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men in the position of the vendor and the purchaser would intend it to bear when they made the contract.

ISAACS J. I also am of opinion that the appeal should be dismissed. The Chief Justice has so fully stated the reasons which govern my mind that any statement of them by myself would be mere repetition. I would only add that, however debateable the question was previously, the moment Mr. *Owen* pointed out sec. 14 of the Act of 1903, in which the legislature had disclosed its mind on the question, the appellant's position was absolutely hopeless.

*Appeal dismissed with costs.*

Solicitors, for the appellant, *A. J. Taylor & Greenwell*, for *W. F. McManamey*, Dubbo.

Solicitors, for the respondent, *Sly & Russell.*

B. L.

Cons *Brickworks Markets Pty Ltd v Corp of the Town of Thebarton* 67 SASR 180

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[HIGH COURT OF AUSTRALIA.]

MILNE AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE MUNICIPAL COUNCIL OF SYDNEY . RESPONDENTS.
DEFENDANTS,

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SYDNEY,

*May* 14, 15, 17.

Griffith C.J., Barton and Isaacs JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Contract—Offer to do work—Acceptance of offer—Implied promise to employ.*

The plaintiffs agreed with the defendants in effect to do all the mechanical repairs required to the defendants' electrical plant for the term of twelve months, at certain rates of payment:

*Held*, on the construction of the documents, that there should be implied a promise by the defendants to employ the plaintiffs to the exclusion of other persons to do those repairs.

The circumstance that the word "all" might on that construction have the effect of preventing the defendants from doing trivial or urgent repairs by their own workmen is not a reason for denying the implied promise, but, at most, a reason for limiting the meaning of the term "mechanical repairs."

Decision of the Supreme Court of New South Wales: 11 S.R. (N.S.W.), 439, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Alexander Martin Milne, William Milne, Andrew Milne and Martin Luther Milne against the Municipal Council of Sydney for breach of a contract which the plaintiffs by their declaration alleged to be a contract, that in consideration that they would execute and complete the mechanical repairs to the defendants' plant at the defendants' electrical power house for the term of twelve months at certain prices and in accordance with certain conditions, the defendants promised to allow the plaintiffs to execute and complete all the mechanical repairs required to the said plant during the said term. The defendants set out in their plea the exact terms of the contract, which were contained in several documents the material portions of which were as follow:—

"Articles of agreement made the twentieth day of April one thousand nine hundred and ten between the Municipal Council of Sydney (hereinafter called the Council) of the one part and Alexander M. Milne, William Milne, Andrew Milne and Martin L. Milne trading as Milne Brothers of Sydney (hereinafter called the contractors) of the other part Whereas the Council is desirous of having certain repairs to power house machinery done (all of which are hereinafter referred to as the said works) and has caused a specification relating thereto to be prepared And whereas the said specification has been signed by or on behalf of the parties hereto and the same is hereunto annexed And whereas the contractors have agreed to execute upon and subject to the conditions hereunto also annexed and signed by or on behalf of the parties hereto (hereinafter referred to as the said

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conditions) the said works for the sums named on the form of tender Now it is hereby agreed as follows :—

"1. In consideration of the sums named to be paid at the time and in the manner set forth in the said conditions the contractor will upon and subject to the said conditions execute and complete the said works.

"2. The Council will pay the contractor the said sums or such other sum as shall become payable hereunder at the time and in the manner specified in the said conditions.

"3. The said conditions and specification and the contractor's tender shall be read and construed as forming part of this agreement and the parties hereto will respectively abide by and submit themselves to the conditions and stipulations and perform the agreements on their parts respectively in such tender conditions and specification contained."

"Instructions to Firms Tendering.

"1. The City Council does not undertake to accept the lowest or any tender.

"2. Each firm tendering must deposit the sum of one guinea with the City Treasurer on application for the specification and if the complete specification and general conditions together with a *bonâ fide* tender is not returned to the Town Clerk on or before 3 p.m. on Monday February 7th 1910 this deposit will be forfeited absolutely to the Council. The deposit will be returned to firms tendering who shall make a *bonâ fide* tender and who return the specification and general conditions to the Town Clerk on or before 3 p.m. on Monday February 7th 1910.

"3. The specification and general conditions having been approved of by the Council will not be departed from in any particular, and any tender sent in must accept the same unconditionally. If any tender shall be made subject to any modification addition or alteration such tender will not be considered in any way and will be rejected.

"4. The form of tender must be completely filled up and returned to the Town Clerk at the same time of tendering, together with the specification and general conditions.

"5. For further information application should be made to the City Electrical Engineer's Office, Queen Victoria Markets."

"General Conditions.

