[VASSILIADES, P., TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

CYPRUS AGRICULTURE AND TRANSPORT CO. LTD., AND ANOTHER,

Appellants-Plaintiffs,

v.

ATTORNEY-GENERAL OF THE REPUBLIC,

Respondent-Defendant.

(Civil Appeal No. 4772).

Contract—Contract for soil conservation works of five years duration—Breach of by the respondent Republic of Cyprus by giving out works within the ambit of such contracts, on the basis of tenders at large—Instead of proffering such works to the appellants under the terms of the said contract.

Contract—Rescission—Implied rescission by conduct of the parties—When such mutual rescission may be implied—Principles applicable—Circumstances and conduct of the parties in the instant case not such as to warrant the inference that there has been an implied rescission of the original agreement between them—Cf. section 62 *of the Contract Law, Cap.* 149, *which is the same as section* 62 *of the Indian Contract Act,* 1872—*See comments thereon in Pollock and Mulla* (8*th ed.*) *at p.* 370 (*Commentary on the Indian Contract Act,* 1872, *by Pollock and Mulla,* 8*th ed.*)—*Cf. Halsbury's Laws of England,* 3*rd ed., Vol.* 8 *p.* 174, *paragraph* 296.

Damages—Breach of contract—Assessment—Estimate of damages made in the absence of essential evidence which would render it safe and accurate—No sufficient facts on record enabling Court of Appeal to assess themselves damages—Consequently, case remitted to the trial Court for a retrial by a different Bench of the issue of damages, and in the light of the construction of the contract sued on made by the Court of Appeal.

Appeal—New trial—Retrial ordered of the issue of damages (supra)—*Principles laid down in* Constantinou *v.* Mina (1966) 1 C.L.R. 171, applied.

Rescission of contract—Implied rescission—Principles applicable—When such rescission may be inferred—See supra *under Contract.*

This is an appeal by the plaintiffs from a decision of the District Court of Nicosia whereby the trial Court dismissed

a claim of the plaintiffs (now appellants) against the defendant (now respondent) as representing the Government of the Republic for damages for breach of an agreement in writing dated the 30th August, 1957, and ending on 31 August, 1962.

This was a contract for soil conservation works of five years duration. The alleged breach was that the Government of the Republic gave out works (those set out in " Report No. 2 "), alleged to be within the ambit of the said contract, on the basis of tenders at large, instead of proffering such works to the plaintiffs (now appellants) under the terms of the said agreement which was in force at the material time (July 3, 1962).

It was contended on behalf of the defendant-respondent that, *inter-alia*, (*a*) the said works were not within the ambit of the contract, and (*b*) that the contract sued on was mutually rescinded by the conduct of the parties, because the appellants submitted tenders in response to the invitation for tenders on July 3, 1962 (*supra*) and then they signed, each one of them acting for his own account, contracts for part of the project covered by such invitation.

Rejecting both submissions of the respondent (defendant), allowing the appeal and ordering a new trial for the due assessment of damages, the Court :—

Held, (1) (*a*). On a correct construction of the agreement between the parties we hold that the works set out in " Report No. 2 ", which were not proffered to the appellants, but were, on the contrary, and for reasons which cannot be held to be legally valid reasons, given out on the basis of tenders at large, were works within the ambit of such agreement and that, therefore, the respondent is guilty of breach of contract.

(*b*) Nor, again on the basis of a correct construction of the agreement, can we accept the argument that any of the said works were not within its ambit because if given to the appellant in July, 1962, it might not, or would not be completed until after the expiry of the agreement at the end of August, 1962—even if there were any ambiguity regarding this point we could not have given the agreement such a construction as would lead to an unreasonable result—(See *Dodd* v. *Churton* [1897] 1 Q.B. 562, at p. 567, per Lord Esher M.R., *viz.* that

the material factor for giving effect to the rights and obligations of the parties under the agreement was not the time when work, envisaged by the agreement, was to be proffered, but the expected duration of completion of such work after it had been already undertaken in accordance with the agreement).

