1936 *Present :* **Macdonell C.J. and Poyser J.**

THE TIMES OF CEYLON COMPANY, LTD. *v.* THE ATTORNEY-GENERAL.

97—D. C. Colombo, 1,063.

Agreement for sale of land—Covenant to sell property in the event of the vendor purchasing it—No covenant to buy—Option to buy—No implied covenant to purchase—Successful party deprived of costs—Discretion of Court.

An agreement was entered into between the plaintiff company and the Crown for the sale to the company of a block of land adjoining its premises, the buildings to be erected thereon, and the transfer of a certain strip of land belonging to the company to the Crown for the purpose of street-widening in exchange for the transfer by the Crown to the company of a strip of land belonging to the Crown.

In the first seven clauses of the agreement the Crown binds itself to sell and the company binds itself to buy the aforesaid block of land adjoining its premises. The two parties bind themselves mutually to give in exchange the two strips of lands mentioned. There are convenants by the company as to the value of the buildings it will erect on the block of land, covenants as to the earliest date at which the company can ask for a Crown grant and a provision in the event of the agreement failing. Clause 8 provides as follows :—

> The company further agrees to sell to the Crown (in the event of the company becoming the owner thereof) such portions of lot 2 and 3 coloured red in the said sketch marked A as are inside of and to the north and north-west of the street lines of Main street at a price to

[1] *2 Bal. Reports 122.*

be calculated at the same rate per acre as that at which the company shall have bought the said lots, provided however the company shall not be bound to sell until the completion of the aforesaid buildings. And further the Crown hereby agrees that in the event of negotiations taking place for the acquisition or purchase by the Crown of the whole of the said two lots, the Crown in effecting such acquisition or purchase will, as regards so much thereof as is outside of and to the south and south-east of the street lines of Main street as depicted as aforesaid, do so as agents of and on behalf of the company, and the company shall be obliged to purchase the same from the Crown at a price to be calculated at the same rate per acre as that at which the Crown shall have acquired or purchased the same.

***Held,* that under clause 8 the Crown did not enter into a binding agreement to purchase the land mentioned therein, and that the clause was meant only to give the Crown an option to buy.**

***Held, further,* that a covenant to buy on the part of the Crown cannot be implied into clause 8 of the agreement.**

A Court has a discretion to deprive a successful party of its costs where it disapproves of its conduct in connection with or leading up to the action.

***Donald Campbell and Company, Ltd. v. Pollak* (*1927, A.C. 732*) followed.**

THE plaintiff the "Times of Ceylon" Company, Ltd., sued the Attorney-General as representing the Crown for the recovery of a sum of Rs. 128,331.46 as damages sustained by the plaintiff for breach of an agreement entered into by the Crown with the plaintiff. The fact as well as the relevant terms of the agreement are set out in the head-note. The learned District Judge held that the Crown did not by virtue of clause 8 enter into a binding agreement to purchase the land. The main question argued in appeal was whether a covenant by the Crown to buy may be implied into clause 8 of the Agreement.

Hayley, K. C. (with him *A. E. Keuneman and Gratiaen*), for plaintiffs, appellants.—Where two persons mutually agree that one of them shall sell his property to the other, the law implies a corresponding and correlative obligation on the other party to purchase the property. *Pordage v. Cole*[1]; *Wood v. Copper Miners Co.*[2]; *Church Ward v. The Queen*[3]; *Great Northern Railway Co. v. Harrison*[4].

The appellants are entitled to demand the full purchase price stipulated for in the contract (*Pordage v. Cole* (ibid)). This is so even if the action is treated as one for damages, as the land is now sterile and valueless (*Newnham v. Gomis*[5]).

An action for specific performance lies against the Crown as against any private individual. *Fry on Specific Performance* (*6th ed.*), *p. 63*; *Halsbury's Laws of England, vol. 27, p. 18.*

J. E. M. Obeyesekere, Acting Deputy Solicitor-General (with him *M. F. S. Pulle, C.C.*) for the defendant, respondent.—There is no express agreement in clause 8 of the contract whereby the Crown agrees to buy the land in question. That being so, the only question is whether a promise to buy on the part of the Crown must be implied from the terms

[1] *(1669) 1 Wm. Saund 319 ; 85 E. R. 449.*
[2] *(1849) 17 C. B. 906.*
[3] *(1865) L. R. I. G. B. 173.*
[4] *(1853) 12 C. B. 576.*
[5] *35 N. L. R. 119.*

of the contract. A Court will read an implied covenant into a contract only if it is necessary to do so as to give business efficacy to the transaction (*In re Moorcock*[1]). A Court will imply such a term only when on considering the terms of the contract in a reasonable and business like manner an implication necessarily arises that the parties must have intended that the suggested stipulaton should exist (*Hamlyn & Co. v. Wood & Co.*[2]). Counsel also referred to the case of *L. French & Co., Ltd. v. Leeston Shipping Co., Ltd*[3]. It cannot be said in this case that an agreement on the part of the Crown to buy must be read into clause 8 in order to give business efficacy to the whole transaction. Clause 8 reserves to the Crown an option which it may exercise within a reasonable time, the consideration for the option being the advantageous terms under which the Company became the purchasers of lot 1 of the same land. If this lot had been sold by public auction the Company may conceivably have been obliged to pay more than the stipulated price. This is a good consideration.

