IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 491 OF 2016

BETWEEN

HENRY PACHIDOLO AND 302 OTHERS.....CLAIMANTS

AND

MOTA ENGIL ENGENHARIA CONSTRUCAO E AFRICA, SA.....DEFENDANT

Coram; Hon Mr. D. Justice Madise

Mr. Kazembe for the Claimants

Mr. Chagoma for the Defendant

Mr. Mathanda Court Clerk

JUDGMENT

Madise, J

Introduction,

1. The Claimants in this matter took out a writ of summons against the Defendant claiming damages for negligence, The Claimants were at all material times the residents of Matsinde Village and Mtambalika Village in Traditional Authority Chigaru's area in Blantyre District. The Defendant was at all material times a construction company carrying out quarrying activities at Zalewa Mgodi quarry mine in Traditional Authority Chigaru's area in Blantyre District.

Particulars of negligence

a. Failure to pay the Claimants on time and as agreed.
b. Disturbance to the Claimants' farming activities and to their families.
c. Forcing the Claimants to run away from their homes with their children and their animals.

Particulars of loss

i. The Claimants were unable to live in their homes peacefully.
ii. The Claimants failed to do farming in their gardens.
iii. The Claimants failed to do business.
iv. The Claimants' children failed to attend school.
v. The Claimants incurred expenses and lost energy and time transferring their families and animals every time a blast occurred.

AND the Claimants claim:

a) Damages for nuisance

b) Damages for noise pollution

c) Damages for exposure to noxious fumes

d) Damages for trespass

e) Damages for mesne profits

f) Damages for loss of amenity value in the Plaintiffs' land

g) Payment of the sum MK 1,120, 987,500.00 ;

h) Interest on said sum MK 1,120, 987,500.00 ;

i) Indemnity of collection costs.

j) Costs of this action.

The Defendant's defence

2. In their defence the Defendant denied the above claims but they made the following admissions and observations:
   a. That the Defendant entered into agreements with some members of the surrounding community requiring the members of the community to leave their houses temporarily and that they would be paid an agreed amount.
   b. That the Defendant paid the sums stated in the agreements
   c. That if the Claimants suffered any loss, damage or inconvenience as a result of the Defendant's mining operations then it was an inevitable result of the mining operations
   d. That the Defendant was a holder of a mining licence issued by the Malawi Government.
   e. That the Defendant was issued a blasting licence under the Explosives Act of Malawi.
   f. That the Defendant used reasonable care and skill such as employing skilled operators and alerting members of the surrounding communities of any blasting.

g. The Defendant called on the Claimants to prove the allegations as laid out in the statement of case.

The Evidence

3. The Claimants summoned six witnesses. The first to testify was Frank Harrison (CW1) an adult of Masinde village, Traditional Authority Chigaru in Blantyre. He stated that he was one of the Claimants in this matter and who were at all material times the residents of Matsinde Village and Mtambalika Village in Traditional Authority Chigaru's area in Blantyre District and that the Defendant was at all material times a construction company carrying out quarrying activities at Zalewa Mgodi quarry mine in Traditional Authority Chigaru's area in Blantyre District.

4. That in or around 2012 the Defendant started carrying out quarry activities at Zalewa Mgodi quarry mine without conducting any sensitization activities on the impact of their quarry activities on the surrounding villages and all the Claimants herein were not told of the impending quarry activities, the impact and the effects of the quarry activities and how to mitigate the dangers and effects of the quarry activities. That before the Defendant started its quarry activities at Zalewa Mgodi quarry site none of the Claimants had complained to any authority that quarry stones, bad smell, noise and dust had been coming from the direction of the Defendant's quarry site

5. That all the Claimants herein have persistently complained to the Traditional Authority, District Commissioner that quarry stones, bad smell, noise and dust have been coming from the direction of the Defendant's quarry site and the quarry stones, bad smell, noise and dust that was coming from the direction

of Defendants quarry site was so dangerous and greatly inconvenient to the Claimants. That the Defendant was not at all material times spraying water on the ground at the quarry site and on all the roads in the surrounding quarry site in order to deal with the dust arising from quarry activities.

6. That the Defendant was ordering all the Claimants herein to be fleeing their homes with their animals, every time the Defendant was carrying out blasting. That in or around July, 2014 the Claimants entered into agreements with the Defendant. The agreements stipulated that the Claimants should be fleeing their homes with their animals every time the Defendant would be blasting stones and that the Claimants would return to their homes when the Defendant had finished blasting the stones. The agreement also stated that the Defendant should pay compensation to the Claimants every time they fled from their houses including the times the Claimants had fled from their houses before the agreements were entered into. I exhibit hereto copies of the agreement marked "FH1 to FH43"

7. That the Claimants and their animals fled 151 times from their houses during the period the Defendant was carrying out quarry activities at Zalewa Mgodi quarry mine. The Defendant carried out 151 blasts and the Defendant did not at all material times pay compensation to the Claimants in respect of any damages that occurred due to the blasting activities. The Defendant only paid once out of the 151 times the Claimants had fled from their houses with their animals. That the Defendant agreed to be paying the MK 20 000.00 per person as compensation for inconvenience each time the Claimants fled from their homes or per blast. There are 340 Claimants and the Defendant was supposed pay the Claimants MK 6,800,000.00 per blast.

8. That the Defendant agreed to be paying MK 2 000.00 per goat as compensation for inconvenience each time the Claimants fled from their houses with their goats or per blast. The Claimants had 110 goats and the Defendant was supposed to pay the Claimants MK 220, 000.00 per blast. The Defendant agreed to be paying MK 1 250.00 per chicken as compensation for inconvenience each time the Claimants fled from their houses with their chickens or per blast. The Claimants had 229 chickens and the Defendant was supposed to pay the Claimants MK 286, 250.00 per blast.

9. That the Defendant agreed to be paying MK 10, 000.00 per cow as compensation for inconvenience each time they fled from their houses with their cattle or per blast. The Claimants had 3 cattle and the Defendant was supposed to pay the Claimants MK 30, 000.00 per blast. The Defendant agreed to be paying MK2 000.00 per pig as compensation for inconvenience each time the Claimants fled from their houses with their pigs or per blast. The Claimants had 31 pigs and the Defendant was supposed to pay the Claimants MK 62,000.00 per blast.

10. That the Defendant agreed to be paying MK1 250.00 per duck as compensation for inconvenience each time the Claimants fled from their houses with their ducks or per blast. The Claimants had 2 ducks and the Defendant was supposed to pay the Claimants MK 2,500.00 per blast. The Defendant agreed to be paying MK1 250.00 per dog as compensation for inconvenience each time the Claimants fled from their houses with their dogs or per blast. The Plaintiffs had 7 dogs and the Defendant was supposed to pay the Plaintiffs MK 8750.00 per blast.

11. That the Defendant agreed to be paying MK1 250.00 per dove as compensation for inconvenience each time the Claimants fled from their houses with their doves or per blast. The Claimants had 51 doves and the Defendant was supposed to pay the Claimants MK 63,750.00 per blast. In total the Defendant was supposed to pay MK 7, 473,250.00 as compensation for inconvenience each time the Claimants fled from their house with their animals. The Defendant carried out 151 blasts and the Defendant was supposed to pay MK 1, 128, 460, 750.00.

12. That the Defendant was supposed to pay the balance of MK 1,120, 987, 500.00 since the Defendant paid the Claimants only once for the inconvenience from the blasts. The Claimants wrote letters of complaints to the office of the District Commissioner and the Claimants were not assisted on the same. That the Claimants have been deprived their right to peaceful use and enjoyment of their houses and land. The Claimants have been subjected to humiliation and have suffered great anguish and mental distress. All the Claimants herein have suffered great inconvenience.

13. That the Defendant carried out its quarry activities without due care to the Claimants and the Defendant is liable to pay the Claimants the damages due herein as the Defendants only made some payments to them. The payments were as low as MK10, 000.00. He exhibited hereto copies of the payment vouchers as FH 44 to FH 46". That the Defendant identified 79 heads of families to be compensated according to the payment vouchers in exhibits FH 44 to FH 46.

14. That the payment vouchers in exhibits FH 44 to FH 46 identified the number of people to be paid per family. The total number of people to be paid came to 368 and the payment voucher in exhibit FH46 stated that the payment was for temporary relocation during blasting. This was the Defendant's own payment voucher. The Defendant paid them for 2 months only per exhibit FH44 which was the Defendant's own payment vouchers yet the Defendant's blasting activities which were inconveniencing them and interfering with the peaceful occupation of their houses lasted from 2012 to 2016.

15. That the Defendant was supposed to pay them for the remaining 46 months over the 4-year-old period they were on site at the rates agreed in the payment vouchers as shown in exhibit FH 45 that is:

a. MK 10,000.00 per person per months (multiply by the number of the family members)
b. MK 1,000 per goat per month
c. MK 1250 per chicken per month
d. MK 2,000 per cow per month
e. MK 1,000 per dove per month
f. MK 1,000 per pig per month.

16. That as a result of this they suffered the following losses:

vi. The Claimants were unable to live in their homes peacefully.
vii. The Claimants failed to do farming in their gardens.
viii. The Claimants failed to do business.

ix. The Claimants children failed to attend school.

x. The Claimants incurred expenses and lost energy and time transferring their families and animals each time blast occurred.

a. That the Defendant acknowledged that there was need to relocate houses which were close to the quarry site. The Defendant wrote to the Blantyre District Commissioner on 26th November, 2014 to that effect. A copy of that letter is exhibited as "FH 47.

b. That following the Defendant's request the Department of land and the District Commissioner's Office produced a valuation indicating figures to be paid as compensation to the affected houses. This report identified 88 families to be relocated as those affected by the by the blasting activities. The report is exhibited as "FH 48".

c. That the report in exhibit FH 48 states that the damages assessed to be paid were as a result of the blasting activities.

d. That they were never compensated damages for the following:

a. Nuisance

b. Trespass

c. Interference with peaceful occupation of our Houses

d. Exposure to noise pollution

e. Exposure to air pollution

f. Loss of mesne profits

g. Loss of amenity value in our land.

h. Compensation for the requirement to leave our houses with our families and animals over a period

of 46 months. We were only paid a period of 2 months.

17. In cross examination he stated that the agreement was that the Claimants should move out of the danger zone before each blast was conducted. When asked what rates were agreed upon in relation to moving out of the danger zone, the witness could not say what the agreed rates were. The witness agreed that the Claimants' houses were situated at varying distances from the quarry mine. He said he was a businessman at Zalewa. He did not say what kind of business he does. He said Mota-Engil stopped blasting at Mgodi quarry at the end of the 2015.

18. In re-examination he told the court that Mota-Engil conducted 48 blasts during the entire period they operated the quarry mine. He said they were counting and writing the number of blasts but they did not keep the document on which this was written. He said there are 47 agreement forms attached to his witness statement. He told the court that he has 7 children. He confirmed telling the court that Mota-Engil stopped blasting at the end of 2015. He said there are 18 months from July 2014 to December 2015.

19. He told the court that Mota-Engil did not pay them for the 18 months. He said Mota-Engil paid them once for 8 blasts that were blasted in one month. He told the court that the Claimants are situated at 450m from the quarry. He said the chiefs involved in the blasts were Mtambalika, Masinde and Chigaru. He told the court that Mota-Engil told the Claimants that they would get an allowance for food and transport each time it carried out a blast. He said Mota-

Engil undertook to pay K10, 000.00 per person and that the K10, 000.00 also applied to each animal.

