

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2023] SC GLA 2

GLW-CA4-22

JUDGMENT OF SHERIFF S REID

in the cause

PLZ SOCCER LTD

Pursuer

against

STV CENTRAL LTD

Defender

Act: Mr R McIlvride K.C.; Harper Macleod LLP, Glasgow
Alt: Mr G Walker K.C.; Levy McRae Solicitors LLP, Glasgow

GLASGOW, 6 December 2022

The sheriff, having resumed consideration of the cause, Sustains the defender's preliminary plea (plea-in-law 1); Dismisses the action; Reserves the issue of expenses meantime; and Assigns Wednesday 21 December 2022 at 10am as a hearing to determine the issue of expenses, said hearing to proceed by way of telephone conference call before Sheriff S Reid.

NOTE

Summary

[1] In 2018, STV Glasgow Limited ("STV") wanted to produce a weekly sports magazine television programme for initial transmission on STV branded television channels. The programme was to be called "Peter and Roughie's Friday Football Show" ("the Programme").

[2] To that end, STV entered into a contract with PLZ Soccer Ltd (“PLZ”), a television production company, in terms of which PLZ agreed to produce and deliver to STV 19 hours of footage for the Programme, comprising a minimum of 38 studio recordings covering 38 fixture rounds of the Scottish Premiership and Scottish Championship selected from the second half of the 2017/18 season and the first half of the 2018/19 season, all in accordance with the editorial and technical specification set out in the contract. In exchange, STV agreed to pay a fee of £190,000 to PLZ, in time-tabled instalments.

[3] The pursuer duly delivered 19 episodes of the Programme. These were broadcast between 26 January 2018 and 25 May 2018. Then a problem arose.

[4] On 1 August 2018, STV allegedly told PLZ that it had decided to “cancel the Show” (that is, that it would not broadcast any future episodes). PLZ avers that this decision was made because STV had been unable to obtain from the Scottish Professional Football League (“SPFL”) a renewal of the licensing rights necessary to enable STV to broadcast Scottish Premiership and Scottish Championship match footage in the forthcoming football season. As a result, PLZ made no further episodes of the Programme.

[5] In this commercial action, PLZ claims that by “unilaterally cancelling the Show” STV was in breach of an implied obligation to broadcast (or procure the broadcast of) PLZ’s footage. Such an implied term, it says, was both obvious and necessary to give the contract business efficacy. PLZ claims that, by intimating an intention not to broadcast any further footage, STV breached that implied term.

[6] PLZ seeks damages for the alleged breach of contract. First, it seeks payment of £135,379, being the alleged “net remuneration” which PLZ claims it would have earned under the contract, but for STV’s breach, by producing and delivering the remaining episodes of the Programme. Second, PLZ seeks payment of a further sum of £1,086,382,

being the profit which it claims it had the chance to earn, but for STV's breach, from a separate contract, that it is "likely" to have concluded with a separate broadcaster, to produce a separate (but similar) football magazine programme for broadcast in the period from January to December 2019.

[7] The action called before me at a debate on the defender's preliminary plea.

[8] Having reserved judgment, I have concluded that the pursuer's averments anent the alleged implied term are irrelevant; that the defender's preliminary plea (plea-in-law 1) is to be sustained; and that the action falls to be dismissed. I explain my reasoning below.

The pleadings

[9] The pursuer avers that it is a television production company; from around 2014, it produced footage for broadcast in various formats on channels within the STV network; the footage comprised programmes focused on Scottish football; and the programmes were presented by Peter Martin and Alan Rough. The pursuer avers that, in particular, under two separate contracts with a third party called STV North Ltd, the pursuer produced footage for a programme called "Peter and Roughie's Football Show"; the footage was provided under the first contract for the period from 1 January 2016 to 31 December 2016; subsequently, footage was provided under a three year contract commencing from 1 January 2017; and the footage so provided under both contracts was broadcast initially on local STV channels and thereafter, following a merger of those local channels, on the STV 2 channel. The programme was said to be popular.

[10] The pursuer then avers that, in January 2018, it entered into another contract ("the Contract"), this time with STV Glasgow Ltd. The pursuer avers that, in terms of the Contract, it agreed to provide footage to STV Glasgow Ltd to be incorporated into a new

programme called “Peter and Roughie’s Friday’s Football Show” (“the Friday Show”) to be broadcast between January 2018 and December 2018 on the STV 3 channel (the main STV channel) and on other STV branded services. The full terms of the Contract are not expressly incorporated into the pursuer’s pleadings. Instead, reference is made to a number of specific clauses.

[11] In compliance with the Contract, the pursuer avers that it duly delivered footage for 19 episodes of the Friday Show; these were broadcast between 26 January 2018 and 25 May 2018; and STV Glasgow Limited duly paid the contractual instalments for the period to 30 April 2018.

[12] The critical averments appear in Article 5. On 1 August 2018, STV Glasgow Limited is said to have informed the pursuer that it had decided to “cancel” the Friday Show because it had been unable to secure from the SPFL the licensing rights necessary to broadcast match footage in the forthcoming season.

[13] The pursuer avers that it was never a pre-condition of the Contract that STV Glasgow Ltd must be successful in securing those licensing rights. Instead, it avers:

“It was, however, an implied term of the [Contract] that STV Glasgow was obliged to broadcast the footage provided by the pursuer which complied with the terms and requirements set out in the [Contract] *et separatim* was obliged to procure that such footage was broadcast on STV Channel 3.”

PLZ avers that such an implied term “goes without saying” *et separatim* that it was required in order to give the Contract business efficacy.