(2) *As to the submission that the contract was mutually rescinded by the conduct of the parties (supra) :*

(*a*) It is clear that there has not been any new express agreement rescinding the existing agreement and so, all that has to be examined is whether there has been an implied rescission of such agreement, intended by both sides.

(*b*) The trial Court rejected this contention of counsel for the respondent ; and we are of the view that it was rightly rejected. In Halsbury's Laws of England, 3rd ed., Vol. 8, p. 174, paragraph 296, it is stated :—

> " A rescission of the original contract may be implied where the parties have subsequently entered into an agreement which is inconsistent with it ; and where neither party has insisted upon the performance of the contract for a long period after it was made, or where the parties have acted inconsistently with its continuance, an intention to abandon the contract may be inferred. In that case the contract will be deemed to be rescinded although no express agreement to such effect has been made."

(*c*) Reverting to the facts of the present case, it must not be lost sight of that about eighteen months before the invitation for tenders, in July 1962, one of the appellants wrote to the Minister of Agriculture and Natural Resources, in February, 1961, asking for the renewal of the original agreement of the 30th August, 1957, on the ground that for reasons beyond the control of the parties it had remained inoperative, and that in March, 1961, he was informed in reply that the contract of 1957 could not be renewed and that it would expire by the end of August, 1962, *i.e.* nearly two whole months after July 3, 1962, when the invitation for tenders relied upon by the appellants, as constituting a breach of the agreement concerned, was published.

(*d*) Moreover, when the same appellant made a tender on the 14th July, 1962, in response to the aforesaid invitation

for tenders, express reference was made to the said agreement, a further request for its renewal was put forward, and then there was set out the appellant's tender prefaced by the phrase " in the meantime ".

(*e*) On the basis of all relevant considerations it cannot be held—the onus to persuade us to that effect being on the respondent—that the circumstances, and the conduct of the parties, from the conclusion of the contract in August, 1957, up to the tenders and contracts in 1962, were such as to constitute an implied rescission of the said contract of 1957.

(*f*) In our view, the submission of tenders, in July, 1962. by the appellants, and the acceptance of separate contracts by them for part of the work involved, should be treated as being, only, an attempt on their part to minimize the damage suffered through the breach of the agreement of August, 1957, on the part of the respondent.

(3) *Regarding the question of damages :*

(*a*) The trial Court, on the alternative assumption that there has been a breach of contract, found that the appellant did not suffer damages " more than approximately £2,000". Counsel for the respondent accepted that figure ; but counsel for the appellants did not, arguing that it was inadequate.

(*b*) We cannot accept as correct the assessment made by the trial Court in the absence of essential evidence which would render it safe and accurate ; nor do we have, on the material on record, sufficient facts before us to assess ourselves the damages due to the appellants. We, therefore, have—as in other similar cases, such as *Constantinou* v. *Mina* (1966) 1 C.L.R. 171—deemed it to be proper course to remit this case to the District Court for retrial of the issue of damages arising out of the breach of contract by respondent ; such assessment to be made on the basis of the construction of the contract found by us to be the correct one ; and by another Bench, as the trial Judges have already expressed views on the issue of damages.

Appeal allowed with costs here and in the Court below ; further costs to be costs in cause.

Cases referred to :

Dodd v. *Churton* [1897] 1 Q.B. 562, at p. 567, *per* Lord Esher M.R. ;

The Earl of Darnley v. *The Proprietors & C. of the London, Chatham and Dover Railway* [1867] L.R. Vol. II, H.L. 43, at p. 60, *per* Lord Cranworth ;

Morris v. *Baron and Company* [1918] A.C. 1 ;

Marriott v. *Oxford and District Co-operative Society Ltd.* [1969] 1 All E.R. 471 ; and on appeal : [1969] 3 All E.R. 1126 ;

British and Beningtons, Limited v. *North Western Cachar Tea Company, Limited and Others* [1923] A.C. 48, at p. 67, *per* Lord Sumner;

G. W. Fisher Ltd. v. *Eastwoods Ltd.* [1936] 1 All E.R. 421, at p. 426, *per* Branson J. ;

Constantinou v. *Mina* (1966) 1 C.L.R. 171.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Mavrommatis and Stylianides, D.JJ.) dated the 10th October, 1968, (Action No. 4013/63) whereby the plaintiffs' claim for damages for breach of an agreement in writing dated 30th August, 1957, was dismissed.

