SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2025] SC KDY 98

PER-CA36-24

JUDGMENT OF SHERIFF CHARLES LUGTON

in the cause

MARTIN MCLEAN MAVER

Pursuer

against

A WILLIAMSON HAULAGE LIMITED, having their registered office at Thain House, 226 Queensferry Road, Edinburgh, EH4 2BP

Defender

Act: Way, Advocate, instructed by Innes Johnston LLP
Alt: Anderson, Advocate, instructed by Clyde & Co (Scotland) LLP

Kirkcaldy 4 November 2025

The sheriff, having resumed consideration of the cause, finds the following facts admitted or proved:

1. The pursuer is Martin Maver. The pursuer is a boat builder.

2. The defenders are a company incorporated under the Companies Acts, having their registered office at Thain House, 226 Queensferry Road, Edinburgh, EH4 2BP. The defenders are a haulage company.

3. A boat mould is a piece of equipment which is used for building boats. In particular, it is used to build the hulls of boats.

4. In around July 2020 the pursuer engaged the defenders to transport an 8 x 4 metres boat mould from his premise in Anstruther, to a premises at Leven. The defenders' employees arrived to perform the move on 7 August 2020. In the present action, the pursuer alleges that the defenders damaged the mould while doing so.

5. The 8 x 4 metres boat mould was one of two moulds which were provided to the pursuer by Chris Coe. The size of the second mould was 6.9 x 2.65 metres.

6. Chris Coe is a marine engineer. He is a director of the company, Marusya Properties Limited ("Marusya"). Until around July 2021 he was the sole director and shareholder of another company, Twinseas Limited ("Twinseas").

7. The pursuer and Mr Coe had dealings over several years. Between around 2013 and 2018 Mr Coe sold the pursuer unfinished boats on behalf of Twinseas. The pursuer finished the construction of the boats and sold them as commercial fishing boats.

8. In around early 2017 Mr Coe provided the pursuer with the two boat moulds. It was agreed that the pursuer would use the boat moulds to build boats and that he would pay Twinseas a fee for each of the boats that he built with them. Mr Coe would provide the pursuer with order numbers from the UK fishing industry's governing body, Seafish, for each of the boats under construction.

9. The pursuer signed a written agreement to this effect on 4 February 2017, at Mr Coe's premises in Halton Heath, Poole ("the 2-years agreement"). Mr Coe signed the agreement on behalf of Twinseas and Marusya. The agreement comprised a typed template, into which details were inserted in handwriting. It recorded that the boat moulds were owned by Marusya and that any change of ownership would require a new agreement. It stipulated that the pursuer would retain the boat moulds for a two-year term. The agreement also provided that at the end of the agreed term the moulds were to be returned in the same

condition as at the start of the agreement. The fees to be paid by the pursuer to Twinseas were noted as being "to be agreed", as the figures had not yet been agreed. Figures of £2,000 - £2,500 and £1,000 - £1,500 for boats built using the bigger and smaller moulds, respectively, were under discussion.

10. Before the pursuer took possession of the moulds he began taking orders for boats. As the moulds were still in Poole, Mr Coe built the boats and supplied them to Mr Maver to be provided to the customers. In particular, the pursuer took an order for 4 boats to be supplied to Seawave; and a second order for 6 boats to be supplied to another customer. Mr Maver took deposits from the customers, which ranged from £4,000 to £6,000, depending on the size of the boat.

11. In the period March to April 2017 the pursuer made a number of payments via bank transfer to Mr Coe. On 23 March 2017 the pursuer made three bank transfers to Mr Coe of £4,000, £4,000 and £2,000, respectively. On 10 April 2017, the pursuer made three bank transfers to Mr Coe, each of £10,000. These payments were made in respect of the boats being built by Mr Coe. They were deposits taken from the customers.

12. On around 8 April 2017 the moulds were transported from Holton Heath to the pursuer's premises in Anstruther. The pursuer began using the moulds to build boats.

13. Subsequently, difficulties arose in the pursuer's management of his business and in his relationship with Mr Coe. The pursuer did not supply his customers with the boats that they had ordered within agreed timescales. He did not order the materials required for construction of the boats from his suppliers. He did not keep up payments of fees to Twinseas, in terms of the 2-years agreement. Seafish threatened to stop the pursuer from building boats as he had not been doing so in accordance with their approved specification,

nor had he provided Seafish with information about the boats in construction, as he was obliged to do.

14. In around late 2017 the pursuer employed Mark Noble to assist him with his business. Mr Noble acted as a trouble shooter, dealing with all aspects of the business apart from the physical building of the boats.

15. Mr Noble liaised with Richard Blackwood of Seafish to address Seafish's concerns. He and Mr Maver travelled down to Hull to meet Mr Blackwood. He also emailed Mr Blackhurst on 14 December 2017, to confirm that Mr Maver had Chris Coe's authority to build boats and to address the issue of previous boats which had not been built correctly. Mr Maver was copied into the email.

16. Mr Noble liaised with Mr Coe. Mr Coe had become concerned about the pursuer's difficulties with Seafish and about the unpaid fees. He was refusing to obtain order numbers from Seafish and provide them to Mr Maver until Mr Maver paid the outstanding fees.

17. Mr Noble held an initial meeting with Mr Coe and the pursuer at a carwash near Mr Coe's premises in Holton Heath.

18. On 18 January 2018 Mr Noble sent Mr Coe an email, in which he detailed historical problems with the management Mr Maver's business and set out the projected orders and fees payments to be made to Mr Noble in the coming year. Mr Noble recorded that the fees had been agreed at £3,500 and £1,500 for boats built using the larger and smaller moulds, respectively.

19. On 28 January 2018 the pursuer, Mr Noble and Mr Coe held a meeting at the Royal Hotel in Anstruther. Mr Noble took contemporaneous handwritten notes of the meeting. The purpose of the meeting was to clarify the responsibilities of Mr Coe, Mr Maver and

Mr Noble. It was agreed that in future, the fees would be £3,000 and £1,500 for boats built using the larger mould and smaller mould, respectively. It was agreed that Mr Maver would pay 50% of the fee when Mr Coe provided a Seafish order number and 50% on completion of the build. Mr Coe offered to waive most of the outstanding fees, provided Mr Maver paid him £2,500. The possibility of Mr Coe's employees coming up to Scotland to show Mr Maver's staff how to build the boats in line with the layout plans was discussed.

20. At the meeting of 28 January 2018, the pursuer and Mr Coe signed a second written agreement ("the 15-years agreement"). The agreement comprised the typed template which had been used for the earlier agreement, with handwritten insertions entered by Mr Noble. The agreement provided that the moulds would remain the property of Marusya, but that the pursuer would be entitled to use them during a 15-year term. It stipulated that at the end of the agreed term, the moulds should be returned in the same condition as at the start of the agreement. The agreement provided that Twinseas would be paid £3,000 and £1,500 for each hull built using the respective moulds.

21. After the meeting, the pursuer made no payments to Mr Coe or to Twinseas. In particular, he did not make a payment of £2,500 in respect of the outstanding royalties, nor did he make payments in respect of any new orders, in terms of the agreement made in January 2018.

22. In the late summer of 2018 Mr Noble left Mr Maver's employment. He was concerned by the manner in which Mr Maver was running the business. He had concluded that Mr Maver would not listen to his advice.

23. In 2020 Mr Coe instructed Mr C of B Solicitors to seek to recover the moulds from the pursuer. He provided Mr C with the 2-years agreement. He did not provide him with the 15-years agreement. Mr C understood his client to be Twinseas. Mr C wrote to the pursuer.

24. In December 2020 the pursuer telephoned Mr C. Mr C was unavailable but returned the pursuer's call. Their telephone conversation was recorded. The pursuer told Mr C that he had owned the moulds, but that he had sold them to a purchaser in Ireland, Iain Kelly. In fact, the moulds were still in his possession. The pursuer also described a meeting at Anstruther in which prices were discussed with Mr and Mrs Coe. The pursuer referred to the involvement of Mark Noble in the meeting, who he described as his manager.

25. In around August 2021 B Solicitors instructed Urquharts solicitors to raise a court action on behalf of Twinseas for the recovery of the moulds from the pursuer. On 6 August 2021 an initial writ was served on the pursuer, craving delivery of the moulds and interdict against the pursuer from disposing of them. The pursuer did not enter appearance. On 10 August 2021 interim interdict was granted against the pursuer. Final decree was not taken in the action.

26. In 2021 Mr Coe sold Twinseas. He ceased to be a company director on 31 July 2021. After selling Twinseas Mr Coe continued to work for the company as an employee for a period.

27. Twinseas subsequently entered liquidation. In August 2024 the liquidator's annual progress report recorded that B Solicitors were previously instructed by the company on a litigation matter which was concluded. The report noted that the liquidator had subsequently been contacted by the previous director of the company on a related matter that required the participation of the liquidator. This matter would be reviewed to determine if it might lead to any recoveries for the benefit of creditors, who would be updated in a subsequent report.

28. When Mr Coe sold Twinseas, he did not tell the new owners about the legal proceedings against the pursuer. He believed that the moulds were the property of Marusya. He was unsure of why the action had been raised on behalf of Twinseas.

29. Subsequently, Mr Coe took no further action to pursue the recovery of the moulds. He concluded that it was not worth doing so. He prevented the pursuer from making further use of them by refusing to issue Seafish numbers. Mr Coe considered the moulds to be redundant. He began building a new mould. There is no realistic prospect of Mr Coe or Maryusa taking further steps to recover the mould or the cost of its repair.

30. The agreement reached in January 2018 was extant when the mould was allegedly damaged in August 2020. It has never been terminated.

Finds in fact and law:

1. The pursuer does not own the 8 x 4 metre mould. It is owned by Marusya.

2. The pursuer holds a possessory title to the 8 x 4 metres mould, and held a possessory title to it on 7 August 2020, under the agreement reached in January 2018.

3. The defenders owed the pursuer a duty of care to exercise the care and skill to be expected of a reasonably competent haulier when transporting the mould.

4. It was an implied term of the pursuer's contract with the defenders that the defenders would exercise the degree of care and skill to be expected of a reasonably competent haulier when transporting the mould.

Finds in law:

1. The pursuer has title and interest to sue.

THEREFORE, Repels the second plea in law for the defenders; and Fixes a hearing on the expenses occasioned by the preliminary proof and for determination of further procedure.

NOTE

Introduction

[1] A boat mould is a piece of equipment which is used for building boats. This action concerns an 8 x 4 metres boat mould, of which the pursuer claims to be the owner. He engaged the defenders to transport it on 7 August 2020. The pursuer avers that the mould was damaged during the move. He advances a claim for his resulting losses, based on breach of contract and fault at common law. But the defenders insist on a plea of no title and interest to sue, alleging that the pursuer is not the owner of the mould.

[2] At the outset, it may be worth summarising the pursuer's account of how he came to own the mould. One evening in March 2017 he set off in his Land Rover Discovery on a long journey from his premises in Pitkerrie, Fife to an industrial yard in Poole. Accompanying him were his employee, Stephen McDonald, and two of his acquaintances, Arthur Smith and Dylan Stewart. The pursuer and Mr McDonald shared the driving responsibilities. They drove through the night, stopping briefly in the Birmingham area, before reaching Poole in the early morning. There, the pursuer had arranged to make a payment of £35,000 in cash towards the purchase of the mould. Soon after their arrival, the seller, Christopher Coe, arrived in a ford fiesta transit van.

[3] The pursuer and Mr Coe had an initial exchange while the others remained in the Land Rover. Then the pursuer summoned them to witness the transaction. He handed Mr Coe three envelopes, the first containing £15,000, and the other two £10,000 each, all in

£100 notes. Mr Coe counted out the money on the surface of a 45-gallon resin drum as the men looked on. Satisfied, Mr Coe informed the pursuer that he was now the owner of the boat mould. This was not strictly accurate as the mould was purchased in instalments. The pursuer had made an earlier cash payment of £10,000 and he would go on to make several bank transfers on 23 March and 9 April 2017, in settlement of the agreed purchase price of £85,000.

[4] In contrast to this account, the defenders contend that the pursuer came to possess the mould under an agreement. The terms of the agreement, and a subsequent agreement which superseded it, are discussed in detail later in this opinion. But in brief, the defenders maintain that it was agreed that the pursuer would hold the mould, together with a second mould, for a fixed term, paying a fee for each hull that he built with them. To this, the pursuer responds that even on this hypothesis he has title and interest to sue.

[5] The action called for a preliminary proof on the issue of title and interest to sue on 24 April 2025, 28 April 2025, 19 June 2025 and 8 September 2025. On 3 October 2025 counsel lodged full and careful written submissions. The parties also lodged a joint bundle of productions ("JB") and a joint list of authorities. I am grateful to counsel and agents for their considerable assistance.

[6] This opinion is organised as follows:

The Evidence

Summary of objections to evidence

[7] At the start of the proof, counsel for the pursuer intimated two objections to aspects of the evidence on which the defenders propose to rely.

[8] The first objection concerns a recording and transcript of a telephone conversation between the pursuer and Mr C of B Solicitors, which took place in December 2020. The background to the call was that Mr C had been instructed to recover the mould from the pursuer. During the call, the pursuer made various disclosures to Mr C about the circumstances in which the mould came into his possession and its whereabouts. The pursuer's position is that he was not made aware that the call would be recorded. Subsequently, Mr C provided the recording of the call to the agents for the defenders in the present action.

[9] The pursuer objects to the recording and transcript on the basis that the call was recorded and disclosed to the defenders' agents unlawfully. He relies on: (a) the

Investigatory Powers Act 2016 ("the 2016 Act") and the Investigatory Powers (Interception by Businesses etc for Monitoring and Record-keeping Purposes) Regulations 2018 ("the 2018 Regulations") (collectively referred to as the "investigatory powers regime"); and (b) the UK General Data Protection Regulation ("UK GDPR") and the Data Protection Act 2018 ("the 2018 Act") (collectively referred to as "the data protection regime"). If the pursuer establishes relevant breaches of these regimes, the court must then decide whether to exercise its discretion to admit the recording and the transcript having regard to the circumstances: in particular, the questions of whether it would be fair to the pursuer to do so and whether their admission would throw light on disputed facts and enable justice to be done: *Baronetsy of Pringle Stichill* 2016 SC (PC) 1.

[10] The second objection concerns certain documents which are said to be covered by "without prejudice" privilege. These documents are lodged at JB, pp 60 – 66) and JB, pp 89-102. They comprise:

1. A partially redacted email, dated 10 March 2022, sent by the pursuer's former agent, Mr W, to Elizabeth Watton, solicitor, of Clyde & Co, at the foot of which is written "This email is written entirely without prejudice to our client's whole rights, remedies and pleas and must not be founded upon in any court action to follow hereafter except at the instance of our client." (JB, pp 60-61);
2. A purported receipt for payment of £85,000 an 8 x 4 m boat mould, attached to the email of 10 March 2022 (JB, p 55);
3. A second partially redacted email, dated 16 May 2022, sent by Mr W to Ms Watton. The email contains a "without prejudice" notice, identical to that contained in Mr W's first email (JB, pp 89-90);

4. A series of Mr Maver's bank statements attached to that email (JB, pp 91-95);
5. Copies of the bank statements at pp 91-95 (JB, pp 62 – 66);
6. An email, dated 16 May 2022 at 16:53, from Mr W to Miss Watton (which contains the same "without prejudice" notice) (JB, pp 97 – 99); and
7. A series of the pursuer's bank statements, attached to Mr W's email of 16 May 2022 (JB, pp 97-99).

In his written submission, counsel for the defenders confirms that no findings are sought in relation to the texts of the emails themselves: it is the attached documents that are relied on, and which must be taken as forming the focus of the objection, therefore. This is important, for reasons that I will come on to.

[11] In the case of both objections, it was agreed that I should hear the evidence in question under reservation. They are disposed of below, following my summary of the evidence.