Counsel then proceeded to distinguish the cases of *Pordage v. Cole* (*supra*) and *Church Ward v. The Queen* (*supra*) cited by Counsel for the appellant. Counsel also referred to *Helby v. Mathew*[4] and *Massdorp's Institutes of Cape Law, vol. III., p. 74.*

Hayley, K.C., in reply.

Cur. adv. vult.

March 25, 1936. MACDONELL C.J.—

In this case the Times of Ceylon, a duly registered company with limited liability, sued the Crown as represented by the Attorney-General of Ceylon for a sum of Rs. 128,331.46 as damages sustained by the plaintiff through the breach by the Crown of its notarial agreement of October 31, 1927, with the plaintiff company.

The whole case turns on the correct interpretation of clause 8 of this agreement whereby the plaintiff company bound itself (in the event of its becoming owner) to sell to the Crown a certain piece of land depicted in the plan annexed to this judgment, but in which there are no explicit words by the Crown binding itself to buy this same piece of land. A question of law arises and it is really the sole question in this case,—must a covenant by the Crown to buy be implied into clause 8 of this agreement ?

The facts in this case necessitate a plan, and, accordingly, a plan is annexed to this judgment with sufficient detail to make the judgment intelligible. The plaintiff compnay owned a building for the purposes of its newspaper, facing west to Bristol street in the Fort, Colombo, a street of secondary importance. To the north of the plaintiffs' building, blocking it from access to the far more important Main street—which is a principal artery of traffic—there was a building facing on to Main street which belonged to the Colombo Electrical Tramways & Lighting Co., Ltd., but which for shortness sake will be called the "red" block or building, and to the east of the plaintiff company's premises there was a

[1] *14 P. D. 64.*
[2] *(1891) 2 Q. B. 488.*
[3] *(1922) 1 A. C. 451.*
[4] *(1895) A. C. 471.*

larger block of land, the property of the Crown, likewise facing on to Main street. This block of land is in the original plan coloured blue, its northern strip facing on to Main street coloured dark blue, and the rest of this block, that further to the south and making the greater part of the whole, coloured light blue. One of the main objects of the agreement between the plaintiff company and the Crown was to enable the plaintiff company to buy this piece of Crown land to the east of its original premises, which piece is coloured light blue. Along with this conveyance to the plaintiff company of the Crown land to the east, coloured light blue, there was to go a certain exchange by which the plaintiff company was to obtain from the Crown a longish narrow strip of land, coloured yellow, which lay between the Company's original premises and the light blue Crown land it proposed to acquire, and which therefore it was very convenient for the plaintiff company to acquire so as to give access from its original premises to the light blue Crown land immediately to the last of those premises. In exchange the company was to give to the Crown a piece of land coloured green parallel to its original premises and facing on to Bristol street. It is clear also that the plaintiff company was anxious to obtain two small triangular strips of the red property to the north of its original premises which would round them off and which we will call X and Y. There was also a further small rectangular strip of the Crown land, light blue, which the Crown was willing that the plaintiff company should acquire, which we will call Z.

With these facts before us and the plan to make them clear, it will now be possible to examine in detail the agreement of October 13, 1927, between the Crown, the defendant, and the company the plaintiffs. It was in the following terms :—

"This agreement made between His Excellency Sir Herbert James Stanley, Knight Commander of the Most Distinguished Order of St. Michael and St. George, Governor and Commander-in-Chief in and over the Island of Ceylon with the Dependencies thereof, acting on behalf of His Majesty King George the Fifth, his heirs, &c. (hereinafter referred to as the Crown which term shall include the said Sir Herbert James Stanley and his successors in office), of the one part and the Times of Ceylon Company, Limited, a company registered under the Ceylon Joint Stock Companies Ordinance and having its registered office at Colombo (hereinafter called 'the Company'), of the other part.

"Whereas with a view to widening the streets known as Main street and Bristol street in Colombo in the Island of Ceylon certain arrangements have been come to between the Crown and the company in regard to the sale to the company of a block of land adjoining its present premises in Bristol street aforesaid and the buildings to be erected thereon and the transfer of a certain portion of land belonging to the company to the Crown for the purpose of the said street widening in exchange for the transfer by the Crown to the company of a portion of land belonging to the Crown and in regard to other matters connected therewith."

"Now this indenture witnesseth and it is hereby agreed between the Crown and the company as follows:—

"1. The Crown shall sell to the company and the company shall purchase from the Crown at a price to be calculated at the rate of one million rupees an acre lot 1 in P. P. 19,144, in extent 1 rood and 5.42 perches (subject to any necessary minor alterations for rounding off street corners) being the portion coloured light blue in the sketch hereto attached markd 'A' excepting therefrom the north-west lot marked 2A in the said P. P. 19,144.

"2. The full purchase price shall be paid in advance on or before the execution of these presents but the Crown shall not be under any obligation to issue a Crown grant in favour of the company until the terms of this agreement on the part of the company hereinafter specified have been fulfilled and until the said grant has issued the said land shall remain vested in the Crown, provided that if for any reason this agreement cannot be fulfilled and thereby becomes determined and the said lot 1 in P. P. 19,144 has not been granted to the Company the said purchase price shall be repayable to the company subject however to the right of the Crown to deduct therefrom the amount of any damages for any breach thereof which the company may be legally liable to pay the Crown.

"3. Plans for buildings to be erected by the company on the said land at a cost of not less than Rs. 600,000 shall be submitted by the company for the approval of the Crown within six months from the date hereof.

"4. The said buildings shall not extend beyond the proposed street lines of Main street and Bristol street as shown in the said sketch marked 'A'.

