OUTER HOUSE, COURT OF SESSION

[2026] CSOH 22

A227/23

OPINION OF LORD ERICHT

In the cause

BPL CONTRACTS (SCOTLAND) LIMITED

Pursuer

against

BEATTIE FRC LIMITED

Defender

Pursuer: Barne KC, Tyre; Harper Macleod LLP (Edinburgh)
Defender: Jones KC (sol adv), Ford (sol adv); Brodies LLP

6 March 2026

Introduction

[1] Aberdeen Harbour Board embarked upon extensive works to expand Aberdeen Harbour. They entered into contracts with the defender as main contractor for various packages of works, including the Crown Wall works, Coping works, Pavement Slab works, sewer works and drainage works. The defender in turn entered into sub-contracts with the pursuer in relation to only two of these packages of works, the Crown Wall works and the Pavement Slab works. Each of these sub-contracts was entered into orally and was not reduced to writing. The parties are in dispute as the terms of each sub-contract, and the pursuer seeks declarators as to their terms. The parties are also in dispute as to the amount

remaining due in relation to each sub-contract. The pursuer seeks payment of outstanding sums which it says are due to it under each sub-contract. The defender denies that any sums are outstanding, and counterclaims in unjust enrichment for return of alleged overpayments under the Crown Wall sub-contract.

The Crown Wall sub-contract

[2] In around February 2021, the defender's Vincent O'Donnell telephoned the pursuer's Michael Foy to inform him that the Aberdeen Harbour Board were to appoint the defender as main contractors to carry out expansion works at Aberdeen Harbour.

[3] A new main contractor was needed because Aberdeen Harbour Board had parted company with the previous main contractor. Construction of the Crown Wall required form work. Form work is a shuttering which holds the concrete in place until it sets. In traditional form work the shuttering is built, taken down, and rebuilt at each section of concreting. However, under the previous main contractor, an innovative form of form work, known as travelling form work, was to be used. This involved sliding panels which were moved along as the concrete set. DOKA GmbH had been appointed to supply the travelling form work. Neither the pursuer's personnel nor the defender's personnel were familiar with this new system.

[4] On or around 1 March 2021 Vincent O'Donnell telephoned Michael Foy to arrange a meeting to discuss the Crown Wall work. The meeting took place on 8 March 2021 at the defender's office at Bo'ness Road, Grangemouth. The purpose of the meeting was to allow the pursuer, the defender and DOKA to consider the Crown Wall work package.

[5] At that meeting, the pursuer and the defender entered into the Crown Wall sub-contract orally. The dispute between the parties is what the terms of that contract were.

There is no dispute that the parties agreed on a 50/50 share of the profit. The question is, profit on what? The pursuer says it was the profit made by the defender on the Crown Wall works under the pursuer's contract with the Harbour Board. The defender says that it was the profit on only the labour element of the Crown Wall works.

[6] In this action both parties seek payments in respect of the Crown Wall sub-contract. The pursuer seeks £836,544 and the defender counterclaims for £93,295.15

The Pavement Slab works

[7] The pursuer and defender also entered into a sub-contract for Pavement Slab works.

[8] The parties are in dispute as to its terms, and the pursuer seeks payment of £654,117.

The £200,000 payment

[9] A further area of dispute between the parties is whether a payment of £200,000 made by the defender to the pursuer in December 2022 should be ascribed to the Crown Wall sub-contract or the Pavement Slab sub-contract.

Procedural history in this action

[10] The action was raised in July 2023. It is an ordinary action rather than a commercial action. The procedural history is marked by changes in position by the defender, delays by the defender in providing critical information, and the discharge of the first proof set down for 10 December 2024 on the first day of the proof. Many of these difficulties could have been avoided had the case had the benefit of case management as a commercial action.

Changes in the defender's position on the Crown Wall sub-contract

[11] Skeletal defences were lodged in August 2023 and were developed during the adjustment period. Adjustments made in October 2023 by the defender had the meeting on 8 March 2021 being attended throughout by Mr O'Donnell. This position changed in adjustments made on 17 January 2024 which stated that Mr O'Donnell left the room before commercial terms were agreed. By the time the record was closed in June 2024, the defender's pleaded position as to what happened at the meeting on 8 March 2021 was as follows:

> "Explained and averred that the purpose of the meeting was to allow the pursuer, the defender and Doka to consider the Crown Wall works package. The meeting was attended by John Hogg and Michael Foy for the Pursuer. David Hancock was in attendance for Doka. Mr O'Donnell, Mr Beattie and Adam Finch were in attendance for the defender. As at 8 March 2021, the defender had not yet agreed to carry out the Crown Wall Works for the Harbour Board. The defender was considering whether to accept the Crown Wall works package. It was the defender's intention, if it were to proceed with the Crown Wall works, to deliver the works with the pursuer as labour subcontractor for certain elements of the Crown Wall works. The pursuer had previously provided labour to the defender in respect of other projects. The pursuer, the defender and Doka considered the Crown Wall works and associated drawings at the meeting. Mr Hancock, on behalf of Doka, explained the works to the pursuer and the defender during the meeting. Mr Hancock thereafter left the meeting to allow the pursuer and the defender to discuss commercial terms for the supply of labour by the pursuer to the defender in connection with the Crown Wall works. Mr O'Donnell also left the room at this time. It was agreed that the pursuer would provide joiners and office staff for part of the Crown Wall works. It was agreed that the defender would supply and take contractual risk for the plant and materials for the Crown Wall works. It was agreed that the defender would supply steel fixers, concrete workers, and scaffolders. To deliver the Crown Wall works, the fixers, joiners and concrete workers would have to work collaboratively. In return for providing joiners and office staff for part of the Crown Wall works the defender offered the pursuer a 50% share of the profit the defender made from the Harbour Board on the labour element of the Crown Wall works. This offer was made to reflect the collaborative nature of the labour works that required to be carried out as part of the Crown Wall works. No other element of the Crown Wall works formed part of the pursuer's profit share. The defender also offered to pay the pursuer an additional sum on a time and line basis for the pursuer's labour in respect of the Crown Wall works. The pursuer accepted that offer. This concluded a contract between the parties for the Crown

> Wall works (the 'Crown Wall Subcontract'). The pursuer did not seek, and did not obtain, any other entitlements to payment under the Crown Wall Subcontract. Shortly after the conclusion of the Crown Wall Subcontract, the defender's Iain Beattie entered the room. He asked Mr (William) Beattie in front of Mr Hogg and Mr Foy what had been agreed. Mr (William) Beattie informed Iain Beattie that the defender was going to 'go 50/50 on the profit of the labour' with the pursuer. Mr Hogg and Mr Foy heard that remark. They remained silent. They did not dispute that this represented the profit share that had been agreed between the parties as part of the Crown Wall Subcontract."

[12] By interlocutor dated 10 July 2024, the court allowed parties an 8 day proof before answer commencing on 10 December 2024. On 14 November 2024, the court allowed a minute of amendment for the pursuer to be received. The minute of amendment made adjustments to the sums sought but did not otherwise make any change to the pursuer's substantive position. In answering that formal minute in answers dated 28 November 2024, the defender made material alterations to its position as to what happened at the meeting of 8 March 2021:

> "3. In answer 5, by inserting after the sentence 'Mr O'Donnell also left the room at this time', the following:
>
> > 'As Mr Hancock and Mr O'Donnell left the meeting, Mr Iain Beattie arrived.'
>
> 4. In answer 5, by deleting the word 'after' where it appears in the 41st line and substituting therefor 'before, as hereinbefore condescended upon,'
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> 5. In answer 5, by deleting the word 'asked' where it appears in the 43rd line and substituting therefor 'heard'
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> 6. In answer 5, by deleting the words 'in front of' where they appear in the 43rd line and to substitute therefor the words 'say to'
>
> 7. In answer 5, by deleting the words 'what had been agreed. Mr (William) Beattie informed Iain Beattie that the defender was going to 'go 50/50 on the profit of the labour' with the pursuer. Mr Hogg and Mr Foy heard that remark. They remained silent. They did not dispute that this represented the profit share that had been agreed between the parties as part of the Crown Wall Subcontract' where they appear in the 44th to 48th lines and substituting therefor the following:

> 'that he was considering offering the pursuer 50% of the defender's profit on the labour. Mr Hogg and Mr Foy heard that remark. Mr (Iain) Beattie also heard that remark and was concerned by it and disagreed that this was an appropriate offer. Mr William Beattie and Mr Iain Beattie then left the room to discuss it between the two of them. When they returned to the room, Mr William Beattie informed Mr Hogg and Mr Foy that the defender was offering to give the pursuer 50% of the profit the defender made on the labour. Mr Hogg and Mr Foy accepted this. They did not dispute at the meeting that the profit share was in respect of anything other than labour."

[13] As can be seen from the foregoing, the defender's pleaded position changed in material respects over the course of the action. The suggestion that Mr O'Donnell left the room before the commercial terms had been agreed was not introduced until 5 months after defences had been lodged. More significantly, there was a material change in respect of the input of Mr Iain Beattie to the contract negotiations. Until shortly before the discharged proof in December 2024 the defender's position was that Mr Iain Beattie arrived after the contract was concluded. Thereafter the defender's position changed in that Mr Iain Beattie was there before the contract was concluded and privately discussed the terms of the contract with Mr Billy Beattie before Mr Billy Beattie concluded the contract.

Changes in the defender's position in relation to the £200,000 payment

[14] In addition to the amendment about what happened at the meeting of 8 March 2021, the November answers made a material change to the defender's position as to the £200,000 payment, by adding to Answer 8 the words:

> "This payment was discussed between William Beattie and John Hogg on or around 29 November 2022. William Beattie and John Hogg were both in Edinburgh as part of the Edinburgh Trams Project. William Beattie called his son, Stephen Beattie, over to witness a conversation. During that conversation Mr Hogg and Mr William Beattie agreed that there was a further payment of £200,000 due for the Crown Wall Works in respect of the pursuer's profit entitlement. Mr Hogg accepted this, shook Mr William Beattie's hand and said 'that's brilliant, can you make payment as soon as possible'".