[14] The pursuer explains (in Article 5) that its profit under the Contract was relatively small, and that it had no ability to generate additional income from the Friday Show by entering into separate sponsorship arrangements with third parties. The pursuer contrasts that position with the more generous situation which pertained under the first contract with

STV North Ltd (for the period to 31 December 2016) where PLZ was, in fact, able to generate additional sponsorship income of £30,000 per month by concluding a contract with a third party sponsor called "Arnold Clark." The pursuer avers that, in those circumstances, its "commercial purpose" in entering into the Contract was to obtain "national exposure" for the Friday Show with a view to obtaining "more lucrative and/or longer term contracts thereafter" with STV or another broadcaster for what would by then, it says, be "a show with an established national broadcast track record". The pursuer avers that its "commercial objective" would be "entirely thwarted" if STV Glasgow Limited were entitled to demand delivery of the pursuer's footage of the Friday Show and "thereafter to throw it in the bin". It was also said to be "necessary for STV Glasgow's purposes" that the footage produced by the pursuer was "actually broadcast". The pursuer avers (Article 5):

"A contract under which (i) the pursuer would be obliged to expend time and effort producing footage in compliance with the terms and requirements of the [Contract] but which might at the sole option of STV Glasgow be disposed of without being broadcast and (ii) STV Glasgow would be obliged to pay for that footage but would obtain no benefit in the form of filling a broadcasting slot in its programming, would have no business efficacy."

[15] PLZ claims to have suffered loss and damage as a result of STV Glasgow Limited's alleged breach of contract. Two sums are craved.

[16] In crave one, the pursuer seeks damages of £135,379. This is said to comprise (i) the value of the remaining fee instalments that would otherwise have been paid to PLZ under the Contract; plus (ii) an additional sum of £100,000 (plus VAT) that was said to have been agreed by the parties in June 2018 by way of a variation to the Contract fee; less (iii) the costs (totalling £26,809.00, being £1,411.00 per episode) that would allegedly have been incurred by the pursuer in producing and delivering the remaining 19 episodes of the Friday Show under the Contract.

[17] In crave two, the pursuer seeks a separate award of damages in the sum of £1,086,382. This is said to comprise damages for the loss of a chance, namely, the lost opportunity to have the Friday Show viewed weekly by “the Scottish football viewing public” on “a major Scottish television channel” in two consecutive seasons; the chance to then market that Show to “another broadcaster” as a successful television product; and thereby to obtain the opportunity of successfully contracting with “another broadcaster” to provide footage for a further 38 episodes of a “New Show” (similar to the Friday Show) for broadcast during the period from January 2019 to December 2019. But for that lost opportunity, attributable to STV Glasgow Ltd’s breach of contract, PLZ avers that it would have been “successful in contracting with another broadcaster” to provide footage for the New Show; that it would have received a total sum of £1,140,000 under that contract (being £30,000 per episode of the “New Show”); that the total cost of producing the New Show would have been £53,618 (being £1,140.00 per episode); therefore, the damages attributable to the pursuer’s lost “chance” are quantified in the sum of £1,086,382.

Four non-contentious issues

[18] It may be convenient to dispose of four non-contentious issues at this stage.

[19] Firstly, the action is directed against an entity called “STV Central Limited.” That entity does not appear in the Contract. Instead, the Contract bears to be between PLZ and a different entity called “STV Glasgow Limited”. At the outset of the debate, I asked parties to clarify whether any issue was taken by the defender in relation to that discrepancy, such as that the wrong party had been sued. I was assured by both parties that no such point was taken. While the matter was not addressed in any detail, the pursuer’s counsel explained his understanding that a transfer of assets and liabilities had occurred, as a result of which the

defender has assumed the liabilities of STV Glasgow Limited under the Contract. The defender's counsel did not expressly confirm that understanding but nevertheless conceded that, for the purposes of the litigation, no issue was taken with the identity of the designed defender. For the sake of brevity, I shall refer to STV Glasgow Ltd as "STV".

[20] Secondly, the greater portion of the sum first craved involves a disputed claim by the pursuer for payment of a sum of £100,000 plus VAT. This sum is averred to be an "increased fee" payable by STV to the pursuer by way of a variation of the fee payable under the Contract. In its written Note of Arguments (paragraphs 12 to 14), the defender challenged the relevancy of the pursuer's averments anent this so-called "increased fee." However, at the debate before me, this particular relevancy argument was no longer insisted upon.

[21] Thirdly, the lesser portion of the sum first craved comprises a claim for payment of a sum equating to the profit element on the two remaining fee instalments that would otherwise have been paid to PLZ under the Contract (on 31 July and 31 October 2018), excluding the increased fee element. That profit was said to equate to the value of those original instalments (£31,094 each), less the cost that would have been incurred in producing the remaining episodes. However, I was advised by counsel that I need not concern myself with this portion of the sum first craved, as an extra-judicial settlement has been agreed in respect of those two particular instalments.

[22] Fourthly, in its critical averments in Article 5, the pursuer complains of a decision by STV to "cancel the Show"; and, later in the same Article, it characterises the alleged breach of contract as being the action of STV in "unilaterally cancelling the Show". For the purposes of the debate, the parties acknowledged that this terminology was a little informal, and should be understood as meaning no more than that STV had made a decision not to

broadcast (or to procure the broadcast of) the pursuer's footage; and that the alleged breach of contract comprised the action of STV in unilaterally refusing to broadcast (or to procure the broadcast of) that footage.

The debate

[23] The action called before me at a diet of debate on the defender's preliminary plea (plea-in-law number 1).

[24] For the defender, I was invited to sustain its preliminary plea and dismiss the action, which failing, to allow a proof before answer, reserving the plea. The defender's written note of argument (number 16 of process) was adopted, under exception of paragraphs 12 to 15 (anent the "increased fee"). It was submitted that the theory underpinning the entire claim was that the defender was impliedly obliged to broadcast a further 19 episodes of the Friday Show and that by failing to do so (by supposedly "cancelling" the Show) the defender was in breach of the Contract. The damages sought in both craves derive from that single alleged breach. The action was said to be irrelevant because no such term fell to be implied. The criteria for the implication of the term, as set out by the Supreme Court in *Marks & Spencer plc v BNP Baribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, were not met. There was no necessity for the implication of the term contended for because the Contract operated in a commercially sensible and adequate manner without it; the implication of such a term would be inconsistent with the express terms of the Contract; and the implication of such term would "inappropriately innovate" on the parties' agreement. Counsel reviewed the Contract terms, notably clauses 1.3, 7.2, 10.19 and 13.1. These clauses were said to be inconsistent with the notion of an implied obligation on the part of STV to broadcast the footage against its wishes, because STV had absolute editorial

control over the footage. The pursuer's arguments were said to focus on its own commercial objectives, which were either unknown to, or not shared by, the defender. On a proper interpretation, the Contract was nothing more than a services agreement: the pursuer had undertaken to provide a service (of "producing" footage); STV had undertaken to pay the fee. Counsel also submitted that STV was identifiable from the Contract as merely a producer, not a broadcaster; and the pursuer was properly characterised as a "sub-producer."