Dylan Stewart

[12] The first witness to give evidence was Dylan Stewart, who was 29 years old. He was unemployed, having recently been made redundant. He had known the pursuer all his life.

[13] Mr Stewart spoke to travelling to Poole and witnessing the cash payment being made to Mr Coe. He couldn't recall exactly when this had happened, though he thought the year was 2017. He explained that he had wanted to go down to Poole with the pursuer as he had never seen that part of the county. And the pursuer wanted the payment to be witnessed as a large sum of money was involved. On the journey down, Mr Stewart recalled seeing the money in envelopes. He had opened a couple of them and counted some of the cash. He

described Mr Coe's arrival, the exchange between Mr Coe and the pursuer and the counting out of the money on the barrel, as set out at the start of this opinion. Mr Coe then told the pursuer that the mould was his and the men shook hands.

[14] In cross examination, Mr Stewart confirmed that there had been three envelopes, the first of which contained £15,000, with the remaining two each containing £10,000. He agreed that the total figure was £35,000. He said that he and Arthur Smith had counted it on the way down. Having elicited this from Mr Stewart, counsel for the defender lodged evidence in replication at the Bar, in the form of a sheet of paper which bore to contain three statements for Mr Stewart, Arthur Smith and Stephen McDonald, respectively. The format each of the statements was identical, as was the text, which read as follows:

> "WITNESS STATEMENTS
>
> ARTHUR SMITH . DILLON STUART . STEVE MCDONALD . As witness to the transaction for the cash paid for the 8x4 twinsea mould, do solemnly swear that the following cash payments were witnessed as paid to chris COE date 21/3/2017 amount £15.000. Should you require further information regarding the transaction pleas do not hesitate to contact me on email"

An email address for "M Maver" and a mobile phone number were given at the bottom of the text. In each statement, two of the names at the start had been scored out, leaving the name of the person giving the statement. The purported signature of that person appeared on the left-hand side and the signature of another individual, Peto Robert, who appeared to have witnessed the statement being given, was on the right-hand side. The three statements were dated 29 October 2021.

[15] Mr Stewart accepted that he had signed the statement, though he was vague about whether he recalled doing so. He could not remember whether a witness had been present. At first, he rejected the suggestion that the statement was put in front of him for signature and suggested that he must have drafted it. But he accepted that his name was misspelled in

the text of the statement, that the other two statements were identically worded and that what appeared to be the pursuer's email address featured at the bottom of the statement. Mr Stewart was unable to account for the reference to a payment of £15,000 being made, maintaining that he had witnessed a payment of £35,000.

Arthur Smith

[16] Arthur Smith was an 80-year-old retired fisherman. He had an interest in boats, which he had been involved in building in his spare time. Mr Smith had known the pursuer for about ten years and had built boats and creels at the pursuer's premises.

[17] Mr Smith gave evidence of travelling to Poole with the pursuer's party to witness the payment to Mr Coe. He gave a broadly similar account of the episode to Mr Stewart, describing the long overnight drive, the arrival of Mr Coe in the ford van, and the £35,000, stored in three envelopes before being handed to Mr Coe who counted it out on the barrel. He thought that Mr Coe had told Mr Maver that he had made a good move in purchasing the mould, as it would make him a lot of money. Mr Smith did not recall anyone counting the money on the journey down – he said that it had been placed in the glove compartment.

[18] Mr Smith explained that the pursuer had wanted witnesses to the transaction. There would be nothing in writing as it was a cash deal. For his part, Mr Smith had wished to go so as to have a look around the workshop in Poole. They had had a tour of it after the transaction.

[19] Mr Smith had met Mr Coe once before when he and his wife had come to stay at the Anstruther Hotel. He had never done business with Mr Coe, but he knew of him. The

rumour was that Mr Coe was a bit of a shark, a fly by the night guy - but anyone might be called that in the fishing trade.

[20] When Mr Smith's statement was put to him, he accepted that the signature at the document's foot was his. At first he said that he recalled signing it, but then he said that he did not remember whether the pursuer had asked him to sign it. He confirmed that he had not drafted the wording. He did not recall swearing an oath. He said that the reference to £15,000 in the statement was incorrect, reiterating that the actual figure had been £35,000. He posited that he might have been getting mixed up between payments, but he was unable to identify another payment to which the statement might have related. It was put to him that the statement might be accurate as his memory would have been fresher at the time, but he maintained that what he had said at proof was more likely to be correct.

The pursuer

[21] The pursuer was a 73-year-old boat builder. Before that he had been a farmer. He had also had a plant hire business.

Prior dealings with Chris Coe and Twinseas

[22] The pursuer had first become aware of Chris Coe and of Twinseas at a boat show in around 2007/2008. The pursuer had purchased a boat hull from Mr Coe at around this time. From around 2013 the pursuer had started doing business with him more regularly. The pursuer would buy boat hulls from him, bring them up to Scotland, fit them out and sell them into the fishing market in Scotland. The hulls would come from Mr Coe with the requisite paperwork for their registration as fishing boats. Later, Mr Coe had started undercutting the pursuer, selling boats in Scotland at lower prices.

[23] When the pursuer was asked about Mr Coe's reputation in the fishing business, he described him as a thief who would take money off people for nothing. None of the boats that he sold came up to standard.

Purchase agreement for boat mould

[24] The pursuer said that he had agreed to buy the boat mould in early 2017. He thought that the deal had been made during a phone-call in or around March 2017. Mr Coe had wanted to sell his entire business at the time, but he was looking for £250,000, which the pursuer couldn't afford. Instead, they agreed that the pursuer would buy the boat mould only. The agreed price was £85,000, to be paid partly in cash and partly via bank transfer. The pursuer said that he travelled with his wife to Poole to make an initial payment in cash of £10,000, which Mr Coe was desperate for, as he needed to pay his staff. It was agreed that Mr Coe would remove his hull from the boat mould, after which the pursuer would return to make a further cash payment of £35,000. The pursuer would then make the necessary arrangements for a haulage company to transport the boat mould to Scotland with a police escort. Finally, the balance of the £85,000 would be paid by bank transfer. Fishermen would often make deals which involved making half of the payment in cash and half "through the books". Mr Coe made no mention of VAT at any stage.

[25] Mr Coe had offered to throw a smaller boat mould into the deal, measuring 2.5 x 5.9 or 6.5 metres, but the pursuer never received this. One of Mr Coe's workers asked if he could use the smaller mould and the pursuer had agreed. The next time that the pursuer saw the mould it was in the factory occupied by Mr Coe, where it was being held by the owner in lieu of unpaid rent.

[26] In cross examination it was put to the pursuer that his original position in the pleadings had been that he had paid Mr Coe £50,000 via bank payments. The pursuer replied that his solicitor had got his figures mixed up. He was also asked why there were no bank statements showing a withdrawal of money used to make the initial cash payment of £10,000 and the subsequent cash payment of £35,000, to which he replied that he had sent his solicitor statements which showed this. Insofar as the latter sum was concerned, he had withdrawn the funds from his savings account gradually over a period of 3 to 4 months, keeping the cash at his home.

Cash payment of £35,000

[27] The pursuer thought that the journey down to Poole had taken place on around 20 March 2017. He gave a similar description of the episode to Arthur Smith and Dylan Stewart: the overnight journey in his Landrover Discovery (though he said it silver rather than champagne-coloured); the splitting of the driving between the pursuer and Mr McDonald; the break at Birmingham; the requirement for witnesses to the payment (given Mr Coe's reputation this was essential – when dealing with him, you never got a receipt); the three envelopes holding sums of £15,000, £10,000 and £10,000, respectively, all in £100 notes (whereas Mr Stewart had described counting the money en route, the pursuer said that he had not showed it to the others, instead storing the envelopes in the glove box); their arrival at around 6am and Mr Coe turning up in "a wee silver ford fiesta van"; his initial conversation with Mr Coe before the others came out to join them; and Mr Coe counting the money on the surface of a 45-gallon drum before telling the pursuer that he was now the owner of an 8 x 4 metre mould. The pursuer and Mr Coe had then confirmed that the pursuer would pay the balance of the purchase sum by bank transfer and arrange

for the mould to be transported to Scotland, in preparation for which Mr Coe would remove the hull from the mould. The party then had a look round the yard, apart from Mr Stewart, who went to look at some nearby Alfa Romeo's and Lamborghini's, which he had spotted.

[28] In cross examination the pursuer was asked about the witness statements of Stephen McDonald, Arthur Smith and Dylan Stewart. He said that they had been drafted by another individual, Alexander Aitken. He had only seen them around a year ago, when they were shown to him by his previous solicitor. He accepted that the statements contained his email address but he was unsure whether the telephone number shown was his. When he was asked why the figures in the statements did not tally with his evidence of having made a cash payment of £35,000, the pursuer replied that Mr Aitken would have to answer this as he had drafted them.

Subsequent bank payments

[29] The pursuer spoke to a statement for one of his bank accounts ("account A"), dated 3 April 2017 (JB p 6), which showed a payment in of £10,000 from a savings account which he held ("account B") on 23 March 2017 and three payments out on the same date of £4,000, £4,000 and £2,000, respectively, under the reference "Chris Coe". He confirmed that these were payments to Mr Coe, coming to a total of £10,000. The pursuer also confirmed that a statement for account A, dated 3 May 2017 (JB p 7), showed a further payment in from account B of £30,000 on 10 April 2017, and three payments out of £10,000 made to Chris Coe on the same date. The result was that the pursuer had made total bank transfers of £40,000 to Mr Coe. When added to the initial cash payment of £10,000 and the subsequent cash payment of £35,000, he had paid the full price of £85,000 by 10 April 2017.

[30] In cross examination the pursuer was taken to another version of the bank statement of 3 April 2017 (JB, page 66), under reservation of the objection taken by counsel for the pursuer. This version of the statement appeared to show six payments being made to Chris Coe on 23 March totalling £20,000 (£4,000, £2000, £2000, £4,000, £2,000 and £2,000). The pursuer accepted that it looked as if two statements (or copies of the same statement) had been put together to make it look as if total payments of £20,000 had been made instead of just £10,000: effectively, three individual transactions were shown twice. The pursuer accepted this and described this copy of the statement as "a load of rubbish". When he was asked if he had been aware that it had been passed to the solicitors acting for the defenders, the pursuer said that he had tried to withdraw it when he had seen it.

Transport of boat mould

[31] The pursuer spoke to a document entitled "electronic service delivery for abnormal loads", dated 5 April 2017, and a confirmation from Police Scotland of abnormal load movement, dated 7 April 2017 (JB, p 9 – 10), which vouched the transportation of the boat mould from Poole to Anstruther between 8 and 10 April 2017. He confirmed that the mould had been moved during this time.

Purported Receipt

[32] The pursuer confirmed that he had received a receipt for the purchase of the boat mould, dated 5 April 2017 (JB, p 8). The pursuer said that it arrived two or three weeks after this date. It was headed "Twin Seas Boats Ltd". A squiggle appeared in the bottom left-hand corner, which the pursuer said was Chris Coe's signature. The pursuer denied having forged the receipt.

[33] Under reservation of his own objection, counsel for the pursuer put what appeared to be several other versions or copies of the receipt (JB, pp 54, 55, 58 and 59) to the pursuer. These had been produced along with emails from the pursuer's former solicitor, Mr W, and had been lodged by the defender. Counsel explained that one of the versions of the invoice was said to be a PDF version. The pursuer confirmed that he did not know the difference between a PDF and a word document. Also among the documents was a blank version of the receipt. The pursuer denied that he had ever possessed a blank Twinseas invoice. One of the versions was said to be an invoice, with the author being recorded as being Louise Morris. The pursuer said that this name meant nothing to him. The pursuer was also asked about the left-hand box of the invoice, which contained the words "Boat Mould Received £85,000.00 pounds" and the squiggle, which the pursuer had identified as Chris Coe's signature, in all of the completed versions apart from the copy at JB, p 59, in which the box was empty. The pursuer maintained his position that he had received the version of the invoice at JB, p 8 through the post. He had not forged the invoice, nor was he sufficiently skilled in IT and technology to have done so; and nobody had forged it for him. He had no idea why there were two versions which appeared to be dated 5 April 2017.

[34] In cross examination it was put to the pursuer that the documents to which he had been referred had been sent by his solicitor to the defender's agents in Microsoft word format. He did not accept this. He denied having edited the content of the documents and claimed that he did not understand how Microsoft word worked. He accepted that he might have provided his solicitor with the version of the receipt at JB p 55, but he denied providing the properties document at JB, p 57.

[35] The pursuer was asked whether he had bought the boat moulds from Chris Coe or from Twinseas, given that the receipt was headed "Twinseas Boats Ltd". He answered that

Chris Coe and Twin Seas were the same: he had made the purchase from Chris Coe, who was the owner of Twin Seas. He accepted that while the invoice was dated 5 April 2017, he had made bank transfers in the total of £30,000 on 10 April 2017. He confirmed that there was no separate invoice for this final set of transactions. He explained the fact that the invoice predated them with reference to the fact that he had made a number of staged payments over time to settle the total price of £85,000. Counsel suggested to the pursuer that VAT on the sale price would have amounted to £17,000, but the pursuer confirmed that he had not been required to pay VAT.

Purported agreements for use of boat moulds

[36] The pursuer said that the deal had not involved signing documents. He was referred to a purported agreement, dated 4 February 2017 ("the 2-years agreement"), for the use of an "8m x 4m mould tools - hull and all other components" and a "6.9 x 2.65 mould tools – hull and all other components" from "Twin Seas Boats/ Marusya Properties" for a two-year period (JB, p 38). The fees were marked as "To be Agreed". He denied having signed the agreement, explaining that he never hired equipment, preferring to own what he used. The pursuer added that it would not make commercial sense for a boat mould owner to lease it as another party, as it was liable to be copied.

[37] The pursuer said that in 2017 he did not know of the existence of Marusya and it had never been suggested to him that the company owned the boat moulds that he was purchasing. He had not entered into a contract with Marusya or Twin Seas or Chris Coe on 4 February 2017. Asked whether he had attended a meeting on this date, he said that he thought that he had met Chris Coe at the Royal Hotel in Anstruther, where Mr Coe had been

staying. The pursuer had been invited for breakfast, but he only had a cup of tea. It had not been a meeting. He had not entered into a contract and he had not signed any documents.

[38] The pursuer was next referred to what appeared to be another version of the agreement (JB, p 13), which contained the same text, but which gave the term of the lease as 15 years; and which set out fees of £3,000 and £1,500 for the use of the larger and the smaller boat moulds, respectively. He said that he had only seen the document recently. He was asked if he had sent it to his solicitor, to which he responded, "Mark Noble's done that." The document appeared to contain the pursuer's signature. When he was asked about this, the pursuer replied "That's been copied from somewhere. I'm not saying that's not my signature, but that's been copied, that's a piece of rubbish that." He said that the other signature on the document was Chis Coe's signature, which he thought he had seen before. The pursuer thought that the other writing on the document belonged to Mark Noble. The pursuer had never agreed to pay the figures set out in the agreement to Twinseas. In fact, these were sums which he had paid to Seafish as survey fees.

[39] In cross examination the pursuer accepted that both versions of the document had been lodged by his former solicitor at the time of the first diet of proof. He said that he did not know where his solicitor had got them from, denying having provided the documents himself. He had first seen the documents four or five years after the event, when his solicitor had shown them to him. The pursuer rejected the suggestion that he had an agreement with Twinseas under which he was obliged to pay royalties or a commission for the use of the mould; and likewise, he denied having owed Mr Coe substantial sums of money in early 2017 or at any other time.