"The party tendering for the supply of these materials shall deliver to the City Treasurer a cash deposit of ten pounds (£10) on or before the time or date specified in the advertisement for the reception of tenders. No tender will be considered by the Council unless it is accompanied by such deposit which deposit will be returned in all cases in which the tender shall not be accepted and shall not be withdrawn within the time mentioned in the tender and to the successful tenderer on the execution by him of the contract and the deposit of the cash security as hereinafter provided but not otherwise. The tenderer whose tender the Council shall decide to accept shall within five days of the delivery of a letter at his last known place of abode or business in Sydney intimating such acceptance execute a contract in a form which may be seen at the office of the City Electrical Engineer and before the execution of such contract deposit with the City Treasurer cash security to the amount of 10 per cent. of the contract price for the due performance of the Contract and the contractor's obligations thereunder. In the event of any tenderer whether successful or not withdrawing his tender before the time mentioned in such tender or in the event of a successful tenderer failing to deposit the cash security or to execute the contract as hereinbefore provided the deposit made by any such tenderer may be held by the Council pending the settlement of any claim for liquidated or unliquidated damages which the Council shall have against the said tenderer. For the purpose of this clause the difference between the cost of the supply of the materials to the Council and the amount of the tender of any such tenderer shall be deemed liquidated damages and the Council may deduct the sum from any sum so deposited. In the event of the contractor in the opinion of the engineer completing the contract in accordance in all respects with the conditions and specifications the cash security deposited as aforesaid shall be returned to the contractor at the expiration of one month from the time when the contract shall have been completed. In the event of any breach or non-performance of the said specifications and conditions the Council may retain out of the said sum deposited as cash security as aforesaid all liquidated damages

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which shall be incurred and all moneys which shall become payable by the contractor to the Council in respect of the contract. The Council may also hold such sum or the balance thereof after such deduction as aforesaid pending the settlement of any claim which the Council may or shall have against the contractor for unliquidated damages under the contract."

"General Conditions.

"The contractors are to carry out the repairs under this contract in accordance with orders in writing from the Town Clerk and on receipt of such order the contractors shall carry out such repairs in accordance with these conditions and specification hereunto annexed. The workmanship and materials used in the repairs are to be of the best quality of their several kinds and subject to the approval of the City Electrical Engineer.

"Payment will be made once every four weeks to the full extent of the value of the work done and materials delivered by the contractors in accordance with the conditions and specification on their presenting to the Town Clerk an account of the materials supplied by them and upon producing a certificate from the City Electrical Engineer that the work has been done and the materials supplied in accordance with the conditions and specification. No amount whatever will be payable to the contractors except upon such certificate.

"The contractors shall not without the consent of the Council in writing assign or sublet the contract or the benefits or burdens thereof or any part thereof to any other person or persons or body corporate. In the event of a breach of this condition the contractors shall pay to the Council a sum of twenty-five pounds (£25) by way of liquidated damages. Provided that if such consent be given at any time the contractors shall not be relieved of any obligation or duty under the contract. The contractors shall hold harmless and indemnify the Council against all actions claims demands costs charges and expenses that may be brought against made upon or incurred by the Council by any person or corporation in respect of the manufacture or use of any article or material to be supplied under this contract whether any such person or corporation shall be a patentee assignee or licensee of any patent rights regarding the said article or material or portion

thereof or otherwise and the contractor undertakes to pay to the Council on demand all sums of moneys damages costs and expenses which the Council may be called upon to pay in respect of such manufacture or use.

"And it is hereby agreed that the Council may in its absolute discretion compromise any such action claim or demand on such terms as it shall think fit or may defend or contest any such action claim or demand and in any such case the amount of damages costs charges and expenses paid by or recovered against the Council shall be payable by the contractor to the Council under the indemnity and undertaking contained in this clause.

. . . . . .

"The contractors shall at all times during the continuance of the contract provide an office in some convenient place in Sydney wherein notice to be given or served hereunder may be served upon them and any notice left at such office shall be deemed duly served.

"The decision of the City Electrical Engineer shall be final and conclusive both in respect of all matters herein expressly or impliedly left to his decision and the quality or nature of the materials and workmanship.

"In case of terms or provisions repeated wholly or partially in these conditions and specification the Council may adopt both or either of such terms or provisions so as to secure in all cases the most ample protection and any discrepancy between the conditions and specification shall be construed or determined by the City Electrical Engineer in the manner which in his judgment is most in accordance with the general spirit and intention of the contract.

"All moneys payable by the contractors to the Council under any of these conditions or the specification may be deducted by the Council from any money due to the contractors under the contract or may be recovered by the Council from the contractor by action.

. . . . . .

"If the contractors shall commit a breach or fail in the observance or performance of any condition in these conditions or the specification contained the Council may at any time thereafter

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determine the contract without prejudice to any right of action arising prior to such determination or to any power conferred upon the Council or the City Electrical Engineer in the contract."

"Specification.

