

SCOTLAND / JUDGMENT

Bitwise v. CPS Broadcast Products BV [2002] ScotCS 280 (23 October 2002)

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[2002] ScotCS 280 [New search] [Help] OUTER HOUSE, COURT OF SESSION CA21/02 OPINION
OF LORD MACFADYEN in the cause BITWISE LIMITED Pursuers; against CPS
BROADCAST PRODUCTS BV Defenders:

Pursuers: Logan; MacBeth Currie Defenders: Lake; Ledingham Chalmers 23 October 2002

Introduction

In this action the pursuers, who are a Scottish company with their registered office in Dunfermline, conclude for payment of two separate sums by the defenders, who are a company domiciled in the Netherlands. The first conclusion is for payment of £37,854.38, which sum is said to be due as part of the price of certain work performed by the pursuers under a contract between them and the defenders. The second conclusion is for £120,000, which sum is said to be a reasonable estimate of loss and damage suffered by the pursuers as a result of breach on the defenders' part of an implied term of the contract between the parties. The defenders plead *inter alia*

- (1) that the court has no jurisdiction, and (2) that the pursuers' averments are irrelevant, and on each of these bases seeks dismissal of the action. The case was appointed to debate in respect of those pleas. Jurisdiction
- (a) The Defenders' Submissions Although the defenders' first plea-in-law seeks dismissal of the action on the ground that this court has no jurisdiction, the argument advanced under that plea by Mr Lake, who appeared for the defenders, was confined to the proposition that the court had no jurisdiction in respect of the second conclusion, the claim for damages for breach of contract. The Rules of Court require a pursuer to deal with the question of jurisdiction in his averments. Rule of Court 13.2(4) provides *inter alia* as follows: "A

condescendence shall include averments stating -

- (a) in an action to which the Civil Jurisdiction and Judgments Act 1982 applies, the domicile of the defender (to be determined in accordance with the provisions of that Act) so far as known to the pursuer; [and]
- (b) the ground of jurisdiction of the court, unless jurisdiction would arise only if the defender prorogated the jurisdiction of the court without contesting jurisdiction". In this case the pursuers make no express averment as to the defenders' domicile. It is clear, however, from the averment that the defenders are incorporated under the law of the Netherlands, and have their principal seat at an address in the Netherlands, that it is not maintained by the pursuers that the defenders are subject to the jurisdiction of this court by virtue of domicile. The averments which the pursuers make about jurisdiction are in the following terms: "The parties entered into a contract for the sub-contract of design services in application software hereinafter referred to. Payment in respect of said contract was due to be made to the pursuers' registered office aforesaid. The pursuers seek implementation of this obligation of payment. This court accordingly has jurisdiction." Those averments clearly cover the claim advanced in the first conclusion. Mr Lake did not dispute the contentions advanced by Mr Logan for the pursuers (1) that it is necessary first to determine by Scottish choice of law rules what system of law is applicable to the contract, then to apply that system of law to determine what the place of performance of a particular obligation is (*William Grant & Sons International Ltd v Marie Brizard España SA* 1998 SC 536; *Industrie Tessili Italiana Como v Dunlop AG* , Case 12/76,

[1976] ECR 1473 ; *Leathertex Divisione Sintetici SpA v Bodetex BVBA* , Case C-420/97, [1999] 1 ECR 6748,

[1999] 2 All ER (Comm) 769); (2) that Scots law is the proper law of the contract between the parties; (3) that under Scots law, in the absence of provision to the contrary, a contractual debtor is bound to tender payment at his creditor's place of business (*Bank of Scotland v Seitz* 1990 SLT 584); (4) that the place of performance of the payment obligation relied upon in the claim advanced in the first conclusion is therefore Scotland, and (5) that accordingly, by virtue of Article 5(1) of the Brussels Convention (Civil Jurisdiction and Judgments Act 1982, Schedule 1), this court has jurisdiction in respect of that claim for payment. Mr Lake maintained, however, that the averments simply did not address the question of the basis on which it was contended that the court also had jurisdiction in respect of the claim for damages for breach of contract advanced in the second conclusion. In the absence of averments expressly dealing with the matter, Mr Lake derived his understanding of the pursuers' contention as to jurisdiction in respect of the damages claim from the terms of their Note of Proposals for Further Procedure (No. 19 of process). In that Note the pursuers advance the proposition that: "If the court is seized of jurisdiction in respect of a substantial issue under a contract it also has jurisdiction to deal with other matters." Mr Lake interpreted that proposition as an assertion that, because the court had jurisdiction in respect of the claim for payment under the contract, it followed

that it also had jurisdiction in respect of the claim for damages for breach of the contract. He therefore directed his submissions against the soundness of that proposition. The starting point of Mr Lake's submissions was to be found in the terms of Article 5(1) of the Brussels Convention, which provides: "A person domiciled in a Contracting State may, in another Contracting State, be sued:

- (1) In matters relating to a contract, in the courts for the place of performance of the obligation in question ...". Mr Lake referred to a series of decision, mostly of the European Court of Justice, explaining the scope of Article 5(1). The first of these was *Etablissements de Bloos SPRL v Société Bouyer*, Case 14/76,
- [1976] ECR 1497 . The judgment of the Court contained the following passages: "5. In the first question, the Court is asked whether, in an action brought by the grantee of an exclusive sales concession against the grantor in which he claims that the latter has infringed the exclusive concession, the term 'obligation' in Article 5(1) of the Convention is to be interpreted as applying without distinction to any obligation arising out of the outline contract granting an exclusive sales concession or even arising out of the successive sales concluded in performance of the said contract, or as referring exclusively to the obligation forming the basis of the legal proceedings. 6. If the last-mentioned possibility is the correct one, the Court is further asked to rule whether the word 'obligation' in the aforementioned Article 5(1) refers to the original obligation, the obligation to provide the equivalent of the original obligation or to [the] obligation to pay damages where the effect of the dissolution or termination of the contract is to render void the original obligation, or, finally, to the obligation to pay 'fair compensation' or even 'additional compensation' within the meaning of the Belgian Law of 27 July 1961. 7. ... 8. As stated in its preamble, the Convention is intended to determine the international jurisdiction of the courts of the contracting States, to facilitate the recognition and to introduce an expeditious procedure for securing the enforcement of judgments. 9. These objectives imply the need to avoid, so far as possible, creating a situation in which a number of courts have jurisdiction in respect of one and the same contract. 10. Because of this, Article 5(1) of the Convention cannot be interpreted as referring to any obligation whatsoever arising under the contract in question. 11. On the contrary, the word 'obligation' in the article refers to the contractual obligation forming the basis of the legal proceedings. 12. ... 13. It follows that for the purpose of determining the place of performance within the meaning of Article 5 ... the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based. 14. In a case where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the other party, the obligation referred to in Article 5(1) is still that which arises under the contract and the non-performance of which is relied upon to support such claims." Mr Lake then referred to *Shenavai v Kreischer* , Case 266/85,

- [1987] ECR 239 . In that case the Court, after referring to *De Bloos v Bouyer* , went on to say: "10. The general rule thereby defined admits, however, of certain exceptions on the ground that 'matters relating to a contract' cover relationships of widely differing kinds, ..." At paragraph 16, the Court pointed out that contracts of employment (such as had been under consideration in *Ivenel v Schwab* , Case 133/81, [1982] ECR 1891) were distinguishable by virtue of certain particularities, and went on to say: "17. When no such particularities exist, it is neither necessary nor appropriate to identify the obligation which characterises the contract and to centralize at the place of performance thereof jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract. The variety and multiplicity of contracts as a whole are such that the above criterion might in those other cases create uncertainty as to jurisdiction, whereas it is precisely such uncertainty which the Convention is designed to reduce. 18. On the other hand, no such uncertainty exists for most contracts if regard is had solely to the contractual obligation whose performance is sought in the judicial proceedings. The place in which that obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it, and it is this connecting factor which explains why, in contractual matters, it is the court of the place of performance of the obligation which has jurisdiction. 19. Admittedly, the above rule does not afford a solution in the particular case of a dispute concerned with a number of obligations arising under the same contract and forming the basis of the proceedings commenced by the plaintiff. However, in such a case the court before which the matter is brought will, when determining whether it has jurisdiction, be guided by the maxim *accessorium sequitur principale* ; in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction." Pursuing the point mentioned in paragraph 19 of the judgment in *Shenavai v Kreischer* , Mr Lake then cited *Union Transport plc v Continental Lines SA*
- [1992] 1 WLR 15, an English House of Lords case dealing with the problem of determining which court has jurisdiction on the basis of place of performance when the claim is founded on more than one obligation and the contract provides for performance of the various obligations in different places. That case concerned a voyage charter of a vessel to be nominated by the defendants (who were domiciled in Belgium) for carriage of a cargo of telegraph poles from Florida to Bangladesh. The nomination of the vessel was to take place in London. Following a dispute the defendants declined to nominate a vessel. Consequently, no vessel was supplied to undertake the voyage. The plaintiffs brought proceedings in the High Court in London claiming damages for the defendants' failure to nominate the vessel. The defendants maintained that the High Court had no jurisdiction. That contention was rejected. Lord Goff of Chieveley said (at 22C-H): "I entirely agree that a charter which calls for tonnage to be nominated - a t.b.n. charter - is for present purposes quite different from a charter of a named vessel. Nomination of a vessel under such a contract is not a mere naming of a vessel; it is rather the identification of the subject matter of the contract, with the effect that the name of the vessel, once nominated,