Relationship with Mark Noble

[40] The pursuer explained that Mark Noble had been very interested in boats, and that he had made a repair for Mr Noble. He denied that Mr Noble had ever worked for Maver Boats: in particular, the suggestion that he might have been employed as a manager. The pursuer did say, however, that Mr Noble knew what was going on in the business as he would often spend lunch and tea breaks with others in the pursuer's office. The pursuer had "an open book" and anyone who came into his yard could look at any documents that they wished to. The pursuer's relationship with Mr Noble had ended abruptly, as Mr Noble had started interfering with his relationship with Chris Coe. Their intention had been to shift boat moulds out to Spain, where both men lived, in order to start producing boats there. The pursuer described the relationship between Mr Noble and Mr Coe as "cosy" and explained that Mr Noble had paid for Mr Coe's flights and accommodation at the Royal Hotel in Anstruther for a meeting.

Handwritten notes, dated 28 January 2018

[41] The pursuer was referred to a set of handwritten notes, dated 28 January 2018 (JB p 113), which purported to set out amounts due as royalties or fees. When asked if he had attended a meeting at the Royal Hotel on this date, he initially said that this was the occasion on which he had attended for a cup of tea. But when it was pointed out to him that he had already described a similar meeting said to have taken place in February 2017, the pursuer clarified that there was only one such occasion, but he was unsure of the date. He was unable to comment on a Flybe flight and payment confirmation for Mr Coe, dated 27 January 2018 (JB, p120). The pursuer denied that he had owed Mr Coe money in respect

of royalties in early 2018, or that the various payments to Mr Coe had been made under a distribution agreement.

Email from Mark Noble to Richard Blackwood, dated 14 December 2017

[42] The pursuer was referred to an email, dated 14 December 2017 (JB, p117), from Mark Noble to Richard Blackwood, surveyor at Seafish, into which he appeared to be copied under the name "Marty Maver". The email referred to Maver Boats acting as a licensee and building Twinseas boats. The pursuer said that he had not received the email (nobody called him "Marty") and that he did not know why Mr Noble had written this to Seafish. He had not given him permission to do so.

Email from Mark Noble to Chris Coe, dated 18 January 2018

[43] He was taken next to an email from Mark Noble to Chris Coe, dated 18 January 2018 (JB, p 118), which was entitled "Twinseas & Maver Boats Partnership inc Projected Royalty payments". He denied having entered into a partnership with Twinseas. In the email, Mr Noble wrote that he had "been tasked with organising almost every part of Martin's organisation", to which the pursuer responded by reiterating that Mr Noble had not been employed in his business. He disputed the accuracy of the email's contents – in particular, he denied that (i) royalty payments of £1,500 and £3,500 had been agreed; and (ii) his business had taken losses of around £55,000 - £70,000 in 2017. The pursuer said that his dealings with Mr Coe had been by telephone rather than via email.

Court action against pursuer

[44] The pursuer was taken to an initial writ relating to an action pursued against him by Twinseas, which contained craves for (1) payment of £110,000; (2) delivery of two boat moulds (8m X 4m and 2.69n X 2.65m, respectively); and (3) interdict against him from removing the boat moulds from Burnmill Industrial Estate in Leven or otherwise disposing of them (JB, page 68). He was also referred to a Certificate of Citation, confirming service upon him by Sheriff Officer via first class post to his address (JB, p73) and an order of the court for interim interdict in terms of the third crave, dated 10 August 2021. The pursuer denied having received service and did not accept that any order had been granted against him. He had been told by his solicitor that decree in absence had never passed against him.

[45] Under reference to various Companies House documents, he confirmed that on 31 July 2021 Chis Coe had ceased to be a person of significant of control in relation to Twinseas, which coincided with the appointment of Richard Neno and James Neno as company directors (JB, pp 16, 18 and 19). The pursuer was next taken to a Notice of the appointment of a liquidator to Twinseas (JB, pp 77 - 78), which confirmed the liquidator's appointment on 5 July 2023. He was then taken to the liquidator's annual progress report, dated 15 August 2024 (JB, pp 20 – 29), in which it was recorded that following inquiries, the liquidator had identified no assets or right of action which might lead to recovery. The liquidator noted that B Solicitors had been instructed by the company in a litigation that concluded in 2021, though the matter was under review to determine if it might lead to any recoveries for the benefit of the creditors.

[46] In cross examination it was suggested to the pursuer that the statements of Dylan Stewart and Arthur Smith appeared to have been drafted in response to the action, as they were drafted a few weeks later, in October 2021. The pursuer again denied having

received service of the proceedings, suggesting variously that his home might not have had a letterbox at the time and that the initial writ and citation were not legal documents as they did not contain his middle name.

Call between Mr C of B Solicitors and the pursuer

[47] The pursuer was asked about a recording of a call between him and Mr C, solicitor, of B Solicitors, and a transcript of the call.

[48] The pursuer said that he had not been aware that he was being recorded, nor had he consented to being recorded. When it was suggested to him that he would have heard an automated message, advising that calls would be recorded, he replied that this would have caused him to end the call. He had not been aware of B Solicitors' privacy policy (JB, p51). Mr Cole had not told him who his client was. The call had taken place in around 2020. The pursuer had not known who was in control of Twinseas at this time, though he thought that it was Chris Coe. The pursuer claimed that he thought Mr C was a scammer; and consequently, he had "led him up the garden path" rather than answering his questions truthfully.

[49] On the recording Mr C asks the pursuer to whom he has sold the boat moulds for scrap; and the pursuer responds that he sold them to a man in Ireland called Iain Kelly. When giving evidence, the pursuer said that he had actually sold a boat hull to Mr Kelly rather than a boat mould. He had sold other boat moulds into Ireland and had thought that Mr C was asking him about what he did generally, rather than about the moulds that were the subject matter of the action. He had not sold those particular moulds and still had possession of them. While he appeared to have told Mr C that there was documentation in

relation to the purchase of the moulds, in cross examination the pursuer said that there were no such documents.

[50] It was put to the pursuer that if he had sold the moulds prior to speaking to Mr C in December 2020, they could not have been moulds that were inspected by the loss adjusters in March 2021. The pursuer repeated that he had not sold them, contrary to what he had told Mr C.

[51] At page 42 of the transcript the pursuer is noted as saying that he was supposed to be the sole agent of the boats in Scotland, but that Mr Coe kept selling boats in Scotland. When he was asked about this in examination in chief, the pursuer initially said that he didn't know what this part of the transcript was about. But he went on to say that the passage referred to a period between 2006 and 2013/14 when he was buying hulls from Chris Coe to fit out and sell into Scotland and Ireland. At this time the pursuer didn't have boat moulds.

[52] In the same passage the pursuer is noted as saying that he and his manager agreed prices with Mr Coe and his wife. When he was asked about this, the pursuer repeated that Mr Noble had never been his manager or his employee. The pursuer is also noted as saying that he flew Mr and Mrs Coe up to Scotland at his expense "to make sure something was done above board". When giving evidence the pursuer repeated his position that he had met Mr and Mrs Coe at Anstruther hotel, but that this had been arranged by Mr Noble, who had paid for Mr Coe's flight and accommodation. The pursuer had not agreed anything with Mr Coe when he met him.

[53] The pursuer accepted that he had told Mr C that he had been building boats on licence but explained that he had been talking about the period before 2015. At this stage he couldn't get a certificate for the boats and Mr Coe had obtained licensing fees for him. He had not been referring to the period from 2017 onwards from when he had the moulds.

[54] The pursuer was asked about a section of the transcript in which he is noted as saying

> "The licence was for him to hold the drawings. I bought the moulds and he held the drawings. If he held the drawings, he would get money off the drawings and that is exactly what he did but the moulds did not belong to him."

When asked about this the pursuer said that he had bought the moulds from Mr Coe. He hadn't bought the drawings, but he received them with the moulds: "it was all included."

Mr C

[55] Mr C was an English solicitor, who had been employed by B Solicitors in December 2020. He confirmed that he had been instructed to act for Twinseas. While the company had been his client, he had received instructions from a company director, Chris Coe.

[56] Mr C had been instructed in relation to two boat moulds, which his client had provided to the pursuer under a licence agreement. His client's position was that the pursuer had used the boat moulds to generate new hulls, but that he had not paid the fees due under the agreement. Mr C had corresponded with the pursuer at first, but he had subsequently received a phone call from the pursuer, which he agreed might have taken place in around December 2020. While initially he said that the pursuer had called him, he accepted that it appeared from what had been said at the start of the call that he might have called the pursuer. The pursuer had told him that he no longer had the moulds, as he had sold them to a Mr Kelly in Ireland. Mr C found this surprising as at the time of the phone call he was looking at a photograph with a date stamp from the previous day, which showed the boat moulds at the pursuer's premises. During the conversation, the pursuer had

referred to an agreement, which he said was organised by his business manager. He had called Mr Coe a liar and he had claimed that he had bought the moulds.

[57] Mr C confirmed that the call had been recorded. He had listened to the recording, which he said was an accurate reflection of the call. He did not recall having made a transcript of the call and assumed that someone else must have done this. Mr C confirmed that callers to the firm would be told by an automated voice that calls would be recorded. He could not speak to this from personal experience, but the firm's partners had told him this. This corresponded with the written policy of the firm on client privacy. Mr C said that the 2023 version of the policy (JB, p 51) and the version in place in 2020 would have been in similar terms.

[58] Mr C said that Urquharts Solicitors had been instructed to raise proceedings in Scotland, with the initial writ being served on the pursuer on 6 August 2021. He confirmed that Twinseas had been sold shortly prior to this, on 6 August 2021, but he said that he had not been aware of this at the time. When he spoke to the new owners it transpired that they were unaware of the action. The case had been progressed until Twinseas were no longer solvent.

[59] Mr C was asked about the purported written agreement between Twinseas and the pursuer. He confirmed that he had not seen the version of the agreement which provided for a 15-year term. His recollection was that he had been instructed to recover the moulds on the basis that the term had expired, which tallied with the version which contained a two-year term.

Chris Coe

[60] Chris Coe was a marine engineer. He was 53 years old and lived in Spain. Until July 2021 he had been the sole director and shareholder of Twinseas. He was also a director of Marusya.

Dealings with the pursuer

[61] Mr Coe said that he had dealings with the pursuer on behalf of Twinseas over a number of years. He had sold the pursuer boats between 2013 and 2018. These had been basic boats, which the pursuer finished. They were intended to be commercial fishing boats.

Agreement regarding boat moulds

[62] In around March or April 2017 Mr Coe provided the pursuer with moulds on a lease arrangement. The agreement was that the pursuer would have the moulds for a number of years and pay Twinseas royalties on the boats that he built with them. This was standard within the industry. Mr Coe would happily have sold the pursuer the moulds, but the pursuer didn't have the requisite funds. Mr Coe confirmed that the agreement was as set out at JB, p 38. He said that the pursuer and he had signed it at his premises in Halton Heath, Poole. He had seen the pursuer sign it. The boat moulds were owned by Marusya, as set out in the written agreement, because the building of the moulds had been funded by Marusya. The agreement stipulated a two-year term. The royalties (or fees) to be paid were noted as being "to agreed". Mr Coe explained they had yet to reach agreement on this at the time of signing, but that they had spoken of figures of £2,000 - £2,500 and £1,000 - £1,500 for boats built using the bigger and smaller moulds, respectively.

[63] When Mr Coe was asked about the second version of the agreement (JB, p 13) he explained that this had been agreed when he had a meeting with the pursuer and Mark Noble in 2018. He confirmed that fees of £3,000 and £,1500 per boat were agreed for the use of each of the moulds respectively. A 15-year term was agreed.

Payments received from pursuer

[64] Mr Coe accepted that payments totalling £10,000 had been made to him on 23 March 2017 (JB, p 108). He explained that these payments were for boats that were already in build: the pursuer had received advance orders and Mr Coe had started to build them for him before the moulds were sent up to Scotland. The deposit per boat varied but was usually in the region of £4,000 - £6,000. Mr Coe denied having received an additional cash payment of £10,000 in March. He accepted that he had received three payments of £10,000 on 9 April 2017, which he again attributed to orders for boat builds. Mr Coe accepted that the pursuer had probably travelled down to Poole to meet him on around 20/ 21 March 2017; but he denied having received a cash payment of £35,000. He said that he had never seen him with colleagues at any time, apart from Mark Noble. While he had received cash payments from the pursuer on occasion, he had always put these through the bank and issued invoices.

[65] Mr Coe confirmed that a blank invoice of the sort that he would issue was shown at JB, p 54. He described the invoice for £85,000 (JB, p 55) as a fake. The handwriting was not his; and in any case, he always typed the invoices rather than writing them in hand. The signature was not his. It was possible to tell from the top left corner of the invoice that this was an adaptation of an invoice that had related to the sale of a boat. The address on the invoice was out of date: it was not the address from which he had been working when he

built the boat moulds. Mr Coe also suggested that if he had agreed to sell the moulds for a figure made up of a combination of bank transfers and cash payments, it would not have made sense for him then to have issued an invoice for the full amount.

Meeting in January 2018

[66] Mr Coe said that he had held a meeting with the pursuer and Mark Noble in Anstruther in January 2018. The context was that the pursuer owed him a lot of money and was struggling to pay his bills. He confirmed that a flight booking for 27 January 2018 from Southampton to Edinburgh, shown at JB, p 120, tied in with this. There were also handwritten notes of the meeting, taken by Mark Noble (JB, pp 113 – 115); and Mr Noble had emailed Mr Coe following the meeting (JB, pp 118 - 119). Both the notes and the email recorded that the fees had been agreed at £3,000 and £1,500 in respect of the larger and smaller mould, respectively. 50% of each fee would be payable when Mr Coe had obtained the necessary issue paperwork from Seafish, with the balance being payable on completion of the build. In his email, Mr Noble included a forecast for the likely number of builds across the year.

Subsequent developments

[67] Mr Coe said that he had considered the meeting to be positive at the time, but that he had not received a penny in the months that followed. He had issued the pursuer with numerous invoices; but ultimately, he had cut his losses as he was too busy to keep chasing him. Within 6 months of the meeting Mr Coe had started working on building a new boat mould as he could see that things with the pursuer were going the wrong way.

[68] Subsequently, Mr Coe had sold Twinseas as he was so busy that he couldn't cope with the extent of the demand. The new owners had made a mess of things, and the company had gone into liquidation, meaning that he had lost a job for life.

Alleged sales to Scottish customers

[69] Mr Coe denied having undercut the pursuer to sell boats into the Scottish market. He had only once sold a boat to a Scottish purchaser, who had been unwilling to deal with the pursuer. More generally, Mr Coe and the pursuer were using moulds of different sizes to build different sizes of boats, so they were not in direct competition.

Ownership of boat moulds

[70] Mr Coe was cross examined about the question of ownership of the boat moulds at some length. He maintained his position that they were the property of Marusya, of which he was a director. Mr Coe denied having sold the moulds to Twinseas. He confirmed that he had sold Twinseas in July 2021, at which point he had ceased to be a company director and a person of significant control (JB, pp 15 -16). Concurrently with this, Marlon Holdings Limited had become a person of significant control (JB, p 17). But he said that the moulds were not part of the sale. He did, however, confirm that he had instructed solicitors to raise an action in Twinseas' name against Mr Maver for the recovery of the boat moulds. He also accepted on 10 August 2021 an order for interim interdict prohibiting their removal was granted against Mr Maver. He said he was unsure of why the action was raised on Twinseas' behalf: the solicitor had subsequently told him that this was wrong, given that the boat moulds were owned by Marusya. He had not told the new owners about the court action, as he considered that it was nothing to do with them. When it was put to him that

the action had been raised after the transfer of the company in July 2021, he said that while the sale was recorded as having taken place in July, it had actually happened in September.

[71] Mr Coe said that he had never taken action on behalf of Maryusa to recover the boat moulds or payment of royalties as to do so would cost money and was a waste of time. He had no further use for the moulds, which he now considered to be redundant. He had effectively prevented Mr Maver from using them to build further boats, as this could only be done if he provided Seafish order numbers. Consequently, the moulds could not have been used to build any boats for over a year before they were damaged.