"5. In consideration of the company paying the purchase price in advance the Crown undertakes to put the company in vacant possession of the land at the earliest convenient opportunity and for that purpose the Crown shall cause the buildings on the said land to be demolished within three months from the date of this agreement.

"6. The said buildings or such portion thereof as shall cost not less than Rs. 600,000 shall be completed and rendered fit for application to be made for the certificates of conformity in respect thereof under section 182 of Ordinance No. 6 of 1910 within three years of the date of this agreement. Provided that allowance shall be made for any delay caused by the Crown or its servants, strikes, civil commotions, war, acts of God, or other occurrences beyond the control of the company or abnormal and unforseen difficulties in connection with the foundation or the obtaining of materials for the said buildings.

"7. Within six months of the date of execution of these presents a deed of exchange shall be executed by the Crown and the company by which the Crown shall convey to the company lots 2 and 2A in P 2 19,144 in extent 5.86 perches subject to any necessary minor alterations for rounding off street corners, the said lot No. 2 being the portion marked yellow in the said sketch marked A, and the said lot

2A being the block on the north-west corner of lot No. 1 coloured light blue in the said sketch marked A, and the company shall convey to the Crown lot No. 1 in P. P. 19,275, in extent 6.55 perches being the portion marked green in the said sketch marked A, provided however that the said transfer shall be expressed so as to entitle the company to remain in possession of the said portion marked green free of all rent until one year after the said certificate of conformity under section 182 of Ordinance No. 6 of 1910 has issued.

"8. In pursuance of the premises the company hereby further agrees to sell to the Crown (in the event of the company becoming the owner thereof) such portions of lots 2 and 3 coloured red in the said sketch marked A as are inside of and to the north or north-west of the street lines of Main street as depicted in the said sketch marked A at a price to be calculated at the same rate per acre as that at which the company shall have bought the said lots, provided however that the company shall not be bound to sell until the completion of the aforesaid buildings under clause 6. And further the Crown hereby agrees that in the event of negotiations taking place for the acquisition or purchase by the Crown of the whole of the said lots 2 and 3 coloured red as aforesaid (or such portion thereof as includes the portions thereof which are shown in the sketch marked A as being outside of and to the south or south-east of the street lines of Main street) the Crown in effecting such acquisition or purchase will as regards so much thereof as is outside of and to the south or south-east of the street lines of Main street as depicted as aforesaid do so as agents for and on behalf of the company and the company shall be obliged to purchase the same from the Crown at a price to be calculated at the same rate per acre as that at which the Crown shall have acquired or purchased the same.

"9. The Crown shall keep always a reservation 15 feet wide free from all buildings and erections running from the said Bristol street to Duke street and alongside of and immediately adjoining the southern boundaries of the Times building and lots coloured yellow and blue and depicted in the said sketch marked A".

It is necessary to take this agreement in detail. (It seems to have been executed on October 31, 1927, but is referred to in some of the correspondence in this case as the agreement "of 3rd December, 1927", but it is common cause that it is the same agreement and that it was duly executed and apparently on October 31, 1927.) The recital states that with a view to widening Main street and Bristol street certain "arrangements" had been come to between the Crown and the company in regard to a sale and to a certain transfer and exchange. Commenting on these recitals one would note that they do not talk of widening Bristol street or Main street for the whole extent of those streets but only, having regard to what follows, for the portion of Bristol street where the company's original building fronted it and for that portion of Main street where the Crown had the northern, dark blue, portion of its block the rest of which, the light blue portion, it was about to sell to the company. The arrangements, we are told in the recitals, are with regard

to a sale to the company of a block of land adjacent to its present premises in Bristol street; it is admitted that this is the light blue block in the plan. The arrangements are also with regard to buildings to be erected thereon, that is to buildings which the company is to erect on the light blue block. The arrangements between the Crown and the company are also with regard to the transfer of a certain portion of the company's land to the Crown for the purpose of widening the said street—admittedly this refers to the green strip fronting on to Bristol street—in exchange for the transfer by the Crown to the company of a portion of Crown land which admittedly is the yellow strip on the plan. The agreement then goes on to say that it is hereby agreed between the Crown and the company that (clause 1) the Crown shall sell to the company, and the company shall purchase from the Crown, at a definitely calculable price the light blue Crown land but excepting from it the rectangular strip Z which, as will be seen, is part of the exchange between the Crown and the company of yellow for green; the words of this clause 1 are perfectly definite, the Crown is to sell to the company and the company is to buy from the Crown.

Clause 2 says that the purchase price for the light blue block of Crown land is to be paid in advance and that there is to be no obligation on the Crown to issue a Crown grant until the company has fulfilled the terms of this agreement—this is a clear reference to the subsequent clauses 3, 4, and 6 in the agreement—till which fulfilment the title to the light blue block is to remain in the Crown, and the clause also provides for a possible failure of the agreement in which case the purchase price is to be repaid to the company less any damages which it may be liable to pay to the Crown. This clause again is perfectly clear, and it can be carried out by the company purchasing and paying for the light blue block and by its conforming to the conditions contained in clauses 3, 4, and 6.