This is a significant change of position since it introduces for the first time the meeting at the Trams project.

The discharge of the November 2024 proof

[15] The case called before Lord Clark on 10 December 2024 for the first day of the proof. On the pursuer's opposed motion, Lord Clark discharged the diet of proof and set a timetable for adjustment. On 4 March 2025, Lord Clark extended the timetable and after sundry procedure, the proof commenced on 17 June 2025.

Provision of information

[16] The defender only identified on 20 May 2025, being the last day for lodging productions, what its figure was for the Pavement Slab sub-contract. It was only then that new materials produced by the defender's witness Scott Kennedy were provided and relied on as a basis to calculate the pursuer's entitlement. Similarly, it was only in February 2025 that the defender came to a final view on the parties' entitlements under the Crown Wall sub-contract.

The proof

[17] The proof lasted for 10 days of evidence and a further day of oral submissions after written submissions had been lodged. There were extensive productions and detailed written submissions. In coming to my decision in this case I have carefully considered all of the extensive material before me.

Witnesses as to fact

Pursuer's witnesses as to fact

Mr Michael Foy

[18] Mr Michael ("Mick") Foy was one of the directors of the pursuer. He had worked with the other director, Mr Hogg for many years. He had also worked with Mr Billy Beattie for over 10 years. He had known Mr O'Donnell since he was a boy as Mr O'Donnell was a family friend. I found him to be a credible and reliable witness.

Mr Ben Hall

[19] Mr Hall was director of his own company, BH Civil Engineering Limited. He had been brought on site at the Harbour because there had been three near fatalities so his job was predominantly to make sure that everyone was working safely and to assist on site as a supervisor. He did so on a self-employed basis, working with Mr Billy Beattie. I found him to be a credible and reliable witness.

John Hogg

[20] Mr Hogg, also known as "Jock" , had been a director of the pursuer for 7 years. I found him to be a credible and reliable witness.

Keith Young

[21] Mr Young was a consultant civil engineer who worked for himself providing services to engineering products. He was the engineering director and then project director on the Aberdeen Harbour Expansion Project, employed by the Aberdeen Harbour Board.

He was a witness who was independent from both the pursuer and the defender. I found him to be credible and reliable.

Defender's witnesses as to fact

Mr William ("Billy") Beattie

[22] Mr Beattie was a director of the defender, and the brother of Mr Iain Beattie. For the reasons given below, I did not find him to be a credible and reliable witness.

Iain Beattie

[23] Iain Beattie was the brother of Billy Beattie and owner of the holding company which owns the defender. I did not find him to be a credible and reliable witness.

Adam Finch

[24] Mr Finch was employed by the defender as a works manager. He had grown up with Billy Beattie as they were from the same village and had worked with the Beatties for some 25 years. As works manager he looked after the men and ordered materials. He had known Mr Hogg and Mr Foy for around 10 to 15 years. Where his evidence conflicted with Mr Foy or Mr Hogg I preferred their evidence in view of my findings about their credibility and reliability, but otherwise I found Mr Finch to be generally credible and reliable.

Vincent O'Donnell

[25] Mr O'Donnell was a site engineer and estimator. For the last 5 or 6 years he had been working with Billy Beattie as an estimator. Having considered his evidence against

contemporaneous documentation, I accepted his evidence as being credible and reliable on some, but not all, issues.

David Meekham

[26] Mr Meekham was retired and had previously worked in management and civil engineering. He had been employed by Aberdeen Harbour Board as works manager and clerk of work from around 2017 to 2023. He was an independent and objective witness unconnected with either the pursuer or the defender. I found him to be a credible and reliable witness.

David Hancock

[27] Mr Hancock was a representative from DOKA who designed and supplied the travelling system of form work for the Crown Wall works. I found him to be a credible and reliable witness.

Scott Kennedy

[28] Mr Kennedy was a quantity surveyor who had his own company providing construction management services. He had provided services to the defender in relation to the original unsuccessful tender for the Pavement Slab works and other matters. I did not accept certain aspects of his evidence.

Michael Grimley

[29] Mr Grimley was a construction manager employed by the defender. His involvement was procuring the plant and material for the Pavement Slab sub-contract. I found him to be a credible and reliable witness on these matters.

Stephen Beattie

[30] Stephen Beattie was the son of Billy Beattie. He gave evidence about the meeting between his father and John Hogg on 29 November 2022. I did not find him to be a credible and reliable witness.

Gordon Davidson

[31] Mr Davidson was a steel fixer who had worked for the defender for 8 years. His role was working on the Coping works. He spoke to which employees and plant were used in the work. I found him to be a credible and reliable witness.

Ryan Beattie

[32] Ryan Beattie was the son of Billy Beattie. He worked in foreman jobs, supervising construction steel fixing and concreting for his own company and the defender. He gave evidence as to the personnel and plant used in the Coping works. I found him to be a credible and reliable witness.

Expert witnesses

[33] The pursuer's expert Mr Lynch and the defender's expert Mr Gray are to be commended on the detailed collaborative work which they did in this case. At the joint

experts' meeting and in the joint statement of issues, they cooperated in narrowing down and focusing the issues in dispute.

The pursuer's expert: Stephen Lynch

[34] Mr Lynch was a chartered quantity surveyor and a senior managing director at Delta Consulting Group Limited. He has over 30 years' experience in construction contracting and consultancy. He is experienced in giving expert opinions in construction disputes and his specialist field is quantum. He produced reports dated 9 July 2024, 8 November 2024, 2 December 2024 and 30 April 2025.

[35] The defender objected to Mr Lynch and sought for his evidence to be excluded from the proof both in general and in certain particular respects. I heard Mr Lynch's evidence under reservation of that objection.

[36] Senior counsel for the defender submitted that Mr Lynch was not a neutral witness. At every turn he sought to advocate his client's case.

[37] I repel the objection. Mr Lynch was a suitably qualified expert doing his best to assist the court. His evidence was based on a careful analysis of the information and documentation which he had before him. Over the course of the reports produced by him, he revised his opinion as further information and documentation was made available to him. To the extent that the objection relates to the approach which Mr Lynch took in his evidence to matters on particular matters, that goes to whether to accept or reject his evidence on these matters, and is not a general ground for excluding his evidence on the basis of *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6. I consider his evidence on these matters when dealing with these matters below.

The defender's expert: Stuart Gray

[38] Stuart Gray was a chartered quantity surveyor who had worked in private practice on a wide range of construction projects for over 30 years. He is an experienced expert witness. I found him to be a suitably qualified expert witness who was doing his best to assist the court.

[39] Senior counsel for the pursuer submitted that the fundamental difficulty with Mr Gray's conclusions was that they were based on evidence that was provided to him but was not led in court or otherwise proved: the "substratum" of his report was absent, meaning that his views were without foundation (*Ruby Properties (Scotland) Limited* v *Watt* [2025] CSOH 61). That is a matter to which I will return when considering details of his evidence.

Evidence of the parties actings

[40] There was no dispute that the Crown Wall sub-contract was entered into at the meeting on 8 March 2021. The dispute between the parties was as to what the terms of that contract were.

[41] Senior counsel for the defender took issue with the evidence of post-contract actings of the parties. He submitted that the ordinary approach in determining the terms of a contract was not to take into account the actings of the parties after entering into the contract. However, there were some obscure exceptions, for example, ambiguity (*McBride on Contract* paragraphs 8-30 to 8-33). The actings of parties after the date of the contract are not allowed to alter the unambiguous meaning of a contract (*Bairds Trustees* v *Bairds and Co* (1877) 4R 1005).

[42] Senior counsel for the pursuer submitted that post-contract conduct was relevant and admissible evidence when seeking to establish what the terms of a contract was, as opposed to what the correct construction of a contract is (Lewison, *The interpretation of contracts* 8th Edition at paragraph 3.190).

[43] When it comes to considering whether post-contract conduct is admissible, there is a fundamental difference between interpreting a contract and establishing the terms of a contract. Evidence of post-contractual conduct is, generally, not allowed in the former case (*McBride* paragraph 8.30-33): the task of the court is to interpret the words of the contract. However, different considerations apply where the dispute is not about the interpretation of the words of the contract but about whether the contract exists at all, or what the terms of the contract are. The task of the court is not to interpret the contract but to make findings in facts about the existence of, or terms of, the contract. The carrying out of that task requires the court to assess all the evidence and come to a conclusion as to matters of fact. Evidence of post-contract conduct can cast light on what the parties understood the contract to be at the time of the conduct. It can support or undermine evidence from the witnesses as to the existence or terms of the contract. Accordingly, in the current case the post-contract conduct of the parties is relevant to establish the terms of the oral contract agreed between them.

The Crown Wall sub-contract

[44] The pursuer sought a declarator of the terms of the Crown Wall sub-contract as follows:

> "For declarator that, in terms of the verbal contract entered into between the pursuer and defender on 8 March 2021 in relation to the Crown Wall works forming part of the Aberdeen Harbour expansion project (the 'Crown Wall works'), the pursuer is entitled:

(i) to payment by the defender of fifty per cent of the net profit made by the defender in completing the Crown Wall works under and in terms of the contract entered into between the defender and Aberdeen Harbour Board in terms of which the defender was required to undertake and complete the Crown Wall works;"

Witness evidence on the terms of the Crown Wall sub-contract entered into at the meeting on 8 March 2021

Michael Foy

[45] Mr Foy's evidence was that he had received a call from Mr O'Donnell about the possibility of the pursuer getting involved in the Harbour project and was asked to come to a meeting. He was not told who exactly would be at the meeting but he knew that Mr O'Donnell and Mr Billy Beattie would be there and possibly Mr Hancock from DOKA which was the form work provider. Mr Hancock was going to bring drawings of the form work system to look at. The purpose of the meeting was for the pursuer to have a look at the project and see if it was something they were willing to get involved in. The meeting lasted a couple of hours and at the start those present were Mr Foy, Mr Hogg, Mr O'Donnell, Mr Hancock, Mr Billy Beattie and Mr Finch.

