SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2024] SC PER 48

PER-CA3-22

JUDGMENT OF SHERIFF D HAMILTON

in the cause

PRIORITY CONSTRUCTION UK LIMITED, a company registered under the Companies Acts (under Company No SC558970) and having its registered office at 1 Rutland Court, Edinburgh, Midlothian, EH3 8EY

Pursuer

against

ADVANCED MATERIAL PROCESSING LIMITED, a company registered under the Companies Acts (under Company No SC511266) and having its registered office at 9 Broadleys Road, Springkerse Industrial Estate, Stirling, Scotland FK7 7ST

Defender

Pursuer: Mr Massaro; Advocate
Defender: Mr Whirter; Advocate

Perth 20 November 2024

The Pursuer seeks payment from the Defender of an overpayment made by the Pursuer to the Defender. That payment was made under a contract for services between the parties, pertaining to the provision of construction works, as hereinafter described.

The sheriff, having heard parties,

1 In terms of Crave 1, Grants decree for payment by the Defender to the Pursuer in the sum of FIFTY EIGHT THOUSAND SEVEN HUNDRED AND TWENTY FOUR POUNDS AND FIFTY ONE PENCE (£58,724.51) STERLING with interest thereon at the rate of eight *per centum per annum* from the date of service until payment.

2 In terms of Crave 2, Grants decree for payment by the Defender to the Pursuer in the sum of ONE THOUSAND SIX HUNDRED AND ELEVEN POUNDS (£1,611) STERLING with interest thereon at the rate of eight *per centum per annum* from the date of service until payment.

The Sheriff, having resumed consideration of the cause;

FINDS IN FACT:

Circumstances of Payment of the Invoices

1. The Defender submitted two invoices to the Pursuer in respect of the processing of rock which it claimed it had carried out on the Pursuer's instructions.

2. The first invoice, invoice number 2062, dated 31 July 2020, was received by the Pursuer on 12 August 2020. The invoice was in the sum of £62,116.80 (£51,764 plus VAT). The invoice records that it was for the processing of 13,100 m^3 of material, charged at £3.70 per m3.

3. The Pursuer paid invoice number 2062 on 9 October 2022, in the reduced amount of £61,497.80 The deduction of £619 represented the charge for standing time, which the Pursuer did not accept.

4. The Defender issued the Pursuer with a second invoice, invoice number 2111, dated 31 August 2020. The invoice was in the sum of £59,199.30 (£49,332.75 plus VAT). The invoice recorded that it was for the processing of a further 10,227.50 m^3 of material.

5. The Pursuer made the Defender aware that it disputed invoice number 2111, and later sent an email dated 20 November 2020, enclosing information in support of their position.

6. The Defender presented a Petition to wind up the Pursuer to Edinburgh Sheriff Court on 2 December 2020. It was averred in the petition that the Pursuer was a creditor of the Defender in the amount of £58,608.71. That was incorrect. The Defender had issued a credit note on 27 November 2020, in respect of invoice 2111 in the amount of £7,481.40 (£6,234.50 plus VAT) The petition relied upon section 123(1)(e) of the 1986 Act.

7. On 3 December 2020, the Pursuer's solicitor wrote to the Defender's solicitor disputing liability for the debt and sought to have the Petition dismissed without it being advertised.

8. On 8 December 2020, the Defender's solicitor emailed the Pursuer's solicitor to advise that she would be seeking instructions to advertise the Petition unless payment was made.

9. On 8 December 2020, the Pursuer's solicitor wrote to the Defender's solicitor confirming that payment of the principal sum sought (£58,608.71) plus 10 days' interest (£115.80) would be made on the condition that the Defender arrange for dismissal of the petition and did not proceed to advertise it. The Pursuer disputed liability for the debt, stated that the payment was being offered despite that, and that the Pursuer reserved its rights to seek to claim the sum back.

10. On 9 December 2020, the Defender's solicitor responded by email to advise that the Defender would also require its expenses of the winding up petition of £1,611 (inclusive of VAT) to be paid. The sum sought by the Defender inclusive of interest and expenses was £60,335.51. The Pursuer's solicitor responded the same day, confirming that payment of that amount would be made and that it would be made on the same basis as set out in the letter dated 8 December 2020.

11. The sum of £60,335.51 was paid by the Pursuer to the Defender. Following receipt of same, the winding up petition was dismissed.

12. Included within the sum of £60,335.51 was the sum of £1,611, which represented the expenses sought by the Defender as a pre-condition to the winding up petition being dismissed.

13. On presenting the Petition to wind up the Pursuer, the Defender knew (i) the Pursuer disputed the sum sought, (ii) the Pursuer had provided information in support of their position and (iii) the Pursuer did not owe the sum stated in the Petition.

The Project

14. The Pursuer is a civil engineering infrastructural contractor.

15. The Defender is involved in inter alia processing, quarrying, crushing and shredding material, including rock.

16. In 2019, the Pursuer was compiling a Tender Submission for a prospective instruction from Renewi UK Services Limited ("Renewi") in respect of construction at Lingerton Landfill Site, Lochgilphead, Argyle PA31 BRR. Renewi was the main contractor for the construction of a landfill cell, particularly Cell 4, at Lingerton Landfill Site.

17. Part of the Tender Submission prepared by the Pursuer and submitted to Renewi, included a quotation for the excavation of rock from the Cell 4 site and for the processing of that rock for use in the construction project.

18. A Bill of Quantities, to be used by the Pursuer in the tendering process, was sent by Renewi to the Pursuer. That Bill of Quantities included a figure for the volume of rock to be

excavated and processed. The volume of rock to be excavated and processed was expressed in m^3.

19. The Pursuer was to carry out the excavation of the site and processing of the excavated material, or to engage a third party to do so. The Pursuer invited tenders, including from the Defender, for the crushing and processing of the excavated rock at the site.

20. Part of the Bill of Quantities sent by Renewi to the Pursuer, relating to the rock processing works, (referred to as the Mini Bill of Quantities), was sent by the Pursuer to the Defender when inviting the Defender to tender. The volume of rock to be excavated and processed was expressed in the Mini Bill of Quantities in m^3.

Volume of Rock

21. Renewi UK Services Limited instructed SLR Consulting Limited to prepare a volume calculation of the rock on site which was to be excavated and processed.

22. A number of other surveys were carried out in order to calculate the volume of material to be excavated from the site, and the volume which was excavated from the site.

(i) In 2019, Chris McNiven was a Senior Engineer and then an Associate Engineer with SLR Consulting Limited. He was involved in the design work for Cell 4 at the Lingerton Site. As part of that design work, he was involved in the preparation of a Construction Quality Assurance (CQA) Plan and, later, a Report, all of which was submitted to SEPA.

(ii) David Linnen, Civil Engineer and Land Surveyor, on the instructions of the Pursuer, carried out;

(a) an Original Ground Level Survey on 10th June 2020.

(b) a Top of Rock Survey on 15th June 2020.

(c) a Foundation (or Top of Formation) Survey. This was carried out over several visits during the excavation.

(d) Surveys of Processed Rock. These were done on a regular basis during the course of the excavation.

23. SLR calculated that the volume of **material** to be excavated was 15,922 m^3. It was thought the top 500 m^3 was **soil** and the remainder **rock**. The volume of **rock** to be crushed and processed was therefore stated in the Bill of Quantities as 15,422 m^3 (15,922 m^3 – 500 m^3). That was also the figure in the Mini Bill of Quantities sent by the Pursuer to the Defender.

24. Having carried out an Original Ground Level Survey and a Top of Rock Survey, David Linnen was able to calculate that the volume of **topsoil** actually required to be removed was much greater than that allowed for by SLR. Mr Linnen calculated there was approximately 3,000 m^3 additional soil and therefore a corresponding volume less of rock to be excavated. He calculated the volume of rock to be excavated to be 12,422 m^3 (15,922 m^3 – 3500 m^3).

25. Measuring equipment will invariably have inbuilt tolerances. Calculations are made in that knowledge. Taking into account any tolerances in the equipment used by Mr Linnen, his calculations were within acceptable tolerances for SLR and Renewi.

26. When Mr Linnen's surveys were overlayed on to SLR's design model, there were some minor differences in levels, but all within acceptable tolerances for SLR for this type of project.

27. The surveys carried out by Mr Linnen, and his calculations, were carried out to appropriate professional standards.

28. Mr Linnen's calculation of the volume of rock to be excavated was consistent with SLR's calculation.

29. The volume of rock excavated (allowing for acceptable tolerances) was properly calculated at 12,465 m^3.

Weight of Rock Processed

30. Once the rock was processed by the Defender, the crushed and screened material was taken off the processing machine by a machine fitted with a loading shovel.

31. All rock processed by the Defender was weighed using scales on the loading shovel.

32. The weight for each load was recorded on a display within the machine operator's cab. There was no electronic record kept of those weights. The machine operator simply recorded the total weight for each day on a handwritten weekly time sheet. There was no record of the weight of the individual loads or of how that daily total was calculated.

33. The total weight invoiced as having been processed by the Defender was initially incorrectly stated.

34. The standing time charges contained within the Defender's invoices to the Pursuer were not consistent with the Defender's weekly time sheets.