becomes written into the contract. Furthermore ... nomination of the vessel triggers certain other obligations under the contract ... Of course, it is true that a voyage charterparty is a contract of services under which the owners make available the services of their vessel and her crew for the carriage of the relevant cargo from the loading port to the discharging port; and it is also true that, under a t.b.n. charter, the owners have to cause the vessel, once nominated, to proceed to the loading port in accordance with the terms of the charter. But the question in the present case is whether, on the principles stated by the European Court of Justice in *Shenavai v Kreischer* ... the nomination of the vessel or the causing of the vessel (once nominated) to proceed to the loading port is to be regarded as the principal obligation. For the reasons given by Evans J, I have no doubt that it is the former. ... However ... I do not reach this conclusion on the ground that the performance of the obligation to nominate precedes in point of time the performance of the obligation to provide the vessel; I do so because the obligation to nominate is, for the reasons I have given, the more fundamental obligation." A distinction fell to be made, however, Mr Lake submitted, between that sort of situation where a single claim was based on more than one obligation, and a situation in which separate claims were made based on separate obligations. In that connection he cited *Leathertex Divisione Sintetici SpA v Bodetex BVBA* (*supra*). Bodetex, who had acted for a number of years as commercial agent for Leathertex, sued for payment of (1) arrears of commission, and (2) compensation in lieu of notice (Judgment, paragraph 9). The question on which a preliminary ruling was sought was in the following (somewhat cumbersome) terms (paragraph 18): "Are Articles 5(1) and 2 of the Brussels Convention, in the version applicable to the present case, to be interpreted as meaning that a composite claim founded on different obligations arising from the same contract may be brought before the same court, even though, according to the jurisdictional rules of the State in which the proceedings are brought, one of the contractual obligations on which the claim is based is to be performed in that State and the other is to be performed in another EC Member State, having regard to the fact that the court before which the proceedings are brought decides, on the basis of the claim brought before it, that neither of the two obligations forming the subject-matter of the claim is subordinate to the other and that they are of equal rank." The Court noted that the Belgian courts had held that the obligation to pay compensation in lieu of notice was to be performed in Belgium, while the obligation to pay commission was to be performed in Italy (paragraph 34); and that the contract was not a contract of employment (paragraph 35) and therefore not subject to the rule in *Ivenel v Schwab* distinguished in *Shenavai* at paragraphs 16 and 17. The Court expressed its conclusion as follows: "39. Finally, when a dispute relates to a number of obligations of equal rank arising from the same contract, the court before which the matter is brought cannot, when determining whether it has jurisdiction, be guided by the maxim *accessorium sequitur principale* referred to by the Court in paragraph 19 of the judgment in *Shenavai* , cited above. 40. The same court does not therefore have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one