Clause 3 says that the plans for the buildings (to cost not less than 6 lacs) that the company is to erect on the said land, that is, on the light blue block, are to be submitted to the Crown for its approval within six months from October 31, 1927. This clause again is perfectly clear and refers to buildings on the light blue block and not to anything else. Clause 4 says that these buildings, which means the buildings on the light blue block, are not to extend beyond certain proposed street lines of Main street and Bristol street as shown in the plan, and the plan is perfectly clear that the street line of Bristol street will include the green strip which the company is to give to the Crown, that is to say, the green strip is to be part of that street, and likewise that Main street is to include the portion of Crown land coloured dark blue abutting on Main street and immediately to the north of the light blue block which the company is to purchase from the Crown; the dark blue bit is to be part of that street. Here, for the first time, we have to note an ambiguity in the agreement. The said buildings, *i.e.*, those which the company is to erect, are clearly the buildings which it is to erect on the light blue block it was purchasing from the Crown. There is nothing hitherto in the agreement as to what is to happen to the company's existing buildings facing on to Bristol street. By the agreement the company is under no obligation

to rebuild them or alter them in any way but this clause 4 may be read to mean that the company's existing buildings facing on to Bristol street must not extend over the green strip which is to go into that street. Clause 5 then says that in consideration of the company paying the purchase price in advance, the Crown will give vacant possession as early as possible and will demolish the buildings on the said land within three months from October 31, 1927. The "buildings on the said land" clearly mean the buildings on the light blue block which the company is purchasing from the Crown. The clause can hardly be interpreted to refer to any other buildings, and in particular cannot refer to any buildings that there may be on the dark blue piece of Crown land fronting into Main street. It may have been the intention of the Crown and the draftsman of this agreement that the buildings on the dark blue piece of Crown land were also to be demolished, but the agreement does not say so. The undertaking by the Crown to demolish buildings on the said land must mean buildings on the light blue block and not any other buildings. Then comes clause 6 by which the company undertakes that such buildings, *i.e.*, the buildings on the light blue block or such portion of them as shall cost not less than 6 lacs, shall be so far completed that the company will be able to apply for certificates of conformity under section 182 of Ordinance No. 6 of 1910 within three years of October 31, 1927, subject to the usual exceptions as to strikes, war, act of God, and the like. Clause 7 deals with the exchange between the two parties, the Crown and the company, and says that within six months of October 31, 1927, the deed is to be executed between the parties by which the Crown will convey to the company the yellow strip and the rectangular strip of light blue, which we call Z, and the company will convey to the Crown the strip facing on to Bristol street, coloured green, with a proviso that the company may remain in possession of the green strip free of rent for one year after it has obtained a certificate of conformity. This again is a clause which seems perfectly clear.

We now come to clause 8 which is the crux of the whole agreement and on the interpretation of which this case depends. It will be necessary to take it almost word by word. It begins by saying "In pursuance of the premises". Now premises (*10 Halsbury, p. 300, paragraph 371*) should "name the grantor and grantee and define the thing which is granted", and what follows in this clause 8 has not been mentioned in the "premises", no reference has hitherto been made to it. To continue, "In pursuance of the premises the company hereby further agrees to sell to the Crown (in the event of the company becoming the owner thereof) such portions of the lots . . . . coloured red in the sketch . . . . as are inside of and to the north or north-west of the street lines of Main street as depicted in the sketch . . . . at a price to be calculated at the same rate per acre as that at which the company shall have bought the said lots, provided however that the company shall not be bound to sell until the completion of the aforesaid buildings under clause 6". Taking this in detail; "the company agrees to sell to the Crown", no time limit is mentioned, save that at the

and of the sentence it is stated that the company need not sell until the completion of the buildings that it is to put up on the light blue block. But save for this, no time limit is given within which the company must sell and the Crown is to buy, if the Crown is bound to buy. It goes on, "in the event of the company becoming owner" of these portions of the red block; it will be noted that the company is under no obligation to become owner. The company is to sell the red block at the price at which it has bought it, that is to say, it is not to make a profit on the sale, but it is curious that there is no provision to safeguard the Crown from the possibility of the company doing the owners of the red block an obligement by itself paying a high price so that the owners of the red block could get a correspondingly high price from the Crown. It is necessary to mention these facts, namely, contingencies which the draftsman of this clause has not foreseen—absence of a time limit, absence of sufficient safeguard as to price—because the Court is asked to read into this first sentence of clause 8 a covenant by implication on the part of the Crown to buy the red block from the company, in the event of the company becoming owner of it, such covenant being nowhere explicitly mentioned in the clause. Clause 8 continues: "And further the Crown hereby agrees that in the event of negotiations taking place for the acquisition or purchase by the Crown of the whole of the said lots coloured red"—these words contemplate the possibility of the Crown acquiring the lots coloured red under Ordinance No. 3 of 1876 or of it buying the whole either from the original owners or *semble*, from the plaintiff company itself after purchase by that company—"or such portion thereof as includes the portions thereof which are shown in the sketch as being outside of and to the south or south-east of the street lines of Main street", *i.e.*, the two triangular portions X and Y which would round off the company's original site—"the Crown in effecting such acquisition or purchase will as regards so much thereof as is outside of and to the south or south-east of the street lines of Main street as depicted as aforesaid do so as agents for and on behalf of the company and the company shall be obliged to purchase the same from the Crown at a price to be calculated at the same rate per acre as that at which the Crown shall have acquired or purchased the same". This, the second sentence of clause 8 states in effect that if the Crown purchases the red block, wholly or in part, it will, so far as concerns the triangular portions X and Y, do so as agents for the company, and in return the company shall be obliged to purchase (not the whole red block but) the triangular pieces X and Y at the same price per acre as the Crown acquired or purchased them. And note that in this second sentence of clause 8 there is an explicit agreement that if the Crown buys the whole of the red or the triangular bits of it, X and Y, the company shall be obliged to purchase X and Y from the Crown at an ascertainable price.

