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Case No: CL-2018-000585

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 03/10/2022

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

JAMES KEMBALL LIMITED	**Claimant**
- and -	
"K" LINE (EUROPE) LIMITED	**Defendant**

- -
- -

NIGEL JACOBS KC and **RUTH HOSKING** (instructed by **HFW Solicitors**) for the **Claimant**
JAMES COLLINS KC and **RICHARD HOYLE** (instructed by **MFB Solicitors**) for the **Defendant**

Hearing dates: 18, 19 and 20 July 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the trial of a claim by the claimant against the defendant for damages for alleged breach of a service agreement ("SA") by which the claimant agreed to provide road haulage services for a fixed period and up to a defined maximum volume and by which the defendant agreed to provide an agreed minimum volume. The claimant alleges that it was entitled to terminate the SA in accordance with its terms upon the defendant informing the claimant that it would not be able to comply with the minimum volume requirement for the or most of the final period covered by the SA, referred to in the SA as "*Period 3"*. The defendant disputes both liability and quantum. It maintains that in the events that have happened it is not liable for anything other than a sum to be calculated in accordance with some contractual machinery that it was agreed would apply where the minimum volume requirement was not met, but in any event, if it is liable to the claimant and damages are at large, it is liable for only a fraction of the sums claimed. Most of the trial was taken up with expert evidence relevant to quantum on the assumption that damages are at large.

2. The trial took place between 18-20 July 2022 inclusive. I heard oral evidence from Mr Iain Liddell, the Group Managing Director, founder and owner of the Uniserve Group, which includes the claimant. The group operates in the warehouse and inland transport industry. I heard expert evidence relevant to Quantum from Mr Richard Cameron-Williams, a chartered accountant and partner in BDO whose evidence was adduced on behalf of the claimant and Mr David Scrivener, a chartered accountant, insolvency practitioner and partner in the firm of Ensors Accountants LLP, whose evidence was adduced on behalf of the defendant.

3. The sum claimed by the claimant has varied substantially over the life of the claim, but by the time of the trial was valued by the claimant at a fraction of its originally pleaded value. Originally this claim was alleged to entitle the claimant to £6.8m in damages, based on an assertion as to the likely revenue that it would probably have earned over Period 3. By the time the case came to be opened, that sum had reduced to £857,000 odd and was based on the profit that it was alleged was probably lost over the same period. On the defendant's case the claim is worth either £150,984, if the contractual machinery applies, or between £148,200 and £195,140 odd if damages are at large.

4. By the time the trial closed, Mr Jacobs KC, who appears with Ms Hosking on behalf of the claimant, accepted in principle the quantum reasoning advanced by Mr Scrivener (thereby in effect abandoning the evidence of Mr Cameron-Williams), but challenged three elements in the make-up of the damages that Mr Scrivener had calculated. The effect of this part of the claimant's closing submissions is that if the claimant succeeds on the liability issues, is right in its submission that damages are at large, and right in its submissions concerning the three disputed elements, then damages are to be assessed at £560,000 odd, whereas the defendant continues to contend that Mr Scrivener's evidence should be accepted in its entirety and therefore (assuming damages are at large, which it continues to dispute) they are to be assessed at either £148,200 or £195,140 odd. Had the claimant's claim been pleaded at what it now accepts it should have been valued at from the outset, it is highly likely that this

case would either not have been started in, or would have been transferred out of, the Commercial Court.

Background

5. The claimant is a company whose business consists of or includes the transport by road of shipping containers from and to ports in the UK, using its own fleet of vehicles and by sub-contracting its work to haulage sub-contractors. The defendant is a wholly owned indirect subsidiary of Kawasaki Kisen Kaisha Limited ("KKK"). KKK's business included the operation of a cargo ship liner service for the transport of containerised cargos to and from ports round the world, including the UK. It is based in Japan. Until the events to which I refer below, the defendant managed the import to and export from the UK of containers carried or to be carried on KKK's ships. At all material times prior to 22 April 2016, the claimant was a wholly owned subsidiary of the defendant. Prior to that date, the claimant carried containers to and from UK ports on the instructions of the defendant as agent for KKK.

6. By a sale and Purchase Agreement dated 22 April 2016, Uniserve Holdings Limited acquired the claimant from the defendant. At the same time, the claimant and defendant entered into the SA, which as I have said was expressed to apply for a minimum period of three years. It will be necessary for me to set out its terms in detail shortly. At this stage it is necessary to note only that under the SA, the defendant agreed to supply a minimum amount of business (referred to in the agreement as "*Jobs*") over a three-year period between 1 April 2016 and 31 March 2019. This period was divided up into three periods designated in the SA as Period 1, Period 2 and Period 3. Period 3 was between 1 April 2018 and 31 March 2019. This claim is concerned with what the claimant alleges to be an anticipatory repudiatory breach of the SA in relation to Period 3 from May 2018 to its end on 31 March 2019.

7. On 31 October 2016, the claimant was first informed that three shipping companies, all based in Japan, including KKK, were to merge and their respective container shipping businesses integrated and operated by a new joint venture company. The joint venture company was ultimately named Ocean Network Express and was abbreviated by its promoters to ONE. ONE was planned to commence operations on and from 1 April 2018. In consequence, the defendant would no longer be responsible for KKK's container business in the UK and therefore would be unable to perform its obligations under the SA for Period 3, because KKK's container business was to be conducted exclusively by ONE. There were discussions between the claimant and ONE concerning the provision of container work by ONE to the claimant, but those discussions foundered because the claimant was seeking guaranteed minimum volumes of work (as was the position under the SA), but ONE was not prepared to enter into such an agreement. The defendant maintains that this was a failure by the claimant to mitigate.

8. Against that background it is now necessary to turn to the SA in detail. It defines the claimant as "*JKL*" and the defendant as "*K-Line*". Various definitions are set out in clause 1 of the SA. Those included the definition of a "*Job*" as being " … *a road haulage job, either in/out, of the nature described in Schedule 1 and by reference to which K-Line has calculated the targets set out in clause 2.2 and Annex 1 Part A* …" In so far as is material the SA provided as follows:

"2. **Service Commitment**

2.1 For the purposes of clause 2.2, as regards the twelve month period 1 April 2016 to 31 March 2017 ("Period One"), 1 April 2017 to 31 March 2018 ("Period Two") and 1 April 2018 to 31 March 2019 ("Period Three") (as applicable) the "**Daily Minimum**", the "**Daily Target**" and the "**Daily Maximum**" shall be as specified in the table below:

	Daily Minimum	Daily Target	Daily Maximum
Period One	88	110	132
Period Two	80	100	130
Period Three	72	90	117

2.2 For so long as this Agreement continues:

(a) K-Line shall offer to JKL no less than the applicable Daily Minimum number of Jobs per day;

(b) JKL shall perform all Jobs offered by K-Line (subject to any right it may have in Schedule 2 to reject any of such Jobs) up to the applicable Daily Maximum; and

(c) JKL may but shall not be obliged to perform, more than the applicable Daily Maximum.