of those obligations is to be performed in that State and the other in another Contracting State. 41. It should be remembered that, while there are disadvantages in having different courts ruling on different aspects of the same dispute, the plaintiff always has the option, under Article 2 of the Convention, of bringing his entire claim before the courts for the place where the defendant is domiciled." It was clear, Mr Lake submitted, that the present action contained two separate claims, as was evidenced by the fact that they were advanced in two separate conclusions, supported by two separate pleas-in-law. Each claim was based on a separate alleged obligation. The claim for payment (conclusion 1) was based on an alleged obligation under the contract to make payment for work done. The claim for damages (conclusion 2) was a claim for damages for breach of an implied obligation, allegedly incumbent on the defenders, to comply with their obligations under their contract with a third party, Zinwell Corporation ("Zinwell"), and not by any action or default within their control to allow a termination of the Zinwell contract to occur, to the effect of preventing the pursuers from earning royalties which were calculable by reference to the quantity of goods supplied by the defenders to Zinwell. The payment obligation relied upon in support of the claim made in the first conclusion was one which fell to be performed in Scotland. It was accepted that this court therefore had jurisdiction in respect of that part of the action. There was no suggestion, however, that the implied obligation relied upon in support of the second conclusion was one which fell to be performed in Scotland. These were two obligations of equal rank, one of which fell to be performed in Scotland and one of which did not. This was therefore a case to which the rule explained in paragraph 40 of the judgment in *Leathertex* applied, and not one to which the rule mentioned in paragraph 19 of the judgment in *Shenavai* and applied in *Union Transport* applied. The plea of no jurisdiction should therefore be sustained to the extent of granting decree of dismissal in respect of the second conclusion.

- (b) **The Pursuers' Submissions** The submissions made by Mr Logan did not take the form foreshadowed in the pursuers' Note of Proposals. His submission was not, as the Note of Proposals appeared to suggest, that the fact that the court has jurisdiction over one issue arising under the contract gives it jurisdiction over other issues arising under the contract. Rather his submission was that the principal obligation on which the second conclusion was based was not the implied term contended for, but the obligation in certain circumstances to make a payment of royalties in respect of goods supplied to Zinwell. The implied obligation was designed to protect the right to payment of those royalties. The search, carried out in accordance with *Shenavai*, for the principal obligation on which the claim in the second conclusion is founded thus led to the defenders' obligation to make a payment to the pursuers of the royalties on goods supplied by the defenders to Zinwell. The place of performance of that obligation to make payment, like that of the obligation to make payment of the sum claimed in the first conclusion, was Scotland. It therefore did not matter that the place of performance of the obligation to comply with the alleged implied term was not Scotland. That was only an accessory obligation. The principal obligation was the obligation to make payment of the royalties. The court therefore had jurisdiction under

Article 5(1) in respect of the second conclusion. In order to elaborate upon that argument, Mr Logan pointed to the averments made by the pursuers about the evolution of the contract between the parties. The contract was for the supply by the pursuers to the defenders of certain software products. The defenders required those products in order to fulfil a contract which they had with Zinwell. The arrangements evolved through three stages.

- (1) In December 1999 the defenders explained that their contract with Zinwell was a fixed price contract with royalty payments. The cost of the software to the defenders in accordance with the pursuers' standard rates would exceed the payment that the defenders were to receive from Zinwell. The pursuers had previously done work for the defenders' associated company, CPS Europe BV, at a discounted rate in exchange for a royalty payment. It was agreed that the pursuers would invoice the work at the same discounted rate as they had previously charged CPS Europe BV in exchange for payment of a royalty of 5 guilders for each of the first 100,000 units of the completed product sold by the defenders to Zinwell. Although a written contract was to be entered into, it was agreed that the pursuers would start work immediately and invoice the defenders on the agreed basis, i.e. at the discounted rate.
- (2) The defenders continued to press the pursuers for a fixed price contract in the sum of £150,000 plus royalties. In April the pursuers proposed a new agreement to cover all work done in 2000 (but not work done in 1999, which had already been paid for). It provided that if the additional costs exceeded £150,000, the pursuers would only recover the additional costs from the royalty payment. If the royalty payments were insufficient to pay the overrun of costs within 24 months of completion of the contract, the defenders would pay 50% of the outstanding overrun, up to a maximum of £25,000. Those terms were accepted by the defenders.
- (3) In June 2000 the defenders advised the pursuers that Zinwell were not proceeding with the project. The project did not proceed because the defenders had failed to supply their part of the project timeously. The defenders said that they were anxious to proceed with the project without Zinwell. It was agreed that the pursuers would continue to undertake the work and invoice it at the discounted rate until some equivalent of the royalty payment the defenders had previously undertaken to pay could be ascertained. It was against the background disclosed in those averments, Mr Logan submitted, that the claim based on breach of an implied term of the contract fell to be examined. The pursuers' recovery of royalties depended on the defenders supplying units of the completed product to Zinwell. In these circumstances, the pursuers contend that certain terms were implied into their contract with the defenders. They aver, in particular: "It was an implied term of the agreement ... that the defenders would comply with their obligations in terms of the contract with Zinwell. It was an implied term that the defenders would not by any action or default within their control allow a termination of the Zinwell contract to occur and thus defeat the payment of the royalty." Mr Logan's submission was that the pursuers' entitlement to receive and the defenders' obligation to pay royalties on completed units supplied by the defenders to

