OPINION OF LORD MACKAY OF DRUMADOON OUTER HOUSE, COURT OF SESSION. 23rd July 2004

[1] The pursuers are a limited company, which is in receivership. The defenders are also limited companies. All four of the defenders are active in the construction industry. For the purposes of carrying out the works of road construction, to which this action relates, the defenders have traded together as the *"Amey-Robert McAlpine-Taylor Woodrow-Barr M6 Joint Venture"*. It is as constituting the members of that trading entity that the defenders are parties to the present proceedings.

[2] In 1997, Autolink Concessionaires (M6) plc (*"the Employer*") entered into a Design Build Fund Operate Contract with the Secretary of State for Scotland, for the upgrading, operation and maintenance of the M6/M74 motorway from Millbank to Junction 44 on the M6 ("*the DBFO Contract*"). On 30 April 1997 the Employer entered into a contract with the defenders, for the design, construction and completion of the works involved in upgrading the sections of the motorway covered by the DFBO Contract and certain ancillary and accommodation works ("*the Main Contract"*). Under the Main Contract, the Operations Commencement Date was 29 July 1997.

[3] On 28 July 1997, the defenders issued an Official Order No. TWC/S 87156 ("the Official Order") to the pursuers. The Official Order related to the earthworks and site clearance required in the construction of a section of the motorway in Scotland and ancillary works in Scotland, which were collectively referred to as *"Scotland North"*. That section of motorway ran between Paddy's Rickle and Marchhouse Bridge. The Official Order stated that the pursuers would "*Provide all necessary Labour, Supervision, Plant and Materials and carry out the Site Clearance, Excavation, Earthworks, Topsoiling, Structures Excavations, Capping Layer and disposal of Drainage arisings in Scotland North for the sum of £9,000.000"*. The Official Order was placed subject to various conditions, including that the pursuers would complete and execute a Form of Sub-Contract, incorporating a number of Appendices, to which I will refer later. In this Opinion I intend to refer to the earthworks covered by the Official Order as *"Scotland North Earthworks",* without in any pre-judging the questions of (a) when and on what terms the pursuers and the defenders first entered into a contractual relationship and (b) the terms of the Sub-Contract, which it is agreed existed between the parties, following the execution, on 4 February 1998, of a Form of Sub-Contract, together with the Appendices and other documents referred to therein *("the Form of Sub-Contract Agreement"*). It will be appreciated that once the parties entered into the contractual relationship of Main Contractor and Sub-Contractor, the earthworks that required to be undertaken by the pursuers fell to be regarded as being *"Sub-Contract Works"*. On any view that had occurred by 4 February 1998. Later in this Opinion, I will deal further with the question of whether there may have been a contractual relationship between the parties from an earlier date.

[4] During July 1997, and it would appear some days before 29 July 1997, the pursuers began carrying out the Scotland North Earthworks. From that month onwards, interim applications for payment were submitted to the defenders and paid by the defenders. Whilst the first of those applications was submitted on notepaper in the name of APC (Civils) Scotland Limited, subsequent applications appear to have been in the name of the pursuers. From July 1997, the pursuers continued to carry out the Scotland North Earthworks (and such further earthworks as may have been instructed and ordered by the defenders) until 24 September 1998, on which date Joint Receivers were appointed to the pursuers. The pursuers and the Joint Receivers were only prepared to complete the Scotland North Earthworks (and the further earthworks that had been instructed and ordered by the defenders), on the basis of a re-negotiated sub-contract between the pursuers and the defenders. Such a proposal was not acceptable to the defenders. The defenders held the pursuers to be in repudiatory breach of the Sub-Contract that existed between them. On 30 September 1998, the defenders determined that Sub-Contract.

[5] Following the determination of the Sub-Contract, the pursuers submitted a claim for payment to the defenders. That claim is set out in documentation which is extensive and complicated. For the purposes of the debate before me the discussion proceeded on the basis that the pursuers' claim was contained in the Final Account Submission Version 2.1 (dated 9 September 2002) and an Addendum thereto, Version 2.1 (Nos. 6/18 and 6/19 of process). Various Appendices and other documents relevant to the quantification of the pursuers' claim against the defenders have also been lodged as productions.

[6] The present action was raised on 22 February 2002. In the summons, the pursuers conclude for payment of two sums, £10,441,754 and £2,450,617. The defenders, for their part, have counterclaimed for payment of five sums, £2,955,845.83, £404,496.71, £264,151.17, £429,345 and £1,716,147. After the pleadings were adjusted, a hearing was sought by the parties at which the Court was to be invited to answer a number of questions, the terms of which had been agreed by the parties. I understand that the parties seek answers to those questions, in the hope that such answers may assist in negotiating a settlement of some or all of the financial disputes between them.

[7] The questions posed are as follows:

Question A *What are the documents that form the Sub-Contract between the parties?*

Question B *Do the pursuers have a relevant case for payment of a bonus in terms of Clause 22 of Appendix 1 to the Sub-Contract as averred in Condescendence 8?*

Question C.1 *Can the pursuers claim under both clause 10 of the Sub-Contract conditions and clause 20 of Appendix 1 in respect of increased quantities of excavated earthworks?*

Question C.2 *If yes, what elements of such claim fall to be valued under (i) clause 10 of the Sub-Contract conditions and (ii) clause 20 of Appendix 1?*

Question C.3 *Is the programme TARGET2.PMA 17/Jun/97 listed in Appendix 8 to the Sub-Contract a contractually binding programme, such that, in respect of the earthworks specified therein, the pursuers were obliged to carry out the work specified in respect of material type, quantity, timing and location, all as set out therein?*

Question D *Do the pursuers have a relevant claim in respect of those alleged changes for which they have averred no written instruction or written confirmation?*

Question E *Do the pursuers have a relevant claim for finance charges as averred in Condescendence 10?*

Question F *Is the counterclaim relevant, or pled (whether in the pleadings or in the discs or documents lodged in process) with sufficient specification, to allow it to proceed to probation?*

By agreement between the parties, Questions E and F are not to be answered in this Opinion.

[8] It is important to note that during the course of the hearing I was not invited to sustain any pleas in law. All that I was asked to do was to answer those questions as I considered to be capable of answer, on the basis of the submissions I had received. It was recognised by senior counsel for both parties that I might reach the view that certain questions were not susceptible of answer, on the basis of submissions alone and that evidence might be required.

[9] In anticipation of the hearing, both parties lodged written Notes of Argument. During the course of the submissions extensive reference was made to certain of the productions that have been lodged. That occurred because both senior counsel found it appropriate to expand upon the factual averments in the written pleadings of their respective parties. Towards the end of the initial hearing I indicated that senior counsel should feel free to lodge written summaries of their respective positions, as to how the questions should be answered, having regard to the submissions and discussions during that hearing. Subsequently the defenders lodged a written Note, to which certain other documents were attached. That Note was subsequently revised on 10 February 2004. The Note summarised the defenders' position during the hearing. However, under reference to the documents attached to the Note, the Note also sought to expand on the factual and legal arguments advanced during the hearing. That was taken a stage further, by additional oral submissions, which senior counsel for the defenders delivered on 11 February 2004. The pursuers for their part lodged a written Response in reply to the defenders' Note. The initial version of that written Response was lodged before I heard the additional oral submissions from senior counsel on 11 February 2004. Subsequently, the written Response on behalf of the pursuers was adjusted to 10 March 2004. Both the Note for the defenders and the Response for the pursuers both contain detailed factual information relating to certain aspects of the Sub-Contract Works, which were mentioned during the course of the oral submissions, including ISC 37, Earthworks Schedules, Mass Haul Charts issued by the defenders, and road box excavations. The terms of the defenders' Note, the further submissions I heard on 11 February 2004, and to a lesser extent the terms of the pursuers' Response, all serve to illustrate the difficulty of focussing questions, whether of law or of fact, that are susceptible of answer, before the full facts of a complicated dispute have been established in evidence.

[10] During the course of the original hearing, I raised with counsel for both parties the general approach I might take to answering to the questions that had been posed. Both counsel were agreed that what the parties were looking for were the answers themselves, rather than summaries of the submissions I heard, extensive reference to authority or detailed explanation of the reasoning behind such conclusions as I felt able to reach. As best I can, I have sought to follow that approach.

