OUTER HOUSE, COURT OF SESSION

2020 CSOH 87

CA143/19

OPINION OF LORD TYRE

In the cause

VAN OORD UK LIMITED

Pursuer

against

DRAGADOS UK LIMITED

Defender

Pursuer: Moynihan QC; Burness Paull LLP
Defender: Walker QC; CMS Cameron McKenna Nabarro Olswang LLP

30 September 2020

Introduction

[1] The defender was employed by Aberdeen Harbour Board as the main contractor in a project for the design, management and construction of the Aberdeen Harbour Expansion Project ("AHEP") at Nigg Bay, near Aberdeen. By a subcontract agreement dated 16 March 2018, the defender subcontracted certain works to the pursuer. The subcontract scope of works included soft dredging works, the volume of which was originally estimated at about 2,150,000m^3. The scope also included the filling of caissons. The subcontract incorporated the standard form NEC3 subcontract conditions, including *inter alia* the core clauses, the clauses for main Option B, and the Shorter Schedule of Cost Components, set out in the

NEC3 engineering and construction subcontract ("ECC") (April 2013 edition), as amended by two schedules of amendments.

[2] From time to time the defender instructed the omission of work falling within the scope of the pursuer's subcontract and transferred that work to one of two other subcontractors. The first issue that arises in the present action is whether the defender was entitled in terms of the subcontract to transfer work to others or, alternatively, whether in so doing the defender was in breach of its contract with the pursuer. The second issue, which arises if the defender was in breach of contract, is whether, in terms of the contract, the effect of omission of the works transferred to other subcontractors was to reduce the bill rate payable to the pursuer in respect of works that it still had to carry out. A third and separate issue arises between the parties in relation to the proper interpretation of the provisions of the subcontract relating to wave measurement for the purpose of determining whether the pursuer was entitled to a compensation event for adverse weather conditions.

[3] All three issues have been the subject of adjudication, as provided for in the subcontract. The adjudications were decided largely in favour of the defender. The parties having intimated notices of dissatisfaction, the issues are at large for determination by the court. They came before me in the form of a debate of the parties' preliminary pleas to relevancy.

Factual narrative

[4] The following brief summary of relevant facts not in dispute is derived partly from the pleadings and partly from a notice to admit served by the pursuers, most of which was admitted by the defender in a notice of non-admission.

[5] In addition to its subcontract with the pursuer, the defender entered into subcontracts with two other subcontractors, namely WASA Dredging UK Limited ("WASA") and Canlemar SL ("Canlemar"). The contract with WASA was entered into on 15 May 2018, and was for the carrying out of works that included an area of soft dredging works which also formed part of the scope of the work under the defender's subcontract with the pursuer. Prior to contracting with the pursuer on 16 March 2018, the defender did not tell the pursuer of its intention to include that area of soft dredging works in its subcontract with WASA. Prior to the commencement of this action the defender did not tell the pursuer of the inclusion of those works in its subcontract with WASA. The contract with Canlemar was entered into by way of a letter of intent dated 13 August 2018 followed by a formal subcontract agreement on 14 December 2018. This contract too was for the carrying out of works that included areas of soft dredging which also formed part of the scope of the work under the defender's subcontract with the pursuer. Prior to contracting with the pursuer, the defender did not tell the pursuer of its intention to include those areas of soft dredging works in its letter of intent or its subcontract agreement with Canlemar. Prior to the commencement of this action, the defender did not tell the pursuer of the inclusion of those works in the letter of intent and the subcontract with Canlemar.

[6] The pursuer began dredging work on 5 May 2018. In the course of 2018 and 2019, the defender issued various Contractor's Instructions to the pursuer to omit certain areas of soft dredging from its works. Some of the work was transferred to WASA and some to Canlemar. The work transferred to Canlemar also included some caisson filling. It is unnecessary for the purposes of this opinion to detail the various Contractor's Instructions; suffice to say that their validity is disputed by the pursuer. This is the first of the issues

mentioned above. The pursuer seeks declarator that the instructions were issued in breach of contract.

[7] Each omission of works from the scope of the pursuer's work had two separate effects. The first and more obvious was that the pursuer was no longer obliged or entitled to carry out the work and be paid for it. In these proceedings the pursuer does not seek payment for work that it did not, in the circumstances, carry out. The second effect is more controversial. In terms of the NEC3 contract, each omission of works constituted a compensation event. The effect of a compensation event on the sum payable under the contract is calculated not under reference to sums in the bill of quantities but rather under reference to Defined Cost (as explained more fully below). According to the defender's calculation, this resulted on each occasion in a reduction of the total amount payable to the pursuer for the works that it still had to carry out under the contract. Those reductions were given effect by a reduction on each occasion in the bill rate payable by the defender for the pursuer's remaining work. The defender contends that this is a correct application of the terms of NEC3; the pursuer contends that it is not. This is the second of the issues mentioned above. The pursuer seeks (i) declarator that the defender was not entitled to reduce the sum payable to it for work done consequent upon the disputed Contractor's Instructions and (ii) payment of a sum calculated on the basis of the unreduced bill rate.

The terms of the subcontract

[8] It is convenient at this point to set out the relevant terms of the subcontract. Unfortunately this has to be done at some length. Clause 4 of the Subcontract Agreement stated:

"4 The documents forming this subcontract are:

4.1 this Agreement;

4.2 the conditions of subcontract (being the core clauses, the clauses for main Option B, dispute resolution Option W2 and secondary option clauses X2, X4, X7, X16, X18 and Y(UK)2 and the Shorter Schedule of Cost Components set out in the NEC 3 "engineering and construction subcontract" April 2013 edition) as amended by the Standard Schedule of Amendments set out on the Legal Documents Disc and as further amended (where applicable) by the Subcontractor Specific Schedule of Amendments included in Schedule Part 3 (and all references in this subcontract to the conditions of subcontract shall be deemed to be to such provisions as so amended);

4.3 the completed Subcontract Data Part one set out in Schedule Part 1;

4.4 the completed Subcontract Data Part two set out in Schedule Part 2;

4.5 the Subcontract Works Information;

4.6 the Works Information under the Main Contract (insofar as relevant and applicable to the *subcontract works* and/or performance of the *Subcontractor's* other obligations under this subcontract);

4.7 the Site Information under the Main Contract (insofar as relevant and applicable to the *subcontract works* and/or performance of the *Subcontractor's* other obligations under this subcontract);

4.8 the Risk Register; and

4.9 the Bill of Quantities including preamble.

The documents listed above are to be taken as mutually explanatory of one another however, for the purposes of interpretation, the priority of documents shall be in accordance with the order of precedence outlined above where clause 4.1 has the highest priority and clause 4.9 has the lowest priority."