3**.Offered Jobs**

3.1 "K" Line shall determine the number of Jobs offered each working day during each month of this Agreement for the purposes of clause 2.2, by reference to "K" Line's haulier utilisation figures. Each month (commencing month 2 of this Agreement) it shall state the total number of Jobs offered during the preceding month (the "**Offered Number**") as so determined and the corresponding minimum number referred in Annex 1 Part A for such month (the "**Monthly Minimum**").

3 .2 As regards any particular month (the "Relevant Month"), if either:

(a) the Offered Number is equal to or greater than the Monthly Minimum;

or

(b) the Offered Number for the next following month exceeds the Monthly Minimum for that month and such

excess when added to the Offered Number for the Relevant Month would be equal to or greater than the Monthly Minimum for such month,

then K-Line shall be deemed to have complied with clause 2.2 throughout the Relevant Month regardless of the number of Jobs offered per day, during such month.

3.3 For each month that K-Line is not deemed to have complied with the provisions of clause 2.2 (a "K-Line Shortfall Month"), JKL's sole and exclusive remedy shall be to levy a surcharge in respect of that month. The surcharge shall be calculated by reference to the target number of Jobs for the K-Line Shortfall Month as set out in Annex 1 Part A (the "**Monthly Target**") in accordance with the following formula:

(A x B) x 2%

Where:

"A"= the Monthly Target for the K-Line Sho1ifall Month; and

"B" = £360 (being a fixed figure which is to apply for the duration of this Agreement).

By way of illustration, if the Relevant Month were April 2016, and the Offered Number for such month were 1,800 (48 lower than the Monthly Minimum for April 2016, being 1,848) and the Offered Number in May 2016 were less than 1,808 (being 48 more than the Monthly Minimum for May 2016, being 1,760) then the month of April would be a "K-Line Shortfall Month" for the purposes of clause 3.3. As the Monthly Target for April 2016 is 2,310 the amount of the surcharge would be £16,632 (being 2% of 2,310 multiplied by £360).

3.4 JKL shall invoice K-Line the applicable surcharge for each K-Line Shortfall Month no later than 30 days of such month being determined to be a K-Line Shortfall Month in accordance with this clause 3 and shall be payable within 30 days of receipt.

4. **Performed Jobs**

4.1 Unless as regards any particular Job, the Parties shall otherwise agree in writing, Jobs that are accepted or deemed accepted in accordance with the provisions of Schedule 2 shall not be rejected or accepted on any basis other than as provided for in this Agreement and any Job that is so rejected or is not so accepted shall be deemed accepted on the terms of this Agreement (whether or not performed).

4.2 As regards each Job, "K" Line shall determine whether such Job is one [JKL] has accepted or is deemed to have accepted (whether or not performed) in accordance with the provisions of Schedule 2 and clause 4.1 (an "Accepted Job") and shall determine, by reference to its haulier utilisation figures, whether such Accepted Job has been performed by JKL. Any Accepted Job that has not been performed, as so determined is refe1Ted to in this clause as a "**Rejected Job**".

4.3 JKL shall be liable to pay a charge of £36.00 per Rejected Job. K-Line shall invoice such charges to JKL on a periodical basis and such invoices shall be payable within 30 days of receipt (and K-Line shall be entitled to off-set any unsettled charges against any amounts payable to JKL). The provisions of clause 4.4 shall also apply as regards Rejected Jobs.

4.4 As regards any particular calendar day, including Saturdays Sundays and public holidays (a "**Relevant Day**"), "K" Line shall calculate the total number of Accepted Jobs (the "**Accepted Number**") and the total number of Rejected Jobs if any (the "**Rejected Number**") in accordance with clause 4.2. If the Rejected Number is equal to 5% or more of the Accepted Number then the Relevant Day shall be treated as a "Shortfall Day". As regards any particular month, if there are three or more Shortfall Days in such month, then such month shall be treated as a "**JKL Shortfall Month**". Without prejudice to any of K-Line's other rights or remedies, in the event that there are two JKL Shortfall Months in any 12 month rolling period, then upon the occurrence of such second JKL Shortfall Month, JKL shall be deemed to be in material breach of this Agreement for the purposes of clause 1 l .3(a) and K-Line shall be entitled to terminate this Agreement forthwith at any time thereafter, without notice

…

11. **Duration and Termination**

11.1 This Agreement shall commence on 1 February 2016 and shall continue, unless terminated earlier in accordance with this clause 11 for a period of three (3) years ending on the third anniversary of the commencement date (the "**Initial Term**"). This Agreement may continue after the end of the Initial Tern, if both parties agree. Unless terminated earlier in accordance with this clause 11, both Parties agree to commence negotiations for any potential continuation of the Agreement no later than 6 months prior to end of the Initial Term. If the Parties agree to continue this Agreement, then unless terminated earlier in accordance with this clause 11, this

Agreement shall continue unless and until terminated on the giving of 6 months' written notice by either Party.

11.2 Parties may terminate this Agreement by mutual consent at any time.

11.3 Either Party may forthwith terminate this Agreement by giving written notice to the other Party if:

(a) the other Party commits a wilful, persistent or material breach of any provision of this Agreement and, if the breach is capable of remedy, fails to remedy it within 30 days after being given written notice of the breach and requiring it to be remedied;

(b) an encumbrancer takes possession, or where the other Party is a company, a receiver is appointed, of any of the property or assets of that other Patty;

(c) the other Party is unable to pay its debts as they fall due or makes any voluntary arrangement with its creditors or becomes subject to an administration order (within the meaning of the Insolvency Act 1986);

(d) the other Party ceases, or threatens to cease, to carry on business; or

(e) control of JKL is acquired by any person or connected persons not having control of JKL on the date of this Agreement. For the purposes of this clause 10, "control" and "connected persons" shall have the meanings set out in Sections 1124 and 1122 respectively of the Corporation Tax Act 2010.