Zinwell was a sine qua non of the contract. The pursuers' claim for damages for breach of the implied term arose out of the defenders' non-payment of royalties. The implied obligation not to interfere with the earning of royalties had no free-standing status. Its only point was to support the pursuers' entitlement to receive payment of royalties. The implied term was ancillary to the defenders' obligation to pay royalties. Mr Logan submitted that on a proper interpretation of what was said by the European Court of Justice in *De Bloos* at paragraph 14 - "In a case where the plaintiff asserts the right to be paid damages ... the obligation referred to in Article 5(1) is still that ...the non-performance of which is relied upon to support such claims" - the principle was wide enough to identify, as the obligation to which Article 5(1) would direct attention in relation to the claim made in the second conclusion, the defenders' obligation to pay royalties. He referred to *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging*, Case 34/82,

- [1983] ECR 987, in which the European Court of Justice observed: "The provisions of the Convention should therefore be interpreted in such a way that the court seised is not required to declare that it has jurisdiction to adjudicate upon certain applications but has no jurisdiction to hear certain other applications, even though they are closely related." (Reference was also made to *Kleinwort Benson Ltd v Glasgow City Council*
- [1999] AC 153, per Lord Goff of Chieveley at 170-171.) The present case was one in which the principle enunciated in *Leathertex* at paragraph 40 was inapplicable; this was not a case of two obligations of equal rank. The obligation to comply with the implied term was merely ancillary to the principal obligation to pay royalties, and therefore the court had jurisdiction by virtue of the application of the principle enunciated in *Shenavai* at paragraph 19. Moreover, Mr Logan submitted, it was a useful cross check to ask whether the claim, if entertained in this court, would be determined in the forum which is clearly the most appropriate for it (*Union Transport* per Lord Goff at 23). Here the contract was a Scots contract expressed in English, and this court would be the most appropriate forum. Finally, Mr Logan submitted that if he was wrong about the implied obligation being ancillary to the obligation to pay royalties, it did not follow that the plea of no jurisdiction was well founded. In determining the place of performance of the implied obligation, the place of performance of the obligations of the defenders to Zinwell were not relevant. It was not clear that the place of performance of the implied obligation was the Netherlands.
- (c) The Defenders' Response In response to Mr Logan's submissions, Mr Lake made two additional points. The first, which perhaps relates principally to the question of the relevancy of the averments of the existence of the implied term, was that Mr Logan had accepted, in the course of preliminary hearings, that the pursuers' claims were based on the agreement of June 2000. I shall return to that point in the context of the issue of the relevancy of the averments of the implied term. The second point, however, related exclusively to the issue of jurisdiction. It was that Mr Logan had accepted that the fact that the court has jurisdiction in respect of the first conclusion does not per se give it jurisdiction in respect of the second conclusion. That, however, was the only basis of jurisdiction

advanced in the pleadings. It was necessary for a party invoking Article 5(1) to make clear averments of the basis on which he did so. In *Eddie v Alpa Srl* 2000 SLT 1062, Lord Eassie made that point at 1067H-I: "In my view a pursuer seeking to rely on the special and derogative provisions of art 5(1) of the Brussels Convention should be able to set out, in averment, a sufficient exposition of contractual terms wherefrom it can be seen that there is an intelligible and statable basis for maintaining that the location of the place of performance of the contractual obligation in issue is within the territorial jurisdiction of the court before which the action has been brought. ... [A] pursuer ostensibly in doubt as to his contractual situation and as to whether he is able to aver the existence of art 5(1) jurisdiction always has available to him the primary ground of jurisdiction, namely domicile under art 2 ...". Reference was also made to *Kleinwort Benson Ltd* per Lord Clyde at 184F-H. In the present case, the pursuers had failed to set out in averment the basis on which they maintain that this court has jurisdiction in respect of the conclusion for damages. More particularly, Mr Logan's final submission about the place of performance of the implied obligation (see paragraph [17] above) was without merit. If the implied obligation was the relevant one for the purpose of Article 5(1), it was for the pursuers to aver that its place of performance was in Scotland, if they wished to advance that contention. They had not done that.