20. The second to testify was Harvey Chilembwe (expert witness) (CW2) of the Polytechnic, University of Malawi, P/Bag 303, Chichiri, Blantyre 3 told the court that he was a Geodesist and Geodynamics expert. That Geodynamics studies plate technics, earth movements, earth quakes and volcanoes. Geodynamics is concerned with processes that move material and waves and it understands earth's internal activities by measuring gravity and seismic waves as well as mineralogy. That he did research and study at the Defendant's Zalewa Mgodi quarry mine in Traditional Authority Chigaru's area in Blantyre. He also studied the Claimants' houses at the said location.

21. That the Defendant was carrying out mining and explosive activities close to houses of the Claimants and those activities subjected the Claimants to noise, dust inconvenience and air pollution. The activities of the Defendant also destroyed houses of the Claimants. That he carried out a detailed study on the effects of the blasting activities of the Defendant at Zalewa Mgodi quarry mine in Blantyre on the houses and lives of the Claimants.

22. That the study found out that the seismic events emanating from the Defendant's quarry mine at Zalewa caused structural and architectural damage to the houses of the Claimants in Mtambalika and Masinde Villages in Traditional Authority Chigaru's area in Blantyre. The cause effect relationship between the blasting activities of the Defendant and the damage done to the houses and livelihood of the Claimants was explained in his report

exhibited as "**HC1**". That during his study he found that there were a lot of fly rocks that had been flown onto the houses of the Claimants and close to the houses of the Claimants.

23. He then concluded from his study that all nuisance experienced by the Claimants and the damage done to their houses were a direct result of the blasting activities done by the Defendant. That another study carried out by the Department of Energy and Mining found that the blasting activities of the Defendant were destructive to neighbouring houses at Njuli in Blantyre. A copy of the report is exhibited hereto as "**HC2**"

24. In cross examination he told the court that another study by a team of experts from the Department of Geology found that the effects of blasting activities by the same Defendant went as far as 1,200metres from the blasting point. A copy of that report is exhibited as "**HC3**". A scrutiny of the report revealed that the effects could go beyond that. That the houses of all the Claimants herein are within 800 metres from the blasting point as explained and illustrated in his report in exhibit **HC1.**

25. He told the court that he did not see quarry dust coming from Mota-Engil's blasting operation at Mgodi Quarry. He said he did not experience any noise from the quarry activities at Mgodi quarry. He said neither did he see flying rocks coming from the quarry mine. He confessed that he did not have any direct evidence that quarry dust, noise, fumes and fly rocks were coming from the quarry mine, or of air pollution. He further confessed that there is no expert

report on these nuisances. He said it was however possible that there were some fly rocks.

26. In re-examination he stated that he did not see the fly rocks and other things which the communities were telling him about during the study. He said he was told during the study that the fly rocks came from the quarry mine. On how he concluded on the origin of dust in the area, the witness told the court that there is usually dust during blasting, even during crushing. He said the dust is carried by wind to the Claimants' homes. He said he was not there during the blasts but literature say there is noise during blasting.

27. The third witness was Fabiano Thulu (expert witness) (CW3). He stated that he was from the Polytechnic, University of Malawi, P/Bag 303, Chichiri, and Blantyre 3. He told the court that he was an expert in Environmental Physics, Energy Physics, Atmospheric Physics, Nuclear Physics and Natural Resources Law. That he has a Bachelor's Degree in Physics obtained from the University of Malawi where he studied in detail environmental pollution.

28. That currently he was studying a Master's Degree in Nuclear Physics and Technology at the University of Alexandria in Egypt and that he is a lecturer at the Polytechnic in the Department of Physics and Biochemical Sciences. That he was an expert in the field of noise pollution, vibrations and air quality. He stated that he had seen the report on noise pollution done by Gift Tsokonombwe.

29. That the Defendant was carrying out mining and explosive activities close to houses of the Claimants at Zalewa in Blantyre district and those activities subjected the Claimants to noise pollution, dust, inconvenience and air

pollution. That he had studied the report by Mr Gift Tsokonombwe on noise levels at the Defendant's quarry mine at Chiwaula Quarry site in Mangochi and at Njuli Quarry.

30. He noticed that Mr Tsokonombwe did not indicate the measurement uncertainty of the equipment he was using. That he had noticed that Mr. Tsokononbwe's report did not indicate all the data that was collected in the study but that the report only made use of average readings. He also noticed that the amount of noise produced by blasting at the Mangochi quarry was 84.7 decibels using a scale of C (dBC) for a house which is at 1000 metres from the blasting point according to the report done by Mr. Tsokonombwe. That Mr. Tsokonombwe extrapolated the results for Mangochi to Zalewa and was arguing that the results for Mangochi should apply to Zalewa.

31. That noise levels increase as one gets closer to the source of noise. This is related by natural log of base ten in Physics. That if the level of noise was 84.7 dBC at 1000 metres then at 500 metres was 90.7 dBA and at 800 metres was 86.7 dBA. The calculation of the noise at those distances was explained in his report exhibited hereto as **FT 1**. That Mr Tsokonombwe did not put the amount of 84.7 decibels (dBC) using a scale of dBA which is the scale used to measure the impact of noise on the human ear. DBC levels are always lower than DBA.

32. That the Malawi Bureau of Standards came up with tolerance limits for noise pollution in Malawi in standard number MS 173:2005. I attach and exhibit hereto as **FT2** a copy of the said standard. That according to the Malawi

Bureau of standards the maximum tolerance limits for noise in Malawi are as follows:

AREA CODE	CATEGORY OF AREA	LIMIT IN DECIBELS (MAXIMUM) DAY TIME	NIGHT TIME
A	INDUSTRIAL AREA	75	70
B	COMMERCIAL AREA	65	55
C	RESIDENTIIAL AREA	55	45
D	SILENCE ZONE	50	40

33. He told the court that the noise levels which were found after the study of the noise at both Njuli and Mangochi quarry mining sites for the Defendant were WAY ABOVE the maximum tolerance limits set by the Malawi Bureau of Standards. That Mr. Tsokonombwe extrapolated the results for the Mangochi site to the Mgodi quarry site at Zalewa in Blantyre. Even the extrapolated results were WAY ABOVE the maximum tolerance limits set by the Malawi Bureau of Standards.

34. In cross examination he confessed that he did not take his own measurement of noise at Mgodi quarry. He also said did not visit the quarry site. He said in coming up with his conclusions on noise level in **FT1**, he looked at Tables 1 and 2 of FT2. He said was aware that blast noise is impulsive by nature. He

said noise from quarry blasts are an occupational noise. He said occupational noise fall under paragraph 6 of **FT2**. He confessed that his report **FT1** omitted to discuss paragraph 6 of **FT2**. He read to the court paragraph 6.1(a) (b) and (c) of **FT2**. He said he did not know how long a quarry blast takes. He said dBC is less than dBA.

35. When shown Table 1 on page 3 of GT1 (an expert report for Mr. Gift Tsokonombwe – a defence witness) he said that noise level of 84.7 dBC was registered for the nearest household (during blast) in respect of the Mangochi quarry. When shown para 6.1(c) and (d) of **FT2** and told the court to compare with the 84.7 dBC registered at the Mangochi quarry. He told the court that he could not tell which one is greater unless he does some calculations. In re-examination he said where effects of noise on people are concerned, you use dBA and not dBC. He said a blast would take 30 seconds.

36. The next to give evidence was TRADITIONAL AUTHORITY S. CHIGALU (CW4). of Traditional Authority Chigalu in Blantyre. He stated that Defendant was at all material times a construction company carrying out quarrying activities at Zalewa Mgodi quarry mine in Traditional Authority Chigaru's area in Blantyre District. That in or around 2012 the Defendant started carrying out quarry activities at Zalewa Mgodi quarry mine.

37. That all the Claimants own houses and gardens within Masinde and Mtambalika villages and he knew the houses and gardens of the Claimants. That the Defendant identified families to be relocated but the Defendant started its quarry activities at Zalewa Mgodi quarry mine without conducting

any sensitization activities on the impact of their quarry activities on the surrounding villages. That all the Claimants herein were not told of the impending quarry activities, the impact and the effects of the quarry activities and how to mitigate the dangers and effects of the quarry activities.

38. That before the Defendant started its quarry activities at Zalewa Mgodi quarry site none of the Claimants had complained to any authority that quarry stone, bad smell, noise and dust had been coming from the direction of the Defendant's quarry site. That all the Claimants herein have persistently complained to the Traditional Authority, District Commissioner that quarry stone, bad smell, noise and dust have been coming from the direction of the Defendant's quarry site was so dangerous and greatly inconvenient to the Claimants. That the Defendant was not at all material times spraying water on the ground at the quarry site and on all the roads surrounding the quarry site in order to deal with the dust arising from quarry activities.

39. That the Defendant was ordering all the Claimants herein to be fleeing their homes with their animals, every time the Defendant was carrying out blasting. That in or around July, 2014 the Claimants entered into agreements with the Defendant. The agreements stipulated that the Claimants should be fleeing their homes with their animals every time the Defendant would be blasting stones and that the Claimants would return to their homes when the Defendant had finished blasting stones. The agreement also stated that the Defendant should pay the Claimants every time they fled from their houses including the times the Claimants had fled from their houses before the agreements were entered into. See copies of the agreements they signed marked SG 1 to SG 43.

40. That the Claimants and their animals fled 151 times from their houses during the period the Defendant was carrying out quarry activities at Zalewa Mgodi quarry mine. That the Defendant did not at all material times pay compensation to the Claimants in respect of any damages that occurred due the blasting activities. That the Defendants only paid once out of the 151 times the Claimants had fled from their houses with their animals.

41. That the Defendant agreed to be paying MK 20 000.00 per person as compensation for inconvenience each time the Claimants fled from their homes or per blast. There are 340 Claimants and the Defendant was supposed pay the Claimants MK 6,800,000.00 per blast. That the Defendant agreed to be paying MK 2 000.00 per goat as compensation for inconvenience each time the Claimants fled from their houses with their goats or per blast. The Claimants had 110 goats and the Defendant was supposed to pay the Claimants MK 220, 000.00 per blast.

42. That the Defendant agreed to be paying MK 1 250.00 per chicken as compensation for inconvenience each time the Claimants fled from their houses with their chickens or per blast. The Claimants had 229 chickens and the Defendant was supposed to pay the Claimants MK 286, 250.00 per blast. That the Defendant agreed to be paying MK 10, 000.00 per cow as compensation for inconvenience each time the fled from their houses with their cattle or per blast. The Claimants had 3 cattle and the Defendant was supposed to pay the Claimants MK 30, 000.00 per blast.

43. That the Defendant agreed to be paying MK2, 000.00 per pig as compensation for inconvenience each time the Claimants fled from their houses with their pigs or per blast. The Claimants had 31 pigs and the Defendant was supposed to pay the Claimants MK 62, 000.00 per blast. That the Defendant agreed to be paying MK1, 250.00 per duck as compensation for inconvenience each time the Claimants fled from their houses with their ducks or per blast. The Claimants had 2 ducks and the Defendant was supposed to pay the Claimants MK 2, 500.00 per blast.

44. That the Defendant agreed to be paying MK1, 250.00 per dog as compensation for inconvenience each time the Plaintiffs fled from their houses with their dogs or per blast. The Claimants had 7 dogs and the Defendant was supposed to pay the Plaintiffs MK 8750.00 per blast. That the Defendant agreed to be paying MK1 250.00 per dove as compensation for inconvenience each time the Claimants fled from their houses with their doves or per blast. The Claimants had 51 doves and the Defendant was supposed to pay the Claimants MK 63,750.00 per blast.