The plaintiff company contends that since it in the first sentence of clause 8 agrees to sell to the Crown the red portion (in the event of its becoming owner of the same), there is an implied corresponding obligation upon the Crown to buy from the company the red portion as soon as the latter has become owner of it. Confessedly, this corresponding covenant

on the part of the Crown is not expressed in clause 8. If it is to be held that the Crown has entered into such a covenant, then that covenant must be implied.

These being the facts, I must apply the law on the matter to enable me to try and determine whether we must read into clause 8 such an implied covenant by the Crown, and the law on the subject is authoritatively stated in *Hamlyn & Co. v. Wood & Co.*[1], *per* Esher M.R., where he says, "I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned", and he then proceeds to quote with approval the following words of Bowen LJ., in *The Moorcock*[2]. An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe, if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have". Can it be said here that the implication contended for by the plaintiff company is "necessary" or one that "both parties must have intended"?

If we examine the recitals and the first seven clauses of this agreement we find, as I have tried to show in the foregoing analysis of those recitals and clauses, that they can all be completely carried into effect without any need at all of reading into the contract the implication which the plaintiff company asks us to. The Crown binds itself to sell, the company binds itself to buy, the portion of land marked liht blue. The two parties bind themselves mutually to give in exchange certain two strips of land. There are covenants by the company as to the value of the buildings that it will erect on the light blue portion, covenants as to the earliest date at which the company can ask for a Crown grant, and a sufficient provision for the event of the agreement failing. We may add that these clauses 1 to 7 do if implemented carry out the recital as to the widening of Bristol street and Main street, though only for the widening of the latter street where the dark blue bit abuts on it. The recitals and clauses 1 to 7 constitute, then, an agreement complete in itself, needing no implication to give full effect to its terms. It is only clause 8 which is in need of any implication such as is contended for by the plaintiff company.

[1] *(1891) 2 Q. B. 488.*

[2] *14 P. D. 68.*

The company says, we bind ourselves by clause 8 to sell to the Crown, therefore it follows of necessity that the Crown binds itself by implication to buy from us, though we are not to be obliged to sell for a certain period which can be defined as a period not to exceed three years from the execution of the agreement. Now it must be noted that in all the other clauses of the agreement and also in the second sentence of clause 8, wherever it is said that one side shall sell it is also said that the other side shall buy. This obligation—I am to sell, you are to buy—is explicitly stated in all the other portions of the agreement where buying and selling is mentioned. There is therefore some ground for concluding that the draftsman of the first sentence of clause 8 when he placed the company under the obligation to sell but omitted any mention of a corresponding obligation on the part of the Crown to buy, did so advisedly. Still the difficulty remains. Is the implication asked for a necessary one, one that both parties "must" have intended, the company having bound itself to sell, must it not necessarily follow that the Crown impliedly binds itself to buy? Now, the law as laid down by Esher M.R., in the *Hamyln* case quoted above, is that it is not enough that the implication asked for is a reasonable one, it must also be necessary. If there is then a doubt as to that necessity the contention for the insertion of an implied covenant fails. Let us examine once again the language of the disputed portion of clause 8, "The company agrees to sell to the Crown, in the event of the company becoming owner thereof, the red block at an ascertainable price". It seems to me that there is another possible and reasonable way of construing this agreement, other than that contended for by the plaintiff company, since the obligation of the company to sell is conditional on its having become the owner of the red block. It would be, I think, a reasonable interpretation of that first sentence of clause 8 to say that it means that the company when about to purchase the red block —and remember there is no obligation on the company at all to become the owner of the red block—should warn the Crown of its intention to conclude a binding contract by which it would buy, and the former owners would sell, the red block, and in that notice to ask the Crown if and when it intends to buy. I repeat, the company was under no obligation whatever to purchase the red block, and until it did so, could be under no obligation to sell. In the absence from the words of clause 8, first sentence, of any words by the Crown agreeing to purchase the red block from the company, it seems to me that it is at least reasonable to hold that this first sentence of clause 8 meant to give an option to the Crown to purchase but not that the Crown was thereby entering into a binding covenant to purchase. I will put the case for the plaintiff company as high as this; the first sentence of clause 8 can be interpreted as implying a covenant by the Crown to purchase when the plaintiff company, having itself purchased from the original owners, offers the red block to the Crown, but the first sentence of that clause seems to me also capable of meaning that the company shall before purchasing the red block from the original owners, inform the Crown of its intention to purchase and ask the Crown whether it proposes to exercise the option to purchase, which this first sentence of clause 8 seems to give. Putting

it shortly, the first sentence of clause 8 seems to me to be this: either it gives an option to the Crown to purchase or it imposes an implied obligation upon the Crown to purchase, but if there is a doubt on the matter then the implication contended for by the plaintiff company is not "a necessary implication", and the plaintiff company's case fails.

While writing this judgment, my attention was drawn by my brother Poyser to the words on the plan annexed to and part of the agreement which say—"Premises which the Times (*i.e.*, plaintiff company) will try to purchase from B coloured red. They will sell back to Government as much as is required for road widening at the price they pay for it". "Required" by whom? Clearly, by Government. And supposing Government only requires for road widening a little of the red bit or none at all? The words on the plan quoted above show uncertainty as to this and if so render it more difficult to say that the implication asked for by the plaintiff company is a "necessary" one.