- (d) Discussion In my opinion the principles which emerge from the European jurisprudence in relation to the application of Article 5(1) are clear. Although counsel quite properly examined the principal authorities, I can do no better by way of summary of the result than to quote the following passage from the opinion of Lord Eassie in *Eddie v Alpa Srl* at 1063L-1064B, to which Mr Logan referred: "[Where] damages are sought for breach of contract the obligation relevant for the purposes of art 5(1) was the obligation under the contract which had allegedly been breached (*De Bloos* , paragraph 14). In determining the location or situation of the place of performance it was necessary, in construing the contract, to apply the proper law of the contract, that law being ascertained in accordance with the private international law rules of the *lex fori* (*Industrie Tessili*). If an action were founded on a number of different obligations all arising under the same contract a court might identify the principal obligation in issue, which would determine its jurisdiction, any subsidiary obligation being governed by the *maxim accessorium sequitur principale* - *Shenavai* , paragraph 19. However, if the separate obligations were of equal importance and the one was not clearly ancillary to another, principal obligation, jurisdiction existed only in respect of a claim based on the obligation whose place of performance lay within the territorial jurisdiction of the court seized - *Leathertex* [Since] the provisions of art 5(1) constitute a derogation from the basic leading provision of the Convention that a defender be sued in the courts of his domicile, its provisions fell to be construed restrictively." In order to determine whether this court has jurisdiction in respect of the second conclusion by virtue of Article 5(1), the first question which requires to be answered is: What is "the obligation in question"? The answer is to be found, in my opinion, by applying paragraph 14 of the judgment in *De Bloos* . The claim is a claim of damages for breach of contract. The

obligation in question is therefore the obligation the non-performance of which is relied upon in support of the claim. In the present case, that obligation is the defenders' alleged implied obligation to comply with the terms of their contract with Zinwell, and not by any action or default within their control to allow a termination of their contract with Zinwell to occur and thus defeat the payment of royalties to the pursuers. The next question is: What is the place of performance of the obligation in question? Since it is, as I understand the position, a matter of concession that Scots law is the proper law of the parties' contract, that question is to be answered in accordance with Scots law (*Grant v Marie Brizard España* ; *Industrie Tessili* , paragraph 13; *Leathertex* , paragraph 33). It is, in my view, clear that the place of performance of that obligation is not in Scotland. Mr Logan was no doubt right to say that the place of performance of the obligations which the defenders owed to Zinwell was not relevant as such, but the alleged implied obligation in the parties' contract on which the pursuers found seems to me inevitably to have had its place of performance in the place where the defenders were to perform their obligations under their contract with Zinwell. Given that the only place of business of the defenders mentioned in the pleadings is in the Netherlands, it appears probable that the place of performance of the defenders under their contract with Zinwell, and consequently the place of performance of the implied obligation in the parties' contract, was in the Netherlands. Be that as it may, it is in my view clear that it is for the pursuers to aver the place of performance of the obligation in question (*Eddie v Alpa Srl* per Lord Eassie at 1067; *Kleinwort Benson* per Lord Clyde at 184G). The pursuers make no averment in support of the proposition that the place of performance of the implied obligation was Scotland. If, therefore, the obligation in question was that implied obligation, there are no relevant averments that on the basis of Article 5(1) this court has jurisdiction in respect of the second conclusion. That is not, however, the end of the matter, because the pursuers contend that the implied obligation, even if it is the obligation which is identified by the application of the principle set out in paragraph 14 of the judgment in *De Bloos* , is not the principal obligation founded upon. The contention is that that obligation is merely ancillary to the obligation to pay royalties. It is therefore submitted that, on the principle enunciated in *Shenavai* at paragraph 19, it is the place of performance of the obligation to pay royalties that determines jurisdiction. It is therefore necessary to examine the contention that the implied obligation is in the relevant sense ancillary or accessory to the obligation to pay royalties. There is, in my view, a sense in which the implied obligation is ancillary to the obligation to pay royalties. As Mr Logan submitted, its purpose can be seen as the protection of the pursuers against loss of their right to royalties through act or default on the part of the defenders. Taking pro veritate the pursuers' averments as to the terms of the contract, their entitlement to royalties depended on the delivery of completed units by the defenders to Zinwell. They were therefore at risk of losing that entitlement if the defenders failed to perform their contract with Zinwell. The purpose of the implied term contended for was to give them a claim against the defenders if, through the defenders' default, no units were delivered and thus no royalties came to be payable. Were it not for the provision entitling the pursuers to royalties on completed units delivered by the defenders to Zinwell, there would have been no question of the implied obligation coming into

