in that sense, the court does not then deprive the

claimant of a trial merely because of forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered. Once that hurdle is passed, the claimant is entitled to have the court quantify their loss, almost *ex debito justitiae*, except in a situation where there has already been a previous award of compensation for the same loss. There are cases where the court has to do the best it can upon the basis of exiguous evidence.

107. In relation to damages, this fundamental requirement of justice that the court must do its best on the evidence available is often labelled the "broad axe" or "broad brush" principle: see *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson (A Firm)* 1914 SC (HL) 18, 29-30 per Lord Shaw. It is fully applicable in competition cases. *ASDA Stores Ltd v Mastercard Inc* [2017] EWHC 93 (Comm) was a claim by an individual merchant arising out of (*inter alia*) the same breach as in these proceedings. After citing the Watson Laidlaw case Popplewell J said, at paragraph 306:

*"The 'broad axe' metaphor appears to originate in Scotland in the 19th century. The more creative painting metaphor of a 'broad brush' is sometimes used. In either event the sense is clear. The court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of his rights.*

108. It is clear from the above citations that justice requires that the damages be quantified for the twin reasons of vindicating the plaintiffs' rights and exacting appropriate payment by the defendant to reflect the wrong done. In the present context that second reason is fortified by the

perception that anti-competitive conduct may never be effectively restrained in the future if wrongdoers cannot be brought to book by the masses of individual consumers who may bear the ultimate loss from misconduct which has already occurred.

109. There is nothing in the statutory scheme which suggests, expressly or by implication, that this principle of justice, that plaintiffs who have suffered more than nominal loss by reason of the defendants' breach should have their damages quantified by the court doing the best it can on the available evidence, where the plaintiff succeeds in proving their case against the defendant. The evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of those rights.

110. However, it is clearly established as a general rule that where there has been a breach of contract damages cannot be awarded for the vexation or anxiety or aggravation or similar states of mind resulting from the breach. The principle was stated by Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445:

*"A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy".*

111. This general principle was approved by the House of Lords in *Johnson v Gore Wood & Co* [2001] 2 WLR 72 . The principle has particular application to commercial cases and in *Johnson v Gore Wood & Co* Lord Cooke of Thorndon observed, at p 108, that :

*"Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude."*

112. This principle is not applicable in every case and in *Watts v Morrow* [1991] 1 WLR 1421 Bingham LJ went on to state, at p 1445, that there was an exceptional category of cases which he described as follows:

*"Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category."*

Bingham LJ. then stated:

*"In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort"*

113. In any event, the measure of damages depends on the success or otherwise of the plaintiff in proving its case.

114. Notwithstanding, in as much as the common law is part of the laws of Sierra Leone, Parliament has enacted section 170(1) of the Constitution of Sierra Leone in a hierarchical manner. At the apex of section 170 is the constitution of Sierra Leone, followed by laws made under the authority of Parliament. Where Parliament has enacted a

statutory scheme to provide compensation, the courts ought not to intervene save for a situation where the relevant body charged with the responsibility for managing the statutory scheme has failed in its duty as required by law, in which case public law principles require the courts to act by way of its prerogative orders.

115. The court should consider the primary test for liability which was espoused by Lord Diplock at page 189 in the celebrated case of **Lonrho Ltd V Shell Petroleum Co Ltd (No 2) 1982 AC 173**, in which he stated as follows:

*"the court should presume that if the Act creates an obligation which is enforceable in a specific manner then it is not enforceable in any other manner. In this way if the Act was intended for the general benefit of the community rather than for the granting of individual rights then it will not usually be possible to use the Act to bring an action in tort."*

116. In this present case, the Telecommunications Act 2006, creates obligations which are enforceable in the specific manner provided for in the Act, in particular, sections 36,37, 39 and 40. The court should therefore presume that the obligation is enforceable in the specific manner provided for by the Act and the Act itself was enacted with the intention that it was for the general benefit of the community rather than for the granting of individual rights. It is noteworthy to mention that the short title to the Telecommunications Act 2006, which provides as follows:

*"Being an Act to establish the National Telecommunications Commission and to provide for the licensing and regulation of telecommunications"*

*operators and for the promotion of universal access to basic telecommunication services, fair competition for the benefit of investors in, and the users of telecommunication networks and services, to improve the national, regional and global integration of Sierra Leone in telecommunications and to provide for other related matters"*

117. The duties and obligations of public telecommunications Operators are also set out at part VII of the Telecommunications Act 2006. With these principles in mind, this court now has the task of considering the plaintiffs claim as pleaded and the defendants' defence, as pleaded, within the context of the regulatory framework, which is the Telecommunications Act 2006

#### The plaintiff's claim

118. To ensure clarity in this judgement, I shall set out the plaintiff's claim sequentially.

#### Declarations sought.

##### Declaration 1

119. The plaintiff's first pleaded claim is that the defendants (references to defendants means the (1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants) failed to comply with the requirement to provide free calls by way of compensation in conformity with the 4<sup>th</sup> defendant's instructions. In support of that claim, the plaintiff relied upon the following averments:

1. Paragraph 18 of the statement of case which refers to notices from all defendants in the following manner:

#### Public Notice from AFRICELL:

"Africell hereby informed it valued customers and the general public that it will be offering free on net calls (that is Africell to Africell only) commencing on Friday 8th September to Sunday 10th September 2017 from 11:00am to 05:00pm. This is in conformity with National Telecommunication Commissions (NATCOM) instructions to offer our customers free calls. Africell will continue to provide its customers with the best services in Sierra Leone, Africell na we network"

Public Notice from ORANGE trading as Airtel

"Orange SL trading as Airtel hereby informs it valued customers and the general public that it will be offering free on net calls (that is Airtel to Airtel only) commencing on Friday 8<sup>th</sup> September to Sunday 10<sup>th</sup> September 2017 from 11am to 5pm daily.

*This is in conformity with National Telecommunication Commissions (NATCOM) instructions to offer our customers free calls. We remain committed to providing quality telecommunication services to our customers in Sierra Leone".*

Public Notice from SIERRATEL:

"Sierratel wishes to inform it valued customer informs it valued customers and the general public that it will be offering free on net calls (that is Sierratel to Sierratel (only) commencing on Monday 11<sup>th</sup> onto Wednesday 13<sup>th</sup> September 2017.

*This is in conformity with National Telecommunication Commissions (NATCOM) order to compensate our customers. Remember our*

*bonus on incoming calls for local and international calls and our tariff as listed below: still the cheapest in Sierra Leone.*

SIERRATEL TO SIERRATEL -LE 500

SIERRATEL TO ALL OTHER NETWORKS- LE 600

SIERRATEL TO UK ALL OTHER NETWORKS- LE 600

SIERRATEL TO UK LANDLINE, CANADA AND USA - LE 700

SIERRATEL NA WI YONE"

2. That the 72 hours free calls were not complied with in that the 1<sup>st</sup>, 2nd and 3rd Defendants offered the said free calls 6 hours a day which summed up to 18 hours in all of the 3 days, with even total free calls falling below the expected standard of performance of service delivery in that plaintiffs experienced within the said 3 days the following:
  - a. annoying unsolicited calls
  - b. dropped and failed calls,
  - c. Traffic congestion,
  - d. Failed attempt to load recharge payments,
  - e. Inability to activate the services offered,
  - f. Inability to send or receive SMS and calls misdirected to unintentional numbers,
  - g. Poor signal strength,
  - h. Bad network,

i. poor customer service, system failure,

j. crashes,

120. The question for the court to determine is whether the defendants did in fact provide free calls in accordance with the 4<sup>th</sup> defendants' instructions and their press releases.