[11] Before I turn to deal with the individual questions, it may be helpful if I indicate that in addressing the issues that have been raised, I found considerable assistance in what was said by Lord Hoffman in ***Investors Compensation Scheme Limited v West Bromwich Building Society*** [1998] 1 All E R at pp.114e - 115 f and Lord President Rodger in ***Bank of Scotland v Dunedin Property Investment Co Ltd*** 1998 SC 657 at p 661d-e and 665d-g. I refrain from quoting those passages verbatim. They both emphasise that when interpreting the provisions of a written contract a court is entitled to have regard to the full factual background and circumstances in which the language in the contract was agreed to.

Question A *What are the documents that form the Sub-Contract between the parties?*

[12] This question raises the issue of which documents "*form the Sub-Contract between the parties*". That question unfortunately begs a number of other questions, which have not been formally posed, but which were touched upon during the course of argument. Those questions arose despite the fact that the written pleadings of neither party assert that the parties had entered into a contractual relationship prior to 4 February 1994. The additional questions include (i) when the parties first entered into a contractual relationship with each other, (ii) if they did so prior to 4 February 1998, when that occurred and on what terms did the parties contract, (iii) whether the terms of any initial sub-contract were amended before 4 February 1998 and (iv) whether the terms of any sub-contract between them were amended when the parties executed the Form of Sub-Contract Agreement on 4 February 1998.

[13] In their written pleadings the pursuers aver that in February 1998 the parties entered into a *"written Sub-Contract" for the provision by the pursuers, as sub-contractors, to the defenders, as main contractors, of labour, supervision, plant and materials and the carrying out by the pursuers for the defenders of site clearance, excavation, earthworks, top soiling, structures excavations, capping layer and disposal of drainage arising in relation to the M6/M74 motorway. The pursuers aver that the Sub-Contract was constituted by (i) a written order (No. TWC/S 87156) dated 28 July 1997 issued to the pursuers by Taylor Woodrow Construction Limited on behalf of the*

defenders ("the Official Order"), (ii) the Conditions of Order attached thereto, (iii) minutes of meetings among representatives of the pursuers and the defenders held on 14 August 1997 and 7 September 1997 and (iv) a Form of Sub-Contract entitled "M6 CONSTRUCTION WORKS/Form of Sub-Contract Agreement SUB/M6/Sub-Contract Ref:- EARTHWORKS 2 / (PADDY'S RICKLE TO MARCHHOUSE BRIDGE)" dated 4 February 1998, together with the appendices thereto.

[14] The defenders, for their part, aver that the Sub-Contract was constituted by the Form of Sub-Contract Agreement executed on 4 February 1998 alone, that document having incorporated the terms of the documents specified in its Second Schedule, which include the minutes of the meetings on 14 August 1997 and 14 September 1997. In an effort to avoid confusion, I shall refer to the document executed 4 February 1998, including all the appendices and other documents referred to in its Second Schedule, as being "the Form of Sub-Contract Agreement", that being a term which appears on its front cover. All of the documents referred to in the pursuers' pleadings were lodged as productions.

[15] Taking the documents in chronological order, the Official Order is dated 28 July 1997. It was sent on that date to the pursuers, together with a version of the Form of Sub-Contract. As I have indicated, that Order was to the effect that the pursuers should "*provide all necessary Labour, Supervision, Plant and Materials and carry out the Site Clearance, Excavation, Earthworks, Topsoiling, Structures Excavations, Capping Layer and disposal of Drainage arising in Scotland North for the sum of £9,000,000.*" The Official Order provided that it was subject to certain conditions, which included the *"due and proper conclusion of the enclosed Form of Sub-Contract",* incorporating the various appendices referred to therein. The Official Order provided that the pursuers were required to confirm acceptance of the Agreement by returning the Form of Sub-Contract to Taylor Woodrow Construction Limited, duly completed. Paragraph 3 of the Official Order provided that:

> *3. The works are to be carried out in accordance with the Programme ref. TARGET2.PMA17/JUN/97 and all other documentation listed in Appendix 8 of the enclosed Sub-Contract Agreement."*

[16] As I have already indicated, it appears clear that the pursuers began carrying out the Scotland North Earthworks shortly before 29 July 1997. Site meetings between representatives of the pursuers and the defenders took place on 14 August 1997 and 7 September 1997. The minutes of the first of those meetings record that the purpose of the meeting was "*to discuss and agree the Sub-Contract and Sub-Contract Order previously sent to*" the pursuers. The minutes record that at the outset of the meeting all parties present were agreed that all of the documentation sent to the pursuers was deemed to be agreed, except for any items raised for discussion during the meeting. The meeting then considered and agreed a number of alterations to the documentation, which involved changes to the Form of Sub-Contract and Appendices 1, 2 and 3 attached thereto. A few of those agreed alterations were further modified, during the meeting of 7 September 1997. The minutes of that later meeting record that the representatives of the pursuers would recommend to the pursuers that they should sign the Form of Sub-Contract, amended as agreed. On 7 September1997, a copy of the minutes of that day's meeting was faxed to the pursuers by the one of the representatives of the defenders, who had attended the meeting. An accompanying fax sent by the defenders to the pursuers stated that the minutes reflected *"the agreement we now have in place"*. The fax message went on to assert that "*The Sub-Contract can now be signed subject to these minutes"*.

[17] Following the second of those site meetings a copy of the Official Order was amended, to include reference to two faxes dated 21 August 1997 and 7 September 1997, which included copies of the minutes of the two site meetings. Those hand-written amendments to the Official Order were initialled on behalf of both parties. Roger Reid, who had attended the site meetings on behalf of the pursuers, wrote to the defenders on 18 September 1997. Whilst the letter was typed on the notepaper of APC (Civils) Scotland Limited, it enclosed a copy of the Form of Sub-Contract, with attached Schedules and Appendices, which had been signed on behalf of the pursuers. In a reply 24 September 1997, R. C. Acres, writing on behalf of the defenders, sent a further copy of the Form of Sub-Contract (including reference to and copies of the two sets of minutes) for signature and initialling on behalf of the pursuers. Neither party suggested that there had been any change between the terms of the Form of Sub-Contract, with attachments, enclosed with the letter of 24 September 1997, and the terms of the Form of Sub-Contract Agreement that was signed on 4 February 1998.

[18] As I have indicated, the Form of Sub-Contract Agreement signed on 4 February 1998 included a number of schedules, appendices and other documents. The appendices and the two faxes, with accompanying minutes, all fell within the description of "*Further Documents forming part of the Sub-Contract",* set out in the Second Schedule. So also did four Earthworks Schedules, detailed in Appendix 10. The Official Order itself was not, however, referred to in the list of "*Further Documents forming part of the Sub-Contract*".

[19] The principal part of the Form of Sub-Contract Agreement contains a number of clauses. Appendix 1 sets out a total of twenty-nine "*Additional Conditions*". Appendix 2 is headed "*Preamble*" and sets out, over four and a half pages, and in numbered paragraphs, the scope of the Sub-Contract Works, what the Sub-Contract Price includes (Para. 1) and what it excludes (Para.2). It will be necessary to refer to the terms of certain of the other Appendices in the course of this Opinion. I merely note that the changes to the clauses in the principal part of the Form of Sub-Contract, which were agreed during the two site meetings, were not given effect to in the copy of that principal part, which was signed on behalf of both parties on 4 February 1998. Rather copies of the minutes of the meetings were incorporated into the Form of Sub-Contract Agreement, by being referred to in the Second Schedule and initialled on behalf of the parties on 4 February 1998.