[46] Mr O'Donnell and Mr Billy Beattie said that the value of the work was in the region of £6.3 million. At that point Mr Foy did not know whether the contract was a fixed price or to be measured. He did not see a Bill of Quantities for the Crown Wall works at the meeting. At the meeting he was not told about the labour value of the contract between the defender and the Harbour Board. In the discussion, the pursuer's position was that if they were coming on board to build the wall they would provide the services they provided to other contractors, that is that they would bring in workers and their own staff to deal with the day-to-day running and operation and construction of the wall. If the pursuer was to be

involved in building the wall, the pursuer wanted to do so with the pursuer running the project so the pursuer could make its own decision on the pursuer's way of working. The pursuer was to provide the management staff they were going to need and office staff. They would bring in their document controller Marica Stott and their engineer Stuart Forbes. A document controller controls the documents used to run the project. The pursuer was running the project on behalf of the defender and set up the pursuer's office in the way the pursuer normally did.

[47] At the meeting it was decided that the defender would provide steel fixers on site. The pursuer would be responsible for form work, labour, office staff and engineers.

[48] Iain Beattie popped his head into the meeting for 5 minutes to ask Adam Finch something and then left. Mr Finch left early on. When Mr Finch left Mr Hancock remained for a considerable amount of time. They were picking his brain about the form work system. Mr Foy said that if the pursuer was to be involved there would have to be more discussion before they went on site and at that point the drawings were due to change. Mr Hancock left and that left Mr Foy, Mr Hogg, Mr O'Donnell and Mr Billy Beattie at the meeting. It was then that the deal was done. Mr Billy Beattie and Mr O'Donnell told Mr Foy and Mr Hogg that the contract value was £6.3 or £6.2 million and said they will go 50/50 on it.

Mr Billy Beattie said he would pay labour on a weekly or fortnightly basis at cost. The profit would be made at the end of the project and whatever that profit element was would be split 50/50. Billy Beattie told Mr Hogg and Mr Foy not to tell Iain Beattie or Adam Finch, but keep it between the four of them. Billy Beattie said "you know Vincent, he will look after you and make sure you get your money". The meeting drew itself to a close. Mr O'Donnell was present. There was no reason for him to leave: the pursuer always dealt with Mr O'Donnell when it came to money. Iain Beattie was never part of any discussion and

Billy Beattie told them not to tell Iain anything. In relation to plant and materials, it was agreed that Billy Beattie would finance these and also finance the labour element. The pursuer would come in and take a share of the process and day-to-day running of the project and make sure the project got over the line.

[49] Mr Foy would never have accepted an offer for 50% of the profit on labour. There was no figure for labour so they could not tell what the labour profit would be.

John Hogg

[50] Mr Hogg's evidence was that Vince O'Donnell had called Mick Foy and asked if the pursuer would be interested in giving the defender a hand to carry out the job. About a week later they went to look at the form work at the defender's offices in Grangemouth. The meeting lasted around 1½ to 2 hours. At the meeting he saw Billy Beattie, Adam Finch, David Hanock, Vince O'Donnell and Michael Foy. The form work system was discussed and there were discussions about how the job would be done. The DOKA shutter system was discussed only between himself and Mick. Mr Finch was looking at the steel and base and not contributing to the discussion. Billy Beattie and Vince O'Donnell told them that the value of the job was £6.2 million. They told them that they were 99% sure they had the job. They told them that there was a fixed price contract and they were sent the bill at the end of March. The pursuer started on 29 March and got the bill on 29 March. At the meeting there was no mention of the labour value of the contract. After the discussion about the drawing, first Adam Finch left then Mr Hancock left. Mr Finch went away to look at another job with Iain Beattie. Iain Beattie popped his head round the door and asked Adam to leave.
Iain Beattie did not hear the discussion about contract terms. Mr Hogg had worked for the defender for over 10 years and had never had a discussion with Iain in his life.

Vincent O'Donnell did not leave: nothing happens without Vincent being involved in the money aspect.

[51] There was discussion of contractual terms. The pursuer would run the job, supply office staff, an engineer, a document co-ordinator and a lot of the labour management for a 50/50 split. The pursuer would provide joiners and labourers and the odd concrete guy if needed. The defender would supply concrete guys and a steel fixer for the base and a couple of scaffolders. The terms agreed were that there was to be a 50/50 split. Mr Hogg thought it meant 50% of the £6.2 million profit left over. At the end of the meeting, the pursuer asked for payments to account because they had overheads. It was agreed that when the defender got the costs of the labour from the Harbour Board they would give them to the pursuer and the pursuer would charge labour at no cost with no mark-up. There was no discussion of overheads. There was no discussion about reducing the agreement to writing: the pursuer had never had any written contracts with the defender. Every time they had worked with them previously it was a handshake. Mr Hogg was told by Billy Beattie not to mention the terms of the contract to Iain Beattie or anyone else who worked for Beattie. Iain Beattie and Vincent O'Donnell were out of the room when he was told that. The defender was to pay for material.

[52] Mr Hogg would not have accepted a contract that the pursuer was to receive 50% of the profit on the labour element. There was too much risk. The job was in the North Sea and it was during Covid. If it had been labour only Mr Hogg would not have been on the job himself: he would only have provided the men and had a markup on their supply.

William Beattie

[53] Billy Beattie's evidence was that he was approached by Mr Meekham in late 2020. Billy Beattie was nervous about the proposed form work system. A meeting was held in his office on 8 March 2021. Vincent O'Donnell , Davey Hancock, Adam Finch, Billy Beattie, Jock Hogg and Mick Foy were there from 9.00am. The travelling form work system was discussed to find out more about it. Davey Hancock of DOKA persuaded them it would be ok. Once that had been established, Vincent and Davey left the room. Those left in the room were Billy Beattie, Adam Finch, Jock Hogg and Mick Foy. Billy Beattie said he was planning a 50/50 share of the profits of labour. Iain Beattie was angry and said the pursuer only ever supplied joiners and why should they get half of the steel fixer and concrete, why not just as usual pay them for their joiners. Billy Beattie and Iain had a discussion outside for about 10 minutes. When they returned, Billy said that Iain was on board and said "let's build the job." Billy Beattie said that they would pay the pursuer's men at cost and split the profit after deduction of the costs of the pursuer's and the defender's men from the labour bill and that's what the profit would be on labour.

[54] In his evidence in chief, Billy Beattie was clear that the agreement at the meeting was that the pursuer would supply only joiners. Then, a week later, the defender was asked by the Harbour Board to supply an engineer and document controller and the pursuer said that the pursuer could get them, namely Marica Stott the document controller and Stuart Forbes the freelance engineer. At that stage Billy Beattie asked the pursuer to put them to him and he would pay them but the pursuer said that they wanted to pay them. The pursuer brought them on board and were reimbursed their hourly rate.

Iain Beattie

[55] Iain Beattie's evidence about the 8 March meeting was that he was running late, coming from another job. He had said to Billy that he would be at the meeting to look over everything and make sure everyone was happy and how they were going to make it work. The defender was nervous about the traveller system. He arrived mid-morning about 10ish. Billy Beattie was there with Adam, Mick and Jock. He had seen Vincent in the hall when arriving and Vincent was heading out. He went into the meeting and said "where are we?". Billy said that he was proposing that they work 50/50 profit share on labour and Iain disagreed and queried why they would not take labour rates as normal. Iain and Billy left and had a conversation outside the meeting room and after discussion Iain agreed with Billy's suggestion and would see how the contract went. They went back into the room and Billy said "right lads Iain's on board with 50/50 on labour contract". Everybody was happy with that deal and the meeting finished.

Adam Finch

[56] Mr Finch's evidence was that he arrived at the defender's offices early to discuss the traveller system. Billy Beattie was there and then Mr Hancock, Mick Foy and Jock Hogg turned up. Vince was there probably in the office. All of them discussed the traveller system. Iain popped his head in and Billy told him that he was proposing a 50/50 split on labour only. Iain Beattie said that he was not happy because he did not normally do that. Iain and Billy went outside to discuss and when they returned Iain explained that he was happy to go forward with that deal ie the 50/50 split on labour. The pursuer would provide the joiners and the defender would provide concrete men and steel fixtures.

Vincent O'Donnell

[57] Billy Beattie, Vincent, Adam, Mick, John and Mr Hancock discussed the drawings then Mr O'Donnell and Mr Hancock left the room. He saw Iain Beattie go in the door. He was not there when the terms of the contract were discussed, but later, when he was working on the measure, Billy Beattie told him the contract was 50/50 on the measure, that is take away the labour costs and split it between the two of them.

David Hancock

[58] Mr Hancock's evidence of the meeting was that the meeting had been arranged by Vincent O'Donnell to go through the drawings for the project. After discussion of the drawings, Mr Hancock left. He was not present when the contract was discussed.

Ben Hall

[59] Mr Hall's evidence was that he was Billy Beattie's right hand man. He had conversations with Mr Beattie about the terms of the Crown Wall sub-contract. Mr Beattie told him that it was a 50:50 split on the job, a joint venture, by which Mr Hall meant a 50:50 split on the profit.