45. That in total the Defendant was supposed to pay MK 7, 473,250.00 as compensation for inconvenience each time the Claimants fled from their house with their animals. The Defendant carried out 151 blasts and the Defendant was supposed to pay MK 1, 128, 460, 750.00. That the Defendant was supposed to pay the balance of MK 1,120, 987, 500.00 since the Defendant paid the Claimants only once for the inconvenience from the blasts.

46. That the Claimants wrote letters of complaints to the office of the District Commissioner and the Claimants were not assisted on the same. That the Claimants have been deprived their right to peaceful use and enjoyment of their houses and land. That the Claimants have been subjected to humiliation and have suffered great anguish and mental distress. That all the Claimants herein have suffered great inconvenience since the Defendant carried out its quarry activities without due care to the Claimants and in that regard the Defendant is liable to pay the Claimants the damages due herein.

47. That as a result of this he stated that the Claimants have suffered the following losses:

xi. The Claimants were unable to live in their homes peacefully.

xii. The Claimants failed to do farming in their gardens.

xiii. The Claimants failed to do business.

xiv. The Claimants children failed to attend school.

xv. The Claimants incurred expenses and lost energy and time transferring their families and animals each time blast occurred.

48. That the Defendant acknowledged that there was need to relocate houses which were close to the quarry site. The Defendant wrote to the Blantyre District Commissioner on 26th November, 2014 to that effect. That following the Defendant's request the Department of Lands and the District Commissioner's office produced a valuation report indicating figures to be paid as compensation to the affected houses. This report identified 88 families to be relocated as those affected by the blasting activities. The report is exhibited as "**SG 44**".

49. That the report in exhibit SG 44 stated that the damages assessed to be paid were as a result of the blasting activities but the Claimants were never compensated damages for the following:

a. Nuisance

b. Trespass

c. Interference with peaceful occupation of our houses

d. Exposure to noise pollution

e. Exposure to air pollution

f. Loss of mesne profits

g. Loss of amenity value in the land.

h. Compensation for the requirement to leave their houses with their families and animals over a period of 3 years. The Claimants were only given payments for 8 blasts. Cross-Examination

50. In cross examination he told the court that he came from Kaphiri Kantama village in Mdeka which is about 4 km to the quarry mine. He said as a chief, he would not tell all the names of his subjects. He said he could mention some gardens and not all. He said there are 46 Claimants in this case but he only visited 20 houses. The houses are in Masinde and Mtambalika villages.

51. He said there was no agreement form between him and Mota-Engil. He said his house is far away and was not affected by the blast activities. He confessed that **SG3** and **SG13** are duplicated as they are all in Julius Masinde's name. He said the same was true for **SG4** and **SG5** (in Yunisi Kapyola's name), **SG6** and **SG28** in Fyness Kapyola's name), **SG8** and **SG11** (in Lucy Chaweza's name). He said paragraph 6.17 of his witness statement says Mota-Engil would pay K20, 000.00 per person per blast. He confessed

to the court that that rate cannot be found in the agreement forms, but there is K10, 000.00 per person on the forms. He said he was stammering because these agreements were being done before the Traditional Authorities (T/As) and that the T/As would be better placed to testify on the contents of the agreement forms.

52. He said the Agreement forms do not mention how much money would be paid per animal. He said paragraph 6.13 of his witness statement stated that Mota-Engil was to pay including the times the Claimants had fled from their houses before the agreements were entered into. He told the court that the agreement forms do not state anywhere that Mota-Engil was to pay including the period before the agreement. He told the court that he did not advise his lawyers as indicated in paragraph 6.13 of his witness statement.

53. He said there is nowhere in the agreement forms where it is indicated that payment would be per blast. He told the court that Mota-Engil conducted 8 blasts although the committee said there were 51 blasts. He told the court that Mota-Engil made one payment to the Claimants in respect of the 8 blasts. He said it was the committee and his T/A that told him of the number of the blasts. He further told the court that the agreement forms do not say when exactly the money was to be paid.

54. In re-examination he said Mota-Engil conducted 8 known blasts. He surprisingly confirmed the contents of paragraph 6.14 of his witness statement which stated that Mota-Engil conducted 151 blasts at Mgodi quarry. Asked if the agreement forms tendered included blasts prior to the agreements, he said

at that time it was like that. He said he was getting reports as T/A in whose village the quarry mine was. He said he inspected 20 houses only.

55. The 5th witness for the Claimants was Mankhwala Masinde (CW 5). He repeated what TA Chigalu had said and there is no point in restating his evidence. In cross examination he admitted that there were no quarrying activities at Mgodi quarry between 2014 and 2016. He said Mota-Engil was not spraying water on the ground. He said Mota-Engil made one single payment. He told the court that there was no agreement for Mota-Engil to pay for 46 months. He said they were only paid for 8 months. When shown **MM1**, he said there was nothing on it indicating that Mota-Engil would pay for times before the agreement forms were signed.

56. When asked, he could not say what were the figures for compensation on the agreement forms as stated in paragraphs 6.17 to 6.24 of his witness statement. He said Mota-Engil told them of the figures verbally. He said he worked as a guard at Mgodi quarry mine up to 2014 or 2015 and that he used to work from 5am to 5pm a day. He said his wife is a party to this action. He could not say how many Claimants are in this action.

57. In re-examination he could not answer the question on when did he sign the agreement form. He said blasting stopped in 2014. He said blasting started in 2012. He said before blasting, Mota-Engil would send officials to ask people from the villages to move out of their houses. He said the guards were told to be at shed at the office. He could not point where he signed on the agreement form. He said the payment amount was determined by Mota-Engil. He said Mota-Engil would pay compensation at the end or conclusion of the blasting.

58. The 6th witness for the Claimants (CW 6) was Eunice Kapyola. She repeated what the TA Chigalu and the other witnesses had said and there is no point in restating what she said. In cross examination she said the Mgodi quarry mine closed in 2014. She confessed that her statement alleged that the inconvenience was suffered until 2016. She said it is true that the inconvenience was suffered between 2014 and 2016. She said she has never worked for Mota-Engil but that her house is close to the quarry.

59. She said quarry dust was getting to houses close to hers. She said the fled from houses eleven (11) times. She however said Mota-Engil only paid them once for the 11 times they fled. She said it was not correct that Mota-Engil agreed to pay for 4 years or that there remains 46 months to be paid. She confirmed having signed her witness statement. She said that their agreement with Mota-Engil was to count the times of blasting. She agreed that the agreement forms do not say Mota-Engil would pay for each of the blasts. She said the agreement forms do not say Mota-Engil shall pay the amount stated in her witness statement. She said the agreement forms do not talk about 151 blasts. She said there are 82 Claimants and 82 houses in this case from Masinde and Mtambalika villages. She said she does not know all the Claimants by name.

60. In re-examination she said she did not see a water bowser spraying water. She said quarrying activities were conducted between 2011 to 2015. She said there was a brick fence around the quarry mine. She said their agreement with Mota-Engil regarding blasts before the agreement was that compensation would be paid at the end. She said Mota-Engil determined the figures to be paid. She said Mota-Engil drafted the agreement forms. She

confirmed to have received K299, 250.00 and that the figure included that for her children and animals. She further confirmed that every family received money.

The defence's case

61. The first to give evidence for the defence was Tiago Jose Dias Barbosa (DW1). He stated that there were 110 blasts between 2012 and 10th December, 2014. See page 306 of the Trial Bundle. He testified that there were EVACUATION PROCEDURES during blasting (see paragraph 8 on page 306 of the Trial Bundle). He said that sometimes the Defendant would carry out 2 blasts a week. He stated that all people (including the Claimants) who were within 500 metres from the blasting point would be evacuated from their homes during blasting operations.

62. In paragraph 15 of his witness statement he stated that one hour before the blast the Defendant would remove all people (including the Claimants) who were inside the 500 metre radius from the blasting point. In cross examination DW1 stated that the Claimants would be told to leave their homes and go across the M1 tar mac road to seek shelter from the blasts.

63. He told the court that people from the surrounding villages were required to vacate the area within 500m from the quarry mine as required by the Explosives Act and as a standard requirement. He said he joined the project on 19th March 2013. However the first blast was on 1st December 2012 and that the last blast was conducted on 10th December 2014. He said they could

do 2 blasts per week or even more depending on production required. He said 1 hour before blasting, their safety team would verbally inform people from the surrounding villages of the impending blast.

64. This was later followed by a siren which produces sound like that of an ambulance. The villagers could then leave their houses to the assembly point near the national road, which was more than 500m from the mine. On the suggestion that the villagers had no choice to leave their houses, Mr. Tiago said that evacuation was a requirement of the law. He said the times for blasting was agreed with the surrounding communities. On the question whether a siren could work up someone having a siesta, Mr. Barbosa said that was the exact idea – to alarm and create awareness of the impending blast.

65. He told the court that sound from the quarry mine did not affect the communities but the workers. To the suggestion that the effects of blasting can go up to 1,200m, Mr. Tiago said it all depends on the type of explosives being used. He was however quick to say that at Mgodi quarry mine, Mota-Engil was using detonating codes which makes the blasts almost silent. He said Ammonium Nitrate melts in water and does not detonate, and that this is why Mota-Engil did not use that type of an explosive.

66. He said one was at liberty to say generally fly rocks was a sign that a blast was done properly. He said their job however was to use expert knowledge to mitigate bad effects of blasting. He said one thing to do was to temporarily evacuate people from the 500 m radius for at least 15 minutes. He said shields do not work for fly rocks. He said Mota-Engil tried using shields but some

houses in the surrounding villages were destroyed and compensation was paid for the physical damage. He told the court that there was no psychological damage on the villagers caused by the quarrying activities.

67. He said Mota-Engil conducted an environmental and social impact assessment of the Mgodi quarry mine project. He said the aim was to identify problems the quarrying activities would cause and what measures to mitigate such effects. He said the social problem was how to integrate with the surrounding communities. He said the radius could sometimes be increased as the intention is to avoid harming people. He said on two occasions, this radius was increased by 200 m.

68. He told the court that there was a clean record of quarry operations at Mgodi quarry since no person or animal was injured during the entire period of operation. He said Mota-Engil conducted 110 blasts or detonations at Mgodi quarry. He said there was one blast for every evacuation. On the question of how many holes would be dug for every blast, Mr. Barbosa said it depends because one blast is different from the other. He referred the court to column 7 of "**TJ2**".

69. He said blast vibrations weaken with distance. He said it is strong within 10 m from the blast point. He said within 150 m from the blast point, one cannot feel anything. He quickened to point out that the problem is to mistake the noise (which comes in echoes) with the vibrations. On how much noise a blast produces, he told the court that an aero plane taking off makes more noise than a blast which takes not more than 3 seconds. He further told the court

that noise from a blast is significant within 100m from the blast point and not more. He said he did not work at Njuli quarry mine but that the technology used at Zalewa was used to improve situations in other quarries belonging to Mota-Engil.

70. He said the technology used at Zalewa was top notch. On whether it is safe to conduct a blast without ear plugs, the witness told the court that only the supervisor, who is the blaster detonating the blast could put on earplugs since the requirement is that no people should be inside or around the quarry when a blast is being executed. He told the court that there were no fumes from the blast at Mgodi quarry mine because they did not use Ammonium nitrate. He said dust takes less than one minute to dissipate. He said the Method Statement was developed by experts, the community and by the witness himself.

71. He told the court that hole depth depended on ground elevation but that it was about 10 m on average. He said **TJ4** is correct since there were only 12 houses at the time within the 500 m radius from the quarry mine. He said he could not exactly remember how many times fly rocks fell on the houses. He said it might have been 3 or 4 times. He said most houses are at big distances away from the quarry mine. He said people were made aware of the impending blast 1 hour before but that they required the people to evacuate 15 minutes to the blast.