[9] As regards the NEC3 conditions, parties helpfully provided a consolidated text of selected clauses, adopting Option B and incorporating the Standard Schedule of Amendments and the Subcontractor Specific Schedule of Amendments. The following clauses, using the consolidated text provided, are relevant to this opinion:

"Clause 10

10.1 The *Contractor* and the *Subcontractor* shall act as stated in this subcontract and in a spirit of mutual trust and co-operation.

Clause 11.2

…

(8) The Fee is the sum of the amounts calculated by applying the *subsubcontracted fee percentage* to the Defined Cost of subsubcontracted work and the *direct fee percentage* to the Defined Cost of other work.

…

(19) Subcontract Works Information is information which either

- specifies and describes the *subcontract works* or
- states any constraints on how the *Subcontractor* Provides the Subcontract Works and is either
  - in the documents which the Subcontract Data states it is in or
  - in an instruction given in accordance with this subcontract.

…

(21) The Bill of Quantities is the *bill of quantities* as changed in accordance with this subcontract to accommodate implemented compensation events and for accepted quotations for acceleration.

(22) Defined Cost is the cost of the components in the Shorter Schedule of Cost Components whether work is subsubcontracted or not excluding the cost of preparing quotations for compensation events.

…

(28) The Price for Work Done to Date is the total of

- the quantity of the work which the *Subcontractor* has completed for each item in the Bill of Quantities multiplied by the rate and
- a proportion of each lump sum which is the proportion of the work covered by the item which the *Subcontractor* has completed.

Completed work is work without Defects which would either delay or be covered by immediately following work.

…

(31) The Prices are the lump sums and the amounts obtained by multiplying the rates by the quantities for the items in the Bill of Quantities.

Clause 14.3

14.3 The *Contractor* may give an instruction to the *Subcontractor* which changes the Subcontract Works Information or a Key Date. The *Contractor* may, in the event that a corresponding instruction is issued by the Project Manager under clause 14.3 of the Main Contract only, also give an instruction to omit (a) any Provisional Sum and/or (b) any other work, even if it is intended that such work will be executed by Others. The *Subcontractor* has no claim for loss of revenue, loss of opportunity, loss of any contract, loss of profit or for any indirect loss or damage against the *Contractor* in relation thereto.

[***NB: Clause 14.3 of the Main Contract*** *provides:*

14.3 The *Project Manager* may give an instruction to the *Contractor* which changes the Works Information or a Key Date. The *Project Manager* may also give an instruction to omit (a) any Provisional Sum and/or (b) any other work (provided the total value of all such work omitted under all instructions issued by the *Project Manager* shall not exceed 5% of the total of the Prices in the aggregate), even if it is intended that such work will be executed by Others. The *Contractor* has no claim for loss of revenue, loss of opportunity, loss of any contract, loss of profit or for any indirect loss or damage against the *Employer* in relation thereto.]

Clause 27

27 .3 The *Subcontractor* obeys an instruction which is in accordance with this subcontract and is given to him by the *Contractor*.

Clause 60.1

60.1 The following are compensation events.

(1) The *Contractor* gives an instruction changing the Subcontract Works Information except

- a change made to take account of any mistake, ambiguity, inconsistency, inaccuracy, discrepancy or omission which the *Subcontractor* ought to have notified to the *Contractor* pursuant to clause 17.2

- a change made in order to accept a Defect or

- a change to the Subcontract Works Information provided by the *Subcontractor* for his design which is made either at his request or to comply with other Subcontract Works Information provided by the *Contractor*.

…

(13) A wave measurement is recorded, during the Backhoe Dredging activities that

- has a significant wave height of over 1.0m and with a wave period of up to 5 seconds, or

- has a significant wave height of over 0.75m and with a wave period of greater than 5 seconds.

Or

During Trailing Suction Hopper Dredging activities:

- A wave measurement is recorded that has a significant wave height of over 1.5m,

- Crosswinds greater than Beaufort Force 8 are measured.

The *Subcontractor* shall provide a wave rider buoy and wind measurement equipment which will be positioned, at locations to be mutually agreed, within 500m of the operations. The readings from this buoy will form the basis of determining wave measurements in accordance with the above. The vessel captain shall have the ultimate authority to determine safe dredging operations, but only delays caused by weather conditions that exceed the above parameters above shall be taken into account in assessing a compensation event. Notwithstanding this, the Subcontractor shall, for Backhoe Dredging operations undertaken after 1 October 2018 be entitled to additional cost and time compensation:

- equivalent to 4 hours (2 hours each way) over and above the delays caused by weather conditions that exceed the parameters above, each time above the first ten times, the vessel captain considers it necessary to move the e equipment out of the working area and into a sheltered area; and

- until such time that there is a favourable weather outlook from Cantabria University based on the above parameters, indicating a minimum period of working of 24 hours.

…

(18) A breach of subcontract by the *Contractor* which is not one of the other compensation events in this subcontract or any act of prevention.

…

(21) The *Contractor* gives an instruction in accordance with clause 14.3.

Clause 61

61.1 For compensation events which arise from the *Contractor* giving an instruction,

issuing a certificate, changing an earlier decision or correcting an assumption, the *Contractor* notifies the *Subcontractor* of the compensation event at the time of that communication. He also instructs the *Subcontractor* to submit quotations, unless the event arises from a fault of the *Subcontractor* or quotations have already been submitted. The *Subcontractor* puts the instruction or changed decision into effect.

61.2 The *Contractor* may instruct the *Subcontractor* to submit quotations for a proposed instruction or a proposed changed decision. The *Subcontractor* does not put a proposed instruction or a proposed changed decision into effect.

61.3 The *Subcontractor* notifies the *Contractor* of an event which has happened or which he expects to happen as a compensation event if

- the *Subcontractor* believes that the event is a compensation event and
- the *Contractor* has not notified the event to the *Subcontractor*.

If the *Subcontractor* does not notify a compensation event within seven weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Subcontract Completion Date or a Key Date unless the event arises from the *Contractor* giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.

61.4 If the *Contractor* decides that an event notified by the *Subcontractor*

- arises from a fault of the *Subcontractor*,
- has not happened and is not expected to happen,
- has no effect upon Defined Cost, Completion or meeting a Key Date or
- is not one of the compensation events stated in this subcontract

he notifies the *Subcontractor* of his decision that the Prices, the Subcontract Completion Date and the Key Dates are not to be changed. If the *Contractor* decides otherwise, he notifies the *Subcontractor* accordingly and instructs him to submit quotations.