[25] *Separatim* the defender submitted that the pursuer's averments anent quantum were materially lacking in specification. This was especially acute in relation to the sum second craved. It was said the pursuer had provided no specification of the component elements of its alleged costs, with the result that it was impossible to interrogate the calculation of lost profit in both craves. As regards the first crave, the pursuer's averments anent income generated from a separate contract with a third party (Arnold Clark) for the production of a different show, and the pursuer's alleged allocation of that income to defray the cost of producing the Friday Show, were irrelevant. The defender criticised the pursuer's failure to provide any detail as to which broadcaster might allegedly have broadcast the New Show; how the fee(s) payable by the notional broadcaster would have been calculated; and the terms of the hypothetical contractual arrangement.

[26] For the pursuer, I was invited to refuse the defender's motion for dismissal, and to allow a proof before answer, reserving all preliminary pleas. The pursuer's written note of arguments (number 15 of process) was adopted. Counsel submitted that the action was not bound to fail, even if all the pursuer's averments were proved (*Jamieson v Jamieson* 1952 SC (HL) 44). The pursuer had relevantly averred the contested implied term. The implication of the term was said to be obvious and, without it, the Contract would lack

commercial or practical coherence (*Marks & Spencer plc, supra*, paragraphs 21-23). It was submitted that a commercial contract should be construed purposively, that is, in such a way as to give effect to the fundamental “object” or “purpose” of the contract (*Ardmair Bay Holdings Ltd v Craig* 2020 SLT 549, paragraphs 47-49). The shared commercial “object” or purpose of the Contract was said to be the broadcasting of the footage on STV Channel 3, edited or otherwise. This could be inferred from the Contract terms. The alternative analysis, for which the defender contended, was that the pursuer had committed itself to expend time and resources to produce footage complying with the Contract, while foregoing the opportunity to generate income elsewhere from those endeavours; that STV had bound itself to pay a fee for that footage; and that, nevertheless, STV was supposedly at liberty to put the footage “in the bin”. Such an analysis, it was submitted, did not give the Contract commercial coherence nor was it consistent with business common-sense. The pursuer disputed that its averments focused solely upon its own commercial objectives. It was also necessary for the defender’s purposes that the footage was actually broadcast for the one year “trial period” of the Contract, in order for STV to ascertain if the Friday Show was “sufficiently successful” to give it “a more permanent place” on the main channel (Closed Record, Article 5, page 6). The implied term was not inconsistent with any express terms. Clauses anent STV’s ownership of the footage and its editorial control over the content could easily sit alongside an obligation to broadcast it. However, it was submitted that the broadcasting of a single edited frame of the footage may not necessarily discharge the implied obligation to broadcast, because such transmission might be “so qualitatively limited” as to breach the implied term. By analogy with an *ex facie* unqualified contractual discretion (which may, by implication, have to be exercised reasonably, and not capriciously or arbitrarily), counsel submitted that there would be a “qualitative restraint” on the extent

of the pursuer's right to edit footage for broadcast, so as not to frustrate the fundamental "object" of the parties' agreement. As for the quantum averments, they were said to be sufficient for the purposes of a commercial action. Besides, STV must be "presumed" to have knowledge of the UK broadcasting market, and of the component elements of the lost profit calculation. *Esto* the pursuer's quantum averments failed to provide sufficient specification, I was invited to make an order under rule 40.3(1) of the Ordinary Cause Rules 1993 requiring the pursuer to provide a statement of fact addressing any alleged deficiencies, rather than to dismiss the action.

Discussion

[27] The leading modern authority on the implication of contract terms is the Supreme Court decision in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* 2016 AC 742. Though it was an English appeal, there can be no serious doubt that it accurately reflects the position in Scots law.

[28] The decision lays to rest the debate as to whether the exercise of implication is properly classified as part of, or distinct from, the exercise of interpretation, and when the two exercises should be carried out. The majority of the Supreme Court Justices concluded that the interpretation of a contract, and the implication of a term into a contract, are different processes governed by different rules. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered (*Marks & Spencer plc, supra*, [26] and [28], per Lords Neuberger, Sumption and Hodge). This sequential approach is logical because until one has decided what the parties have expressly agreed it is difficult to see how one can set about deciding whether a new term should be

implied, and if so what term. Besides, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it follows logically that, until the express terms of a contract have been construed, it is (at least normally) not sensibly possible to decide whether a further term should be implied (paragraph [28]). The distinction was explained by Bingham MR (as he then was) in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 481, cited with approval in *Marks & Spencer plc, supra*, [29]):

“The courts’ usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether a more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power”.

[29] What then is the test for the implication of a term in a contract? Lord Simon’s distillation of the principles involved (in *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283) has been commended. He stated:

“For a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.”

