

TERMS OF CONTRACT HIRE AGREEMENT

- 1. Definitions**
In this Agreement:
- 1.01 "Agreement Date" means the date so called in the Schedule.
- 1.02 "Equipment" means the Equipment described in the Schedule and any substitute Equipment exchanged therefor by us pursuant to Clause 2.04 below and includes each item thereof and all component parts, accessories, ground engaging tools, additions, alterations and replacement parts thereto.
- 1.03 "Schedule" means Schedule attached to this Agreement which shall form part of this Agreement.
- 1.04 "Repair and Maintenance Schedule" means the section of the Schedule headed "Repair and Maintenance".
- 1.05 "Fixed Period" means the period so called in the Schedule.
- 1.06 "Total Loss" means any loss, theft, seizure, confiscation or destruction of the Equipment or any damage thereto which in the insurer's opinion may not be economical to repair.
- 1.07 "Premises" means the premises where the Equipment is situated.
- 2. The hiring; rentals; delivery of the Equipment**
- 2.01 We agree to hire and you agree to take on hire the Equipment on the terms of this Agreement.
The hiring will start on the Agreement Date and will continue for the Fixed Period and at the Rentals shown in the Schedule. It is agreed and declared that you shall have no right to terminate the hire earlier than the expiry date of the full Fixed Period shown in the Schedule.
- 2.02 You will pay us at our address shown in the Schedule at the times stated in the Schedule together with value added tax:
(a) the rentals shown in the Schedule or as adjusted under this Agreement;
(b) any other sum payable under this Agreement.
Payments made by post will be at your own risk. Punctual payment shall be of the essence of this Agreement.
- 2.03 You will accept delivery of the Equipment only if it satisfactory. If the Equipment is unsatisfactory you will notify us immediately by fax or email. If we do not receive a fax or email from you within 48 hours of delivery it will be conclusively presumed that you have accepted the Equipment and that it is completely satisfactory.
- 2.04 We hereby reserve the right, such right to be exercised by us giving notice in writing to you at any time after the Agreement Date and/or from time to time thereafter to exchange for the Equipment shown in the Schedule hereto (the "Original Equipment" substitute equipment (the "Substitute Equipment") which shall be of substantially similar design and specification to the Original Equipment. The Substitute Equipment shall upon its delivery to you become subject to all terms and conditions of this Agreement. On delivery of the Substitute Equipment to you, you shall execute and deliver to us a schedule in the form required by us identifying the Substitute Equipment and shall deliver up the Original Equipment to us in accordance with Clause 9.02 of this Agreement and in the state and condition required by the terms of this Agreement.
- 3. Risk, Care, Title, Use of Equipment: Indemnity**
- 3.01 You will be responsible for any loss, theft, destruction of or damage to the Equipment from the date of delivery until it is sold or disposed of.
- 3.02 If you have not chosen repair and maintenance by ticking the box in the Repair and Maintenance Schedule you will at your own expense keep the Equipment properly serviced, maintained and in good repair and operating condition and repair or replace any missing or unfit parts with parts supplied by the manufacturer or its accredited agent and have all servicing and maintenance carried out strictly to the standard and strictly at the service intervals recommended by such manufacturer or its accredited agent by qualified personnel.
You will maintain or cause to be maintained complete records of all service, maintenance and repair to the Equipment. All replacement parts fixed to the Equipment will belong to the owner of the Equipment and be subject to the terms of this Agreement. Without prejudice to the foregoing you will carry out routine preventative maintenance to the engine, hydraulic and cooling systems in strict accordance with the manufacturer's instructions and recommendations.
- 3.03 The Equipment as between us and you will remain personal and moveable property even if temporarily fixed to land or buildings. If requested by us you will attach the owner's nameplate to the Equipment. You will ensure that we or our agent will have a right of access to the Equipment and all related records at all reasonable times for inspection and removal and the periodic collection of oil samples for analysis (the cost of such collection and analysis shall be borne by you) and at any reasonable time during the nine months immediately prior to the date of the expiry of the Fixed Period shown in the Schedule will at our request demonstrate the Equipment to any potential purchaser and allow them to inspect the Equipment and all related records. If the Equipment becomes fixed to land or buildings you will make sure that any person who has an interest in the land from time to time gives us in writing a waiver of any right to the Equipment and a right to enter the land and remove the Equipment. You will tell us immediately if you change your address. You will not take the Equipment outside Great Britain without our previous written consent.
- 3.04 You will ensure that the Equipment is only used or operated by properly skilled and trained personnel in a careful and proper manner, only for the purpose for which the Equipment has been designed and in strict accordance with any operating instructions issued by the manufacturer of the Equipment, any government agency or any statutory authority. You will not use or let anyone use the Equipment illegally.
- 3.05 You will not let anyone obtain any rights over the Equipment or let anyone take or threaten to take it to pay any of your debts. You will keep the Equipment in your possession and under your control and you will not sell, transfer, mortgage, lend, let, sublet or give the Equipment to anyone or otherwise part with possession of the Equipment without our previous written approval (deemed to be given in respect of temporary use of the Equipment by any United Kingdom "holding company" of yours or any United Kingdom "subsidiary" of such holding company within the meaning of section 736 of the Companies Act 1985 on terms that such holding company or subsidiary must deliver up possession of the Equipment to us or the owner immediately on demand or earlier termination of the hiring under this Agreement).