The *Contractor* notifies his decision to the *Subcontractor* and, if his decision is that the Prices, the Subcontract Completion Date or the Key Dates are to be changed, instructs him to submit quotations before the end of either

- two weeks after the *Subcontractor's* notification or
- a longer period to which the *Subcontractor* has agreed.

If the *Contractor* does not notify his decision, the *Subcontractor* may notify the

Contractor of his failure. A failure by the *Contractor* to reply within three weeks of this notification is treated as acceptance by the *Contractor* that the event is a compensation event and an instruction to submit quotations.
…

Clause 63

63.1 The changes to the Prices are assessed as the effect of the compensation event upon

- the actual Defined Cost of the work already done,
- the forecast Defined Cost of the work not yet done and
- the resulting Fee.

If the compensation event arose from the *Contractor* giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption, the date which divides the work already done from the work not yet done is the date of that communication. In all other cases, the date is the date of the notification of the compensation event.

63.2 If the effect of a compensation event is to reduce the total Defined Cost, the Prices are not reduced except as stated in this subcontract.
…

63.4 The rights of the *Subcontractor* to changes to the Prices and the Subcontract Completion Date are its only rights in respect of a compensation event.
…

63.10 If the effect of a compensation event is to reduce the total Defined Cost and the event is

- a change to the Subcontract Works Information or
- a correction of an assumption stated by the *Contractor* for assessing an earlier compensation event,

the Prices are reduced.
…

63.13 Assessments for changed Prices for compensation events are in the form of changes to the Bill of Quantities.

- For the whole or a part of a compensation event for work not yet done and for which there is an item in the Bill of Quantities, the changes are

- a changed rate,
- a changed quantity or
- a changed lump sum.

• For the whole or a part of a compensation event for work not yet done and for which there is no item in the Bill of Quantities, the change is a new priced item which, unless the *Contractor* and the *Subcontractor* agree otherwise, is compiled in accordance with the *method of measurement*.

• For the whole or a part of a compensation event for work already done, the change is a new lump sum item.

If the *Contractor* and the *Subcontractor* agree, rates and lump sums may be used to assess a compensation event.
…

Clause 64

64.1 The *Contractor* assesses a compensation event

• if the *Subcontractor* has not submitted a quotation and details of his assessment within the time allowed,

• if the *Contractor* decides that the *Subcontractor* has not assessed the compensation event correctly in a quotation and he does not instruct the *Subcontractor* to submit a revised quotation,

• if, when the *Subcontractor* submits quotations for a compensation event, he has not submitted a programme or alterations to a programme which this subcontract requires him to submit or

• if, when the *Subcontractor* submits quotations for a compensation event, the *Contractor* has not accepted the *Subcontractor*'s latest programme for one of the reasons stated in this subcontract.

…

64.3 The *Contractor* notifies the *Subcontractor* of his assessment of a compensation event and gives him details of it within the period allowed for the *Subcontractor*'s submission of his quotation for the same event. This period starts when the need for the *Contractor*'s assessment becomes apparent.

64.4 If the *Contractor* does not assess a compensation event within the time allowed, the *Subcontractor* may notify the *Contractor* of his failure. If the *Subcontractor* submitted more than one quotation for the compensation event, he states in his notification which quotation he proposes is to be accepted. If the *Contractor* does not

reply within three weeks of this notification the *Subcontractor* informs the *Contractor* of the *Contractor*'s failure to reply and if the *Contractor* does not respond within three weeks of the *Subcontractor* informing the *Contractor* of that failure the notification is treated as acceptance of the *Subcontractor*'s quotation by the *Contractor*.

Clause 65

65.1 A compensation event is implemented when

- the *Contractor* notifies his acceptance of the *Subcontractor's* quotation,
- the *Contractor* notifies the *Subcontractor* of his own assessment or
- a *Subcontractor's* quotation is treated as having been accepted by the *Contractor*.

65.2 The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong."

[10] The definition of Defined Cost in clause 11.2(22) above is the cost of the components in the Shorter Schedule of Cost Components. That schedule lists costs under various headings such as People, Equipment and Plant and Materials, broadly consisting of costs directly attributable to the carrying out of the subcontract works.

[11] For a definition of the *subcontract works* it is necessary to refer to the Subcontract Data Part one, where the subcontract works are defined as "the Dredging of Silts, Sands, Gravels and Glacial Till (including Boulders) associated with the Aberdeen Harbour Expansion Project as detailed in Scope Document AHEP-DRA-SOW-0002 Rev 8 and material Reuse Method Related Philosophy AHEP-DRA-SOW-0003 rev 2". The documents referred to contain, but are not exhaustive of, Subcontract Works Information for the purposes of the definition of that term in clause 11.2(19).

[12] The Subcontract Data part 2 contains specification *inter alia* of the direct fee percentage and the subsubcontracted fee percentage (both 12.5%), the tendered total of the Prices, the working rate and standing rate for various items of equipment, and the working

rate and standing rate for site staff, survey and environmental support. These are the rates used in Defined Cost calculations for costs included in the Shorter Schedule of Cost Components.

Issue 1: Was the transfer of work from the pursuer to other subcontractors a breach of contract?

Argument for the pursuer

[13] On behalf of the pursuer it was submitted that the transfer of work falling within the pursuer's subcontract to other contractors was a breach of contract. It was accepted that there was no absolute rule of law prohibiting transfer of work to another contractor in any circumstances. The question of whether works could be "omitted", ie removed from the scope of the contract, whether transferred to another contractor or not, depended upon the proper interpretation of the contract. Reference was made to *Abbey Developments Ltd* v *PP Brickwork Ltd* [2003] EWHC 1987 (Technology).

[14] In the present case there was no provision permitting such transfer. By clause 14.3, the parties had expressly agreed circumstances in which the defender could instruct that work be omitted, even if it was transferred to someone else to carry out, namely where the project manager under the main contract had issued a corresponding instruction. The parties had further agreed by inclusion of clause 60.1(21) that the issuing by the defender of such an instruction was a compensation event. It was not suggested that there had been any corresponding instruction issued under the main contract and accordingly those subclauses had no application to the circumstances here. The defender's purpose or motive was irrelevant.

[15] The removal of work from the scope of the pursuer's works and its transfer to WASA and to Canlemar was a breach of the defender's obligation under clause 10.1 to act in a spirit of mutual trust and co-operation. Without informing the pursuer of its intention at the time of entering into the subcontract, the defender had "triple-contracted" in relation to approximately one third of the pursuer's works. The pursuer did not and could not have envisaged that the defender would hold such an intention or proceed to carry it out. By this means the pursuer was exposed to a situation in which it could, for example, be required to carry out the more difficult portion of the works at the contractual rates, with the easier portion then being transferred to another contractor. (The pursuer contends that this is what occurred, but that is not admitted by the defender.) To suggest that this was simply a bad bargain was outrageous: it was clearly a breach of clause 10.1. If it were to be contended that the pursuer acquiesced in some of the transfers of work, the pursuer could not have acquiesced when it was unaware that the defender had had the possibility of transfer in mind at the time of contracting, and even after the present action had been raised, the terms of the defender's contract with Canlemar had remained undisclosed.