"This contract is for the carrying out of the mechanical repairs to the plant at the Electrical Power House, Pyrmont Street, of the Sydney City Council for twelve months from .

"On receiving instructions in writing from the Town Clerk the contractor shall immediately commence any repair and continue to employ upon it such a number of men and such tools as will ensure its being completed in the least possible time, but without employing men at such times as to make the payment of overtime necessary unless specially instructed in writing by the Town Clerk that overtime is to be worked.

"Only the highest class of workmanship and material is to be used in the repairs and the workmanship and material are to be to the satisfaction of the City Electrical Engineer.

"If a repair carried out under this contract fails within six months of completion, and if the failure is in the opinion of the City Electrical Engineer due to bad workmanship or material used in the repair, the contractor shall immediately when called upon make good the repair without charging the Council for the making good.

"If the contractor on receiving instructions in writing to carry out a repair, fails to put it in hand in a reasonable time, or if he does not proceed with the repair at a reasonable speed the Council may by its own workmen or by another contractor carry out or complete the repair and the contractor shall bear any additional expense to which the Council is put by employing its own workmen or another contractor as aforesaid.

"The contractor's books and wages sheets are to be open for the inspection of the Council's officers at any time while this contract is in force, for the purpose of checking the contractor's charges, and the contractor shall from time to time produce such books and wages sheets when required to any officer of the Council holding an authority under the hand of the Town Clerk for that purpose.

"Form of Tender.

"To the Municipal Council of Sydney.

"We hereby offer to supply materials execute repairs and perform all the obligations set out in the specifications, general conditions and schedule of prices attached hereto for the sums filled in on the said schedule of prices. In consideration of one shilling paid to us by the Council before lodging this tender (the receipt of which we hereby acknowledge) we further agree that this tender shall not be withdrawn by us before one month and that in the event of the Council deciding to accept this tender we will deposit with the City Treasurer cash security and execute a formal contract within the time and in the manner provided in the general conditions and that in the event of any breach or non-performance of the foregoing agreement the sum of ten pounds (£10) mentioned in the general conditions may be held by the Council pending the settlement of any claim for liquidated or unliquidated damages which the Council shall have against us.

"(Signed) Milne Bros."

The plaintiffs demurred to the plea. On the hearing of the demurrer, the Full Court ordered judgment to be entered for the defendants on the demurrer: *Milne* v. *The Municipal Council of Sydney* (1).

From this decision the plaintiffs now appealed to the High Court.

*Knox* K.C. (with him *Mitchell*), for the appellants. There is to be implied from the documents a contract that the respondents would employ the plaintiffs to execute all the repairs that were required. The parties intended to contract and the documents should be so constructed as to give effect to that object. On the construction given by the Supreme Court there is not even a contract to make a contract but merely an offer by the appellants from which either party could withdraw at any time. Unless there is a promise to employ the appellants there is no consideration for the appellants' promise. That there was a contract binding on both parties is borne out by several provisions and

(1) 11 S.R. (N.S.W.), 439.

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particularly by the provision in the specification for terminating the contract in certain events, and by the provisions in the general conditions that the appellants shall not assign or sublet the contract without the consent of the respondents, and that, if repairs are not put in hand within reasonable time, or proceeded with at reasonable speed, the respondents may employ other persons. The provision for determination imports a promise not to determine except under the particular circumstances mentioned, and it pre-supposes an existing contract to employ the appellants. A right to withdraw at any time is absolutely inconsistent with the terms of the documents. [He referred to *Pilkington* v. *Scott* (1); *Whittle* v. *Frankland* (2); *Devonald* v. *Rosser & Sons* (3); *Ford* v. *Newth*; *In re Gloucester Municipal Election Petition* 1900 (4); *Turner* v. *Goldsmith* (5); *Islington Union* v. *Brentnall* (6); *R.* v. *Demers* (7); *Colonial Ammunition Co.* v. *Reid* (8); *Great Northern Railway Co.* v. *Witham* (9); *Burton* v. *Great Northern Railway Co.* (10); *Moon* v. *Mayor &c. of Camberwell* (11).]

[GRIFFITH C.J. referred to *Hart* v. *MacDonald* (12).

ISAACS J. referred to *Knight* v. *Gravesend and Milton Waterworks Trust* (13).]