A. Triantafyllides with *A. Vassiliou* (*Mrs.*), for the appellant.

K. Talarides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES, P. : On the 30th March, 1971, the then President of the Supreme Court, Mr. Justice Vassiliades, Mr. Justice Josephides and myself gave judgment in this appeal in these terms :

" 1. The appellants' appeal is allowed as follows :

(*a*) There has been by the respondent a breach of the contract dated 30th August, 1957, through inviting tenders in respect of work described in Notification 860 in the official *Gazette* of the 3rd July, 1962, instead of proffering such work to the appellants under the terms of the said contract, which was in force at the time,

and on a proper interpretation of which it applied even to work which once proffered to the appellants within the period of the operation of the contract it might have to be completed after the expiry of such period.

(*b*) On the basis of the material on the record it has been deemed to be the proper course to send this case back to the District Court for retrial, by another bench, of the issue of damages arising out of the said breach.

2. The judgment of the trial Court is set aside on the above terms and it is ordered, accordingly. The respondent to pay the appellants' costs here and in the Court below ; further costs to be costs in cause.

3. Reasons for the judgment will be given later. "

We shall now proceed to give the reasons for our judgment :

This was an appeal from the decision of a Full District Court in Nicosia, on the 10th October, 1968, in civil action No. 4013/63. By such decision the trial Court dismissed a claim of the appellants-plaintiffs against the respondent-defendant (as representing the Government of the Republic) for damages for breach of an agreement in writing dated the 30th August, 1957.

The agreement was entered into between the Director of Agriculture acting in his official capacity for the then British Colonial Government of Cyprus (referred to therein as " the Director ") and the appellants (referred to therein as the " Authorized Contractors ").

The main clauses of the agreement are as follows :—

" 1. In consideration of the Director's undertaking to proffer, if and when work is available, up to 1500 tractor hours' work per tractor unit per annum for five crawler tractors (" Oliver " OC 18-each of a drawbar h.p. capacity of 133) owned by the Contractors, for a period of five years from the date hereof, at a rate to be fixed by tenders from amongst the Authorized Contractors not exceeding five pounds per tractor-hour (hereinafter referred to as the approved maximum rate) the Authorized Contractors undertake to keep, maintain and have available for use by

the Director the above quoted number of tractors for the period herein stipulated, subject to the following terms and conditions :

(*a*) The work referred to above consists of mechanised soil conservation works (including earth banks and levelling) to be carried out to the absolute satisfaction of the Director.

(*b*) ....

(*c*) The Soil Conservation Divisions in Cyprus shall, for the purposes of this Agreement, be deemed to be interested parties and shall have the authority to require the Authorized Contractors to undertake work for them as per the terms of this Agreement.

(*d*) The Director and the Soil Conservation Divisions shall have the right to call for tenders from the Authorized Contractors for any work they may have, and the latter shall put up tenders within the approved maximum rate and to execute the work within the required or specified time.

(*e*) The Director guarantees payment for any work done by the Authorized Contractors for the Soil Conservation Divisions provided that such work is carried out to the satisfaction of the Director or his duly authorized representative.

(*f*)

(*g*)

(*h*) The Authorized Contractors have this day furnished security in the sum of £2000, (two thousand pounds) per tractor-unit for the proper fulfilment of the terms and conditions of this Agreement.

2. (*a*) The Director undertakes, for a period of five years, not to employ any other contractor in connexion with soil conservation works unless the Authorized Contractors have already been proffered 1,500 tractor-hours' work per tractor unit per annum.

(*b*) The Director shall be at liberty to register other contractors as Authorized Contractors, if in his opinion there is more work than the Authorized Contractors can cope with but so that

the guaranteed period of working hours of the Authorized Contractors per tractor unit, as agreed herein, is not adversely affected.