The Supreme Court in *Marks & Spencer, supra*, approved this summary, subject to certain observations. Amongst other things, Lord Neuberger (at [21]) questioned whether a requirement that the term to be implied had to be “reasonable and equitable” would usually, if ever, add anything. If a term satisfies the other requirements, he said, it is hard to think that it would not be reasonable and equitable. Further, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one

considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. He also suspected that, whilst the requirements of obviousness or necessity for business efficacy could be alternatives (in the sense that only one need be satisfied), it would be “a rare case” where only one of those two requirements would be satisfied. As for the requirement of necessity for business efficacy, this involves a value judgment; the test is not one of “absolute necessity”. A more helpful way of expressing the second requirement may be (as suggested by Lord Sumption in the course of argument in the *Marks & Spencer plc* case) that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

[30] That said, the Supreme Court Justices in *Marks & Spencer plc* were unanimous that there had been no “watering down” (per Lord Clarke, [77]) or “relaxation” of the “traditional, highly restrictive approach to implication of terms” (per Lord Carnwath, [66]). Since that decision, the Supreme Court and Privy Council have consistently re-affirmed the tests of obviousness and/or necessity for business efficacy as the foundation stone for the implication of a contract term (*Hallman Holding Ltd v Webster* [2016] UKPC 3, [14]; *Airtours Holiday Transport Ltd v HMRC* [2016] 4 WLR 87; *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2017] AC 73, [31]; *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [7]).

The supposed “object” or “purpose” of the Contract

[31] At the heart of PLZ’s submission lies the proposition that “the fundamental or basic purpose” of the Contract was the broadcasting of a football focused programme which incorporated the pursuer’s footage (note of argument, paragraph [4]). This proposition was drawn from dicta in *Ardmair Bay Holdings Ltd*, *supra*, paragraph [49].

[32] However, *Ardmair Bay Holdings Ltd* is a case concerning the construction of a contract, not the implication of a term.

[33] Moreover, the pursuer's emphasis on the supposed "ultimate purpose" of the contract does not reflect (and is certainly not the starting point for) the modern approach to the implication of contractual terms which, as set out above, is to focus on whether the twin tests of obviousness and/or necessity for business efficacy are met.

[34] The proposition that the parties wanted, planned, indeed intended, to broadcast the footage is very obviously correct from the face of the Contract itself. But that is not the issue. The question is whether, as a matter of obviousness or of necessity for business efficacy, STV is to be taken to have accepted an obligation to broadcast the footage. The fact that, indubitably, the parties were working towards the transmission of the footage does not answer the proper question; it begs it.

[35] The same distinction is illustrated in the Court of Appeal decision in *Yoo Design Services Ltd v Iliv Realty PTE Ltd* [2021] EWCH Civ 560. In that case, *Yoo* had provided design consultancy services to a prestige property developer. Under the contract, *Yoo* was entitled to payment of further enhanced fees upon the sale of the properties. In the event, following a crash in the Singaporean property market, the developer was unable to sell the properties. It decided to withdraw them from the market until economic conditions improved. *Yoo* was aggrieved. It complained that it was thereby denied the opportunity to earn the enhanced fees. *Yoo* sued the developer for damages, averring that it was an implied term of the contract that the developer was under an obligation to sell the properties within a reasonable time. The action failed. The Court of Appeal concluded that a presumed intention on the part of both parties to sell the properties was not to be equated with a presumed intention that there should be an obligation on the part of the developer to do so,

still less to do so within a reasonable time. It was very obviously correct that both parties desired, indeed intended, that the properties be sold, but that did not justify the conclusion that, as a matter of necessity for business efficacy and/or obviousness, the developer was to be taken to have agreed an obligation to sell the properties, either at all or within a reasonable time.

What does the Contract say?

[36] Before applying the legal principles for the implication of a contract term, it is necessary to begin by considering (and construing) the express terms of the Contract, in the context of the averred relevant factual matrix, and business common-sense. Only then can it be determined whether the term contended for falls to be implied as a matter of obviousness and/or of necessity to give business efficacy to the parties' deal. This was the methodology adopted by Lord Neuberger in *Marks & Spencer plc, supra*.

[37] In my judgment, looking at the Contract as a whole, it is, in essence, an agreement whereby the pursuer undertook to provide certain services to STV, and STV undertook to pay the agreed price for those services. It is not much more complicated than that.

[38] Thus, the Contract is entitled a "Production Services Agreement"; the opening Recital (entitled "Background") narrates that the pursuer has agreed "to provide the Services" described in the Schedule to the Contract; the pursuer agrees to "render the Services to STV" (clause 1.1); the pursuer agrees to "produce and deliver the footage" (clause 1.2); the pursuer is required "to provide the Services" during its one year term (clause 2.1); a fuller description of "the Services" is set out in Part I of the Schedule; and Part II of the Schedule sets out the detailed format, content and quality of "the Services" to be provided by PLZ.

[39] One is hard pressed to find any obligation incumbent on STV, other than to pay the agreed “fee” (and that obligation is expressly conditional upon the due performance by the pursuer of its multiple obligations under the Contract) (clause 3.1).

[40] The high water mark of the pursuer’s analysis was found in the Recital (entitled “Background”). It states:

“a) STV intends to produce a weekly sports magazine television programme for initial transmission on STV Channel 3 and other STV branded services between January – December 2018 entitled ‘Peter and Roughie’s Friday Football Show’ (the ‘Programme’)...

b) STV wishes to engage PLZ, and PLZ has agreed, to provide the services described in Part I of the Schedule to this Agreement (the ‘Services’) relating to the production and delivery of certain footage to be incorporated in each episode of the Programme...”

The pursuer placed particular emphasis on this wording, as it was said to disclose STV’s intention to produce the Programme “for initial transmission”, and that the initial broadcast was to be on “STV Channel 3 and other STV branded services” during 2018. This analysis was sought to be reinforced by reference to various other words and phrases in the Contract, all of which were said to indicate the parties’ clear expectation and intention that the footage would be broadcast. Thus, clause 7.1 entitled the pursuer to an “on-screen credit”, albeit subject to “broadcaster approval”. The detailed specification of the format, content and quality of the footage (as set out in Part 2 of the Schedule) was itself said to be consistent with “the common intention” that the footage would be broadcast. For example, the pursuer was obliged to record the footage “as live” in its studio facility “on the day of TX”, an abbreviation which was said to mean “transmission” (Schedule, Part 2, paragraph 5). This abbreviation then appears on multiple further occasions in the Schedule: the footage must be delivered by the pursuer no later than 4pm “on the day of TX” (paragraph 5); the pursuer is obliged to provide a short preview clip to the STV social media team by 4pm “on

day of TX" (paragraph 6); certain social media promotional footage is to be recorded "as live", and delivered by 1pm, on "the day of TX" (paragraph 6); and the Payment Schedule in Part B of Part 3 of the Schedule links the instalment payments of the fee to "RX/TX date[s]" (which were said to be abbreviations of recording and transmission dates, respectively).