12. **Post-Termination**

Upon the termination of this Agreement for any reason:

12.1 Uniserve Holdings Limited (company number 02234562), being JKL's parent company, shall, unless otherwise directed by K-Line, conclude any movement of goods in transit at the time of such termination and the terms and conditions of this Agreement shall apply as regards any such movements;

12.2 any rights or obligations to which any of the Patties to this Agreement may be entitled or be subject before its termination shall remain in full force and effect where they are expressly stated to survive such termination;

12.3 termination shall not affect or prejudice any right to damages or other remedy which the terminating Party may have in respect of the event giving rise to the termination or any

> other right to damages or other remedy which either Patty may have in respect of any breach of this Agreement which existed at or before the date of te1mination;
>
> 12.4 subject as provided in this clause 12, and except in respect of any accrued rights, neither Patty shall be under any further obligation to the other;
>
> …
>
> 14. **Nature of the Agreement**
>
> …
>
> 14.2 This Agreement contains the entire agreement between the Parties with respect to its subject matter and may not be modified except by an instrument in writing signed by the duly authorised representatives of the Parties..
>
> …"

The SA then sets out a series of schedules and annexes. In so far as they are relevant at all, they are relevant to quantum only and I will refer to them in more detail later in this judgment to the extent that it is necessary to do so.

9. I return to the chronology of relevant events. By an email from the defendant to the claimant dated 23 February 2018, the defendant informed the claimant that:

> "You will note from attached it confirms your understanding, that from April the 3J's will effectively only control Inbound cargoes subject to any export vessel delay around that point. Discussions are taking place on whether we will be able to combine any export activity with O.N.E, but this has not been agreed therefore I must work on the basis not at this stage.
>
> We are however confident that we will be able to meet our service commitments during April under the SLA agreement, but we will need to update you on May. Load figures are usually available 2-3 weeks before arrival and from these we are able to predict our delivery requirements as we go forward."

By 26 February 2018, the discussions between ONE and the claimant concerning future work had broken down because of the issue concerning minimum volumes of business referred to above. On the same day, the claimant sent its letter dated 23 February 2018 to the defendant. In that letter the claimant sought confirmation that:

> "1. K Line will be placing no new export orders on James Kemball after 31/3/18.

> 2. The only import orders we will receive after 31/3/18 will be "run off work" In respect of customer bookings made on K Line before 31/3/18. After the run off work, there will be no further import bookings.
>
> 3. K Line will not require any further assistance at all from James Kemball or meet its volume commitments under clause 2.1 of the Service Agreement because all container transport will be handled by ONE out of Southampton."

No response to that letter was received.

10. On 1 March 2018, in a letter marked "*Without Prejudice save as To Costs*" but which it is accepted by all parties was either not privileged, or in respect of which all parties accept privilege has been waived, the claimant sought to induce a response by writing to the defendant in these terms:

> "… As we understand it, save as set out in that letter, K Line will not be providing any business to us after 31/3.
>
> Given there are no provisions in the Agreement entitling K Line to discontinue using James Kemball, we are expecting K Line to honour its legal obligations and pay us the revenues that would have reasonably been payable to us during 18/19 had K Line not transferred its business to ONE.
>
> The average annual revenue paid by K Line to James Kemball during the past three years has been £12,436,553. On a without prejudice basis, we therefore propose that this is the sum payable to us over the next twelve months on presentation of our invoices in the normal way. Any failure to pay these invoices on time will only increase our losses. We look forward to your confirmation that our invoices will be paid in accordance with our normal credit terms.. … "

The next contact between the parties was at a meeting on 6 March 2018. There are some minutes of that meeting included within the bundle but in the event there does not appear to be any dispute as to what occurred. In essence the defendant confirmed:

> "… that effectively from 1.4.18, ONE would control all exports and we would only perform import haulage with the last vessels YM Witness 015w 10/5 (LGW) & AL Dhail 005w 12/5 (Sou)."

By a letter of 12 March 2018, the defendant responded to the claimant's letter of 1 March in these terms:

> "I acknowledge receipt of your letter of 1 March.
>
> To the extent that we are unable to offer you sufficient Jobs to meet the Monthly Minimum, we intend to apply clause 3.3."

This response is important because it makes clear to the claimant that the defendant intended to comply with its contractual obligations under the SA even after 1 April 2018. It maintains the only remedy agreed between the parties for a shortfall in the minimum volume of Jobs is that set out in clause 3.3 of the SA. If that is right then it is difficult to see what other remedy could have been provided other than an unqualified agreement to comply with the terms of clause 3.3, or how the defendant could be said to have repudiated or anticipatorily repudiated the SA.

11. Following further email communication which took matters no further, by an email dated 16 April 2018, the claimant purported to invoke the termination procedure set out in clause 11.3(a) of the SA. It is common ground that this is the Notice that matters for present purposes. In so far as is material, that email was in these terms:

> "I refer to the Service Agreement dated 22 April 2016 (the "Agreement") including, in particular, Clause 2.
>
> It is clear from K Line (Europe) Limited's ("K Line") written and/or oral correspondence and/or its meetings with James Kemball Limited ("Kemball") that K Line is now in anticipatory repudiatory breach of the Agreement. K Line's breach comprises its unambiguous and repeated confirmation over a prolonged period of time that, save for some short-lived and limited run off business, it will not be complying with its Clause 2 obligations in relation to Period 3. There have been persistent and/or material and/or repudiatory breach(es) of clause 2 of the Agreement. Furthermore, K Line has stated both orally and in writing that Kemball can rely on its communications to make adjustments to Kemball's business including making staff redundant and restructuring operations. Kemball continues to rely upon these communications and has been making redundancies and major operational changes.
>
> In these circumstances and in accordance with clause 11.3(a) of the agreement, we hereby give you 30 days within which to remedy the breach, failing which Kemball will forthwith terminate the Agreement and claim substantial damages. By our calculation, the period of 30 days will expire on 16 May 2018.
>
> To remedy the breach, K Line will need to confirm, honestly and truthfully, in writing that it will, during Period 3, be providing Kemball with the minimum job offers set out in clause 2 of the Agreement. In the event that K line cannot provide that confirmation, Kemball will be entitled to terminate the Agreement forthwith on the basis that the breach(es) is/are incapable of remedy.
>
> We anticipate that K line will be unable to remedy this breach: it is no longer the UK agent of the liner business of the Kawaskai Kisen Kaisha Ltd (or its successor, ONE) and has

> thus disabled itself from performing the Agreement. However we await your urgent response to this contention."

The substance of what was being alleged is set out in the second paragraph, where two points are made – firstly it was alleged that the defendant would not in the future be complying with its clause 2 obligations in relation to Period 3 and secondly that there had been persistent and/or material and/or repudiatory breach(es) of clause 2 of the Agreement. As to the first of these points, as I have explained, the defendant's obligation under clause 2 was that set out in clause 2.2(a) – to offer the claimant no fewer that the Daily Minimum number of Jobs per day and the " *... sole and exclusive ...*" remedy agreed in respect of a failure to do so was to pay a surcharge calculated in accordance with clause 3.3 in respect of any Shortfall Months. The allegation that there "*have been persistent and/or material and/or repudiatory breach(es) of clause 2* …" is unexplained and unparticularised. This letter ignored entirely the point made in the letter of 12 March 2018 namely that the defendant intended to comply with its obligations under clause 3.3.