3. (*a*) The Authorized Contractors undertake to do any kind of work necessitating the use of their tractors together with such ancillary equipment as may be required on any project anywhere in the Island, provided they are not required to do less than 250 tractor-hours' work in any locality, and guarantee that the output of work shall be in accordance with the estimated production as given by the manufacturers of the particular tractor used on that work.

(*b*) .....

(*c*) The Authorized Contractors undertake to do any work proffered to them up to 1500 tractor hours a year per tractor unit. If they fail so to do the Director shall be at liberty to surcharge them with any difference in cost that may have been paid for the completion of the work.

This Agreement shall be deemed to have commenced as from the 1st April, 1957.

Signed this 30th day of August, 1957."

The agreement in question was the result of the acceptance by Government of tenders submitted by the appellants in response to a relevant invitation dated the 29th March, 1956. It is useful, in order to show the framework of circumstances in which the agreement was entered into, to quote the main part of the relevant notice :

"*Tender Notice*
Soil Conservation Machinery Contract

Tenders are invited from persons willing to carry out mechanised soil conservation works, including earth banks and levelling, as contractors authorised by the Department of Agriculture, Cyprus. Would-be contractors should be prepared to operate crawler type tractors with a draw-bar power of at least 70 H.P. Each tractor should be equipped with an angle dozer and a scraper with a carrying capacity of at least 9 cubic yards. Persons wishing to become authorised contractors should state the maximum rate, inclusive of all costs, including transport, they are prepared to charge per tractor working hour (as registered by

the machine) during a five-year period. Persons tendering should state the numbers and the exact type of tractor and ancillary equipment they propose to operate. If the machinery is not at present on the island they should state the approximate date when they would expect to obtain delivery. (The Department of Agriculture would, in approved cases, be prepared to sponsor applications for the importation of machinery from non-sterling countries).

Successful tenderers, the number of which will be limited, would be required to sign an agreement with the Director of Agriculture undertaking to accept proffered work up to 1,500 tractor hours per year on any projects, anywhere in the island, sponsored by the Department of Agriculture, providing that an individual project gives a minimum of 250 tractor hours work. It is expected that most of the work would be in soil conservation divisions where payment would be guaranteed providing the work is performed to the satisfaction of the Director of Agriculture..... "

Some work, as envisaged by the agreement, was proffered to, and performed by, the appellants in 1957 and 1958, but it does not appear that the agreement was put into operation to any appreciable extent, due to the situation arising out of the liberation struggle, which was going on in Cyprus, from 1955 to 1959, against the colonial rule.

On the 2nd February, 1961, one of the two appellants wrote to the Minister of Agriculture and Natural Resources of the Republic—under whom comes the Director of the Department of Agriculture—pointing out that the agreement had not, really, been put into operation and requesting that it should be renewed for another term of five years, as the appellants had spent about £140,000 in order to import the necessary machinery ; it is quite clear from the contents of this letter that it was written on behalf of both appellants.

A reply was given on the 9th March, 1961, to the effect that, in the light of changed circumstances, it was not possible to consider renewing the agreement, which was due to expire after eighteen months (ἡ προθεσμία ἐκπνέει μετά δεκαοκτώ μῆνας).

Thus, on the 9th March, 1961, Government officially acknowledged that the agreement of the 30th August, 1957, was in force and that its effect was to cease after eighteen months, at the end of August, 1962.

During the winter of 1961/1962 there was a drought in Cyprus and to alleviate its effect the Government of the United States of America donated to Cyprus wheat to be used for the relief of the stricken farmers. Part of it was sold and the proceeds were used for development projects for the farmers, including a soil conservation project. The use of such proceeds was subject to the approval of the American Aid Mission here and of the farmers themselves. Fifty per cent of the cost for the soil conservation works was to be borne by the farmers and the other fifty per cent by the said American Mission, acting through the Government of Cyprus. The Government took the soil conservation project under its auspices in order to check payments, reduce costs and convince the American Mission that the money would not be wasted but be used in the best possible way. Works which were to be done under such project appear in " Report No. 2 " (in the particulars filed in the proceedings by the respondent). The project was approved by the American Mission and the farmers gave their consent.