*Leverrier* K.C. (with him *Edwards* and *Haigh*) for the respondents. No obligation on the part of the respondents arises until an order is given by the Town Clerk to do a certain repair. The appellants were bound to do all repairs in respect of which such a direction was given, but the respondents were under no obligation to give the appellants any repairs to do. The cases relied on by the appellants are all cases of master and servant, the ground of them being that, as a servant owes all his time to his master, if the master gave the servant no work the latter would be unable to earn any wages. [He referred to *R.* v. *Demers* (14); *Anson on Contracts* 13th ed., p. 38; *Devonald* v. *Rosser &*

(1) 15 M. & W., 657, at p. 659.
(2) 31 L.J.M.C., 81.
(3) (1906) 2 K.B., 728, at p. 739.
(4) (1901) 1 Q.B., 683.
(5) (1891) 1 Q.B., 544.
(6) 71 J.P., 407.
(7) (1900) A.C., 103.
(8) 21 N.S.W., L.R., 338.
(9) L.R. 9 C.P., 16.
(10) 23 L.J. Ex., 184; 9 Ex., 507.
(11) 89 L.T., 595.
(12) 10 C.L.R., 417.
(13) 2 H. & N., 6.
(14) (1900) A.C., 103, at p. 106.

*Sons* (1); *Ford* v. *Newth*; *In re Gloucester Municipal Election Petition* (2); *Moon v. Mayor &c.. of Camberwell* (3).]

*Knox* K.C. was not heard in reply.

*Cur. adv. vult.*

May 17.

GRIFFITH C.J. This was an action for breach of a contract which is alleged by the plaintiffs in the declaration to be a contract that, in consideration that they would execute and complete the mechanical repairs to the defendants' plant at the defendants' electrical power house for the term of twelve months at certain prices and in accordance with certain conditions, the defendants promised to allow the plaintiffs to execute and complete all the mechanical repairs required to the said plant during the said term. The defendants set out in their plea the exact terms of the contract sued upon, by way of argumentative traverse. The plaintiffs demurred to the plea, so raising the question whether the contract relied upon by the plaintiffs did or did not embody the alleged promise by the defendants. The contract, which is contained in a formal document called "articles of agreement," was expressed to be made between the defendants of the one part and the plaintiffs of the other part, and has several documents annexed to it. It appears from these documents that tenders had been invited by the defendants for the performance of the work for twelve months, that the plaintiffs had tendered and that their tender had been accepted. *Primâ facie* when A asks B. to make an offer to do certain work, and B. accordingly makes an offer which A. accepts, there is a contract mutually binding, by which B. is bound to do the work and A. is bound to employ him to do it. That inference may be excluded by the terms of the express contract. Let us look at the contract in this case. The articles of agreement recite that the defendants are "desirous of having certain repairs to power house machinery done (all of which are hereinafter referred to as 'the said works') and" have "caused a specification relating thereto to be prepared," and that "the said specification has been signed by or on

(1) (1906) 2 K.B., 728. (2) (1901) 1 Q.B., 683.
(3) 89 L.T., 595.

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behalf of the parties." They then recite that the plaintiffs "have agreed to execute upon and subject to the conditions hereunto annexed . . . the said works for the sums named on the form of tender." Then the plaintiffs agree that "in consideration of the sums named to be paid at the time and in the manner set forth in the said conditions," they will "upon and subject to the said conditions execute and complete the said works," and the defendants agree that they will pay the contractor the said sums or such other sums as may become payable under the contract. The specification describes the work to be done in these words: —"This contract is for the carrying out of the mechanical repairs to the plant at the electrical power house, Pyrmont Street, of the Sydney City Council for twelve months." It also provides that the plaintiffs are, on receiving instructions in writing from the Town Clerk, to proceed at once to undertake the work and to employ upon it such a number of men and such tools as will ensure its being completed in the least possible time, but, if possible, without employing men at such times as to make the payment of overtime necessary. It is also provided in the specification that if the plaintiffs, on receiving instructions in writing to carry out a repair, fail to put it in hand in a reasonable time, or if they do not proceed with the repair at a reasonable speed, the defendants may by their workmen or by another contractor carry out or complete the repair at the expense of the plaintiffs.

Now, so far, it appears to me that that is a clear contract to do specific work, that is to say, all the mechanical repairs to the plant that may be needed to be done during the term of twelve months. The subject matter of the contract is none the less specific because the work to be done is unknown at the date of the contract. It is just as specific as a contract to destroy all prickly pear growing on a certain block of land during twelve months, or to keep down the rabbits on a certain block of land during twelve months, or to unload all ships consigned to a certain person that may arrive within twelve months. The doctrine *id certum est quod certum reddi potest* is, in my opinion, clearly applicable.

Turning to the general conditions we find various provisions which seem to me to indicate that the contract is regarded by

both parties as binding upon both of them. One condition was that the successful tenderer should execute a contract and before its execution deposit with the City Treasurer a "cash security to the amount of 10 per cent. of the contract price for the due performance of the contract." It is said that, as the amount of the repairs that would be needed was unknown when the contract was made, it was impossible to say what 10 per cent. of the contract price would be. That is true. But the contract must be construed as the parties intended at the time they made it. At that time it was only possible to make an estimate of the repairs that would be needed and of the amount of their cost. No question is raised as to the fact that the deposit was paid. The declaration contains an averment that all conditions had been performed, and that averment was not traversed. In any event, it was open for the defendants to waive the condition.