In accordance with the warning given by Esher M.R. in the *Hamlyn Case* cited above, where he says, "A large number of cases have been cited, in some of which the Court implied a stipulation, and in others refused to do so. In my opinion, it is useless to cite such cases, so far as they merely show that in the particular case an implication was or was not made", it is really sufficient to insist upon the rule of law which must govern this matter. The plaintiff company must show that the implication it asks should be read into the agreement is a necessary one, that it must be "an implication which the law draws from what must obviously have been the intention of the parties". It is not obvious to me that the covenant to be implied must have been the intention of the parties to this agreement, since it can be given a perfectly reasonable interpretation (as it seems) without the implication contended for by the plaintiff company. The implication must "prevent such a failure of consideration as cannot have been within the contemplation of either side". Even on the interpretation of the clause contended for by the company, it cannot be said that there is a complete failure of consideration since by purchasing the red block the company does get—and the second sentence of clause 8 guarantees that it shall get—the two small pieces X and Y of the red block necessary to round off the northern front of its original premises. But it is not this upon which I would so much rely as on the interpretation that seems forced on me as to this first sentence of clause 8, since it seems reasonable to construe that sentence either as an option to the Crown to purchase or as an obligation on the Crown to purchase, but if it is capable of two interpretations than there can be no question of the necessity of the implication contended for by the plaintiff company.

As was pointed out by Esher M.R. in the *Hamlyn Case* (*supra*), decided cases are of little help since the facts in each case must always be different, and the problem is to apply the rule correctly to the facts of the case before you, but out of courtesy to the very able argument that was put to us for the appellants I would wish to refer to two of the cases upon

which that argument relies. The first of these is *Pordage v. Cole*[1]. There the words of the agreement were that C should give to P £ 775 for all his lands (which were fully described) and there was "mutually given as earnest in performance of this agreement 5 shillings," the balance of the money to be paid before midsummer 1668. There it was certainly necessary to make the implication which learned Counsel for the plaintiff contended for in the present appeal. C had promised a sum of money and had given a small portion of it in earnest to P for all the lands of P. What other meaning could you give to the contract save that P should be entitled to claim the money and that C should be entitled to claim the conveyance? There was nothing uncertain about the contract. P had certain lands, C had given certain money for them and promised so much more; the contract would be meaningless unless you implied into it an agreement by P to convey the lands on receiving the money from C. The other case to which I will refer is *Wood v. Copper Miners Co.*[2] There the defendants agreed to grant a lease of certain premises to the plaintiff for twelve years at a peppercorn rent for the purpose of plaintiff's carrying on there the manufacture of patent fuel, and it was also a term of the agreement that all the coals consumed and used by the plaintiff for his manufacture during the term of twelve years should be bought from the defendants, "provided the defendants supplied him with the quantity that he might require from time to time or to such extent as the defendants could supply", and that the plaintiff should use and consume no other coal at his factory during the term of twelve years than that bought from the defendant. *Per* Wilde C.J.[3]—"When the plaintiff contracted to purchase from the defendants all the coals which were to be used by him, it was necessary that he should guard himself against the possibility of their being unable or unwilling to furnish him with the required supply. It was to meet that contingency that these words (quoted above) were introduced. The object that the defendants had in view was to restrain the plaintiff from using any other coal than that which came from their colliery. Considering this as a contract of purchase on the one hand and of sale on the other, and looking to its nature and object, namely, the promotion of the manufacture to be carried on by the plaintiff near the colliery of the defendants . . . . it appears to me to be plain and free from doubt . . . . that the defendants did contract to supply the plaintiff with coal to the extent of 500 tons weekly, provided they were of ability so to do". There again the terms of the agreement were free from doubt. The plaintiff had a manufactory which would need coal to be carried on. The defendants had a colliery close by which could supply the coal the plaintiff needed, and when the plaintiff bound himself to consume only the defendants' coal, there was the necessary implication that the defendants should supply the coal to be consumed by the plaintiff. The facts in the present case fall far short of those in the two cases summarized above, and if I had to lay stress on one element of uncertainty more than on another, it would be on the fact that at the time when this agreement

[1] *Wm. Saund 391 ; 85 E. R. 449.*
[2] *17 C. B. 906 ; 137 E. R. 359.*
[3] *7 C. B. 936.*

was made, on October 31, 1927, the plaintiff company was not yet the owner of the red block, was under no obligation to become the owner of it, and might never become its owner. With this unquestionable element of uncertainty in clause 8 of this agreement, it surely seems safer and more in accordance with sound reasoning to construe it as an option to the Crown to purchase on a certain contingency rather than as a binding agreement that if the plaintiff company purchased the red block the Crown would then purchase the same from the plaintiff company.