72. He said noise from the crusher could not go beyond 100 m away. He told the court that the crusher had sprinkling water in and around the quarry area to mitigate dust. He said workers needed eye protection to protect them from fragments from drilling. He said drilling produces dust. He further said that,

if it was during peak of production, drilling could happen every day. He said it was not their aim to produce fly rocks. He said human error can cause fly rocks.

73. In re-examination he told the court that they could do 2 blasts a week during peak blasting period, and that they could blast once a month during off peak period. He said a peak period would last 2 or 3 months. He said a blast lasts a few seconds. He said people were expected to be outside the danger zone for about 15 minutes. He said the basis to evacuate people was the Explosives Act. He said some people were living within 500m from the mine. He told the court that the cause of fly rocks were many including human error.

74. He said fly rocks in this case were caused by different rock density. On the suggestion that blast effects can go up to 1,200 m from the blast source, he said that was not happening at Mgodi quarry as they were doing controlled blasts. He said noise from drilling and the crusher could not go beyond 100 m from the source. He said personal protection equipment was required only for workers in the quarry. He said no-one suffered psychological injury. He said people had agreed to move out of the 500 m radius and had moved out not more than 10 times.

75. The second to testify was Gift Tsokonombwe (DW 2). DW2 was the expert witness for the defence. DW 2 told the court that he conducted an assessment impact of the Defendant's quarrying activities on noise levels in relation to a number of quarries including Mgodi Quarry in Zalewa. He produced an expert report marked **GT 1**. DW 2 found out that the noise level at a distance of 1,000

from the blasting point was 84.7 decibels at Chiwaula Quarry in Mangochi (see page 343 of the Trial Bundle). DW2 extrapolated the results to the quarry at Mgodi in Zalewa since the Defendant was using the same equipment. DW 2 asserted that the noise levels at Chiwaula Quarry Mine were the same like those at Mgodi Quarry.

76. In cross examination DW2 was referred to the noise levels at different distances per the calculation of Fabiano Thulu (CW3), an expert witness for the Claimants. CW 3 had found that noise level at 1,000 metres was 84.7 decibles (using the expert report of DW2) and that noise level at 800 metres was 86.64 decibels, noise level at 500 metres was 90.72 decibels and at 400 metres it was 92.65 decibels. (See page 136 of the Trial Bundle).

77. Further cross examination established that the maximum acceptable noise level per Malawi Bureau of Standards (Standard MS 173:2005) is 55 decibels for a residence (see page 148 of the Trial Bundle). DW 2 admitted that the noise levels were above those recommended by the Malawi Bureau of Standards. DW 2 was asked to define resonance. He defined resonance as the situation whereby the frequency of an incoming wave of blast is the same as the natural frequency of a house.

78. He explained that when there is resonance a house shakes at big oscillations and develops cracks or falls down. He told the court that he measured noise levels at Mangochi and Njuli. He said he extrapolated the noise levels at Zalewa. He told the court that measurement is more reliable but that you

extrapolate where parameters are not there. He said Mota-Engil drilled 1000 holes but that only 12 were drilled in Zalewa. He said he had looked at Mota-Engil's documentation from the archives. He said distance from the quarry in Zalewa to the road is about a kilometer. He said the closer you get to the sound source, the higher the sound level. He said according to the Malawi Bureau of Standards, the recommended sound / noise levels for a residential area is 55dB for day and 45dB for night. He said the acceptable noise levels for dwellings were between 45 to 55dB.

79. He said his report established that sound level for the nearest house to the quarry in Mangochi (located at 350m) was 84.4dBC. He agreed that the noise level was 31 dBC higher than the accepted level in respect of residential areas. He said according to the World Health Organisation (WHO), noise levels beyond 85dB are harmful. He agreed to the suggestion that for noise to be harmful, it has to be irritating. He agreed that everyone within 800m was exposed to noise pollution.

80. He told the court that in paragraph 3 of his supplementary statement that noise levels at Mgodi quarry mine were within the allowed limits on the following grounds:

1. Quarrying / mining activities are essentially industrial activities;

2. The MBS (Standard) does not define what an industrial area is;

3. In the quarrying / mining industry, the operator of the mine warn the people who are within the "*ear protected area*" to vacate the danger

the zone. In such cases, the application of the (residential noise) limits will not be based on Table 1 and 2 of the MBS limits, but on paragraph 6 of it on "*Operational, Health and Safety*" Table.

81. He said the MBS noise limit for industrial Area is 75dB day time and 70dB night time. He said blast noise level at 800 m is at 86dBA. He told the court that it was wrong to conclude that the blast noise was above the MBS limit because according to Note 6.1(a), the blast noise has to be "Continuance in any one day" and yet blast noise is impulsive and not continuant. The witness stated that he did not agree with paragraph 6.2 of the MBS.

82. He said sound level from a blast is impulsive and not "Continuant". He read "NOTES" (1) under paragraph 61(d) of the MBS limits which in essence states that "*if exposure is for periods other than 8 hours, or if the sound level is fluctuating, an equivalent sound level shall be calculated, and this resultant noise shall not exceed the equivalent of 8dB(A)*". He urged the court to look at parameters under 6.1 (a) (b) (c), especially 6.1(d) which is applicable to impulse sound or noise which is measured with an instrument set at "fast" in any one day.

83. When shown the table on page 136 of the trial bundle, he said sound levels at 100 m was 84.7dBA. He also said sound level 800 m was 86.64dBA. He agreed that from the table on page 136 of the trial bundle, 86.64dBA is above 55dBA which is the noise limit for a residential a residual dwelling on day time. He however told the court that, a blast being an industrial noise, one has to look at and consider the provisions of paragraph 6, especially 6.1 (d) of the

MBS tolerance limits, and not to simply dwell on the Tables 1 and 2 on page 148 of the trial bundle.

84. He insisted and maintained that his conclusion on paragraph 3 (or on page 352) of the trial bundle) of GT2 – that "noise levels at Zalewa quarry were within acceptable limits" – is correct, if one reads the provision in the MBS limits in totality. When challenged to show the court where, in the MBS tolerance limits, it says residential area noise should be 86.5dB (A), the witness pointed at paragraph 6.1(c) and (d) of the MBS tolerance limits. He told the court that earplugs are given to and used by those workers operating the crusher. He said during blasting, all people are evacuated from the danger zone beyond 500m and those do not need ear plugs. He ended by maintaining his stand that noise levels at Zalewa quarry were well within the acceptable limits.

85. Susan Namangale DW 3 told the court that she was working for the Defendants from the year 2012 to 2016 as an Environmental and Local Communities Manager. She stated that the Defendant was operating Mgodi Quarry mine from 2012 to 2016. DW 3 said that the Defendants obtained a mining licence to carry out quarry mining project at Mgodi in Zalewa, and exhibited a copy of the license obtained and a copy of the renewal as part of her evidence. DW3 stated in her evidence that the Defendant carried out an Environmental and Social Impact Assessment (ESIA) exercise before the project commenced.

86. In cross examination she stated that she worked for Mota-Engil as an Environmental and Local Communities Manager from 2012 to 2016. She confirmed that Mota-Engil did an environmental and social impact assessment of the Mgodi quarry project and that there is a report on it. She said risks were envisaged and there were also mitigation measures employed by Mota-Engil. She said the safety radius was 500 m from the blast point.

87. When shown an agreement form on page 367 of the trial bundle, she said the people from the surrounding villages who signed the agreement forms were the ones that were potentially to be affected by the quarry operation. The agreement was for temporal relocation before blasting. She said it was important for one to understand the context in which the agreements were made. The surrounding villagers were prior to the agreements complaining that the requirement for evacuation before blasting was posing some inconvenience.

88. She said at one point in time, the villagers caused chaos at quarry offices to stop them from blasting and the Malawi police had to be called to intervene. She said by entering into these agreements, Mota-Engil was trying to promote peaceful co-existence with the surrounding villagers. She said the inconvenience complained of was to do with household chores. She said the evacuation requirement was a must only for those villagers whose houses were within the danger zone or safety radius. She said the assembly point was at a church close to the M1 road.

89. She said Mota-Engil received some complaints of inconvenience. She said Mota-Engil made payments and that there are payment vouchers to that effect.

When referred to page 368 of the trial bundle, she said the total rental for 2 month was K60, 000.00. She said the Agreement was for two months. She said the Agreement was to avoid further disturbance by the surrounding villagers to the quarry operations for two (2) months before the mining licence expired. She told the court that the people received the money from Mota-Engil but never complied with the terms of the agreement.

90. She further told the court that the people were not evacuating with the animals even though that was the requirement in the agreement. She said it was possible for an animal to be struck with a fly rock and hence the requirement to evacuate with the animals. She said such payment vouchers (as shown on page 374 of the Trial Bundle) were issued. She said the payments were for two months only. She said it was therefore wrong to say that the people were not paid for 46 months.

91. She emphasized that the agreements were a temporary remedy to the problem the Mgodi quarry was facing from residents of the surrounding villages. She told the court that the people were in fact not supposed to be paid since evacuation from the safety radius is a legal requirement. She further pointed out that "number of people" (on page 368 of the trial bundle) is in respect of each household. She told the court that Mota-Engil was not paying each member of the household but that the payment was only made to the household owner.

92. She therefore said it would not be fair and right now to pay for the 46 months claimed. She also quickly pointed out that at the time the agreements were made, Mota-Engil needed only two month to finalize its quarry operations as

its mining licence was expiring. She said Mota-Engil needed peaceful operation. She said the payments were done in 2014 but the quarry project started in 2012. She concluded by telling the court that, in terms of the agreement forms, the Claimants do not deserve to be paid for the 46 months claimed, or at all. DW 3 however admitted that the payments were for a period of 2 months as indicated in the payment vouchers from page 368 of the Trial Bundle. DW 3 also confirmed that Mota Engil worked for a period of 4 years from 2012 to 2016 (48 months). She admitted that the payment for the other 46 months has not been made to date

93. In re-examination she said the agreements were made to achieve peaceful co-existence with the surrounding villagers for the remaining two months. She said the requirement to evacuate was a must for only those residents whose houses were within the safety radius. She confirmed that Mota-Engil made payments to house owners and not to each member of a family.

94. She said that the ESIA Report envisaged that there would be noise, dust and ground vibrations during the quarry mining activities. DW3 testified that a pre-blast survey would be conducted before each blast to check the surrounding communities, where the communities would be given prior warning and information of any impending blasts taking place on a particular day. A siren would then ring and the Defendant would remove anyone from the risky radius. In cross examination she admitted that the risky radius was 500 metres as testified by DW1.

95. DW 3 stated that after each blast she and other community officers, as well as the owners of the structures surrounding the quarry mines conducted a post-

blast survey to check if there was an impact. DW 3 stated that it was necessary for those families that lived close to the quarry site to relocate during the blasting. That DW 3 held discussions with traditional leaders and the people who were deemed too close to the quarry to temporarily relocate. The discussion resulted into certain agreements being executed, that required Mota-Engil to make payments to the people that had entered into agreements with the Defendants.

96. DW3 exhibited a copy of the one such agreement as exhibit **SN 3** and copies of payment vouchers as exhibits **SN4a, SN4b** and **SN4c**.. That marked the close of the defense's case.

The Issues

97. There are three main issues for determination before this court.

1. Whether the Defendant made an agreement with the Claimants for payment of compensation for relocating and inconvenience.
2. Whether the Defendant still owes the Claimants sums of money
3. Whether there was nuisance, air pollution, noise and inconvenience as alleged due to the Defendant's negligence

The Law

The burden and standards of proof in civil matter.