Then it was provided that payment was to be made to the plaintiffs once every four weeks to the full extent of the work done, and materials supplied—indicating a continuous contract. It was also stipulated that the plaintiffs should not, without the consent of the defendants, assign or sublet the contract, and that, even if they did so with such consent, the plaintiffs should not escape from any liability or duty under the contract. It was further stipulated that the wages to be paid by the plaintiffs should not be less than the standard rate of wages, and that the plaintiffs should at all times "during the continuance" of the contract provide an office in some convenient place in Sydney at which notices of repairs required to be done might be served. Finally, it was stipulated that, if the plaintiffs should "commit a breach or fail in the observance or performance of any condition in these conditions or the specification contained the Council may at any time thereafter determine the contract." A power to determine obviously assumes an obligation from which the party is to be at liberty to free himself. Such a stipulation is senseless where there is no obligation that the party can determine. In answer to this it is said that there is no express promise on the part of the defendants to employ the plaintiffs exclusively during the twelve months. That is true. But it is not necessary that an obligation of that sort should be stated in express words. The

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doctrine of implied obligations has been expressed by *Bowen* L.J. in the well-known case of *The Moorcock* (1), as follows:—"Now, 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. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men." That principle has often been applied. This Court applied it in *Hart* v. *MacDonald* (2). It was also applied in the well-known case of *M'Intyre* v. *Belcher* (3), where the plaintiff sold to the defendant a medical practice on the terms that the plaintiff was to be paid at the end of each of the four years succeeding the sale one-fourth part of the earnings and receipts from the practice. It was held that there was an implied promise on the part of the defendant that he would continue to carry on the practice for four years. This is only, after all, giving effect to the intention of the parties as it is found on the face of the documents.

The learned Judges of the Supreme Court were of a contrary opinion. They pointed out that the calculation of the amount of deposit was impossible. I have already dealt with that point. They also thought that such an implication as I have mentioned would be unreasonable in this case because it would have the effect of preventing the defendants from doing even small repairs by their own workmen. With great respect, if that

(1) 14 P.D., 64, at p. 68.
(2) 10 C.L.R., 417.
(3) 14 C.B.N.S, 654; 32 L.J.C.P., 254.

is so, it has nothing to do with the question whether there was a promise. It only raises the question whether small or trivial repairs, or urgent repairs that must be done at a moment's notice, come within the meaning of the words "the mechanical repairs to the plant." It is a reason for giving a limited meaning to those words, as meaning such mechanical repairs as may reasonably be expected to be done by an outside contractor with a plant, and who will provide workmen of a kind not ordinarily employed by the defendants. I think that is a reasonable construction of those words. They do not, therefore, support the argument that the implied provision alleged is unreasonable. Not only is it not unreasonable, but I think it was the clearly expressed intention of the parties. I should be content to rest my judgment upon the fact that the tenderer was requested to tender for the carrying out of the mechanical repairs to the plant for twelve months. An offer to do such work in pursuance of such a request, when accepted, establishes, in my opinion, as I have already said, unless the contrary appears on the face of the documents, mutual obligations, on the one side to do the work, and, on the other, to let the tenderer do it. That view is emphasized by the various stipulations of this contract to which I have referred.

It was also suggested that the stipulation that the plaintiffs were to proceed to work immediately on receiving instructions from the Town Clerk indicated that a fresh contract was to be deemed to be made on every occasion when those instructions were given. It was said that that stipulation imposed a condition precedent. No doubt it did. But it was a condition precedent to the obligation of the plaintiffs to do the work, and had nothing to do with the obligation of the defendants to give the plaintiffs the work.

For these reasons I think that the documents involve on their face, although not in express terms, a promise by the defendants to give the plaintiffs all the mechanical repairs to the plant, in the sense in which I have explained, for the term mentioned. I think, therefore, that the appeal must be allowed, and that there should be judgment for the plaintiffs on the demurrer.

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Barton J.

BARTON J. The declaration states the contract as follows:— "in consideration that the plaintiffs would execute and complete the mechanical repairs to the defendant Council's plant at the Electrical Power House Pyrmont Street for the term of twelve months at certain prices and in accordance with certain conditions then agreed upon between them the defendant Council promised the plaintiffs amongst other things to allow the plaintiffs to execute and complete all the mechanical repairs required to the said plant during the said term and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiffs to maintain this action for the breaches hereinafter alleged yet although certain mechanical repairs to the said plant were required during the said term the defendant Council did not nor would allow the plaintiffs to execute or complete the same and employed other persons to execute and complete the same and repudiated its said promise and refused to be bound thereby" &c. The plea invites demurrer by setting out the articles of agreement with the conditions, specification and tender to which it refers. If the contract pleaded is different in substance from that declared on, the proof of the plea would establish a complete variance and be fatal to the plaintiffs. If, on the other hand, the statement in the declaration sufficiently describes the contract pleaded, the plea is no answer, but is bad for confessing but not avoiding the plaintiffs' cause of action.