Then, on the 3rd July, 1962, tenders were invited for the project by a notice (Not. 860) published by Government in the official *Gazette*. It was expressly stated in such notice that the tenders were invited for the carrying out of soil conservation works for the account of the Department of Agriculture (which comes under the Ministry of Agriculture and Natural Resources) ; and that the tenders were to be submitted to, and be accepted or not, by the Government Tender Board, under the chairmanship of the Accountant-General. The notice concluded with a statement that " the Government " was not bound to accept the lowest or any tender. There can be really no doubt that this was a project " sponsored " by the Government, in the sense of the invitation for tenders in March, 1956, which led to the signing of the agreement of August, 1957.

The appellants submitted tenders in answer to such notice and, later on in July, 1962, contracts were signed with the successful tenderers, amongst whom, in respect of certain works, were, also, the two appellants.

Some time later, in October, 1963, the civil action which gave rise to the present appellate proceedings was filed.

The trial Judges, who, indeed, have gone into the case in a most meticulous manner, reached the conclusion that the project described in " Report No. 2 " could not be considered as a project within the ambit of the aforesaid

agreement dated 30th August, 1957, as it was a project of individual farmers subsidized by the U.S.A. through the Cyprus Government ; as a result they dismissed the claim of the appellants for breach of contract by the Government.

All individual works set out in " Report No. 2 " were of a duration of more than 250 hours each and, therefore, they all seem to be works envisaged by the agreement of the 30th August, 1957 ; it follows that if, otherwise too, they come within the ambit of such agreement, then, to invite, in July, 1962, tenders in respect thereof and to award, on the basis of the tenders, contracts in relation thereto, without first proffering such works to the appellants, in accordance with the terms of the said agreement, does constitute a breach of the agreement.

With all respect for the contrary view taken by the trial judges, we found ourselves unable to agree with them that the project in question was not within the ambit of that agreement:

Once Government treated the matter—as it is clear, *inter alia*, from the contents of the invitation for tenders of the 3rd July, 1962—as part of its own activities, the fact that half of the relevant expenditure was to be covered by the aid given to farmers, through the Government, by the U.S.A., is not a factor of such a decisive significance as to take the project concerned outside the ambit of an agreement which was still in force and binding on Government ; such project being otherwise, due to its nature, within the ambit of the agreement.

Nor, in the circumstances, could the fact that the farmers were to contribute to the extent of one half of the expenditure sustain the view taken by the trial Court ; because, as stated in evidence by the then Director of the Department of Agriculture, Mr. R. Michaelides, work under a Soil Conservation Division scheme—(which normally would have been carried out under the agreement of the 30th August, 1957)—is usually subsidized by Government and such subsidy, at the time of the conclusion of the agreement in 1957, was around half of the cost involved; the other half being contributed by the farmers.

When Mr. Michaelides was asked why the works in " Report No. 2 " could not be done under the said agreement he replied as follows :— " Firstly, because we had considered it as having expired and secondly, the prices

were too high to such an extent that it was impossible for the farmers to accept them. Thirdly, the situation in 1962 had changed since 1957, the time of the signing of the contract, because in the meantime the new types of transcavators and tractors have been imported. Fourthly, because in many areas, and I have in mind the area of Pyrgos, (Tyllirias), the farmers wanted Caterpillar tractors to be used". It is, however, quite clear from what has already been stated, and especially in view of the aforesaid letter—dated 9th March, 1961—of the Ministry of Agriculture and Natural Resources, that the agreement had neither expired nor was it regarded by the Government as having expired.

Actually, in view of the phrase, at the end of the agreement, which states that " This Agreement shall be deemed to have commenced as from the 1st April, 1957 ", it was pleaded and argued before the trial Court that the agreement expired on the 31st March, 1962, prior to the invitation for tenders in July, 1962; but this contention was rejected by the trial Court, which found that, on the basis of the express wording of its clause 1, the agreement was in force for five years as from the date when it was signed, *viz.* as from the 30th August, 1957—(this being, as a matter of fact, to the same effect as stated by the Ministry of Agriculture and Natural Resources in its letter just aforementioned)—and that the reference to the 1st April, 1957, was made because of certain work which had already been performed earlier. The view of the trial Court as to the duration of the agreement has not been challenged by the respondent in the appeal proceedings.