[20] Senior counsel for the pursuers described the documentation relating to the Sub-Contract between the parties as being "*incomplete, confusing, and indecipherable*". That is a description which could not seriously be disputed. It is extremely surprising that the documentation setting out the terms of a major sub-contract, relating to a roads project of the significance of the upgrading of the M6/M74 Motorway, should be such a mix of standard form provisions, schedules, appendices, documents which have obviously been *"borrowed*" from previous written contracts, and other documents, which appear to have been drafted for one purpose and then incorporated into the Sub-Contract to fulfil some other purpose. It is perfectly obvious that nobody sat down and sought to revise the Form of Sub-Contract into a coherent and consistent form. That could have taken place, prior to the issuing of the Official Order. It should certainly have been carried out prior to the execution of the Form of Sub-Contract Agreement on 4 February 1998. The failure to do so has proved contrary to the interests of all parties. Many of the submissions that I heard would probably have been unnecessary, and could certainly have been refined, had the Sub-Contract documentation been properly drafted and revised. Standing the fact that the Sub-Contract relates to a major infrastructure project of public importance, a question may arise as to whether it is in the public interest for contract documentation of such significance to be put together in such a manner.

[21] As I have indicated, one of the questions which the parties have not formally posed for my answer is whether there was a contractual relationship between the parties prior to 4 February 1998. On the authority of ***Trollope and Colls Limited and Holland, Hannen and Cubitts Ltd, trading as Nuclear Civil Contractors (a firm) v The Atomic Power Construction Ltd*** [1962] 3 All E R 1936, I fully accept that it is possible for a construction contract to have retrospective effect, in a situation where work has commenced before any contractual relationship has been entered into between the parties involved. Equally, however, there is authority that parties can enter into a contractual relationship, in anticipation of their execution of a formal sub-contract (See ***Stent Foundations Ltd v Carillion Construction (Contracts) Ltd (formerly Tarmac Construction (Contracts) Ltd)*** (2000) 78 Con.L.R. 188).

[22] The pursuers' position, during submissions, was that parties initially entered into a contract during July 1977. They contend that contract was subsequently amended, after discussion and by agreement between the parties, before being formalised when the Form of Sub-Contract Agreement was executed on 4 February 1998. They also contend that the Official Order was intended to survive execution of the Form of Sub-Contract Agreement, that it remains a contractual document, that it "tells" parties and the court when the Sub-Contract between the parties commenced and that, in any event, it is part of the factual matrix relevant to the construction of the Form of Sub-Contract Agreement executed on 4 February 1998. The Form of Sub-Contract Agreement itself had retrospective effect in respect of changes to the Sub-Contract Works ordered prior to 4 February 1998.

[23] In response to those submissions, the defenders' position, both in written pleading and submission, was that the Form of Sub-Contract Agreement, dated 4 February 1998, constitutes the Sub-Contract between the parties. The Second Schedule of the Form of Sub-Contract Agreement details the further documents that form part of the Sub-Contract. Those further documents do not include the Official Order dated 29 July 1997 and accordingly it never was a document forming part of the Sub-Contract between the parties.

[24] In my opinion, the question of whether the parties entered into a contractual relationship prior to 4 February 1998 is an important factual issue, which in all probability will require to be addressed and determined, before this action can be finally resolved. That issue was one on which the defenders' position was, at least at the outset of the debate, slightly equivocal. That may have been partly because of the terms in which the pursuers' pleadings are couched. Against the background that no admission was made that there had been any contractual relationship between the parties, prior to 4 February 1998, the defenders' position, as summarised, in Para. 1.2 of their Note of Argument, was that the Form of Sub-Contract Agreement, which the parties had executed on 4 February 1998, superseded earlier documents *"even those that might otherwise have had contractual effect"*. That argument could be described as being somewhat coy. The argument has also to be read in conjunction with a further argument, which was advanced on behalf of the defenders, to the effect that the Official Order was *"merely an intermediate stage in the process of negotiation of the contract and not the document that constituted the final contract" (Para. 4.1 of the Note of Argument for the Defenders). Whilst in their further Note the defenders considered it appropriate to call upon the pursuers to give "a candid account of when they say that the sub-contract work commenced",* it is important to remember that in commercial actions the court expects all parties to plead their cases clearly and unambiguously.

[25] Having carefully considered all of the oral and written submissions placed before me on behalf of the defenders, it remains unclear to me whether the defenders' position is that there was no contract at all, prior to 4 February 1998, or whether the defenders are keeping their options open, in respect of that important factual issue. That issue is, of course, separate from the issues of whether the Form of Sub-Contract Agreement executed on 4 February 1998 is now the Sub-Contract between the parties and whether it contains all the terms of that Sub-Contract.

[26] Some of the documents to which I was referred during the course of the hearing may point towards a contractual relationship having existed between the parties prior to 4 February 1998, as may the fact that a considerable volume of earthworks were carried out by the pursuers between July 1997 and 4 February 1998. Furthermore, during the course of his submissions, senior counsel for the defenders acknowledged that if the pursuers had gone into receivership, prior to 4 February 1998, it might have been difficult for the defenders to have resisted the contention that there had been a contract between the pursuers and the defenders. Indeed, it might well have been in the defenders' interest to argue that there had been such a contract. In the absence of any contract, the

pursuers (in receivership) might have been able to argue that they had a *quantum meruit* claim in respect of the earthworks they had carried out. Moreover the absence of any contract would have made it difficult for the defenders to have advanced a counterclaim along the lines that they currently do.

[27] As the additional questions I have mentioned involve questions of fact, in which there is dispute between the parties, it would not be open to me to make any findings in respect of them, until a hearing of evidence had taken place. In my opinion, however, Question A could not be answered until those additional questions are resolved by the parties or determined by the court. Accordingly, after giving the question careful consideration, I have reached the conclusion that it would be inappropriate for me to attempt to answer this question at this stage. Having reached that conclusion, I would not wish to give any impression that I agree with the defenders' suggestion that this question may now be academic.

Question B : *Do the pursuers have a relevant case for payment of a bonus in terms of Clause 22 of Appendix 1 to the Sub-Contract as averred in Condescendence 8?*

[28] The relevant provisions in the Form of Sub- Contract Agreement are as follows:

Appendix 1
Clause 20 End of Contract Bonus
If the Contractor earns a bonus from the Employer for completing the Contract early then the Contractor will pay the Sub-Contractor a corresponding bonus in accordance with the attached schedule. This will only be payable to the Sub-Contractor if and when the Contractor receives payment." ....

Appendix 7
SCHEDULE OF POTENTIAL SUB-CONTRACTORS BONUS PAYMENTS
Further to clause 22 of Appendix 1 the Sub-Contractor will be paid a bonus if and when the Contractor receives payment calculated from the following schedule. The Sub-Contractor shall only be paid if the Contractor receives payment. No claim will be made by the Sub-Contractor for whatever reason if they do not receive payment.

POTENTIAL BONUS EARNING	**EARTHWORKS**	**SUBCONTRACT**	**SCOTTISH NEW WORKS**			
BONUS DETAIL	CONTRACT	TARGET	NO OF WEEKS	NO OF DAYS	BONUS	BONUS
	PROGRAMME	PROGRAMME	EARLY	EARLY	PAYMENT	DUE
	PERIOD (WEEKS)	PERIOD (WEEKS)			PER DAY	£
1. Early Completion of New Scottish						
Works	121	92	29	203	201	40,803
2. Early Permit to Use Paddies *(sic)*						
Rickle to Beattock	115	92	23	161	1,290	207,690
3. Early Permit to Use Beattock to						
Cluechbrae	96	73	23	161	356	57,316
4. Additional Bonus for Scot North						
PTU achieved before Scot South	0	0	0	0	378	0
TOTAL POTENTIAL BONUS						**305,809**

[29] The pursuers' position in respect of this question is set out in their revised skeleton Note of Arguments. They argue that their right to a bonus is an accrued right, which vested on 4 February 1998 (at the latest) and survived the determination of their Sub-Contract with the defenders. In advancing that submission, considerable reliance was placed on a passage in the Opinion of Fox L.J. in ***Damon Compania Naviera SA v Hapag-Lloyd International SA*** [1985] 1 W.L.R. 435 at p.450A - 451H, in which he quoted from the Judgement of Dixon J. in ***McDonald v Dennys Lascelles Ltd*** (1933) 48 C.L.R.457 at pp. 476 - 477:- *"When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from further performance of the contract, but rights are not divested or discharged which have been unconditionally acquired. Rights and obligations which arise from partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected."*

[30] Senior Counsel for the pursuers argued that the only contingencies referred to in the Sub-Contract, which affected payment of a bonus to the pursuers, as Sub-Contractors, were (i) that the defenders, as Main Contractors, had earned a bonus under the provisions of the Main Contract and (ii) that the defenders had received payment of that bonus. The pursuers' right to bonus did not arise from nor was it dependent upon their having carried out the Sub-Contract Works, whether in whole or in part. Their right arose from the terms of the Sub-Contract and the subsequent purification of the two contingencies to which I have referred.