The point of attack is the statement of the promise in the declaration, "to allow the plaintiffs to execute and complete all the mechanical repairs required" to the defendant Council's plant at the electrical power house, during the term of twelve months. Mr. *Leverrier* put it that the articles describe the work merely as "certain repairs to the power house machinery," and that the defendants purport by the articles to agree that for the consideration stated the contractors will upon and subject to the conditions "execute and complete the said works," *i.e.*, nothing more specific than "certain works." Further, he says that the first paragraph of the specification is a mere indication of the class of work to which the contract relates, and that the next paragraph contains the obligation, which is, that the contractor shall on receiving written instructions from the Town

Clerk "immediately commence any repair and continue to employ upon it such a number of men and such tools as will ensure its being completed in the least possible time," &c. In this view "any repair" means by reference to the description in the recital "certain repairs to the power house machinery . . . hereinafter referred to as the said works." Hence, it is argued, there is no binding contract until and unless there are written instructions to begin and proceed with some specific repair, and thus, in the absence of instructions, the defendants are not under any liability. From this, it of course follows that the contract is not truly alleged in the declaration and the plea is a good one.

But I do not think the matter can be disposed of in that fashion. "Certain repairs" and "the said works" as used in the agreement are terms referable to the first paragraph of the specification, which I think describes the work agreed to be done —"the carrying out of the mechanical repairs to the plant . . . for twelve months," and the second paragraph—it of course being conceded that only necessary repairs and such as ordinarily require a contractor for their execution were agreed for—binds the contractor to commence any such repair on receiving the Town Clerk's instructions in writing, and to continue to employ upon it such a number of men and such tools as will ensure the work being completed in the least possible time. I am of opinion that necessary repairs the subject of such instructions are described in the declaration with substantial accuracy as "all the mechanical repairs required to the said plant," and that the defendants have a reciprocal duty to allow the plaintiffs to execute all the mechanical repairs thus required. In *Mackay* v. *Dick* (1), Lord *Blackburn* says:—"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." And where one party is bound to the other at the request of that other to do for profit to himself certain things which cannot be

(1) 6 App. Cas., 251, at p. 263.

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done at all or effectually unless by the allowance of the other party, that other impliedly agrees to allow the doing of the thing contracted for.

Many authorities were cited, but I do not think any of them prevent the application of these principles to the present case. Several portions of the contract pleaded were referred to for the plaintiffs as, for instance, the requirement of the deposit of a cash security to the amount of 10 per cent. of the contract price (which of course could only be approximately estimated); the agreement by the plaintiffs not to assign or sublet the contract or its benefits or burdens without the defendants' consent in writing, such consent not to relieve the contractors of any obligation or duty under the contract; the condition that, if the plaintiffs should commit any breach or fail to perform any condition, the Council might at any time thereafter determine the contract. These provisions taken together seem to me to be inconsistent with the existence of a mere possibility of a contract. They import the existence of an obligation on the part of the defendants which would be a mere futility unless it were the obligation to allow the work to be done by the plaintiffs and by them only. Of such an obligation the withholding from the plaintiffs of the whole of the work and the employment of other persons to execute and complete it are a breach. There is thus a contract declared on which is not at variance with that pleaded; and there is a breach aptly alleged which may well be in law a breach of that contract. Nothing more is necessary. I think, then, that this plea merely setting out a contract is bad, for it is not even an argumentative denial of the contract declared on, and it really confesses but does not avoid it.

I therefore think the appeal must be allowed and the demurrer to the plea allowed.

ISAACS J. read the following judgment:—The question we are called upon to decide is whether the respondents agreed to give certain repairs to the appellants, or whether they retained under the contract absolute liberty to give them to whomsoever they pleased or to effect them themselves.

Naturally, no decision upon a like question in any other con-

tract can assist, except so far as it lays down a rule of law or of construction.

The parties have made a written agreement, which is not under seal, and that is the mutually agreed evidence of their contractual relations, and so the question for the Court is how far such a promise as that relied on by the appellants is expressly contained in or to be implied from the writing to which the parties have reduced their agreement.