- 3.06 You will not permit or allow the Equipment to be used contrary to law including any statute or other rule, regulation or order.
- 3.07 You will not be a party in a legal proceeding brought by the EC commission.
- 3.08 You will respect national and EC regulations with regard to protection of the environment at the location in which the Equipment is situated.
- 3.09 You will not make any alterations to the Equipment without our prior written consent unless you are obliged to do so by law. Any additions, upgrades, accessories, alterations or replacements will become the property of the owner of the Equipment and subject to this Agreement.
- 3.10 You will not change the location of the Equipment from the location shown in the Schedule without our written consent.
- 3.11 You will maintain or cause to be maintained in full force and effect all certificates, licences, registrations, permits and authorisations required by any statutory authority at all times during this Agreement and ensure that each of the foregoing are in force on termination of this Agreement.
- 3.12 You will indemnify us against any liability or loss (including legal costs on a full indemnity basis) arising from the possession or use of the Equipment by you or its ownership by the owner or repossession by us.
- 3.13 You must:
(a) Not default on the payment of any sum due or commit any other breach under any loan, instalment credit, rental, hire or leasing agreement you may have with us or our holding company or any of our subsidiaries (as such expressions are defined in section 736 of the Companies Act 1985);
(b) Not do or allow to be done anything which we reasonably believe may put at risk the performance of your obligations under this Agreement;
(c) If you are a limited company or a partnership, not cause or allow any change in your control (as defined in section 840 of the Income and Corporation Taxes Act 1988).
- 4. Insurance and Damage**
- 4.01 You agree at your own expense and with insurers and on terms previously approved by us to insure:
(a) the Equipment and keep it insured against all usual risks for at least whichever is the greater from time to time of:
(i) the total of the rentals shown in the Schedule less the sum of the rentals already paid; and
(ii) the full replacement value of the Equipment; and
(b) you and us for at least £2,000,000 against liability to others for loss or damage caused by the Equipment (including without limitation, injury, death, disease or physical damage or loss whether to persons or property).
- In each case from the time the Equipment is delivered to you until it is returned to us or otherwise disposed of following termination of the hiring under this Agreement. If you fail to insure in accordance with this Clause we may do so and you will repay the costs and expenses incurred by us (including premiums) upon demand.
- 4.02 You agree to have the owner's interest noted on the insurance policy and produce to us before the Agreement Date and then on each renewal or replacement of the policy a certificate of insurance from the insurers and a receipt for the current premium.
- 4.03 You agree that if the Equipment is damaged but such damage is not a Total Loss, you will apply all insurance proceeds received by you in repairing the damage. If there is a Total Loss of all or some of the Equipment you will pay to us the amounts due on termination for Total Loss in respect of such Equipment under Clause 8.
- 4.04 You agree that if there is any damage to the Equipment whether or not a Total Loss, you will notify us immediately and assign to us all your rights and claims under the insurance policy and by your signature in the Schedule you irrevocably appoint us to be your sole agent to receive all insurance proceeds and to negotiate or agree or compromise with the insurers in respect of the claim and to give an effective receipt and discharge to the insurers PROVIDED THAT any insurance proceeds received by us for damage which is not a Total Loss will on receipt by us of evidence that the repairs to the Equipment have been completed, be applied by us in or towards reimbursement to you of such payment, any surplus to be paid to you and any shortfall paid by you.
- 5. Total Loss and Termination**
- 5.01 If there is a Total Loss you will tell us immediately and we and you agree that this Agreement will terminate automatically (but if only one or more items of the Equipment and not all the Equipment suffers such Total Loss then this Agreement will terminate only in relation to the item or items suffering such Total Loss) and you will immediately pay to us the amounts due on termination for Total Loss in respect of such Equipment under Clause 8. If there is a Total Loss of some of the Equipment only then subject to you making payment in full of the amounts due under Clause 8 for termination for Total Loss the rentals due in respect of the remaining proportionately to take account thereof and we will certify the amount of the reduced rentals:
(a) the total of the rentals shown in the Schedule (but if only one or more items of the Equipment suffer a Total Loss as aforesaid there shall be payable only such proportion of the total of the rentals as the original cost (exclusive of VAT) of the item or items in question bears to the original cost (exclusive of VAT) of all the Equipment which is on hire under this Agreement immediately before the Total Loss) less the sum of the rentals already paid (but if only one or more items suffer a Total Loss as aforesaid only the same proportion as stated above of such sum shall be so deducted); and
(b) the full replacement value of the Equipment (but if only one or more items suffer such Total Loss, as aforesaid, the full replacement value of such item or items only shall be used in this calculation).