[31] It was also submitted on behalf of the pursuers that it was clear from the provisions of Appendix 7 that bonus could be paid in respect of one or other or both of the sections of the Sub-Contract Works. That served to demonstrate that the right to bonus was intended to survive a termination of the Sub-Contract, on a date prior to the completion of all of the Sub-Contract Works. It was argued that since the pursuers may be obliged to pay damages to the defenders, in respect of any loss incurred by the defenders in completing the works that fell within the scope of the Sub-Contract Works, it would be perverse to deprive the pursuers of a bonus. That was because the calculation of damages payable to the defenders, following on the termination of the Sub-Contract, would require to reimburse the defenders for any reasonable bonus that may have paid to earthworks sub-contractors, who had completed the earthworks required to enable the Main Contract Works to proceed.

[32] The defenders' position is that the pursuers' entitlement to receive a bonus was dependent on the completion by the pursuers of one or both of the individual sections of the Sub-Contract Works, referred to in Appendix 7, by dates determined by reference to the Contract Programme Period (as determined in accordance with the Main Contract) and the Overall Programme Period (as determined in accordance with the provisions of the Sub-Contract). The pursuers had not enjoyed any unconditional accrued right to payment of a bonus, which had survived the termination of the Sub-Contract, following the appointment of Receivers to the pursuers, and which was still payable, notwithstanding the fact that the pursuers had not themselves completed either section of the Sub-Contract Works.

[33] In fact senior counsel for the defenders went further. He conceded that had the earthworks constituting the Sub-Contract Works been completed by the pursuers and the pursuers had thereafter gone into Receivership, before any bonus under the Main Contract had been paid, the Receivership and the consequent determination of the Sub-Contract would not have deprived the pursuers of any bonus, to which they would otherwise have been entitled.

[34] The dispute that has arisen as to whether the pursuers are entitled to be paid a bonus may be another example of where a lack of care and attention given to the drafting of the contractual documentation may have given rise to a problem that could have been avoided. Carefully drafted Clause 18 of the Form of Sub-Contract Agreement could have provided when the pursuers' rights to bonus accrued and whether or not such rights would survive the determination of the contract, in the event of default on the part of the pursuers.

[35] During the later stages of the hearing, it became apparent that there is a considerable dispute between senior counsel for the pursuers and senior counsel for the defenders as how the terms of Appendix 7 fall to be construed and, in particular, as the maximum amount of bonus that could have been payable to the pursuers, as Sub-Contractors, had the pursuers completed the Sub-Contract Works. Indeed senior counsel for the pursuers ended up advancing a construction of Appendix 7, which was different from that which had been adopted by the pursuers in the preparation of their Final Account of Submission (No. 6/18 of process). Put shortly the submission on behalf of the pursuers during the hearing was that the total bonus payable to them could not have exceeded £305,809, the sum shown in Appendix 7.

[36] The contention on behalf of the defenders was that the total bonus payable to the pursuers could have been higher than that figure, if either or both of the sections of the Sub-Contract Works had been completed by the pursuers by dates falling with the Overall Programme Period, referred to in Appendix 7. For the purposes of answering this particular question it is unnecessary to go into the detail of this particular dispute, which I suspect may only be resoluble after hearing evidence, as to the facts and circumstances surrounding the conclusion of the Sub-Contract, including the terms of the Main Contract.

[37] Equally, my answer to this question is not dependent on when the Sub-Contract between the parties was entered into nor on whether the Official Order forms part of the contractual documentation. That is because both parties are agreed that, in addition to Clause 18 of the Form of Sub-Contract Agreement, Clause 22 in Appendix 1 and Appendix 7 are the contractual provisions that are of crucial relevance to this Question.

[38] I have not found this an easy question to answer. In my opinion, once the Sub-Contract between the parties was concluded, (whenever that was), the pursuers did acquire rights to be paid a bonus. Those rights were, however, subject to a number of contingencies. Two of these contingencies related to the defenders' position under the Main Contract. These were that the defenders became entitled to receive and had been paid a bonus under the Main Contract. In my opinion, however, the pursuers' right to be paid a bonus was also dependent upon the pursuers completing the earthworks forming those Sub-Contract Works, referable to one or other or both of the two sections of the Main Contract Works specified in Appendix 7. In my opinion, that is the inference to be drawn from considering the relevant contractual provisions, namely Clause 22 of Appendix 1 and Appendix 7, and giving the words found in those provisions their natural and ordinary meaning. Clause 22 of Appendix 1 refers to the defenders earning a bonus from the Employer for completing the Main Contract early and then paying the pursuers, as Sub-Contractors, *"a corresponding bonus in accordance with the attached schedule*". In my opinion, "a

corresponding bonus" falls to be construed as being a bonus earned by and paid to the pursuers for completing the Sub-Contract Works and doing so "*early*", in the sense that one or both of the sections of the Sub-Contract Works are completed within the timescale provided for in Appendix 7. The bonus under the Main Contract required to be "earned" by the defenders. In my opinion, the *"corresponding bonus*" required to be *"earned"* by the pursuers and was contingent on their completion of one or both of the sections of the Sub-Contract Works, within dates determined in accordance the provisions of the Main Contract and the Sub-Contract.

[39] I accept, of course, that the provisions of Clause 18 of the Form of Sub-Contract Agreement gave the defenders a discretion as to whether to issue a Notice of Determination to the pursuers, in the event of some default on the part of the pursuers. If such a Notice of Determination had not been issued, in circumstances in which it could have been, that would, no doubt, have assisted the pursuers in their claim that they are entitled to a bonus. In my opinion, however, the fact that the Sub-Contract was determined before either of the sections of the Sub-Contract Works referred to in Appendix 7 was completed by the pursuers was, by itself, sufficient to prevent the pursuers from completing the Sub-Contract Works (or either section of them). Indeed, the Sub-Contract Works, as such, were never completed. What happened was the uncompleted portion of the earthworks, which fell within the scope of the Sub-Contract Works, as that term was defined in the Sub-Contract, was made the subject of another contract and completed by other sub-contractors.

[40] In my opinion, nothing in the case of ***Damon Compania Naviera SA,*** to which I was referred, requires this question to be answered in favour of the pursuers. I accept, of course, that the parties to the present dispute did not provide in the Form of Sub-Contract Agreement that upon determination of the Sub-Contract, no bonus would be payable to the pursuers. No provisions to that effect were included within Clause 18 or Clause 22 of Appendix 1 or Appendix 7. Nevertheless, when the language used in Clause 22 of Appendix 1 and Appendix 7 is given its ordinary meaning, it is, in my opinion, clear that the parties agreed that bonus should only be payable when the pursuers, as Sub-Contractors, had completed, within the timescale provided for in Appendix 7, one or more of the two sections into which the Sub-Contract Works have been divided and the two contingencies relating to the defenders had been purified.

[41] I appreciate that the construction I favour would have the consequence that if the determination of the Sub-Contract under Clause 18 had occurred after the pursuers had completed say 95% of the Sub-Contract Works, no bonus might have been payable. On the other hand, the construction that the pursuers argue for is one that could have entitled the pursuers to a substantial bonus, irrespective of the percentage of the Sub-Contract Works that the pursuers had actually completed.

[42] In my opinion, there is a further reason why the construction of the contractual provisions argued for by the pursuers can be rejected. The possibility of the Sub-Contract being determined on account of default by the Sub-Contractors was in the minds of the parties, when the Sub-Contract was entered into. That was what Clause 18 of the Form of Sub-Contract Agreement provided for. In my opinion, it is highly improbable that the parties intended that, if the Sub-Contract was to be determined under the provisions of Clause 18, by reason of some default on the part of the pursuers, and subsequently, through the efforts of others, one or other of the uncompleted sections of the Sub-Contract Works was to be completed, by dates that would otherwise have resulted in bonus being payable, then such bonus should be payable to the pursuers. Standing the wide range of circumstances that could have given rise to the defenders terminating the Sub-Contract under the provisions of Clause 18, I do not consider that it would have been commercially sensible for the parties to have so provided.