35. The total weight of rock processed by the Defender was recorded on the Defender's weekly time sheets as 43,285 tonnes.

The Parties Contract

36. In 2019, Renewi contacted Kenneth Madden, a director of the Pursuer, inviting the Pursuer to tender for construction works at the Landfill site. As part of the Pursuer's

Tendering Document with Renewi, the Pursuer was to provide a price for the creation of a landfill cell.

37. Renewi sent a Bill of Quantities to the Pursuer for use in their tendering process. That Bill of Quantities sought, inter alia, a price for the excavation of rock and ancillary processes at the site. The Pursuer's pricing for the tender document was to be calculated by reference to volume, i.e. cost per m^3.

38. The Pursuer sought a price from the Defender, for the Defender to crush and process a given volume of excavated rock at the site. An extract from the Bill of Quantities was sent to the Defender. That extract contained the details for excavating and ancillary processing of rock.

39. The prices sought from the Defender were to be used by the Pursuer, inter alia, to assist the Pursuer in its tendering process with Renewi.

40. The Pursuer wished the Defender's price to be calculated in m^3 to mirror the measurement to be used in their contract with Renewi.

41. The Defender was aware that the price quoted by them was to be used by the Pursuer as part of their tendering process with the main contractor (Renewi).

42. The Defender sought to convert the volume of rock to weight of rock. A figure, to convert volume of rock to weight of rock (the conversion factor) of 2T (tonnes)/m^3 was selected by the Defender.

43. The Defender knew the conversion factor selected by them was not the appropriate rate to convert weight of rock to compacted volume of rock (unblasted rock in the ground).

44. During exchanges of e-mails the Defender interchanged between volume and weight and often quoted both.

45. The Defender was asked to price for processing a known volume of unexcavated rock. That volume was altered by the Pursuer during negotiations. That change did not alter the volume rate per m^3.

46. At no point during an exchange of e-mails between the parties did the Pursuer express agreement to the price it was to be charged being calculated by weight measurement.

47. A purchase order for the contract was issued by the Pursuer to the Defender. The measurement was expressed in m^3 and the rate was stated as per m^3. The Defender did not dispute the Purchase Order.

48. The Pursuer did not agree to the contract price being measured by reference to weight.

49. Rock processed to 6F2 was to be charged at £3.20 plus vat per m^3.

50. Rock with Fines taken out was to be charged at £3.70 plus vat per m^3.

51. An unspecified volume of rock was processed to 6F2.

Transport Costs and Standing Time

52. In an e-mail from the Defender to the Pursuer dated 4 June 2020, the Defender stated, *"Transport at cost"*. There was no response from the Pursuer and the issue of transport costs was not followed up.

53. The Pursuer's Purchase Order made no mention of transport costs.

54. The Pursuer did not agree to meet the Defender's transport costs.

55. There is no mention in the exchange of e-mails between the parties of standing time.

56. The Pursuer's Purchase Order made no mention of standing time.

57. The Pursuer did not agree to meet the Defender's costs for standing time.

FINDS IN FACT AND LAW

1 The Pursuer, having made payment to the Defender of the sums of £60,335.51 in purported settlement of Invoice 2111, interest and expenses, to avoid first orders being granted in a winding up petition lodged by the Defender, and having done so under an express reservation of its rights, is entitled to seek a remedy in unjust enrichment in the event of any part of the sum paid not being due to the Defender.

2 The Pursuer, having invited the Defender to tender for the crushing and processing of a m^3 volume of material (which volume was liable to variation), and having sought a price from the Defender at a rate specified as per cubic metre, and the Pursuer not having agreed to the price being calculated on a weight basis, in terms of the contract between the parties the price to be charged was to be calculated on a per m^3 volume basis.

3 There having been no agreement between the parties regarding payment of transport costs, the Pursuer is not liable to the Defender in respect of transport costs.

4 There having been no agreement between the parties regarding payment of standing time, the Pursuer is not liable to the Defender in respect of standing time.

5 The sum due by the Pursuer to the Defender in terms of the contract entered into by the parties was £55.344.60. The Pursuer has paid the sum of £61,497.80 in settlement of Invoice 2062. The Pursuer paid to the Defender the sums of £58,608.71, plus interest of £115.80 and expenses of £1,611 being the sums claimed as due by the Defender in respect of Invoice 2111, and which were required to have the winding up petition dismissed.

Therefore;

(i) the Defender has been enriched at the Pursuer's expense;

(ii) there was no legal justification for that enrichment; and

(iii) it would be equitable to compel the Defender to redress the enrichment;

the Pursuer is entitled to the remedy of unjust enrichment, and to payment from the Defender in the sums of £58,608.71, £115.80 and £1,611.

THEREFORE

1 Sustains the Pursuer's pleas in law numbers 1 and 2, Repels the Defender's pleas in law numbers 1, 2, 3, 4, 5 and 6.

2 In terms of Crave 1, Grants decree for payment by the Defender to the Pursuer in the sum of FIFTY EIGHT THOUSAND SEVEN HUNDRED AND TWENTY FOUR POUNDS AND FIFTY ONE PENCE (£58,724.51) STERLING with interest thereon at the rate of eight *per centum per annum* from the date of service until payment.

3 In terms of Crave 2, Grants decree for payment by the Defender to the Pursuer in the sum of ONE THOUSAND SIX HUNDRED AND ELEVEN POUNDS (£1,611) STERLING with interest thereon at the rate of eight *per centum per annum* from the date of service until payment.

4 Continues the issue of expenses to a hearing on a date to be assigned.

NOTE

Witnesses

Pursuer

Kenneth Madden – Civil Engineer, Director, Pursuer

Sean Jamieson – Director, Groundworks Scotland Ltd

David Linnen – Civil Engineer and Land Surveyor, Linnen Civil Engineering and Surveying Limited

Christopher McNiven – Associate Engineer, SLR

Ruaridh Aitken – Project Engineer, SLR

Iain Marwick – Chartered Quantity Surveyor, Director, Sinclair Marwick Ltd

David Quinn – Contracts Manager, WH Malcolm (previously employee of Pursuer)

Defender

Keiran O'Kane, Director, Defender

Kristine O'Kane, Company Secretary, Defender

Terence Mallon, Civil Engineering Consultant

Glossary

Parties involved in the Project

Linnen Civil Engineering and Surveying Ltd - Provider of land surveying services and instructed by the Pursuer. Managed by David Linnen

Groundworks Scotland Ltd - Instructed by the Pursuers to site manage the project site

Renewi UK Services Limited ("Renewi") - The main contractor for work to be carried out at Lingerton Landfill Site, Lochgilphead, Argyle PA31 BRR

SEPA - Scottish Environment Protection Agency

SLR Consulting Limited (SLR) - Instructed by Renewi to design a landfill cell construction at Lingerton Landfill Site, Lochgilphead. Prepared a Construction Quality Assurance plan and report for submission to the Scottish Environment Protection Agency.

Surveys

Original Ground Level Survey

This is a topographical survey and is usually carried out at the start of a land project to determine the base levels of the land. Subsequent surveys carried out are compared to that original ground level survey. On 10th June 2020, David Linnen, Civil Engineer and Land Surveyor, on the instructions of the Pursuer, carried out an Original Ground Level Survey.

Top of Rock Survey

This survey takes place after all vegetation is scraped/removed from the surface. The survey takes place before the rock has been blasted/excavated and can be used as a base level for how much rock will be taken out for crushing and processing. On 15th June 2020, David Linnen, Civil Engineer and Land Surveyor, on the instructions of the Pursuer, carried out a Top of Rock Survey.

Foundation (or Top of Formation) Survey

This survey is done after the rock has been blasted and the material excavated. It can be done in stages as the floor area of the excavation is cleared. It allows the excavation to be done to the agreed levels and, by comparing with the Top of Rock Survey, allows the volume of rock excavated to be calculated. David Linnen, Civil Engineer and Land Surveyor, on the instructions of the Pursuer, carried out a Foundation (or Top of Formation) Survey over several visits during the excavation.

Survey of Processed Rock

This is done by measuring the piles of processed material and calculating their volumes. The volume of crushed material often exceeds the volume of excavated material due to a bulking swell factor. Prior to blasting, rock will have dense compaction. Once blasted and compacted, the material will have air voids in the stockpiles, and that is known as bulking. This survey was done by David Linnen, Civil Engineer and Land Surveyor on the instructions of the Pursuer. It was done on a regular basis during the excavation.

Terminology

6F2 - rock material which is crushed to between 4" and zero.

Bulking - when a volume of rock is crushed its volume increases. That is known as bulking.

CQA - Construction Quality Assurance.

Fines - rock material which is crushed to between 10mm and zero.

Introduction and Right to a Remedy

Introduction

[1] The Pursuer seeks payment from the Defender of an overpayment made by the Pursuer to the Defender. That payment was made under a contract for services between the parties, pertaining to the provision of construction works, as hereinafter described.