121. The defendants for their part did not agree that they did not provide free calls. In the 1<sup>st</sup> defendant's pleaded defence, at paragraph 9 denies that the 72 hours free calls were not complied with and put the claimant to strict proof. At paragraph 22 of the witness statement of Andrew Fatoma, the Human Resource and Administrative Director of the 1<sup>st</sup> defendant at page 223 of the 1<sup>st</sup> defendant bundle, they complied with the requirement to give free calls and to that extent were never queried by the 4<sup>th</sup> defendant for failure to provide the free calls as directed by the 4<sup>th</sup> defendant. The mechanism for compliance with the directives were clearly agreed between the 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant as regulators. The 1<sup>st</sup> defendant relied upon exhibit B10 which he states proves that the public notices were vetted and approved by the 4<sup>th</sup> defendant, as regulators.

122. The 2<sup>nd</sup> plaintiff who was PW3 told the court in evidence that the 1<sup>st</sup> defendant only provided 6 hours of free calls. However, he was unable to provide any evidence of the same.

123. The 4<sup>th</sup> defendant did not specifically deny or admit that there was a failure by the defendants to comply with the free calls directive but avers that they carried out their regulatory functions in line with the statutory scheme.

124. The 2<sup>nd</sup> defendant denies the averments at paragraph 19 of the particulars of claim and puts the plaintiffs to strict proof. Before me I have considered the witness statement of Haffie Haffner, a barrister and solicitor and general secretary of the 2<sup>nd</sup> defendant, at page 468 of the bundle. At paragraph 23 of that statement, she testified that the 2<sup>nd</sup> defendant complied with the instructions of the 4<sup>th</sup> defendant to provide free calls on the 8<sup>th</sup> 9<sup>th</sup> and 10<sup>th</sup> September 2017, in compliance with the 4<sup>th</sup> defendant's orders in their letter of 30<sup>th</sup> August 2017.

125. She makes the point that the 2<sup>nd</sup> defendant was never queried for non-compliance with these directives to provide free calls. The mechanism of complying with the directives was agreed between the 2<sup>nd</sup> and the 4<sup>th</sup> defendant in several meetings subsequent to the letter of 30<sup>th</sup> August 2017. The network was congested as the network was not designed to be utilised by all subscribers simultaneously. However, a list of subscribers who utilised the free calls between the 8<sup>th</sup> and 10<sup>th</sup> September 2017 were provided. These were set out at pages 473-486 of the 2<sup>nd</sup> defendant's bundle.

126. PW3's own witness statement at page 175 to 181 of the bundle, specifically at page 180, alluded to the fact that the 4<sup>th</sup> defendant ordered the defendants to pay fines of USD750,000,450,000 and 200,000 respectively and in addition were ordered to give 72 hours free calls to subscribers nationwide. In the same statement, he alluded to the fact and accepted that the correct position was that the defendants would give 6 hours free on net calls for three days (72 hours), to compensate consumers nationwide. He further stated that the 6 hours free calls issued by the 1<sup>st</sup> and 2<sup>nd</sup> defendants turned out to be a

nightmare as the lines became congested and the bonus Calls became useless to the subscribers.

127. By his own admission, the free calls were provided by the defendants and anyone with a knowledge in telecommunications would realise that if you provide free calls and a lot of subscribers are making use of the free calls, traffic on the networks would become congested. But that is not to say there were no free calls offered. It is significant to note that contrary to the assertion in PW3 Edmund Abu's witness statement that the 4<sup>th</sup> defendant ordered the defendants to provide 72 hours of free calls, there was no such order from the 4<sup>th</sup> defendant.

128. The letter from the 4<sup>th</sup> defendant addressed to the 1<sup>st</sup> defendant which is similar to the letters addressed to the other defendants dated 30<sup>th</sup> August 2017, did order the payment of fines but crucially at order 3, the following order was made:

*"That Africell (SL) Ltd shall compensate its subscribers as a result of poor-quality service herein complained of. Such compensation shall be determined by the Commission."*

129. It is evident that PW3 Edmond Abu, is mistaken in his assertion and the averments he made in the pleadings is not accurate and therefore unreliable. Moreover, it is significant to note that the plaintiffs did not provide any technical data in support of their claim. Whilst the defendants relied upon significant technical data.

130. During cross examination of PW3 by counsel for the 2<sup>nd</sup> defendant, PW3 claimed he would be surprised that the 2<sup>nd</sup> defendant offered free calls between the 8<sup>th</sup> and 10<sup>th</sup> September 2017. He however admitted

that the number in column 16 at page 146 of the bundle is his number which clearly showed he utilised the free calls service on the 9<sup>th</sup> September 2017.

The free calls.

131. As pointed out above, the defendants did issue out public notices, alerting the public to the availability of the free calls between 11am and 5 pm from Friday 8<sup>th</sup> September to Sunday 10<sup>th</sup> September 2017. It is significant to note that all three press releases from the defendants confirmed that the free calls were being offered pursuant to instructions from the 4<sup>th</sup> defendant. There is no evidence before the court that the 4<sup>th</sup> defendant challenged these press releases as inconsistent with its instructions. Neither is there any evidence before the court to demonstrate that the plaintiffs challenged these press releases as inconsistent with what was agreed at Bintumani.

132. The plaintiff has consistently maintained that no free calls were offered even where his own number was shown on call logs provided by the 2<sup>nd</sup> defendant to have utilised the free calls provided by the 2<sup>nd</sup> defendant. Even more significantly is the fact that the 4<sup>th</sup> defendant did not raise a query as to non-compliance by the defendants with its directives.

133. As a matter of public principle, this court feels the need to allude to the important balance being struck between fines and regulatory punishments and sustainability of telecommunication service providers in providing public service communications in Sierra Leone. Focus on sustainability is becoming a necessity for long-term success for telecom

operators, as they are under pressure to comply with stringent non-financial laws and regulations; suffer from growing energy costs driven by increasing demand on traffic and edge solutions, resulting in requirements of more sites, and are expected to obtain good ESG ratings by investors. At the same time, sustainability also represents great business opportunities as customers and talent are increasingly aware of and attracted to solutions that create a positive impact on the environment and society. Integrating sustainability into the overall commercial strategy can be a driver for business growth, help to avoid cost and risk and increase companies' ability to attract and retain talent - all while doing good for the employees, society, and the planet.

134. Public policy and the public interest demands that a fair balance be struck between regulation of the industry and sustainability of the industry itself. Sustainability means meeting the needs of consumers without compromising the ability of future generations to meet their needs. Telecom operators face many external and internal challenges linked to sustainability, such as costs; compliance to non-financial laws and regulations; tough competition for recruiting talent; and increased pressure from investors. That is why sustainability is increasingly becoming a central part of the overall commercial strategy for many telecom operators and is more and more integrated into business units' daily work and core business strategies. Sustainability is considered fundamental for long-term success as it helps to grow the business, avoid cost and risk and/or increase employer branding.

135. In the area of business growth, sustainability can be a driver for telecom operators for all these growth strategies towards both

consumer and enterprise customers, through direct and indirect business opportunities. New technologies pushed by the telecom operators, such as 5G and Internet of Things (IoT) are enablers of more sustainable behaviours for companies and for individuals. Sustainability also has the potential to substantially boost telecom network usage as a wide range of sustainable offerings are also "smart" and connected, such as electric cars (cleaner energy), real-time ride-sharing (reduced consumption) and high-precision manufacturing (waste reduction) to mention a few.

136. Even though investing in sustainability can bring many upsides for an organization, it is becoming more and more a must-have, stemming from pressure from investors, cost and productivity reasons, or to comply with laws and regulations. Most telecom operators are under pressure to reduce the cost of their operations and whereas sustainability is often perceived as a cost to companies, it can also bring substantial savings. The GSM Association internationally, estimates that telecom operators today account for 2 to 3 per cent of the total global energy demand and estimates that it will increase despite the savings in energy consumption that the 5G-new-radio standard brings. Many more mobile stations will be needed to meet the expected exponential growth in data traffic from 5G connected devices, as well as the growing demands of edge capacity for high-performing services. More and distributed sites will lead to higher energy requirements and more energy transmission loss than a more centralized distribution of data.