[41] Pausing there, the irresistible conclusion to be drawn from the Recital, and these sundry scattered references throughout the Contract, is that the parties plainly envisaged, indeed intended, that the footage to be delivered by pursuer would be broadcast. However, that is not the issue in contention. The issue is whether, as a matter of obviousness and/or as a matter of necessity for business efficacy, it is to be implied that there was an obligation on STV to broadcast the footage (or to procure its broadcast). That is an entirely different matter.

[42] In my judgment, read in context, the multiple references in the Schedule to transmission (or "TX") exist merely for the purpose of defining the pursuer's obligations, not for the purpose of signifying an obligation upon STV to broadcast. The first appearance of the abbreviation "TX" is in paragraph 5 of Part 2 of the Schedule. That paragraph imposes an obligation upon the pursuer to record the footage in its studio facility "as live" on the day of transmission ("TX"); thereafter, the paragraph provides that the footage must be delivered to its exact running time (or within a "permitted tolerance of 30 seconds below") no later than 4pm on the day of transmission ("TX"); and the paragraph then states that a failure by the pursuer to meet any of these "requirements" triggers an entitlement on the part of STV to reject the footage and to "levy a charge of £5,000" against the pursuer for "late or non-delivery."

[43] In my judgment, on a proper reading, these references to transmission are intended to define deadlines for the discharge of the pursuer's obligations. They reflect a shared understanding that the purpose of the exercise was timeously to provide STV with a finished product which was capable of being broadcast, but they are not indicative of an obligation upon STV actually to do so.

[44] The further abbreviated references to transmission ("TX") in the Contract Schedule are likewise of little assistance to the pursuer. Many appear in section B of Part 3 of the Schedule to the Agreement. This is the Payment Schedule. It explains when the agreed fee instalments are to be paid. But these instalments are payable expressly by reference to "provisional" transmission ("TX") dates. So, the first instalment of £33,316.00 is payable after delivery of the fifth episode, for which the "provisional" transmission date is stated as 23 February 2018; the second instalment of £31,094.00 is payable upon delivery of the 18th episode for which the "provisional" transmission date is 25 May 2018; the third instalment of £31,094.00 is payable on delivery of the 23rd episode for which the "provisional" transmission is 31 August 2018; and so on. The express use of the adjective "provisional" with reference to the transmission date is problematic for the pursuer. The position is exacerbated by the "Notes" appended to the Payment Schedule which state: "RX/TX [recording/transmission] dates are provisional and subject to change..."

How can there be an implied obligation to transmit, if transmission dates are expressly "provisional" and "subject to change"?

[45] Five other substantive clauses are worth noting in this review of the Contract. Their significance is discussed more fully below.

[46] Clause 1.3 expressly confers on STV "final editorial control and approval over the footage". It reads:

“STV shall have final editorial control and approval over the footage. In particular, and for the avoidance of doubt, STV shall have final approval over the editorial brief, the Recording and Delivery Schedule, any scripts (including running orders), the identity of such on- off- screen personnel as STV shall specify, together with such elements of the Services that STV identifies as being key and any change or substitution will require the prior written approval of STV.

Clause 7.2 gives STV “full control” of all publicity and advertising in connection with the Friday Show and the pursuer’s footage. It reads:

“STV shall have full control of all publicity and advertising in connection with the Programme and Footage. For the avoidance of doubt, PLZ shall not undertake or authorise any advertising or publicity without the approval of STV”.

Clause 13.1 deals with intellectual property rights in the footage. All such rights are assigned to STV. It states:

“PLZ hereby grants and assigns to STV absolutely, free from any encumbrances and without further payment, its whole right, title and interest in and to... the entire copyright throughout the world in all media whether now known or hereafter developed, for the full period of copyright,...and...all other rights whatsoever including all consents under Part II to the Copyright Designs and Patents Act 1988 or any statutory modification or re-enactment thereof for the time being in force, in the Footage..., to enable STV to make the fullest use of the Footage without restriction or payment of further fees.”

Clause 13.2 continues in a similar vein. It states:

“PLZ recognises that STV has the unlimited right to edit, copy, alter, add to, take from, adapt, and to exploit and distribute all or any of the footage, including the right to produce spin-off and compilation programmes which feature extracts of the footage, in any way it sees fit and over any media now known or hereafter devised without further payment to PLZ and hereby irrevocably and unconditionally waives the benefit of any provision of law relating to so-called ‘moral rights’ (including without limitation any rights of PLZ under section 77 to section 85 inclusive of the [Copyright Designs and Patents Act 1988] and any similar laws of any jurisdiction in relation to the Footage...”

Clause 10.1.9 is one of the multiple warranties granted by PLZ to STV. It reads:

“PLZ warrants and represents that...except as expressly permitted under this Agreement, PLZ shall not market or exploit its relationship with STV, nor shall it market or exploit any of the footage created as a result of such relationship without the prior consent of STV...”

[47] I turn now to consider the business efficacy and obviousness tests in the present case. The considerations under each overlap to a large extent. Nevertheless, I shall address them separately as a matter of principle.

Business efficacy

[48] Looking first at the issue of business efficacy, in my judgment the Contract has practical and commercial coherence as it stands. On an objective assessment of its terms, this is a straight-forward agreement for the purchase by STV of services, and a finished product, from PLZ. The product has to be made in a certain way; it has to be delivered by a certain time; beyond that, the buyer can do what it likes with it. The only material obligation on STV is to pay for it. Viewed objectively, the Contract “works” without the need for the interpolation of a further term obliging STV to broadcast (or procure the broadcast) of the footage.