12. The 16 April letter was acknowledged by the defendant by an email of 19 April 2018, in which it was stated that:

> "Since it appears you intend to "go legal", I don't think it is appropriate for me to address each of the contentious remarks you have made at this stage.
>
> Having said that, I don't consider that K-Euro has been or is in "persistent" or "material" or "repudiatory" breach of the [SA]. I note you do not specify what you mean by that. Indeed, I am not aware that K-Euro is in breach at all.
>
> Nor do I understand what you mean when you say K-Euro has "disabled itself" from performing the SLA. Could you please explain?"

The claimant purported to give effect to its Notice by its letter to the defendant dated 22 May 2018, which was in these terms:

> "We refer to the attached letter of 16 April 2018.
>
> On behalf of James Kemball Limited, we hereby give you written notice that we forthwith terminate the Service Agreement dated 22 April pursuant to Clause 11.3{a) of this Agreement. You are in anticipatory repudiatory breach of the Agreement and have failed to remedy this breach within 30 days of our client's letter of 16 April 2018. This entitles James Kemball Ltd. to terminate the Service Agreement and we hereby terminate the Agreement.
>
> Please confirm that your solicitors, MFB, have authority to accept service of proceedings by Wednesday 23 May, failing which proceedings will be served directly on you."

The significance of this letter is that although it asserts that the defendant is in anticipatory repudiatory breach of the SA, it purports to terminate the SA not for wrongful repudiation at common law, but pursuant to clause 11.3(a) of the SA. It is also significant that this letter did not attempt to answer the points made in the 12 March or 19 April letters. Finally, it no longer made any reference to the allegation made in the 16 April Notice email that there "*have been persistent and/or material and/or repudiatory breach(es) of clause 2* …" Thus, the claimant's case on termination is based exclusively on an assertion it was entitled to terminate the SA under clause 11.3(a) by reason of an alleged anticipatory repudiatory breach of clause 2.2 of the SA, which the defendant had failed to remedy within 30 days as required by the 16 April Notice email.

13. I have not referred to any of the internal correspondence within the defendant because it is obviously not material either to the construction of the SA, or to whether the defendant should be treated as having anticipatorily repudiated the SA or the claimant was entitled to terminate the SA as it claimed to have done - something that depends on the true construction of the relevant provisions of the SA, the communications between the parties and the actions of the defendant.

Liability Issues

14. It is common ground that the liability issues that arise primarily turn upon the true construction of the SA. The principles that apply to the construction of a contract are well known. In summary:

    i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

    ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 21;

    iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 17;

    iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40; and

viii) A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11. As Lord Leggatt JSC held at paragraph 108 of his judgment in Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29; [2021] AC 1148 the *"... modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation"*.

15. I am satisfied (indeed it is not disputed) that the SA is a professionally drawn document entered into at a time when both parties were legally represented and therefore should be interpreted principally by textual analysis save where a provision lacks clarity or is apparently illogical or incoherent, applying the principles summarised in sub paragraphs (vii) of the applicable construction principles set out above.

16. Neither party sought to rely on any contextual evidence in aid of the construction of the SA other than what is set out within the four corners of the SA itself.

17. For these reasons, I conclude that the construction of the SA should be approached by reference to the natural and ordinary meaning of the provisions being construed, considered in the context of any other relevant provisions of the SA, and bearing in mind the overall purpose of the provision being construed and the contract in which it is contained. Commercial common sense was relied on by Mr Jacobs in the course of his submissions. However, that concept is relevant only in the limited sense identified in (vi) above. It is not a mechanism by which the natural meaning of a provision should be rejected because, with hindsight and by reference to events that have happened since the SA was concluded between the parties, a provision within it appears imprudent from the perspective of the claimant, nor is it a basis for avoiding how the parties chose to allocate risk at the date when they entered into the SA. The relevant risks so far as the parties were concerned were (a) the risk that the defendant would not supply the minimum number of Jobs agreed and (b) the risk that the claimant would refuse to carry out the maximum number of Jobs it had contracted to carry out. Both those risks were addressed by agreement between the parties.

18. As I have explained, the claimant sought to invoke the express termination machinery within the SA. It did not seek to terminate the agreement relying on any common law rights that it might have had outside the four corners of the SA. Thus, no issue arises as to whether it might have been able to take advantage of such a principle and I express no conclusions, provisional or otherwise, about it. Mr Jacobs submitted that the effect of the SA is that clause 11 sets out an exhaustive code for the termination of the SA. He relies on this point as justifying a construction of clause 11.3(a) as extending to an anticipatory breach of contract. I return to this point later.

19. Clause 11.3 permits termination by notice for one or more of the grounds identified in that clause. The notice relied on by the claimant – being its email to the defendant of 16 April 2018 - relies exclusively on clause 11.3(a), which provides that a party could terminate the SA by giving written notice " … *if the other Party commits a wilful, persistent or material breach of any provision of this Agreement*." I suggested in the course of the argument that the claimant might also or alternatively have relied on clause 11.3(d), which entitles a party to terminate where the other party " *… threatens to cease to carry on business …"*. However, no attempt was made by the claimant to rely on that provision in either of its notices, nor has it attempted to rely on it in its pleadings. That point does not arise therefore and I say no more about it.

20. I should make clear however that I reject Mr Jacobs' submission that it would have been difficult or impractical to serve a notice that both purported to accept a repudiation at common law as well as purporting to rely on a contractual termination mechanism. The serving of such notices without prejudice to the effect of the other is a well-recognised and used technique. Similarly, there would have been no difficulty in serving a notice under clause 11.3 that invoked different sub-paragraphs within clause 11.3 in the alternative.

21. In circumstances where the claimant has not sought to rely on wrongful repudiation at common law or on any provision within clause 11.3 other than sub-paragraph (a), it follows that the claimant must bring itself within clause 11(3)(a) or fail in its claim. In this context it is common ground that the defendant offered the minimum number of Jobs required by the SA to the claimant during April 2018.