137. These free calls were offered for six hours per day making a total of 18 hours of free calls over the period. Having regard to the costs to

the defendants of these free calls over the period, it is obvious that in addition to the fines paid by the 2<sup>nd</sup> defendant in particular, the free calls will occasion a substantial loss to the defendants, which may well impact upon sustainability. In any event from a compensatory point of view, 18 hours of free calls represents adequate compensation to those consumers who have been affected by poor service.

138. As the call logs show, not all consumers would be affected simultaneously by any alleged poor service and it is inevitable that the inconvenience suffered by most consumers can adequately be compensated by free calls that are commensurate with any credits that have been purchased. I do not consider that the plaintiff can make out his claims that the free calls were not provided by the defendants. No evidence has been adduced before this court to show that the free calls were not provided by the defendants. There is equally no evidence that the 4<sup>th</sup> defendant mandated or instructed the defendants to provide 72 hours of free calls. In the circumstances this court is unable to make the declaration sought by the plaintiffs in paragraph 1 of the statement of claim and the declaration is therefore refused.

## Declaration 2

139. The plaintiff seeks a declaration that the 4<sup>th</sup> defendant failed or neglected to exercise and perform their statutory mandates/functions to enforce compliance by the 1<sup>st</sup> 2<sup>nd</sup> and 3rd, defendants to provide quality services to Plaintiffs. With respect to this claim by the plaintiffs I considered a number of matters, in determining whether the 4<sup>th</sup>

defendant has failed or neglected to exercise and perform their statutory mandates to provide quality services to the plaintiffs.

Failure or neglect to exercise and perform a statutory duty

140. This is where there are similarities between private law and public law, The two branches of law provide for separate remedies. The term remedy in this context refers to the varieties of awards/relieves that may be granted by the reviewing court following an application for judicial review, in a public law context. As a general rule, where any of the grounds justifying judicial review are there, a person complained against the agency decision has to include in his or her application for judicial review the type(s) of order or redress he or she sought from the reviewing court. Thus, the relief that the applicant seeks from the reviewing court is referred to as the remedy sought. In this case the plaintiff is seeking a declaration.

141. For technical and historical reasons, remedies are broadly classified into public law remedies and private law remedies. Those included within the category of public law remedies also known as prerogative orders are certiorari (a quashing order), prohibition (prohibiting order), mandamus (mandatory order), Quo Warrant, and Habeas Corpus, whereas private law remedies include injunction, declaration and damages. Despite the classification of these remedies into public law and private law remedies, due to technical and historical reasons, both types of remedies have been now used in many common law jurisdictions as remedies in public law.

142. At the outset, it has to be noted that each of the remedies listed above are not mutually exclusive. Leaving the issue of damages aside, these remedies perform four main functions:

1. the mandatory function of ordering something to be done is performed by mandamus and the injunction;
2. the prohibiting function of ordering that something not be done is performed by prohibition and the injunction;
3. the quashing function of depriving a decision of legal effect is performed by certiorari;
4. and the declaratory function of stating legal rights or obligations is performed by the declaration.

143. The use of more than one remedy to perform two of these functions involves unnecessary duplication and produces undesirable complications in the law, which is arguably what the plaintiffs have set out to do, by seeking both public law remedies and private law remedies simultaneously.

### Public law remedies

144. In so far as public law remedies are concerned, the primary purpose of judicial supervision of the administration is to restrain the latter from operating within the bounds of the law. So, public law or prerogative remedies of public law, in the English tradition, have primarily been used to ensure whether or not the government machinery operates properly. Due to this fact, it is said that these remedies are more liberally granted than the private law remedies that are mainly

concerned with the enforcement of private rights. Brief mentions of the typical public law remedies that are widely used to rectify administrative wrongs through the process of judicial review include certiorari, which is the procedure through which the reviewing court investigates the legality of an agency's decision complained of, and will quash or nullify where the decision in question is found to be ultra vires.

145. Prohibition, performs the function of ordering a body amenable to it to refrain from illegal action. It is an order issued by a higher court to prevent an inferior tribunal or administrative authority from exceeding or from continuing to exceed its authority, or from behaving ultra virally while dealing on matters that affect the interest of the complainant.

146. Mandamus (mandatory order) is the other important public law remedy that deals with agency inaction. Thus, it [mandamus] may force a decision-maker to take relevant considerations into account (**R v Birmingham Licensing Planning Committee, ex parte Kennedy [1972] 2 QB 140**) and not to abuse power which has been conferred (**Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997**).

147. Breach of statutory duty can take the form either of non-feasance (i.e. failure to perform the duty) or misfeasance (i.e. bad performance). In certain circumstances a person who suffers damage as a result of a breach of statutory duty by a public authority can bring an action in tort for damages or an injunction. Public authorities can also be attacked for non-feasance by being required to perform their duty. Mandamus (or an injunction in lieu) is the remedy for this purpose.

148. The first step in examining a statute for the purposes of tort is therefore to establish whether a breach of the statute is actionable. private law remedies are so-called because they were originally used only in private law but later came to be used in public law. Classification between private and public law remedies is merely historical and technical. Technically speaking, prerogative remedies may be invoked by an application for leave for judicial review but this is not the case in most private law remedies.

149. A declaration is simply asking the court to make a ruling on what the law is. It is used in both public and private laws and is available in wider circumstances than the prerogative orders. It declares what the legal rights of the parties to the action are and differs from other judicial remedies in that it declares the law without any sanction and has no coercive effect. The reason for this is that it was always sought in conjunction with remedies, which the court could enforce. Now in English law, a declaration may be sought in public law case along with one or more of the prerogative orders as well as with an injunction and/or an award of damages. Although it is a private law remedy in its origin, declaration is now widely in use as a remedy in both private and public law cases. Its main purpose is to determine or ascertain what the law says without changing the legal position or rights of the parties. It declares what the law is or says in relation to a certain uncontested fact.

150. In legal parlance, the term damages is usually used interchangeably with the term compensation. The purpose of awarding damages in this context is to repair the pecuniary or non-pecuniary harm inflicted upon the complainant because of administrative wrongs. It is worth mentioning

here that damages may not be awarded to the complainant on the mere ground that s/he has suffered some sort of compensable injury due to the act of an administrative body, which is found to be ultra vires in a judicial review. This means, the fact that an administrative action is successfully attacked in judicial review does not necessarily entitle the victim of that act a right to claim compensation.

151. Damages are purely a private law remedy that can be claimed by the victim of a wrongful act in accordance with the dicta of private law. As in *Cooper v Board of Works for the Wandsworth District (1836)*, damages may also be awarded in judicial review but only if the applicant also has private law rights.

152. It is equally noteworthy to mention that unlike declaration and injunction, which are private law remedies (remedies for the redress of private law wrongs) which have been extended to redress public law illegality, damages are purely private law remedy. In other words, in order to obtain an award of damages it is necessary to show a private law wrong; damages cannot be awarded simply on the basis that a government body has acted illegally. The relevance of the remedy in public law is that public bodies can commit private law wrongs, and so damages are a remedy available against public bodies. For example, damages for breach of contract can be obtained against a government department. Conversely, whereas a declaration or injunction is available to restrain a breach of natural justice or to declare the invalidity of a decision made in breach of the rules of natural justice, damages are not available for breach of natural justice as such, because this is a wrong recognized only

in public law. If a breach of natural justice also amounted to a breach of contract, damages might be available for the breach.

153. It is therefore the case that a claim for award of damages can be filed before the reviewing court, but the granting of the award depends on whether or not the decision rendered is invalid on the grounds of the public law principles at the same time constitutes a civil wrong in private law such as torts and contract and whether or not the applicant suffers a compensable injury due to such private wrong. So the award of damages in judicial review is a matter of coincidence. That is, when the grounds justifying judicial review at the same time constitutes private wrongs, damages may be awarded to the applicant provided that s/he proved a compensable injury caused to her/his interest as per the governing private laws.