[49] While it is undoubtedly correct that both parties envisaged that the Friday Show would be broadcast, it cannot be said, on an objective assessment, that transmission of the footage is necessary to give the Contract business efficacy (that is, practical or commercial coherence). PLZ might well be disappointed that the fruits of its labour are not ultimately broadcast to the nation; STV might be equally disappointed; but the Contract “works” perfectly well as a mechanism by which STV acquires a finished product (or “content”, to use the media terminology) that is capable of being broadcast, should it choose to do so. (Whether STV is characterised as a broadcaster, or as a producer of content for broadcast by others, is not determinative one way or the other.) PLZ, like STV, took the risk of the footage never being broadcast. That was an entirely coherent judgement in commercial terms, which the parties were entitled to reach at the time of entering in to the contract, when they

had the comfort of the shared ambition that everything would run smoothly. Multiple provisions in the Contract justify the conclusion that PLZ had “washed its hands” of the footage, once delivered. It had assigned all its intellectual property rights (including moral rights) in the footage to STV; it had ceded all editorial control of the content to STV (clause 1.3); it had accepted STV’s “unlimited right” to edit, cut, alter, exploit, and distribute, the footage (clause 13.2); it had abdicated to STV all involvement in the “publicity and advertising” of the footage (clause 7.2); it had warranted it would do nothing to “market or exploit” any of the footage, or even its relationship with STV (clause 10.1.9). Having expressly retained for itself absolute control over the content of the footage, it would make no commercial sense for STV to cede to PLZ any element of power over the broadcast of that footage. To take a hypothetical scenario, STV may so dislike the footage produced, for any number of subjective editorial reasons, that it chooses to cut and delete significant portions, in exercise of its express contractual powers (clauses 1.3 & 13.2). The resulting mish-mash may not be worth broadcasting at all. Yet, on the pursuer’s analysis, STV would still be obliged to broadcast the remnants of its footage, however savagely sliced and spliced. That makes no commercial sense. Neither party is likely to be happy with the result.

[50] That STV has retained full control over the broadcast of the footage can also be inferred from the fact that even the scattered references to transmission (“TX”) in the Payment Schedule of the Contract are stated to be “provisional” only. If that were not clear enough, the “Notes” appended to the Payment Schedule expressly reiterate that the transmission (“TX”) dates are “provisional” and “subject to change.”

[51] In any event, if it were necessary to fill a gap in the Contract on the ground of business efficacy, the question arises as to how that gap should be filled. The expression of an implied term to broadcast the footage raises obvious practical difficulties. What part of

the footage is to be broadcast; when is it to be broadcast; over what geographical area, and on what channel, is it to be broadcast? Rather than providing practical or commercial coherence, the definition or expression of the supposed implied term would open up a can of worms as to what exactly STV is obliged to do. For example, would it be sufficient to broadcast one single, fleeting frame of the footage (perhaps subliminally) on a local Hebridean network, at off-peak hours, in the early hours of a weekday morning? In answer to these difficulties, counsel for the pursuer suggested that some sort of “qualitative” control would require to be implied as to the content, timing and scope of the transmission. However, such qualitative control sits uneasily with the express terms of the Contract conferring on STV “final editorial control” (clause 1.3) and “unlimited” rights to edit, alter, exploit, and distribute (Clause 13.2).

[52] In my judgment, the implication of an obligation to broadcast the footage is not necessary to bring practical or commercial coherence to this Contract. Further, the supposed implied term to broadcast, as contended for by the pursuer, is not capable of clear expression, in the sense that its scope cannot be precisely defined. In any event, as explained further below, the implication of such a term tends to contradict the express terms of the Contract.

Obviousness

[53] The position is even clearer when one comes to consider the question of obviousness. Firstly, having expressly retained “final editorial control and approval” over PLZ’s footage (clause 1.3), and having expressly reserved to itself the “unlimited” power to edit, alter, exploit, and distribute, that footage (clause 13.2), it is illogical (and certainly far from

obvious) that STV would have ceded control or power over the transmission of that footage, by assuming an obligation to broadcast it. The contrary seems more logical (and obvious).

[54] Secondly, decisions as to what should be broadcast, and when, and where, are pre-eminently matters which a national or local television broadcaster would wish to guard jealously. Such decisions may be susceptible to change on a day-by-day, minute-by-minute basis. Global or local news stories may well take precedence over a scheduled programme. As the defender's counsel presciently observed, if the monarch were to die suddenly, a national or local broadcaster (such as STV, or the group to which it is said to belong) may well wish to change its broadcasting schedule at short notice to cover such a major event. Or if public opinion or taste were to turn against a particular show or presenter, a broadcaster may wish to withdraw that show from its schedule, temporarily or otherwise. It is inconceivable (and certainly far from obvious) that a broadcaster would commit itself to broadcast particular content, at a particular time, over a particular geographical area, unless expressly agreed. More obviously, a local or national broadcaster would retain freedom and control over what it broadcasts, and when, and where. To use the rather quaint approach of MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227 (approved in *Marks & Spencer plc, supra*, [17]), imagine that an officious bystander, observing the execution of this Contract, had asked the parties: "Is it agreed that STV must broadcast this footage?" In my judgment, the parties would not testily have answered "Oh, of course!" Rather, there would have been a sneer of derision from STV, and an emphatic "No".

[55] Thirdly, the whole structure and detail of the Contract point to the conclusion that PLZ agreed to deliver the footage to STV, in exchange for payment of a fee, and relinquished all (contractual) interest in the footage thereafter. That conclusion follows irresistibly (and obviously) from PLZ's acceptance that the fee represents a full "buy out" of all PLZ's rights

in the Contract (clause 3.4); its assignation of all IP rights (including moral rights) in the footage (clause 13.1); its ceding of editorial control to STV (clause 1.3); its acceptance of STV's "unlimited right" to edit, cut, alter, exploit, and distribute, the footage (clause 13.2); its abdication of involvement in the "publicity and advertising" of the footage (clause 7.2); its warranty that it would do nothing to "market or exploit" any of the footage, or even its relationship with STV (clause 10.1.9). Indeed, PLZ has no right even to an "on-screen credit" except with the "approval" of the relevant broadcaster. In short, PLZ's contractual interest ends upon delivery of the footage, and receipt of the money.