[43] When the Form of Sub-Contract Agreement was executed, the parties intended that in the event of a termination brought about by a repudiatory breach of contract on the part of the pursuers, both parties would have continuing rights and obligations. In the event of such a termination, the defenders would have a right to claim against the pursuers for any additional costs they incurred in completing the earthworks encompassed within the Sub-Contract Works. The pursuers, for their part, would have the right to claim for payment, in accordance with the provisions of the Sub-Contract, for the works they have done, together with any other payments they were entitled to in accordance with rights they had acquired prior to the date of termination. Although the pursuers' right to claim bonus might come to nothing, in the event of a termination of the Sub-Contract in terms of Clause 18, it would still be in the commercial interests of both parties that the pursuers should seek to meet the Overall Programme, so long as the Sub-Contract remained in existence. Were the pursuers to do so, that would serve to maximise the payments they were entitled to receive and to restrict the extent of any earthworks that the defenders would require to have completed by other sub-contractors. As far as any losses recoverable by the defenders are concerned, it would be in the interests of the pursuers that they should be minimised as far as possible. Equally, from the perspective of the defenders, it was in their interests that the pursuers should seek to meet the Overall Programme and avoid acting in a manner that would entitle the defenders to determine the Sub-Contract, in terms of Clause 18, on the ground of the pursuers' default.

[44] I understand the position to be that whilst the pursuers made good progress in the completion of the Sub-Contract Works, they had not completed either section of those works before they went into Receivership. Notwithstanding the dispute as to the correct construction of Appendix 7, the parties appear to be agreed that had the pursuers not gone into Receivership and had the Sub-Contract run its course, then, having regard to the dates when the Main Contract Works and the earthworks covered by the Sub-Contract were actually completed, the pursuers would probably have received a bonus. Such bonus would have become payable to them, once the defenders had received payment of the bonus which they earned under the Main Contract. In these circumstances, I wish to

make it clear that my answer to this question is not designed to exclude all further consideration of the contractual provisions relating to bonus, during later stages of this action. I do not wish to foreshadow, in any detail, the submissions I may hear in relation to Question F, but I would be surprised if the extent of the bonus that the pursuers might have received, had the Sub-Contract run its course, did not figure in discussions as to the extent of any damages that the defenders are entitled to recover from the pursuers.

Question C.1 *Can the pursuers claim under both clause 10 of the sub-contract conditions and clause 20 of Appendix 1 in respect of increased quantities of excavated earthworks?*

[45] The provisions of the Form of Sub-Contract Agreement that are relevant to this Question are as follows:

"Clause 1(1)(a)

'Change' means a variation in the design, quality or quantity of the Sub-Contract Works and may include but not be limited to additions, substitutions, alterations in design, properly ordered by the Secretary of State for Scotland or the Department's Agent, or the employer or a contractor. ....

Clause 1(1)(bb)

'Sub-Contract Works' means the works described in the documents specified in the Second Schedule hereto and any further works instructed as a change in accordance with the sub-contract. ....

Clause 9(1)

A Sub-Contractor shall make such Changes to the Sub-Contract works, whether by way of addition, modification or omission as may be:-

(a) ordered by the Secretary of State for Scotland's Agent or the Employer under the main contract and confirmed in writing to the Sub-Contractor by the contractor; or

(b) agreed to be made by the Employer and the Contractor and confirmed in writing to the Sub-Contractor by the contractor; or

(c) ordered in writing by the Contractor. ....

Clause 9(3)

Save as aforesaid a Sub-Contractor shall not make any alteration in or modification to the Sub-Contract Works. ....

Clause 10

1. *All authorised Changes of the Sub-Contract Works shall be valued in the manner provided by this Clause and the value thereof shall be added to or deducted from the Price specified in the Third Schedule hereto or as the case may require.*
2. *The value of any authorised Changes may be ascertained by reference to the rates and prices (if any) specified in this Sub-Contract for the like or analogous work, but if there are no such rates or prices, or if they are not applicable, then such value shall be such as is fair and reasonable in all the circumstances. In determining what is a fair and reasonable valuation, regard shall be had to any valuation made under the Main Contract in respect of the same Change. .... "*

Clauses 12 and 20 of Appendix 1 provide:

"12 <u>Schedule of Rates</u>

When written changes are issued pursuant to the terms of the Sub-Contractor (sic) by the Contractor they shall be valued at the rates included within the schedule of rates attached to this sub-contract where ever possible. These rates are total rates and are deemed to be fully inclusive rates which shall require no payment whatsoever for the works concerned.

20 <u>Changes in Quantities</u>

If the total final volume of excavations carried out by the Sub-Contractor increases or decreases by more than 10% from the attached earthwork schedules, the Sub-Contract price will be increased or decreased respectively, any adjustment in the Sub-Contract Price by way of increase or decrease shall be shared equally by the Contractor and the Sub-Contractor, as follows:

i) Sub-Contract sum divided by the excavation quantity in attached earthwork schedule = rate of m^3 of excavation.

ii) Rate for m^3 of excavation x increase or decrease in volume excavation (over the 10%) = value of adjustment.

iii) Increase or decrease in the Sub-Contract Price = value of adjustment x 50%.

This adjustment will be fully inclusive of all costs whatsoever."

[46] It is important to bear in mind the definition of "Cost" in Clause 1(1)(a), which provides that "Cost" means all direct expenditure reasonably and properly incurred or to be incurred whether on or off the Site excluding overhead finance and profit.

[47] As far as the applicable law is concerned there was no real dispute between the parties. Senior counsel for the defenders referred to ***Sinochem International Oil (London) Co Ltd v Mobile Sales and Supply Corporation*** [2000] 1 Lloyd's Rep. 339, in the leading judgement of which, Mance L.J. referred to the speech of Lord Hoffmann in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1988] 1 W.L.R. 896. It was a matter of agreement between the parties that guidance was to be gained from such authorities.

[48] In my opinion, the pursuers are correct in arguing that the provisions of Clause 10 apply to the valuation of particular items of work. Such items of work require to be "*authorised Changes*" in the Sub-Contract Works. Such changes require to be authorised in terms of Clause 9, before they fall to be valued, as such, under the provisions of Clause 10, whether by reference to rates and prices or on the basis of what is fair and reasonable in all the

circumstances. The valuation exercise requires to take into account of the provisions of Clause 12 of Appendix 1, which I have already quoted.

[49] The schedule of rates referred to in Clause 12, which is attached to the Form of Sub-Contract Agreement, is Appendix 6. It is headed SCHEDULE OF SUB-CONTRACTORS' RATES and provides that *"Further to Clause 12 of Appendix 1 these rates are total rates and shall be deemed to be fully inclusive of all costs whatsoever*". There then follows in Appendix 6 a list of rates for various items of work, such as the excavation of topsoil, deposition, compaction, topsoil storage and placing. As I have already indicated, Clause 10 provides that if no rates and prices are applicable to the work covered by an "*authorised Change*", then its value shall be such as is "*fair and reasonable in all the circumstances"*.

[50] During the debate there was considerable discussion as to whether particular items of works should be regarded as (i) "Changes" authorised under Clause 9 and to be valued under Clause 10, or (ii) covered by the provisions of Clause 2(8) of the Form of Sub-Contract Agreement or (iii) attributable to delay and disruption arising from the development of the detailed design of the Project, as dealt with in Clause 11(1)(d) of the Form of Sub-Contract Agreement. Clause 2(8) provides that 'the Sub-Contractor shall be deemed to have fully satisfied himself as to the risks and contingencies influencing his price' and shall not be entitled to any extension of time or additional payment in respect of any failure on his part to discover or foresee any conditions, risk, contingency or other circumstance, which may influence the execution of the Sub-Contract Works. Clause 11(1)(d) provides that the Sub-Contractor is deemed to have allowed within the Price for any delay and disruption arising from the development of the design and is not entitled to an extension of time or to recover any additional costs as a result of the continuing development of the detailed design.