Assessment of the evidence on the terms of the Crown Wall sub-contract

[60] This element of the case turns on a question of fact. What were the terms of the contract orally agreed to at the meeting on 8 March? There was no dispute that it was agreed that there be a 50/50 split. The dispute is to whether the 50/50 split was agreed to be a split of the of the profit on the Crown Wall contract (as advanced by the pursuer) or a split of the profit of only the labour element of the Crown Wall contract (as advanced by the

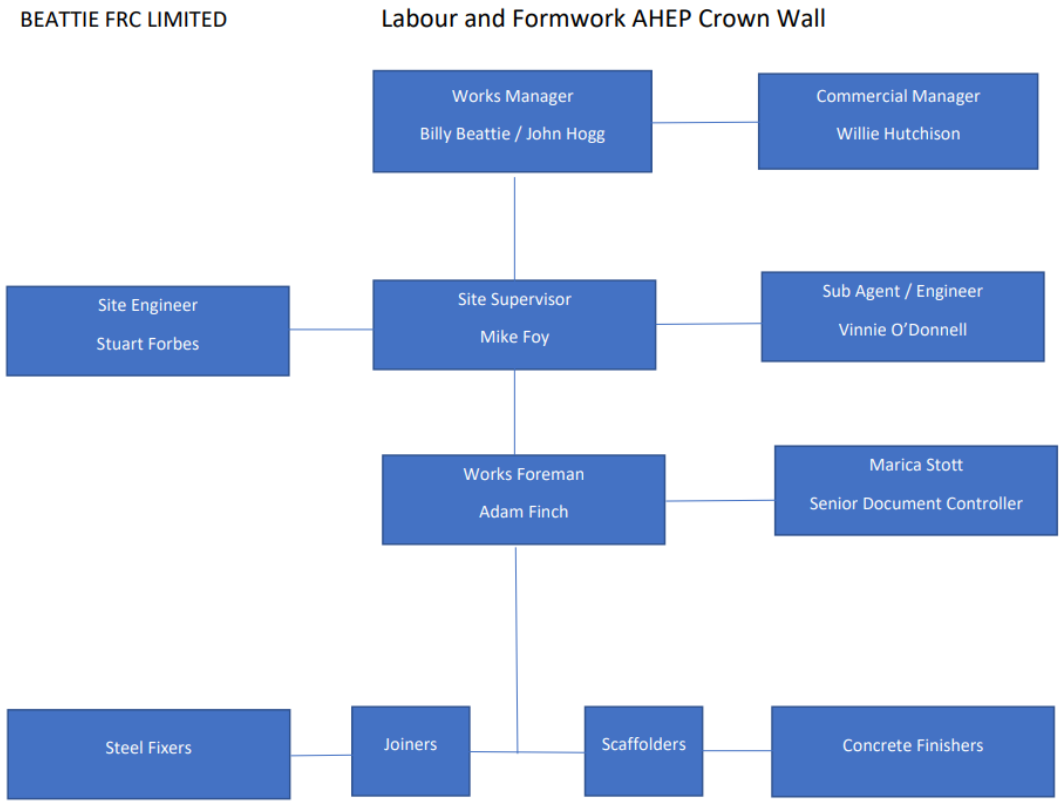
defender). It is the evidence about that central part of the meeting which is crucial: differences between the witnesses about peripheral details of the meeting are minor and are understandable given the passage of time.

[61] I prefer the position advanced by the pursuer for the following reasons.

Consistency with contemporaneous documentation

[62] The pursuer's account is more consistent with contemporaneous documentation.

[63] As part of the documentation provided to the Harbour Board, the defender submitted an organogram as follows:



[64] That organogram is incompatible with the version of the contract advanced by the pursuer ie that the pursuer was doing nothing more than supplying labour. It shows much more involvement by the pursuer on a managerial level. The pursuer's John Hogg is given

equal status with the defender's Billy Beattie as works manager. The pursuer's Mick Foy has a managerial role as site supervisor. The pursuer's Marica Stott is shown as senior document controller. All of the labourers, whether steel fixers, joiners, scaffolders or concrete finishers, are shown as responsible to the pursuer's Mick Foy and ultimately jointly to Billy Beattie and John Hogg. That reflects the factual evidence about the position on the ground which was that Mr Hogg (apart from when he was absent from the site after an incident) attended fulltime at the site. It is not in the least compatible with the position advanced by the defender that all the pursuer did was provide labour.

[65] I do not accept the evidence of Billy Beattie that this organogram was a mistake. This was part of a pattern in Billy Beattie's evidence where he dismissed various matters which contradicted his evidence as being mistakes. In my view the organogram was not a mistake. It was an important part of the documentation provided by the defender to the Harbour Board. Like other inconvenient evidence which Billy Beattie tried to explain away as mistakes, this is strong evidence against the defender's version of the contract. The various attempts to explain this and other matters away as mistakes reflect badly on Billy Beattie's credibility and reliability.

[66] A further example of contemporary documentation which is consistent with the account of the pursuer and inconsistent with that of the defender is the payment applications of 6 July 2021 and 2 September 2021 discussed in para 68 below.

Inconsistency between Billy Beattie's account of the Crown Wall sub-contract in court and his contemporaneous account of that contract to Mr O'Donnell

[67] The defender's account of the Crown Wall sub-contract is inconsistent with Mr O'Donnell's evidence as to the account of the contract given by Billy Beattie to

Mr O'Donnell after the meeting. Mr O'Donnell's evidence was that Billy Beattie told him that the contract was 50/50 on the measure, that is take away the labour costs and split it between the two of them. I accept the evidence of Mr O'Donnell on this as it is consistent with, and explains, his subsequent actions.

[68] Mr O'Donnell's subsequent actions were in accordance with what he had been told by Mr Beattie. For example, on 6 July 2021 and 2 September 2021 the pursuer issued applications for payment. Each application stated "Measured works@ Aberdeen Harbour Crown Wall Ongoing". These applications are consistent with the pursuer's account of a profit share on the measured works and inconsistent with the defender's account of a profit share on only the labour element of the measured works. These applications were issued by the pursuer at the request of Mr O'Donnell and were paid by the defender. If Mr O'Donnell had not been given that account of the contract by Billy Beattie, then there was no reason for Mr O'Donnell to request the defender to issue these applications. If the defender's version of the contract is correct, then these applications should not have been requested by Mr O'Donnell, should not have been issued by the pursuer, and should not have been paid by the defender.

Inconsistency between Billy Beattie's account of the Crown Wall sub-contract in court and his contemporaneous account of that contract to Mr Hall

[69] The defender's account of the Crown Wall sub-contract is also inconsistent with Mr Hall's evidence as to the account of the contract given by Billy Beattie to Mr O'Donnell after the meeting. Mr Hall's evidence was that Mr Beattie told him that the Crown Wall sub-contract was a joint venture, with the profit on the job being split 50:50. Mr Hall had no

reason to lie about this: he was on friendly terms with Billy Beattie and they went on family holidays together. I accept Mr Hall's evidence.

The defender's changes of position

[70] Further, the evidence of the defender's witnesses was significantly undermined by the defender's changes of position during the course of the procedural history of this action, all as set out above. A further change in position came in Billy Beattie's oral evidence, when he departed from the position on record that it was agreed at the meeting that the pursuer would provide joiners and office staff. Instead he gave an account of a two-stage process whereby the Crown Wall sub-contract made at the meeting was for joiners only and was subsequently varied to include an engineer and office staff. No other witness spoke to that two-stage procedure, and Billy Beattie's evidence was neither credible nor reliable.

Conclusion on the terms of the Crown Wall sub-contract

[71] I find as a matter of fact that the Crown Wall sub-contract entered into at the meeting on 8 March 2021 was in the terms contended for by the pursuer. Accordingly, I shall grant the declarator sought. As a result of that finding, the counterclaim, which is predicated upon an acceptance of the defender's version of the Crown Wall sub-contract, falls away.

Sums outstanding

[72] Having found that the pursuer is entitled to payment of 50% of the net profit made by the defender in completing the Crown Wall works under the defender's contract with Aberdeen Harbour Board, I now turn to what sums remain due and outstanding by the defender to the pursuer under the Crown Wall sub-contract.

[73] Many of the issues between the pursuer and the defender as to the sums due have been resolved by agreement through their respective experts. However, the experts were unable to reach agreement on the following issues.

Overheads issue

[74] There was a dispute between the parties as to whether or not the profit should be assessed after deduction for overheads. The defender's position was that there should be such a deduction, whereas the pursuer's position was that no such deduction should be made.

[75] In my opinion no deduction for overheads should be made.

[76] The terms of the Crown Wall sub-contract were those agreed at the meeting on 8 March 2021. There was no evidence of any discussion at all about the deduction of overheads. This was a simple oral agreement reached on a shake of the hand. Reflecting that simplicity, profit was to be calculated by identifying the amount paid by the Harbour Board for the Crown Wall works and then deducting the costs incurred by both the pursuer and the defender in completing the works. There was no discussion or agreement of a detailed formula requiring complicated factors such as overheads to be brought into the reckoning.

[77] The defender seeks to complicate that simple calculation by bringing in overheads. The calculation of overheads is a complex matter, requiring complex analysis of the parties' financial position. Mr Gray's approach to calculating an appropriate percentage deduction for overheads on behalf of the defender relied on a complex calculation based on three sets of the defender's accounts, one of which post-dated the date of the Crown Wall sub-contract. I agree with the pursuer's submission that it can hardly have been in the parties'

contemplation at the time of the meeting on 8 March 2021 that such a simple oral agreement would require to be supplemented by a recourse to complex calculations relying on accounts that had not yet been produced.

[78] Moreover the position now adopted by the defender is inconsistent with its position prior to the action being raised. As discussed in paragraphs 164ff, Mr O'Donnell, on behalf of the defender, made a calculation as to the final payment due for the Crown Wall sub-contract. He calculated the final amount being due as £200,000. In making that calculation, he made no deduction for overheads.