98. The burden and standard of proof in civil matter is this. He who alleges the existence of given facts must be the first to prove as a positive is earlier to

prove than a negative. He who alleges must prove. The burden of proof rests on the party (the plaintiff) who substantially asserts the affirmative. It is fixed at the beginning of the trial by the state of pleading and remaining uncharged through the trial. See ***Joseph Constantine Steamship Line vs. Tamperial Smelting Corporation Limited*** **[1942] AC 154,174.**

99. In *Joseph Jonathan Zinga vs. Airtel Malawi Limited*, Civil Cause No. 74 of 2014 (Mzuzu District Registry) (unreported), the court said

"In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the quantum of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than the other carry the day". [Emphasis added]

100. The standard required is on a balance of probabilities. If the evidence is such that the tribunal can say; we think it more probable that not the burden is discharged but if the probabilities are equal it is not. Denning J in ***Miller vs. Minister of Pension*** **[1947] All E.R 572.** Our own local case of

Commercial Bank of Malawi v Mhango [2002-2003] MLR 43 (SCA), the court stated as follows:

"The burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. The court makes its decision on the 'balance of probabilities', and this is the standard of proof required in civil cases."

Negligence as a tort

101. The best definition of negligence was given by Baron Alderson in *Blyth vs Birmingham* water works (1856) I Ech 781 at 784.

"Negligence is the omission to do something which a reasonable man would, guided upon those circumstances which ordinarily regulate the conduct of human affairs do or doing something that a prudent man would not do"

102. The tort demands that a defendant must owe the claimant a duty of care and there must be a breach of such a duty which result in the claimant suffering damage. See *Banda* vs. *Southern Bottlers Ltd* Civil Cause No. 558 of 2010 (High Court) (unreported). For a better understanding of the tort of

negligence read Winfield and Jolwicz on tort 14 Ed page 78. On duty of care Lord Atkin stated in *Donoghue* vs. *Stevenson* (1932) AC, 562 as follows:-

"A person's neighbors are those persons who are closely and directly affected by any act that I ought reasonably to have them in contemplation as being affected when in directing my mind to the acts or omissions which are called in question".

The maxim *res Ipsa loquitur* sums up the law on negligence"

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Blyth vs. Birmingham Waterworks Co. (1856) ll EX .781, 784 per Alderson, B.

103. Our own local case is *Dilla vs. Rajan* ll MLR 113, 116 Mtegha J (as he then was) said as follows:

"For an action based on negligence to succeed, the Plaintiff must show that the Defendant owed him a duty of care. The duty of a person who drives a vehicle on a public road is to use reasonable care to avoid causing damage to persons and property. Reasonable care in this connection means the care which an ordinary skilful driver or rider would have exercised under all circumstances."

Claimants Submission

104. The Claimant cited several cases on negligence which I have discussed above

Blyth vs. Birmingham Waterworks Co.

Donoghue vs. *Stevenson* (1932) AC, 562

Dilla vs. Rajan ll MLR 113, 116

The Claimants submitted that the Rule in *Rylands vs Fletcher* [1868 UKHL] 1 (1868) LR 3 HL 330 was as follows. he rule states that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and , if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. This is a decision of the House of Lords.

105. That Liability under the rule in *Ryalands vs Fletcher* is strict in the sense that it relieves the claimant of the burden of showing fault. In cases of strict liability the Defendant is liable even though the harm done to the claimant occurred without intention or negligence on the Defendant's part. This is part of the rule in Rylands vs Fletcher.

Guiding principles on Trespass to Land

That "Trespass is unjustifiable interference with possession of land." *Tea Brokers (Central Africa) Ltd v Bhagat* [1994] MLR 339 (HC) per Mwaungulu AJ (as he was then)

106. Throwing things on someone's land amounts to trespass. See the case of *Rigby –vs- CC Northamptonshire* (1985) WLR 1242

That in *British Waterways Board –vs- Seven Trent Water Ltd* (2001) EWCA Civ. WLR 613 it was held that; "Discharging water into the flowing watercourse of another amounted to trespass."

Trespass is actionable per se. see the case of Entick –vs- Carrington (1765) 2 Wils. K.B. 275

107. Guiding principles on Nuisance

The Claimants argued that nuisance is a branch of law of tort mostly closely concerned with protection of environment. See Buckley, Law of Nuisance, 2nd edn. Nuisance is divided into two as Public and Private Nuisance. See Winfield & Jolowicz, On Tort Eightieth Edition at page 711. That a private nuisance is a continuous, unlawful and indirect interference with the use of enjoyment of land or some right over or connection with it as per Lord Lloyd in the case of Hunter –vs- Canary Wharf (1997) 2 All ER 426 where he stated that private nuisance are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quite enjoyment of his land.

108. That the interference of a neighbour's quite enjoyment of his land must be continuous interference. See the case of Bliss –vs- Hall (1838) where it was held that smell and fumes from candle making invading adjoining land amounted to nuisance. The maxim *Sic utere tuo ut alienum non laedas* means that "so use your own property as not to injure your neighbour's. See the case of Cambridge *Water Co –vs- Eastern Counties Leather* (1994) 1 All ER 53. That disturbing neighbours' sleep by noise and vibration and damage to

clothes from acids smuts. See the case of Halsey v Esso Petroleum Co. Limited [1961] 2 All ER 145,

109. Guiding principles on Inconvenience

It was submitted that aircraft noise was considered to be inconvenient. See the case of *Farley v Skinner* [2001] UKHL 49, the court stated that damages are recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort

110. Statement by public officials.

The Claimants stated that the report in exhibits MM 7 and EK 48 (page 291 of the trial bundle) was made by the Ministry of Lands. This report is compensation assessment for properties belonging to the Claimants. That statements by public officers in the course of their duty or the documents they release in the course of their duty constitute one of the exceptions to the rule against hearsay. (See Chapter 31 of Phipson on Evidence at page 765). In that regard this court is requested to admit such exhibits in evidence. This report was done by the Ministry of Lands for the benefit of the Claimants. The court is also urged to take judicial notice of the public document released by the Ministry of Lands.

111. In conclusion the Defendant's mining activities interfered with the Claimants' peaceful enjoyment of their land. That this is clear from the evidence of every witness in this case. Even Defence witnesses such as DW 1 and DW 3 admitted that the Claimants were inconvenienced and were told to leave their homes with their families during blasting operations. See page 307 for DW 1and and page 357 of the trial bundle for DW 3.

112. That a mining licence does not give permission to the holder of a mining licence to destroy or damage other people's property by virtue of being a holder of the mining licences. In the Jamaican case of *Errol Trowers –vs- Noranda Jamaica Partners Limited* Claim No. 2011HCV 05421 [2016] JMSC Civ. 48 Lindo J stated that:

"I find as a fact that the Defendant carried out its activities in Calderwood community pursuant to the mining lease under the Mining Act. This authorisation or permission however, does not automatically vitiate its liability."

113. That the Defendant through DW 3 identified 79 families to be compensated. These 79 families had 368 people. This is clear from the payment vouchers and other documents filed in the witness statements of Susan Namangale (DW 3) and the witness statements of the witnesses for the Claimants. The Defendant grossly underpaid these 79 families. Further the Claimants were not paid damages for nuisance, inconvenience, trespass, loss of mesne profits and damages for loss of amenity value in the Claimants' land.

114. That the Defendant's mining operations were producing noise, bad smell and dust and these inconvenienced the plaintiffs. This is clear from the evidence of the Claimants and from the expert evidence of CW 2 and CW 3. The noise levels produced were beyond those set by Malawi Bureau of Standards. The noise level for residential premises is 55 decibels. The Defendants were producing noise levels beyond 84.7 decibels at 1000 metres per their own expert witness, DW 2. At 800 metres the noise was 86.64

decibels. At 500 metres the noise level was 90.72 decibels. At 400 metres the noise level was 92.65 decibels.

115. That the Defendants are liable per the rule in *Rylands vs Fletcher* which states that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. The activities of the Defendant resulted in rocks, debris, dust, bad smell and noise being thrown onto the premises of the Claimants.

116. That the Defendant's activities also resulted in seismic waves flowing to the Claimants' land which destroyed the Claimants' houses. That per the rule in Rylands vs Fletcher the Defendant cannot claim that the movement of the debris, dust, seismic waves and noise onto the premises of the Claimants was an act of God. The movement of the debris, stones, seismic waves, bad smell and dust amounted to trespass, nuisance, inconvenience and the illegal interference with the land of the Claimants.

117. They argued that the Defendant had no defence to the claims for damages for negligence, trespass, loss of mesne profits, loss of amenity value in the Claimants' land, nuisance, inconvenience and interference with the peaceful enjoyment of land and this court is requested to enter judgment accordingly. That in cross examination Susan Namangale (DW 3) wanted the court to believe that money for compensation for relocation had been paid. However she admitted that the payment vouchers in her exhibits SN 4(a) and

SN4 (b) showed that the payment was for **2 months**. She explained that the payment was for inconvenience for 2 months.

118. That the Defendants paid the Claimants the sum of MK12, 675,500 as compensation for inconvenience for 2 months. This means that the payment for inconvenience for one month was MK 6,337,750. The Defendants inconvenienced the Claimants for 4 years (48 months). That it follows both legally and fairly that the Defendants must pay for the remaining 46 months at MK6, 337,750 x 46 = MK291, 536,500. This sum must be paid with interest at the commercial bank lending rate from 2012 to date because the money was supposed to be paid in 2012 BEFORE commencement of the quarry mining.

Defendant's Submissions

Allegation of lack of Consultation / sensitization

119. The defence submitted that Mota-Engil started the quarrying activities at the mine in 2012 without conducting sensitization activities; the Claimants allege that they were not told by Mota-Engil of the impending quarry activities, the impact and effects of the quarry activities, and how such effects could be mitigated.

Allegation of Nuisance

120. That quarry stones, bad smell, noise and dust had been coming from the direction of Mota-Engil's quarry site which were dangerous and greatly inconvenient to the Claimants. That the Claimants have been deprived of their

right to peaceful use and enjoyment of their houses and land. The Claimants wrote letters of complaints to the office of the District Commissioner but they not assisted.

Allegation of ordering the Claimants to flee

121. That Mota-Engil was ordering the Claimants to flee from their homes with their homes with their animals every time it was carrying out blasting activities at Mgodi quarry mine from the date on which Mota-Engil started its quarrying activities. The Claimants could stop everything they were doing. The Claimants would return to their houses after Mota-Engil had finished carrying out the blasts. The practice of ordering the Claimants to flee caused great inconvenience to them.

Allegation of outstanding balance on Agreements between the Claimants and Mota-Engil

122. That the Claimants entered into agreements with Mota-Engil in or around July 2014 which stipulated that (i) the Claimants shall be fleeing their homes with their animals every time Mota-Engil shall blast stones and the Claimants to return to their homes after the blasts (ii) Mota-Engil shall pay the Claimants every time they flee from their houses, including the times on which the Claimants had fled from their houses before the agreements were entered into.

123. That the Claimants and their animals fled 151 times as Mota-Engil had, during its quarry activities at Mgodi quarry mine, carried out 151 blasts times.

In total, Mota-Engil was supposed to pay MK7, 473,250.00 as compensation for inconvenience each time the Claimants fled with their animals. Mota-Engil carried out 151 blasts which meant Mota-Engil was supposed to pay a total of MK1, 128,460,750.00. Mota-Engil only paid once (i.e. MK7, 473,250.00) and it is supposed to pay the balance of MK1, 120,987,500.00.

Allegation of Negligence

124. That Mota-Engil was negligent and was in breach of its duty as a neighbour.

Particulars of Negligence

i) Failure to pay the Claimants on time and as agreed;

ii) Disturbance to the Claimants' farming activities and to their families;

iii) Forcing the Claimants to run away from their homes with their children and animals.