[51] For the purposes of answering this Question I intend to proceed, in the first instance, by addressing the issues of construction involved on the basis of two factual assumptions (a) that the pursuers can establish that they were instructed, in accordance with the procedure set out in Clause 9, to carry out "authorised Changes" to the Sub-Contract Works in the form of earthworks and (b) that such "authorised Changes" involved the pursuers excavating volumes of earth and rock additional to the volumes provided for in the Earthwork Schedules detailed in Appendix 10. In carrying out this exercise, it is appropriate to leave out of account, for the moment, the fact that the pursuers have gone into receivership.

[52] Proceeding on the basis of those two assumptions, the pursuers would, in my opinion, be entitled to have the earthworks covered by "authorised Changes" valued in accordance for the provisions of Clause 10 of the Form of Sub-Contract Agreement and to recover payment of the value of those earthworks. Still proceeding on the basis of those factual assumptions, when the provisions of Clause 20 of Appendix 1 fall to be applied and the total final volume of excavations carried out by the pursuers is being calculated, the volumes of rock and soil excavated in accordance with "authorised Changes", would, in my opinion, fall to be taken into account, in determining whether the total final volume of excavations carried out by the pursuers, as Sub-Contractors, had increased or decreased by more than 10% from the volume of excavations provided for in the original Earthwork Schedules. In my opinion, account would require to be taken of such additional excavations authorised under Clause 9, whether they had been valued by reference to Schedule 6 Rates or on the basis of what was fair and reasonable in all the circumstances. Equally, in applying the provisions of Clause 20 of Appendix 1 account would require to be taken of "authorised Changes" that reduced the excavations carried out by the pursuers.

[53] In my opinion the fact that the value of an "*authorised Change*" falls to be determined, if possible, by reference to rates, which are described in Clause 12 of Appendix 1 as being "*total rates and... deemed to be fully inclusive rates which will require no further payment whatsoever for the works concerned"* and in Appendix 6 as being *"total rates and... deemed to be fully inclusive of all costs whatsoever",* does not result in any additional volumes excavated, in accordance with the terms of authorised Changes, being excluded from the exercise provided for in Clause 20 of Appendix 1. Equally, in my opinion, the fact that Clause 20 of Appendix 1 concludes with the words *"this adjustment will be fully inclusive of all costs whatsoever*" does not alter the position. Similar observations can be made in respect of the language to be found in the opening sentence of Appendix 6, which refers to the rates *'being deemed to be fully inclusive of all costs whatsoever"*. In my opinion it is perfectly possible to give content to those various passages, without adopting the construction argued for by the defenders, to the effect that the pursuers, as the Sub-Contractors, are not able to claim under both Clause 10 and Clause 20 of Appendix 1, in respect of the same increases in the volume of excavations. That is so because it was, in my opinion, possible for both parties to envisage that the defenders, as Main Contractors, would require to authorise Changes under the provisions of Clause 9, which would have a significant impact on the volume of excavations to be carried out by the pursuers, as Sub-Contractors, whether the result would be to increase or decrease the total final volume of excavations. Were such Changes to be valued in terms of the rates set out in Appendix 6, such valuation would take no account of preliminaries, overheads and profit, which do not fall to be considered as elements of the *"costs"* for the earthworks in question. I accept, of course, that it was equally possible to envisage that in circumstances that are provided for in Clause 2.(8) and Clause 11.(1)(d), the pursuers might require to carry out earthworks that were not specified in the Earthworks Schedules referred to in the Form of Sub-Contract Agreement nor covered by an "*authorised Change*" ordered by the defenders in terms of Clause 9. However, in my opinion, the provisions of Clause 20 of Appendix 1 are not limited to the earthworks shown in the original Earthworks Schedules and those arising out of events of the nature anticipated by Clause 2.(8) and Clause 11.(1)(d), which may have impacted on the pursuers' completion of the Sub-Contract Works.

[54] In any event the provisions of Clause 20 of Appendix 1 are directed to adjustment, upwards and downwards, of the Sub-Contract Price, not to the adjustment of payments to be made to or withdrawn from the pursuers, in respect of individual increases or decreases in the quantities to be excavated, which have been authorised in terms of Clause 9. But for the provisions of Clause 20 of Appendix 1, the sole beneficiary of any significant reduction in the total volume of excavations would have been to the pursuers, who would have retained the profit element (and probably more) in respect of the reduction of the total volume of excavations. Likewise the beneficiary of any significant increase in the total volume of excavations would have been the defenders, who would have been required to meet the increased costs of the pursuers, taken into account during Clause 10 valuations, without requiring to pay any preliminaries, overheads or profit element, in respect of the additional volumes of excavation valued under that Clause. The provisions of Clause 20 of Appendix 1 serve to adjust that position, to the shared benefit of both parties, when the variation in the total volume excavated amounts to an increase or decrease of more that 10% from the volumes shown in the Earthwork Schedules referred to in the Form of Sub Contract Agreement. The fact that both parties benefit when the provisions of Clause 20 apply supports the view the pursuers are not claiming twice in respect of individual items of work. The provisions of Clause 20 of Appendix 1 bear to apply to the total volume of excavations actually carried by the pursuers. In my opinion, there is nothing in the terms of Clause 20 that requires any increases or decreases in earthworks covered by "*authorised Changes*" under Clause 9 to be excluded from the calculation of the total volume of excavations.

[55] Whether the pursuer is able to establish that additional volumes of excavation have been ordered in accordance with the provisions of Clause 9 (or should be deemed to have been so authorised) are questions of fact, for agreement between the parties or determination at a later stage in these proceedings. But if the pursuers are able to establish that additional earthworks involving excavation have been ordered by the defenders in accordance with the provisions of Clause 9 of the Form of Sub-Contract, that would establish that there had been *"Changes",* as defined in Clause 1(1)(bb), to the Sub-Contract Works. In that event, the pursuers would be entitled to be paid the value of those additional works of excavation, as determined in accordance with the provisions of Clause 10. In my opinion, the pursuers would also be entitled to have the volumes of those additional works of excavation taken into account, when the calculations provided for in Clause 20 of Appendix 1 are undertaken. In my opinion, the right to recover payment under Clause 10 and Clause 20 of Appendix 1 would also apply in respect of additional works of excavation that fall to be deemed to have been authorised in accordance with the provisions of Clause 9. By the use of the word "*additional*", I am, of course, referring to volumes of excavation additional to the volumes provided for in the Earthwork Schedules detailed in Appendix 10 to the Form of Sub-Contract Agreement.

[56] Similarly, as I have already stressed, "*authorised Changes*" that have resulted in the pursuers being ordered not to carry out excavations specified in the original Earthworks Schedules would require to be valued in accordance with Clause 10 and taken account of in determining the adjustment in the Sub-Contract Price, in terms of Clause 20 of Appendix 1.

[57] The next issue I consider is whether the fact that the pursuers went into receivership, before the Sub-Contract Works were completed, should have any bearing on the answer to this Question. Clearly the possibility of the pursuers going into receivership was contemplated, when the Sub-Contract was concluded. The Form of Sub-Contract Agreement provides that in the event of such a receivership occurring, it is open to the defenders, as the Main Contractors, to determine the Sub-Contract.

[58] In my opinion, the occurrence of the receivership has no bearing on what the pursuers are entitled to recover under Clause 10, in respect of earthworks they have carried out, which were either authorised under Clause 9 or are deemed to have been so authorised. However the position is different in respect of what adjustment, if any, falls to be made under the provisions of Clause 20 of Appendix 1. That will depend upon the total volume of excavations carried out by the pursuers, in their capacity as Sub-Contractors, prior to the date of the receivership. Clause 20 explicitly refers to the total final volume of excavations "*carried out by the Sub-Contractor*". It would be perfectly possible, accordingly, for the pursuers to have carried out additional excavations covered by authorised Changes, ordered in terms of Clause 9, without the total final volume of excavations carried out by the pursuers being a higher figure than the total volume of excavations in the Earthwork Schedules attached to the Form of Sub-Contract Agreement and specified in the Second Schedule and Appendix 10.