154. In a matter such as this, the question of an award of damages for breach of contract or damages in tort as a private law remedy is unquestionable. The position becomes more complex in a situation where remedies are claimed against a public body, of which the 4<sup>th</sup> defendant is. Consideration of the law in this area is required.

#### Remedies against public bodies.

155. At prayers 6, 7 and 8, the plaintiffs have prayed for damages and punitive damages against the 4<sup>th</sup> defendant which is a public body. In considering this matter, the starting point is to maintain a broad perspective on the notion of remedies, is to approach the question bifocally - to maintain a focus on both public law unlawfulness and liability

in tort. Damages may be awarded against public bodies, prescribed circumstances and in line with certain considerations.

156. Public bodies become liable to pay compensation to citizens in a multiplicity of circumstances. In a private law situation, liability is generally for negligence. It is in relation to negligence that the courts have constructed special rules for public authority liability. However, public bodies can be liable to pay damages under a number of torts; in principle they can be liable for the same range of torts as private individuals. With respect to liability for the torts of breach of statutory duty and misfeasance in public office, which particularly apply to public bodies, the courts have so far been indifferent to awarding damages for breaches of a statutory duty.

157. Save for a few exceptions upon a review of relevant authorities, it is difficult to find any cases in which the courts have recognised that breach of statutory duty ought to give rise to a remedy in damages". This was the case in **O'Rourke v Camden London Borough Council [1998] AC 188**. This principally because the courts have traditionally construed the relevant legislation imposing a statutory duty as not conferring rights on individual claimants. The courts have rarely held that public bodies owe a duty of care in their administrative procedures to avoid infliction of economic loss as was the case in **Hedley Byrne and Co Ltd v Heller and Partners [1964] AC 465**. Such cases are considered suitable par excellence for Ombudsmen or specific compensation schemes such as the scheme enacted into the Telecommunications Act 2006, as amended.

### Statutory Compensation Schemes

158. Statute can impose liability to pay compensation on public bodies. Consequently, there are a number of remedies available other than damages awarded by the courts. Remedies established under a statutory scheme must be in the public as well as in private interests. They must not unduly burdensome on public bodies. There are a large number of competing claims on public money, and public resources should not be used excessively to dispute claims or to make payments of compensation which are not justified in principle or in terms of quantum.

159. The Telecommunications Act 2006 prescribes the redress available in a statutory framework to deal with reliefs sought in disputes between telecommunication operators and their consumers, the public. It is in this light that section 40(4) of the Telecommunications Act 2006, prescribes such a statutory scheme for the payment of compensation to persons adversely affected by the failure of a telecommunication operator to meet certain standards.

160. However, regard must be had to subsection (5) which provides as follows:

*(5) The requirement for payment of compensation under this section in respect of any failure to meet the required standard does not preclude any other remedy at law which may be available or any other measure that may be taken or sanction that may be imposed by the Commission in respect of the act or omission which constituted that failure*

161. It is significant to note that subsection 5 in its application makes provision for the payment of compensation under the statutory scheme, whilst not precluding any other remedy available at law, or other remedy

or sanction that may be imposed by the 4<sup>th</sup> defendant. Notwithstanding the availability of any other remedy at law, which includes damages for negligence under the law of Tort, it is a fundamental principle under the law of negligence that the plaintiff in an action for negligence is entitled to a sum of damages which will return the plaintiff to the position the plaintiff would have been in had the accident not occurred, in so far as money is capable of doing this.

162. This goal was expressed in the early cases by the maxim *restitutio in integrum*. The plaintiff is entitled to full compensation and is not to be denied recovery of losses which he has sustained: *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25 (H.L.), at p. 39, per Lord Blackburn. the basic rule is that it is the net consequential loss and expense which the court must measure": *Hodgson v. Trapp*, [1988] 3 W.L.R. 1281, at p. 1286. At the same time, the compensation must be fair to both the plaintiff and the defendant. In short, the ideal of the law in negligence cases is fully restorative but non-punitive damages. The ideal of compensation which is at the same time full and fair is met by awarding damages for all the plaintiff's actual losses, and no more. The watchword is restoration; what is required to restore the plaintiff to his or her pre-accident position. Double recovery is not permitted.

163. In *Clark v. Urquhart* [1930] A.C. 28, 66, Lord Atkin had this to say:

"damage is an essential part of the cause of action and if already satisfied by one of the alleged tortfeasors the cause of action is destroyed".

164. In that case the plaintiff had received in satisfaction of his claim against one defendant the full amount of damages which he could have received on any of the causes of action against the rest. It was held that his acceptance of the money paid into court was a satisfaction of all the claims in the action and that his damage, in a question with the other defendants, had been satisfied.

165. These authorities clearly show that the principle against double recovery in tort is still good law. It is also important to note that not only is double recovery not allowed, a plaintiff who seeks damages must prove loss. In **Jones v Stroud District Council [1986] 1 WLR 1141, LJ Neill said at 1150-1151:**

*"It is true that as a general principle a plaintiff who seeks to recover damages must prove that he has suffered a loss.... "*

166. Not only must he prove the loss but the doctrine of election requires the plaintiff, where he has succeeded in proving loss, to elect to receive the higher award to which it was entitled but that it had to give credit against the damages for loss of use and occupation for the sums received pursuant to the account of profits. In **Tang Man Sit v Capacious Investments Ltd [1996] AC 514**, Lord Nicholls made the point succinctly:

*"The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same*

*breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss.*

*Sometimes the two remedies are cumulative. Cumulative remedies may lie against one person. A person fraudulently induced to enter into a contract may have the contract set aside and also sue for damages. Or there may be cumulative remedies against more than one person. A plaintiff may have a cause of action in negligence against two persons in respect of the same loss.*

167. Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. The procedural principles applicable to cumulative remedies are necessarily different. Faced with alternative and inconsistent remedies a plaintiff must choose between them. Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so concurrently and obtain judgment against both.

168. There are limitations to this freedom. One limitation is the so called rule in *Henderson v. Henderson (1843) 3 Hare 100*. In the interests of fairness and finality a plaintiff is required to bring forward his whole case against a defendant in one action. Another limitation is that the court has power to ensure that, when fairness so requires,

claims against more than one person shall all be tried and decided together. A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery."

169. The first step in examining a statute for the purposes of tort is therefore to establish whether a breach of the statute is actionable. Some statutes will have tortious remedies in mind and will expressly provide for a civil remedy. The Telecommunications Act 2006 arguably makes provision for an alternative remedy in section 40(5) of the said Act, without expressly provide for a civil remedy. It is therefore key that when dealing with express provisions for actions to be taken, regard must be had to not only what is included, but also what is excluded by the statute. In this case civil remedies under the law of tort are not excluded. However, the statute is silent on whether an action is possible in tort. This does not necessarily mean that such an action is impossible. In such a situation, the courts will first look to see if there has been a precedent set regarding the relevant statute - in other words, whether a claim for a breach of the statute has been allowed or denied in the past.

170. If no precedent has been set in previous cases such as this maiden action, the court will examine the statute in more detail, in order to establish the potential for civil liability. The test for establishing this potential stem from *Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)*, in which Lord Diplock had this to say:

*"the court should presume that if the Act creates an obligation which is enforceable in a specific manner then it is not enforceable in any other manner. In this way if the Act was intended for the general benefit of the community rather than for the granting of individual rights then it will not usually be possible to use the Act to bring an action in tort."*

171. So the generally applicable principle is that statutes which include specific remedies are less likely to be enforceable in another way (i.e. via tortious remedy). In this case, the civil tortious claim against the 4<sup>th</sup> defendant by the plaintiff does not create a mechanism by which breaches of the statutory duty can be specifically enforced against them. To that extent an action in tort can be maintained against the 4<sup>th</sup> defendant.

172. Having assessed matters in the round, I now turn to deal with the plaintiffs claim for negligence against the 4<sup>th</sup> defendant for negligence in failing to exercise and perform their statutory mandates.