22. Applying the principles set out above, I am satisfied that it is necessary for a party relying on clause 11.3(a) to be able to show that the other party was in " … *wilful, persistent or material breach …"* of a provision of the SA at the date when that party gives notice if it is to succeed. In this case that means that the claimant must show that is so on 16 April 2018, when it purported to give notice under clause 11.3. I reach that conclusion because clause 11.3(a) is not expressed to apply to events that are prospective. This is the effect of the word "*commits"* as defining the trigger for the giving of a notice. This is the approach that has been adopted in relation to sub paragraphs (b), (c) and (e). This formulation is to be compared and contrasted with the reference in sub paragraph (d) to "… *threatens to cease …*". This contrast in drafting techniques shows that where the parties wanted to confer a power to terminate for prospective as opposed to present or past conduct they adopted language that made that clear. Had the parties wished to replicate the common law in relation to anticipatory breaches of contract as being a ground of termination under clause 11.3 they could with ease have drafted the clause so as to have that effect, either by broadening the scope of sub-paragraph (a) or by including a separate sub-paragraph. They did neither of these things.

23. I have considered whether Mr Jacobs is right to submit that I should take a different view because clause 11 on its proper construction excludes reliance on the common law of repudiation. I am not convinced that is the effect of this provision, not least because where the parties considered a provision should provide a sole and exclusive remedy they so expressed themselves. However, I am prepared to proceed for present purposes on the assumption that Mr Jacobs is correct without finally deciding the point. In my judgment this submission does not assist. The language used by the parties is clear and unambiguous. As I have explained, where the parties wished to extend the right to terminate to prospective events they did so expressly. The availability or otherwise of the common law of repudiation is not a reason for coming to a different conclusion than I have concerning the effect of the plain language used by the parties.

24. Mr Jacobs placed some reliance on authorities that establish that an anticipatory breach of contract is to be treated as a breach of contract – see by way of example Moschi v. Lep Air Services Limited [1973] AC 331. However, that case was not concerned with a contractual termination mechanism but with the common law of wrongful repudiation. What comes within the scope of an express power to terminate a contract depends on its true construction applying the principles set out earlier. It does not follow that because anticipatory repudiation is treated as a repudiatory breach for the purposes of the common law doctrine of wrongful repudiation, the parties are to be treated as having adopted a similar approach when adopting a contractual mechanism that is clearly confined to actual breach, particularly where the parties have shown themselves ready and willing to incorporate prospective events where they have considered it appropriate to do so. No authority was drawn to my attention which has this effect. The analysis also breaks down for the reasons considered at T3/51/19-52/14.

25. Mr Jacobs places some reliance on Afovos Shipping Co SA v Romano Pagan and Pietro Pagnan [1983] 1 WLR 195. In my judgment that authority does not assist the claimant in the circumstances of this case. That case was concerned with the effect of a provision within a time charter that gave the owner the right to give 48 hours' notice

of withdrawal of the vessel if hire that was due but unpaid when notice was given was not paid within the 48 hour period of notice. Notice was given before the time for payment had expired. Even though it was accepted that the sum could not be paid by the time when notice could have been given because it would have expired when the relevant banks were closed for business, the notice was nonetheless held to be of no effect. It was held by both the Court of Appeal and House of Lords that the particular clause took effect in accordance with its terms and anticipatory breach was of no relevance. In so far as it is material, this authority supports the defendant's not the claimant's case.

26. Mr Jacobs relies on business common sense as leading to a different conclusion from that I have identified above. I have addressed the limits that apply to a submission of this sort when summarising the law above and do not need to repeat it. The underlying basis for this submission is that if it is correct then the claimant would have to wait for more than one breach to occur, then give 30 days' notice, in order to satisfy the requirement the breach relied on was persistent. This last point is wrong in the sense that the requirement for any breach to be persistent is disjunctive from the requirement that it be either wilful or material. Thus, a breach which is either material or wilful does not also have to be persistent.

27. More generally, the suggestion that the construction to which I have referred is uncommercial is mistaken in my judgment. First, if the effect of the clear words used by the parties is that the power to terminate is not available unless and until the other party has committed a breach which is either wilful or persistent or material, then there is no basis for not giving effect to the bargain of the parties. As I have said in the summary of applicable construction principles set out earlier, "… *commercial parties are free to make their own bargains …*" and effect must be given to the language used. That principle is illustrated by Afovos Shipping Co SA v Romano Pagan and Pietro Pagnan (ibid.) and, in this case as in that, is the effect of the unambiguous language the parties have chosen to use.

28. Secondly, commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made. It no doubt appears to the claimant, in the events that have happened, to be contrary to commercial common sense for it to have to conduct itself in the manner Mr Jacobs submits is uncommercial, but that is very different from how reasonable people in the position of both parties would have seen the situation at the date when the contract was entered into. It is by no means obvious why it would lack common sense for commercial parties to decide that one of them could not terminate the SA unless a relevant breach had occurred. Indeed, it may have made real commercial sense for such a provision to be included so as to prevent a termination unless a breach had actually occurred, as opposed to a party concluding that one might or would be committed in the future as a means of bringing a contract to an end in that party's own interests. Finally, for the reasons that I set out below, I do not accept that what has occurred is a breach that comes within the scope of clause 11.3(a) in any event.

29. I now turn to a point that I drew attention to when setting out the relevant correspondence between the parties leading to the notices of 16 April then 22 May 2018.

30. The only provision which it is alleged the defendant would breach by reason of the transfer of business to ONE is clause 2.2. Clause 2 contains the subheading "*Service Commitment"*. The only obligation imposed on the defendant by clause 2.2 is that set out in clause 2.2(a) – that is to offer no fewer that the Daily Minimum number of jobs referred to in clause 2.1, which for Period 3 was 72 per day. If that provision was viewed in isolation, then if it was breached either wilfully or persistently or materially, that might have entitled the claimant to serve notice under clause 11.3(a) as and when such a breach had occurred. However, that provision cannot be read in isolation. It must be read together with clause 3.3, as compared and contrasted with the very different provisions set out in clause 4.4. So read, in my judgment it is plain that the parties did not intend that a breach of clause 2.2(a) would entitle the claimant to invoke clause 11.3(a). My reasons for reaching that conclusion are as follows.

31. First, clause 3.3 provides that the claimant's "*... sole and exclusive remedy ..."* for breach of the clause 2.2 obligation "*… shall be to levy a surcharge in respect of that month* …" to be calculated in accordance with the formula set out in that clause. In my judgment a provision to the effect that the sole and exclusive remedy for a failure to provide the Jobs guaranteed under the SA is the payment of a surcharge is entirely inconsistent with it being contemplated by the parties at the time the SA was entered into that the claimant would be entitled to terminate for such a breach. Clause 3.4, which provides for the claimant to invoice the defendant for payment of the surcharge is consistent with this analysis.