[59] Accordingly, the final outcome of claims advanced under reference to the provisions of Clause 20 of Appendix 1 can not be determined until the facts are established. All I would observe at this stage is that *prima facie* the Moss Agreements, to which I was referred during the course of the hearing, appear to relate to agreements as to final excavated quantities, without specifying whether all of those quantities were excavated by the pursuers. It would appear to me to be the quantities excavated by the pursuers that are relevant to the exercise that requires to be carried out when the provisions of Clause 20 of Appendix 1 are applied.

Question C.2 *If yes, what elements of such claim fall to be valued under (i) clause 10 of the sub-contract conditions and (ii) clause 20 of Appendix 1?*

[60] This question proceeds on the premise that I have answered Question C.1 in the affirmative. The earlier question relates to "*increased quantities of excavated earthworks"*. The pursuers' starting position in relation to the present question is that it is for them to establish that the additional works claimed for, in respect of increased quantities of excavation, were included within "*authorised Changes*" or should be deemed to be treated as "*authorised Changes"*. The pursuers concede that when those issues are addressed, it will be open to the defenders to argue

that, having regard to the provisions of Clause 2.(8)(a) and Clause 11.(1)(d), or indeed other provisions of the Sub-Contract between them, particular Items or constituent parts of the Items in the Final Account Submission should not be held to be *"Changes"*, within the meaning of Clause 1.(1)(a), that have been "*authorised"* under reference to the provisions of Clause 9. Issuing "detailed design information", as envisaged by Clause 11.(1).(d), is one thing. Ordering an "*authorised Change*", constituting a variation in the design, quality or quantity of the Sub-Contract Works is another.

[61] Complex issues of fact may arise in determining whether an "*authorised Change*" has been ordered, or should be deemed to have been ordered, in terms of Clause 9 of the Sub-Contract. In respect of those issues the onus of proof will be on the pursuers. It certainly should not be assumed that the Court will be satisfied that every difference as to the quantities of materials, the movement of materials and the timings of particular item of earthworks specified in Mass Haul documentation will be sufficient to constitute an "*authorised Change*", ordered in terms of the provisions of Clause 9. Unless an item of work has been, or falls to be treated as having been, ordered by the defenders, as an "*authorised Change*" in terms of the provisions of Clause 9, the provisions of Clause 10 will have no application.

[62] In my opinion, the pursuers were also correct to concede that a valuation of an authorised Change, in accordance with the provisions of Clause 10, would require to take account of any reduction in the Sub-Contract Works.

[63] The defenders responded to the pursuers' position by asserting that the pursuers have not made clear which elements of their claim they have valued under each of the clauses upon which they seek to rely. The defenders submit that no consistent explanation had been advanced by the pursuers as to the manner in which the Pursuers' claim has been valued and that Item 3 of the pursuers' Final Account Submission (No. 6/18 of Process) "remains a mystery". Those submissions were developed by attacking the approach to valuation that the pursuers have adopted in Item 3 of their Final Account Submission (No. 6/18 of Process).

[64] Having read through the Final Account Submission Version 2.1 (No.6/18 of Process) more than once, I have reached the view that, at this stage in the action, I could not, and indeed should not, hold that the pursuers' statement of claim, as set out in the Final Account Submission, with its accompanying Addendum and Appendices, is irrelevant. Apart from any other considerations I am not being invited to sustain any pleas-in-law. In my opinion, the pursuers' pleadings and the Final Account Submission provides adequate notice of the legal and factual bases of the individual Items making up the pursuers' claim, the extent to which individual Items in the claim are based on the provisions of Clauses 9 and 10 of the Form of Sub-Contract and the extent to which, if at all, the claim is based on the provisions of Clause 20 of Appendix 1 to the Form of Sub-Contract. In that regard it is important to bear in mind that this action has been raised as a Commercial Action, to which the more traditional strictures of written pleading do not apply. The defenders may well wish to challenge much that is set out in Items 3 and 4 of the Final Account Submission (No. 6/18 of Process), but in my opinion it cannot be said that the pursuers have not given an appropriate level of notice as to the legal and factual bases for their claim and, in particular, how they identify and seek payment in respect of the individual Items that make up that claim.

[65] As I have already observed, the question whether the issue to the pursuers of particular documents, such as Mass Haul Revisions and Revised Target Programmes, added to, altered or otherwise modified the Sub-Contract Works, which the pursuers had undertaken to carry out, involves questions of fact and questions of law that could not be determined after a hearing of the nature that has taken place. In particular, I could not at this stage determine whether the pursuers are correct to assert, as they do at page 25 of No.6/18 of Process, that various documents, which they detail there, constitute orders in writing in terms of Clause 9(1)(c) of the Form of Sub-Contract Agreement. Likewise, it would not be appropriate for me to hold that because documents issued by the defenders contained details of what could be described as "*detailed design information*" that automatically means that the works involved in implementing the development of the detailed design could not and did not fall within the scope of the provisions of Clause 9 and Clause 10 of the Form of Sub-Contract Agreement.

[66] As I have indicated, how the pursuers have chosen to quantify or value the various items of work constituting their claim involves questions of law and fact. Such questions are additional to those as to whether the items making up the pursuers' claim attract payment under Clause 9, which is to be valued under the provisions of Clause 10. That such additional questions arise is well illustrated by the approach to valuation that the pursuers outline, on page 35 of their Final Account Submission, under reference to Clause 10, for the haulage of materials and by the detailed criticisms of that approach that the defenders have raised as to use made by the pursuers of the rates contained within the Schedule of Sub-Contractors Rates, set out in Appendix 6. The pursuers submit that when they could use Schedule 6 rates they have done so. On the other hand, they contend that there are items of work to which such rates are not applicable. In respect of those they have set out their approach to determining valuations that are "*fair and reasonable"*.

[67] There is clearly a dispute between the parties as to the particular items of work to which the Schedule 6 rates could be applied. Accordingly, even when it has been resolved (by agreement between the parties or by decision of the Court) which particular items of work fall be to valued in terms of Clause 10, important questions of fact and law will remain as to the extent to which the Appendix 6 rates could or should be applied in the valuation of individual items of work. On the basis of the information placed before me, by way of submission and reference to the productions, I do not consider that it would be appropriate for me to consider issues such as the procedure by which and the basis upon which the Court should determine the additional payment, if any, which the pursuers would be entitled to receive for items of work such as (a) the haulage, between two points specified in an

Earthworks Schedule, of a greater quantity of material than was provided for in the Schedule, when it was originally issued, or (b) the haulage of a quantity of material, provided for in an Earthworks Schedule, over a greater distance than that specified in the Schedule, when it was originally issued.

[68] If such questions of law and fact remain in dispute, then proof will be necessary. In my opinion, the questions that arise could not be resolved without evidence being heard. The submissions made by both senior counsel in respect of the Item of Work CN1, on Page 47 of No. 6/18 of Process, confirm that view. Under reference to various documents placed before me, including an Instruction to Sub-Contractor (ISC.37), dated 28 October 1997, (No. 6/33 of Process), I was taken through what was alleged to have happened following the excavation of 121,000 m^3 of peat between Chainages 2,800 to 4,800 and invited by the defenders to determine that particular element of the pursuers' claim was irrelevant, on the basis that it was unclear whether the claim was one for an addition to the Sub-Contract price or one based on additional costs, which had been calculated on Schedule 6 rates, relating to price. As the submissions of both senior counsel included assertions of fact, which the other did not accept, I am very firmly of the view that I should not accede to the defenders' submission. Like all of the individual elements of their claim, which are set out in Item 3 of No. 16/18 of Process, the determination of whether the pursuers are entitled to recover the sum they claim in respect of the works referred to in ISC.37 involve questions of fact as well as questions of law. They cannot be resolved at this stage. What the pursuers are inviting the Court to accept is that Item 3 of No.6/18 of Process constitutes a fair and reasonable valuation, in terms of Clause 10, of items of work that (a) the pursuers carried out, (b) were not within the Sub-Contract Works, as originally defined, (c) constitute "*authorised Changes*" in terms of Clause 9, either explicitly or implicitly ordered by the defenders, and (d) are not claimed for in Item 4 of No.16/18 of Process.