[16] The effect of the transfer of work to other contractors was that the defender claimed to be entitled to apply the compensation event provisions, relying on calculations of Defined Cost, in a way that was never intended by the parties. That too was a breach of clause 10.1: it was contrary to a spirit of mutual trust and co-operation to use the contractual provisions dramatically to reduce the bill rate for work actually done by the pursuer. It was self-evident that the pursuer would not have agreed to the use of Defined Cost if it had been aware that a significant proportion of its work could be transferred to another subcontractor.

Argument for the defender

[17] On behalf of the defender it was submitted that the removal of work from the pursuer's scope of works was not a breach of contract. By means of the compensation event mechanism, NEC3 provided a fair and adequate procedure to compensate a subcontractor for omissions, with the purpose of ensuring that the subcontractor was neither better nor worse off as a result. Instruction of an omission should not therefore be regarded as a breach of contract.

[18] The pursuer's analysis assumed that the scope of the works, as set out in the Subcontract Works Information, was fixed at the time of the contract and could not subsequently be reduced. That was incorrect. Clause 11.2(19) made clear that the Subcontract Works Information was not fixed but could be specified in an instruction "given in accordance with this subcontract" which specified and described the subcontract works. The fact that the second part of clause 14.3 addressed a particular situation, ie a corresponding instruction in the main contract, did not prevent the first sentence of the clause from being interpreted as permitting other omissions by means of instructions which changed the Subcontract Works Information. By virtue of clause 60.1(1), the pursuer was able to advance such a change as a compensation event. The circumstances of the present case had been envisaged by the contracting parties and had been provided for.

[19] The fact that the defender entered into contracts with WASA and Canlemar was irrelevant to the proper interpretation of its contract with the pursuer. Those contracts were entered into after the pursuer and defender's contract had been concluded. There had been nothing secret or underhand about the transfer of work to either of these companies: they were onsite and the pursuer was aware of what was happening.

[20] The circumstances of the present case were distinguishable from those in *Abbey Developments Ltd* v *PP Brickwork Ltd*. The contractual provisions were different. In *Abbey Developments*, the scope of the work was fixed in the contract, whereas in the present case the defender was using an express contractual power to amend the scope by omitting work from it.

Decision

[21] The *Abbey Developments* case concerned a labour-only subcontract for the brickwork of a housing development, in the course of which the contractor became dissatisfied with the subcontractor's performance. The issue was whether the contractor was entitled as a matter of law to remove most of the remaining work from the subcontractor and to employ an alternative subcontractor to carry it out. Before turning to consider the terms of the subcontract, HHJ Lloyd QC reviewed in some detail the case law and other authorities, including the then current edition of Hudson on Building Contracts, on the question of whether, and in what circumstances, an employer (or, as in that case and in the present case, contractor) is entitled to instruct the omission of work which the contractor (or subcontractor) has been engaged to perform. His conclusions may be summarised as follows:

- A contract for the execution of work confers on the contractor not only a duty to carry out the work but a corresponding right to complete the work which it contracted to carry out.
- A clause entitling the employer to vary the works must be construed carefully so as not to deprive the contractor of his contractual right to the opportunity to complete the works and realise such profit as may then be made. Clear words

are needed if the employer is to be entitled to remove work from the contractor in order to have it done by somebody else.

- There is no principle of law that says that in no circumstances may work be omitted and given to others without incurring liability to the original contractor. The test is whether, on a proper interpretation of the contract read as a whole, the clause relied upon by the employer is wide enough to permit the change that was made.
- The employer's motive or reason for instructing the omission of the work is irrelevant.

[22] Although *Abbey Developments* remains unreported in official law reports (the text provided to me unfortunately had no page numbering), it is frequently referred to and no authority was cited to me that expressed the view that it was wrongly decided. I see no reason not to follow the guidance that it provides. The principles that I have identified are capable of general application including, in my opinion, application to contracts incorporating the NEC3 clauses. I should, however, note in particular the following observation made by HHJ Lloyd QC before he turned to apply the principles identified above to the contractual terms applicable in that case:

> "The valuation provisions of many contracts… provide the contractor with a means of obtaining acceptable compensation in the event of omissions which deprive it of profit, et cetera. In these circumstances it may be doubted if there would be a viable claim for breach of contract even if the work is given to another if the contract provides its own means of awarding the contractor amounts that it might recover if it had a claim for breach of contract."

[23] Applying the principles identified in *Abbey Developments* to the circumstances of the present case, the question is whether the terms of the subcontract entitled the defender to omit works from the scope of the subcontract works and have them carried out instead by

WASA and Canlemar. The defender's argument was based upon clause 14.3, read together with the definition of Subcontract Works Information in clause 11.2(19). In my opinion those clauses do not amount to a clear contractual entitlement to omit works and transfer them to another subcontractor, except in the circumstances in which omission of work is permitted by the second and third sentences of clause 14.3. It is not suggested by the defender that those circumstances subsisted at the time of any of the defender's Contractor's Instructions. It is of significance that the parties have expressly provided in the contract for a particular situation in which the defender *was* entitled to give an instruction to omit work; that, in my opinion, raises at least a *prima facie* inference that in other circumstances the defender was not so entitled, in the absence of another equally clear provision empowering it to do so.

[24] The defender submitted that, following the giving of the Contractor's Instructions, the Subcontract Works Information was changed, because the definition of Subcontract Works Information, read short, includes "information which… specifies and describes the subcontract works… and is… in an instruction given in accordance with this subcontract". I accept that an instruction to omit works is an instruction that changes the Subcontract Works Information, even if the giving of that instruction is a breach of contract. That must be so because as a matter of practicality the omitted works no longer form part of the scope of the subcontract works: the reality is that the subcontractor is no longer able to proceed to carry them out. I accept also that the phrase "an instruction given in accordance with this subcontract" should not be read as meaning "an instruction which is not given in breach of contract". That, in my view, would attach too much weight to the words "in accordance with". I note that the same words appear in clause 60.1(21) where they seem to mean no more than "in terms of". It is also apparent, as discussed further below, that clause 60.1

envisages that the giving of an instruction could constitute a breach of contract. That being so, the fact that an instruction has the effect of changing the Subcontract Works Information does not prevent it from being a breach of contract. No other provision of the subcontract was founded upon as entitling the defender to give the Contractor's Instructions which omitted work from the scope of the pursuer's works. It follows, in my opinion, that their omission was a breach of contract by the defender.