173. The first step in examining a statute for the purposes of tort is therefore to establish whether a breach of the statute is actionable. Some statutes will have tortious remedies in mind and will expressly provide for a civil remedy. The Telecommunications Act 2006 arguably

makes provision for an alternative remedy in section 40(5) of the said Act.

174. The modern law of negligence was established in *Donoghue v Stevenson* [1932] AC 562. In order to be successful in a negligence claim, the claimant must prove:

1. The defendant owed them a statutory duty of care.
2. The defendant was in breach of that duty.
3. the breach of duty caused damage to the plaintiff and that damage must have been caused by the breach of the statutory duty.

175. In order to establish a statutory duty, the plaintiff must then successfully argue that they are a member of the class of persons the statute aims to protect, as was the case in Hartley v Mayoh & Co [1954] 1 QB 383. It can therefore be seen that the courts will closely inspect a statute in order to work out who is the intended beneficiary. If the plaintiff is not one of those people, it is unlikely that they will be able to use the statute against the defendant. The Telecommunication Act 2006 was clearly intended to provide protection for persons in the position of the plaintiffs and were therefore the intended beneficiaries. I would therefore hold that the 4th defendant does not owe the plaintiffs a statutory duty to regulate the defendants but to apply the law as required by statute.

176. The next question for consideration by the court is whether there has been a breach of the statutory duty of care by the 4<sup>th</sup> defendant. It must be shown that the defendant has breached the duty. This will

depend on the exact wording of the statute. Statutes can be divided into two different categories - those which impose strict liability and those which do not. In cases of strict liability, the duty imposed by the statute is absolute, and so if a breach has occurred it will be held to be the defendant's fault regardless of their conduct.

177. Where the statute does not provide for strict liability, the plaintiff needs to show that defendant's behaviour fell below the standards described in the statute. If a statute does not impose strict liability, then you can safely infer that whilst the standards imposed by the statute might be high, that it will always be possible for a defendant to avoid liability if they have taken a sufficiently proactive approach to their duties. This principle can be seen in *Brown v NCB* [1962] AC 574. It should be noted that in general the courts will place the burden on defendants to demonstrate that their behaviour has been reasonable.

Did the 4<sup>th</sup> defendant breach its duty of care?

178. In line with its duty of care to regulate the telecommunications industry in the public interest, the 4<sup>th</sup> defendant has powers under sections 39 and 40 to deal with general or specific standards of performance in relation to the provision of telecommunications services by an operator. In particular subsection 4 and 5 of the said section 40. If the 4<sup>th</sup> defendant is to comply with its duty of care to the plaintiffs, it must act in accordance with its powers under sections 39 and 40.

179. I have to say I am troubled by the plaintiffs' claim for a declaration that the 4<sup>th</sup> defendant failed or neglected to exercise and perform their statutory mandates to enforce compliance by the

defendants to provide quality services to the plaintiffs. There are a number of matters which makes the plaintiffs' claim unarguable, and the declaration sought is wholly misconceived for the following reasons:

1. The particulars of claim at paragraph 8,10,14,15,16,17,18 show that the 4<sup>th</sup> defendant took active steps to deal with poor quality service by the defendants, in terms of holding the conference at Bintumani Hotel in March 2017, and by organising the public dialogue forum, holding a meeting with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> plaintiffs, which led to the Bintumani Public dialogue forum, holding of a joint press conference to deal with the issue of poor service, the provision of ten million leones to the 2<sup>nd</sup> plaintiff to cover the costs of conducting the press conference and to facilitate the training of local persons to conduct a public perception survey, which subsequently led to the 4<sup>th</sup> defendant imposing fines on the defendants as well as imposing the sanction of free calls for 72 hours.
  2. The plaintiffs in their own pleaded case admitted that fines were imposed on the defendants and in addition, free calls were ordered to be provided to consumers across the network over a period of 72 hours for a total period of 18 hours, as a result of their complaints of poor service.
180. It is difficult to see what else the 4<sup>th</sup> defendant ought to have done over and above what the plaintiffs themselves have conceded were done by the 4<sup>th</sup> defendant to address the complaints of poor service. In the particulars of breach of statutory duty and negligence by the 4<sup>th</sup>

defendant, the plaintiffs have alleged that the 4<sup>th</sup> defendant failed to ensure that all affected plaintiffs as users or consumers of the telecommunication services were adequately compensated, in accordance with the provisions of section 9 (1) of the Telecommunications Act 2006, as amended. The said provision provides as follows:

*9. (1) The object for which the Commission is established is to license and regulate the activities of telecommunications operators so as to promote efficiency and fair competition, and the expansion of investment in the telecommunications sector; the protection of the users or consumers of telecommunications networks and services and the progressive development of the telecommunications industry and technology in Sierra Leone*

181. The above provision simply provides for the functions of the 4<sup>th</sup> defendant as regulators of the telecommunications sector. The mandate as set out in section 9 does not relate in any way to compensation. It is designated solely to the basis of the regulatory powers of the 4<sup>th</sup> defendant. On the issue of compensation and its adequacy, subsection 4 of section 40, gives the sole discretion on the adequacy or otherwise of the compensation payable by the network operators to consumers to be determined by the 4<sup>th</sup> defendant in its sole discretion. This was the clear wish of parliament.

182. The particulars of breach of the statutory duty alleged against the 4<sup>th</sup> defendant cannot possibly be established. The failures set out at paragraph 25(b) have clearly not been established by any evidence before this court. There are a number of functions set out at section

9(2) of the Act and no evidence has been adduced by the plaintiffs to show that the 4<sup>th</sup> defendant has failed to carry out any of the functions set out in section 9(2) of the Telecommunications Act 2006.

183. With respect to the increase in voice tariffs, those increases were reversed by the 4<sup>th</sup> defendant and in any event section 9(2)(K) of the Telecommunications Act 2006, permits the 4<sup>th</sup> defendant to provide guidelines on tariffs chargeable for the provision of telecommunications services. Most importantly sections 52 to 54, provides the basis of the setting of the tariffs for the provision of telecommunications services. At paragraph 25(4) of the particulars of claim, the plaintiffs argue that there is a failure by the 4<sup>th</sup> defendant to ensure the increment in the tariff on voice measures with efficient and effective service delivery.

184. In making this claim, the plaintiffs have failed to realise that the 4<sup>th</sup> defendant can only act within the powers given to them by parliament. Parliament by the enactment of sections 52-54, have provided the matters that the 4<sup>th</sup> defendant must take into account in setting the tariff for the provision of telecommunications services. There is no suggestion by the plaintiffs that the provisions of the Telecommunications Act 2006 were not followed in setting the tariffs for voice calls. In particular and of some significance are the provisions of section 52 (1) which provides as follows:

*"52. (1) Subject to this Act, the Commission may regulate the tariffs payable for telecommunications services rendered by public telecommunications operators:*

*Provided that no operator shall be required to offer services at tariffs which do not permit him to recover the cost of providing the services plus a reasonable return on capital investment".*

185. In addition, section 53 provides the legal basis for the 4<sup>th</sup> defendant to approve tariffs and it is perhaps expedient I set out the said section 53 in full:

*53. (1) The tariff proposals submitted under subsection (2) of section 52, shall become effective thirty days after submission unless before then the Commission issues a notice of modification to the operator.*

*(2) The tariffs proposals shall contain all relevant information concerning the costing for the rates or charges for services, including deposits and other non-recurring charges, monthly charges as well as terms and conditions applicable to the provision of services, including rights and remedies available to consumers in the event of unauthorized charges or other disputes or claims over billing or provision of services.*

*(3) Notice of such submission shall be published by the Commission for public information in a local newspaper with an invitation to consumers to comment on the reasonableness or otherwise of the tariffs.*

*(4) If, after thirty days, the Commission has not issued any notice of modification to the operator, the Commission shall be deemed to have approved the proposals and shall publish them by Government Notice as the tariffs chargeable by the operator.*