[79] Accordingly, I find that in assessing the profit due under the Crown Wall sub-contract, no deduction should be made for overheads.

Deductions agreed between the defender and Aberdeen Harbour Board

[80] Parties were in dispute as the effect on the amount due under the Crown Wall sub-contract of two deductions from the final account value that were agreed between Aberdeen Harbour Board and the defender. The first deduction was in the sum of £145,000 and was said to be for efficiency savings. The second deduction was in the sum of £85,704 and was said to be for form work failure.

[81] The position of the pursuer's expert Mr Lynch was that no calculation of the deductions agreed between the defender and the Harbour Board had been provided: the Crown Wall was a lump sum contract and it was not reasonable to reduce the value for an unsubstantiated reason and unquantified sum.

[82] The position of the defender's expert Mr Gray was that the deductions formed part of the calculation of the final account between the defender and the Harbour Board. It

would be totally inequitable for the pursuer to be paid monies which the defender had not been paid by the Harbour Board for the project.

[83] Senior counsel for the pursuer submitted that the contract between the Harbour Board and the defender was a fixed priced NEC contract and any deductions should be part of a formal variation. There was no evidence before the court of any formal variation for efficiency savings.

[84] Senior counsel for the defender submitted that regardless of the reasons for the deductions, because they were never paid, they fall to be deducted from the final account figure.

[85] The dispute between the parties on this issue can easily be resolved by looking at the terms of the Crown Wall sub-contract as set out in the declarator sought by the pursuer. The term of the contract set out in that declarator is that the defender is entitled to 50% of the "net profit made by the defender". From that wording it can be seen that the pursuer's share is to be calculated not on the final account for the contract as formally varied, but on the profit made by the defender. The deductions reduce the amount paid by the Harbour Board to the defender and therefore reduce the profit made by the defender. Accordingly I find that, for the purpose of calculating the pursuer's profit share under the Crown Wall sub-contract, the net profit made by the defender is to be calculated by reference to the actual sum paid by the Harbour Board to the defender after making these deductions.

Labour cost issue

[86] At the same time as the defender was on site undertaking the Crown Wall works, it was also on site undertaking the Coping works. At the time no attempt was made to

allocate the defender's labour and plant costs as between the Crown Wall works and the Coping works. That allocation must now be done.

[87] The pursuer's expert Mr Lynch and the defender's expert Mr Gray have not been able to reach agreement on the allocation of the defender's labour costs. The difference between them amounts to £157,895.

[88] Mr Lynch's methodology was to take three methods to identify the cost of labour required to do the Coping works and adopt the lowest figure, that is the figure least advantageous to the pursuer. The three methods were:

- SPONS, an industry standard estimating tool, which gives a figure of £636,347;
- the labour cost as estimated in the Bill of Quantities for the Coping works, which gives a figure of £478,646; and
- the figure of 9.5 men per week set out in Ryan Beattie's draft witness statement, which gives a figure of £394,737.

[89] The lowest figure was that given by the third of these methods.

[90] Senior counsel for the defender challenged Mr Lynch's conclusion on the basis that the figure of 9.5 men in Ryan Beattie's statement had not been borne out in the evidence at the proof. He submitted that Mr Gray's figure was the more reliable one.

[91] Mr Gray's methodology was to rely on factual information of costs actually incurred on the Coping works. For example, Appendix B to his report of February 2025 contains a list of job descriptions with the number of days worked on the Coping works by these workers. During Mr Gray's evidence it became apparent that significant and material factual information (including information in Appendix B) which was fundamental to his conclusion was derived from emails from the defender which had not been disclosed to

Mr Lynch or to the pursuer, and had not been lodged with the court as productions, and nor had factual evidence in those emails been led or spoken to in the course of the proof.

[92] The failure to disclose and lead material evidence on which Mr Gray's opinion on the labour cost was based is a fatal blow to the ability of this court to accept his opinion on the labour cost issue. Unlike other witnesses, a skilled or expert witness can give opinion evidence to assist the court. But the expert's opinion is only of assistance to the court if the expert's conclusions are founded upon factual evidence which is before the court. In the current case the full factual evidence upon which Mr Gray has come to the conclusions on the labour cost issue in his report, is not before the court. Accordingly his report does not assist the court on the labour cost issue.

[93] Turning to Mr Lynch's report, in the absence of any satisfactory expert report on behalf of the defender, I accept Mr Lynch's methodology of taking the number of men per week who worked on the contract.

[94] As his report was, in the normal way, drafted before the proof, the figure of 9.5 men per week is by necessity taken from a precognition.

[95] It is therefore necessary to consider the evidence led at proof as to that figure.

[96] Ryan Beattie was the supervisor of the Coping works. He suggested that five to six steel fixers were on each caisson, with a couple of joiners and a couple of concrete finishers, giving a total of around ten. He did not think that there were scaffolders.

[97] Gordon Davidson's evidence was that there were five steel fixers, a couple of joiners, some concrete finishers and an engineer giving a total of around nine.

[98] In the absence of accurate records, no accurate figure can be given for the number of men and so a broad brush approach requires to be taken. The figure of 9.5 men taken

by Mr Lynch from Ryan Beattie's precognition is broadly in line with the evidence from Ryan Beattie of around ten and Mr Davidson of around nine.

[99] Accordingly I find that for the purposes of this action the labour cost of the Coping works is to be calculated by the third method set out by Mr Lynch, and on the basis of the figure used by Mr Lynch of 9.5 men per week.

Plant cost issue

[100] Similarly, the pursuer's expert Mr Lynch and the defender's expert Mr Gray have not been able to reach agreement on the allocation of the defender's plant costs. The difference between them amounts to £234,535.

[101] Mr Lynch's methodology is to take the incidence of plant costs in January and February 2022, when the Coping works were still ongoing but the Crown Wall works had been completed. He then extrapolates that Coping only figure to the period when both sets of works were ongoing. As cross-checks he uses (a) SPONS (b) the Bill of Quantities for the Coping works and (c) the cost of two principal items of plant (cranes and concrete pumps).

[102] Senior counsel for the defender challenged Mr Lynch's methodology on the ground that Mr Lynch was seeking to ignore what Doig and Smith certified and Aberdeen Harbour Board agreed to pay for as part of the Crown Wall works and for the Coping works.

[103] However, the matter is not as simple as that. The Coping works were undertaken as a variation to the contract between the Harbour Board and the defender for the Crown Wall works: from the perspective of the contract between the Harbour Board and the defender, the Crown Wall works and the Coping works were part of the same contract. The question of whether the plant is allocated to Crown Wall or Coping is of no importance as between the Harbour Board and the defender as the same total amount is due regardless of

allocation. However that question is of significant importance as between the pursuer and the defender as misallocation of Coping plant costs to the Crown Wall has the effect of reducing the profitability of the Crown Wall contract and consequently reducing the amount of profit to be shared between the pursuer and defender under the Crown Wall sub-contract.

[104] Mr Gray's opinion in respect of plant costs suffers from the same fatal defect as it does in respect of labour costs: it is based on information which is not before the court. For example in paragraph 2.30 of his February 2025 report, Mr Gray refers to further information in the form of breakdowns, spreadsheets, invoices and witness statements which he has considered in respect of the plant costs. These documents have not been produced, nor been spoken to by the relevant witness. In all the circumstances, I did not find Mr Gray's report to be of assistance on the plant cost issue.

[105] It was clear from the evidence of those working on the site, such as Ryan Beattie, Keith Young and Gordon Davidson that plant and equipment on site would be used across the work packages in the interests of efficiency. Complete and accurate records were not kept of the different uses, and witnesses do not have a detailed recollection of what plant was used on what works on what days. It is therefore very difficult for a court to reconstruct the precise allocation of plant between the Crown Wall and the Coping. Again a broad brush view must be taken. In my opinion, Mr Lynch's methodology of taking accurate figures of use of plant when there was only Coping works and extrapolating that to allocate between Crown Wall and Coping works is an appropriate method to come to such a broad brush view.

[106] For these reasons I prefer Mr Lynch's opinion on this matter to that of Mr Gray and find that the allocation of plant between the Crown performance and the Coping works should be in accordance with the third method set out in Mr Lynch's opinion.

Terms of the Pavement Slab sub-contract

[107] The pursuer and the defender also entered into an oral sub-contract for Pavement Slab works. The parties are in dispute about the terms of that contract.

[108] In conclusion 4, the pursuer seeks a declarator in the following terms:

> "For declarator that, in terms of the verbal contract entered into between the pursuer and defender on 25 May 2022 in relation to the Pavement Slab works forming part of the Aberdeen Harbour expansion project (the 'Pavement Slab works'), the pursuer is entitled:
>
> (i) to payment by the defender of ninety per cent of the net profit made by the defender in completing the Pavement Slab works under and in terms of the contract entered into between the defender and Aberdeen Harbour Board in terms of which the defender was required to undertake and complete the Pavement Slab works"

[109] Although the declarator refers to the contract being entered into on 25 May 2022, the pursuer's pleadings were more nuanced. The pursuer's position was that in a telephone call around May 2022 between Mr Billy Beattie and Mr Hogg, Mr Billy Beattie offered to share the profit that the defender made in respect of the defender's Pavement Slab contract with the Harbour Board on a 90:10 basis in favour of the pursuer. Work commenced on the Pavement Slab sub-contract on 23 May 2022. At an on-site meeting on 25 May 2022 the defender renewed that offer and the contract was concluded.

[110] The defender's position, on the other hand, was that the price in the Pavement Slab sub-contract was 90% of the labour rate in the Bill of Quantities. Mr O'Donnell made that offer by telephone to Mr Foy and Mr Hogg on behalf of the pursuer on 6 May 2022. The Pavement Slab works Bill of Quantities was sent to the pursuer on 20 May 2022. The pursuer commenced the Pavement Slab works on 23 May 2023. The pursuer accepted the defender's offer by performance, thus concluding the contract between the parties.