Also, none of the other reasons stated by Mr. Michaelides, in the above-quoted passage from his evidence, could, in the light of the particular circumstances of this case, be held to amount to a valid ground for acting contrary to the agreement between the parties.

During the hearing of the case before the trial Court, the statement of defence of the respondent was amended so as to aver that the agreement was frustrated by supervening events and that, in any case, the Republic was not liable under it, as it had been signed by the previous British Colonial Government; but later on in the proceedings counsel for the respondent, quite rightly in our view, abandoned both these contentions.

On a correct construction of the agreement between the parties we hold that the works set out in " Report

No. 2", which were not proffered to the appellants, but were, on the contrary, and for reasons which cannot be held to be legally valid reasons, given out on the basis of tenders at large, were works within the ambit of such agreement and that, therefore, the respondent is guilty of breach of contract.

Nor, again on the basis of a correct construction of the agreement, can we accept the argument that any of the said works were not within its ambit because if given to the appellants in July, 1962, under the agreement, it might not, or would not, be completed until after the expiry of the agreement at the end of August, 1962. Even if there were any ambiguity regarding this point we could not have given the agreement such a construction as would lead to an unreasonable result—(see *Dodd* v. *Churton* [1897] 1 Q.B. 562, per Lord Esher M.R. at p. 567)—*viz.* that the material factor for giving effect to the rights and obligations of the parties under the agreement was not the time when work, envisaged by the agreement, was to be proffered, but the expected duration of completion of such work after it had been already undertaken in accordance with the agreement.

Both before the trial Court and before us counsel for respondent has argued that the agreement in question was mutually rescinded by the conduct of the parties, because the appellants submitted tenders in response to the invitation for tenders in July, 1962, and then they signed, each one of them acting for his own account, contracts for part of the project covered by such invitation.

Section 62 of our Contract Law, (Cap. 149) provides that :—

> " If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

Section 62, above, is the same as section 62 of the Indian Contract Act, 1872 ; and in the Commentary by Pollock and Mulla (8th ed.) on the said Act the following appears (at p. 370) :—

> " It must, of course, be shown, especially where it is sought to prove a variation not by an express agreement, but by a course of conduct, that the variation was intended and understood by both parties."

This proposition is based on a case decided by the House of Lords in England, *The Earl of Darnley* v. *The*

Proprietors, & c. of the London, Chatham, and Dover Railway, [1867] LR, vol. II, H.L., 43, in which (at p. 60) Lord Cranworth said :—

> " When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to shew, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding—that both parties were proceeding on a new agreement, the terms of which they both understood."

It is clear that there has not been any new express agreement between the parties rescinding the existing agreement and, so, all that has to be examined is whether there has been an implied rescission of such agreement, intended by both sides.

The trial Court rejected this contention of counsel for respondent; and we are of the view that it was rightly rejected.

In Halsbury's Laws of England, 3rd ed., vol. 8, p. 174, para. 296, it is stated :—

> " A rescission of the original contract may be implied where the parties have subsequently entered into an agreement which is inconsistent with it; and where neither party has insisted upon the performance of the contract for a long period after it was made, or where the parties have acted inconsistently with its continuance, an intention to abandon the contract may be inferred. In that case the contract will be deemed to be rescinded although no express agreement to such effect has been made."

One of the leading cases on the point is that of *Morris* v. *Baron and Company*, [1918] A.C. 1, which was, also decided by the House of Lords. It was quite recently referred to, and applied, in *Marriott* v. *Oxford and District Co-operative Society, Ltd.* [1969] 1 All E.R. 471 (and though in the *Marriott* case the decision of the Queen's Bench Divisional Court, to the report of which the above reference relates, was later reversed on appeal in view of the specific facts of the case, no doubt was cast on the correctness of the law as laid down in the *Morris* case, *supra*—see [1969] 3 All E.R. 1126).