Now one principle of law is determined for us beyond all discussion, and that is as to where an unexpressed term may be implied. In *Douglas* v. *Baynes* (1) it was laid down by the Judicial Committee in these terms:—"The principle on which terms are to be implied in a contract is stated by *Kay* L.J. in *Hamlyn* v. *Wood* (2) in the following words:—'The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied.'" I venture to repeat what I said in *Hart* v. *MacDonald* (3), that "to imply less than the rule thus formulated requires, would be to restrict the indisputable intention of the parties; to imply more would be to make a new contract for them." We have therefore to see whether there are to be found some words which, properly interpreted, amount to an express promise, and, if not, then whether we are driven to the conclusion that the parties intended to stipulate for the promise alleged.

As to that the document properly construed with reference to its subject matter must speak for itself. It begins by reciting that "the Council is desirous of having certain repairs to power house machinery done." Now that is a very material statement. The respondents contend that the whole transaction is a mere standing offer, secured to some extent against withdrawal by a deposit so that the Council may or may not according to its desire at any time avail itself of the offer. In other words, the contention is that the Council when it makes the agreement

(1) (1908) A.C., 477, at p. 482. (2) (1891) 2 Q.B., 488, at p. 494.
(3) 10 C.L.R., 417, at p. 431.

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had formed no definite desire on the subject except to have an offer.

But the opening recital, which is put there for a purpose, distinctly states that the Council is then desirous of having those repairs done, that is, done by somebody other than the Council itself. Now, such a recital does not of itself amount to a stipulation. But such a recital coupled with what follows may. That is a very old and deeply-rooted principle of construction. Though the recitals are *primâ facie* not the place where one naturally looks for binding promises, yet there is no rule of law which confines the parties' stipulations to any part of the document they sign; and, if their intention is clear, it is to be given effect to wherever they may choose to record it, and in whatever form of words they may select. See *per* Lord *Blackburn* in *Russell* v. *Watts* (1). A recital even in a deed may be a covenant, or a warranty: *Severn & Clerk's Case* (2) is distinct. There it is said:—"Recital of itself is nothing, but being joined and considered with the rest of the deed it is material." This was affirmed in *Farrall* v. *Hilditch* (3). There also *Williams* J. for the Court referred to *Hollis* v. *Carr* (4), where *Finch* L.C., held that where both parties to a deed recited "whereas it is intended a fine shall be levied" this declared an agreement to levy, and that every agreement under seal amounts to a covenant on which an action lies. And the learned Lord Chancellor after expressing the caution which the Court should exercise in spelling a covenant out of a recital, nevertheless went on to say that the Court thought it sufficiently appeared by the whole deed that it was intended to express thereby the whole arrangement and transaction. The caution so expressed requires this further addition that a distinction must be observed between words creating a mere expectation however strong, and those amounting to a binding agreement. But once the agreement is found, it is as strong as if it were expressed in the most formal terms. (*In re Cadogan and Hans Place Estate Ltd.*; *Ex parte Willis* (5)). And when we add that a writing dealing with a matter of business must be

(1) 10 App. Cas., 590, at p. 611.
(2) 1 Leon., 122.
(3) 5 C.B.N.S., 840, at pp. 853-4.
(4) 2 Mod., 86.
(5) 73 L.T., 387.

considered, as *Bowen* L.J. said in *The Moorcock* (1), "in a reasonable and business manner" we have stated all the principles of law really relevant to the matter and have only to apply them to the particular document. We then find that the recital of desire to have the repairs done, is followed by a further part of the same recital defining them as "the works," and that a specification relating thereto had been prepared, and that both parties had signed those specifications annexed, indicating that both parties were to be held to them. That is the first recital, which we may regard as the Council's part. The second recital is the contractors' part, and recites that they have agreed to execute those works upon and subject to the conditions, which are also signed by both parties, and therefore may be regarded as holding both parties to them.

So far the business sense is that one declares an intention to have the repairs done, if the other will agree to do them; and the other thereupon agrees.

The parties next put that agreement into three formal clauses. The first states the consideration—namely, payment—and the contractor's promise. The second contains a promise by the Council to pay. The third is of the highest importance because it incorporates the conditions and specification and tender as part of the agreement, and it provides that "the parties hereto will respectively abide by and submit themselves to the conditions and stipulations, and perform the agreement on their part respectively in such tender, condition and specification contained." All these documents then are to be construed with each other and so far as applicable as part of the contract. The first clause of the document, called instructions to firms tendering, is—"The City Council does not undertake to accept the lowest or any tender." What meaning has that if the Council, notwithstanding the execution of the formal contract, were free? The general conditions require a contract deposit "to the amount of 10 per cent. of the contract price for the due performance of the contract." In the circumstances that was an impossible condition to work out in figures, but none the less it indicates an intention to secure the due performance of the conditions as to all the works. Then

(1) 14 P.D., 64.

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payment is to be made "once every four weeks," which has reference, no doubt, to monthly financial consideration of affairs of the Council. It presupposes a general recurrence of repairing requirements, a constant attention to them and a systematic method of payment for them. The agreement not without consent to assign or sublet the contract or the benefit or burden thereof or any part thereof, is extremely significant. The word "contract" plainly means the agreement then signed and the words "any part thereof" practically exclude the idea of "contract" referring to some specific repair directed.