125. That due to Mota-Engil's said quarrying activities at Mgodi quarry mine, the Claimants have suffered loss:

Particulars of Loss

i) The Claimants were unable to live in their homes peacefully;

ii) The Claimants failed to do farming in their gardens;

iii) The Claimants failed to do business;

iv) The Claimants' children failed to attend school;

v) The Claimants incurred expenses and lost energy and time transferring their families and animals every time a blast occurred.

Mota-Engil Re-Amended Defence

126. That the Defendant denied that the Claimants were at all material times residents of Matsinde and Mtambalika villages and puts each of the Claimants to strict proof thereof;

It admitted that Mota-Engil was at all material times carrying out quarrying activities at Mgodi quarry mine in Zalewa;

It denied that the Claimants were not sensitized or told of the impending quarry activities, the impact and effects of such activities, and how to mitigate its effects;

It admitted that Mota-Engil carried out quarrying activities at Mgodi quarry mine but denies that it started carrying out the quarrying activities on or around 2012;

It denied that (i) quarry stones, bad smell, noise and dusts had been coming from the direction of its quarry site (ii) the Claimants wrote letters of complaints to the office of the District Commissioner (iii) if the letters were lodged, they were unfounded and without merit as Mota-Engil's quarrying activities never caused any of the alleged damage, loss or inconvenience;

It denied that Mota-Engil was ordering the Claimants to flee from their homes or that they had thereby suffered inconvenience as alleged.

It pleads, without admission of any liability, that:

127. That Mota-Engil entered into agreement with some members of the surrounding communities requiring them to leave their houses temporarily and that they would be paid an agreed amount;

That Mota-Engil paid all the sums that were agreed in the said agreements;

That the agreements required Mota-Engil to make a one-off payment. Save as pleaded under paragraph 2.7 hereof, Mota-Engil denied all matters alleged in paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the Claimants' statement of case

128. Mota-Engil denied the contents of paragraphs 24, 25 and 27 of the Claimants' statement of case, namely that it was did not show a duty of care to its neighbours or that the Claimants have been deprived of their right or subjected to humiliation or anguish and mental distress.

That Mota-Engil refers to paragraph 28 of the Claimants' statement of case and: Denied that it was negligent or in breach of duty as alleged and Particularized, or at all;

129. Alternatively the Defendant submitted that if the matters complained of occurred, Which is denied, the same were not occasioned by any negligence or default on its part but were an inevitable result of the mining operations for which it is not liable; Pleads in the further alternative that if the Claimants suffered any loss, damage or inconvenience, which is denied, the same were of a level which a reasonable person would be able to put up with and / or were not actionable. That Mota-Engil pleads that it had, at all material times, employed reasonable care and skill when carrying out its quarrying operations which, among other measures, included:

Employing skilled operators to carry out the blasting operations;

Ensuring that the quarrying activities are done by and under the supervision of holders of valid blasting licence with vast expertise and experience in correct and safe use of blasting explosives;

Using safe type and amounts of explosives as well as methodology when carrying out the blasting operations;

Alerting the surrounding communities at all material times, of any blasting to be conducted.

130. The Law

Nuisance

The appropriate plaintiff in nuisance claims is the person in possession or occupation of the land affected.

- Lyme Corporation vs Wolstanton Ltd [1947] Ch.427

To be unlawful, the interference must be substantial and the claimant must have suffered actionable damage.

Clerk & Lindsell on Torts, 16Ed, para 24 - 05

The defendants may have the burden of providing that any nuisance was the inevitable result of carrying out the activity empowered by statute, to establish a defence. See *Allen vs Gulf Oil Refining Ltd* [1981] A.C. 1001

Liability in Negligence

131. For one to be liable in negligence, three things must be present: a duty of care; breach of that duty care; and damage to the claimant as a result of that breach (***Makala vs Attorney General*** [1998] MLR 187 (HC).

That the duty of care that a driver of a vehicle owes to other road users is not absolute. He/she is only required to take reasonable care as n ordinary prudent driver would do (***Southern Bottlers Limited vs Commercial Union Assurance Company Plc*** [2004] MLR 364 (SCA).

132. That it must also be noted that one is only liable in negligence for damage which he/she in fact and in law, caused to the plaintiff. In ***Kalolo vs National Bank of Malawi*** [1997] 1 MLR 427 (HC) the High Court, in holding that causation will not have been proved where there are several possible causes and there is doubt or it is not clear as to which one caused the plaintiff's damage. According to the case of ***Vincent Lompwa vs Raiply Malawi Limited,*** three elements must be provided for a defendant to be held liable in negligence. First and foremost the defendant must owe a duty of care to the complaining party. Secondly, the defendant, by his act or omission, must be in breach of that duty of care. Thirdly, the defendant's breach of duty must be the cause of the damage complained of and such damage must be foreseeable and not remote.

Law of Contract

133. That to constitute a valid contract, there must be definite parties to the contract; the parties must intend to create legal elations, and the promises of each party must be supported by factors which the law considers sufficient: **Chitty on Contracts** (25th Edition), Vo. 1 (General Principles) Sweet & Maxwell, London 1983. An agreement is usually reached by the process of offer and acceptance and the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made: **Halbury's Laws of England** (4th Edition) Vol 9 paragraph 226, Butterworths, London, 1974.

134. That an apparent meeting of the minds of the parties will suffice for a binding contract. Where a party has so conducted himself that a reasonable man would believe that he is unambiguously assenting
to the terms as proposed by the other party, the former is precluded from

setting up his real intention and is bound by the contract as if he had intended to agree to the other party's terms: ***Woodhouse, AC Israel Cocoa Ltd SA vs Nigerian Produce Maneeting Co. Ltd*** [1972] AC 741; ***Smith vs Hughes*** (1871) LR 6Q. B. 597.

135. An offer is an expression by one party, made to another, of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered certain: **Halsbury's Laws of England** (supra), para 227. Acceptance is a final and unqualified expression of assent to the terms of an offer, and an offer may be acceptable by conduct: **Chitty on Contracts** (supra) paras 54 – 55.

Rules of documentary evidence

136. The Defendant submitted that rules on documentary evidence are very clear that a document speaks for itself. One cannot introduce parol evidence to contradict a document: ***Kamwendo vs Bata Shoe Co. Ltd,*** Civil Cause No. 2380 of 2004. That in paragraph 7 of their Statement of Case, the Claimants alleged that quarry stones, noise, bad smell and dust came from Mgodi quarry mine which were dangerous and inconvenient to them. The Claimants particularize their loss or the ways in which they have been affected by these alleged nuisance in paragraph 28 of their statement of case as follows:

(i) The Claimants were unable to live in their houses peacefully;

(ii) The Claimants failed to do farming in their gardens;

(iii) The Claimants failed to do business;

(iv) The Claimants' children failed to attend school;

(v) The Claimants incurred expenses and lost energy and time transferring their families and animals every time a blast occurred.

Noise

137. That the witness statements of all the ordinary / factual witnesses for the Claimants, including their oral testimony given at trial, do not state how substantial the blast or quarry noise from Mgodi quarry mine was. Their expert witness, Mr. Fabiano Thulu, however told the court that noise levels produced by "*blasting*" were beyond the limits set by the Malawi Bureau of Standards in respect of residential areas. He told the court that the MBS noise tolerance limits in respect of residential areas were 55dB during day time and 45dB during night-time and yet that the extrapolated blast noise levels in Zalewa at 800m from the Mgodi quarry mine was 86.64dBA.

138. That it was clear from paragraph 6.11 of his witness statement (and from the conclusion in FT1 on page 137 of the trial bundle) that his evidence related to no other noise source from the Mgodi quarry than "*blasting*". It is also clear that the conclusion he makes in paragraphs 6.18 and 6.19 of his witness statement only relates to blast noise. Mr. Fabiano Thulu admitted in cross-examination that blast noise is impulsive by nature. He said blast noise is an occupational noise.

139. He told the court that the tolerance limits for such noise fall under paragraph 6 of ***FT2***. He confessed to have omitted to discuss the implication of paragraph 6 of ***FT2*** in his expert report marked as ***FT1***. He

said a blast noise level of 84.7 dBC was registered for the nearest household at Chiwaula quarry mine in Mangochi situated at 1000m from the blast source. When shown noise limits in paragraph 6.1(c) and (d) of ***FT2*** and told to compare those limits with the 84.7 dBC from Mangochi, he told the court that he could not say which one was greater unless he did some calculations.

140. That the first defence witness, Mr. Tiago Barbosa told the court that they were requiring the Claimants to move out of the danger zone before each blast. He said that the safety radius could at times be extended from 500m to 700m. His evidence was not challenged that Mgodi quarry employed controlled blasting since they used water gel- based emulsions / explosives or detonating codes which makes the blasts almost silent. The witness said they did not use Ammonium Nitrate at Mgodi quarry mine. He further told the court that blast noise at the quarry was significant within 100m from the source and no more.

141. In Paragraph 16 (v) of his witness statement, Mr. Barbosa told the court that the proximity of the quarry site to the surrounding communities was not so close that it would cause any of the claimed impacts like noise pollution. DW3 – Miss Susan Nmangale – states in paragraph 6 of her witness statement that there was no grievance submitted to Mota-Engil by members of the surrounding community regarding noise at the material time and the Claimants did not dispute this assertion at trial.

142. The defence submitted that the second defence witness (DW2) – Mr. Gift Tsokonombwe – told the court that he had extrapolated the blast noise level at Zalewa from the results obtained from Chiwaula quarry mine in Mangochi. He confirmed to the court to have stated in paragraph 3 of his supplementary witness statement that the noise levels at Mgodi quarry mine were within allowable limits. He said he formed this opinion based on the following grounds:

(i) Quarrying/mining activities are essentially industrial activities;

(ii) The MBS (standards) – FT2 - does not define what an industrial area is;

(iii) In the mining/quarrying industry, the mine operator require people whose houses are situated within the "***ear protected area***" to vacate such area before any blast. In such cases, the application of the blast noise limits will not be based on Tables 1 and 2 of FT2 but rather on paragraph 6 of FT2, since blast noise is "impulsive" and not "continuant" as envisaged in Tables 1 and 2 of ***FT2***.

143. That thus, from the entirety of the evidence before the court, the Defendant argued that accordingly the Claimants had failed to prove on a balance of probabilities that the blast noise at Mgodi quarry mine in Zalewa was above the acceptable noise levels of the Malawi Bureau of Standards. The Claimants have failed to prove that the blast noise, which is impulsive (and not continuant) was seriously substantial or in excess of the tolerance limits under paragraph 6.1(c) (d) of FT2 that any reasonable man living within the Claimants' area would have failed to put up with it.

144. Further, the Defendant alternatively submitted that the conclusion of the Claimants' expert witness, Mr. Fabiano Thulu, in his expert report (FT1) on page 137 of the trial bundle that "sound levels due to blasting at Mgodi quarry mine in Zalewa were above the maximum tolerance limits for residential sites" is not supported by any evidence. His further conclusion on the same page, i.e. 137, of the trial bundle that all the residents or Claimants in Zalewa are within 800metres from the quarry mine and that they were subjected to noise pollution also lacks a sound and valid basis as there is no evidence to support it.

145. That to begin with this expert witness' evidence that all the Claimants are within 800 metres from the quarry mine was out rightly contradicted by the Claimants' own factual witness, Mr. S. Chigalu, who told the court during cross-examination that he comes from Mdeka which is about 4 kilometres away from the Mgodi quarry mine. In paragraph 6.32 of his witness statement, Mr. S. Chigalu states that "**as a result of this**, (i.e. the quarry activities) **we have suffered the following losses**....." Surely this claimant / witness was not residing within 800 metres from the Mgodi quarry mine at the material time as Mr. Thulu would like the court to believe through his expert report (FT1).