*(5) Where the Commission and the operator fail to reach an agreement on the proposed tariff and any modification thereto proposed by the*

*Commission, the operator may appeal to a tribunal of three persons appointed by the Chief Justice.*

*(6) The tribunal shall be chaired by a judge of the High Court or a person qualified to be appointed as a judge of the High Court with an accountant and telecommunications engineer as the other members.*

*(7) The tribunal shall make its decision within thirty days of the lodgement of the appeal.*

*(8) Any operator who fails to lodge an appeal within thirty days after the date of the disagreement referred to in subsection (5) shall be deemed to have abandoned his tariff proposal and accepted the modification proposed by the Commission and the Commission shall publish the modified tariff as the approved tariff.*

186. Section 54 also provides the legal and regulatory basis for the setting of tariffs for the provision of telecommunications services in the following terms:

54. (1) *The Commission shall review the tariffs for public telecommunications (Review of tariffs and charges.) services if such review is warranted by any rapid changes in the cost-of-living index and foreign exchange rates.*

*(2) In reviewing the tariffs, the Commission shall take all relevant factors into consideration including -*

*(a) a reasonable return on capital and accumulation of adequate reserves for expansion and up-gradation of services;*

*(b) optimization of usage and growth of network;*

- (c) usage by, value to, and capacity to pay of different classes of customers;
- (d) the need for cross-subsidization such as between different parts of the network, between urban and rural and between business and residential customers;
- (e) consumer price index and rates of foreign exchange; and
- (f) views of the public telecommunications operators and a cross-section of customers.

187. There is no provision for the 4<sup>th</sup> defendant to ensure that the increment of the tariffs on voice measures with the efficient and effective service delivery, within its mandate as set out in sections 52 to 54 of the Telecommunications Act 2006, as amended. Section 52 ensures that tariffs cannot be set at a level that does not permit the operator to recover the costs of providing the services plus a reasonable return on capital.

188. The failure or otherwise of the 4<sup>th</sup> defendant to establish a system of receiving complaints from consumers and to conduct investigations have not been established by the plaintiffs. By the plaintiffs own admission, when they took their complaints to the 4<sup>th</sup> defendants, the complaints were received and acted upon. The fact that the systems in place may not be as transparent as they ought to be, does not mean there are no systems in place. Section 9A (d) of the Telecommunications (Amendment) Act 2009, provides as follows:

9A "Without prejudice to section 9, the Commission shall perform the following additional functions:-

(d) "Establish a suitable system for receiving complaints from consumers, conduct investigations into the complaints or submit them to any other appropriate body, where necessary."

189. The plaintiffs have alleged negligence on the part of the 4<sup>th</sup> defendant to establish a suitable system of complaints, but no evidence has been submitted to this court to show that they 4<sup>th</sup> defendant has not complied with the provisions of section 9A (d). The 4<sup>th</sup> defendant in its defence averred that the plaintiffs have not filed any complaint to it in accordance with the provisions of the Act. In any event, the plaintiff by his own statement of case has confirmed that letters of complaints of poor service sent to the 4<sup>th</sup> defendant were addressed by all the measures undertaken by the 4<sup>th</sup> defendant which I have set out at paragraph 163 (above).

190. Similarly, the complaint under paragraph 25 (h) of the particulars of claim, is not sufficiently particularised to show how the 4<sup>th</sup> defendant has failed to comply with the provisions of section 9B of the Telecommunications Act 2006 as amended. There is no evidence of a breach of the statutory duty by the 4<sup>th</sup> defendant neither is there evidence of negligence on their part in the performance of their duties as pleaded by the plaintiffs. In those circumstances the claim by the plaintiffs against the 4<sup>th</sup> defendant must fail. The declaration sought by the plaintiffs against the 4<sup>th</sup> defendant as set out at paragraph 35(2) of the particulars of claim is therefore refused.

Failure by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants to provide a quality service to the plaintiff.

191. The plaintiffs have prayed for a declaration to the effect that the defendants have failed in their contractual and statutory duties to provide quality services to the plaintiffs. This court need not issue a declaration to that effect. With respect to any statutory duty, I have not been able to discover in the legislation any statutory duty owed by the defendants to the plaintiff to provide quality services. The defendants are private entities who are not creatures of statute and do not have the kind of statutory duty imposed upon the 4<sup>th</sup> defendant. Notwithstanding, section 23 of the Telecommunications Act 2006, requires telephone operators like the defendants to provide "the basic telephony, data communications, mobile cellular, radio paging and private telecommunications services.

192. Similarly, section 37(1)(d) makes provision for compensation in cases where service is denied or interrupted due to an act or omission of the service provider. That is not to say there is a statutory duty to provide quality services. In section 40(3)(b) of the 2006 Act, Parliament has ensured that it is the 4<sup>th</sup> defendant who has the power to determine "standards of performance in relation to any duty under the Act. Subsection 4 of section 40 prescribes that where an operator fails to meet any required standard, which is not set in statute but by the regulator, any person affected by such failure is entitled to compensation as the 4<sup>th</sup> defendant may determine.

193. The question of whether the defendants as providers of telecommunications services, have a contractual duty to provide quality services may be express in terms of the provisions of their licenses or implied as a matter of general contractual principles between the plaintiffs and the defendants. With regard to express terms of the license, I have had course to review the said licenses, which are granted under section 25 and 28 of the Telecommunications Act 2006.

194. Clause 7 (b) deals with a requirement to prepare and submit annually a program of activities which must have details of quality, coverage and development objectives. Clause 9 deals with and provides for technical standards and for services to comply with international standards of the ITU-T and ETSI organisations.

195. Clause 14 makes provision for performance guarantees and bonds and for reliable quality control and quality measurement systems as specified in appendix A of the license and most importantly, the general service quality must be in accordance with the provisions of appendix A to the license, which provides for the technical specifications.

196. Clauses 17 and 18 deals with the rights and privileges of customers and consumer protection. Clause 17 (c) in particular provides for compensation to be payable (not damages) in cases where service is unreasonably denied or interrupted due to an act or omission of the service provider, in a manner provided for in annex B and a regular statement of charges payable for the services received, suitably itemised where possible. In the area of consumer protection, a statement of terms and conditions, should be filed with the 4<sup>th</sup>

defendant and made available for inspection at the request of any member of the public.

197. The question to ask is what is defined as quality of service. Quality of Service means the collective effect of service performance which determines the degree of satisfaction of a user of the service, as specified in ITU-T Recommendation E. 800. Quality of Service (QoS) shall include network performance as specified in ITU-T Recommendation E. 800. QoS is the outcome of the user's experience/perception while Network Performance is performance of all single elements of a network. The QoS requirements take into account the customer/user's and the service provider's point of view.

198. This is a requirement in the telecommunications industry and it is for this reason that where the performance levels of a service provider falls below the accepted parameters in the license, regulatory action is taken by the 4<sup>th</sup> defendant as regulators. It is acknowledged that that there has been poor service rendered by the defendants but regulatory action was taken which resulted in fines being levied by the 4<sup>th</sup> defendants and compensation ordered to all consumers affected by the poor standards. The adequacy or otherwise of the regulatory action taken is a matter for the 4<sup>th</sup> defendant as the regulators in accordance with the statutory provisions of section 40(4) of the Telecommunications Act 2006. This court cannot interfere with the decision of the 4<sup>th</sup> defendant on the appropriate level of compensation, as parliament has decided that they as regulators have the expertise in determining the appropriate level of regulatory action and this court will only interfere where they fail to carry out their mandate or in carrying out their

mandate, they acted unreasonably or ultra vires their mandate in a public law sense. There is no evidence that they have so acted.