[25] I reach this conclusion without, at this stage of the argument, having to place any significant weight upon clause 10.1. I have already noted that one of the conclusions of HHJ Lloyd QC in *Abbey Developments*, following observations made in the earlier case of *Amec Building Ltd* v *Cadmus Investments Co Ltd* (1996) 51 Con LR 105, was that the contractor's motive for omitting the works is irrelevant. It is not therefore necessary in this context to inquire into whether the omission of the works amounted to a breach by the defender of its obligation under clause 10.1 to act in a spirit of mutual trust and co-operation. It is sufficient to hold that the subcontract, read as a whole and construed in accordance with the principles applicable to the interpretation of commercial contracts, did not contain any provision entitling the defender to omit works with a view to having them carried out by an alternative sub-contractor.

[26] I do not regard the present case as meeting the description in the passage I have quoted above from HHJ Lloyd QC's judgment regarding a contract "which provides its own means of awarding the contractor amounts that it might recover if it had a claim for breach of contract". It seems to me that the reverse is true here: in terms of NEC3 the omission of work *does* constitute a breach of contract. But the matter is not left there, because the contract goes on to specify the remedy – and indeed the only remedy – available for a breach

of contract, namely that it is a compensation event. That leads on to the second issue arising for determination in these proceedings.

[27] I have thus far addressed the first issue as a matter of principle. The parties do have pleadings regarding the reasons why the work was transferred to WASA and Canlemar. As I have already said, I would regard most of this as irrelevant to the question whether the defender was contractually entitled to act as it did. It would not, for example, be a defence to the pursuer's breach of contract argument merely to assert that the pursuer's performance had been unsatisfactory (cf *Abbey Developments*). It can be assumed that unsatisfactory performance is otherwise addressed by the provisions of NEC3. The defender also, however, has averments (denied by the pursuer) that, at least in relation to caisson filling, it had wished the pursuer to carry out the works but the pursuer had refused to do so. The defender also has averments that the pursuer co-operated with and facilitated transfer of works to WASA; this, as I understand it, is the basis of the defender's plea of acquiescence. In response, the pursuer founds upon clause 10.1, and submits that the pursuer could not have acquiesced in the transfers because it had been unaware of the existence of the other subcontracts. It had not indeed been aware of the subcontract with Canlemar until after the raising of the present action. Those matters would require proof and would, at this stage, appear to preclude the granting of the declarator sought by the pursuer that all of the various Contractors' Instructions and relative compensation event notices were issued by the defender in breach of contract. I shall, however, hear any further submissions that parties wish to make on whether, in the light of my decision, the question of acquiescence remains a live issue and, if so, what order should be made at this stage.

Issue 2: What are the consequences of the defender's breach of contract?

Argument for the defender

[28] In relation to the second issue, it is convenient to begin by narrating the argument for the defender presented on the hypothesis that it was held (as I have held) that the omission of work from the scope of the pursuer's subcontract works was a breach of contract. The defender's position was summarised in the following propositions:

- The compensation event mechanism was appropriate for all compensation events, including breaches of contract. It provided fair and adequate compensation for a breach consisting of omission of works.
- The compensation event mechanism put the subcontractor in the same position as if the event had not occurred. Properly understood, it made no difference whether or not the instruction was a breach of contract.
- Clause 61.3 did not entitle the pursuer to prevent a compensation event being valued under the contractual mechanism. The pursuer's approach was contrary to the terms of the contract, and would produce a windfall benefit for the pursuer.
- Because (as was common ground) the bill rates played no part in the valuation exercise, they changed if and to the extent necessary to spread an increase or reduction in the Prices resulting from the compensation event mechanism.

[29] Most of the compensation events listed in clause 60.1 were, in essence, breaches of contract by the employer. The intention underlying NEC3 was that a contractor should be left neither better nor worse off as a consequence of a compensation event. This was achieved by the Defined Cost calculation, which used actual past costs and forecast future costs falling within the Shorter Schedule of Cost Components, rather than the bill rates. This

meant that if, for example, the tender had been priced too low, or if productivity to date had been poor, Defined Cost would exceed the bill rates which would therefore be reduced. If they were not, this would amount to a benefit to the contractor and a penalty imposed upon the employer.

[30] Properly characterised, the defender's instructions omitting work from the scope of the pursuer's subcontract were compensation events within clause 60.1(1) (instruction changing the Subcontract Works Information), rather than clause 60.1(18) (a breach of contract which is not one of the other compensation events). In any event, clause 63.4 made clear that the pursuer's rights to changes to the Prices and the Subcontract Completion Date were its only rights in respect of a compensation event. Common law remedies were excluded. Breaches of contract required to be valued in accordance with clause 63 in the same way as any other compensation event. The procedure in terms of NEC3 was that in terms of clause 61.1 the defender notified the pursuer of the compensation event and the pursuer submitted a quotation. If the pursuer failed to submit a quotation, the defender would make an assessment in terms of clause 64. Either way, the effect of the compensation event was assessed in a three-stage process:

(1) Under clause 63.1, there required to be calculated (i) the Defined Cost of work already carried out; (ii) forecast Defined Cost of work that the pursuer would have had to carry out but for the omission; and (iii) forecast Defined Cost of completing the work remaining after the omission.

(2) If clause 63.10 applied, ie if the effect of the compensation event was to reduce the total Defined Cost *and* the event was a change to the Subcontract Works Information, the Prices were reduced.

(3) The reduction in the Prices was effected by calculating a new bill rate, with the purpose of spreading the reduction in the Prices over the work remaining to be done.

[31] This was the process that had been carried out in relation to each of the instructions omitting work from the scope of the subcontract. The fact that each resulted in reduction of the bill rate was not suggestive of any unfairness: it was how NEC3 was intended to work to ensure that the pursuer was neither better nor worse off as a consequence of the compensation event consisting of the breach of contract. If the Prices were not reduced, the pursuer would be relieved of a loss that it would otherwise have incurred because of poor productivity to date during its performance of the subcontract works. The pursuer would be paid on the basis that it had incurred costs carrying out work that it had not, in fact, carried out. Only by reducing the rates was the reduction in Defined Cost to the pursuer from not having to execute some of the work reflected in the remaining payments. This was because the rate in the Bill of Quantities assumed that all the work would be done.