OR PERFORMANCE OF THE EQUIPMENT OR AS TO ITS FITNESS FOR ANY OR ANY PARTICULAR PURPOSE. ALL SUCH REPRESENTATIONS AND UNDERTAKINGS ARE SPECIFICALLY EXCLUDED.

- (b) IF IN MAKING THIS AGREEMENT YOU DEAL AS A CONSUMER OR IF IN SCOTLAND THIS AGREEMENT IS A CONSUMER CONTRACT (WITHIN THE MEANINGS OF SECTIONS 12 AND 25 OF THE UNFAIR CONTRACT TERMS ACT 1977) BUT NOT OTHERWISE, THE EQUIPMENT IS HIRED TO YOU WITH THE BENEFIT OF ANY UNDERTAKINGS ABOUT TITLE, CORRESPONDENCE WITH DESCRIPTION, FITNESS FOR PURPOSE AND SATISFACTORY QUALITY IMPLIED BY THE SUPPLY OF GOODS AND SERVICES ACT 1982;
- (c) NO LIABILITY (EXCEPT FOR DEATH OR PERSONAL INJURY RESULTING FROM OUR NEGLIGENCE) WILL ATTACH TO US IN CONTRACT OR IN TORT, FOR LOSS, INJURY OR DAMAGE SUSTAINED BY ANY REASON OF DEFECT IN THE EQUIPMENT WHETHER LATENT OR APPARENT AND HOWEVER CAUSED.
- (d) WE MAKE NO REPRESENTATIONS AS TO THE EQUIPMENT BEING "MILLENNIUM COMPLAINT" NOR DO WE WARRANT THAT THE EQUIPMENT NOR ANY SUPPORTING FUNCTIONS ARE CAPABLE OF FUNCTIONING ON, BEFORE OR AFTER THE YEAR 2000.

10.03 We will not be obliged to supply any replacement for the Equipment and will not be liable for any loss including loss of earnings or profits suffered by you if the Equipment is or becomes unusable.

11. Repair and Maintenance

11.01 If the maintenance Schedule indicates that repair and maintenance is to be provided we will arrange for the Equipment to be maintained throughout the period of hire on the terms set out in this clause and set out in the Repair and Maintenance Schedule.

11.02 The repair and maintenance will be carried out by the person named and described as the "Maintainer" in the Repair and Maintenance Schedule.

11.03 Provided that you carry out your obligations stated in this Agreement, the Maintainer will arrange for:

- (a) the servicing of the Equipment in accordance with the manufacturer's guidelines or every 500 hours or at such intervals that we or the Maintainer deem necessary;
- (b) oil sampling in accordance with the Maintainer's Schedule;
- (c) for repair of the Equipment as necessary to keep it in satisfactory operation including the fitting without additional charge of new or reconditioned parts;
- (d) the replacement of components at no additional charge using new or reconditioned components when the Maintainer deems that such component has reached the end of its optimum economical service life;
- (e) the Maintainer to respond at your request in the event of a breakdown of the Equipment. Providing this request is made before 11 a.m., the Maintainer shall attend on site within twenty four hours of such request but will use reasonable endeavours to attend on site within 6 hours (within the hours specified in clause 11.04) for the purpose of inspecting the Equipment and shall carry out such servicing, adjustments and repairs to the Equipment and shall replace such components parts as the Maintainer shall in its absolute discretion deem to be necessary to restore the Equipment to satisfactory operation;

11.04 Normal working hours for the purpose of this Agreement will be between 8:00a.m and 4:30 p.m on any weekday (excluding Saturday) which is not a public holiday. Should the Maintainer inspect, repair or service the Equipment, at your request, outside of normal hours, then a premium rate will be charged and we or the Maintainer will be entitled to invoice you directly for these charges and payment will be made within 30 days.