32. Secondly, there is a plain and very clear contrast between on the one hand clauses 2.2(a) and 3.3 (which govern the defendant's minimum service obligation to the claimant and the claimant's remedy for non-compliance) on the one hand and clause 4 (which governs the defendant's remedies in respect of Jobs that are deemed accepted by the claimant but not performed). The default remedy is a financial charge imposed by clause 4.3. By clause 4.4 however, it was agreed that where there were two or more Shortfall Months in any 12-month period, then:

> "Without prejudice to any of K-Line's other rights or remedies, in the event that there are two JKL Shortfall Months in any 12 month rolling period, then upon the occurrence of such second JKL Shortfall Month, JKL shall be deemed to be in material breach of this Agreement for the purposes of clause 1 l .3(a) and K-Line shall be entitled to terminate this Agreement forthwith at any time thereafter, without notice"

This provision is significant to the issues that arise on this claim for a number of separate reasons. First, both clause 3.3 and 4.4 are written in clear and unambiguous terms in a professionally drawn contract between parties who were professionally represented when the contract was being drafted. Secondly, it is clear that when entering into the SA the parties were focussed on what was to happen in the event that the defendant failed to provide the guaranteed number of Jobs or the claimant failed to perform a significant number of the Jobs that it accepted or was deemed to accept and chose to manage the risk posed by each of these possibilities in different ways. In consequence, whilst the parties chose to treat the contract as a continuing one with provisions for a sole and exclusive remedy in the event the minimum number of Jobs were not provided to the claimant, they chose to adopt a different approach in relation

to failures by the claimant to carry out accepted Jobs. Fourthly, the terms of clause 4.4 shows the parties understood that where appropriate a breach could be deemed to be a material breach so as to trigger a right to terminate under clause 11.2(a).

33. The parties were fully entitled to approach each risk differently and having agreed to that approach should be held to their bargain. It may well be that the sole and exclusive remedy provided by clause 3.3 is perceived to be inadequate so far as the claimant is concerned. The terms of the letter of 1 March 2018 suggests that is how it perceives it to be, as does the apparent extravagance of this claim as it was pleaded originally. However, that is nothing to the point. Commercial absurdity (if that is what is alleged to be the effect of holding the claimant to its bargain) is not to be judged at any date after the date when the contract concerned was entered into, nor is it to be judged from the point of view of one party but not the other, and in any event, is relevant only to the extent that the language used by the parties in their agreement is unclear or capable of bearing two meanings. That is not this case. It is not the function of a court when construing a contract to relieve a party from what it perceives to a bad bargain or to have become one in the events that have happened by hunting for ambiguities that in reality do not exist. In this agreement the parties have chosen to manage the risk that the defendant would not provide the guaranteed minimum number of Jobs by a contractual compensation mechanism and have done so in clear and unambiguous terms. They might have formulated clause 3.3 in similar terms to those adopted in clause 4.4 but they chose not to do so. There is no basis for the phrase "*… sole and exclusive remedy …"* to be ignored or for concluding that it should not take effect in accordance with its terms.

34. Mr Jacobs argued that the effect of the opening words of clause 2.2 ("*… for so long as this Agreement continues …"*), implied that the parties recognised that the claimant might terminate the SA by reference to clause 11.3(a) for non-compliance with clause 2.2. I do not agree. All that this phrase is designed to achieve is to make clear that the obligations of the parties under clause 2.2 do not survive the termination of the SA. It says nothing at all about whether it was open to either party to terminate for the other's non-compliance with the obligations imposed in particular by clauses 2.2(a) and (b). As I have explained already, breach of clause 2.2(a) is addressed expressly and in clear and unambiguous terms by clause 3.3.

35. In summary therefore I conclude that the claim fails because:

    i) The remedy provided by clause 3.3 for a failure on the part of the defendant to comply with clause 2.2 has been agreed to be the sole and exclusive remedy available to the claimant;

    ii) In consequence the contractual right to terminate under clause 11.3(a) (assuming it was otherwise as a matter of construction available) was not a remedy available to the claimant in respect of a breach of clause 2.2;

    iii) Had the defendant acted in breach of clause 3.3 by failing to pay as provided for in that clause that may have enabled the claimant to rely on clause 11.3(a), if such failure was either wilful or persistent or material, but not merely did the defendant not breach clause 3.3, but it did not threaten to do so. On the contrary, before service of the 16 April Notice, it said in terms that it intended

to comply with that provision – see the letter of 12 March 2018. It had not either failed, or threatened not, to comply with it either prior to 16 April or at all;

iv) On its true construction, clause 11.3(a) could be triggered only if a breach had occurred at the time when the notice referred to in its first line was given and that was not and is not alleged to have been the position at the date when the relevant notice (that of 16 April 2018) was sent to the defendant;

v) Leaving to one side whether the claimant might have been entitled to rely on anticipatory repudiatory breach if it had purported to accept a repudiatory breach of contract as bringing the SA to an end at common law (something which is questionable having regard to the terms and effect of clause 3.3 and the defendant's expressed willingness to comply with that provision), that is not something it was entitled to rely on as a trigger for a notice under clause 11.3(a) for the reasons summarised in (iv) above; and

vi) In any event, the defendant had made clear by its letter of 12 March 2018, that it intended to comply with the SA and in particular with its obligations under clause 3.3. It could not be said that what was to happen from the date when ONE took over operations from KKK would have the effect of depriving the claimant of substantially the whole benefit which it was the intention of the parties that the claimant should obtain, because the benefit he was entitled to was the provision of the minimum number of Jobs as provided for in clause 2.2(a) and in default the payment provided for in clause 3.3. For that reason, the SA was not repudiated nor had the defendant threatened to repudiate it.

36. In those circumstances it is not necessary that I address the quantum issues that arise at all since they are academic in the circumstances. However, I address them shortly in the next section of this judgment because the issue was argued in full.

The Quantum Issues

37. This part of the judgment proceeds on the counter factual basis the claimant was entitled to terminate the SA under clause 11.3(a). Nothing I say hereafter is intended to derogate from my dismissal of this claim for the reasons set out above.

38. Had it been necessary to do so, I would have considered that damages would be at large. Mr Collins KC argues that the effect of clause 3.3 is to restrict the damages that would otherwise be recoverable for breach of the clause 2.2 obligation. In my judgment that submission is mistaken given the terms and effect of clause 12.2 of the SA, which provides that:

> "Upon the termination of this Agreement for any reason … any rights or obligations to which any of the Parties to this Agreement may be entitled or be subject before its termination shall remain in full force and effect <u>where they are expressly stated to survive such termination</u>" [Emphasis supplied]

There is no provision within the SA that provides that clause 3.3 survives termination. On the other hand, by clause 12.3 of the SA: "… *termination shall not affect or*

prejudice any right to damages or other remedy which the terminating Party may have in respect of the event giving rise to the termination …". The effect of these provisions in my judgment is therefore that if the claimant was entitled to terminate for breach under clause 11.3(a), then the sole and exclusive remedy provided by clause 3.3 ceased to apply (because it was not expressly preserved) but the claimant's right to damages for breach was preserved. The result is that damages are at large.