The position of the plaintiff company is a hard one. On September 1, 1926, the Colombo Municipal Council recommended that in the future Main street, from York street to Lotus road, that is the portion of Main street upon which the red block and the dark blue block abut, should be widened to 100 feet, and Bristol street to 60 feet, but the evidence does not show that this resolution of the Municipal Council was communicated to the public until some considerable period after the agreement of October 31, 1927, had been executed. Thereafter, on November 27, 1933, there was a recommendation of the Municipal Council that Main street from Prince street to Lotus road should be declared a street 100 feet wide under section 18 (4) of Ordinance No. 19 of 1915, but this resolution of September, 1933, was considerably later than the purchase of the red block by the plaintiff company which seems to have taken place on February 1, 1930. On that date, by deed No. 806, the plaintiff company purchased the red block from its then owners for Rs. 150,000. The effect of the Municipal Council resolution of September, 1933, is that the plaintiff company cannot build on the land originally occupied by the red block, that it must be thrown into the street, and that the company will receive merely nominal compensation from the Municipal Council. This is undoubtedly hard on the plaintiff company. It bought from the Crown this land, the red block, fully believing that it had a binding agreement with the Crown to take the red block off its hands at the price it paid for it. Now it finds that this agreement does not bind the Crown to take the red block, and further that the department of public activity called the Municipal Council steps in and under statutory powers practically confiscates the land which it has purchased. This is undoubtedly a hardship on the plaintiff company, though on the other hand it must be remembered that the plan attached to the agreement of October 31, 1927, showed that the Crown (quite possibly) would at some time in the future make the red block part of the street and so incapable of occupation and therefore of earning anything, rent or anything else, but, however much we may sympathise with the company, it is necessary to apply the law to the agreement which it has made. Doubtless the plaintiff company, when it executed this agreement on October 31, 1927, thought that the effect of clause 8 was that the Crown was bound to purchase the red block from it as soon as itself had bought the same. The Crown's advisers pretty certainly thought the same, but it has to be interpreted not by what the parties thought they had agreed to but by what was their intention as shown in the deed; *10 Halsbury, p. 252, s. 317*—"The intention must be gathered from the written instrument.

The function of the Court is to ascertain what the parties meant by the words they have used ; to declare the meaning of what is written in the instrument, not of what was intended to have been written ; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention. It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention. And the ordinary rules of construction must be applied, although by so doing the real intention of the parties may in some instances be defeated ".

It is not possible to speak very highly of the conduct of the defendant, the Crown, in this case. The company purchased the red block and then on February 21, 1931, it, through its lawyers, wrote to the Colonial Secretary stating that it has bought the red block, that it proposed to demolish the buildings upon it in about a year's time and that it wished to know when Government would then take over and pay for "in accordance with the agreement of December 3, 1927," (this is a mistake for October 31) "the portions of the red block inside the street lines of Main street". (This letter, by the way, shows explicit knowledge that Main street was to be widened.) The Colonial Secretary acknowledged this letter on February 23, 1931, and writing again on March 18, 1931, inquired what portion of the red block the plaintiff company proposd to retain to be utilized for its new building. The plaintiff company, through its lawyers, replied on March 27, 1931, stating the area that it proposed to retain for its new building. On May 26, 1931, the Government Agent, Western Province, wrote to the plaintiff company's lawyers asking them, to forward the deed of transfer in favour of the company for reference and return, and at the same time to favour him with their estimate of the price to be paid under the agreement for the area to be sold to the Crown. The plaintiff company's lawyers replied on June 15, 1931, enclosing a copy of the deed of transfer and stating their estimate of the price to be paid under the agreement for the area to be sold to the Crown. On June 22, 1931, the Government Agent, Western Province, acknowledged the letter and stated that the Surveyor-General was going to be requested to verify the area of the land to be sold to the Crown and make a survey plan of the same. Replying on July 16, 1931, the plaintiff company said by its lawyers that it would give the Surveyor-General all the assistance in its power. On December 4, 1931, the plaintiff company's lawyers asked when they might hear further in reply to their letter of June 22, 1931, also asking for a Crown grant in respect of the light blue block. On April 19, 1932, the plaintiff company's lawyers again wrote to the Government Agent stating that the buildings on the red block were now in the course of demolition and asking that an immediate reply be given them to enable their clients to mark off and prepare the plot of land purchased by Government. This letter was acknowledged by the Government Agent on April 22, 1932. The plaintiff company prayed for an answer by a letter of May 18, 1932, and on May 25, received a letter from the Government Agent saying that the matter was now being dealt with by the Executive Committee for Agriculture

and Lands and that no decision had yet been arrived at. This was the first intimation in all the correspondence between the parties that purchase by the Crown was something that might be uncertain. On June 2, 1932, the plaintiff company's lawyers wrote to the Minister of Agriculture and Lands saying that they had never yet been told when Government would take over and pay for the portions of land belonging to their clients in accordance with the agreement referred to. On June 10 the Secretary to the Minister for Agriculture and Lands wrote asking what agreement they referred to, and on June 13, the plaintiff company's lawyers replied that the agreement referred to was the present agreement of October 31, 1927. There does not seem to have been an answer to this letter but on July 31, 1932, the lawyers of the plaintiff company wrote to the Minister for Agriculture and Lands to say that if the question of the immediate payment of the whole amount of the purchase money was causing difficulty, their clients would be willing to facilitate the complication and to consider any proposals Government might make for deferred payment. Then at last on July 26, 1932, nearly eighteen months after the Crown had been advised by the plaintiff company that it had purchased the red block, the Minister for Agriculture and Lands replied that "Government does not propose at present to exercise its rights under clause 8 of the agreement to purchase from your clients the portions coloured red . . . . which fall within the street lines of Main street". The plaintiff company on August 1, 1932, wrote to the Minister for Agriculture and Lands protesting that the letter of July 26 was not an accurate statement of the position which was that Government had entered into a binding agreement to take over and pay for the portion of land referred to. This letter does not seem to have received the courtesy of acknowledgment, and on May 15, 1933, the plaintiff company's lawyers wrote that they had heard nothing further as to the fulfilment by Government of its agreement to take over and pay for this piece of land. There seems to have been no acknowledgment of this letter either, and the plaintiff company's lawyers wrote again on July 11, 1933, referring to its letters of May 15, 1933, and of August 1, 1932, and asking for a reply. At last on August 12, 1933, the Minister for Agriculture and Lands informed the plaintiff company's lawyers that the Government did not intend to purchase the land lying within the street lines of Main street and belonging to the plaintiff company.