[2] In around 2019, Renewi UK Services Limited ("Renewi") was the main contractor for work to be carried out at Lingerton Landfill Site, Lochgilphead, Argyle PA31 BRR. Renewi was to construct a landfill cell, particularly Cell 4, at Lingerton Landfill Site. The Pursuer

was compiling a Tender Submission for a prospective instruction from Renewi in respect of construction works at the Landfill Site.

[3] Part of the Tender Submission to be prepared by the Pursuer and submitted to Renewi, was to include a quotation for the removal of rock from the site and for the processing of that rock for use in the construction project.

[4] A Bill of Quantities, to be used by the Pursuer in the tendering process, was sent by Renewi to the Pursuer. That Bill of Quantities included a figure for the volume of rock to be excavated and processed. The volume of rock to be excavated and processed was expressed in m^3. That volume had been calculated by SLR Consulting Limited (SLR).

[5] The Pursuer was to carry out the excavation of the site or engage a third party to do so. In 2019 the Pursuer invited a tender, including from the Defender, for the crushing and processing of the rock that would be excavated at the site.

[6] Part of the Bill of Quantities sent by Renewi to the Pursuer, relating to the rock processing works (referred to as the Mini Bill of Quantities), was sent by the Pursuer to the Defender when inviting the Defender to tender. The volume of rock to be excavated and processed was expressed in the Mini Bill of Quantities in m^3.

[7] In submitting a tender to Renewi, the Pursuer had to provide a figure for processing the rock, which was to be excavated, and which had been calculated by SLR initially to be 15,422 m^3. That was later revised to 12, 422 m^3 when the volume of soil was found to be 3,500 m^3 and not 500 m^3 as previously estimated in SLR's survey.

[8] The Defender entered negotiations with the Pursuer. The Defender was used to working in weight of material rather than volume. During the negotiations on price to process the stated volume of rock, a conversion factor from volume to weight was suggested

by the Defender. Parties agreed the Defender would process the rock on the Pursuer's behalf.

[9] Following completion of the works, a dispute arose over payment due to the Defender. When the Defender submitted their invoices, they sought to charge the Pursuer based on the weight of rock which had been processed. They submitted that was what had been agreed in e-mail exchanges with the Pursuer. The Pursuer disputed that method of charge and maintained the charging basis was volume of rock excavated. The issue was in sharp focus, as by applying the conversion factor from weight to volume as selected by the Defender, the volume of rock apparently processed was almost double that calculated by the Pursuer as likely to be, and which was in their view, excavated from the site. In addition, the Defender charged for transport of their equipment on to site, and for standing time. The Pursuer disputed that they had agreed to such charges.

[10] Matters were further complicated by negotiations on different pricing levels for different specifications to which the rock was to be processed.

Right to a Remedy

[11] The Defender submitted two invoices to the Pursuer. The first invoice, invoice number 2062, dated 31 July 2020, was received by the Pursuer on 12 August 2020. That invoice was in the sum of £62,116.80 (£51,764 plus VAT). The Pursuer paid invoice number 2062 on 9 October 2022, in the reduced amount of £61,497.80 The deduction of £619 represented the charge for standing time, which the Pursuer did not agree.

[12] The Defender issued the Pursuer with a second invoice, invoice number 2111, dated 31 August 2020, in the sum of £59,199.30 (£49,332.75 plus VAT). The Pursuer made the

Defender aware that it disputed the invoice, and later sent an email dated 20 November 2020, in support of their position.

[13] The Defender presented a Petition to wind up the Pursuer to Edinburgh Sheriff Court on 2 December 2020. It was averred in the petition that the Pursuer was a creditor of the Defender in the amount of £58,608.71. That was incorrect as the Defender had issued a credit note on 27 November 2020, in respect of invoice 2111 in the amount of £7,481.40 (£6,234.50 plus VAT).

[14] There was an exchange of correspondence between parties' solicitors. The Pursuer's agents disputed liability for the debt and sought to have the Petition dismissed without it being advertised. The Defender's solicitor advised that she would be seeking instructions to advertise the Petition unless payment was made. The Pursuer confirmed that payment of the principal sum sought, plus 10 days' interest, would be made in the amount of £58,608.71 on the condition that the Defender arrange for dismissal of the petition and did not proceed to advertise it. The Pursuer disputed liability for the debt, stated that the payment was being offered despite that, and that it reserved its rights to seek to claim the sum back.

[15] The Defender's solicitor responded to advise that the Defender would also require its expenses of £1,611 (inclusive of VAT) to be paid. The sum sought by the Defender inclusive of expenses was £60,335.51. The Defender's solicitor responded the same day, confirming that payment of that amount would be made and that it was being made on the same basis as set out in their earlier letter.

[16] The sum of £60,335.51 was paid by the Pursuer to the Defender. Following receipt of same, the winding up petition was dismissed.

[17] The Pursuer disputes the original sum sought by the Defender in invoice 2111, and the interest paid thereon, and seeks recovery of those sums paid which they claim were not

due. They also seek repayment of the expenses they had to pay the Defender to have the winding up petition dismissed.

[18] The Pursuer makes its claim based on unjust enrichment and seeks repetition. The Pursuer paid to the Defender the sum sought by them, but said the payment was made on a without prejudice basis in order to have the winding up petition dismissed. To succeed, the Pursuer must show;

(i) the Defender has been enriched at the Pursuer's expense;

(ii) There is no legal justification for the enrichment; and

(iii) It would be equitable to compel the Defender to redress the enrichment.

[19] I was referred by the Pursuer to several authorities which set out circumstances where persons are entitled to seek the remedy of unjust enrichment. Parties did not disagree on the relevant authorities, or the principles brought out, and there is therefore no need for me to list them. If a defender has been unjustly enriched because he has received a sum of money from the pursuer, the enrichment can be reversed by ordering the defender to repay the money to the pursuer. In those circumstances, the appropriate remedy is repetition of the money from the defender.

[20] Repetition is not allowed in the case of money paid as a compromise, since the compromise itself forms a fresh obligation to pay. An unjustified enrichment claim might lie however where a payment is made under an express reservation of the right to seek to reclaim it.

[21] Closely linked, and quite separate from paying under a compromise is where payment is made under duress. In Gloag and Henderson, para 24.14, the authors state:

> "Payments made under economic duress can be recovered, even if the duress was lawful in the country where it was applied. On the other hand, money paid merely because the creditor threatens to take legal proceedings cannot be recovered, and a

> mere protest will not justify recovery of money really paid to avoid the expense and inconvenience of a law suit. But if a sum has been paid under protest to avoid some immediate inconvenience, such as seizure of goods for failure to pay market dues or threatened ejection from a vehicle in which the payer was travelling, it may be recovered on its being established that the demand in question was unwarrantable, even if through an action raised by a third party."

[22] Para 24.15 notes there is, "a residual category covering a number of cases where Scots law recognises a right to repayment in situations which do not fit conveniently under any of the previous headings."

[23] The Court may grant a winding up petition if a company is unable to pay its debts (section 122(1)(f) of the Insolvency Act 1986 ("the 1986 Act")). Section 123(1) sets out the circumstances in which a company will be deemed unable to pay its debts. One of those circumstances, section 123(1)(e), is if it is proved to the Court's satisfaction that the company is unable to pay its debts as they fall due. A winding up petition is not the process in which to establish a company's liability to pay a debt disputed in good faith and on substantial grounds. A winding up petition is not a normal legal process, such as an action for payment. The Courts recognise that disruption and damage may be caused to a company's business by presenting and advertising a winding up petition, and there is a need to ensure that this potential to damage is not used by a petitioner to apply commercial pressure to obtain payment of a disputed debt.

[24] In the present case, the Defender lodged a winding up petition against the Pursuer very shortly after the invoices were submitted. They knew the Pursuer was disputing the second invoice, and indeed they knew the second invoice was incorrect, (they later issued a credit note). The petition could be said therefore to have been presented on false or erroneous information. There was no evidence that the Pursuer was unable, as opposed to unwilling, to pay this debt once liability had been clarified. There was no evidence that the

Pursuer was unable to pay its other debts as they fell due. The speedy lodging of the winding up petition could be perceived to have been done to apply commercial pressure to obtain payment of a disputed debt. Disruption and damage could have been caused to the Pursuer's business by the presentation and advertisement of a winding up petition. There is a need to ensure that such potential for damage is not used by a petitioner. I am satisfied that the Pursuer made the payment to settle Invoice 2111, interest thereon and the expenses claimed in order to avoid first orders being granted in a winding up petition. It did so under an express reservation of rights. It is submitted by the Defender that the Pursuer could have chosen to lodge answers in the wining up petition. A court which receives a winding up petition would not be the normal forum to dispute debts which are founded upon in winding up petitions. A court will refuse a winding up petition where the whole debt is the subject of a genuine dispute with the company but will not necessarily refuse it when only some of the debt is in dispute. I do not consider the Pursuer acted unreasonable in not seeking to oppose the petition. Even opposing the petition could have resulted in possible disruption and damage to the company's business.

[25] If the Pursuer establishes that the sum stated as due in terms of Invoice 2111 is not in fact due then; (i) the winding up petition would have been raised on erroneous grounds, (ii) the expenses of the petition may not be due, (iii) the Defender will have been enriched at the Pursuer's expenses, and (iv) there would be no legal basis for the enrichment.