[32] The pursuer's arguments based upon clauses 61.3 and 63.10 were misconceived. The purpose of clause 61.3 was not to provide the subcontractor with an opportunity to prevent a valuation and thereby avoid a reduction in bill rates. Its purpose was simply to ensure that the subcontractor could initiate the valuation process if the contractor failed to do so. In any event clause 61.3 had no application to the present circumstances because the defender had given notification of compensation events within the specified time limits. Regardless of whether the instruction was a breach of contract, it was a change to the Subcontract Works Information, and so clause 63.10 was engaged.

Argument for the pursuer

[33] On behalf of the pursuer it was submitted that the compensation event procedure operated differently in cases where the compensation event was a breach of contract from how it operated in other cases. The compensation event mechanism in clauses 60 - 64 proceeded on the basis that references to an instruction were to a valid instruction, ie to an instruction which was not a breach of contract. Clause 60.1(1) in particular was concerned with valid instructions changing the Subcontract Works Information. It appeared to be common ground that the provisions of NEC3 were intended to ensure that a subcontractor did not suffer detriment as a consequence of the occurrence of a compensation event. If in the present case the pursuer were to suffer the double penalty of losing part of the works from the subcontract and also having the bill rate reduced for the work that remained with it, that would clearly amount to a significant detriment. The occurrence of such a detriment was, however, avoided by the following contractual provisions.

[34] Firstly, clause 61.1 applied only to valid instructions. It was not therefore applicable to the present case, and the defender was not empowered to initiate the compensation event mechanism by means of a notification of the compensation event. Instead, the initiative lay with the pursuer to initiate the mechanism in terms of clause 61.3.

[35] Secondly, clause 61.3 entitled but did not oblige the pursuer to initiate the compensation event mechanism. Clause 61.3 provided expressly for the eventuality that the subcontractor did not notify a compensation event within seven weeks of becoming aware of it: the consequence was that there was no change to the Prices. If, therefore, the subcontractor appreciated that the effect of the compensation event mechanism would be a reduction in the Prices, and thus a reduced bill rate, it could simply choose not to initiate the process, and the reduction in the Prices would not occur.

[36] Thirdly, in any event, clause 63.10 stated that if the effect of a compensation event was to reduce the total Defined Cost, the Prices were reduced only if (reading short) the event was a change to the Subcontract Works Information. If an invalid instruction, ie an instruction that was a breach of contract, was not a change to the Subcontract Works Information, then clause 63.10 was excluded and there was no reduction in the Prices. Clause 63.2 stated expressly that if the effect of a compensation event was to reduce the total Defined Cost, the Prices were not reduced except as stated in the subcontract.

[37] On this interpretation, the prejudice to the pursuer occasioned by the reduction in the bill rate was avoided. There was no question of the pursuer claiming payment for work that it was no longer doing, but that was a separate matter, addressed by the contractual provisions regarding the Price for Work Done to Date.

[38] Past productivity was irrelevant. The problem in the present case arose because Defined Cost was higher than the bill rate. That was a pricing decision taken in good faith by the pursuer at the time of contracting, when it was unaware of the defender's intention to enter into contracts with other subcontractors for some of the same work. It was not for the defender now to suggest that the pursuer had entered into a bad bargain: it was obvious that if the pursuer had been aware of the defender's intention, it would have put in place a different Defined Cost structure that took account of the possibility of removal of work from the scope of the subcontract works. By the time of the defender's breaches of contract that could no longer be done. The clauses identified above provided protection to the pursuer from the adverse consequences of such breaches. The defender's conduct in entering into the contracts with WASA and Canlemar, and then exploiting the compensation event procedure to reduce the rate payable to the pursuer following transfers of work, was a breach of clause 10.1.

Decision

[39] The identification and valuation of change by reference to compensation events is a key element of NEC3. As it is put in Mitchell and Trebes: *NEC Managing Reality, Book One: The Engineering and Construction Contract* (2005) at paragraph 1.7.3:

> "The ECC uses compensation events to determine change and the Schedule of Cost Components to value change. Compensation events are those events for which the contractor becomes entitled to an assessment of time and money, bearing in mind that the assessment could be zero. Compensation events tend to be a contractual remedy to the project manager's or the employer's breach of contract.
>
> Neither the originally tendered activity schedule (main Option A) nor the priced bill of quantities (main Option B) is used for assessing the financial effects of change. Instead the contractor is reimbursed the financial effects of the compensation event upon Actual Cost or forecast Actual Cost (ECC2), or upon Defined Cost or forecast Defined Cost (ECC3). The premise behind this is that the contractor should be neither better off, nor any worse off for the change occurring."

(We are concerned here with Option B and with ECC3.)

[40] As the authors point out, there is nothing unusual about a compensation event consisting of a breach of contract. It would therefore be surprising if different rules applied to valuation of breaches of contract and to valuation of other compensation events. It would be equally surprising if different rules applied to valuation of breaches of contract effected by the giving of an instruction and to valuation of other breaches of contract. In my opinion the pursuer's contention that the reference in clause 61.1 to the employer giving an instruction applies only to the giving of a valid instruction must be rejected. The purpose of clause 61.1, in my opinion, is to require the employer to notify the contractor of a compensation event in circumstances where the occurrence of the event consists of a communication from the employer – giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption – as opposed to other compensation events

which occur otherwise than by a direct communication. The contractor is obliged to put the instruction into effect even if it constitutes a breach of contract; his remedy is provided by the compensation event mechanism.

[41] I reject also the pursuer's contention that clause 61.3 affords the contractor an opportunity to avoid a change in the Prices by failing to notify a compensation event. The purpose of clause 61.3 is clear: to allow the contractor to put the compensation event mechanism in motion if the employer fails to do so. The language of clause 61.3 is of "entitlement" to a change in the Prices; that does not sit easily with the proposition that the contractor can use clause 61.3 to derail the compensation event procedure if he calculates that it is financially beneficial to do so. The clause should in my view be read as ensuring that the valuation procedure is engaged rather than as preventing it from proceeding. It is also relevant to note that where the contractor initiates the compensation event procedure because of the occurrence of any event other than the ones mentioned in clause 63.10, the Prices cannot be reduced.

[42] In any event clause 61.3 is not applicable to the circumstances of the present case. The compensation events were instructions given by the defender, and notifications in terms of clause 61.1 were given. The pursuer's clause 61.3 argument depends upon acceptance of the prior contention that instructions given in breach of contract were not instructions for the purposes of clause 61.1. As I have rejected that contention, the argument based on clause 61.3 must also fail.