146. That the area of the Claimants' residences clearly goes as far as 4KM from the quarry mine yet Mr. Thulu has not given in FT1 the respective calculation of sound levels pertaining to Claimants in those residences beyond 800m from the Mgodi quarry mine to help the court to determine whether or not the noise levels in those residences was so

materially substantial as to amount to an actionable nuisance. The court should therefore note here that Mr. S. Chigalu's testimony on distance in fact corroborates paragraph 16 (v) Mr. Tiago Barbosa's witness statement that the Claimants can hardly be affected by noise or other alleged quarry impacts since the Claimants' residences are located at vast distances away from the Mgodi quarry mine.

147. Secondly, that Order 17, Rule 20(1) of the High Court Civil Procedure Rules, 2017 (the CPR) provides that "expert evidence shall be given in a written report unless the court directs otherwise". In Order 17, Rule 25(1) (g) (i) and (v) of the CPR, it requires the expert report to give details of the expert's qualifications and to state who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision.

148. That Mr. Thulu testified in cross-examination that he did not go to or visit the material area or place in Zalewa. He confessed to the court that he did not carry out any assessment, study or measurements there. Mr. Thulu has not given details of his expert qualification in his expert report (FT1) as required by the CPR. Besides, he has not stated in FT1 who carried out the distance measurements in respect of all the residents at Zalewa (allegedly residing within 800m from the blast point) in his purported Appendix1 to FT1 and the persons qualifications. The original of the Appendix 1 to FT1 (the map) was not brought to court. The Defendant accordingly submitted that Mr. Thulu's expert report (FT1) is incurably irregular as it is not compliant with the requirements under Order 17, Rule 25 (1) of the CPR.

This expert report (FT1) should therefore be thrown out and disregarded by the court with all the contempt it deserves for as being unreliable.

149. That the Defendant was equally fortified in their submission (that the noise levels at Mgodi quarry mine did not constitute an actionable nuisance) by the fact that, looking at the loss particularized in their statement of case, the Claimants have not brought any evidence to prove such losses. In so far as particulars of loss (a), (b) and (c) on pages 13 and 14 of the Trial bundle is concerned, how could they live, let alone peacefully, in their houses, when they were required by law to move out of their houses situated within the danger zone before each blast? Insofar as particular of loss (d) on page 14 of the Trial bundle is concerned, none of the Claimants brought evidence at trial of their alleged children, or schools at which they were students, or the dates on which the alleged failure to attend school occurred to enable Mota-Engil to confirm whether or not it had indeed conducted blasts on such dates.

150. That the court should also note here that paragraph 4 of FT2 (MBS Noise Tolerance Limits) states as follows:

"*In selecting criteria to evacuate a situation, it is important to recognise various problems that may be caused by the noise. Criterion for environmental noise is best developed basing on problems faced by human beings, animals, physical damage to structures and reduced utility of property.*"

151. That the noise effect on health has been categorized as *physical injury* (subpara 4.2.1 of FT2, *hearing loss* (sub para 4.2.2), *physiological* and *vestibular* reactions (sub para 4.2.3) and, *interference effects* (sub para 4.2.4). Such effects with which to evaluate blast or quarry noise from the Mgodi quarry mine have not been pleaded in the Claimants' statement of case to have been suffered. The totality of the Claimants' evidence adduced at trial does not establish any of these efforts to have ben suffered by virtue of noise from quarrying/blasting activities at Mgodi quarry mine.

152. On the contrary, a consideration of the nature of the loss pleaded in the Claimants' statement of case clearly establishes that such loss claimed arise from the legal requirement on the Claimants to move out of the danger zone before each blast, and not from exposure to any noise levels. The nature of the loss pleaded in fact discredits Mr. Fabiano Thulu's conclusion (on page 137 of the trial bundle) in his expert report (FT1) that "sound levels due to blasting at Zalewa were above the maximum tolerance limits stipulated by the Malawi Bureau of Standards for both industrial and residential sites," since such loss or effects are not akin to those envisaged in paragraph 4.2.1 through to 4.2.4 of FT2.

Bad smell/Fume

153. That the Claimants' Statement of Case alleged in paragraph 7 that bad smell/fumes had been coming from the direction of Mota-Engil's Mgodi quarry mine which was dangerous and inconvenient to them. Sentences couched in the exact manner pleaded appear as evidence of the Claimants' action in paragraph 6.7 (p.21 of trial bundle) of Mr. Frank Harrison witness statement, paragraph 6.10 of Mr. Chigalu's statement, paragraph 6.10 of Mr.

Mankhwala Masinde's witness statement and, paragraph 6.11 of Eunice Kapyola's witness statement. Mota Engil, in paragraph 5 of the Re-Amended Defence, denied that its quarrying operations were producing bad smell as alleged. There is no evidence whatsoever, expert or ordinary, on court record from the Claimants to establish that the alleged fume or smell was indeed produced, and that it was sufficiently serious to constitute an actionable nuisance.

154. That on the contrary, Mr. Tiago Barbosa told the court through paragraph 16(i) of his witness statement that there was no bad or noxious smell produced by the quarrying activities as the type of explosives used (at Mgodi quarry mine) do not produce such effects. He reiterated and stood firm, in cross-examination, that Mota-Engil used water gel based emulsions or explosives at Mgodi quarry mine, which does not produce any smell. This evidence was unchallenged by the Claimants.

155. In paragraph 6 of her witness statement, Miss Susan Namangale (DW3) told the court that no grievance was submitted to Mota-Engil during the entire period of quarry operations at Mgodi quarry mine regarding the alleged bad smell. We accordingly submit that the Claimants have failed to provide on a balance of probabilities that there was bad smell/fumes coming from the Mgodi quarry as pleaded.

Dust

156. That Mota-Engil denied this particular allegation in paragraph 5 of its Re-Amended defence. The Claimants' first witness, Mr. Frank Harrison stated in paragraph 6.8 of his witness statement that Mota-Engil was not

spraying water at Mgodi quarry site and on roads surrounding the quarry to deal with quarry dust. The assertions made by all the Claimants' witness of fact however do not establish whether or not the dust was materially serious to assist the court to determine whether this constituted an actionable nuisance. The Claimants' expert witness, Mr. Harvey Chilembwe, actually told the court during cross-examination that the Claimants did not arrange for any expert report on substantiality of the dust at Mgodi quarry mine.

157. That on the contrary, it was Mr. Tiago Barbosa's evidence, in paragraph 16(iv) of his witness statement, that dust was mitigated at Mgodi quarry mine through spraying water with water sprinklers from water bowsers. In paragraph 16(v), he stated that the proximity of the quarry site to the surrounding communities was not so close that would cause any of the claimed impacts. In cross-examination, Mr. Barbosa told the court that most houses are at vast distances from the Mgodi quarry. He said that blasting, drilling and crushing produce dust. He also said that dust from blasting takes less than one minute to dissipate. He told the court that the crusher had sprinklers that sprinkled water around it to mitigate dust.

158. That the evidence of this witness went un-assailed. Miss Susan Namangale (DW3) also stated in paragraph 6(i) (ii) and (iv) of her witness statement that Mota-Engil mitigated the risk of dust. The Defendant then submitted that the Claimants had failed to lead any evidence that the dust was seriously substantial to render this alleged nuisance actionable.

Quarry stones/fly rocks

159. That the Claimants alleged in their Statement of Case that quarry stones were coming from Mgodi quarry site which were dangerous and greatly inconvenient to them. Mota-Engil denied this allegation in paragraph 5 of its Re-amended Defence. On page 10 of ***HC1*** (page 87 of trial bundle), the expert report, Mr. Harvey Chilembwe stated that fly rocks were visible around the area. It stated that the communities narrated that fly rocks were damaging their houses and killing their livestock. However, none of the Claimants' ordinary witnesses in this case told this to the court in this matter. Neither did the Claimants' ordinary witnesses bring any evidence to establish how dangerous and greatly inconvenient the quarry stones were as pleaded.

160. That this Honourable Court should recall having been informed, during a site visit at Mgodi quarry, by both lawyers for the Claimants and Mota-Engil that the present action or matter does not make any property damage claims, and that the Claimants had already lodged a separate property damage claim as allegedly being caused by fly rocks or quarry stones from the quarry operations at Mgodi quarry mine in the high Court of Malawi in Zomba styled as ***Frank Harrison & 47 Others vs Mota-Engil***. Civil Cause No. 6 of 2014.

161. That in that action, the Claimants seek (i) Damages representing the cost of renovating and rebuilding of each of the Claimants' houses (ii) Damages for inconvenience (like in the present case) from 2012 to the time the blasting activities will cease, and (iii) Damages representing resettlement compensation. Besides there is also another subsisting case in the High

Court, Principal Registry, in respect of quarry operations at Mgodi quarry mine. This case is styled as ***Collings Manyamula & 174 others v. Mota-Engil***, Civil Cause No. 176 of 2020.

162. This subsisting action registered with the High Court in 2020 seeks to recover most of the remedies being sought in the present case before this court. As the lawyers for both parties were agreed and made this disclosure to the court, we accordingly attach hereto both copies of the Frank Harrison case registered at the High Court in Zomba and the Collings Manyamula case registered at the High Court, Principal Registry for this courts and attention and consideration.

163. That on its part, Mota-Engil's witness, Mr. Tiago Barbosa stated in paragraph 16(ii) of hi witness statement, that Mota-Engil employed people mitigating measures to ensure safety of all people surrounding the blast radius. He said Mota-Engil defined a secure blast radius and ensured that all people were evacuated from the defined area. In cross-examination, this witness told the court that Mota-Engil tried to use shields but some houses surrounding The Mgodi quarry mine were destroyed and Mota-Engil paid compensation for the physical damage. He said he could not remember exactly how many times the fly rocks fell on the houses. He said it might have been 3 or 4 times. He said no person or animal was injured during the entire period of quarry operation. In re-cross-examination, he told the court that the causes of fly rocks are many including human error. He said fly rocks in this case was caused by different rock densities.

164. That from the totality of the evidence before the court, we submit that the Claimants have failed to lead evidence of how materially substantial the fly rocks or quarry stones were to the Claimants in order to help the court determine whether such rocks or stones had amounted to an actionable nuisance in the circumstances. The unchallenged evidence of Mr. Tiago Barbosa in paragraph 16(ii) of his witness statement is that, as far as fly rocks were concerned, Mota-Engil employed mitigating measures to ensure safety of all people surrounding the blast radius. He said they had defined a secure blast radius and ensured that all people were evacuated from the defined area before each blast. In cross-examination, he told the court that no psychological damage was caused on the Claimants.

165. He told the court that the incidents of quarry or fly rocks only occurred 3 or 4 times for the entire period of quarry operations at Mgodi quarry mine. The Claimants lived in the same area of the quarry throughout the material period of its operation. They have not led evidence to show that the incidents of the fly rocks was very regular and sufficiently serious that any reasonable man living in their area under the same circumstances would have failed to put up with such quarry stones.

166. The Defendant therefore submitted that there is no evidence to establish that the incidents of fly rocks was in the circumstances materially substantial to amount to an actionable nuisance. That as to whether Mota-Engil trespassed onto the Claimants' land as alleged, or at all. In relation to this alleged cause of action, we invite the court to throw it out with costs on grounds that the Claimants pray for a remedy, namely damages for trespass in respect of a cause of action not pleaded – trespass to

land being an entry upon or any direct and immediate act of interference with the possession of land.