[26] Parties could not agree where the onus and burden of proof lay. The Defender submitted that the onus was on the Pursuer to prove that 12,465 m^3 of rock was crushed by the Defender, and the Defender is entitled to be paid no more. To do that the Court had to determine on the balance of probabilities which was correct and more accurate: the Defender's measurement of weight or the Pursuer's calculation of volume. The Pursuer

submitted the question to be asked was more straightforward. Was there a lawful justification for the Defender to keep the sums paid to it by the Pursuer to prevent the damage of a winding up petition being advertised? It was for the Defender to establish that more than the 12,465 m^3 claimed by the Pursuer had been processed by the Defender. It was submitted that the Defender could not use the illegitimate use of a winding up position to avoid the need for proof, and if the Court could not ascertain how much rock was processed it must find in favour of the Pursuer.

[27] I consider there is merit in the Pursuer's submission. To find otherwise would mean that an unscrupulous creditor could raise an inflated invoice and then lodge a winding up petition. If that was challenged in a reasonable way, it would not be for the challenger to prove the extent of the debt due.

[28] Taking the Pursuer's submission to its logical conclusion in this case would mean that if the Court could not determine how much rock was processed, the full amount paid to the Pursuer would fall to be returned to them. That would be unsatisfactory, as it would possibly require the Defender to pursue further litigation to determine the sum due to them.

[29] The issue of onus and burden effectively becomes irrelevant if I find on the balance of probabilities how much rock was processed by the Defender and the basis of the charge.

[30] For reasons hereinafter stated, I am satisfied the Defender was not entitled to the sums claimed from the Pursuer in respect of Invoice 2111, the interest thereon and the expenses of the winding up petition, and therefore the Defender was enriched at the Pursuer's expense, and there was no legal basis for the enrichment.

[31] The Defender submitted that even if I was so satisfied, it would not be equitable to compel the Defender to redress the enrichment. The Defender submitted the Pursuer was either at fault or was the author of its own misfortune by paying the invoice.

[32] In support of that position, it was said the Purser was aware that the first invoice was not a final invoice. The first invoice gave a volume of rock processed which was more than the volume the Pursuer was claimed was in the ground. At that stage, the Pursuer should have stopped the Defender crushing rock. It was unfair on the Defender to commit further resources to crushing rock.

[33] I do not agree with the Defender's submission. Firstly, the Pursuer paid the first invoice timeously. There was no expectation that the figures would be scrutinised at that stage because the contract to process all the rock extracted from the ground had not been completed. Secondly, the Pursuer would not know what exact volume of rock was to be processed until a final survey had been carried out at the conclusion of the excavation.

[34] I am satisfied it is equitable to compel the Defender to redress the enrichment.

There were several issues at proof.

1 Volume of rock excavated

2 Was additional rock, over and above the excavated rock from Cell 4, processed by the Defender?

3 Weight of rock processed

4 Significance of the conversion factor chosen by the Defender

5 Did parties agree that the cost of processing the rock be based on volume of rock excavated or on weight of rock processed?

6 Prices for different specifications to which the rock was to be processed

7 Transport costs and standing time

1 Volume of rock excavated

[35] In 2019, Christopher McNiven, associate engineer with SLR, was the head designer for Cell 4, at Lingerton Landfill Site. SLR had been engaged by Renewi for that purpose. Mr McNiven had been involved at the end of construction work for Cell 3 at the site. Mr McNiven was involved in creating all of the design and contract documents for Cell 4. The design and a Construction Quality Assurance (CQA) Plan were used to obtain SEPA approval for the construction of Cell 4. Mr McNiven produced a Bill of Quantities which gave volumes of material (expressed in m^3) that required to be excavated for Cell 4. The figure calculated was based on a topographical survey and a design formation model, and the Bill of Quantities was to be used in Renewi's tendering process.

[36] SLR estimated that the volume of material to be excavated was in the region of 15,922 m^3. It was thought the top 500 m^3 was soil and the remainder rock. The volume of rock to be crushed and processed was therefore stated in the Bill of Quantities as 15,422 m^3 (15,922 m^3 – 500 m^3). Those SLR figures were replicated in the Mini Bill of Quantities sent by the Pursuer to the Defender.

[37] Mr McNiven explained that there was always an element of superficial soil on top of the rock and when he prepared SLR's documents at the tender stage, he made an allowance for that.

[38] Mr David Linnen is a self-employed qualified Civil engineer and Land Surveyor and operates Linnen Civil Engineer and Surveying Limited. In 2020, Mr Linnen was instructed by the Pursuer to carry out several surveys, including (in order) an Original Ground Level Survey, a Top of Rock Survey and a Foundation (or Top of Formation) Survey. His first two surveys calculated the volume of rock to be removed to be 12,465 m^3. The volume of topsoil actually required to be removed was found by Mr Linnen to be much greater than that

allowed for by SLR. Mr Linnen's surveys were carried out both before and after excavation and he was able to calculate the respective soil and rock amounts with more accuracy than SLR's survey. Mr Linnen calculated there was approximately 3,000 m^3 additional soil and therefore a corresponding volume less of rock to be excavated. Other than that, his surveys were largely consistent with SLR's surveys. He calculated the volume of rock to be excavated to be 12,465 m^3. When Mr Linnen's surveys were overlayed on to SLR's design model, there were some minor differences in levels but, according to Mr McNiven, all within acceptable tolerances for SLR for this type of project. Mr McNiven regularly attended the site during the Pursuer's works to provide the Pursuer design support and support for any changes, and to liaise with the Pursuer's on-site engineer. SLR wrote to Renewi on 4 December 2020 (Pursuer's document number 12) confirming that Mr Linnen's Top of Rock Survey and Top of Formation Level Survey had been used to calculate the volume of rock removed. SLR confirmed it had compared Mr Linnen's Top of Formation Level Survey with their proposed design formation level and found them to be within acceptable tolerances, and that the formation level as built was correct. He confirmed the volume of rock excavated was 12,465 m^3.

[39] Mr Linnen's surveys formed part of SLR's CQA report which was presented to SEPA. SEPA required to sign off that report before Renewi could begin to use the site for waste disposal.

Challenge to Mr Linnen's surveys and calculations

[40] Several witnesses spoke to the blasting and excavation process, and two independent experts, Iain Marwick, Chartered Quantity Surveyor and Mr Terrence Mallon, Civil Engineering Consultant, specifically to the issue of the volume of rock calculations.

Mr Marwick accepted that Mr Linnen's figures were within acceptable tolerances and therefore could be considered accurate. Mr Mallon did not agree.

[41] Ruairidh Aitken was SLR's project engineer for the work. He was constantly on site and worked closely with Mr Linnen, the Pursuer's appointed on-site surveyor. Mr Aitken, as project engineer was satisfied with Mr Linnen's methodology for his surveys. Mr Aitken was not interested in volume. He was only interested in ensuring the work proceeded in accordance with the specification. That meant he was interested in boundaries, and he required detailed coordinates to check against SLR's plan. He noted Mr Linnen used his equipment to measure depths which enabled him to advise the machine operators on how far or deep they were to excavate.

[42] Mr Ian Marwick, a Chartered Quantity Surveyor for 35 years, was called by the Pursuer. He had spent many years considering the correct valuations of mass excavation which included rock, and many years checking others' figures. What was once a manual exercise by comparing existing and finished average levels was now much more accurate by using equipment such as that used by Mr Linnen. Having checked Mr Linnen's work, Mr Marwick was satisfied with the figures produced, and was satisfied there was no other method available to achieve a more reliable figure. Mr Marwick also checked SLR's figures and was satisfied with their calculations. He accepted there were tolerances in all the figures used, but a figure generated by the calculations made by Mr Linnen was one he would accept, and there was no basis for selecting any other figure, and no method to achieve any better figure. Mr Marwick was satisfied that the volume of rock excavated was 12,465.25 m^3. Further, he noted that Renewi's project was covered by Construction Quality Assurance and was signed off by SEPA.

[43] Mr Linnen explained his methods and the equipment he used. His work was overseen by Mr Aitken from SLR on behalf of Renewi. Mr Linnen's work was checked by Mr Marwick and found to be accurate. It was consistent with the surveys carried out by SLR (other than topsoil, where an adjustment was made) and was done to SLR's specification which was required for SEPA approval.

[44] Mr Linnen's use of his specialist equipment and collection of data was certainly sufficient for those instructing him directly, and for others, including SLR and SEPA who were to rely on his work. It was also consistent with the data gathered by SLR.

[45] Mr Terrence Mallon, Civil Engineering Consultant with 17 years' experience, was called by the Defender. He had not visited the site. His first report made several criticisms of Mr Marwick's initial report and of Mr Linnen's surveying method and calculations. In his initial report, Mr Mallon was critical of Mr Marwick's views and opinions expressed in his report. In evidence Mr Mallon perhaps ungraciously referred to some Quantity Surveyors as "brick counters", i.e. people who did not use professional judgment. He suggested Mr Marwick's conclusions involved "a leap of faith" a comment which was strenuously refuted by Mr Marwick. Mr Mallon agreed with some of Mr Marwick's comments on standards and rules of measurements but disagreed with others. In his initial report he had referred to Mr Marwick as "completely misguided" but in evidence had to accept that was not the case. Mr Mallon made several criticisms of Mr Linnen's surveys, but really offered no realistic alternative more accurate method. He said that the analysis (by Mr Linnen) was entirely dependent upon the information inputted to the equipment, and the competency of the operator.