39. Turning to what might be recovered as damages in this counter factual world, it is necessary to start from first principles. As Mr Collins submits, those principles are accurately summarised in Chitty on Contracts, Volume 1 at paragraph 29-001:

> "The claimant is, as far as money can do it … to be placed in the same position as if the contract had been performed. This implies a "net loss" approach in which any gains made by the claimant as the result of the breach (e.g. savings made because he is relieved from performing his side of a contract which has been terminated for breach …) must be set off against his losses arising from the breach (after he has taken reasonable steps to minimise those losses). In assessing damages for breach of contract, the court can take account of only the defendant's strict, legal obligations: it cannot take account of:
>
> > "… the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do."
>
> Thus, if the contract-breaker had a choice of alternative methods of performance, damages will be assessed on the basis of his minimum legal obligation, viz on the alternative which would have been least onerous, or most beneficial to him…"

40. The debate between the experts, which generated numerous and extensive reports, was designed to give effect to these basic principles. Had the debate not narrowed this would have resulted in a very lengthy judgment, analysing a large number of assumptions and calculations. However, as I indicated at the start of this judgment, by the end of the trial, the issues between the parties, on the assumption that the claimant was entitled to recover damages and that damages were at large, were very narrow.

41. Mr Jacobs indicated that with three exceptions, the claimant accepted Mr Scrivener's assessment as set out in the table at paragraph 10.3 of his report ("Table"). I reproduce the Table below since all the closing submissions made on behalf of the claimant were advanced by reference to it and the underlying reasoning leading to the figures set out in it:

	Period Two *(basis period)* £	Period Three *(actual)* £	Period Three *(lost profit)* £	Period Three *(but for)* £
Haulage revenue	25,541,689	19,308,300	5,682,858	24,991,158
Reload revenue	966,085	206,711	478,152	684,863
Reposition revenue	330,067	287,495	45,448	332,943
Subcontractor diesel fuel sales	211,503	81,204	53,575	134,779
Other revenue	275,116	315,022	(154,690)	160,332
Total revenue	**27,324,460**	**20,198,732**	**6,105,343**	**26,304,075**
Fuel	(7,676,252)	(6,196,277)	(1,943,032)	(8,139,309)
Wages and salaries	(10,251,321)	(7,718,328)	(2,310,098)	(10,028,426)
Vehicle costs	(6,787,621)	(5,767,672)	(829,917)	(6,597,589)
Other direct costs	(540,768)	(520,418)	-	(520,418)
Subcontractor costs	(2,860,323)	(824,361)	(667,343)	(1,491,704)
Total direct costs	**(28,116,285)**	**(21,027,056)**	**(5,750,390)**	**(26,777,446)**
Gross profit	**(791,825)**	**(828,324)**	**354,953**	**(473,371)**
GP%	*-2.9%*	*-4.1%*	*5.8%*	*-1.8%*
Wages and salaries	(1,726,550)	(1,374,481)	(157,553)	(1,532,034)
Motor expenses	(119,253)	(89,712)	-	(89,712)
Premises expenses	(865,063)	(751,640)	-	(751,640)
HP vehicle charges	(41,621)	(36,491)	(2,260)	(38,751)
Other indirect charges	(1,385,720)	(783,652)	-	(783,652)
Total indirect costs	**(4,138,207)**	**(3,035,976)**	**(159,813)**	**(3,195,789)**
Profit before tax	**(4,930,032)**	**(3,864,300)**	**195,140**	**(3,669,160)**

42. The three figures challenged were (a) vehicle costs, which it was submitted should be reduced by £332,239, (b) sub-contractor costs, which it was submitted should be reduced by approximately £20,000 with a consequential reduction of revenue from sub-contractor diesel sales to £52,039 and (c) other revenue, which it was submitted should be reduced by £19,582. The combined effect of these adjustments if permitted is to increase the sum recoverable by way of damages from £195,140 to about £562,000 odd.

43. Before turning to those issues it is necessary to determine one point that surfaced in the course of Mr Collins' oral closing submissions. He submitted at T3/79/16, correctly, that it was " … *common ground that the defendant offered the minimum number of jobs in April* …". I agree. I also agree that it is not open to the claimant to contend otherwise for the reasons identified by Mr Collins at T3/79/17-20. I agree that in consequence it is not open to the claimant to recover anything for the month of April, whether under clause 3.3 or otherwise.

44. The next point that arises concerns whether reloads and re-positions are to be treated as separate jobs or as part and parcel of a single originating Job. The defendant's case on this issue was always that on a proper construction, both reloads and repositions are Jobs and should count towards the minimum number of Jobs in the calculation of the Claimant's loss. As Mr Collins submitted in his closing oral submissions, the effect of Mr Jacobs' closing submissions was that the claimant had abandoned its

pleaded case that reloads and repositions were not separate jobs and that the defendant's case on this issue was correct. The Table proceeds on this assumption. This led Mr Collins to submit that "*... what is sauce for the goose is also sauce for the gander ...",* that the claimant had made a tactical retreat from its case and therefore there was no reason why the defendant should not be permitted to. The reason for this unprincipled submission is that if it is adopted then the end point on the defendant's damages calculation is not £195,140 that appears in the Table but the lower figure of £148,214. I have no hesitation in rejecting this submission. Had the defendant wanted to adopt the claimant's arguments on this issue on any principled basis it could and should have done so weeks or months ago. Its own arguments lead to the conclusion that Mr Jacobs has implicitly if not explicitly accepted. I am unimpressed by the defendant's attempted *volte face* and I reject it.

45. It is now necessary to consider each of the challenged elements in more detail. Turning first to vehicle costs, Mr Scrivener's detailed workings leading to the total he sets out in the Table was summarised in yet another table at Appendix 17 to his report. This contains a column for Period 2 and Period 3. This included an element for "*Maintenance & Tyres"*:

> "Maintenance & tyres [P2] 1,240,357 [P3] 1,157,554"

The figure for P2 was said to be an actual figure and P3 was a figure derived from some management accounts. Mr Jacobs cross examined Mr Scrivener in relation to this issue by reference to a table at Appendix 21 in his report. The issue became somewhat bogged down in the various different tables but in summary, what Mr Jacobs put to Mr Scrivener in cross examination is that the Period 3 mileage figure was misstated so that the Maintenance and Tyres figure was understated by about £200,000 – see T2/160/13. Mr Scrivener accepted this was so mathematically – see T2/160/18 and 161/20. Mr Jacobs submits, and I do not think it is in issue, that the effect of this adjustment mathematically is to increase the sum recoverable by the claimant by £204, 815. The sense test that Mr Jacobs applies to show that Mr Scrivener rightly conceded the point is that without this adjustment the estimated maintenance costs for Period 3 were higher than for Period 2, but on a sharply reduced total mileage. Mr Jacobs submits that cannot be correct. There were other vehicle costs where a similar point arose and was cross examined on with similar result. In the end, Mr Jacobs submitted that the effect of this was or should be to reduce the vehicle cost line in the Table from £829,917 by £332,239.