[56] Again, even if some gap in the Contract required to be filled by an implied term to broadcast the footage, it is far from obvious how that gap would be filled. At the time of contracting, multiple contractual solutions would have been available to the parties to define which part(s) of the footage required to be broadcast; when it was to be broadcast (for example, during peak viewing times or off-peak); over which geographical areas it was to be broadcast; and on which television channel(s) or other media outlet(s) it was to be transmitted. It cannot be said (even probably, let alone with any degree of obviousness) which, if any, of the multiple potential contractual solutions would have been preferred. For implication to operate on this ground, it needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is not enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred (*Yoo, supra*, paragraph 51).

[57] For these reasons, in my judgment an obligation on the part of STV to broadcast the footage does not fall to be implied into the Contract as a matter of obviousness.

Inconsistency with express terms

[58] Apart from the foregoing, in my judgment no obligation to broadcast can properly be implied because it would be inconsistent with the express terms of the Contract. In many ways, this overlaps with the considerations discussed above relating to business efficacy and obviousness.

[59] To explain, the express power of “final editorial control and approval” over the footage (clause 1.3) suggests that STV has a total right of veto over the footage. The express “unlimited” right to edit and “take from” the footage (clause 13.2) naturally infers a right to delete it in its entirety. The express “unlimited” right to “exploit and distribute” all or any of the footage (clause 13.2) suggests that the converse must also be true (namely, that STV can also choose not to exploit or distribute any or all of the footage). The express assignation of all intellectual property rights in the footage (clause 13.1) indicates that STV is the absolute owner of this footage, with an unfettered right to deal with it as it pleases. The implication of an obligation to broadcast is inconsistent with these express terms.

[60] Likewise, many of the scattered references to transmission (using the abbreviation “TX”) which appear in the Schedule to the Contract are expressly prefaced with the adjective “provisional”; and the “Notes” appended to the Payment Schedule expressly state that the transmission (TX) dates are “provisional” and “subject to change.”

[61] In my judgment, the natural reading of the express terms is that there can be no implied commitment to broadcast the footage or any part of it. Transmission of the footage, while obviously envisaged and hoped for by both parties, was never set in stone. It was, at its highest, “provisional” only and “subject to change.” The implication of a supposed blanket obligation to broadcast the footage (or some unspecified part of it) would be

inconsistent with the express terms of the Contract, or “would at best lie uneasily beside” them (*The APJ Priti* (1987) 2 Lloyd’s Rep 37, 42 per Bingham LJ).

[62] A central and recurring theme of the pursuer’s submission was that it would make no sense for time and money to be spent by both parties in producing the footage if STV were then at liberty to simply “throw it in the bin”, without first broadcasting it. This proposition also appears in the averments (closed record, article 5, page 6). In my judgment, this particular submission is unpersuasive, not least because it is inconsistent with the Contract’s express IP assignment and waiver clauses (clauses 13.1 and 13.2). In clause 13.1, the pursuer assigns “absolutely” to STV its whole intellectual property rights in the footage. In clause 13.2:

“PLZ irrevocably and unconditionally waives the benefits of any provision of law relating to so-called ‘moral rights’....”

Moral rights are a collection of personal rights given to creators of literary, dramatic, musical, film or artistic works. These rights include the right to be identified as the author or director of the work, whenever it is commercially published, exhibited to the public or included in a film or broadcast (“the paternity right”); and the right to object to derogatory treatment of the work (“the right of integrity”). Under UK law, these rights cannot be assigned, but they can be waived. Clause 13.2 is such a waiver.

[63] There are sound commercial reasons why the creator of an artistic work (such as film footage) should be required to waive moral rights, especially in circumstances where (as here) the underlying copyright has been assigned and the creator has been paid. The third party acquiring the copyright, especially for value, may well wish to ensure that it has the freedom to do with the artistic work whatever it likes - including, importantly, to destroy the work. Destruction of a work may be a perfectly sound decision for the owner, perhaps

because the owner concludes (rightly or wrongly) that the work has no commercial value or use; or because the work has fulfilled its required purpose; or because its continued existence is at risk of reflecting adversely on the owner's reputation, or is impeding its plans (*Gnass et al v La Cite d'Alma*, Quebec Court of Appeal; *Castillo v G&M Realty LP*, US Court of Appeals); or because, like Sir Winston Churchill, when confronted with his infamous portrait by Graham Sutherland, the owner just does not like it.

[64] The destruction of an original work would almost certainly amount, at least, to a "treatment" of the work. It is the ultimate deletion from it. It has been held that "treatment" of a work (in the context of the "right of integrity") is a broad, general concept: *de minimis* acts apart, it implies a spectrum of possible acts carried out on a work, from the addition of a single word to a poem, to the destruction of the entire work (*Harrison & Others v Harrison* [2010] 3 WLUK 552, per Judge Fysh Q.C.). However, whether, under UK law, destruction of an artistic work constitutes a "derogatory treatment" remains a controversial issue. Some sort of adverse impact on the creator's reputation is generally regarded as a pre-condition for such a finding. That said, the argument has a *prima facie* attraction. Destruction may well be said to be the ultimate act of mutilation of an artist's work, and arguably diminishes the artist's reputation and honour by depleting his oeuvres and authorial "footprint". A broadly similar logic underpins the pursuer's central submission in this case.

[65] Interesting though it is, I do not require to determine the wider academic question in this case. Instead, all that need be said is this. Let us assume, for the purpose of argument, that the deliberate destruction of an artistic work could indeed constitute a violation of the author's moral rights (specifically, the right of integrity). In that event, the pursuer's contention that STV could not conceivably wish to "throw [the footage] in the bin", having

commissioned and paid for it, flies in the face of an express term of the Contract (clause 13.2). One of the purposes of clause 13.2 is to confer on STV just such a right of destruction with impunity. In terms of clause 13.2, PLZ has expressly waived its moral rights as creator (including its right to object to the derogatory treatment of the work, by deliberate destruction or otherwise). Such a waiver is perfectly common-place. Its commercial rationale and prudence are evident. STZ may wish to so deal with the footage for any number of sound commercial reasons (as described above), or for no reason. Clause 13.2 frees up STV, as owner, to deal with the footage as it likes (including by destruction), without interference by, or recrimination from, or accountability to, PLZ as the creator.