[46] Mr Mallon cast doubt on the accuracy of Mr Linnen's surveying equipment, notwithstanding he was not familiar with it and had never used it. This contrasted with

Mr Marwick who was familiar with the equipment and who was happy to rely on its accuracy.

[47] Mr Linnen's volume calculation was disputed. Mr Mallon said it was impossible to calculate a figure with the accuracy claimed by Mr Linnen, as inbuilt tolerances in the equipment meant there was always room for error. I consider that logic could apply to almost any measuring equipment, e.g. satnav, laser measurement/leveller. As Mr Marwick said in evidence, figures calculated will always be read in the knowledge of tolerances in the equipment and in each of the measurements taken. Some tolerances must be accepted if any measurement is to be used. The issue is whether the tolerances are acceptable in the circumstances.

[48] Mr Mallon's evidence on tolerances allowed him to arrive at a potential (maximum) error figure. There was no effort however to provide evidence of a more statistically likely error figure. Further, there was no effort to address possible tolerances on the Defender's weighing equipment.

[49] Mr Mallon had not visited the site and had not seen the natural contours or physical features of the land. He was critical however of the spread of data points used by Mr Linnen.

[50] I found Mr Linnen's explanation as to why there was not a consistent grid pattern of data points to be easier to follow than Mr Mallon's, as he was able to describe the contours and land features and his reasons for placing the grid points where he did.

[51] I did not find Mr Mallon to be helpful on this issue, and where his evidence was critical of, or conflicted with, the evidence of Mr Linnen, Mr Marwick or Mr Aitken, all whose evidence was supported by collected data, I preferred their evidence.

[52] When stating his criticisms of Mr Linnen's methods and calculations of volume, Mr Mallon had been unaware that SLR had completed their own surveys and had arrived at the same volume calculation. Whilst he accepted the figures produced by Mr Linnen and accepted by both SLR (as it was consistent with their figure), and by Mr Marwick, he maintained that did not exclude the possibility of errors in Mr Linnen's surveys.

[53] It appeared to me that Mr Mallon was quick to offer expert opinion and criticise others even when not in full possession of many relevant facts. Given that Mr Mallon was initially so critical of the lack of information which he had, I found it surprising that he could give an expert opinion that the margin of error could be anywhere from 10% to 50%, without providing evidence to support that. Even after considering further information made available to him, he was not prepared to be dissuaded when giving evidence that the margin of error could still be as high as 50%, although he did eventually accept that for Mr Linnen to produce something with a 50% error he would need to be "a complete idiot" and be someone "using extremely poor judgment". No one relying on Mr Linnen's results suggested either was the case, and any suggestion by Mr Linnen of potential data manipulation was robustly refuted by Mr Linnen. There was no evidence offered to suggest that Mr Linnen was negligent in his approach or calculations.

[54] I was satisfied Mr Marwick comprehensively dealt with Mr Mallon's criticisms of Mr Linnen's surveying equipment and methods. Mr Marwick had no reason to doubt Mr Linnen's figures or the accuracy of his surveys. His surveys were carried out under Quality Assurance and had been accepted by SEPA. SLR was satisfied Mr Linnen's calculations were in line with theirs and Renewi was prepared to pay the Pursuer on that basis.

[55] I am satisfied Mr Linnen's surveys, and his calculations, were carried out to appropriate professional standards. The project, which utilised Mr Linnen's surveys, was a Quality Assurance one and was signed off by SEPA. Mr Marwick accepted as a matter of fact the figure for rock excavated was 12,456.25 m^3. He had no reason to question that output figure obtained by using modern surveying equipment, or the software used to generate the answer. I am satisfied that the figure produced by Mr Linnen for volume of rock excavated, was in so far as is possible in the circumstances accurately recorded and calculated and can be relied upon. I am satisfied the volume of rock excavated (allowing for acceptable tolerances) was properly calculated at 12,465 m^3.

2 Was additional rock, over and above the excavated rock from Cell 4, processed by the Defender?

[56] Mr O'Kane for the Defender claimed that there were stockpiles of rock on site when the Defender arrived, and that rock did not form part of the rock excavated for the work on Cell 4. He said that amounted to about 3,000 m^3, which was almost one quarter volume of the whole project.

[57] I do not believe it to be in dispute that excavation had started before the Defender came on site. That being the case, it was unclear how Mr O'Kane was able to conclude that the material already on site had not come from the excavation of Cell 4.

[58] Mr O'Kane said he had taken videos of the stockpiles, and they had been lodged in process. The videos were not entered into evidence. Even if they had been, I fail to see how that would have advanced his position. No one else spoke to there being additional stockpiles of material on site which not had not been excavated from Cell 4, but which had been processed by the Defender.

[59] Mr O'Kane was not constantly on site. He attended from time to time. It is unclear how Mr O'Kane could estimate the additional volume at 3,000 m^3 when he was only on site from time to time and the processed weight of those specific stockpiles were not identified in the time sheets. I am not satisfied it has been proved on the balance of probabilities that the Defender processed additional material over and above that which was part of the original volume of excavated material calculated by Mr Linnen.

3 Weight of rock processed

[60] Mr O'Kane explained the rock crushing and sifting process. Once crushed and screened the rock was taken off the processing machine by a loading shovel. The Defender explained that they weighed all rock processed by using scales on the loading shovel. That weight was recorded on a display within the operator's cab. The operator then recorded the weight on a handwritten weekly time sheet. The time sheet was handed to the Pursuer's representative on site and a copy was taken and sent to the Pursuer. The Defender maintained that by having the Pursuer's supervisor on site signing the time sheets, the Pursuer was agreeing to the tonnages stated thereon. The Pursuer disagreed, stating that their supervisor was simply checking that the Defender's working hours tallied with their own records.

[61] There were no contemporaneous records to check weight. Mr O'Kane said the Pursuer's supervisor was able to check if the stated weights were accurate by assessing the piles of rock that had been processed. That wasn't put to the Pursuer's site supervisor in evidence, and it seems to be a remarkably cavalier way to assess volume. In any event, Mr Jamieson, the Pursuer's site supervisor had no instructions to check weight.

[62] Much court time was spent exploring the method of weighing the processed rock and how it was recorded. It is surprising that if weight was so central to the Defender's business, their method of recording was so informal. The total weight of rock processed at the end of each day was simply handwritten on forms that were not designed for that purpose and were in fact simply weekly time sheets. It was unclear how the daily figure was calculated. There was no evidence of how many shovel loads there might be in a day, or how each load's weight was recorded before being tallied into a total daily figure. Certainly, there were no records offered in evidence. It is also surprising that there was no easy way to check on the weight figures produced by the Defender, and that the Defender's weight figures were simply dependent upon the operator correctly writing down the figures which appeared on his display. There seemed to be no way to check if the operator had tallied the individual loads correctly. The Defender's operator did not give evidence and there was no evidence of how the weight recording process worked in practice. It is a system which could clearly be open to error or abuse and is one where it would be very difficult for a customer to check the accuracy of the amounts recorded on the time sheets.

[63] Mr Mallon was highly critical of the tolerances that must have been in Mr Linnen's surveying equipment and methods. I would have thought there would be inbuilt tolerances on any measuring equipment and that presumably would apply to weighing machines. I did not hear any evidence of that, and I make no assumptions. I did note however that almost every weight recorded in the time sheets for the last three weeks of the process appeared to be a round figure in units of 10. That seems unusual when dealing with shovel loads of rough materials.

[64] The Defender initially invoiced for a weight of rock processed in Invoice 2111 of 20,455 tonnes. An error in the figures was noted by the Defender and a credit note was

issued. At that point the Defender was reporting in volume, as the error was expressed in m^3. Applying the conversion factor chosen by the Defender, that would equate to 3,370 tonnes, which represented an error in the stated amount of material processed of 16.48%. There was no explanation of how that error had occurred.

[65] I also noted the entries in the invoices in respect of standing time, which, for the reasons later stated, I found difficult to reconcile.

[66] Given the observations I have made about, the lack of evidence from the operator of the loading machine of the weighing process, the recording of the weights, the information recorded in the time sheets, the apparent issues in invoicing standing time and the error in invoicing weights of processed material, I am unable to make a finding on a balance of probabilities of the accurate weight of material processed by the Defender.

4 Significance of the conversion factor chosen by the Defender

[67] Mr O'Kane was questioned about the conversion factor chosen, and which he said was agreed by the Pursuer.

[68] When the conversion factor chosen by the Defender was used to convert weight back into volume it appeared the Defender had processed close to double the volume of rock that the Pursuer said would be excavated. The whole tenor of the Defender's pleadings was that they had processed a much larger volume of rock than the Pursuer said they would excavate. At proof both parties sought to defend their own calculations (weight and volume) whilst trying to undermine the other party's calculations. It appeared to me that parties' agents were conducting the proof on that basis to try and explain the significant discrepancy in volumes claimed as processed by each party. For that reason, much of the Pursuer's case was spent on defending their volume calculations. If their volume

calculations were correct, then it seemed the Defender's weight calculations must be wrong, and much time was therefor spent on exploring the Defender's method of weighing.