The background to the Pavement Slab sub-contract

[111] The defender initially tendered for the Pavement Slab works on 7 March 2022. It was unsuccessful at that time and the contract was awarded to Cowies. However, there were difficulties with Cowies and so the Harbour Board replaced Cowies with the defender. In early May 2022 the Harbour Board's Keith Young contacted the defender and asked if the defender could carry out the Pavement Slab works. The Harbour Board required the Pavement Slab works to be commenced imminently. Mr Billy Beattie on behalf of the defender informed the Harbour Board that the defender did not have the resources to carry out the Pavement Slab works in the timeframe requested. For the defender to complete the Pavement Slab works it would be necessary for the labour elements of these to be sub-contracted to the pursuer and for Mr Hogg to return to Aberdeen Harbour (he having previously been removed from the site). The Harbour Board agreed to both of these conditions and entered into the Pavement Slab contract with the defender.

The witness evidence on the formation of the Pavement Slab sub-contract

[112] Mr Foy's evidence was that the defender had sent a sketch to the pursuer on 6 May to which the pursuer replied on 7 May. There was a meeting on site before the works commenced with Billy Beattie and Vince O'Donnell to get a proper idea of the scope of works. Billy Beattie said that this contract was over £3 million. He only wanted 10% of it. They just needed it done. The Harbour Board needed to have part of the harbour open to get new investment so it was important to get the slabs done. Mr Foy maintained that position in cross-examination stating that Mr Billy Beattie had said more than once he only

wanted 10% of the profits made on the Pavement Slab sub-contract. Mr O'Donnell had phoned Mr Foy around 6 May but there had been no discussion about labour rates.

[113] Mr Hogg's evidence was that he first heard about the Pavement Slab sub-contract when he was off the harbour site and instead working on the Edinburgh Trams and Billy Beattie told him that he was putting him back to Aberdeen. The Harbour Board were under extreme time pressure because the work needed to be done so that money could be drawn down from private investors, the slabs needed to be finished as the first boat into the Harbour for Subsea 7 was due, and a section needed to be finished for a visit by the First Minister and television coverage. In a phone call when Mr Hogg was working on the trams, Billy Beattie told Mr Hogg that there would be a 90:10 split on the profit. Mr Hogg then met Billy Beattie and Vince O'Donnell on site. Mr Hogg was not sure of the date but thought it was when Mr O'Donnell had just had an operation. At that meeting Mr Billy Beattie told Mr Hogg that Mr Beattie was happy to do 10% and the defender would take all the risk and responsibility. At the meeting Mr Billy Beattie told Mr Hogg that the pursuer had a free reign to do what Mr Hogg wanted and the deal was a 90:10 split. That was a reference to the profits after costs (ie profits being calculated after all labour, plant and materials had been paid at cost). In cross-examination, Mr Hogg said he was not sure of the date of the meeting on-site. Mr O'Donnell was at the meeting. In relation to the phone call with Billy Beattie, Billy Beattie had told him that he was getting back on the jobs; the Harbour Board had asked Cowies to price it but they could not do it; the defender could not do it so the only way to do it was if the pursuer was brought back. At the meeting on site, Mr Beattie had told Mr Hogg that the project was worth around £3.1 million.

[114] Billy Beattie's evidence was that the defender had priced the slab contract in early 2022 but had been unsuccessful and it was awarded to Cowies. There was a meeting

between the defender and the Harbour Board on 5 May, after which Billy Beattie spoke to Iain Beattie and Mr Finch. Mr Billy Beattie said he thought the defender was going to get awarded this contract but was worried about where to get the labour. Billy Beattie suggested asking the Harbour Board if they could get the pursuer back on site. Billy Beattie discussed that proposal with Keith Young who said he would think about it. Billy Beattie then phoned Mr Hogg and said he thought he could get the pursuer back on the job. Mr Hogg said, "great can I get a price on the work" and Billy Beattie said, "yes". Billy Beattie meant a price for the labour. Mr Beattie then discussed the suggestion with Mr O'Donnell. He said to Mr O'Donnell that he needed to look at the Bill of Quantities with the defender's prices on it and get them 80% of the labour on that bill. Mr O'Donnell said he thought the defender should go to 90% of the labour. Mr O'Donnell favoured Mr Hogg and Mr Foy as they were good friends. Billy Beattie was nervous because he had the risk of plant and materials. Mr O'Donnell convinced Billy Beattie that they had enough in the plant and material to make good money. Billy Beattie phoned Iain Beattie and Iain was okay with 90% of the labour in the Bill of Quantities. Billy Beattie spoke to Scott Kennedy. Vincent O'Donnell was to phone Mr Foy and tell him there would be a Bill of Quantities made up for 90% of the labour. Mr O'Donnell phoned the pursuer and Mr Billy Beattie phoned Mr Kennedy and told him to make up a bill of 90% of the labour prices for the pursuer. Work started on the slab contract on 23 May 2022. On the 25 May Billy Beattie went for an on-site meeting to see Mr Finch of the Harbour Board and Mr Grimley. They were walking around the site and Mr Hogg came over and there was a discussion about technicalities of the concreting. Mr O'Donnell was not in a car or a van in the site as he was still off work. There was no discussion between Mr Billy Beattie and Mr Hogg about the financials on the Pavement Slab sub-contract: they had already covered that. Mr Hogg

wanted a price on labour and they got a bill made up. At no time did Mr Billy Beattie tell Mr Hogg that the defender only wanted 10%. In cross-examination it was put to Billy Beattie that in a phone call when Mr Hogg was at the trams there was an offer of a 90:10 spilt on the profit. Billy Beattie's response was that he could not say he had that conversation: he was not saying that Mr Hogg was wrong, he could not remember. In re-examination he said that the purpose of the Bill of Quantities sent by Mr Kennedy to the pursuer was that the pursuer wanted a price for doing the slabs. The pursuer was supplying the men and wanted a price for the labour and a bill so they could do the measure in their head.

[115] Mr Iain Beattie was not involved in the conclusion of the Pavement Slab sub-contract itself but gave evidence as to the background to it. His evidence was that the defender had wanted to do the slab work themselves, but they did not have enough men so Billy Beattie suggested getting the pursuer back to use the pursuer's labour. Billy suggested to him 80% of the labour and had a discussion with Mr O'Donnell. Billy said to Iain that Mr O'Donnell wanted to give the defender 90% of the labour and Mr Iain Beattie said it was too much. Billy Beattie said that Mr O'Donnell had a good price for the plant and materials so it was worth taking it on as there was enough profit in it.

[116] Mr O'Donnell's evidence was that his first involvement with the slab contract was when he priced the job for the defender in March 2022 for the tender which was not successful. Then, on 6 May Billy Beattie phoned Mr O'Donnell and asked Mr O'Donnell to phone Mr Foy and Mr Hogg to see if they were interested in doing the work.

Mr Billy Beattie said offer them 80% of labour. Mr O'Donnell said if they were offered 90% there would be a better chance of them doing the job. There was no discussion with Billy Beattie about plant and labour. Mr O'Donnell made that offer to the pursuer by

telephone on 6 or 7 May. Mr O'Donnell had a hip operation on 10 May and was discharged on 11 May and off work until June.

[117] Mr Kennedy's evidence was that he had prepared the original tender from the defender to the Harbour Board, which had been rejected and he then revised it. He had not been privy to any agreement between the pursuer and the defender in terms of the formation of the Pavement Slab sub-contract. Billy Beattie had told him to take 90% of the labour rate and allow for overheads.

Assessment of the parties' positions

[118] Senior counsel for the defender analysed the formation of the Pavement Slab sub-contract as being an offer which was accepted by commencement of the work on the project on 23 May 2022.

[119] In my opinion that is the correct analysis. As work commenced on 23 May, the contract was concluded before 25 May. Accordingly, it is not necessary for me to resolve the disputes between the parties as to what happened on 25 May, such as whether or not there was a meeting on 25 May, who attended the meeting, and whether the contract was concluded at that meeting. Having said that, in the light of my findings as to the credibility and reliability of the various witnesses at the meeting, I preferred the evidence about that meeting given by Mr Foy and Mr Hogg to that of the defender's witnesses.

[120] The question then becomes: what was the offer which was accepted by commencement of the work?

[121] The pursuer's position is that the offer was made by Mr Billy Beattie in a telephone call with Mr Hogg when Mr Hogg was working on the Edinburgh Trams project and was an offer to pay 90% of the profit under the contract between the defender and the Harbour

Board for the Pavement Slab works. The defender's position is that the offer was made by Mr O'Donnell on behalf of the defender in a telephone call to Mr Foy and Mr Hogg on 6 May and was an offer to pay 90% of the labour rate in the Bill of Quantities.

[122] In order to succeed on this question, the pursuer has to prove on the balance of probabilities that in the telephone call between Billy Beattie and Mr Hogg, Billy Beattie offered to pay 90% of the profit under the contract with the Harbour Board.

Oral evidence

[123] Mr Hogg gave clear oral evidence that in the telephone call between Mr Hogg and Billy Beattie when Mr Hogg was at the Edinburgh trams project, Billy Beattie offered to pay 90% of the profit under the contract with the Harbour Board. Billy Beattie's evidence was that he was not saying that Mr Hogg was wrong: he could not remember. Having considered the evidence in the round, the factors set out below, and Billy Beattie's evidence that he was not saying that Mr Hogg was wrong, I find Mr Hogg to be a credible and reliable witness on this matter and accept his evidence.

[124] I do not accept Mr O'Donnell's evidence that he made an offer to pay 90% of labour in a telephone call on 6 May. Balancing all the evidence, including the factors set out below, I prefer the evidence of Mr Hogg as to the offer which was made.