Elizabeth Watton

[72] Elizabeth Watton was a solicitor, employed by Clyde & Co, within the firm's Manchester office. She gave evidence of receiving a series of documents from Mr W, the pursuer's former agent. These included an email of 10 March 2022 (JB, p 60), attached to which was the purported receipt for payment of £85,000 an 8 x 4 m boat mould (JB, p 55). She spoke to a properties document (JB, p 57), which related to the receipt. She explained that her firm had checked when the document had been created, as shown in the properties document. She could not recall whether the properties document had been created at Clyde & Co's offices. Ms Watton confirmed in cross examination that she had subsequently discovered that Louise Morris, who was referred to in the properties document, worked for the pursuer's former agent.

[73] Ms Watton said that Mr W had also sent her a series of Mr Maver's bank statements (JB, pp 62 – 66) and an email, dated 16 May 2022, attached to which were a number of further bank statements (JB, pp 89 – 95). Ms Watton confirmed that she had sent Mr W an email, dated 8 June 2022 (JB, pp 96 – 97), in which she referred to witness statements of

Arthur Smith, Dylan Stewart and Steve McDonald. She said that she had been provided with these witness statements by the pursuer's former agent. She said that the purpose of the statements had been to provide evidence that payments of £15,000 had been made to Chris Coe towards the purchase of a boat mould.

[74] Ms Watton said that she had telephoned B Solicitors in around June 2025 and had heard a recorded message that the call would be recorded.

[75] In cross examination, Ms Watton confirmed that she had seen the 2-years agreement (JB, p 38). She said this had originally been attached to a survey report undertaken when the boat mould was inspected. She thought that Chris Coe had provided this to the surveyor. Ms Watton said that she had never seen the 15-years agreement (JB, p 13), which had been lodged by the pursuer's former agent.

Mark Noble

[76] Mark Noble was 57 years old. He lived in Benidorm, where he owned a mobile phone shop. He also worked as a project manager of local buildings.

Employment by Mr Maver

[77] Mr Noble said that he first got to know Mr Maver when he parked his boat outside the yard at which Mr Maver's business was based. He asked Mr Maver for help, advice and the use of tools in order to repair his boat. He also offered to do some work for Mr Maver. After a few months Mr Maver employed Mr Noble to streamline his business. Mr Maver paid him a monthly salary of £1,800 by cheque. Mr Noble said that he had taken on the role of a trouble shooter, dealing with staff, suppliers, Seafish and customers. He was responsible for everything that went into building boats on the business side, apart from the

physical construction of the boats. Mr Noble initially said that he thought he had started working for Mr Maver in late 2016/ early 2017; but later in his evidence he said that his employment must have commenced in late 2017/ early 2018, as this tied in with the dates of various meetings and documents.

Dealings with Seafish

[78] Mr Noble said that when he took up his role, Seafish were threatening to stop Mr Maver from building boats, as he was failing to supply them with information as required. Mr Noble liaised with Richard Blackwood of Seafish to address their concerns. He and Mr Maver travelled down to Hull to meet Mr Blackwood. He also emailed Mr Blackwood on 14 December 2017 (JB, p 117), to confirm that Mr Maver had Chris Coe's authority to build boats and to address the issue of previous boats which had not been built correctly. Mr Noble confirmed that Mr Maver was copied into the email and must have received it, as they discussed it the following day.

Dealings with Chris Coe

[79] Mr Noble was asked about his dealings with Chis Coe. He said they had first met at a carwash near Holton Heath, close to Mr Coe's workplace. Mr Maver had also been present, having driven Mr Noble down. Prior to the meeting, Mr Maver had explained to Mr Noble that the hulls on which he worked came from Mr Coe. The context of the meeting was that Mr Coe was concerned about Mr Maver's difficulties with Seafish, and about the implications for his own reputation. Subsequently, he and Mr Maver met Mr Coe at the Royal Hotel in Anstruther on 28 January 2018, as discussed below.

[80] In cross examination Mr Noble confirmed that Mr Coe had been in contact with him recently to ask his advice about the purchase of property in Spain. He had mentioned the present action, but they had not discussed it as it was ongoing. Mr Noble rejected the suggestions that they were in cahoots or that he was giving evidence to support Mr Coe.

The 2-years agreement

[81] Mr Noble said that Mr Maver had shown him a contract between Mr Maver and Mr Coe, which was dated 4 February 2017 (JB, p 38). He confirmed that he recognised Mr Maver's signature, as shown at the foot of the document. He did not recognise the second signature, but he presumed this belonged to Mr Coe. He understood that the company noted as the owner of the moulds in the agreement, Marusya, belonged to Mr Coe's cousin. Mr Noble confirmed that the agreement predated his employment with Mr Maver. He had asked Mr Maver to furnish him with all documentation that pertained to his relationship with Mr Coe, and this was the only document which Mr Maver had produced.

The 15-years agreement

[82] Mr Noble was referred to the version of the purported agreement which contained a 15-year term (JB, p 13). He said that the handwriting in the document was his. Martin Maver's signature was at the foot of the document; and he presumed that the second signature was Chris Coe's. He said that the figures contained in the agreement of £3,000 and £1,500 for hulls made using the respective boat moulds, had been agreed at a meeting in the Royal Hotel in Anstruther. He thought that the agreement would have been completed and signed at the meeting, although he was uncertain of this.

[83] Mr Noble was referred to a set of handwritten notes (JB, pp 113 – 115), dated 28 January 2018. He confirmed that these were his notes of the meeting and that it had taken place on this date. The meeting's purpose was to clarify the respective responsibilities of Mr Coe, Mr Maver and himself. The position was that Mr Coe would obtain order numbers from Seafish for the hulls and provide them to Mr Maver, but he was refusing to supply further order numbers as Mr Maver owed him royalties. Another discussion point was that customers were complaining as Mr Maver was taking deposits and then not doing the work that he had said he would do. He was giving unrealistic timescales for completion, and the quality of the work was inadequate. Mr Noble had proposed that Mr Coe's employees should come up to Scotland to show Mr Maver's staff how to build the boats in line with the layout plans. Mr Noble had asked about the lifespan of the moulds and had been told that it should be possible to build 150 to 200 hulls from them. The lifespan broadly tied in with the 15-year term of the agreement and with the rate of orders, as Mr Noble had taken orders for 8 boats in a 12-month period.

[84] There was discussion of payment of royalties, and it was agreed that Mr Maver would pay 50% when Mr Coe provided the Seafish number and 50% on completion. There was also discussion as to the extent of the outstanding royalties owed. Mr Noble confirmed that he had recorded the total to be £14,500 in his notes but that there was no agreement over the exact figure. Ultimately, Mr Coe had offered to waive most of the debt provided Mr Maver paid him £2,500. Mr Noble described this as a big leap of faith and recalled Mr Coe's wife, who had also been present at the meeting, looking disgusted when Mr Coe suggested it. Mr Noble didn't think that Mr Maver had ultimately paid even this reduced figure. In cross examination, Mr Noble was referred to a payment of £487.44 made to Seafish on 2 May 2017 from a bank account held by Mr Maver (JB, page 7). He speculated that this

might be a payment for an inspection visit, while maintaining that it was Mr Coe and not Mr Maver who made the payments to Seafish for order numbers.

[85] Mr Noble was referred to booking confirmation documents for a flight from Southampton to Edinburgh on 27 January 2018, returning on 29 January 2018. He agreed that these dates tied in with the date of the meeting given in his handwritten notes, 28 January 2018. He did not know who had paid for the flights – he said that he had not done so, and he did not recall having sought payment from Mr Maver. He assumed Mr Coe would have paid for his own flight.

[86] Mr Noble was referred to an email which he had sent to Mr Coe, dated 18 January 2018, in which he set out projections for the business for the forthcoming year. In the email he also referred to royalty payments of £3,500 and £1,500, in light of which he accepted that these figures must have been agreed before the meeting of 28 January 2018. Mr Noble said that he was not aware of Mr Maver ever having made any payments to Mr Coe subsequently. Nor was he aware of the existence of any agreement for Mr Maver to purchase boat moulds from Mr Coe, or of Mr Maver travelling to Poole in March 2017 to make a cash payment towards such a purchase.

[87] Mr Noble said that he had left Mr Maver's employment after a few months because Mr Maver would not listen to what he said, with disastrous consequences for the business. He had moved to Spain about a year later, in August 2019.

Analysis and Decision

The pursuer's objections

[88] My first task is to dispose of the two objections which I summarised at the beginning of this opinion. These concern: (i) the recording and transcript of the pursuer's telephone

conversation with Mr C on 24 December 2020; and (ii) various attachments to "without prejudice" emails sent by the pursuer's former agent to the defenders' agent. They are dealt with separately, below.

Objection to recording and transcript of telephone conversation between the pursuer and Mr C, solicitor

Introduction

[89] There are three parts to this objection: (a) an alleged breach of the investigatory powers regime; (b) alleged breaches of the data protection regime; and (c) if the pursuer establishes a breach of either or both regimes, the question of whether the court should nonetheless admit the recording and the transcript. I shall address them individually. But before I do so it is necessary to resolve a factual question which is material to the first two parts of the objection: did the pursuer hear a pre-recorded warning that calls would be recorded at the start of the call?

Did the pursuer hear a pre-recorded warning?

[90] Having considered the evidence, my conclusions are as follows: first, at the time of the call in December 2020, persons making telephone calls *to* B Solicitors would hear a warning that calls would be recorded before the start of any conversation. Second, on the balance of probabilities, I cannot be satisfied that recipients of calls *from* B Solicitors heard a similar warning. Third, the sequence of calls between the pursuer and Mr C was as follows: initially, the pursuer called Mr C, who was unavailable; later, Mr C returned the pursuer's call. The recording and transcript which are objected to are of the second call. Fourth, the pursuer must have heard the pre-recorded warning when he first tried to call Mr C. Fifth, I

am unable to find that the pursuer heard such a warning at the start of the call that was recorded, as he was not the caller.

[91] The first of these findings is based primarily on the evidence of Mr C. As discussed below, he struck me as being both a credible and reliable witness. He gave evidence that the firm's partners had told him that an automated message warning that calls would be recorded was played at the start of calls, though he candidly accepted that he had not heard the message personally. While this is hearsay evidence, it is unclear what reason any of the firm's partners would have had to give Mr C a false or inaccurate answer about a standard operating procedure. Mr C also spoke to the firm's non-client privacy notice which provides that "Telephone calls to or from our offices are recorded and may be saved to our client's file" (JB, p 51). While the privacy notice that has been lodged took effect in 2023, Mr C confirmed that the version in force in 2020 would have been in similar terms. Ms Watton's evidence of having called B Solicitors and heard a pre-recorded warning points towards the same conclusion, although I place less weight on her evidence as she made the call in 2025, nearly 5 years after the pursuer's call to Mr C. Taking this evidence in *cumulo*, I find that callers *to* B Solicitors would have heard a warning that calls would be recorded.

[92] But I do not feel able to find, on the balance of probabilities, that recipients of calls from B Solicitors would hear such a warning. As I have it noted, Mr C was not asked about this (nor, indeed, was Ms Watton). The terms of the privacy notice suggest that a pre-recorded warning might have been played to recipients of calls, but in the absence of any corroborating witness or documentary evidence, I am not prepared to go so far as to make a positive finding to this effect.

[93] It is apparent from the recording and transcript that Mr C was the caller, and that he was returning an earlier call from the pursuer. At the start of the call, Mr C tells the pursuer

"Mr Maver, my name is Mr C. I'm calling from B Solicitors." He also says "Hello, I'm sorry I missed your call earlier this morning", to which the pursuer replies "That's OK." In his parole evidence, Mr C accepted that the obvious interpretation of the exchange was that he was the caller, though he had initially thought that the pursuer had called him.

[94] If this was the sequence of events, the pursuer must have heard the pre-recorded warning when he made the initial call. In reaching this conclusion I have little difficulty in rejecting the pursuer's denial of this. He struck me as an incredible and unreliable witness for a number of reasons, as explained later in this opinion. His evidence on this subject was consistent with that general assessment, as in cross examination he made ludicrous suggestions that he had never heard a warning that calls would be recorded when telephoning any organisation; and that if he had done he would have terminated the call immediately. This evidence strained credulity given that such messages have for many years been commonly used by innumerable businesses and organisations. It seemed to me to be an example of the pursuer's tendency to stonewall when inconvenient facts were presented to him.

[95] But importantly, I cannot find, on the balance probabilities, that the pursuer would have heard a warning at the start of the call to which the recording and transcript relate, as he was the recipient of that call rather than the caller. Accordingly, the discussion of the investigatory powers and data regimes that follows proceeds on the assumption that he would not have done.

<u>The investigatory powers regime</u>

[96] I turn now to the first part of the pursuer's objection, based on an alleged breach of the investigatory powers regime. The investigatory powers regime regulates the

interception of communications such as telephone calls. The pursuer contends that the recording is an interception and that it was recorded and processed unlawfully, in terms of the regime.

Is the recording an interception?

[97] The first part of the pursuer's contention is uncontroversial: the recording is an "interception" as defined in section 4 of the 2016 Act. Insofar as material, section 4 is in the following terms:

> **"Definition of 'interception' etc.**
>
> Interception in relation to telecommunication systems
>
> (1) For the purposes of this Act, a person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if—
> (a) the person does a relevant act in relation to the system, and
> (b) the effect of the relevant act is to make any content of the communication available, at a relevant time, to a person who is not the sender or intended recipient of the communication.
>
> For the meaning of 'content' in relation to a communication, see section 261(6).
>
> (2) In this section 'relevant act', in relation to a telecommunication system, means—
> (a) modifying, or interfering with, the system or its operation;
> (b) monitoring transmissions made by means of the system;
> (c) monitoring transmissions made by wireless telegraphy to or from apparatus that is part of the system.
>
> (3) For the purposes of this section references to modifying a telecommunication system include references to attaching any apparatus to, or otherwise modifying or interfering with—
> (a) any part of the system, or
> (b) any wireless telegraphy apparatus used for making transmissions to or from apparatus that is part of the system.
>
> (4) In this section 'relevant time', in relation to a communication transmitted by means of a telecommunication system, means—
> (a) any time while the communication is being transmitted, and
> (b) any time when the communication is stored in or by the system (whether before or after its transmission).

> (5) For the purposes of this section, the cases in which any content of a communication is to be taken to be made available to a person at a relevant time include any case in which any of the communication is diverted or recorded at a relevant time so as to make any content of the communication available to a person after that time."

The recording of the pursuer's call with Mr C falls within this definition. By recording the call, B Solicitors were using their telecommunication system to monitor a transmission, in terms of section 4(2)(b). In turn, this constituted "a relevant act" for the purpose of section 4(1)(a). Subsequently, B Solicitors made the recording available to the defender's agents, who were not the intended recipients of the call, in terms of section 4(1)(b). Accordingly, the call is an interception for the purposes of the 2016 Act.

Was the call recorded and processed with lawful authority?

[98] The next question that arises is whether the call was recorded and processed with lawful authority. Section 6 of the 2016 Act sets out the circumstances in which a person has lawful authority to carry out an interception. In particular, section 6(1)(a) provides that an interception may be authorised by any of sections 44 to 52 of the 2016 Act. In this case, the argument centres on section 44, under which authority may be given in the form of the customer's consent; and on section 46, under which authority may be given in terms of the 2018 Regulations. In particular, reg 3 of the 2018 Regulations makes provision for the lawful interception of communications, subject to various restrictions which are imposed by reg 4. These include a requirement that:

> "the system controller should make all reasonable efforts to inform every person who may use the telecommunication system that communications transmitted by means of that system may be intercepted" (reg 4(1)(c)).