[43] It follows from what I have said so far that the calculation in clause 63.1 had to be made. It is common ground that that calculation produced a reduction in the Defined Cost. But that would not necessarily lead to a reduction in the Prices. In terms of clause 63.2, the Prices are not reduced except as stated in the subcontract. The question is whether the

circumstances of the present case fall within clause 63.10, ie whether each compensation event consisting of an instruction by the defender to omit work was a change to the Subcontract Works Information. I have given my reasons for holding that it was, at paragraph 24 above. I stated there that the fact that an instruction had the effect of changing the Subcontract Works Information did not prevent it from being a breach of contract. In my opinion the converse is also true: the fact that an instruction amounts to a breach of contract does not prevent it from being a change to the Subcontract Works Information.

[44] The remainder of the calculation is mechanical. Under clause 63.13, a change in the Prices is given effect by changes to the bill of quantities. The practical consequence is to reduce the rate payable for the work remaining to be done.

[45] On behalf of the pursuer it was strongly argued that there had to be something wrong with the above analysis. It was common ground, as observed in Mitchell and Trebes (above) that a contractor should be neither better nor worse off as a result of the occurrence of a compensation event, yet here the pursuer was prejudiced not only by losing its profit on the work omitted from the scope of the subcontract but also by having the bill rate reduced for the work which remained to be done. In my opinion this argument is founded upon a factual assertion which is not self-evidently correct, namely that the pursuer is worse off. This is the argument that NEC3's use of Defined Cost, under reference to the Schedule of Cost Components, appears to be intended to avoid. As Mitchell and Trebes put it (*ibid, Book Four: Managing Change*) at paragraph 2.3 under the heading "Why has this approach been taken?":

> "Traditionally, the valuation of change has been assessed on the basis of tendered rates and prices. Problems occur, however, when, as often happens on projects, the scope and nature of the project start to vary and arguments then arise with regard to the applicability of bills of quantities rates, prices and lump sum items and how

> much the quantity/type/scope of an item needs to change before a new rate or price is required.
>
> It is possible to argue ad infinitum about the rights and wrongs of a particular price. The Schedule of Cost Components is a way around these problems.
> …
>
> In the ECC all change is valued at ['Defined Cost'] with no reference made to tendered rates or prices. The philosophy behind this provision is that the contractor should be 'no better nor no worse off' as a result of change which is at the risk of the employer under the contract during the construction of the works…"

[46] As I understand it, the use of Defined Cost is intended to provide an objective method of giving effect to change, including change that occurs as a consequence of a breach of contract, in a way that does not leave the contractor either better or worse off. If the method works as intended, a reduction in bill rates which on the face of it appears to leave the contractor worse off may be doing no more than reflecting losses which will in any event be incurred. That is in effect what the defender says has happened in the present case. In that regard I note, for example, in the project manager's assessment of the compensation event which had the effect of reducing the bill rate from £7.48 to £6.16 per m^3, the following is stated:

> "<u>Loss of revenue</u>
>
> …From the analysis shown above, it appears that this specific item was on track to lose Van Oord significant sums. The effect of those losses, however minimal, would have had a negative contribution to the companies overall performance. Taking this out of Van Oord's scope does not therefore lose Van Oord any positive revenue.
>
> <u>Loss of opportunity</u>
>
> Taking cognasince [sic] of the above, it seems that to release Van Oord from their obligations to continue to perform an activity which is losing money only increases Van Oords potential opportunity to complete these works earlier and commence on other more profitable ventures. It should also be noted that in Dec 2018 Van Oord received additional works valued at over £3.0m based on the Defined Costs as used above…"

I am not in a position to make any finding as to whether what is stated is correct. I am satisfied, however, in principle, that a reduction in bill rates to give effect to a change in Prices produced by the compensation event mechanism does not necessarily imply that the contractor (or, as here, the subcontractor) is worse off.

[47] I do not consider that the pursuer's argument based on clause 10.1 adds anything to what has already been discussed. For a breach of clause 10.1 to have practical consequences, it would have to fall within one of the categories of compensation event in clause 60.1: presumably clause 60.1(18) if nothing else. Any such breach would thus be brought into the compensation event mechanism in the usual way. Any decision taken by the pursuer in relation to pricing at the time of contracting does not seem to me to make any difference: the whole of my discussion of the second issue proceeds on the basis that the defender *is* in breach of contract.

[48] For these reasons I hold that the pursuer has not made out a relevant case for the granting of declarator that the defender was not entitled in terms of the subcontract to reduce the Prices payable to the pursuer consequent upon the Contractor's Instructions and relative compensation event notices.

Issue 3: Wave measurement

Factual context

[49] Clause 60.1(13), set out above, provided for a compensation event to occur whenever a wave measurement exceeding certain specified heights and wave periods was recorded. (In other words, the risk of disruption caused by adverse sea conditions was to be carried by the defender.) The clause specified a means of making wave measurements: the pursuer was to provide a wave rider buoy and wind measurement equipment to be positioned, at

locations to be mutually agreed, within 500m of the pursuer's operations. The readings from this buoy were "to form the basis of determining wave measurements". The parties are in dispute as to the proper interpretation of this clause.

[50] The parties reached agreement on the location of the buoy shortly after the date when the subcontract was entered into, and the buoy was placed at the agreed location. However, it was immediately appreciated that although the buoy might be representative of sea conditions at the dredging site when work commenced, that would not be the case later. As work on the construction of a breakwater advanced, the dredging site would become more sheltered, but the buoy was located outside the breakwater. This mutual appreciation was reflected in the following email exchange on 28 March 2018 between the defender's Mr Malcolm MacDonald and the pursuer's Mr Godfried van Oord (with Mr MacDonald's observations in roman type and Mr van Oord's response in italics):

> "Good morning
>
> I understand that this position is the most suitable from a practical point of view but I am not convinced that it will be reflective of the actual conditions at the dredger location. Although I acknowledge that in the early stages there won't be much difference until the north breakwater is advanced.
>
> Propose the following:
>
> • Install as per discussions and sketch attached *OK, will apply for the exemption*
>
> • Monitor if there is a significant difference between the buoy data and workable conditions at the dredger locations *For sure there will be differences as soon as the breakwater is in place, will ask Anestis how we can deal with that. We'll come back to that.*
>
> - If there is a significant difference we need to move the buoy or have some agreement on the applicable standby *[see above]*
>
> Is this suitable? *Yes I agree that for the upcoming period this is sufficient, Anestis will have to come with a proposal how we can deal with this when breakwater installation progresses…*"

[51] There was no further communication on how to address the issue identified. On 25 June 2018, Mr MacDonald noted in an email that "It is apparent that in most wave directions, the sig wave height inside AHEP is much less than recorded on the wavebuoy". On 13 July 2018, the pursuer produced a technical note which stated *inter alia*:

> "…As the construction of the structure progresses, it will start providing a shelter to certain locations in the bay. This means that the buoy measurements - which are intentionally conducted outside of the impact zone of the breakwater for the reasons explained in paragraph… – are not representative of the sea state at certain areas where dredging activities are scheduled. For this reason a study (mostly based on diffraction which is the most prominent process in such cases) has been conducted to compute the estimated reduction of wave energy to be expected per area.
>
> The results of this analysis are transformation factors with which the buoy readings shall be multiplied to compute the sheltered conditions.
>
> It shall be clarified that this study is performed only for the estimate of the wave conditions at the protected areas. For any activities conducted outside of the sheltering zone (i.e. at the disposal area), the measurements of the buoy shall be used as logged by the buoy, without any transformation. For this reason – amongst others discussed in section 0 – it is important to keep the wave buoy at the main location for the entire period dredging activities are on-going…".