11.05 We or the Maintainer shall not be responsible for the following items or any costs of repairs arising from such items:

- (a) the cost of maintenance and or repair of glass;
- (b) the cost of maintenance and or repair and replacement of tyres or tracks and undercarriage components, including wheel rim repairs, tensioning of tracks, wheel nut replacement and tightening and any contributory damage;
- (c) the supply of oils and greases or the disposal and processing of waste oils;
- (d) any damage caused to the Equipment as a result of your failure to maintain and repair items under 11.05 (a) and (b) or carry out your obligations under 11.07 (a).
- (e) damage to the Equipment caused by accident damage and or misuse, abuse, vandalism and/or theft;
- (f) damage caused as a result of unauthorised repair and maintenance of the Equipment by you and or any unauthorised personnel;
- (g) damage caused by the operation of the Equipment in conditions which it was not designed for or capable of;
- (h) fire damage;
- (i) failure to give the Maintainer sufficient notice of a recognised Equipment fault;
- (j) failure to allow the Maintainer access to the Premises;
- (k) failure to stop the Equipment if requested by the Maintainer;
- (l) buckets, ground engaging tools (including any wear plate, cutting edge or teeth) and forks;
- (m) negligence by you or your servants or agents.

11.06 Following the occurrence of any of the events referred to in Clause 11.05, the Maintainer may carry out any repairs it considers to be necessary. If the Maintainer does so, in addition to the rental charges payable by you, we or the Maintainer will be entitled to invoice you direct to the Maintainer's rates from time to time in force for any costs arising out of the rectification of the items listed in clause 11.05. You will pay these invoices within 30 days.

11.07 You will be responsible for:

- (a) carrying out daily maintenance on the Equipment including checking oil and coolant levels, checking and cleaning air filters and externally checking and cleaning radiators, the fitting of replacement bulbs and wiper blades (to be sourced through the Maintainer) as detailed in the manufacturer's operating and maintenance guide, and undertake not to use fuel and lubricants which do not meet the specification approved by the Maintainer;
- (b) once a month reading and reporting by facsimile or telephone the recorded Meter reading to the Maintainer;
- (c) immediately reporting any damage to the Equipment to the Maintainer;
- (d) arranging the service of the Equipment by the Maintainer at 500 hour intervals or more frequently should the Equipment require attention between these intervals;
- (e) paying for and supplying all fuels, oils, lubricants and greases at and between the scheduled maintenance intervals required to maintain the Equipment in satisfactory operation;
- (f) keeping the Equipment clean;
- (g) repairing all punctures and checking tyres regularly to ensure that they comply with any legal requirements and are in good condition.

11.08 We hereby reserve the right, such right to be exercised by us giving notice to you each year at or around the anniversary of this Agreement, to increase the net rental by a factor equivalent to the sum of the Excess Usage rate per Hour multiplied by the Basic Monthly Usage (as shown in the Repair and Maintenance Schedule), multiplied by any increase in the price index (and compounded in the event of a subsequent increase in the index) for "machinery for mining, quarrying and construction", published by the Office for National Statistics.

12. General

12.01 You confirm that the information provided by you and shown in the Schedule is true and you acknowledge and agree that such information will be treated as if it were terms of this Agreement.

12.02 If you fail to pay any sum due on time we will charge you daily interest on that sum at the rate of 5% above Finance House Base Rate from time to time. Interest will be charged from the date for payment until actual payment. This provision will apply both before and after any court judgement we may obtain against you and will survive and apply after termination.

12.03 If you incur any liability (whether liquidated or unliquidated) to us or our holding company or any of our subsidiaries (as such expressions are defined in section 736 of the Companies Act 1985) we may set off such liability against any sum that would otherwise be due to you under this Agreement.

12.04 Any notice required under this Agreement will be properly served only if in writing and sent by fax or prepaid letter post or delivered by hand to the addressee's address shown in the Schedule or the last known address of the addressee. Notice will be effective at the time of sending if sent by fax 72 hours after posting if sent by prepaid letter post and at the time of delivery if delivered by hand.

12.05 If you are more than one person your obligations will be binding on each person separately and all persons jointly.

12.06 Our rights under this Agreement will not be affected by any forbearance or concession made by us to you.

12.07 In negotiations for this Agreement only persons expressly authorised in writing by us have had authority to act as our agent.

12.08 This Agreement contains all the terms agreed between us except variations recorded in writing and signed by our authorised employee and you.

12.09 You will not assign this Agreement.

12.10 For the purpose of UK taxation and irrespective of the accounting treatment adopted by you, you are not entitled to claim capital allowances on the Equipment.

12.11 Your obligation to pay us interest under Clause 12.02 and to pay us an additional rental or payment under Clause 9.01 will not be affected by any termination of this Agreement.

12.12 You will pay us on demand our charges for changing the terms of this Agreement or providing additional maintenances at your request and for reminding you about or dealing with any failure by you to comply with the terms of this Agreement. Details of our charges are available on request and will be notified to you in any event before you are charged.