Contemporaneous documentary evidence

[125] The pursuer's position is supported by contemporaneous documentation.

[126] On 7 May 2022, Mr Kennedy emailed Mr O'Donnell and Mr Billy Beattie stating "jocks rates attached, discounted 10% on general terms and by 15% on the Bills of Quantities/measured works". A spreadsheet was attached to that effect. The email and the

spreadsheet both show that the pursuer was to be remunerated not only in relation to labour but also in relation to plant and materials. That is entirely consistent with the pursuer's position and contrary to the defender's position.

[127] In his evidence Mr Kennedy sought to explain away the email and spreadsheet by stating that he had misunderstood his instructions from Mr Billy Beattie. I do not accept that explanation. A sub-contract providing for a profit split on the whole job rather than labour rates would have been an unusual one. It is very unlikely that Mr Kennedy would have come up unilaterally with such an unusual provision, which happened to coincide with the pursuer's position. It is much more likely that Mr Billy Beattie gave Mr Kennedy instructions which reflected an agreement between Billy Beattie and Mr Hogg that the split was to be of the 90% of the net profit made by the defender on the contract with the Harbour Board.

[128] Senior counsel for the defender asked me to find support for the defender's position in an email of 20 May 2022, in which Mr Kennedy emailed Mr Foy attaching the "current labour only bill for the Structural Pavements package". Mr Foy's evidence was that, on receipt of the email he called Mr O'Donnell to ask him what the document he had received from Mr Kennedy was and Mr O'Donnell told him to ignore it. By email dated 22 May 2022, Mr Kennedy responded to Mr Foy's email saying "it's their bill that BFRC price, job is remeasurement based…I am going to look at the revised joints layout today and fire something over to everyone".

[129] Counsel for the defender submitted that it could not be clearer from the email of 20 May that the pursuer was to be paid for labour only at the rates set out in the attached labour only bill. The difficulty with that analysis is that the labour only bill attached to the email was not the Aberdeen Harbour Board bill which the defender had priced. The

attached bill did not reflect 90% of the labour rates in the Harbour Board Bill of Quantities. Such a significant inaccuracy in the email casts considerable doubt on the accuracy of the email of 20 May as a whole. I did not find the email of 20 May to be strong evidence in favour of the defender. I found it to be outweighed by the other evidence which was in favour of the pursuer.

The bargaining positions of the parties

[130] The pursuer's position is also supported by the bargaining positions of the parties.

[131] The pursuer's position of 90% of the profits is a much less advantageous contract for the defender to enter than the defender's position of 90% of the labour rates. However, that does not mean that it was not entered into. In my view the advantageous contract in favour of the pursuer is explicable by the very weak bargaining position of the defender. There was urgency to complete the Pavement slab works. The defender was under pressure to take on the Pavement slabs contract late and complete it urgently. The defender did not have the manpower to take it on. It could only take it on if it sub-contracted to the pursuer. The pursuer had a proven workforce. The pursuer would be able to do the work quickly and efficiently. Unless the Pavement Slabs sub-contract was on advantageous terms to the pursuer, the pursuer might not take it on.

[132] One example of the advantageous terms which the defender was willing to grant was the 90% figure, which was arrived at despite internal disquiet within the defender at giving the pursuer such a large percentage.

[133] In my view, another example of an advantageous term achieved because of the weak bargaining position of the defender, and the need to complete the work urgently, was a share of the profits rather than share of the labour rates.

Lack of labour rates in the Harbour Board Bill of Quantities

[134] The pursuer's position is also supported by consideration of the Harbour Board Bill of Quantities. The defender's position is that the pursuer would be paid 90% of the labour rates as agreed between the defender and the Harbour Board in the Harbour Board Bill of Quantities. However, the Bill of Quantities contained no such labour rates. It contained composite rates which covered labour, plant, materials and profit/overheads and so the defender's position is inconsistent with the Bill of Quantities. On the other hand, the pursuer's position that it was 90% of the profits is entirely consistent with the Bill.

[135] I do no not accept the defender's explanation that what was meant was the composite rate in the Bill of Quantities adjusted to extract the labour rates.

[136] Such an extraction is a complex process requiring removal of the cost of *inter alia* overhead and profit, plant and materials from the composite rates in the Bill of Quantities.

[137] The complex state of that calculation is apparent in the difficulty the defender experienced in calculating, for the purposes of the proof, what the labour rates were.

[138] Mr Kennedy prepared the tender rates for the defender's tender to the Harbour Board. However, there was no evidence before the court as to what rates Mr Kennedy allowed for labour. He is said to have made "tender estimator" calculations on a computer, but these have not been provided to the court. The lack of contemporaneous evidence as to calculation of labour rates is a factor against accepting the defender's position. If it was indeed the case that the contract was made on the basis of a percentage of the labour rates, it would have been important to the pursuer to have information about the labour rates in the tender estimator at the time of the offer so that it could assess whether it wanted to enter into the contract. However, the labour rates in the tender estimator were only available to

the defender and neither the pursuer nor the Harbour Board had sight of it. In these circumstances it is more likely that contract was entered into on the basis of a percentage of the profits under the Bill of Quantities as a whole, rather than just the labour rates.

[139] The complexity of calculating the labour rate is further demonstrated by significant changes of position by the defender on this matter during the course of the litigation. The defender's original position was that its expert Mr Gray agreed with the pursuer's expert Mr Lynch that the labour only element of the final account was £2,691,829. However, on 20 May 2025, being the last day for lodging of productions and some 5 months after the original proof date, Mr Gray lodged a report departing from that view and reducing the labour only value of the Pavement Slab contract to £1,918,368. If the calculation of the labour rates is so complicated that the defender's expert could have changed his position to such a significant extent, then it is difficult to see why the parties would have entered into such a complicated and uncertain arrangement. Rather than enter into an agreement on a percentage of labour rates, the quantification of which would be fraught with uncertainty and complications, it is much more likely that the agreement was for a percentage of the profit under the Bill of Quantities, which could be ascertained by a simple calculation. If all that was required was a labour-only sub-contractor, then the pursuer could have received labour costs plus a mark-up for profit: that would have been a simple matter to express and calculate and no reference to the Bill of Quantities would have been required.

Evidence in respect of payments

[140] The evidence of the actual payments made is of little assistance in casting light on what the terms of the contract were.

[141] The invoices refer to "measured works". These words, in the face of them, might support a share of the labour rate rather than a share of the profits. However, nothing should be read into these specific words, as the same words were used in the invoices for the Crown Wall sub-contract, even though the Crown Wall contract undoubtably involved a profit share arrangement. In any event, the pursuer made applications not in respect of measurements, but in accordance with Mr O'Donnell's instructions.

Conclusion on Pavement Slabs sub-contract

[142] For the reasons set out above, I prefer the position of the pursuer as to the terms of the Pavement Slab sub-contract. I find as a matter of fact that in terms of that sub-contract the pursuer was entitled to 90% of the net profit made by the defender. I shall grant the declarator sought, under deletion of the words "on 25 May 2022" to reflect my finding that the contract was constituted by the pursuer accepting the defender's offer by performance.

Quantification of the amount due under the Pavement Slab sub-contract

[143] The parties were in dispute in respect of certain matters in relation to the amounts due under the Pavement Slab sub-contract.

Overheads

[144] This is the same issue which also arose in respect of the Crown Wall and is dealt with in paras 74ff above: should the payment be assessed after deduction of overheads. The same conclusion falls to be applied here as in relation to the Crown Wall. The payment terms of the Pavement Slab sub-contract were dealt with simply and orally without

reference to overheads. It cannot have been the parties' intention that this simple oral agreement would require to be supplemented by complex overheads calculations.

Defender's plant costs

[145] This issue is similar to the issue of plant costs in respect of the Crown Wall. An assessment of the defender's plant costs incurred in the Pavement Slab works requires to be made to identify the contract's profitability. At the time of the works, the defender's plant costs were not accurately allocated between the Pavement Slab works and the other works. Accordingly, an allocation must be made between the defender's plant costs incurred in the Pavement Slab works and the defender's plant costs incurred on other works.

[146] The difference between the parties in this respect is £68,854. The difference arises out of the different approaches of the parties to the issue of the allocation of plant and materials as between the various jobs that the defender was involved in across the Aberdeen Harbour site. It was clear from the evidence that, while the Pavement Slab works were being undertaken, the defender was also involved in the Coping works and the Service Trench works. There was also evidence that the defender was involved in other work packages, such as the Suspended Deck Sewer works and the drainage package. All of these other packages involved reinforced concrete work. The defender failed to keep daily allocation sheets that would record which plant was used on which work package.

[147] The experts took different approaches to this issue. Mr Lynch took into consideration the three areas of work that were being constructed at the same time and employed the following criteria in his analysis of the invoices:

a. If the cost was an item required for the Pavement Slab works only, he allocated the full cost to the Pavement Slab works;

b. If the cost was an item required for work other than the Pavement Slab works, he allocated half of the cost to Service Trench and half to the Coping works;

c. If the cost was of a general item that would facilitate all items of work, he allocated the cost as a third to the Service Trench a third to the Pavement works and a third to the Coping works and

d. an exception to the above, was the allocation of the cost for of hiring the concrete pump from Camfaud. His allocation of the Camfaud costs was the proportion of the total cost with the volume of concrete required for the Pavement works relative to the total volume of concrete pumped by Camfaud. He split the balance of the Camfaud costs between the Service Trench and the Coping works.

[148] Mr Gray's approach, on the other hand, was to take the invoices provided to him at face value. He did not consider the content of the invoice and whether or not an allocation was required under reference to the other work that the defender was undertaking at the time.