existence. It does not, however, in my view follow that the obligation to pay royalties is the relevant principal obligation for the purpose of determining which court has jurisdiction as the court of the place of performance of "the obligation in question". The rule in paragraph 19 of the judgment in Shenavai is concerned with the situation in which the dispute is "concerned with a number of obligations arising under the same contract and forming the basis of the proceedings " (emphasis added). It is therefore not enough, in my opinion, to identify an obligation (to be performed within the jurisdiction of this court) to which the obligation performable elsewhere can be said to be ancillary. The obligation said to be the principal obligation must form part of the basis of the proceedings. In the present case, I am of opinion that the obligation to pay royalties forms no part of the basis for the second conclusion. Indeed, for the implied obligation to come into operation, the situation must be such that there is, in the events which have happened, no obligation on the part of the defenders to pay royalties. It is not in my view sufficient, to make the obligation to pay royalties the principal obligation founded upon, that for the purpose of quantification of damages reference will have to be made to the amount of royalties which would have been payable if the defenders had not acted in breach of the implied obligation. The only obligation on which the second conclusion is based is, in my opinion, the alleged implied obligation. I am therefore of opinion that Mr Logan's attempt to found on the rule in paragraph 19 of the judgment in Shenavai is misguided. In my opinion, therefore, "the obligation in question" for the purpose of the application of Article 5(1) to the claim advanced in the second conclusion is the alleged implied obligation, the place of performance of which is not relevantly averred to be in Scotland. It follows, in my opinion, that the defenders' plea of no jurisdiction is well founded in respect of the second conclusion, and should be sustained to the extent of dismissal of that conclusion. Relevancy - The Implied Term On the view which I have taken of the plea of no jurisdiction, the relevancy of the averments relating to the implied term is no longer a live issue. Nevertheless, lest the matter go further, it is appropriate that I should indicate briefly the view which I would have taken on that issue.

- (a) The Defenders' Submissions Mr Lake submitted that the familiar tests of the relevancy of averments of an implied term of a contract were to be found in *The Moorcock*

(1889) 14 PD 64 and in the other authorities referred to in *Scottish Power plc v Kvaerner Construction (Regions) Ltd* 1999 SLT 721. All that the pursuers said by way of an attempt to satisfy that test was: "It was necessary for the operation of the contract that the risk of non-payment of the royalty by Zinwell following a breach of their obligations by the defenders rested on the defenders." That bare assertion was not, by itself, enough. What were required were averments of facts and circumstances supporting the bare assertion. Secondly, Mr Lake submitted that since it was clear that by the time of the agreement said to have been concluded in June 2000 Zinwell had already terminated their contract with the defenders, an implied term that the defenders would not cause the termination of the Zinwell contract was inconsistent with the known facts on the basis of which the June agreement was entered into. In advancing that argument, Mr Lake relied heavily on the

understanding which he said that Mr Logan had conveyed in the course of preliminary hearings that the pursuers' claim was founded solely on the June agreement. Moreover, Mr Lake submitted, since the June agreement was for payment on a time and line basis, it could not be said that continuation of the Zinwell contract was necessary to give it business efficacy. Mr Lake also pointed to the pursuers' admission that it was CPS Europe BV, and not the defenders, who were the party to the Zinwell contract. There therefore could not be an implied term that the defenders would comply with their obligations under the Zinwell contract, when they were not parties to it. On these grounds Mr Lake submitted that the averments relating to the implied term were irrelevant, and that on that ground, if not on the ground of no jurisdiction, decree of dismissal should be pronounced in respect of the second conclusion.