[69] The reason for the apparent huge differential in the volume calculations of rock processed became clearer when Mr O'Kane for the Defender gave evidence. He gave evidence, initially under reservation, on matters which were not within the Defender's pleadings and to which neither party's agents nor the Pursuer appeared to have had any notice of.

[70] Mr O'Kane explained several matters of significance. He said there were different conversion factors for different types of rock, and different conversion factors for unblasted (i.e. in the ground) rock, and blasted rock (Mr Marwick had alluded to that in his report, but it did not form part of either party's case). The reason for the difference was that the same weight of rock had different volumes depending on whether it was blasted or unblasted, and that was explained by bulking, i.e. rock which was blasted had a much greater volume.

[71] Mr O'Kane's went on to explain that when asked by the Pursuer to give a price for processing a volume of rock he had been working on the basis that the volume of material he was being asked to process and price for, was the volume of rock after blasting. That volume figure was always going to be much higher than unblasted rock due to bulking, although their weight was generally the same. A conversion of a particular weight of a particular rock type to volume would require different conversion factors depending on whether the volume was to be of blasted or unblasted rock. Mr O'Kane said a conversion factor of $2T/m^3$ was more appropriate for conversion of a known weight to a volume of blasted rock. Mr O'Kane then sought to argue that the wording of the Mini Bill of Quantities produced by the Pursuer was such that it referred to processing a volume of rock after it had been blasted. If true, that may have gone part of the way to explain the huge difference in

the volumes of rock calculated by each party. No one appeared to have been alert to this possible explanation for the vast differences in the volume calculations because it did not form any part of the Defender's pleadings.

[72] It was clear to all during this litigation that the Pursuer's calculation was based on rock in the ground, and they were relying on surveys to substantiate their volume figure. It was only when giving evidence Mr O'Kane said he believed he was being asked to price for a volume of blasted rock. Mr O'Kane seemed to give this evidence to support his use of a conversion factor of $2T/m^3$.

[73] Once evidence was heard from Mr O'Kane and from Mr Mallon about different conversion factors for different rock types, and for blasted and unblasted form, it became clear that a conversion factor of $2T/m^3$ was not the correct factor to use for the unblasted type of rock which the Pursuer sought to have processed. Mr O'Kane accepted he knew that, and both he and Mr Mallon thought the appropriate conversion factor was more likely to be in the region of $2.6T/m^3$ to $3T/ m^3$.

[74] I did not find Mr O'Kane credible when he claimed he had understood the volume figures being quoted by the Pursuer were for blasted rock, and that he priced the work on that basis.

[75] The Pursuer's pleadings clearly set out the basis of their volume calculation. It was based on surveys, and those were surveys of unblasted rock. The Defender's response was simply to say the Pursuer's volume figure was incorrect and it was not the volume processed by the Defender. At no point in their pleadings does the Defender suggest the difference is explained because the Defender is calculating volume based on blasted rock. The Defender simply states, "The volume is variable if, for example, there were voids in the

stockpile" and puts the Pursuer to proof on their volume figure. The tenor of their defence was to question the Pursuer's surveys and volume calculation.

[76] Mr O'Kane claimed in evidence he was dealing in volume of blasted rock, where the 2T/m³ may have been an accurate rate. The Defender's position on Record in Answer 5 was, "The Defender used the correct and agreed conversion rate of 2 tonne:1 cubic metre". In response to an averment by the Pursuer in Condescendence 6 that the Defender had used the wrong conversion rate, the Defender in Answer 6 averred, "…that the invoice contained the correct conversion rate…" and "The appropriate conversion rate was not 2.6 tonne: 1 cubic meters (sic)." I do not see any reference in the Pursuer's pleadings to a conversion rate of 2.6, and I do not see any reference to the Defender averring they was pricing for blasted rock.

[77] In evidence, Mr O'Kane said he knew the more accurate figure to be used to properly convert unblasted rock was closer to 3 T/m³. Mr Mallon said in evidence that 3T/m³ would probably have been a more appropriate factor to use. When Mr O'Kane was asked if it was wrong to use 2T/m³ for the volume of 12,422 m³, he said it was and that the conversion factor should have been 2.8. When asked if he should have corrected the Pursuer on this, he replied that he had enough to do running his own business. He did not say it was the correct factor to use. He said it was calculated incorrectly by the Pursuer from the start. He said the Pursuer should have known that, and that it was up to the Pursuer to look out for themselves. As the Defender knew at the time the correct factor was around 2.8-3T/m³, they knew therefore that the Pursuer was dealing in volumes of unblasted rock. The Defender chose a factor more appropriate to unblasted rock yet failed to advise the Pursuer of that.

[78] Mr O'Kane constantly said in evidence that the Pursuer's volume figures were only ever estimates. That ignores the reality of the Pursuer's position that its whole operation

was based on carefully calculated volume figures which it was relying upon in its contract with Renewi.

[79] The significance of Mr O'Kane's evidence on this issue is twofold. Firstly, it supports the Pursuer's case that they had no interest in weight to volume conversions. That was a matter for the Defender. If they had been prepared to enter into a weight to volume conversion, they would have taken steps to ascertain the density of the rock to obtain an accurate conversion factor. That is credible as they took great effort to calculate the volume. Secondly, had the Defender's position at proof been pled by them properly the proof may have taken a quite different turn. The Defender knowingly used an incorrect conversion factor in their discussions with the Pursuer. They admitted that in evidence. They claimed on Record however that it was the correct and appropriate conversion factor. Knowingly using an incorrect conversion factor, meant that the recorded weight of rock crushed was being converted into a volume which they knew was not consistent with what was appropriate for unblasted rock. Mr O'Kane said there were recognised conversion factors available, and the Defender knowingly did not use the correct one. It seems the Pursuer and their agent, and indeed the Defender's agent were all of the view that the proof had to rationalise how one party could claim to have excavated a certain volume of rock, whereas the other party claimed to have crushed almost double that claimed figure. Much time was spent on hearing evidence on volume calculations and weighing processes to try and rationalise the huge difference in volumes. It seems the answer was much easier. The Pursuer said that 12,465 m^3 of rock was excavated. The Defender said they processed 43,285 tonnes of rock. They applied a conversion factor of 2T/m^3 thereby arriving at a volume processed of 21,642 m^3. Mr Mallon said a conversion rate of 2T/m^3 was a completely arbitrary figure and that it was probably more accurate to use a factor of 3T/m^3. If a more

accurate conversion factor of 3T/m³ had been applied the Defender's volume figure would have been 14,428 m³, a difference from the Pursuer's figure of only 1963 m³. That of course would mean Mr Linnen's figures would be nowhere near the possible 50% error suggested by Mr Mallon.

[80] The Defender knew it was applying a conversion factor which was more appropriate to blasted rock rather than unblasted rock where the volume is much greater due to the bulking factor.

5 Did parties agree that the cost of processing the rock be based on volume of excavated rock or on weight of processed rock?

[81] The Pursuer claimed that the price agreed to process the excavated rock was to be calculated on a volume (per m³) basis. The Defender claimed the price agreed was to be calculated on a weight (per tonne) basis.

[82] Both parties brought expert evidence to support their position on industry standards for this type of process and whether the measurement should be by weight or by volume. Ultimately it is what the parties had agreed to which rules, and industry standards only assist in the interpretation of their contract. I was not satisfied either party had proved what the industry standard for this process was.

[83] Parties largely agreed the legal basis on how the court should approach the issue of interpretation of the terms of the contract.

[84] The interpretation of the contract is a matter of objective construction for the Court. From several authorities certain principles have evolved, and these are set out in both parties' submissions, and to which I have had regard. I accept the mere fact that a

contractual arrangement, if interpreted according to its natural language, has worked out badly for one of the parties is not a reason for departing from the natural language.

[85] In 2019, Renewi contacted the Pursuer, inviting the Pursuer to tender for construction works at the Landfill site.

[86] Renewi sent a Bill of Quantities to the Pursuer for use in their tendering process. That Bill of Quantities sought, inter alia, a price for the excavation of rock and ancillary processes at the site. The Pursuer's pricing for the tender document was to be calculated by reference to volume, i.e. cost per m^3.

[87] The Pursuer sought a price from the Defender to crush and process a given volume of excavated rock. An extract from the Bill of Quantities (known as the Mini Bill of Quantities) was sent to the Defender. It contained the details for excavating and ancillary processing of a volume of rock. The prices sought from the Defender were to be used by the Pursuer, inter alia, to assist the Pursuer in its tendering process with Renewi.

The negotiation process

[88] From around August 2019, David Quinn for the Pursuer and Keiran O'Kane for Defender engaged in discussions regarding the price to be charged by the Defender for crushing and processing the excavated rock.