199. There is one issue I need to address under this heading. I have had regard to the evidence of Haffie Haffner at paragraph 24 of her witness statement, in which she made the point that the 2<sup>nd</sup> defendant complied with the instructions of the 4<sup>th</sup> defendant to provide free calls as compensation for poor service on the 8<sup>th</sup> 9<sup>th</sup> and 10<sup>th</sup> September 2017. Their network was not designed to be utilised simultaneously as will be when all the subscribers use the network simultaneously.

200. Traffic congestion occurs for various reasons depending on switch facilities, Exchange equipment and transmission link. Traffic congestion mainly occurs due to inadequate capacity of equipment and improper network management. Causes of Congestion may be classified as follows:

1. Congestion due to faulty equipment
2. Congestion due to generation of high traffic
3. Congestion due to improper configuration of the network.

201. I believe Miss Haffner's evidence on this point. Firstly, if as contended by the plaintiffs that free calls were not provided by the defendants, it is unlikely that there would have been congestion on the networks over the relevant period. The reason why there was congestion As admitted by the 2<sup>nd</sup> plaintiff in his witness statement was simply because the network was congested and it was not designed to be used

with such volumes of traffic as would occur when consumers became aware that they had an opportunity to make free calls.

202. Network congestion as a matter of telecommunications technical specifications, occurs when a network is overrun with more data packet traffic than it can cope with. This backup of data traffic occurs when too many communication and data requests are made at the same time, over a network that doesn't have enough network bandwidth to carry it. As a matter of telecommunications technical specifications, Optimal network performance and the best user experience requires high uptime. Issues like severe network congestion can lead to poor user experience, and severely affect a business's overall performance, which in turn could lead to a loss of revenue for the service provider. While network congestion is usually temporary, it can cause inconvenient network problems that can affect performance, such as high levels of jitter, packet loss, and latency, as well as a decrease in throughput. This can lead to losses for a service provider in a manner that is not sustainable.

203. To put Miss Haffner's evidence into a simplified context, it is vital to understand the causes of network congestion and in this case, Miss Haffner is referring to a common cause which is referred to as "too many hosts in a broadcast domain". A 'broadcast domain' applies to a network structure. This could be the network within an enterprise, educational facility, or a VLAN. A 'host' refers to each individual router or switch within the broadcast domain. Too many hosts in the structure can cause an overload, as too many devices are requesting network access at once.

204. In layman's terms, we have a road network in Sierra Leone. We have a number of cars in Sierra Leone. If a commuter were to travel overnight, from Freetown to Bo, it is less likely that the roads would be congested or they would encounter traffic en route. If the same commuter were to travel between the hours of 7am and 10 am which are peak periods, the commuter is likely to encounter traffic leading to delays. If all the cars presently in Sierra Leone were to travel at the same time from Freetown to Bo, the road network would undoubtedly become gridlocked, as the road network was clearly not designed to accommodate all the cars in Sierra Leone at that particular time on that road to Bo. There would undoubtedly be delays.

205. The concept also applies to mobile networks and routers. Mobile networks and routers are the broadcast domain. While computers, tablets, or phones are the hosts. Networks today are based on IP (Internet Protocol), with all usages (voice, internet data, TV, video) and data being carried in the form of IP packets on fibre optics and managed by routers. Network congestion occurs when the number of data packets to be transported from a source to a destination exceeds its capacity. In this situation, the routers store surplus data packets in buffers (a memory storage device integrated into peripherals that enables temporary storage) until they can be processed. If the buffers are full, the packets cannot be processed and are "rejected". This is known as a "packet drop" or "packet loss". This can be caused by a technical breakdown or by a major and unforeseen increase in traffic, such as was described by Miss Haffner in her evidence. When congestion occurs, the latency, the jitter, which expresses the variation of the latency, and the

packet loss rate - criteria that affect quality of service (the network's ability to carry data correctly) - increase. A sudden increase in the originating and termination call can cause traffic congestion.

206. In practice, this is translated as a slowing down of the network; the response times of certain applications increase. This can have an impact for example on real-time interactive communications. Typically, the quality of video calls is degraded and outages can occur. This congestion can take place at different locations on the networks: in the operator's regional network, at the connection between two operators (for example for voice calls), in an international network (submarine cable for example), or in a data centre that manages services (such as videoconference).

207. Low bandwidth may also be a cause of network congestion. In a situation such as that described by Miss Haffner in her evidence. Preventing network congestion altogether is difficult if not impossible, given the fact that most businesses experience large volumes of network traffic every day. Traffic patterns and device usage can vary across computer networks, or even fluctuate greatly within the same network, owing to the system not having been so designed. The license requirement do not require the network to be designed to deal with a sudden increase in traffic.

208. With respect to the issue of compensation, only the 11<sup>th</sup>, 18<sup>th</sup>, 30<sup>th</sup>, 33<sup>rd</sup>, 34<sup>th</sup>, 37<sup>th</sup>, 54<sup>th</sup>, 55<sup>th</sup>, 64<sup>th</sup>, 73<sup>rd</sup>, 74<sup>th</sup>, 77<sup>th</sup>, 80<sup>th</sup>, 82<sup>nd</sup>, 84<sup>th</sup>, 92<sup>nd</sup>, 96<sup>th</sup>, 99<sup>th</sup>, 101<sup>st</sup>, 102<sup>nd</sup>, 103<sup>rd</sup>, 106<sup>th</sup>, 107<sup>th</sup>, 110<sup>th</sup>, 115<sup>th</sup>, 116<sup>th</sup>, 117<sup>th</sup>, 123<sup>rd</sup>, 125<sup>th</sup>, 126<sup>th</sup>, 128<sup>th</sup>, 130<sup>th</sup>, 132<sup>nd</sup>, 139<sup>th</sup>, 157<sup>th</sup>, 163<sup>rd</sup>, 165<sup>th</sup>, 166<sup>th</sup>, 168<sup>th</sup>, 192<sup>nd</sup>

,199<sup>th</sup>, 228<sup>th</sup>, 233<sup>rd</sup>,234<sup>th</sup> ,238<sup>th</sup>, 243<sup>rd</sup>, 245<sup>th</sup>, 250<sup>th</sup>, 272<sup>nd</sup>, 273<sup>rd</sup>, 274<sup>th</sup>, 276<sup>th</sup> plaintiffs, did not utilise the free calls provided by the 2<sup>nd</sup> defendant. The overwhelming number of plaintiffs did utilise the free calls which was ordered by the 4<sup>th</sup> defendant as compensation for poor service. Some other plaintiffs had identical names or were not provided for in the writ. What ever failure that is admitted by the defendants and acknowledged by the 4<sup>th</sup> defendant has been, in my judgement adequately been addressed and there is no longer a need to make the declaration sought.

#### Damages for breach of contract by the defendants

209. The plaintiffs have prayed for damages for breach of contract against the defendants. For the reasons given above, the plaintiffs are not entitled to additional damages as they have been adequately compensated for the poor services suffered by way of the provision of free calls over a period of 72 hours.

#### Damages for negligent conduct by the defendants

210. For the reasons given above, I do not consider that the plaintiffs have proved any negligent conduct on the part of the defendants. The defendants operate in accordance with terms of the mandate given by their licenses and the applicable law which is subject to regulation by the 4<sup>th</sup> defendant, who exercises their regulatory regime by way of key performance indicators, which are in turn subject to technical specifications. Where there is a breach of key KPIs, regulatory action is taken as was seen in this case. Poor service cannot simply be conclusively proved by perception surveys, whilst ignoring key performance indicators

of a technical nature. The plaintiffs have not provided any technical data to counter the technical data produced by the defendants. Where the defendants produce and rely on technical data which is far more reliable than perception, this court cannot ignore technical data in favour of perception surveys that are not backed up by any technical data. Notwithstanding, the perception surveys assisted in highlighting the issue of poor service which has been addressed by the 4<sup>th</sup> defendant as regulators in accordance with the statutory scheme.