Counsel for the pursuer submits that the pursuer did not consent to the recording of the call, meaning that section 44 was not complied with. He also submits that there was a failure to comply with reg 4(1)(c) (and, by extension, a breach of section 46) as the pursuer was not informed that the call would be recorded. It follows that the call was recorded and processed without lawful authority.

[99] Conversely, counsel for the defenders submits that the pursuer heard a pre-recorded warning that calls would be recorded at the start of the call. It follows that he consented to this by continuing with the call. And as the message gave him notice of the recording, the requirements of reg 4(1)(c) were fulfilled. Consequently, the call was recorded and processed with lawful authority.

[100] I am not persuaded that the interception was authorised under either section 44 or section 46 of the 2016 Act. I have already explained that I am unable to find, on the balance of probabilities, that a warning that calls would be recorded would have been heard at the start of outgoing calls from B Solicitors and that the pursuer heard such a message immediately before his conversation with Mr C. There is no evidence that any other steps were taken to forewarn the pursuer that the conversation would be recorded. In the absence of such evidence, it is not possible to find either that he consented to the recording in terms of section 44, or that all reasonable efforts were made to alert him to this, for the purposes of reg 4(1)(c). By corollary, I cannot be satisfied that the call was recorded and processed with lawful authority, in terms of section 6.

No breach of section 3 of the 2016 Act

[101] Before leaving the investigatory powers regime, it is necessary to address briefly a submission advanced by counsel for the defenders to the effect that this is not a situation in

which an offence of unlawful interception was committed, as defined in section 3 of the 2016 Act, as the recording was made on a private telecommunications system by a person with the right to control the operation of the system, in terms of section 3(2)(a). I am prepared to accept this, but it is beside the point: the pursuer's argument is not that an offence of unlawful interception was committed, as defined in section 3, but that the interception was carried out without lawful authority, in terms of section 6. These are two discrete provisions, containing differing requirements; and, therefore, perhaps counterintuitively, a person who carries out an interception without lawful authority will not necessarily commit the criminal offence of unlawful interception.

The data protection regime

[102] I turn next to the second part of the objection, which is concerned with the data protection regime. The pursuer contends that the recording of the call and its disclosure to the defender's agents involved the unlawful collection and processing of the pursuer's personal data. He alleges that the disclosure was unlawful first, because it did not fall into any of the categories of lawful processing set out in Art 6 of UK GDPR; and second, because B Solicitors failed to comply with Art 13 of UK GDPR both at the time of making the recording and at the stage of disclosing it to the defenders' agents. I shall deal with these issues in turn, but before doing so it is necessary to address a preliminary question raised by the defenders: which personal data is said to have been collected and subsequently processed?

The personal data involved

[103] It is submitted for the defenders that the only personal data contained in the recording appears to be his name. Conversely, counsel for the pursuer relies on the wide definition of personal data, given by Article 4(1), as "any information relating to an identified or identifiable natural person." He refers to an example given by the UK ICO of a courier firm processing personal data about its drivers' mileage, journeys and driving frequency for the purpose of expense claims for mileage and billing customers. As the mileage, journeys and driving frequency are all pieces of information that relate to an identifiable individual they are "personal data". Counsel submits that on this wide definition, much of the content of the recording constitutes personal data which relates to the pursuer.

[104] In my opinion, the pursuer's explanation of the wide ambit of the term "personal data" is correct. Applying that approach to the recording, the pursuer's name is not the only personal data contained in the recording - much of his discussion with Mr C involved information that related to him as an individual. To take a pertinent example, the pursuer's account of having sold the mould to a purchaser in Ireland falls within the definition of personal data as it is an account of an alleged transaction to which the pursuer claimed to have been a party. Similarly, the pursuer's description of Mark Noble as his manager and his account of a meeting in a hotel are personal data as they relate to his conduct of his business. Accordingly, the passages of the recording that are salient for present purposes contain the pursuer's personal data.

Lawfulness of processing

[105] I turn next to the question of whether the disclosure of the recording to B Solicitors was unlawful, in terms of the data protection regime.

Submissions

[106] The pursuer contends that the disclosure of the recording constituted unlawful processing of data, as it did not fall into any of the categories of lawful processing provided by Article 6 of UK GDPR. Conversely, the defenders submit that the supply of the recording was lawful on the alternative bases provided by Article 6(1)(c) and Article 6(1)(e), which are as follows:

> "Processing is necessary for compliance with a legal obligation to which the controller is subject;" Article6(1)(c)
>
> "Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child." Article 6(1)(e)

Counsel for the defenders submits that Mr C's disclosure of the recording to the defenders' agents was for use in the present proceedings. He was a witness at a diet of proof which had been allowed. The allowance of proof contains a warrant to cite a witness: Ordinary Cause rule ("OCR") 29.7(3). Form G13 expressly envisages a witness being directed to bring specified documents. Counsel acknowledges that Mr C could not have been compelled to appear by citation, as he is based in England, but submits that this should not affect the position in principle. The investigations carried out by solicitors and the material which they recover are generally covered by Article 6(1)(c) and Article 6(1)(e).

[107] Counsel further submits that even where a restriction of processing in terms of Article 18 has been obtained, Article 18(2) contains an express exception, permitting processing for the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person. Moreover, Article 18 is one of the provisions listed within Schedule 2, paragraph 1 of the 2018 Act, to which the exemptions set out in Schedule 2, paragraph 5(3) apply.

[108] Counsel for the pursuer responds that Mr C and B Solicitors were under no legal obligation to make the disclosure, in terms of Article 6(1)(c). Mr C was not cited as a witness and could not have been compelled. In any case, the disclosure was made prior to his inclusion on the defenders' witness list. It is also submitted for the pursuer that Mr C and B Solicitors did not have a legitimate interest basis for making the disclosure, in terms of Article 6(1)(e). Recital 47 suggests that there could be a legitimate interest in processing a client's data in the context of a "relevant and appropriate relationship" between the data subject and controller; but there is no suggestion that this would be appropriate for a non-client, particularly where they are not aware the call is being intercepted. Counsel refers to Recital 47, which provides that there must be a "careful assessment" of what the data subject can reasonably expect and that the

> "interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing".

Counsel for the pursuer submits that to the extent that it is suggested that B Solicitors had a legitimate interest, the pursuer's fundamental rights and freedoms outweighed the onward processing of his data by disclosing it to unconnected third parties in an unrelated claim.

Analysis

[109] In my opinion, neither the legal obligation ground under Article 6(1)(c), nor the legitimate interests ground under Article 6(1)(e) provided a lawful basis for the disclosure of the recording to the defenders' agents.

[110] The short answer to the Article 6(1)(c) ground is that Mr C and B Solicitors were under no legal obligation to make the disclosure. The defenders' suggestion that Mr C was subject to such an obligation because a cited witness is required to produce documents or other evidence (eg a recording, as in this case), is founded on the thin premise that the form of citation in the sheriff court contains a reference to bringing documents to court. But the explanation for this is that the form in question, Form G13, plays two distinct roles in ordinary cause procedure: it is used to cite witnesses following allowance of proof, in terms of OCR 29.7; and it is also used to cite havers in commission and diligence procedure, in terms of OCR 28.4. The reference to bringing documents to court applies to havers rather than to witnesses. In any case, it is accepted that Mr C was not cited and could not have been compelled to give evidence. It follows that even on the false hypothesis that a cited witness is subject to an obligation to produce material, neither Mr C nor B Solicitors would have fallen subject to it.

[111] Similarly, I reject the legitimate interests ground which is advanced under Article 6(1)(e). Article 6(1)(e) requires a data controller to apply a tripartite test before processing data: first, the controller must identify a legitimate interest which is being pursued either by the controller or by a third party. Second, the processing of data must be necessary for the purpose of the legitimate interest that has been identified. Third, the controller must be satisfied that the need to process the data is not overridden by the

fundamental rights and freedoms of the data subject which require protection of personal data.

[112] An immediate difficulty with the defenders' position is that no evidence was led to confirm that Mr C or B Solicitors attempted to apply this test before making the disclosure. But in any case, I am not persuaded that if they had done so, they could reasonably have concluded that the test was satisfied.

[113] Insofar as the first part of the test is concerned, there is an argument to be made that the defenders' defence of the action constituted a legitimate interest, but the question is finely balanced. The terms of the article allow for the legitimate interest to be held by a third party, such as the defenders; but Recital 47 to UK GDPR suggests that a legitimate interest is more likely to exist where the data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The recital gives the example of a situation in which there is a relevant and appropriate relationship between the data subject and the controller, such as where the data subject is a client or in the service of the controller. The position in the present case is far removed from this: the call took place in the context of different proceedings, ie Twinseas' action against the pursuer for recovery of the boat mould, in which B Solicitors were instructed by Twinseas rather than the present defenders. And I have been unable to find in fact that the pursuer heard a warning that the call was being recorded. In these circumstances, it is difficult to see how the pursuer could reasonably have expected that the recording would be disclosed to the agents of an opposing party in separate legal proceedings. Accordingly, it is very much open to question whether B Solicitors would have been entitled to conclude that the first part of the test was satisfied.

[114] Turning to the second part of the test, there is a case to be made that the disclosure was necessary. As discussed in more detail below, aspects of the call have a material bearing both on the factual questions which lie at the heart of the present action and on the pursuer's credibility. Its evidential value is substantial. It follows that B Solicitors would have been entitled to decide that the second part of the test was satisfied.

[115] But I do not think that it would have been open to B Solicitors determine that the requirement to disclose the recording was not overridden by the fundamental rights and freedoms of the data subject. Recital 47 specifies that a data subject's fundamental rights and freedoms may override the interests of the data controller in circumstances in which the data subject does not reasonably expect further processing; and I proceed on the basis that this is a consideration which must be given a particular prominence when a data controller is addressing the third part of the test. I do not think that the pursuer could reasonably have had any such expectation, for the reasons given under the first limb of the test. And as I shall come on to shortly, there is no indication that B Solicitors complied with Article 13, in terms of which they should have provided the pursuer with certain information both at the time of recording the call and when they later provided it to the defenders' agents. Consequently, the pursuer was left unaware of the collection of his data, of its subsequent processing and of his rights in relation to these processes. In my opinion, had B Solicitors properly considered whether the disclosure should be made in these circumstances, and with these consequences arising, they would have concluded that the pursuer's fundamental rights and freedoms overrode the necessity of disclosing the recording. It follows that Article 6(1)(e) could not have provided a lawful basis for the disclosure.

[116] Before leaving this issue, I must briefly address counsel for the defenders' submissions regarding the import of Article 18 and the exemptions set out in Schedule 2,

paragraph 5(3). Counsel correctly identifies that (i) Article 18 entitles a data subject to obtain a restriction on the processing of data; (ii) the right of restriction is qualified by Article 18(2), which provides that restricted data may be processed for inter alia the establishment, exercise or defence of legal claims or for the protection of the rights of another natural or legal person; and (iii) Article 18 is subject to the exemptions set out in Schedule 2, paragraph 5(3), which include situations in which the processing of data is necessary for the purpose of, or in connection with, legal proceedings; or for the purposes of establishing, exercising or defending legal rights. Counsel for the defenders relies on these exemptions, submitting that the provision of information and documents by a witness, such as Mr C, to potential or actual legal proceedings is a paradigm example of disclosure which is necessary for the purpose of, or in connection with, legal proceedings. He further submits that since the material has been intimated and lodged as productions in connection with these proceedings, the disclosure was, in terms of sub-paragraph (c), "otherwise necessary for the purposes of establishing, exercising or defending legal rights".

[117] But it seems to me that the references to Article 18, and to the statutory exemptions that apply to it, are something of a red herring: this is not a situation in which a restriction on processing is sought – the relevant data has already been processed, as the recording has been disclosed. The issue in this case is whether that disclosure was lawful and accordingly, the court must direct its attention to Art 6 rather than to Article 18. The requirement that processing must be lawful, as defined by Article 6, is not itself subject to the exemptions provided in Schedule 2, paragraph 5(3).

[118] For the foregoing reasons, I reject the contention that the disclosure was lawful either in terms of either Article 6(1)(c) or Article 6(1)(e).

Provision of information on collection of data

[119] I turn next to the question of whether the recording and its subsequent disclosure gave rise to breaches Article 13, as the pursuer contends. Article 13(2) requires a data controller to provide a data subject with information at the time of collecting his personal data. Insofar as material for present purposes, this information includes the following:

> "(b) the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability;
>
> (c) where the processing is based on point (a) of Article 6(1) or point (a) of Article 9(2), the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
>
> (d) the right to lodge a complaint with **[**F2the Commissioner**]**;
>
> (e) whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data;
>
> (f) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject."

Article 13(3) places an additional duty on a data controller where the further processing of data is in contemplation:

> "3. Where the controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the controller shall provide the data subject prior to that further processing with information on that other purpose and with any relevant further information as referred to in paragraph 2."

[120] The pursuer's submission is that no such information was provided to him either at the time of the call (which was the time of collection of the data) or when the recording was passed to the defenders' agents (which constituted the subsequent processing of the data). This submission appears to be well-founded. Whether or not the pre-recorded warning

contained information of this kind, I have not been persuaded, on the balance of probabilities, that it was played at the start of the call. Moreover, counsel for the pursuer correctly highlights that B Solicitors' 2023 privacy notice does not contain the information required, in terms of Article 13(2). And no evidence was led to the effect that B Solicitors contacted the pursuer to provide him with information in accordance with Article 13(3) at the time of providing the recording to the defenders' agents. It follows that Articles 13(2) and (3) were not complied with at the material times.

[121] For completeness, I note that the exemptions for which Paragraph 5(3) of Schedule 2 of the 2018 Act provides apply to Article 13. But no submission was advanced to the effect that B Solicitors were not excused from complying with Article 13 at the time of making or disclosing the recording.

[122] Accordingly, the circumstances of the making of the recording and its subsequent disclosure by B Solicitors to the defenders' agents gave rise to breaches of Article 13.

Should the recording be admitted?

[123] I turn now to the final question that is raised by the objection: should the court exercise its discretion to admit the recording and the transcript? While both must be treated as unlawfully obtained evidence in view of the breaches of the investigatory powers regime and the data protection regime that are identified above, this is not necessarily a bar to their admission. The court is entitled to admit irregularly obtained evidence if it is fair to do so in the circumstances. In *Baronetcy of Pringle of Stichill* 2016 SC (PC) 1 the Privy Council set out the test to be applied at para [77]:

> "In Scots law historically, the prevailing view was that in civil cases evidence that was relevant to the issue before the court was admissible even if it had been irregularly obtained: *Rattray v Rattray (1897) 25 R 315*. But that can hardly have been

> an unqualified rule so as, for example, to permit the admission of evidence obtained by torture. More recently, judges have asserted a discretion to admit or exclude evidence having regard to whether it is fair in the circumstances to admit it: *Duke of Argyll v Duchess of Argyll 1963 SLT (Notes) 42* ; *Martin v McGuinness 2003 SLT 1424*. In Duke of Argyll v Duchess of Argyll Lord Wheatley assessed the fairness of admitting evidence from the Duchess's diaries which the Duke had stolen from her by breaking into her house. In assessing fairness in all the circumstances Lord Wheatley looked at the nature of the evidence, the purpose for which it would be used in evidence, and the manner in which it had been obtained. He took into account whether the introduction of the evidence was fair to the party from whom it had been illegally obtained and also whether the admission of the evidence would throw light on disputed facts and enable justice to be done."

[124] In addressing this test, counsel for the pursuer submits that (a) the recording was unlawfully intercepted and processed, in breach of the pursuer's reasonable expectation of privacy; and (b) its probative value is minimal: the purpose of the evidence is unclear beyond demonstrating that the pursuer was not candid with Mr C about the whereabouts of the mould, and it sheds no light on then disputed facts. Accordingly, he submits that it would be unfair to admit the recording.