- (b) The Pursuers' Submissions Mr Logan submitted that the bare averment of necessity should be read in the context of the earlier averments about the basis on which the pursuers were to be remunerated. It was clearly averred that the only means by which the pursuers were to make a profit on the transaction was through earning commission. That background gave adequate content to the averment of necessity. Further, he disputed Mr Lake's interpretation of what had been said about the basis of the claim at the preliminary hearings. It was plain, he submitted, that the implied term related to the April 2000 agreement, not the June 2000 agreement. The April agreement made provision for a payment by the defender in the event of a shortfall in royalties within 24 months of the end of the project, but did not contemplate a situation in which there would ultimately be no royalties. So far as the identity of the party contracting with Zinwell was concerned, Mr Logan pointed to the pursuers' averments explaining that the defenders and CPS Europe BV were both subsidiaries of Pijnenburg Beheer NV, and that the defenders had been incorporated specifically for the purpose of undertaking the work involved in the Zinwell contract. (c) Discussion With some hesitation I am prepared to accept that the averment of the necessity of the implied term can be read in the context of the earlier averments about the basis on which the pursuers were to be remunerated, and that in that form further specification is given. Mr Lake was, in my view, mistaken about what Mr Logan had said at the preliminary hearings about the contractual basis of the pursuers' claims. It is, according to my recollection, correct that Mr Logan said that the claim for payment was based on the June agreement, and that the earlier agreements were referred to only to explain the reference to a discounted rate in the June agreement. I do not consider, however, that Mr Logan can be taken to have meant that the claim for damages too was based on the June agreement. For the reason clearly identified by Mr Lake, namely that the Zinwell agreement was already terminated by the time of the June agreement, the claim based on breach of the implied term cannot be based on the June agreement. In light of the explanation about the defenders having been formed specifically to do the work required under the Zinwell contract, I do not consider that the pursuers' admission that it was CPS Europe BV that contracted with Zinwell can be regarded at this stage as fatal to the damages claim. In all the circumstances, I would, had I not sustained the plea of no jurisdiction, have allowed a proof before answer in respect of the damages claim.

Relevancy - The Payment Claim The Defenders' Submissions Mr Lake submitted that in certain respects the claim for payment made in the first conclusion was not supported by relevant averments. He pointed out that the claim was based on three invoices, namely (i) invoice number 00-122 dated 30 June 2000 (No. 6/13 of process); (ii) invoice number 00-126 also dated 30 June 2000 (No. 6/14 of process); and (iii) invoice number 00-149 dated 31 July 2000 (No. 6/15 of process). Although these invoices were not formally incorporated in the pursuers' pleadings, it was only through them that specification of the composition of the claim was given. He therefore submitted that he was entitled to treat them as part of the pleadings. On that basis, he made two points about them.

- (1) He submitted that, although it was the agreement of 10 June 2000 that the pursuers relied upon, two of the invoices (Nos. 6/13 and 6/14 of process) made claims in whole or in part for work done before that date.
- (2) Two of the invoices were headed "Zinwell Application", but the third (No. 6/14 of process) was headed "Open TV Platform - Ian Moody", and thus did not bear to relate to the relevant contract. (b) The Pursuers' Submissions Mr Logan responded to those submissions in the following way.
 - (1) So far as the dates in the invoices were concerned, the claim was based on the April agreement as well as the June agreement, and the fact that some of the work appeared to antedate the June agreement was of no moment.
 - (2) The reference to "Open TV Platform" was simply another way of referring to the contract in question. He pointed to the averment in article 2 of the condescendence in which reference is made to agreement about "what the defenders required in respect of the development of software for boxes to operate Open TV space, a product being developed for Zinwell".
- (c) Discussion In my view, it would be inappropriate to rule at this stage that the claims made in the invoices relating to dates before 10 June 2000 are irrelevant. I do not take that view for the reason advanced by Mr Logan, because it seems to me that it is correct that the payment claim is based on the June agreement. However, it is averred that: "At the meeting on 10 June ... [it] was agreed that the pursuers would continue to undertake the work instructed and invoice this work at the discounted rates". It seems to me to be a possible interpretation of that agreement that it applied not only to work done thereafter, but also to work already done but not yet invoiced. In light of the explanation offered by Mr Logan and the averment about "Open TV", I do not consider that I can properly exclude invoice 00-126 from probation on the basis that it does not relate to the relevant contract. Result I shall accordingly -
 - (1) sustain the defenders' first plea in law, so far as it relates to the second conclusion, and accordingly grant decree of dismissal in respect of that conclusion; and (2) quoad ultra allow a proof before answer. I shall reserve meantime the question of expenses. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2002/280.html>

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