[149] In relation to the Camfaud invoices, Mr Gray accepted the principle that, because the concrete pumps were not being used exclusively for the Pavement Slab works, a deduction required to be made. The Camfaud invoices relate to the concrete pumps which were used across the Harbour site for various work packages. Mr Gray proceeds on the principle that the Pavement Slab works was the main user of the concrete pumps. However, this was not borne out by the evidence. The precise allocation of the concrete pumps between the various work packages was never discussed in any detail by any of the witnesses. Where it was, the evidence was not consistent with the Pavement Slab contract being the main user of the concrete pumps: for example, Mr Hogg gave evidence that the pursuer used the pump

on the Pavement Slab works in the morning and the defender used it in the afternoon on the defender's work eg Coping, the Service Trench and the Suspended Deck. There is no principled reason why the Pavement Slab work should be viewed as the main user of the concrete pumps as opposed to, for instance, the Coping works which were underway before the Pavement Slab works commenced.

[150] By way of cross-check, consideration can be given to the purchase orders referred to in Mr Grimley's notebook. Mr Lynch's allocation is more consistent with Mr Grimley's purchase orders than is Mr Grey's. Mr Grimley's purchase orders for the Pavement Slab works come to £134,944 which is by far closer to the £123,108 allocated by Mr Lynch than the £225,854 allocated by Mr Gray.

[151] For these reasons, I prefer the approach of Mr Lynch on this issue.

Beattie incurred material cost

[152] The difference between Mr Lynch and Mr Gray on this is £29,606. Mr Lynch undertook the same methodology and process of allocation as he did in relation to plant costs. Mr Gray, on the other hand relied on information provided to him by the defender which had not been spoken to in evidence. Having accepted Mr Lynch's methodology in respect of plant costs, for the same reasons I also accept it in respect of material cost. I prefer Mr Lynch's approach on this issue.

The £200,000 payment

[153] A payment of £200,000 was made by the defender to the pursuer on 9 December 2022. That payment was discussed between Billy Beattie and Mr Hogg in Edinburgh around the end of November or beginning of December 2022. The parties are in dispute as to the

contract to which that payment relates. The pursuer's position is that it was a payment under the Pavement Slab sub-contract. The defender's position is that it was a payment under the Crown Wall sub-contract. While the ascription of this payment to one or other of these contracts will not affect the overall amount due by the defender to the pursuer, it is necessary to resolve this dispute in order to calculate the amount remaining due under each contract.

The evidence as to the agreement to make the £200,000 payment

[154] There was no dispute that the agreement was made in Edinburgh at the Tram works. There was however disagreement as to the date on which it was made and what was agreed.

[155] Mr Hogg's evidence was that he was phoning Mr O'Donnell week after week asking where his money was and Mr O'Donnell told him that Billy Beattie would come and see him at the Trams works in Edinburgh. Mr Hogg was at the Tram site with Stephen Beattie and Billy Beattie turned up. Billy Beattie told Mr Hogg that there was no money left in the Slabs contract. Mr Hogg said there was money and he would take the defender to court. Mr Beattie said, "do what you have to do". When the defender's position that the £200,000 related to the Crown Wall was put to him, he pointed out that the invoice stated Slab.

[156] Billy Beattie's evidence was that in November 2022 he went to the Tram site in Edinburgh for a progress meeting on the Trams. Mr Hogg was there and Mr Billy Beattie and Mr Hogg met in the gate going into the Tram project. His son Stephen Beattie was also there as he was running the Trams project. The pursuer had been asking Mr O'Donnell for a final settlement on the Crown Wall sub-contract. Mr Billy Beattie said £200,000 was the pursuer's final account and Mr Hogg accepted that and shook hands and said, "thanks very much can I get paid as soon as possible". In cross-examination he stated that the £200,000

was the final payment that Mr O'Donnell had worked out for the Crown Wall sub-contract. Billy Beattie trusted Mr O'Donnell. When it was pointed out to Billy Beattie in the witness box that the information about an agreement made at the trams project about the £200,000 was not included in the pleadings until the answers to the minute of amendment in December 2024 and he was asked why this vital information was not included in the pleadings from the outset, his response was that that was one of the things that he overlooked at the time.

[157] Stephen Beattie's evidence was that in November 2022 he was working at the Trams project in Edinburgh. On Tuesday 29 November, his father Billy Beattie visited the site. His father shouted to him. Stephen Beattie turned around and saw that his father was standing speaking to Mr Hogg. His father asked him to come over as he wanted Stephen to hear this. His father said to Mr Hogg that he would give him £200,000 for the final payment of the Crown Wall. His father asked if Mr Hogg was happy with that and Mr Hogg said, "yes, Brilliant, how quick can you pay me?". His father said, "as soon as possible". They shook hands and that was the end of the conversation. In cross-examination, he explained that he knew that it was on 29 November 2022, as that was the date they were pouring the Tower Bridge concrete and he doubled checked his diary as to when that was poured.

[158] Mr O'Donnell gave evidence that after the meeting at the Tram works Billy Beattie told Mr O'Donnell that he had met with Mr Hogg and told him he was due £200,000 for the Crown Wall and they had shaken hands on that.

[159] I prefer the evidence of Mr Hogg as to what was agreed at the Tram works in Edinburgh.

[160] Although there was some uncertainty about the precise date at which Mr Hogg met with Billy Beattie at the Tram works, what is important is not the date on which the

agreement at the Tram works occurred, but what was agreed. The precise date around December 2022 is not significant: it is clear that the meeting took place around about then.

[161] The contemporaneous documentation supports Mr Hogg's account of the meeting.

[162] On receipt of the £200,000 payment, the pursuer issued to the defender a payment receipt which specifically stated that the payment was for "Pavement Slabs Works Ongoing". If the agreement at the Trams works had been in relation to the Crown Wall sub-contract, then that receipt would have stated it was for Crown Wall works. The defender did not, at the time, in any way challenge the receipt nor suggest that the receipt was an error and should have referred to the Crown Wall sub-contract.

[163] Further, Mr Hogg's account is consistent with payment for the Slab works being made to the defender by the Harbour Board at around the time of the meeting. On 6 December 2022, the Harbour Board issued payment certificate number 6 certifying a payment of £438,977.63 in relation to the Pavement Slab works. The timing of that payment, which was specifically for the Pavement Slab works, is supportive of the £200,000 payment being made at that same time to the defender also being in respect of the Pavement Slab works: it would have been entirely appropriate, in the normal way, for a contractor who receives payment for particular work to pay the sub-contractor for that same work out of the monies received at around the time they are received.

[164] Mr O'Donnell gave evidence as to how he calculated the £200,000 in November 2022. He did so by reference to a document which stated "Crown Wall" and showed various calculations both typed and manuscript. On the face of it that evidence supported the payment being for the Crown Wall. His evidence was clear that he prepared this document in November 2022. However, on cross-examination it became apparent that this could not possibly have been the case. The document referred to 2023 figures which would not have

been available in November 2022. In these circumstances, I do not accept Mr O'Donnell's evidence that this document was created in November 2022 and constituted a contemporaneous calculation that at the time of the Trams meeting in around December 2022 the sum due under the Crown Wall contract was £200,000. I find Mr O'Donnell's evidence in that regard to be unreliable and put it to one side. As I have out to one side the evidence relied on by the defender to establish the figure of £200,000 was calculated in respect of the Crown Wall contract, there is no contemporaneous calculation evidence to contradict the pursuer's position, supported by the contemporaneous receipt, that the £200,000 related to the Pavement Slab contract.

[165] I reject Billy Beattie's account of the meeting at the Trams work. As well as being inconsistent with the contemporaneous evidence, it is inconsistent with the defender's case on record. There are no averments to the effect that there was an agreement that the payment of £200,000 would be in final settlement of any outstanding sums due by the defender to the pursuer in relation to the Crown Wall contract. That would have constituted a complete defence to the pursuer's claim in this action for further sums due under the Crown Wall sub-contract. No such defence was pled. Further, Billy Beattie's claim that the final amount due under the Crown Wall sub-contract was settled at that meeting is incompatible with, and directly contradicts, the defender's counter claim. In the counter claim, the defender seeks to recover sums which they say they overpaid the pursuer under the Crown Wall sub-contract. If, as Billy Beattie stated in his evidence, agreement was reached at the meeting on the final sum due, then the defender is not now entitled to go back on that agreement and recalculate the final sum due and seek to recover the sums sought in the counter claim

[166] Further, the defender's late change of position on the Trams meeting in its pleadings reflects badly on Mr Billy Beattie's credibility and reliability. If Mr Beattie's evidence is true, then it is of great significance in ascertaining whether the £200,000 payment is ascribable to the Crown Wall sub-contract or the Pavement Slab sub-contract. And yet the meeting at the Trams was not pled during the adjustment period, nor brought in a minute of amendment shortly after the closing of the record. Instead it was first raised by way of answers to the pursuer's minute of amendment shortly before the original December 2024 proof.
Billy Beattie's explanation that this was due to oversight is another example of him trying to explain away important inconsistencies in his position as mere mistakes. I did not find him to be a credible and reliable witness.

[167] As I have rejected Billy Beattie's account of the meeting, Mr O'Donnell's evidence that the same incorrect account was told to him by Mr Beattie is of no assistance in establishing what happened at the meeting.

[168] While it is understandable that Stephen Beattie would wish to come to court to support his father, his evidence too is inconsistent with the contemporaneous documentation and I reject it also.

[169] For these reasons, I find as a matter of fact that at the meeting at the Tram site around the end of November or beginning of December 2022, Billy Beattie agreed to make a payment to the pursuer of £200,000 in respect of the Pavement Slab sub-contract.

[170] The effect of that finding is that the £200,000 payment is referrable to the calculation of the amount due under the Pavement Slab sub-contract.

Conclusion

[171] Both parties invited me to put the case out by order for discussion of the terms of the interlocutor to give effect to my opinion and I shall do so. In the meantime, I reserve all questions of expenses, including expenses of the discharged proof.