[125] Conversely, counsel for the defenders submits that the recording throws light on the principal issue in dispute in the preliminary proof, as it contains statements made by the pursuer about the whereabouts and status of the mould which is the subject of the action. Counsel relies on examples of the courts having admitted highly sensitive material which had been irregularly obtained, in particular *Baronetcy of Pringle of Stichill*, supra, in which a DNA sample was obtained against the background of alleged non-compliance with data protection principles; and *Cowie* v *Vitality Corporate Services Ltd* [2024] CSOH 65, in which medical records were admitted despite having been irregularly obtained.

[126] I prefer the submissions of counsel for the defenders on this issue. As I have already observed, I consider the recording to be of substantial evidential value. The pursuer is heard telling Mr C that he has sold the mould to a purchaser in Ireland. While it is not in dispute

that the pursuer made no such sale (in cross examination he brazenly admitted that he had not been telling Mr C the truth), the fact that the pursuer was willing to mislead a solicitor about the status of the mould has a bearing on his credibility as a witness. And the pursuer's dishonesty concerned the mould which is the subject of the present action, rather than a collateral issue.

[127] The pursuer is also heard making various relevant statements about the mould. He says that he bought it, which is consistent with his position in the present action (although he says that Mr Coe retained the drawings, from which he earned money). But the pursuer also refers to Mark Noble as his manager and describes Mr Noble's involvement in reaching agreement about both moulds ("It was him that dealt with it all and he has everything documented, I can assure you"). He refers to a meeting in a hotel ("I was there on the day in the hotel and everything was done"). This conflicts with his evidence at proof, in which he said repeatedly that Mr Noble was not his manager, and he also denied participating in a meeting at Anstruther hotel, beyond having a cup of tea there. The relevance of this is that the defenders' position is that Mr Noble was integral to the negotiation of an agreement under which the pursuer was entitled to use the mould, for which he paid Twinseas a fee for each hull that he generated. It follows that what the pursuer is heard saying in the recording throws light on this central area of dispute.

[128] It is necessary also to take account of the unfairness to the pursuer which would result in admitting the recording as evidence. The purpose of the investigatory powers and the data protection regimes is at least in part to confer rights and protections upon persons such as the pursuer, in light of which the pursuer would have had a reasonable expectation of privacy at the time of the call. The court is being invited to admit the recording in circumstances in which the pursuer has effectively being deprived of those rights and

protections. While this factor must be given substantial weight, I have nonetheless reached the conclusion that it is in the interests of justice to allow the recording to be admitted, standing the relevance and significant value of the evidence which it contains.

[129] Accordingly, I shall repel the objection and allow the recording to be admitted as evidence.

[130] Before leaving this issue, it should be emphasized that while I have concluded that B Solicitors did not comply with various requirements of the investigatory powers regime and the data protection regime, I have done so on the strength of the necessarily limited evidence that was available. It should be noted that B Solicitors are not a party to this action and that no partner or current employee of the firm gave evidence.

Objection to documents attached to "without prejudice" correspondence

[131] It is necessary to deal next with the pursuer's objection to the admissibility of the documents identified earlier in this opinion, on the basis that they are covered by "without prejudice" privilege.

Submissions

[132] For the pursuer, it is submitted that the fundamental rule when considering "without prejudice" correspondence is that nothing written or said "without prejudice" should be looked at except with the consent of both parties: *Bell* v *Lothiansure* 1990 SLT 58. The rule applies to exclude the content of all negotiations genuinely aimed at settlement from being given in evidence, including attachments to emails. The "guiding principle" is that parties should be encouraged so far as possible to resolve disputes without resort to litigation and that they should not be discouraged by the knowledge that anything that is said in the

course of such negotiations may be used to their prejudice in the course of legal proceedings: *Lujo Properties Ltd* v *Gruve Ltd* 2023 SLT (Sh Ct) 31; *Bradford & Bingley plc* v *Rashid* [2006] 1 WLR 2066. It is for the party asserting privilege to show that the communication was made in an attempt to settle a dispute between the parties, after which the onus shifts to the other party to establish the application of any potential exception to the rule. Counsel submits that the emails were sent as pre-action correspondence seeking to reach settlement with the defenders' insurers; and that they are, therefore, privileged. While parts of the emails have been redacted, attempts to dissect out, and withhold protection from, parts of without prejudice negotiations risks creating practical difficulties, and runs contrary to the underlying objective of giving protection to parties so that they may speak freely about all issues in a dispute: *Lujo Properties Ltd*, supra, para [89].

[133] Counsel for the defenders submits that the admission of the email correspondence is academic as it is the attached documents which are relevant rather than the texts of the emails themselves. Ms Watton, solicitor, gave oral evidence of having received the documents attached and of their source being (through his former solicitors) the pursuer. Counsel submits that to the extent it remains relevant, the objection should be repelled as the onus is on the party asserting the privilege to establish that the communication was an attempt to settle the dispute between the parties; and no such evidence has been led by the pursuer. In any case, a clear and unequivocal admission or statement of fact may be used in subsequent proceedings even in the context of without prejudice discussions: *Daks Simpson Group plc* v *Kuiper* 1994 SLT 689 at 692; *Richardson* v *Quercus Ltd* 1999 SC 2; *Roche Diagnostics Ltd* v *Greater Glasgow HB (No 2)* [2024] CSOH 69, 2024 SLT 1069 at [55]-[58] per Lord Richardson. The purported bank statements and receipts are properly to be regarded in the same way as unequivocal written admissions.

Analysis

[134] While it is unnecessary to undertake a comprehensive analysis of the applicable law (for which, see *Lujo Properties Ltd* v *Gruve Ltd* 2023 SLT (Sh Ct) 31), it may be helpful to begin by setting out certain observations which are relevant to this case. The "without prejudice" rule excludes the content of negotiations that are genuinely aimed at settlement. In *Lujo Properties Ltd, supra,* at para [81], Sheriff Stuart Reid explains the basis of the rule in the following way:

> "The 'guiding principle' (*Rashid*, supra, [24], per Lord Hope) is that parties should be encouraged so far as possible to resolve their dispute without resort to litigation and that they should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of legal proceedings. In deciding whether the privilege applies, the question is whether the communication was made (Rashid, supra, para [23]): '… in an attempt to compromise actual or pending litigation and, if so, whether it can be inferred from its terms and its whole context that it contained an offer in settlement for which the party who made the offer can claim privilege.' The rule is said to be 'generous in its application' (Ofulue, supra, [12], per Lord Hope). It recognises that: 49 '…unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement…' The public interest in encouraging parties to speak frankly to one another in aid of reaching a settlement (that is, 'to put their cards on the table': *Scott Paper Co* v *Drayton Paper Works Ltd* [1927] 44 RPC 151, 156) is very great and ought not to be sacrificed save in truly exceptional and needy circumstances (*Savings & Investment Bank Ltd* v *Fincken* [2004] 1 WLR 667, 684; Rashid, supra, [23]). Attempts to convert offers of compromise into admissions of fact prejudicial to the party making them have been deplored (Rashid, supra, para [24])."

[135] There are various exceptions to the privilege. One such exception recognised by the Scottish courts is that a clear admission or statement of fact, which is contained in the same communication, but does not form part of the offer to compromise, may be admissible as evidence: *Rashid, supra* para [25], per Lord Hope. In *Daks Simpson Group plc* v *Kuiper* 1994 SLT 689 at 692, Lord Sutherland summarised the rationale for the exception as follows:

> "'Without prejudice' in my view means, without prejudice to the whole rights and pleas of the party making the statement. If, however, someone makes a clear and unequivocal admission or statement of fact, it is difficult to see what rights or pleas could be attached to such a statement or admission other than perhaps to deny the truth of the admission which was made. I see no objection in principle to a clear admission being used in subsequent proceedings, even though the communication in which it appears is stated to be without prejudice."

On this analysis, the privilege is tightly circumscribed, with statements or concessions made during negotiation and for the purpose of achieving compromise falling within its boundaries, and bald and unqualified admissions or statements lying beyond its scope. The English courts have been more reluctant to recognise the exception because of the inherent difficulty in judging onto which side of the boundary a statement made by a party will fall; and for fear of whittling away the protection which the privilege is intended to confer upon parties to enable free and uninhibited discussion: *Ofulue* v *Bossert* 2009 1 AC 990 at para [39], per Lord Rodger; *Lujo Properties Ltd*, *supra*, para [84]. Similarly, the Scottish courts, while prepared to apply the exception, have recognised that seeking to "dissect out" and withhold protection from parts of without prejudice correspondence, poses practical difficulties and risks jeopardising the objective of encouraging candid discussion between parties. Consequently, while it is for the party seeking protection to show that the privilege applies, it will generally suffice for that party to point to the fact that the correspondence is marked "without prejudice." After that, the onus shifts to the party resisting the privilege. And the court will adopt a generous approach to the application of the privilege to communications said to contain clear admissions or statements of fact: *Lujo Properties Ltd*, *supra*, para [89].

[136] Turning to the present case, the starting point is that Mr W's emails of 10 March 2022 and 16 May 2022 are marked "without prejudice". But the focus of the objection is the attached documents rather than the emails themselves. A striking feature of the submissions of both parties is that they embrace a fallacy, treating the attachments as if they were

statements made by the pursuer (or made on his behalf by his solicitor), forming part of the texts of the emails. In reality, they are pre-existing documents, being purported bank statements and a purported invoice. Subject to the provenance of these documents being established, they are properly categorised as real evidence as opposed to being evidence emanating from the pursuer. It follows that the rationale for affording protection to statements made in the course of "without prejudice" negotiations does not apply to the attachments. Counsel for the defenders equates them with admissions or statements of fact made by a litigant; but if anything, the attached documents are more clear-cut examples of material falling outside of the ambit of the privilege, as they were neither spoken nor written by the pursuer or by his representatives. Similarly, as the attachments are freestanding documents, there is no requirement for the court to perform the tortuous surgery of excising unprotected passages of text from correspondence which is otherwise privileged.

[137] The provenance of the documents is established by virtue of Ms Watton's evidence of having received them as attachments to emails from the pursuer's former agent. Her evidence on this point does not infringe upon the "without prejudice" privilege, as it is concerned with the arrival of the attachments rather than the content of Mr W's emails.

[138] Accordingly, I repel the pursuer's objection.

Assessment of the witnesses

[139] My next task is to assess the credibility and reliability of the witnesses. Counsel for both parties provided detailed submissions on this issue, which I have taken account of, but which I do not propose to rehearse. My conclusions about each of the witnesses as set out below.

Dylan Stewart and Arthur Smith

[140] Dylan Stewart and Arthur Smith spoke to an alleged journey down to Poole to make a £35,000 cash payment to Chris Coe towards the purchase of the boat mould, which, according to the pursuer, took place on around 20 March 2017. Neither witness gave credible or reliable evidence about these alleged events. Aspects of their accounts were consistent eg the overnight drive down to England in the pursuer's Land Rover, the arrival of Mr Coe in a ford transit van, the sum of £35,000 stored in three envelopes, the counting out of £100 notes on the barrel and the exchange of words between the pursuer and Mr Coe once the money had been paid.

[141] But there were also difficulties with their evidence. One noteworthy discrepancy was that while Mr Stewart described counting the money on the journey, Mr Smith had no recollection of this. Given the substantial sums of money involved and the novel nature of the situation it is peculiar that Mr Smith should not have remembered the money being counted en route.

[142] Perhaps more significantly, the evidence of both witnesses was undermined by the production of their sworn statements, which were in identical terms, and which referred to them as having witnessed the sum of £15,000 being paid, as opposed to £35,000. The inconsistency in the figures was troubling in itself; but the same was true of the reactions of the witnesses to having their statements put to them. Mr Stewart vacillated between claiming that he was unsure that he recalled signing his statement and suggesting that he must have drafted it, notwithstanding that his name was misspelled within its text, that it was in identical terms to the two other sworn statements, and that Mr Maver's email address and telephone number appeared to be at the foot of the statement. Mr Smith initially said that he did not recall having signed the statement, before conceding that his signature was at

its foot. Both witnesses were resolute in maintaining that the figure in their statements was incorrect, whereas it was the sum of £35,000 which they had seen paid. My impression was that they had been given a script to which they were going to follow blindly, even in the face of their prior inconsistent statements.

The pursuer

[143] The pursuer was an unimpressive witness, who I found to be neither credible nor reliable. The hallmarks of his evidence were that he tended to deflect difficult questions and to stonewall when he was presented with documents which contradicted his account, instead of giving honest and straightforward answers. Among the numerous examples of this were the following: (A) as mentioned earlier, he was unabashed in admitting to having misled Mr C during their call about the whereabouts of the mould, giving the implausible explanation that he believed Mr C to be a scammer; (B) he maintained his position that he had not participated in a meeting with Mr Coe at the Royal hotel in Anstruther (other than having a cup of tea) and that he had never employed Mark Noble, despite being presented with statements which he had made to the contrary in the recording of the call; (C) when he was asked about Mark Noble's email to Richard Blackhurst of Seafish, dated 14 December 2017 (JB, p 117), in which Mr Noble appeared to be corresponding in the course of his employment with the pursuer, the pursuer denied having been copied into the email, despite the name "Marty Maver" appearing beside in the "CC" line of the email; (D) when the 15-years agreement was put to the pursuer, he started by suggesting that his signature had been copied onto the document, but he later denied that the signature was his at all. He had no real explanation for the fact that the agreement had been lodged by his own former agent; (E) when he was shown one of his bank statements which appeared to have been

tampered with to show payments of £20,000 rather than £10,000 being made to Chris Coe on 23 March 2017 (JB, p 95), he was unable to offer an explanation, denying all knowledge of the doctored version; (F) when the witness statements of Messrs Stewart and Smith were put to the pursuer, he suggested that they had been drafted, sworn and passed to the lawyers without his knowledge, by a former employee, Mr Aitken; (G) when the pursuer was shown multiple versions of the receipt on which he relied as proof of purchase of the mould, which had been provided to the defenders by his former agent, he could offer no satisfactory explanation, though he claimed that he would have been unable to alter the receipt as he lacked the necessary IT skills; and (H) when he was taken to the initial writ and citation in Twinseas' action against him for delivery of the mould or payment, he asserted that these were not official documents as they did not contain his middle name.

[144] This pattern of the pursuer's refusal to engage with evidence that did not fit with his version of events was the defining characteristic of his testimony. I could not avoid the conclusion that he would say whatever seemed expedient, however implausible, rather than make reasonable concessions when faced with evidence which was unhelpful to his cause. The result is that I have generally preferred the evidence of other, more credible witnesses, where their accounts differed from that of the pursuer.

Mr C and Ms Watton

[145] I had no difficulty in finding both Mr C and Ms Watton to be credible and reliable witnesses, who were doing their best to assist the court. For the reasons given above, I have been unable to find that the pursuer heard a warning that his call would be recorded at the start of Mr C, despite the evidence given by both Mr C and Ms Watton in relation to this.

For avoidance of doubt, this is not to imply any criticism of either witness – it is simply a reflection of the limitations of the evidence which was available on this issue.

Chris Coe

[146] While aspects of Mr Coe's evidence were problematic, I found him to be a credible and reliable witness overall; and I had little difficulty in preferring his evidence to that of the pursuer.

[147] Mr Coe gave a detailed and convincing account of his business relationship with the pursuer, ranging from their initial dealings to the signing of the 2-years written agreement and the transportation of the moulds to the pursuer's premises in April 2017; to the meeting in January 2018, the waiving of most of the outstanding fees and the signing of the 15-years agreement; and finally, to the eventual breakdown in their working relationship. His version of events was corroborated by various contemporaneous documents, including the 2-years agreement; the 15-years agreement, Mark Noble's email to him, dated 18 January 2018, which was sent shortly prior to the January 2018 meeting in Anstruther; the flight booking documents from Southampton to Edinburgh, which vouched his attendance at the January 2018 meeting; and Mr Noble's handwritten notes of the January 2018 meeting. He also gave a plausible explanation for the various bank transfers made to him in March and April 2017 as corresponding with orders taken for boats, which he was building for the pursuer prior to the transfer of the mould.