Damages for breach of statutory duties on the part of the 4<sup>th</sup> defendant to perform their statutory functions to provide legal protection and to enforce compliance by the defendants

211. For the reasons given above, this claim must fail. It is not the function of the 4<sup>th</sup> defendant to provide legal protection to the plaintiffs. Statute already provides that protection and I am satisfied that the regulatory actions taken by the 4<sup>th</sup> defendant in the levy of fines and the orders to provide free calls, is in aid of the statutory legal protection that is provided in the Telecommunications Act 2006 and the license which was granted to the defendants.

Compensation payments to the plaintiffs

212. The statutory scheme provided for in section 40 (4) of the Telecommunications Act 2006, provides for the 4<sup>th</sup> defendant to activate the compensation mechanism in the Act. In my judgement, the provision of free calls provides adequate compensation to the plaintiffs in line with applicable telecommunications law and practice and international standards. The plaintiffs in my judgement are not entitled

to additional compensation under the civil law for the reasons given above.

### Punitive damages

213. For the reasons given above, this claim must also fail. Adequate compensation has already been provided in accordance with the present law. It is for parliament to review the law, if it is considered that the measures of compensation are inadequate.

### General considerations

214. This has been a difficult and complex case to deal with as a number of technical issues are raised in this case with a huge number of plaintiffs, whose individual cases needed to be examined. I have taken into account the respective cases of the defendants and where I have not mentioned a specific matter, it does not mean that I have not taken that issue into account. I will however highlight a few additional issues I have taken into account.

215. The 1<sup>st</sup> defendant argued that in the telecommunication industry, a contractual relationship is established when a consumer purchases a sim-card, registers it and buys top-up. The telecommunication provider in turn has to perform their own obligation by providing voice calls, sms services and other related services. In this particular case, 139 Plaintiffs claim to be subscribers of the 1<sup>st</sup> Defendant. 31 Plaintiffs do not have any telephone number associated to their network. However, in view of my findings, the fact that 31 plaintiffs have no connection with the 1<sup>st</sup> defendant is de minimis. Even if they were, the same compensation provisions would have been applied.

216. Further, of the 139 Plaintiffs purportedly having a claim against the 1<sup>st</sup> Defendant, 38 (thirty-eight) of them have different names registered to the sim cards they claim is theirs. These are matters that the 4<sup>th</sup> defendant need to address as part of the regulatory regime. The 1<sup>st</sup> defendant further argues that in the telecommunications industry the set rules or benchmarks for examining quality of service provided by GSM Providers are set in the International Telecommunications Union ITU-T Telecommunications Sector for ITU Series which is the International Benchmark and Key Performance Indicators (KPIs) set by the 4<sup>th</sup> Defendant. Exhibit B 13, B14 and B 15 respectively, shows that the 1<sup>st</sup> defendant have been meeting the KPIs set by the 4<sup>th</sup> Defendant and most importantly, the 4<sup>th</sup> Defendant had never written to the defendants informing them that they were not performing according to the KPIs set and where an attempt was made, Exhibit B11 shows that this was strongly refuted. The 1<sup>st</sup> defendant also relied on paragraphs 8 and 27 of the Witness Statement of Andrew Sao Fatoma. The Court is also referred to Exhibit B2 which are the summaries of the 1<sup>st</sup> Defendant's Key Performance Indicator (KPI) threshold for 2016 and April to September 2017. Reference is also made to paragraph 9 of the Witness Statement of Alhaji Mamie Fofanah.

217. The said statement of Alhaji Mamie Fofanah, shows that the KPIs set up by the 4<sup>th</sup> Defendants were derived from International Telecommunications Union ITU-T Telecommunications Sector and that Public Perceptions are not used to assess the quality of service given to consumers. Counsel further submitted that there is a legislation which mandates the Regulator to set standards to assess performance. Section

39 (2) of the 2006 Act further provides that a complaint mechanism should be established by the 4<sup>th</sup> Defendant to address complaints between consumers and operators. Counsel submits that the 1<sup>st</sup> Defendant is not even privy to the information used in the Public Perception Survey, whether it contains information technical or even relevant to the survey.

218. With respect to the 2<sup>nd</sup> defendant, they argue that the PPS report is questionable as it has 17 Pages missing and the amount of persons who participated were 900 and the missing pages were imperative. The responses and the number of persons participating have not been put into evidence and should be discounted.

219. The call logs show that the 2<sup>nd</sup> plaintiff did utilise the free calls and arguments about permission not being given to use the said logs cannot be entertained. Most importantly there was no objection when questions were posed to pw3 in cross-examination, seeking to elicit the fact that they had utilised the free calls which they claim were never given by the 2<sup>nd</sup> defendant.

220. The Telecommunications Act 2006 takes precedence over any agreement between the plaintiffs and the defendants. The central argument is the provisions of the statute override any other agreements. As a matter of principle, Parliament has entrusted the regulation of the telecommunications industry into the care of a statutory body. Enforcement of matters that fall within the remit of the statutory body must be dealt with by the statutory body. It is only where the statutory body is unable or unwilling to act, should the courts step in to enforce

the law, by way of its prerogative orders of mandamus or the other recognised public law remedies.

### Disposal

221. Having considered this matter in the round, I have come to the conclusion that the dispute resolution mechanism for consumers of telecommunications services is not transparent and does a disservice to consumers. Had there been in place a transparent system of redress, these proceedings would not have been necessary and would not have taken the time it has taken to reach resolution. For the avoidance of doubt, there is a statutory system of redress in place as enacted into the Telecommunications Act 2006. The availability of this redress mechanism must be clear and transparent and available to all consumers. Customer service and consumer protection does not stop at the sale of sim cards. Telecommunications providers must understand that they have a duty under the Act to act in the best interest of consumers at all times and to that extent, I shall be giving a number of orders to ensure that consumers are protected as envisaged by parliament without the need to resort to litigation.

222. Consequently, more needs to be done in the area of regulation in the public interest and to enhance consumer protection. Right to Redress is fundamental in a telecommunication's regulatory framework. This canvases for availability of effective consumer redress. It focuses on the right of consumer to express grievance, infringement and violation of rights and seek recourse when this happens or products or service found unsatisfactory. The essence of this is to guarantee and increase

consumer's confidence. The provisions for redress were expected to be on a fast-track basis without recourse to costly litigation in the courts.

223. There are consumer protection related provisions in the Telecommunications Act 2006, which from my conclusions in this case do not appear to be strictly or clearly complied with although there is an undertone of compliance. These considerations apply to the provisions of sections 37, 39 and 40.

224. In the light of my findings above, I shall make the following orders:

1. That the declarations sought by the plaintiffs in prayers 1,2 and 3 are refused.
2. That the claim for damages against all defendants in prayers 4, 5 and 6 are dismissed.
3. That the prayers for compensation to be paid to the plaintiffs by all four defendants is dismissed.
4. That the prayer for punitive damages in favour of the plaintiffs against the defendants is dismissed.
5. That the defendants (ie 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup>) shall within 30 days of the date of this judgement, take steps to comply fully with the provisions of section 37 (b),(e) and (g) of the Telecommunications Act 2006, by providing the information required to all consumer of its services by sms messages and to ensure the same is done every 90 days thereafter.
6. That the 4<sup>th</sup> defendant shall collaborate with the defendants, in ensuring compliance with order (5) above.

7. That the 4<sup>th</sup> defendant shall within 90 days of this judgement establish procedures by way of a suitable Alternative Dispute Resolution system for the telecommunication industry to adjudicate disputes and complaints arising between operators and operators and customers, and to provide compensation in line with order (8) below and in accordance with section 39(2) of the Telecommunications Act 2006. When such a system shall have been established, the 4<sup>th</sup> defendant shall take steps to bring its existence to the attention of the public.
8. That the 4<sup>th</sup> defendant shall within 30 days of this judgement establish a system of compensation for consumers to be paid by any operator who fails to meet any required standard to consumers and shall publish the same for the information of the public.
9. The costs of this action shall be borne by the plaintiffs to the defendants, which shall be agreed, if not taxed.

The Hon Mr Justice A Fisher J