Now it certainly cannot be contended that this correspondence estops the Crown from taking up the position that it is not bound by clause 8 of the agreement. None of the earlier letters written by the Colonial Secretary or the Government Agent in any way caused the plaintiff company to change its position for the worse. The correspondence cannot then be relied upon as creating an estoppel—and it was not contended to us that it did—but the earlier letters, those written by the Colonial Secretary and Government Agent, contain no protest against the assumption of the plaintiff company, namely, that the Crown was bound to buy the red block from it. On the contrary, they are in the nature of a tacit acquiescence in that claim of the company. Government waits for eighteen months before it even hints that there was anything uncertain.

about the agreement, and then for over a year takes no notice of other quite reasonable and courteous letters on the matter. Then it abruptly disclaims obligation. This is not mannerly or straightforward conduct, and it is conduct which we hope and believe that no private business firm of repute would indulge in for a moment. It is conduct in connection with or leading up to the action that gives this Court (*Donald Campbell & Co. v. Pollak*[1]) a discretion as to costs, and I think in the exercise of that discretion there should be no costs of the proceedings below. The point as to whether the conduct of the Crown in connection with this case furnished the trial Judge with matter for exercise of his discretion as to costs, does not seem to have been considered in the Court below. If, then, we alter the order of the Court below which was dismissal of the plaintiff company's action with costs, this will not be any interference with the discretion of the learned Judge as this point was not raised to him and he was not asked to exercise his discretion thereon. Now however that the matter has been brought definitely to the notice of a Court of Justice, as it was to us, by the reading of the correspondence between the plaintiff company and the Government, we propose to exercise the discretion which we think the learned trial Judge would have exercised if the matter had been brought forward and argued to him.

Since the plaintiff company's action fails, it is unnecessary to consider the other points that were raised to us on appeal, namely whether the plaintiff company could have a decree for specific performance against the Crown, or failing that, upon what principle its damages should be calculated.

For the foregoing reasons I am of opinion that the decree below should be altered to read "that the plaintiff's action be dismissed without costs" and that this appeal should be dismissed with costs.

POYSER J.—

I have had the advantage of reading the judgment of the Chief Justice and I agree that this appeal should be dismissed and there is very little that I desire to add.

I think, in considering the interpretation of clause 8 of the agreement, (P 1), the following passage in a judgment of Lord Buckmaster should be borne in mind:—"It is always a dangerous matter to introduce into a contract by implication provisions which are not contained in express words, and it is never done by the Courts excepting under the pressure of conditions which compel the introduction of such terms for the purpose of giving what Lord Bowen once described as "business efficacy" to the bargain between the parties". (*L. French & Co., Ltd. v. Leeston Shipping Co., Ltd.*[2])

On a consideration of P1 as a whole I agree with the contention on behalf of the Crown that the omission in clause 8 to set out any obligation

[1] (1927) *A. C. 732.*

[2] (1922) *1 A. C. 454.*

on the part of the Crown to purchase was a deliberate omission. The second part of this clause provides that if the Crown acquires or purchases the said lots 2 and 3, the company shall be obliged to purchase so much thereof as is outside and to the south of south-east of the street lines of Main street, but in the first part of this clause there is no reference to any obligation on the part of the Crown to purchase, nor can, in my opinion, such obligation be implied.

It therefore seems clear that clause 8, so far as it relates to a possible future purchase of these lots by the company, only constitutes a binding offer by the company, if they do purchase these lots, to sell to the Crown such portions of the said lots as are within the street lines.

It grants in effect an option to the Crown and the fact that such option is not clearly expressed and lays down no time within which it is to be exercised does not, in my opinion, render it any the less an option.

As the District Judge points out, if it had been intended that the Crown should be obliged to purchase, the agreement would presumably have so stated and consequently it seems clear that clause 8 was drafted deliberately so as to impose an obligation on the company, if they did purchase this lot to sell to the Crown if the latter so desired, but to impose no obligation on the Crown to purchase from the company. For these reasons I think this appeal fails.

I do not however think there is any doubt that the company have every reason to complain of the treatment that they have received.

In the letter P 5 written on February 21, 1931, they inform the Government that they propose to demolish the building they had acquired on the Main street front and desired to know if the Government will then take over or pay for, in accordance with P 1, such portions of lots 2 and 3 as are within the street lines.

The Government made inquiries as to area and price but do not state that they will not purchase such portions until August 12, 1933.

The consequence was that the company completed the demolition of the building purchased from Boustead Brothers, and the land within the street lines on which such building stood, is practically valueless to the company.

If the Government had indicated, when the company purchased this building, that it was doubtful whether they would exercise their option the company possibly would only have demolished such part of Boustead's building as was necessary for the completion of their own building and would have retained a building of some value at any rate, to them.

It was, however, contended on behalf of the Crown that the company had no cause for complaint as they had been granted preferential terms in regard to the purchase of lot 1. This contention however is not supported by the evidence, and in the document D 2, a memorandum

by the Government assessor, it is stated that "the sale to the Times at Rs. 1,000,000 per acre may be regarded as a fortunate one, the purchasers being willing to pay a higher price owing to the advantages the land had for them as owners of the adjoining property".

I agree that the appeal should be dismissed and with the proposed order as to costs.

Appeal dismissed.

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