[148] His evidence regarding the alleged sale of the mould, the suggestion that the pursuer paid him £35,000 in cash and the purported receipt for the sale was entirely convincing. While making clear that he would not have accepted a cash payment which was intended not to go through the books, he made the obvious but compelling point that if he had done

so, it would have been illogical for him then to have issued a receipt for a total sum that included the cash sum. He gave a credible explanation for his assertion that the purported invoice was a forgery. Moreover, he seemed outraged that the pursuer was making what he considered to be a false claim of ownership, while exuding a palpable sense of dejection at the failure of a commercial relationship in which he had invested time and effort, and for which he had harboured high hopes.

[149] Counsel for the pursuer made numerous criticisms of Mr Coe's evidence. It is true that aspects of his testimony seemed confused – in particular, (i) Mr Coe initially suggested that Twinseas was so busy that he didn't have time to pursue the mould and outstanding sums, before conceding that he had instructed solicitors to raise proceedings; (ii) he was unable to explain satisfactorily why the action had been raised on behalf of Twinseas, despite his position being that the moulds were owned by Marusya; (iii) Mr Coe accepted that he had provided his solicitors with the 2-years agreement rather than the 15-years agreement, without offering an adequate explanation for this; and (iv) though the raising of the action appeared to coincide with the sale of Twinseas to new owners, Mr Coe said that he had not told them of the litigation as it was not their concern.

[150] The knotted questions of fact and law which arise out of these passages of evidence are discussed in more detail below, but they do not me cause me to draw any adverse inferences regarding Mr Coe's credibility. Rather than implying dishonesty on his part, the confusion in Mr Coe's evidence seemed eloquent of a lay person attempting to navigate circumstances which were not straightforward, involving two written agreements, the second superseding the first; and an intricate set of legal relationships, involving the pursuer, Twinseas, Marusya and the purchasers of Twinseas. As far as Mr Coe's decision to take no further action to recover the moulds is concerned, he seems to have moved on,

devoting his energy to building a new boat mould. It is curious that Mr Coe has chosen not to pursue a valuable asset, but that is his prerogative; and I do not consider his evidence on this point to be implausible.

Mark Noble

[151] Mr Noble struck me as being a credible and reliable witness, who gave a persuasive account of his employment with the pursuer, which involved liaising with Seafish and dealing with Mr Coe. Of particular importance was his evidence of the meeting involving the pursuer and Mr Coe, held on 28 January 2018 (the second of two meetings held in quick succession, according to him), at which he said the 15-years agreement was signed. Mr Noble's evidence of the background to the agreement and of the subsequent deterioration in the relationship between the pursuer and Mr Coe was broadly consistent with Mr Coe's account. It was also corroborated by his email to Mr Coe, dated 18 January 2018, the terms of the 15-years agreement and his handwritten notes of the January 2018 meeting.

[152] Various criticisms of Mr Noble's evidence are advanced on the pursuer's behalf, with which I do not agree. Counsel for the pursuer highlights that Mr Noble's initial evidence of the chronology of events was inaccurate - initially, he said he thought he had started working for the pursuer in 2016, with the meetings between the pursuer and Mr Coe taking place shortly thereafter, in late 2016/ early 2017; but he subsequently accepted these events had taken place 12 months later. It is understandable that Mr Noble's memory was out by a year given the passage of time, and this casts no doubt on the credibility and reliability of his evidence as a whole. Similarly, Mr Noble's frank acceptance that he could not recall whether a meeting with Seafish had taken place in Hull or Edinburgh points to no more

than that he was trying to recall events that occurred several years ago. Counsel also founded on the fact that Mr Noble identified the pursuer's signature on the two written agreements, while being unable to confirm that the second signature belonged to Mr Coe; but that is unsurprising given that he was the employee of the former but not the latter. If anything, Mr Noble's evidence on this point demonstrates his candour.

[153] More substantively, it was submitted on the pursuer's behalf that Mr Noble bore a hostility towards the pursuer, and that his evidence should be treated with caution as he had a close relationship with Mr Coe. I did not consider this submission to be well-founded. Mr Noble was open about what he considered to be the problems with the pursuer's management of his business, which included failing to order appropriate materials, failing to build boats to specification, failing to provide information to Seafish as required and failing to make payment to Twinseas in accordance with his obligations. He gave a similarly frank account of leaving the pursuer's employment because the pursuer would not follow his advice. While his frustration with the pursuer was obvious, it would be going too far to characterize this as hostility or to draw the inference that his evidence was exaggerated or untrue.

[154] As to Mr Noble's relationship with Mr Coe, both men confirmed that they are in contact with each other, but this does not cause me to draw adverse inferences about the credibility of either witness. Mr Noble admitted that Mr Coe had mentioned the present case to him recently "just to say he was a witness about it"; but he did not say that they had discussed the details of the case. Mr Coe did not mention a recent occasion on which the court action had come up in conversation, but I have no note of him having been asked about it specifically. More generally, he was open about the fact that he and Mr Coe were in touch. I was unconvinced by the suggestion that these witnesses had colluded with each

other; and it was not obvious what motive they would have had for doing so: while both had relationships with the pursuer which ultimately soured, neither of them is a party to the present action.

Factual Findings

Ownership of the mould and basis of the pursuer's possession of it

[155] I turn now to the question of whether the pursuer was owner of the mould when it was damaged. The starting point is that the pursuer has the benefit of a presumption of ownership, as he was in possession of the mould when it was allegedly damaged. The presumption is rebuttable, and its relative strength will depend on the circumstances of the case: *Prangnell-O'Neill* v *Lady Skiffington* 1984 SLT 282, per Lord Hunter, p 284. In the circumstances of this case, I am satisfied that the defenders have succeeded in rebutting the pursuer's presumed ownership of the mould. This is because the pursuer's account of how he came to own the mould was implausible, whereas the defenders offered a credible alternative explanation of how it came into the pursuer's possession, which I prefer.

[156] The pursuer's position relies in part on the accounts which he and his witnesses gave of travelling to Poole to make a cash payment of £35,000 to Mr Coe. I have no difficulty in rejecting their evidence on this point. As explained above, Dylan Stewart and Arthur Smith gave incredible and unreliable accounts of the episode, which were fatally undermined by the production of their prior sworn statements. More generally, the whole episode had an air of implausibility. The description of reams of £100 notes being removed from envelopes and counted out onto a resin drum in the morning light had a far-fetched, even cinematic quality to it. And Mr Coe's supposed declaration after counting the money that the pursuer was now the owner of the boat mould, seemed similarly contrived.

[157] The pursuer also relies on bank statements showing a series of transfers made by him to Mr Coe on 23 March 2017, totalling £10,000 and on 10 April 2017, totalling £30,000. This coincided with the transportation of the moulds to his premises in Anstruther on 8 April 2017, as vouched by transportation documentation lodged at JB, pp 10 - 11. And the pursuer founds on a purported receipt for the purchase sum of £85,000, dated 5 April 2017. But I am not persuaded that these documents support the pursuer's position. It is not in dispute that the various bank transfers were made, but I prefer Mr Coe's explanation that they were payments for orders of boats which he had been building for the pursuer in advance of the moulds being moved up to Scotland. He gave a detailed description of the orders in question, as set out above.

[158] As to the purported receipt, its provenance is controversial. Several versions of the receipt were referred to in evidence, including a completed and signed version, a completed but unsigned version and a blank version (JB, pp 54 – 59). With the exception of the blank version (JB, p 54), these were provided by the pursuer's former agent to the defenders' agents. Ms Watton, solicitor, spoke to obtaining a documents properties check for the signed and completed version (JB, p 55), which indicated that the document had been modified; but an employee of the pursuer's former agent was identified as the person who had modified it, suggesting that some modification might have been registered at the time that the document was saved, attached or emailed to the defender's agent. While it is not possible to draw any conclusions from the properties check, the fact that the pursuer's former agent was in possession of several versions of the receipt raises questions about the provenance of the completed and signed version.

[159] Other features of the receipt, and of the surrounding circumstances, also put its authenticity in doubt. The receipt's date does not fit in with the various transactions on

which the pursuer relies, as it predates the £30,000 transfer by five days. Mr Coe was adamant that he had not issued it. He pointed to the facts that (i) the receipt was handwritten, whereas his practice was to issue typed receipts; and (ii) it designated him at an old address. He made the reasonable point that it would have made no sense for him to have issued a receipt for the full purchase price of £85,000, given that on the pursuer's evidence the transaction was intended to be structured "half cash half through the books". Having regard to these factors I am not persuaded, on the balance of probabilities, that the receipt is genuine and I place no weight on it.

[160] As the evidence led on the pursuer's behalf is unconvincing, it is necessary to consider the alternative position which the defenders advance. Counsel for the defenders contends that the pursuer took possession of the mould by virtue of the 2-years agreement, which was in place from 2017. Counsel submits that the agreement expired before the mould was damaged, meaning that the pursuer had no contractual right to possess them at the time. Counsel does not invite me to find that the 15-years agreement was a binding contract between the parties, submitting that neither party had considered that it regulated their relationship. The pursuer denied signing it and never made any payments under it.

[161] The defenders' position is premised on the evidence of Chris Coe and Mark Noble, both of whom I considered to be credible and reliable witnesses. As I have already explained, their evidence was supported by substantial contemporaneous documentation. I accept their evidence on all the essential points.

[162] But this poses a problem for the defenders' position: Mr Coe and Mr Noble both spoke to the 15-years agreement having been signed at the time of the January 2018 meeting. On their account, the meeting led to a reset of the pursuer's relationship with Marusya, Twinseas and Mr Coe. Both witnesses gave evidence that the parties reached agreement in

terms of (i) the 15-years agreement, under which the pursuer would possess the mould for the 15-year term, while paying a fee of £3,000 for each hull that he built with it; (ii) an arrangement by which half of the fee would be paid on the supply of a Seafish order number by Mr Coe to the pursuer, with the balance being payable on completion of the build; and (iii) a reduced figure of £2,500 to be paid by the pursuer in respect of the fees that were outstanding at the time of the meeting. Objectively, this constituted a binding contract.

[163] There is no incongruity between this conclusion and the events that followed. The fact that the pursuer may have failed to perform his obligations does not indicate that he did not enter into a binding agreement. Likewise, Mr Coe's refusal to issue Seafish order numbers does not put the existence of the contract in doubt: I would interpret this as an example of one party withholding performance in response to the other party's non-performance of his obligations, in accordance with the mutuality principle.

[164] Accordingly, on the balance of probabilities I find that the mould came into the pursuer's possession, along with the second mould, by virtue of the 2-years agreement in 2017, but that this was superseded by the agreement which the parties made in January 2018.

[165] As this is the basis of the pursuer's possession of the mould, there remains an open question as to who owns it. The terms of the 2-years and the 15-years agreements suggest that the mould is the property of Marusya. The agreements refer to both of the companies of which Mr Coe was a director at the time, Marusya and Twinseas; and he bears to have signed them on behalf of both companies. They stipulate that the pursuer should pay fees to Twinseas in respect of hulls made using the moulds; and that damage should be reported to Twinseas, with the pursuer being liable for the cost of repairs. But the agreements also state in terms that "All mould tools remain the property of Marusya Properties Ltd" and that

"Any change of ownership will require a new agreement". This corresponds with Mr Coe's parole evidence to the effect that Marusya own the mould.

[166] Counsel for the pursuer points to two factors which might be said to militate against the conclusion that Marusya is the owner. The first of these concerns a passage of evidence that I touched on earlier, while assessing Mr Coe as a witness: Mr Coe instructed solicitors to raise an action in the name of Twinseas for the recovery of the mould rather than Marusya; and he provided his agents with the 2-years agreement but not the 15-years agreement. Counsel also points to the fact that the proceedings were raised concurrently with the sale of Twinseas to new owners, who Mr Coe did not make aware of the action. But it is difficult to draw firm conclusions from this puzzling chapter of evidence; and as I observed earlier, the gaps and ambiguities are symptomatic of Mr Coe's confusion regarding elements of his business affairs, rather than anything else. Throughout cross-examination he did at least remain consistent in his position that Marusya owned the mould. And as I have said, his evidence on this issue aligns with the terms of the written agreements.

[167] The second factor on which counsel for the pursuer relies is that no documents have been produced to vouch Marusya's ownership apart from the two agreements, such as asset lists, balance sheets or other corporate records. It is unfortunate that no documentary evidence of this sort is available, although this may be explained at least in part by the fact that neither Marusya nor Mr Coe is a party to the action. But ultimately, I am prepared to find, on the balance of probabilities, that Marusya is the owner of the moulds, given that this is stated expressly in the agreements under which the pursuer took and retained possession of them.

Categorisation of the agreement and subsequent events

[168] Before turning to the question of title and interest to sue, it is necessary to make various findings about the nature of the agreement and regarding the events that followed.

[169] As I shall come on to, in his submissions regarding title and interest to sue, counsel for the defenders raises the question of whether the agreement under which the pursuer holds the mould should be categorized as a loan. During the proof, the witnesses and counsel for both parties referred to the agreement variously as a loan, a lease and a licence agreement, while using the terms "fees" and "royalties" interchangeably when referring to the payments which the pursuer was required to make. Counsel for the defender submits that the agreement is not a loan, as there is no provision for periodical payments to be made. While I did not hear detailed submissions on this point, I am prepared to accept this; and I proceed on the basis that the agreement should be defined as a licence agreement given that the arrangement was that a fee (or royalty) should be paid for each hull built using the mould.

[170] The next factual question which requires to be addressed is whether the agreement reached in January 2018 was extant in August 2020, when the mould was allegedly damaged by the defenders. For the pursuer, it is submitted that there is no evidence of the contract having been terminated before or after the mould was damaged. Counsel for the pursuer highlights that under the 15-years agreement, the pursuer is liable for the costs of repairs. Counsel for the defenders submits that on the pursuer's own evidence, he did not enter into the agreement, let alone perform his obligations under it.

[171] I prefer the pursuer's submissions on this point. I accept the evidence of Mr Coe and Mr Noble that the pursuer did not perform his obligations, with the result that Mr Coe refused to provide him with Seafish order numbers. But there is no evidence that either

party terminated the agreement prior to August 2020 or subsequently. While an action for the recovery of the moulds was raised on behalf of Twinseas in 2021, final decree was never taken. Neither of the parties in the present action submitted that the agreement had been terminated.

[172] Finally, I find that there is no realistic prospect of Marusya taking steps to recover the mould or the cost of its repair from the pursuer. I make this finding on the basis of Mr Coe's evidence that after raising proceedings on Twinseas' behalf in 2021, he took no further steps to recover the mould and that he had no intention of doing so. On his account, he started to build a new mould and gave up any lingering interest in the moulds which were in the pursuer's possession, which he considered to be redundant. He prevented the pursuer from making further use of them by refusing to obtain Seafish order numbers.

Title and interest to sue

Introduction

[173] I turn now to the question of whether the pursuer has title and interest to sue. If I had accepted the pursuer's contention that he owns the mould, this question would have been answered readily in the affirmative. But it is necessary to determine the issue with reference to the factual findings which I have made: that the pursuer possesses the mould under the agreement made in January 2018.

[174] As a result, I must begin by disposing of a submission advanced for the defenders, to the effect that the pursuer does not aver in the pleadings that he has title and interest to sue on this set of facts. This submission must be rejected as it neglects that the pursuer makes the following averments at Cond 6:

> "even if the boat mould was held by the Pursuer under a purported contact of loan as averred by the Defenders (which is denied) the Pursuer still has title and interest to pursue the present claim on account of the contractual and delictual relationship between the parties hereto, along with a hirer's implied duty to restore goods hired to the owner and contractual duty to account for repair costs."