Finding

167. The parties are agreed that the Defendant was operating a quarry mine at Mgodi near the villages were the Claimants were residing. I'm in agreement with the ruling in *Rylands vs Fletcher* [1868 UKHL] 1 (1868) LR 3 HL 330. The rule states that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and , if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

168. There is dispute as to what really happened to the welfare of the Claimants during the mining period. The Claimants claim they were inconvenienced with the blasting noise, dust, fumes and fry rocks and that they were partly compensated and they want the remaining sums of money paid out for the 18 months the Defendant operated. The Defendant on the other hand claim they mitigated the damage by straying water to minimize dust, engaging skilled operators and safely officers who made sure the Claimants were relocated to a safe area during the blasting.

169. That they use to blow a siren to warn the Claimant of an impending blast. That no Claimant was injured during the blasting season. The Defendant however admitted that a few houses were destroyed during the blasting and compensation was paid to those people. The first defence witness, Mr. Tiago Barbosa told the court that they were requiring the Claimants to move out of the danger zone before each blast. He said that the

safety radius could at times be extended from 500m to 700m. His evidence was not challenged that Mgodi quarry employed controlled blasting since they used water gel- based emulsions / explosives or detonating codes which makes the blasts almost silent.

170. Mr. Harvey Chilembwe stated that fly rocks were visible around the area and the communities narrated that fly rocks were damaging their houses and killing their livestock. However, none of the Claimants' ordinary witnesses in this case told this court how many people or animals were injured by the fly rocks. Again neither did the Claimants' ordinary witnesses bring any evidence to establish how dangerous and greatly inconvenient the quarry stones were as pleaded. I find that to have no incident of injury to human beings or animals during the entire blasting season but mere damage of a few houses is a clear indication that the Defendant took all reasonable precautions to ensure the safety of people and animals.

171. The witness for the Defendant Mr. Tiago Barbosa said they did not use Ammonium Nitrate at Mgodi quarry mine. He further told the court that blast noise at the quarry was significant within 100 m from the source and no more. In Paragraph 16(v) of his witness statement, Mr. Barbosa told the court that the proximity of the quarry site to the surrounding communities was not so close that it would cause any of claimed impacts like noise pollution. DW3 – Miss Susan Nmangale – stated in paragraph 6 of her witness statement that there was no grievance submitted to Mota-Engil by members of the surrounding community regarding noise at the material time. The Claimants did not dispute this assertion at trial.

172. I find as a fact that Mr. Thulu testified in cross-examination that he did not go to or visit the material area or place in Zalewa. He confessed to the court that he did not carry out any assessment, study or measurements while on site. Mr. Thulu did not give details of his expert qualification in his expert report (FT1) as required by the CPR 2017. Further to that he did not state who carried out the distance measurements in respect of all the residents at Zalewa (allegedly residing within 800m from the blast point) in his purported Appendix1 to FT1 and the persons' qualifications.

173. Again the original of the Appendix 1 to FT1 (the map) was not brought to court. I agree with the Defendant that Mr. Thulu's expert report (FT1) is incurably irregular as it is not in compliant with the requirements under Order 17, Rule 25 (1) of the CPR. This expert report (FT1) cast doubt as to its correctness and on a balance of probabilities and its weight is less on the scales of justice.

174. I'm in agreement with the Defendant that the Claimants have not led evidence on a balance of probabilities on the effects on their health from the blasting noise and dust. The effects with which to evaluate blast or quarry noise from the Mgodi quarry mine have not been pleaded by the Claimants in the statement of case to have been suffered. The totality of the Claimants' evidence adduced at trial does not establish any of these 'injuries' to have ben suffered by virtue of noise and dust from quarrying/blasting activities at Mgodi quarry mine.

175. In these premises, from the entirety of the evidence before the court, I find that accordingly the Claimants have failed to prove on a balance of probabilities that the blast noise at Mgodi quarry mine in Zalewa was above the acceptable noise levels of the Malawi Bureau of Standards and was seriously substantial or in excess of the tolerance limits under paragraph 6.1(c) (d) of FT2 that any reasonable man living within the Claimants' area would have failed to put up with it.. They have failed to proof that there was too much dust after the blasting which according to the evidence lasted for about a second since the Claimants had been evacuated to a safe location far away from the blast point.

176. The Claimants' statement of case alleged in paragraph 7 that bad smell/fumes had been coming from the direction of Mota-Engil's Mgodi quarry mine which was dangerous and inconvenient to them. Mr. Frank Harrison witness statement, Mr. Chigalu's statement, Mr. Mankhwala Masinde's witness statement and, Eunice Kapyola's witness statement, have all alleged that the blasting exercise was producing bad smell dangerous to the Claimants. The Defendant Mota Engil, in their Defence, denied that its quarrying operations were producing bad smell as alleged.

177. The Claimants have stated that the interference of a neighbour's quite enjoyment of his land must be continuous interference. They cited the case of *Bliss –vs- Hall* where it was held that smell and fumes from candle making invading adjoining land amounted to nuisance. Looking at the evidence before me I find no evidence whatsoever, expert or ordinary, to substantiate the Claimant's claim and establish that the alleged fumes or

smell were indeed produced, and that it was sufficiently dangerous to constitute an actionable nuisance.

178. I further find that the Claimants have failed to prove that there were fly rocks which damaged the Claimants houses which remained unrepaired to date. Harvey Chilembwe (expert witness) (CW2) told the court that he did not see quarry dust coming from Mota-Engil's blasting operation at Mgodi Quarry. He said he did not experience any noise from the quarry activities at Mgodi quarry. He said neither did he see flying rocks coming from the quarry mine. He confessed that he did not have any direct evidence that quarry dust, noise, fumes and fly rocks were coming from the quarry mine. He further confessed that there was no expert report on the same.

179. I agree with the Defendant that the Claimants have failed to show the court the kind of business whatsoever they were undertaking to claim loss of business. This claim must fail outright.

180. The claim for trespass to land must equally fail. On whose land did the Defendant encroach or trespass? Was it the quarry site or the Defendant was carrying out mining on the Claimants' piece of land? Trespass to land being an entry upon or any direct and immediate act of interference with the possession of land. The Claimants alleged that several complaints were made to the DC but no single copy of such complaints have been brought to the attention of the Court. Miss Susan Namangale (DW3) told the court that no grievance was submitted to Mota-Engil during the entire period of quarry operations at Mgodi quarry mine regarding the alleged bad smell. It is my finding that the Claimants through their witnesses Mr. Frank Harrison, Mr.

Chigalu, Mankhwala Masinde and Eunice Kapyola's have failed to provide on a balance of probabilities the several allegations they have made against the Defendant.

181. In these premises what remains is whether there were sums of money unpaid as per the agreements between the parties. From the evidence the Defendant admitted that there was some inconvenience to the Claimants during blasting and evacuation hence the parties had agreed to some form of compensation. However Defendant stated that the alleged loss arose from the legal requirement on the Claimants to move out of the danger zone before each blast, and not from exposure to any noise levels or dust.

182. The question is whether all the sums of money were paid out? To answer that questions the only logical thing to do is to go the agreement the parties signed. What constitute a valid contract, there must be definite parties to the contract; the parties must intend to create legal relations, and the promises of each party must be supported by factors which the law considers sufficient: **Chitty on Contracts** (25th Edition), Vo. 1 (General Principles) Sweet & Maxwell, London 1983. An agreement like in the instant case is reached by the process of offer and acceptance and the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made.

AGREEMET FORM
(RELOCATION)

Iyi ndi kalata ya ngwirizano pakati pa ine (dzina).....amene ndili okhuzibwa ndi ntchito yakuswa miyala ya quarry pa Mgodi Quarry wa pamudzi wa.....mfumu yaikulu Chigalu m'boma laBlantyre ndi Mota-Engil (kampani yomwe ikuyendesa ntchito za Mgodi Quarry.

Ndikugwirizana nazo kuti

- Ndizachoka pa nyumba panga pamozi ndi banja langa lonse ndiponso ziweto zanga patsiku ndi nthawi imene mabomba oswera miyala pa mmgodi Quarry azizaphulitsidwa
- Ndizabwerera pa nyumba panga pamodzi ndi banja langa lonse ndiponso ziweto zanga patsiku ndi nthawi yokhazikisidwayo
- Ndizalandila ndalama.....kuchokera ku Mota Engil yondipepesa chifukwa chakuchoka pa nyumba panga
- Kuti sindizasokoneza ntchito za pa Mgodi Quarry chifukwa cha nkhani za mabomba ophulitsa miyala chifukwa kutero ndi kumphwanya panganoli ndipo a Mota Engil ali ndi ufulu kunditegela kubwalo la milandu

Mwuni Nyumba.....dzina

Kusayinila.....

Mota Engil.....Dzina

Kusayinila.....

Mboni yapambali.....

Kusayini;la.....

183. The agreement speaks for itself. There is no where it says the Claimants shall be paid money per blast. There is nowhere in the agreement that stated that the Defendant will pay out to each member of a household. The Claimants agreed and stated in the agreement that ***Ndizachoka pa nyumba panga pamozi ndi banja langa lonse ndiponso ziweto zanga.*** There is nowhere the agreement talks of compensation to animals much as the voucher itemises the amounts and the type of animal in **FH 45**. What is clear from the agreement is that this was a payment of compensation for the inconvenience of being relocated every day there was a blats. ***"Ndizalandila ndalama.....kuchokera ku Mota Engil yondipepesa chifukwa chakuchoka pa nyumba panga***

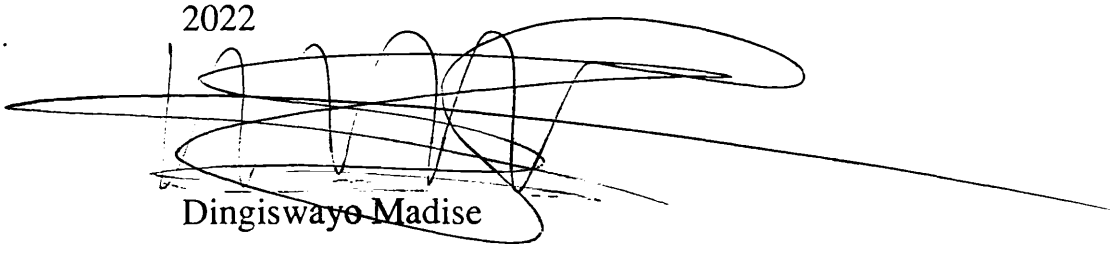
184. Again the figures are different and I do not know why. But surely there was a formula that was used to come up with the different figures for different persons. The payment vouchers stated that this was payment for two months (FH 45) and the total rental for 2 month was K60, 000.00. Ms Namangale admitted that the Agreement was to avoid further disturbance by the surrounding villagers to the quarry operations for two (2) months before the mining licence expired.

185. She told the court that the people received the money from Mota-Engil but never complied with the terms of the agreement. What happened to the payments for the other months since these payments were only for 2 months? I'm in agreement with the Claimants that they should be paid for the remaining number of months from the day the agreement was signed (July 2014) to the day the Defendant stop its mining activities on 10th Dec 2015. The Claimants must take out summons before the Registrar for

assessment of the compensation at the same rate as calculated for the 2 months for the remainder of the blasting period which is 18 months in respect of that Claimants who received the 2 months payments.

186. The agreement does not say that the Defendant will pay compensation for the blasting that occurred prior to the signing of the agreement. This assertion has not been substantiated and it must fail. The truth of the matter is that the Claimants used this money and now they want more. This cannot be allowed in this Court. I dismiss all the other claims save the remaining amount for the remainder of the months. I make no order as to costs.

Pronounced in Open Court at BLANTYRE in the Republic on 16th March 2022



Dingiswayo Madise

Judge