The provision giving power to "determine the contract" is strong also. I do not say it would be by itself sufficient, because the Town Clerk's order when given would derive its efficacy from the contract, and determining the contract after an order given would determine the order too, but its weight when regarded cumulatively is considerable.

Again acceptance for twelve months, when a lower price was offered for five years, indicates forcibly the absence of absolute freedom. Why should the Council select a higher price for the twelve months if they were free all the while?

So far the contract taken as a whole indicates an intention to have some repairs "done" at all events. "But," says Mr. *Leverrier*, "what repairs?" Is it all repairs that are actually necessary, or is it all repairs that the Town Clerk may choose to notify? If the first, he says that leads to an absurdity because there may be an instant repair needed, and it could not have been contemplated that the Council should stand idly by and see injury occur, or effect the repairs by its own officer at the peril of an action. If the second, he says the Council is free because the Town Clerk has not notified the repair referred to in the declaration. But the true answer is that neither extreme is correct. When the general condition, and specification are looked at to see what are the "certain repairs" referred to in the agreement, and when they are read in the necessary business fashion, as they would necessarily appear to persons in the position of the contractors, the answer seems plain. The specification says in the first clause "the mechanical repairs to the plant"—and in the second clause that the contractors shall commence a repair on receiving instructions in

writing from the Town Clerk. The general conditions say that the contractors are to carry out "the repairs under this contract" in accordance with orders in writing from the Town Clerk. Those provisions are inconsistent on the one hand with the Council withholding from the contractors such repairs as require to be done, and the other with an obligation to give such repairs as do not reasonably and practically admit of the prescribed orders being given. No tradesman could imagine, on reading those conditions and that specification, that the Council were to wait, say, on a Sunday or a holiday or at night, if there occurred a break which involved a serious leakage of electricity, and which therefore needed instant attention. Reading the words of the contract with reference to the subject matter—electricity—the words "certain repairs" in the main agreement, and "the repairs under this contract" in the general conditions, must be confined to such repairs as are fairly and reasonably susceptible of being made the subject of the orders in writing. And so reading them, the words "in accordance with orders in writing" in the general conditions indicate clearly that the orders in writing are for the purpose of conveying to the contractor the directions as to the nature of the repairs, and not as a mere intimation of election to have them done. There is consequently no absurdity or unreasonableness in the fact that the contract binds the Council to give the contemplated repairs to the contractors. On two grounds, therefore, I am of opinion the contract should be read as binding the Council. The first is that the words in the first recital "the Council is desirous of having certain repairs to power house machinery done," when coupled with all that follows, constitute a binding declaration of present intention inducing the contractors to bind themselves, and amounting therefore to a warranty or promise to carry out that intention and have those repairs done on the terms agreed to. This ground finds not only general intention, but also specific language upon which that intention may be fastened by a proper interpretation of the actual words of the party charged on the principles fully stated by *Tindal* C.J. in *Williams* v. *Burrell* (1), The other ground is upon a general construction of the whole document. It assumes

(1) 1 C.B., 402, at p. 430.

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that the recital in question is of a less high character; but reading the contract and the documents it incorporates, as a consistent whole, and not denying to the recital its weight as an honest declaration inducing the contract, I am driven to the conclusion that the parties intended the Council to be bound.

I therefore agree that this appeal should be allowed.

*Appeal allowed. Judgment for plaintiffs on demurrer with costs. Respondents to pay costs of the appeal.*

Solicitors, for the appellants, *Minter, Simpson & Co.*

Solicitors, for the respondents, *Dawson, Waldron & Glover.*

B.L.

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Cons *Permanent Trustee Aust* v *WA Planning Commission* (1998) 20 SR(WA) 192

[HIGH COURT OF AUSTRALIA.]

THOMAS PLUNKETT . . . . . APPELLANT;

AND

WILLIAM SMITH . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1911.

PERTH, *Oct.* 18, 24.

Griffith C.J., Barton and O'Connor JJ.

*By-law—Validity—Municipalities Act* 1906 (*W.A.*) (*No.* 32 *of* 1906), *secs.* 179, 304, 308, 335.

A by-law made by a municipal Council provided that:—"Every person who shall hereafter erect alter or add to any building shall comply with the following regulations:— . . . . (*e*) No fascia or projecting eave constructed of inflammable material shall be erected at a less distance than 2 ft. 6 in. from the boundary of an adjoining property."

*Held*, that the by-law was invalid, there being nothing in Part XV. of the *Municipalities Act* 1906 to give the Council power to regulate the material or structure of roofs, except as to the covering.

Decision of the Supreme Court of Western Australia reversed.