These averments set up a basis for asserting title and interest to sue on the facts which I have found. While the description of the contract as a loan may be infelicitous, the averments cover circumstances in which the pursuer holds the mould by agreement for a set term and is liable for its repair.

[175] Returning to the substantive issue, it is convenient to address the question of whether the pursuer has title and interest to sue in respect of his contractual and delictual cases separately.

The contractual case

Submissions

[176] It is submitted for the pursuer that he has title and interest to pursue the present action by virtue of his contract with the defenders. Counsel relies on *Scottish Enterprise* v *Archibald Russel of Denny Ltd* 2002 SLT 519 as authority for the propositions that a party who sues upon his contract has title to sue; and that if the substance of the claim bears upon the contract, he also has interest. He highlights that the pursuer engaged the defender to transport the boat mould, and that the contract included an implied term that the defenders would exercise the degree of reasonable skill and care to be expected of a reasonably competent haulier. The pursuer alleges that the defenders breached this implied term and sues for the losses that he sustained as a result. Counsel submits that it follows that the pursuer sues upon his contract, that the substance of the claim bears upon the contract, and that accordingly, the pursuer has title and interest to sue.

[177] Counsel for the defenders submits that the pursuer has no title to sue on the hypothesis that he possesses the mould as a result of the agreement made in January 2018. The agreement confers only limited contractual rights on the pursuer. As he does not own or have a possessory interest in the mould, he does not have title to sue: *Nacap Ltd* v *Moffat Plant Ltd* 1987 SLT 221. Counsel highlights that *Nacap,* supra was not cited in *Scottish Enterprise,* supra. Counsel further submits that the agreement is insufficient to confer title and interest on the pursuer, as he failed to perform his obligations under the agreement. Counsel relies on *Crimond Estates Ltd* v *Mile End Developments Ltd* [2021] CSIH 60, at para [20], for the proposition that a party is not entitled to rely on its own breach of contract to obtain a benefit under that contract.

Analysis

[178] In my opinion, the pursuer has title and interest to pursue his claim in contract against the defenders. It is a matter of admission that the parties entered into a contract under which the defenders would transport the mould that is the subject of the action. It is also admitted that the contract contained an implied term that the defenders would exercise the degree of skill and care to be expected of a reasonably competent haulier while transporting the mould. The pursuer avers that the defenders breached this term of the contract.

[179] *Scottish Enterprise* v *Archibald Russel of Denny Ltd* 2002 SLT 519 is authority for the proposition that a party pursuing a contractual claim has title and interest to sue – per Lord Johnston delivering the opinion of the court, para [6]:

> "A plea of no title to sue is a plea in bar in respect of an action brought in court challenging the right of the pursuer/claimant to make the relevant claim. A plea of title to sue can never arise in relation to a contracting party seeking to sue upon his

> or her contract. Equally, provided the substance of the claim bears upon the contract, the contracting party is bound to have interest to pursue the matter."

It follows that the pursuer has title and interest to sue by virtue of the parties' contract. The arguments advanced on the defenders' behalf cannot stand in the face of this unequivocal and binding statement of the law; but I shall address them briefly, in deference to counsel for the defenders' careful submissions.

[180] The defenders' reliance on *Nacap Ltd* v *Moffat Plant Ltd* 1987 SLT 221 and the line of authorities that followed it is misconceived in the context of the pursuer's contractual claim. These authorities are concerned with the law of negligence and the restricted circumstances in which a pursuer will be owed a duty of care by a wrongdoer, where the alleged loss is economic loss resulting from damage to property of which the pursuer is not the owner. They have no bearing on a case such as the present, where the pursuer founds his action on his contractual relationship with the defenders. But it should be added that they are relevant to the pursuer's delictual claim, as I shall come on to.

[181] The defenders also contend that the agreement does not confer title and interest on the pursuer given that his own position is that he did not either enter into the agreement or perform his obligations under it. At first blush this argument is not without its attractions. As the authors of *Macphail's Sheriff Court Practice, 3rd Edition* explain at paragraph 4.39:

> "Besides title to sue, the pursuer must have an interest to pursue the action, which has been defined above as some benefit from asserting the right with which the action is concerned or from preventing its infringement. The grounds of the rule that interest is necessary as well as title are that it is the function of the courts to decide practical questions, and that no person is entitled to subject another to the trouble and expense of a litigation without having some real interest to enforce or protect."

If one accepts the definition and rationale that are given here for interest, it is not immediately obvious what interest the pursuer has in pursuing a case premised on the agreement made in January 2018, as he does not accept that he held the mould under its

terms, or that he performed his obligations under it. Moreover, on these facts the claim which the pursuer avers is limited to his contractual obligation to account for the cost of repairing the mould; but on my findings there is no realistic prospect of Marusya seeking to recover the mould or the cost of its repair from the pursuer. Even if the pursuer were to plead a case based on his continuing use of the mould, he would face the difficulty that Mr Coe stopped providing him with Seafish order numbers after their relationship broke down, well before the mould was damaged. But it is not open to me to hold that the pursuer has no interest to sue in light of the Inner House's decision in *Scottish Enterprise*, quoted above. Perhaps the factors which might otherwise have pointed to that conclusion will prove relevant to the question of whether the pursuer can establish that he has suffered a loss, but that issue is not yet before the court.

[182] On a related point, while the pursuer cites *Crimond Estates Ltd* v *Mile End Developments Ltd* [2021] CSIH 60 as authority for the proposition that a party cannot rely on its own breach of contract to obtain a benefit under that contract, this case did not involve a plea of no title and interest to sue. The Inner House identified the principle as a rule of contractual construction which corresponds with commercial common sense, before proceeding to apply the rule when interpreting the clauses of the contract before it, per Lord Pentland, delivering the opinion of the court, para [20]. As *Crimond Estates Ltd,* supra concerns contractual interpretation, it does not vouch the proposition that a party has no title and interest to sue upon a contract of which it is itself in breach. And to interpret *Crimond Estates Ltd* in this way would render it irreconcilable with the court's earlier decision in *Scottish Enterprise.* Accordingly, *Crimond Estates Ltd* offers no assistance to the defenders in the present action.

[183] For the foregoing reasons, the pursuer has title and interest to pursue the action, insofar as it is based on the parties' contract.

The delictual case

Submissions

[184] The pursuer relies on *McGarrigle* v *UK Insurance Ltd* 2023 SCLR 221 for the proposition that a party will have title and interest to sue if he or she is a party to a legal relation providing some right, which the defender has infringed. Counsel submits that in the present action the legal relation to which the pursuer was a party was the agreement made in January 2018, which gave him the right to use the mould to build hulls. Through its negligence, the defender infringed this right.

[185] Very fairly, counsel highlights that the court in *McGarrigle* was not referred to the earlier cases of *Nacap Ltd*, supra, *North Scottish Helicopters Ltd* v *United Technologies Corp Inc* 1988 SLT 77, *Cruden Building & Renewables Limited* v *Scottish Water* [2017] CSOH 98 and *Hand* v *North Scotland Water Authority* 2002 SLT 798, which are authorities for the proposition that a party has title and interest to sue for loss arising from damage to property, provided that the party owns or has a possessory interest in the property. But he submits that if one applies these authorities, the present pursuer had a possessory interest in the mould when it was damaged, as by virtue of the agreement the mould was in his sole possession and control, and he was using it for business purposes.

[186] Counsel for the defenders advances the converse of the pursuer's position, submitting that the pursuer held mere contractual rights in relation to the mould, rather than having a possessory title to it. He argues that if the pursuer is liable for the loss of the moulds, his remedy on making good the damage is to obtain an assignation from Marusya or Twinseas: *Nacap Ltd*, supra, p224A. In any case, there is no suggestion of Twinseas

proceeding against the pursuer, nor does the pursuer offer to account for the damage occasioned to Marusya. Insofar as *McGarrigle,* supra is concerned, counsel submits that the court was not referred to the binding authority of *Nacap Ltd.*

Analysis

[187] The pursuer's case in delict is the mirror image of his contractual case: he avers that the defenders owed him a duty to exercise the degree of skill and care to be expected of a reasonably competent haulier while transporting the mould. He alleges that the defenders breached this duty, thereby damaging the mould and causing him loss. Consequently, this is a case in which the pursuer sues in respect of economic loss arising from damage to property of which he is not the owner.

[188] In such cases, a party will only have title and interest to sue if he or she is owed a duty of care by the alleged wrongdoer. In *Nacap Ltd* v *Moffat Plant Ltd* 1987 SLT 221 the First Division set out the test to be applied when determining whether a duty of care arises. First, the court must ask whether the relationship between the pursuer and the alleged wrongdoer is sufficiently proximate that it should be within the wrongdoer's reasonable contemplation that fault on his or her part is likely to cause loss to the pursuer. Second, the pursuer must have a possessory title to the property at the time of the damage to the property or the resulting loss. It is insufficient for the pursuer to have only contractual rights in relation to the property. The second part of the test is underpinned by the objective of limiting the class of persons to whom a duty is owed, as a matter of policy: *Nacap Ltd*, *supra* per Lord Justice-Clerk Ross delivering the opinion of the court, p222 J; p223 L.

[189] The facts of *Nacap Ltd* were as follows: the pursuers were engaged by British Gas Corporation to lay a pipeline. British Gas Corporation owned the pipeline, but the pursuers

were liable under the contract for any damage to it. The pipeline was damaged during construction by plant hirers; and the pursuers brought an action against them for the costs which they had incurred in making good the damage. On applying the second part of the test which I have summarised above, the First Division held that the pursuers did not have a possessory title to the pipeline as they had been in possession of it only for the limited purpose of constructing it. Consequently, the defenders' plea of no title to sue was sustained.

[190] In the line of authorities which followed *Nacap Ltd*, the courts focussed on the second part of the test, determining whether the pursuer had a possessory title to the damaged property in the circumstances of each case. For example, in *North Scottish Helicopters Ltd* v *United Technologies Corp Inc* 1988 SLT 77, in which the pursuers had the unrestricted use of a helicopter under the terms of a lease, they were found to have a possessory title to it. Similarly, in *Hand* v *North Scotland Water Authority* 2002 SLT 798 which concerned a pub which was damaged by the ingress of water caused by the blocking and perforation of a sewer, the tenant was found to have a possessory title to the pub, as he held a heritable right of lease registered in the General Register of Sasines. Conversely, *Cruden Building & Renewables Limited* v *Scottish Water* [2017] CSOH 98, which concerned damage caused by an escape of foul water from a sewer onto a site on which the pursuers were carrying out building works, was a case which fell on the other side of the line. The pursuers sued for economic loss resulting from the delay. Lord Bannatyne held that they did not have a possessory title to the site, as they were working on it as contractors and did not have a "wide and unfettered possession" comparable to that which the pursuers in *North Scottish Helicopters Ltd* had held, para [77].

[191] In contrast to the foregoing authorities, in *McGarrigle* v *UK Insurance Ltd* 2023 SCLR 221 the Sheriff Appeal Court adopted a different approach to the question of whether a pursuer had title and interest to sue for loss arising from damage to property which he did not own. The case concerned a self-employed private hire driver who leased a vehicle from a third-party leasing company. After the vehicle was damaged in a road traffic accident the pursuer hired an alternative vehicle under a credit hire arrangement. He raised an action in which he sought to recover the credit hire charges. The action was dismissed at first instance on the ground that the pursuer did not have title to sue. The court applied the House of Lords case of *D&J Nicol v Dundee Harbour Trustees,* 1915 S.C. (H.L.) 7, holding that "a person has title to sue if he is a party (in the widest sense) to some legal relation providing some right which the person against whom the action to be raised either infringes or denies", para [10]. They applied this test to the facts before them as follows:

> "[13] There is no doubt that a victim has title to raise an action against their wrongdoer. A legal relation providing some right arises out of the relationship of wrongdoer and victim created by the negligent act. It arises in delict. The record contains averments relating to the delictual wrong. On the particular facts of this case, there is a further legal relation giving some right, namely the pursuer's rights under a third party contract with the original hirer.
>
> [14] Once a legal relationship is established, the remaining question is whether the respondent has infringed or denied some right of the appellant. It must be recognised that the avowedly restricted definition in D & J Nicol does not directly encompass the present situation. It refers to legal relations which are infringed by a defender, rather than legal relations which arise because of a defender's actions, in other words from the delict itself. The delict is the source of both the legal relation and the infringement of the right of the victim. "

On this basis the court held that the pursuer had title to sue and allowed the appeal. While the court's reasoning was predicated on the pursuer having been owed a duty of care by the defender, no submission was made to them to the effect that the pursuer required to show

that he held a possessory title to the vehicle, nor were they referred to *Nacap Ltd* or the cases that followed it. While there may be some difficulty in reconciling *McGarrigle* with those authorities, the reasoning is consistent in the sense that the court held that in an action brought in delict, a pursuer must establish that he or she is owed a duty of care to have title and interest to sue.

[192] It is clear from *McGarrigle, Nacap Ltd* and the other authorities to which I have referred that this requirement is axiomatic; and it poses a fundamental difficulty for the defenders in the present case. This is because the defenders respond to the pursuer's averments of fault by admitting that certain duties of care were incumbent upon them under explanation that they fulfilled those duties (Ans 5). The question of whether the pursuer had a possessory title to the mould when it was damaged is only relevant insofar as it bears on the issue of whether the defenders owed him a duty care; and is rendered academic by the defenders' unqualified admission of having been subject to such a duty. Or to put it another way, as the defenders admit having owed the pursuer a duty of care, it follows that the pursuer has title and interest to sue.

[193] In any event, I am satisfied that the pursuer had a possessory title to the mould when it was damaged. Under the agreement the pursuer had possession of the mould for a 15-year term, unless the owner should require it. He had the mould, not for a purpose that was limited in any way, but to build hulls with, which was the mould's sole function. He was required to pay a fee to Twinseas for each mould that he built; and he was liable for the cost of repairing any damage to the mould. The duration and purpose of the agreement afforded the pursuer a substantial degree of control of the mould: to all effects and purposes it was intended to be his to use for many years.

[194] While each case must turn on its own facts, it seems to me that the present case is most closely analogous to the degree of possession that was apparent in the facts of *North Scottish Helicopters Ltd* supra and *Hand* supra, both of which involved possession of property held under leases. Counsel for the defenders submits that the present case is distinguishable from these authorities, as the agreement under which the pursuer holds the mould is not a lease or contract of hire. But leaving aside the agreed mode of payment, what the agreement has in common with a lease is that the pursuer is to have possession and use of the mould for an extended period. This arrangement may be contrasted with the facts of *Nacap* and *Cruden Building & Renewables Limited*, in which the pursuers were contractors who possessed the property in question for the limited purpose of completing construction work, and for a commensurately restricted period of time. I am satisfied, therefore, that the pursuer has a possessory title to the mould, and that he did so when the damage to the mould occurred. It follows that I would have held that the defenders owed the pursuer a duty of care, if this had not already been a matter of admission.

[195] Finally, I must address counsel for the defenders' submission that there is no suggestion of proceedings being brought against the pursuer for the recovery of the mould or the cost of its repair. Counsel also submits that the pursuer does not offer to account for the damage occasioned to Marusya. If anything, this understates the position: as I have already set out, Mr Coe was clear that he had no interest in seeking to recover the mould, which he now considered to be "redundant". He had prevented the pursuer from making further use of it by refusing to provide him with any further Seafish numbers. But just as in the pursuer's contractual claim, these are factors that may prove relevant to the question of whether the pursuer can establish that he has suffered a loss, rather than bearing on his title

and interest to sue. At risk of repetition, the pursuer has such title and interest because the defenders owed him a duty of care.

Disposal

[196] As I have held that the pursuer has title and interest to sue, I shall repel the defenders' second plea-in-law.

[197] I shall fix a hearing to allow parties to address the court on the question of the expenses occasioned by the preliminary proof, and in relation to further procedure which is to take place on 2 December at 9.30 am using WebEx.