[89] Mr Quinn said the Pursuer's contract with Renewi was priced in m^3. The Pursuer wanted to mirror that in the contract with the Defender to ensure consistency with the unit of measurement. The Defender however said they wanted to work in weight as their machines measured weight. Mr O'Kane insisted in evidence that he would only price a job based on weight, as that was the only accurate way to calculate what had been processed. Mr O'Kane insisted that the volume figures presented by the Pursuer were always

approximate figures, and that the true amount of material crushed would be determined by weighing the processed rock When calculating a price for the Pursuer, the Defender chose a conversion factor from volume to tonnes of 2T/m^3.

[90] Mr Quinn insisted that the Pursuer was never going to agree to a contract based on weight. If they had been prepared to agree a conversion factor, they would not have agreed such an arbitrarily chosen rate, and that further investigation would have been required to calculate the rock's density to obtain an accurate conversion factor. Mr Quinn said that in contracts of this nature, measurement was based upon pre-excavation volumes for rock and soils. The weight of the rock before and after was irrelevant. The volume afterwards was irrelevant due to bulking. In excavation contracts it was standard practice to measure in volume and to use m^3. That view was supported by Mr Marwick.

[91] Mr O'Kane initially denied he knew the Pursuer was contracting with a main contractor. He was easily corrected on that when he accepted he knew the Pursuer's tender in 2019 had to be in by a certain date, and that the Pursuer wanted the Defender's price to assist the Pursuer's tender process. The Defender had received a copy of the Mini Bill of Quantities and therefore knew the Pursuer was tendering with the main contractor (Renewi) on a rate per volume measurement. Mr O'Kane stated that the Pursuer had agreed the conversion rate, although he could not point to that in the e-mails. It was clear from the Pursuer's initial contact with the Defender, and from the Mini Bill of Quantities, that the Pursuer was asking the Defender to quote for processing a volume of excavated rock, and that was on the same basis as the Pursuer was dealing with the main contractor in their tender. There were a number of e-mails exchanged in 2019, and none of them suggested the price was to be measured by weight. On 9 August 2019 at 14.13 hours the Defender responded with prices for the work, shown in m^3, marked on the Mini Bill of Quantities, and

with the message, "Hi David please find attached with prices per m3". The Defender had therefore provided a price in m^3 as requested and had made no reference to having calculated that figure by applying a conversion rate.

[92] The only mention of tonnage was a vague reference in an e-mail from the Defender to the Pursuer dated 9 August 2019 at 16.59 hours, "Would make much more sense for your customer to pay for both aggs which keeps the cost per ton per product down". That comment seemed to simply refer to a possible alternative arrangement which the Pursuer might wish to make with Renewi; again, also confirming that Mr O'Kane well knew there was a principal contractor.

[93] The Pursuer's tender was not initially successful. After the arrangement with the successful tenderer broke down the Pursuer, in 2020, was offered the contract by Renewi. Thereafter the Pursuer approached the Defender (6 May 2020) to check if they were happy with the rates previously quoted.

[94] The Defender replied on 4 June 2020 (to Ken Madden) and on 29 June 2020 (to David Quinn) with prices, setting out rates dependent on the specification to which the rocks would be crushed. There were different rates, and all based on price per ton.

[95] There then followed a series of e-mails;

30 June 2020 at 16.50 hours, - the Pursuer noted the price breakdown. It was said to be for 15,422 m^3 or 30,844 (assuming 2T/m^3). There was to be a split for different specifications of crushing, of 40% 0-20 and 60% 20-40. This e-mail specifically broke down the total volume figure into quantities for the different specifications of crushed rock, and then applied a price per ton to each product.

6 July 2020, - Mr Quinn advised Mr O'Kane of a change in volume to around 12,000 m^3 and a change in the specification of crushing, and said, "It would be useful to have a 6F2 rate only

without removing the fines". Mr O'Kane replied "Hi david the 6f2 rate would be as previous quote £1.60/ton".

[96] Around this time David Quinn was corresponding with Ken Madden and with Niall Battersby of the Pursuer, and that correspondence confirmed the rate in m^3. On 10 July 2020 Mr Battersby was asked by Mr Quinn to issue a purchase order to the Defender based on the m^3 figures. The purchase order issued to the Defender clearly stated the work was to be costed based on volume, i.e. m^3. The description of work and the chargeable unit was stated as, "Crush Rock To 6F2 & Screenings Out 0-10mm Fines (m^3)" The unit price was £3.70 plus VAT of £0.74, a total of £4.44. That purchase order was never questioned by the Defender.

[97] It does not matter if the Defender did not know of the details of the Pursuer's arrangement with Renewi. That may have been a commercially sensitive matter. It was clear to the Defender however that the Pursuer was dealing with Renewi on a volume basis. The Defender knew there was a main client and was aware of a Mini Bill of Quantities which specified the work in volume.

[98] The Pursuer's measurements in respect of the rock were in m^3 and those figures were backed up with scientific data. It does not matter that the Defender was not aware of the details of the surveys. There was of course room for error, and so it was later found that the volume of soil was much greater than initially estimated, and correspondingly the volume of rock was underestimated. By agreeing figures based on volume and with detailed surveys before, during and after the excavation, the volume could be accurately calculated. That meant, if the volume changed (as it did because of the volume of soil discovered) the price changed; and so, both Renewi and the Pursuer were protected and neither was unfairly disadvantaged. The Pursuer was locked into that arrangement with Renewi.

[99] The Defender was asked to tender for processing a known volume of excavated rock. The Defender chose to try and convert that to weight as that was the measurement they were used to working in, and presumably that made their cost calculation for the tender easier. Mr Marwick noted estimators often used their own judgment to work between volume and weight, but that did not constitute an agreed conversion rate. It seems to me that any conversion by the Defender was for their own benefit and was to assist them in arriving at a competitive figure for tendering purposes. Whilst it may have been helpful to negotiations for each party to be considering the costs based on the measurement they were working with, ultimately the Pursuer required a figure which could be used to inform them in their tender process with Renewi.

[100] One would have thought that if the weight of the rock was crucial to the Defender, the Defender could have taken steps to ascertain what an accurate conversion factor should be. It seems, from the evidence of Mr O'Kane however, the Defender was not interested in providing an accurate conversion factor. He said it was a matter for the Pursuer to satisfy themselves. He knew however that the Pursuer was working on volume. As the Pursuer said, if they had been considering a conversion factor they would have had to investigate the matter further. It was for the Defender to satisfy itself what price they sought to charge for the work instructed, i.e. processing of a volume of excavated rock.

[101] Mr O'Kane insisted the Pursuer had agreed to contract based on price per tonne. He insisted that the volume stated by the Pursuer was just an approximation. If those two statements were correct, it made no sense at all for the Pursuer to advise the Defender during their e-mail exchanges on the price of the drop in volume of 3000 m^3. A change in volume would make no difference to the Defender if they were charging on weight of rock processed.

[102] There is nothing in the e-mail exchanges between the parties which I find supports the Defender's position that the Pursuer had agreed that the price to be charged would be based on the weight of rock processed. I preferred the evidence of Mr Quinn and Mr Madden when they said they had not agreed to costs being calculated by weight, and that costs were to be calculated by volume on the same basis as the Pursuer's contract with Renewi. The exchange of e-mails ended with the issuing of a Purchase Order which was clearly expressing the basis of measurement as in volume. That was not questioned by the Defender.

[103] Although Mr Marwick's evidence on this issue was not determinative, and he did not persuade me that volume was standard industry practice, he did satisfy me that volume is regularly used in certain construction/earthwork projects as a measurement of rock.

[104] In Mr Marwick's opinion the contract between the Pursuer and Renewi was a construction contract. The contract between the parties was a step-down contract and in his experience, it would also be a construction contract using the same measurement. Whilst I am not satisfied I can find that the contract between the parties was a construction contract. I am satisfied the Pursuer's wished their contract with the Defender to be calculated on the same basis as with Renewi, i.e. volume.

[105] There is no easy way to convert m^3 to tonnes. It would be clear to any commercial or reasonable business observer of the parties' e-mail exchange, that a figure of $2T/m^3$ selected by one party was simply to assist that party in assisting them in assessing a price to tender, and was not one which the Pursuer agreed to be bound by. Although the Pursuer might have acknowledged that the Defender was working in tonnes, ultimately it was a matter for the Defender to work out a price for the work requested. It could not have been made

clearer to the Defender that the Pursuer required a figure based on volume of material to be processed. The weight of the material was irrelevant to them.

[106] Having entered a contract with Renewi where the measurement was volume, any commercial observer would understand it would make no sense for the Pursuer to then knowingly enter a contract where the cost of processing the rock was based on a different measurement. They would also find it strange in the extreme for the Pursuer to rely on a third party (whose financial interest it was for the price to be as high as possible), to provide them with a conversion figure from volume to weight, and they might expect, if weight was crucial to one party, that party might wish to satisfy itself of the weight they were likely to be asked to process. The Defender did not do that.