46. Turning now to sub-contractor costs, reduced to its bare essentials, Mr Jacobs criticised Mr Scrivener because he used an extrapolated cost per mile to arrive at his figures rather the lower actual figure for Period 3 as extracted from the management accounts of the claimant for that period. He submits also on the evidence the average length of each Job in miles was longer in Period 3 than it was in Period 2, which means the cost per mile was lower. The effect of this if carried into the Table is to reduce the Sub Contractor costs to £647,918 from £667,343. A consequence of this that the revenue from sub-contractor diesel sales drop from £53,575 to £52,039.

47. Mr Collins submits that it is not open to the claimant to accept Mr Scrivener's figures but not his methodology and that his figures as set out in the Table should be not merely be the starting but the end point for this debate.

48. Turning first to the sub-contractor costs, Mr Collins submits that Mr Jacobs is wrong to submit that the figure in the Table should be adjusted, essentially on the basis that to adopt the claimant's contention would be to cease comparing like with like. Mr Collins submits that the cost per mile will be lower for longer distance Jobs. This means that it is wrong in principle to derive the cost per mile from Period 3 – where the Jobs were shorter than those actually undertaken in Period 2 – and then apply that figure to the work profile derived from Period 2. There is an issue too about the impact of the treatment of repositions and reloads.

49. In my judgment there is a real difficulty in attempting to apply a different methodology to some elements that make-up the deduced loss of profit but not others. It is also wrong in principle to attempt to apply a cost per mile figure derived from one period of performance parameters to the work done in another period. I am not satisfied therefore that Mr Jacobs is correct in the point he makes in relation to this issue. In relation to vehicle costs element, Mr Collins submits this point should be rejected as well for a variety of different reasons. Of these points, the one that it seems to me is most material is the absence of any investigation or evidence that addresses the question of whether the cost base for Period 3 increased for any real-world reasons when the financial information that is available suggests that in real terms the costs incurred in Period 3 were higher than in Period 2. Whilst Mr Scrivener was prepared to accept the mathematical point put to him in cross examination, that does not in any way address this point.

50. In any event, in relation to each of these elements there is an air of unreality about the way in which these submissions have been formulated. Various items have been selected from the Table and then a different methodology has been applied to the calculation of the sums concerned from that adopted by Mr Scrivener, without applying the same revised approach to various other relevant heads. In the course of their closing submissions, counsel for the defendant provided a schedule that applied the claimant's revised methodology to fixed costs lines – Road Tax, Vehicle Insurance, Maintenance and Tyres, Trailer and Vehicle hire and other direct costs. I have reproduced this schedule as the Appendix to this judgment. Applying that methodology resulted in variations to the sums concerned that exceeded the adjustments that Mr Jacobs submitted ought to be made. This illustrates the real difficulty of such an approach. It is not appropriate or fair for any conclusions to be reached by reference to the two heads identified by Mr Jacobs – vehicle maintenance and sub-contractor costs – on the overall loss of profit that has been suffered.

51. Finally, I turn to the Other revenue figure, which appears in the Table at £154,690. This was income realised by the claimant from leasing out trucks from its fleet. The issue here is that Mr Scrivener has included leasing revenue for April. It was submitted by Mr Jacobs that this was wrong in principle since the contract was still being performed in April and so there is no reason to suppose that this income could not have been earned as well as performing the SA. Further, since termination did not occur until 22 May, the income derived from leasing out trucks should not be taken into account because there is no duty to mitigate prior to the breach or acceptance of a repudiatory breach. The defendant did not breach clause 2.2 in April. In the result, Mr Jacobs submits that this element should be reduced by £19,582 to strip out the April lease income.

52. In principle Mr Jacobs is correct. Since no loss occurred before 22 May, it follows that the loss of profit for which damages is recoverable is for the period starting on that date not the earlier date of 1 April, when Period 3 started to run. Mr Collins accepts that if this methodology had been adopted then the hire income for April would drop out of the equation. However, the point he makes is that both experts have approached quantification on the basis that loss is to be assessed by reference to the whole of Period 3. Mr Collins submits that if this is the methodology or convention that has been adopted, then it would be wrong in principle to ignore the rental income for April whilst calculating loss by reference to that month. I agree. Had the sums involved been larger and had the issue been one of importance I would have held that damages could not be calculated by reference to any period other than a period starting on 22 May. It strikes me that the impact on this might have been taken account of by a process of apportionment. However, both sides wish to stick with the approach that the experts have adopted. On that basis, the point made by Mr Jacobs is wrong, as he implicitly acknowledged in his closing submissions – see T3/115/11-15.

53. In the result, had it been necessary for me to have assessed damages on the basis that damages were at large, I would have assessed them at £195,140.

Conclusion

54. For the reasons set out at paragraphs 14-36 above, I dismiss the claim. Had I concluded that the defendant was liable to the claimant for breach of contract, I would have rejected the defendant's submission that damages should be assessed by reference to the clause 3.3 formula for the reasons set out in paragraph 38 above, and would have assessed damages in the sum of £195,140, for the reasons set out in paragraphs 39 to 51 above.

APPENDIX

Examples of Vehicle Costs Line Items [C1/166]	P3 Actual [C1/166]	P3 Cost Saving	P3 But For (Actual + Cost Saving)	P2 Actual [C1/166]	Difference
Road Tax	£158,468	£30,959 [C1/171]	£189,427	£272,855	-£83,428
Vehicle Insurance	£625,311	£32,051 [C1/171]	£657,362	£690,812	-£33,450
Maintenance & Tires	£1,157,554	£287,618 [C1/171]	£1,445,172	£1,240,357	£204,815
Trailer Hire and Vehicle Hire	£2,721,406 (£437,188 + £2,284,218)	£191,242 [C1/115, para 7.5.9]	£2,912,648	£3,321,032 (£622,057 + (£2,698,975)	-£408,384
Other direct costs	£554,108	£127,424 [C1/166 and 171][1]	£681,532	£549,684	£131,848