[52] No adjustment methodology was agreed. The buoy was never moved. As the dredging works proceeded, the pursuer submitted compensation event notices using unadjusted data from wave buoy reports. The defender instructed Arup, its designer on the AHEP project, to produce wave modelling reports, which the defender then used in its valuation of the compensation events. In the Arup model, the wave buoy data were adjusted mathematically with a view to producing figures considered to be more representative of the sea conditions at the place where the dredger was working. On this basis the amount of compensation due to the pursuer would be very much lower.

[53] In these proceedings the pursuer seeks (i) declarator that for the purposes of determining its claim under clause 60.1(13), the defender is not entitled to make any

adjustment to the measurements produced by the wave buoy; and (ii) payment of a sum due for weather disruption in 2018.

Argument for the pursuer

[54] On behalf of the pursuer it was submitted that the defender's averments that the wave buoy data required to be adjusted were irrelevant. The contractual provisions were clear: clause 60.1(13) provided for the buoy to be positioned at agreed *locations* (in the plural) and for the buoy data to form the basis of determining whether a compensation event had occurred. Properly construed, that meant that the buoy data were determinative. Clause 60.1(13) did not provide for mathematical adjustment of the data. It provided a clear and sensible means of addressing the issue of buoy data becoming unrepresentative as breakwater construction works proceeded: namely, to move the buoy to a different agreed location.

[55] The defender's averments contained no specification of the adjustment that was said, in terms of the contract, to be necessary. There was no averment of when, if ever, the initial location became unrepresentative. It appeared that the court was being asked to determine, after the event, a "reasonable adjustment" to the data. But decisions on whether to suspend operations had to be made by the vessel captain on the basis of the buoy data. That could not have been done on the basis of adjusted data calculated long afterwards. On the contrary, there were indications within clause 60.1(13) that the question whether the parameters in the clause had been exceeded was to be determined contemporaneously: the reference to a wave height etc being "recorded"... "during… activities", and the link to the vessel captain's ultimate authority to determine safe dredging operations, with the buoy data being used as a cross check.

Argument for the defender

[56] On behalf of the defender it was submitted that the correct interpretation of clause 60.1(13) could only be determined after proof of the factual circumstances at the time when the sub-contract was entered into. The words "the readings from this buoy will form the basis of determining wave measurements " were open to more than one interpretation: they could, as the pursuer submitted, mean that the readings were determinative, or they could mean, as the defender submitted, that the readings provided a starting point which would then require to be adjusted. The defender offered to prove that the latter interpretation was, in the circumstances, the only interpretation that made commercial sense. The email exchange demonstrated that both parties were aware at the time of contracting that as breakwater construction proceeded, the buoy data would become increasingly unrepresentative of sea conditions at the location where dredging work was taking place. Indeed, any reasonably competent contractor or subcontractor in the position of the parties would have realised this.

[57] The purpose of the clause was to compensate the pursuer when weather conditions rendered its dredger unusable, not to give it a windfall benefit when the dredger was not in fact experiencing the same wave conditions as the buoy. It made no commercial sense to construe the clause as containing an unenforceable agreement to agree a series of new locations as the works proceeded. Those difficulties were avoided by interpreting the clause as an agreement to use the buoy data but subject to appropriate adjustment. This appears to have been what the pursuer's technical note had in mind when it referred to "transformation factors" and the need to keep the buoy at the same location for the entire period of dredging.

[58] The defender offered to prove that the method advocated by its expert witness, Mr Timothy Beckett, consisting of a refinement of the method employed by Arup, constituted an appropriate adjustment. The method produced a precise measurement of downtime. There was no difficulty in carrying out this exercise after a lapse of time. There had been no need for the vessel captain to be aware contemporaneously of adjusted data from the buoy; his responsibility was simply to decide whether it was safe to carry on dredging. In fact the pursuer did carry on without the benefit of adjusted data, and notified compensation events as it went along.

Decision

[59] In my opinion the proper interpretation of clause 60.1(13) will be better determined after proof. The words "will form the basis of determining wave measurements" are in my view open to more than one interpretation: they may have been intended to mean that the readings from the buoy were to be determinative or they may not. I accept the pursuer's submission that use of the word "locations" in the plural is a strong indication that parties envisaged, at the time of contracting, that the buoy would not remain at the same location for the duration of the dredging (although the pursuer's technical note seems to suggest a change of mind in this regard). That, however, does not appear to me to provide a conclusive answer to the question whether adjustment of the buoy data was also in the parties' contemplation. Even if the buoy were to be moved, there might still be scope for its readings to be more or less representative from time to time, so that it might make better commercial sense, and reflect a shared intention, to interpret the words "form the basis" in the manner contended for by the defender. Nor is it readily apparent how frequently movement of the buoy might have been contemplated by the parties when using the word

"locations". The email exchange some two weeks after the date of the contract might assist in the process of objective ascertainment of the parties' intentions at the time of contracting, but it is clearly not conclusive one way or the other. As proof before answer is to be allowed on this issue, it is probably better that I say no more about it at this stage.

Other matters

[60] In addition to the conclusions already mentioned, the pursuer seeks payment of a sum representing the 12.5% fee due in terms of the subcontract in respect of the work removed from the pursuer's scope of work by the disputed Contractor's Instructions. In the course of the debate, the defender submitted that this claim was irrelevant, amounting in effect to a common law damages claim of the kind excluded by clause 63.4, and in any event that it was excessive because the 12.5% figure did not consist wholly of profit. Those arguments were not, however, contained in the defender's note of argument and I prefer to reserve consideration of them until parties have had an opportunity to consider the implications for this conclusion of my opinion in relation to the other issues. I shall hear further argument if necessary.

Disposal

[61] I am grateful to both counsel for their very helpful submissions and clear presentation of the issues. As agreed, I will put the case out by order to discuss further procedure and any orders to be made at this stage. Questions of expenses are reserved.