[107] The Court should be concerned to give effect to the natural and ordinary meaning of the words used by the parties. It could not be clearer. It is said commercial common sense is not to be invoked retrospectively. It does not need to be in this case. Whilst a conversion factor might have been suggested by the Defender, and that factor might then be mentioned, as volume and specification changed, there was nothing in the parties' exchanges which suggested the Pursuer was agreeing a conversion factor. The conversion factor would simply have made it easier for the Defender to understand their own position. The Defender would also have known how their position might be affected if they chose to alter the conversion factor.

[108] As well as the exchange of e-mails, I had the evidence of various witnesses on the contract negotiations. I preferred the evidence of the Pursuer's witnesses on this issue, and I specifically rejected Mr O'Kane's evidence where it was in conflict. His evidence was not supported by the exchange of e-mails. His initial denial that he was unaware the Pursuer was involved with a main contractor did not stand up to scrutiny and he altered his position

on that. Further, his evidence on how the figure for the conversion factor was selected showed that he selected a figure which he accepted in evidence he knew was incorrect and was to his financial advantage.

[109] While it is important take an objective view of what reasonable people would have understood the position to be at the time the bargain was concluded, the parties' actings after that time are also relevant to the extent that they may cast light on what reasonable persons would have understood at that earlier time.

[110] After the work commenced, the Pursuer continued to have no interest in the weight of the material. They did nothing to monitor the weight, and indeed it was not clear how they could have gone about doing so. Other than having someone sit in the cab with the shovel operator checking the weights recorded, there seemed little opportunity to monitor weight. Volume continued to be of relevance to the Pursuer as they required to produce surveys for their contract with Renewi, and Mr Linnen continued to monitor the volume excavated.

[111] It seems to me that at no time during negotiations did the Defender ever suggest the volume of rock after it was excavated was of any relevance or significance to matters. The Pursuer was clearly dealing in volume of rock in situ and basing its figures on surveys. It was only after the event that the Defender sought to differentiate between blasted and unblasted material. They seemed to do that to justify selecting a conversion factor of $2T/m^3$, which was more appropriate to blasted rock. That however was inconsistent with Mr O'Kane's evidence that when contracting with the Pursuer he had chosen a conversion factor which he knew was incorrect for unblasted rock.

[112] I believe any reasonable and objective observer, commercial or otherwise would consider it commercial folly for the Pursuer to tie itself to a volume figure with Renewi

(which might adjust during the project, but with fairness to both parties) and at the same time leave itself open to an arrangement involving a conversion factor. That conversion factor appeared to be completely random, was chosen by the party who stood to benefit by a miscalculation of it and was one which the Pursuer had no reasonable method of checking without further detailed enquiry. The Pursuer was on a deadline to submit its tender to Renewi and had a wealth of scientific data from several sources informing them of the volume of excavated rock, and therefore the extent of the work to be done. With that foundation to their calculations and negotiations of costs with Renewi, they could tender with confidence. There could be no such confidence and certainty if they simply left a volume to weight conversion to the Defender. There was no scientific basis for the conversion rate chosen, and it is inconceivable, that with the amount of work having gone into calculating the volume of rock to be excavated, the Pursuer would leave itself open to such an arrangement.

[113] I am satisfied the Pursuer always intended the contract with the Defender to be measured in volume. I am satisfied the Defender was aware of that. I am satisfied the Pursuer did not agree to the contract being measured in weight, that the Defender knew that, yet still agreed to proceed. I find that the parties agreed the measurement to be applied was volume in m^3.

6 Prices for different specifications to which the rock was to be processed

[114] Parties agreed that the excavated rock would be processed to different specifications. Rock processed to 6F2 was to be charged at £3.20 per m^3. Rock with Fines taken out was to be charged at £3.70 per m^3. Mr Quinn said that near the end of the work, he instructed the Defender that they had sufficient material with Fines removed, and that the Defender

should stop removing them. That would have reduced the rate for the remaining work to £3.20 per m^3. Mr Quinn estimated the volume processed without fines removed was between 20% to 25% of rock processed, but he could not be certain of that. Mr O'Kane said that with about two days left of processing the Defender was asked to stop removing fines. He then however spoke to Mr Boyes, the Pursuer's former site supervisor, who told him to continue removing fines. Mr O'Kane said that although Mr Boyes was no longer the site supervisor, he was still in touch with the Defender.

[115] I am not satisfied the instruction to the Defender to stop removing Fines was sufficiently clear and reinforced., and I am satisfied that the Defender is entitled to be paid for all rock processed at the higher price of £3.70 per m^3.

7 Transport costs and standing time

Transport Costs

[116] The Defender's position was that transport costs were always charged, as they incurred a cost in getting their machinery on to site. That was standard industry practice. No 'one else spoke to that standard practice. The Pursuer appears to have initially paid the transport costs without objection. There is nothing in the exchange of e-mails which suggests the Pursuer agreed to meet the transport costs. The Defender's e-mail of 4 June 2020 mentioned "Transport at cost". There was no response from the Pursuer and the issue of transport costs was not followed up. The Pursuer's Purchase Order made no mention of transport costs.

[117] I am satisfied the onus is on the Defender to show a basis for charging transport costs. The Defender has failed to prove it is standard industry practice to charge for transport costs. The Defender did not offer any evidence to show how the transport cost

charge was calculated. I am satisfied there was no agreement reached regarding payment of transport costs. I find the Pursuer is not liable to the Defender in respect of transport costs.

Standing Time

[118] The Defender claims standing time. The Pursuer disputes this charge. Mr O'Kane said it was standard industry practice. There was no evidence of that. Mr Madden said standing charges are sometimes incurred, and he thought the Defender's charge was "fair enough".

[119] Standing time is charged in both invoices issued by the Defender. Invoice 2062 has a standing time charge of £619 plus vat. At a unit price of £619, that is a charge of one unit and covers a period of four hours. Invoice 2111 has a standing time charge of £8,666. Again, the unit price is £619. Applying the same rate, it would appear the Defender has charged the Pursuer 14 units on the second invoice. The standing price period covers 4 and 5 August 2020, and it is difficult to understand the basis of their charges.

[120] The Pursuer's position is that there was no agreement on standing time. The Pursuer sets out its objection to standing time being charged in Condescendence 6. They state it was never part of the parties' agreement. The Defender could not point to any agreement between the parties that standing time was chargeable. The Defender stated in its pleadings that, "It is standard industry practice to charge waiting time if the equipment is standing due to circumstances outwith the sub-contractor's control." There was no evidence of standard industry practice other than from Mr O'Kane. There was no mention in the e-mail exchanges of the Pursuer being liable for standing time. The charge having been disputed; the Defender offered no evidence to support their charge. Mr O'Kane could not give first hand knowledge of the actual standing time as he infrequently visited the site. Again, the

Defender's recording of standing time seemed casual. Their invoicing was difficult to follow. The Pursuer certainly wasn't aware that it was to be charged and therefore there were no steps taken to check the hours claimed. I am satisfied the onus is on the Defender to show a basis for charging standing time. I am not satisfied the Defender has proved it is standard industry practice to charge standing time. Even if it was, there is no evidence that the parties agreed to that practice applying. Further, there was no coherent basis of the rate of charge, or how the sum claimed was calculated, shown on the invoices, and the Defender did not seek to clarify the charge in evidence.

[121] The Defender has failed to prove it is standard industry practice to charge standing time. The Defender did not offer any evidence to show how the standing time charge was calculated. I am satisfied there was no agreement reached regarding standing time. I find the Pursuer is not liable to the Defender in respect of standing time.

Calculations

[122] The Pursuer seeks to recover the sums paid in respect of Invoice 2111 on the basis that the sums claimed therein were not due.

[123] The Pursuer's case is that the volume of rock processed was 12,465 m^3 and that the price agreed was £3.70 per m^3 where fines were removed. It is not possible to say what volume of rock was processed without fines being removed. I find that 12, 465 m^3 of rock was processed by the Defender. As it cannot be said what volume was processed without fines having been removed the whole volume falls to be charged at the higher rate of £3.70 per m^3. The sum due by the Pursuer to the Defender in terms of the contract is £55,334.60 (£46,120.50 + vat £9,224.10). The Pursuer has paid the sum of £61,497.80 in settlement of Invoice 2062. The Pursuer paid to the Defender the sums of £58,608.71, plus

interest of £115.80 and expenses of £1,611 being the sums claimed as due by the Defender in respect of Invoice 2111, and which were required to be paid to have the winding up petition dismissed. The Pursuer had already paid Invoice 2062 in the sum of £61,497.80., which is £6,153.20 more than the sum due.

[124] Therefore;

(i) the Defender has been enriched at the Pursuer's expense;

(ii) there was no legal justification for that enrichment; and

(iii) it would be equitable to compel the Defender to redress the enrichment

the Pursuer is entitled to the remedy of unjust enrichment, and to payment from the Defender in the sums of £58,724.51 **(**£58,608.71 + £115.80) and £1,611.

[125] Had the Defender been clearer at an earlier stage of proceedings of the basis of its choice of figure for a conversion factor, that might have alerted parties that the answer to the widely differing volume figures lay in assessing the true density of the rock, and not in significant failings in the measurement of volume or weight, and that may have allowed parties to limit the time taken by this court to deal with this dispute.

Expenses

[126] Parties wished time to consider expenses once this decision is made available. I will now assign a hearing on expenses.