[69] As I have already indicated, I consider that the application of the provisions of Clause 20 of Appendix is a separate exercise to that involving Clauses 9 and 10. In my opinion, that separate exercise falls to be carried once it is possible to reach a determination as to the total volume of excavations that has been carried out by the pursuers. Once that important figure has been determined, it can be compared with the amount specified in the original Earthwork Schedules. Carrying out that exercise does not require checking on whether or not any additional quantities excavated have been authorised or have attracted payment for the pursuers under other provisions of the Sub-Contract. All that requires to be determined is the total quantity of the excavations actually carried out by the pursuers in executing their obligations as Sub-Contractors.

Question C.3 *Is the programme TARGET2.PMA 17/Jun/97 listed in Appendix 8 to the sub-contract a contractually binding programme such that, in respect of the earthworks specified therein, the pursuers were obliged to carry out the work specified in respect of material type, quantity, timing and location, all as set out therein?*

[70] I answer that question in the affirmative.

[71] Whether or not the Official Order, dated 28 July 1997, is part of the Sub-Contract between the parties, the terms of numbered paragraph 3 of that Order are of significance. They provide:

> *"3. The works are to be carried out in accordance with the Programme ref.TARGET2.PMA 17/Jun/97 and all other documentation listed in Appendix 8 of the enclosed Sub-Contract Agreement."*

That programme, which parties variously referred to during the submissions as being the "*Overall Programme*", the "*Contract Programme*" and the "*Target Programme*", and I shall, for sake of convenience, refer to as the "*Overall Programme*", that being the title of the document, when it was originally produced, bearing the reference "*TARGET2.PMA17/Jun/97*". It should be noted, however, that in the pursuers' Final Account Submission (No. 6/18 of process) the programme is referred to as the "*Contract Programme*".

[72] The Overall Programme was mentioned in the Form of Sub-Contract that was sent to the pursuers with the Official Order dated 28 July 1997. Moreover, the Official Order explicitly provided that the pursuers were to carry out the "*works*" in accordance with (*emphasis added*) that particular programme and all other documentation listed in Appendix 8 of the Form of Sub-Contract.

[73] As I have already mentioned, the Sub-Contract Works are defined in Clause 1(1)(bb) of the Form of Sub-Contract Agreement as *"the works described in the documents specified in the Second Schedule hereto and any further works instructed as a change in accordance with the Sub-Contract"*. Appendix 8 is one of the documents specified in the Second Schedule and the Overall Programme is one of the documents specified in Appendix 8. In my opinion, therefore, the Overall Programme is one of the "*Further Documents forming part of the Sub-Contract*" (cf. the opening words of the Second Schedule). As such, it is one of the documents from which the pursuers, as Sub-Contractors, were responsible for ascertaining the full extent of the Sub-Contract Works (cf. Clause 10.(3)).

[74] I agree with the submission made on behalf of the pursuers that the purpose of the Overall Programme was not limited to specifying the total period within which the Sub-Contract Works required to be completed (cf. Third Schedule (C)). It had a part to play, as had other documents, in describing and defining the Sub-Contract Works. In my opinion, that part was not limited to defining when the Sub-Contract Works could begin and by when they should be finished. In my opinion, if, by the issue of Mass Haul Revisions and amended Target Programmes, the pursuers were required to carry out earthworks, which were different from those provided for in the Overall Programme, it is a matter for determination, in each instance, whether the earthworks specified constituted a *"Change"*, ordered, or deemed to have been ordered, in terms of Clause 9, or whether the defenders were entitled to require or direct the pursuers to carry out those earthworks, by virtue of some other provisions of the Sub-Contract, including those to be found in Clause 2.(8), Clause 8.(2), Clause 11.(1)(d) and Appendix 2.

[75] The language of paragraph 3 of the Official Order could be viewed as being couched in more peremptory terms than those to be found in the Third Schedule and Condition 6 of Appendix 1 of the Form of Sub-Contract. Whether that is so, the terms of paragraph 3 support the view that when the pursuers embarked upon the works covered by the Official Order, they began to do so (and from the documentation available may well have agreed to do so) on the basis that they should do so in accordance with the terms of the Overall Programme. Whether the execution of the Form of Sub-Contract Agreement on 4 February 1998 involved the creation of a new contract, where no contract had previously existed, or whether it involved the replacement of an existing contract, with a new contract, or whether it involved the amendment of an existing contract, the factual circumstances in which the Form of Sub-Contract Agreement were signed on 4 February 1998 include (a) that the pursuers had been ordered by the defenders to carry out the earthworks in accordance with what the Overall Programme laid down, (b) that the pursuers appear to have undertaken to do so and (c) that the pursuers had been attempting to do so.

[76] In any event Clause 2(1) of the Form of Sub-Contract Agreement provides that the defenders shall execute, complete and maintain the Sub-Contract Works in accordance with the Sub-Contract. Clause 6 of Appendix 1 also provides that *"(t)he programme for the Sub-Contract works is in accordance with the enclosed programme schedule"*. In my opinion, as the Overall Programme formed part of the Sub-Contract, those provisions required the defenders to execute the Sub-Contract Works in accordance with the Overall Programme. I agree with senior counsel for the pursuers that if the pursuers did not comply with the Overall Programme they could have been in breach of contract and could have been liable in damages for any loss suffered by the defenders as a consequence of such breach. Likewise I agree that it was open to the defenders to issue changes to the Overall Programme, which did not constitute *"authorised Changes*" in terms of Clause 9, but rather the issue of detailed design information in accordance with the provisions of Clause 11.(1)(d) or the exercise of other of their powers in terms of the Sub-Contract.

[77] The copies of the Overall Programme that were lodged as productions are difficult to decipher. There is, however, little doubt that when the Overall Programme is read in conjunction with the other programmes referred to in Appendix 8 of the Form of Sub-Contract Agreement, the Overall Programme provides considerable detail as to the various items of work (or tasks) that the pursuers began to carry out during July 1997, including (i) the name of each work task, (ii) the description of each work task, including the chainage at which the task was to be performed, (iii) the type of material involved, (iv) the quantities of material to be excavated, moved or filled, (v) the nature of the work itself, (vi) the duration of each work task, (vii) the daily output during the period relevant for each work task and (viii) by reference to the calendar charts, the dates on or between which the individual tasks were to be carried out.

[78] The defenders argue that the scope of the work to be carried out under the sub-contract, including the quantities, haul distances and sequence of the Sub-Contract Works, was not determined by the Overall Programme (and the subsidiary programmes) but simply by reference to Clause 1(ee), the First Schedule, Clause 2 of Appendix 1 and Appendix 2. The provisions of Clause 1(ee) and the First Schedule do not set out in detail the works to be carried out by the Sub-Contractor. Nor do they set out whether any particular items of work are to be carried out at a particular time or in a particular sequence. Clause 2 of Appendix 1 and Appendix 2 equally do not provide such details. Rather the latter define the scope of the works.

[79] In my opinion, for the reasons set out in paragraphs 3.1 to 3.8 of the pursuers' skeleton Note of Arguments, the Overall Programme placed obligations upon the pursuers, as Sub-Contractors, which were subject to the defenders' right, as Main Contractors, to issue authorised Changes. In my opinion it is not fatal to the arguments advanced on behalf of the pursuers that the Overall Programme did not refer to all of the works which the pursuers had contracted to undertake. Whether or not the Overall Programme and the original Earthwork Schedules covered all of the works relating to the 'road box', which figure in the defenders' adjusted Note and the pursuers' adjusted Response, remains unclear. It would certainly be inappropriate for me to determine such a factual issue on the basis of the complicated and highly technical written submissions that are now before me. But even if the defenders are correct, and such works were not covered by the Overall Programme and the original Earthwork Schedules, that does not mean, in my opinion, that the issuing of amended Earthwork Schedules, Mass Haul Charts or Target programmes could never constitute the authorising of Change to the Sub-Contract Works, in accordance with the provisions of Clause 9 of the Form of Sub-Contract Agreement.

Question D *Do the pursuers have a relevant claim in respect of those alleged Changes for which they have averred no written instruction or written confirmation?*

[80] The parties are agreed that this question should be answered in the negative, subject to the qualification of the circumstances in which the pursuers have averred and offer to prove that the defenders are personally barred or have waived their rights to insist on such writing.

Pursuers: Keen, Q.C., Mure; Maclay Murray and Spens
Defenders: Moynihan, Q.C., Borland; Masons