Surrounding circumstances

[66] The pursuer prayed in aid certain supposed surrounding circumstances to support the implication of an obligation on STV to broadcast the footage.

[67] First, much was made of the pursuer's "objective" or "purpose" in entering into the Contract. In article 5, the pursuer avers:

"In those circumstances *the pursuer's* commercial purpose in entering into the PSA was to obtain national exposure for the show with a view to obtaining more lucrative and/or longer terms contracts thereafter with STV or another broadcaster for what would, by then, be a show with an established national broadcast track record. That commercial objective would be entirely thwarted if the SPA conferred upon [STV] the right to demand delivery of the footage produced by the pursuer but thereafter to throw it in the bin." [*my emphasis*]

[68] In my judgment, this supposed factual matrix is irrelevant. First, these averments focus only on the pursuer's asserted commercial interest or objective, that is, what PLZ might have liked, or wanted, or hoped for, from the Contract. They amount to no more than a statement of the subjective aspirations of the pursuer. It is not averred that the defender

shared, or was even aware of, the pursuer's alleged objective at the date of contracting.

Second, even if STV was aware of PLZ's objective (which is not averred), it does not follow that STV necessarily assumed an obligation to satisfy that aspiration, nor is it necessary to do so to give the contract business efficacy, nor is it obviously something that would have been agreed. Looking at the structure and nature of this agreement, it makes no commercial sense for STV to have jealously guarded control over the minutiae of the footage, yet at the same time to have ceded control of its transmission (by obliging itself to broadcast the footage to the public, in whole or in some unspecified part). The more obvious conclusion is that STV retained control over both content and transmission. Third, any such averred "objective" of gaining national exposure can be nothing more than an irrelevant aspiration, standing the express terms of the Contract that (i) STV has "final editorial control and approval" over the footage (clause 1.3); (ii) STV has the "unlimited" right to edit and "take from" the footage (clause 13.2); (iii) STV has the "unlimited" right to "exploit and distribute" the footage (clause 13.2); (iv) STV has absolute ownership of all IP rights in the footage (clause 13.1); and (v) PLZ will not market or exploit its relationship with STV, or market or exploit any of the footage, without STV's prior consent (clause 10.1.9).

Accordingly, there is nothing in the averred factual matrix that is either relevant or sufficient to support the implication of the term contended for by PLZ.

[69] Second, the pursuer submitted that its averments of the factual matrix were not limited to the pursuer's own "objective" but extended also to STV's "objective". Reference was made to the following averments (in article 5):

"Further, the terms of the [Contract] was one year only in order that STV could broadcast the Show on its main channel for a trial period to determine whether it was sufficiently successful to make it commercially advantageous to give it a more permanent place on an STV main channel. To achieve that objective it was necessary

for STV's purposes too that the footage produced by the pursuer was actually broadcast."

In my judgment, for largely the same reasons, these further averments are also irrelevant.

First, the averments focus only on STV's subjective alleged reasoning (for selecting a one year term for the Contract). It is not averred that the pursuer shared, or was even aware at the date of contracting of, the pursuer's rationale for selecting a one year term. Indeed, at first blush, the parties' averred "objectives" do not quite coincide at all: the pursuer's averred subjective purpose in "entering into" the Contract is said to be to obtain "national exposure", with a view to securing for itself a more lucrative and/or longer term contracts thereafter with STV or another broadcaster; STV's averred subjective reasoning relates only to the choice of the one year term in the Contract, and is said to have been driven by a subjective desire to determine if it would be commercially advantageous for STV to give the Friday Show a more permanent place on an STV main channel. Those objectives are not quite the same. Second, as explained above, even if STV's rationale for selecting a one year contract term was known to PLZ at the time of contracting (which is not averred), it makes no commercial sense for STV to have restricted its broadcasting freedom by ceding any obligation to broadcast the footage, nor is it necessary for STV to have done so to give the contract business efficacy, nor is it obviously something that would have been agreed. Third, irrespective of STV's averred subjective rationale in selecting a one year term, the averred obligation to broadcast remains *ex facie* inconsistent with the express terms of the Contract, all of which point to STV having absolute and unlimited control over the exploitation, treatment and disposal of this footage.

[70] In conclusion, the implication of the term contended for by PLZ is neither necessary to give the Contract business efficacy, nor is it obvious, nor is it capable of clear expression.

Besides, the implication of the supposed term would be inconsistent with the express terms of the Contract. For these reasons, the pursuer's pleadings anent the implied term, on which the entire action is founded, are irrelevant. Accordingly, the action falls to be dismissed.

Averments on quantum

[71] Separately, in my judgment, the defender's criticisms of the specification of the pursuer's averments anent quantum are correct.

[72] The sum second craved comprises a claim of damages for loss of a chance. The sum sought is over £1 million. It is predicated on the proposition that the pursuer would have been paid a specified sum (£30,000) for each episode of a New Show, yet to be made, yet to be broadcast, in terms of a contract with an unidentified party at a future date. Nothing is averred to identify the likely broadcaster, or where it would have been broadcast, or how the alleged income of £30,000 was calculated, or how the cost of producing each episode was arrived at. In those circumstances, no fair notice is given of the calculation of the sum sued for. The defender is prejudiced by that lack of specification because it is unable to interrogate the calculation of the claim due to its inherent vagueness.

[73] Accordingly, I would have excluded those particular averments from probation and dismissed the second crave.

Decision

[74] For the foregoing reasons, I have sustained the defender's preliminary plea and dismissed the action. *Esto* the action does not fall to be dismissed, I would have excluded from probation, as lacking in specification, the pursuer's averments anent the computation of the sum second crave, and dismissed that second crave.