The approach adopted in the *Morris* case was reaffirmed, too, by the House of Lords in *British and Beningtons, Limited* v. *North Western Cachar Tea Company, Limited, and Others* [1923] A.C. 48, where (at p. 67) Lord Sumner, in relation to the point whether certain contracts had been discharged by mutual consent, said :—

> " *Morris* v. *Baron and Co.* determines the second point, a case which we have only to appreciate and apply. The question is whether the common intention of the parties on May 12th, 1920, was to ' abrogate ', ' rescind ', ' supersede ', or ' extinguish ' the old contracts by a ' substitution ' of a ' completely new ' and ' self-contained ' or ' self-subsisting ' agreement, ' containing as an entirety the old terms, together with and as modified by the new terms incorporated '."

Useful reference may also be made to the case of *G. W. Fisher Limited* v. *Eastwoods Limited* [1936] 1 All E.R. 421, where Branson J. (at p. 426) said, regarding the question of whether a contract had been abandoned :—

> " That is a question which depends not only upon the time during which a contract is allowed to lie unused and unreferred to, but also upon such other acts of the parties, done while that time was elapsing, which may bear upon the question whether they in their own minds did not come to the conclusion that this contract was to be treated as no longer operative between them. All kinds of considerations of fact may arise in the decision of a question of that sort, the relationship between the parties, their conduct in respect of other contracts which have been entered into between them and the whole history of their mutual dealings."

Reverting to the facts of the present case, it cannot be lost sight of that about eighteen months before the invitation for tenders, in July, 1962, one of the appellants wrote, as already mentioned, to the Minister of Agriculture and Natural Resources, in February, 1961, asking for the renewal of the agreement of the 30th August, 1957, on the ground that for reasons beyond the control of the parties it had remained inoperative, and that in March, 1961, he was informed in reply that the contract of 1957 could not be renewed and that it would expire eighteen months thereafter, in other words in August, 1962, nearly two

whole months after the date in July, 1962, when the invitation for tenders relied upon by the appellants, as constituting a breach of the agreement concerned, was published.

Moreover, when the same appellant made a tender on the 14th July, 1962, in response to the invitation for tenders, express reference was made to the said agreement, a further request for its renewal was put forward, and then there was set out the appellant's tender prefaced by the phrase " in the meantime ".

On the basis of all relevant considerations it cannot be held—the onus to persuade us to that effect being on the respondent—that the circumstances, and the conduct of the parties, from the conclusion of the agreement in August, 1957, up to the tenders and contracts in 1962, were such as to constitute an implied rescission of the agreement of 1957.

The submission of tenders in July, 1962, by the appellants, and the acceptance of separate contracts by them for part of the work involved, should be treated as being, only, an attempt on their part to minimize the damage suffered through the breach of the agreement of August, 1957.

Regarding the question of damages, due to the appellants as a result of such breach, counsel for appellants has challenged as inadequate the assessment of damages which was made by the trial Court in case it were to be found, on appeal, that the project in " Report No. 2 " was within the ambit of the agreement between the parties. On the other hand, counsel for respondent agreed with such assessment.

The trial Court, on the alternative assumption that the said project was within the ambit of the agreement irrespective of the time of its completion (which we have already found to be the proper legal position), found that the appellants did not suffer damages " more than approximately £2,000 " and stated : " We cannot pin any figure to the last pound or penny because we do not know the exact volume of ' other ' work done by plaintiffs for the Government. We only know that at certain stages of the July work plaintiffs could not cope as their tractors were engaged elsewhere by the Government. We estimate, therefore, the damages to which the plaintiffs would be entitled had they been successful at £2,000."

We cannot accept as correct this estimate of damages which was made in the absence of essential evidence which would render it safe and accurate; nor do we have, on the basis of the material on record, sufficient facts before us to enable us to assess ourselves the damages due to the appellants. We, therefore, have—as in other similar cases, such as *Constantinou* v. *Mina* (1966) 1 C.L.R. 171—deemed it to be the proper course to remit this case to the District Court for retrial of the issue of damages arising out of the breach of contract by respondent; such assessment to be made on the basis of the construction of the contract found by us to be the correct one; and by another Bench, as the trial Judges have already expressed views on the issue of damages.

For the foregoing reasons we have given judgment in this case as already stated.

Appeal allowed.