IN THE HIGH COURT OF AUSTRALIA

NATIONAL OIL PTY. LTD.

V.

JOHN STUBBS & SONS PTY. LTD.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on FRIDAY, 26th November, 1948.

H. E. Daw, Gov. Print., Melb.

C.12280/45

NATIONAL OIL PTY. LTD. V. JOHN STUBBS & SONS PTY. LTD.

O R D E R

Appeal dismissed. Cross appeal allowed. Order of the Full Supreme Court set aside. Verdicts of Herron J. of £1,000 on counts 1-12 and £150 on count 13 and his judgment for the plaintiff for £1,150 and his verdicts for defendant on counts 15-38 restored. Defendant to pay costs of proceedings in the Full Supreme Court and in this Court.

NATIONAL OIL PTY. LTD.

V.

JOHN STUBBS & SONS PTY. LTD.

JUDGMENT RICH J.

NATIONAL OIL PTY. LTD.

v.

JOHN STUBBS & SONS PTY. LTD

JUDGMENT RICH J.

This case suffers from an initial complication in the great proliferation of counts undergone by the declaration in the course of the matter through the Supreme Court. On the more material cause of action - an implication in a series of twelve contracts, partly oral and partly in writing - a dozen counts were thought to be necessary to begin with. Each of these has bred three other counts. The result is a case in which the issue or issues require considerable disentangling. But when these issues are understood they reduce themselves very much to a question of implied intention depending on the special facts of the case.

These facts the trial judge, Herron J. , examined very thoroughly and I agree in the view he took of the case.

On the whole I am satisfied that the verdict of Herron J. on the first twelve counts that a breach of the implied obligation therein pleaded had occurred, is justified.

I am also of opinion that the learned judge's verdict on the common money count, count 13, for the recovery of the sum of £150 should be sustained.

The defendant's appeal should be dismissed and the plaintiff's cross appeal allowed.

NATIONAL OIL PTY. LTD.

v.

JOHN STUBBS & SONS PTY. LTD.

JUDGMENT. DIXON J.

NATIONAL OIL PTY. LTD.

v.

JOHN STUBBS & SONS PTY. LTD.

JUDGMENT. DIXON J.

The chief question for decision upon this appeal concerns the right of access to which under his contracts a contractor became entitled for the purpose of bringing his men to and from the site or sites of the works he engaged to execute. The owner after a time refused to allow him to bring his men in and out by motor lorry by the road providing the ordinary and the most convenient access. We are called upon to decide whether the denial by the owner of this form of access involved a breach on his part of any of the implied stipulations arising from the employment of the contractor to execute the works. The decision of the question is somewhat embarrassed by the fact that as the litigation proceeded through the Supreme Court successive restatements or formulations of the implication upon which the contractor, the plaintiff respondent, declared were made by or for his counsel, with the result that a large number of accessory counts have augmented the declaration to almost unmanageable proportions. The number of counts was necessarily large to begin with because there were twelve separate pieces of work or jobs which the owner, the defendant appellant, had employed the plaintiff to execute in the same area. Each of them had been the subject of a separate oral contract based on a schedule of rates and in respect of each of them a separate count was framed. But these and some other difficulties arising from the course that has been pursued in ascertaining and deciding the issues can best be dealt with after the circumstances of the case have been stated and the more substantial questions considered.

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The narrative begins in the early part of 1944. The defendant company carried on at Glen Davis, which is about twenty-two miles from Capertree in New South Wales, an enterprise for obtaining petroleum spirit from shale. At that time with the support of the government it was pressing forward in the constructional development of a considerable area which the company occupied for the purpose of the enterprise. It consisted in a valley of varying width and perhaps nearly three-quarters of a mile long. The average width of the valley is said to be about six hundred yards. The sides of the valley rose sharply into hills and to go up the valley itself seems to involve an ascent. Both in the undertaking itself and in the constructional work done by contractors, of whom there seem to have been a number, a great many men were employed. To accommodate some of the labour employed at the works a War Workers' Hostel was built by the Government. It was situated about 1500 yards from the main gates of the defendant company's area, the gates at the lower end of the valley. A good road was made down to the gates and this continued through the company's premises as a concrete road. Near the gates on either side of the road were buildings. On the right was first the office, then the laboratory, next some sections of the refinery and after that, the boiler house. On the left there was a tank farm for the storage of products.

By this road through the gates men and materials were brought to the works and from the road the material was transported to the various sites where it was needed. Up to 25th February 1945 men were brought to their work by motor vehicle. Single men employed by the company and by contractors for the most part lived at the hostel and contractors who employed them found it imperative to bring them to and from their work by motor lorry or other motor vehicle. The men obtained their midday meal at the hostel. Thus it was necessary to make four journeys a day.

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Early in 1944 the plaintiff company undertook an important piece of work for the defendant. It was the construction of a boiler house and auxiliary bay. This work was made the subject of a formal contract consisting of a deed containing covenants, general conditions, specifications, plans, tender and schedule of rates. The contract was dated 24th April 1944.

In the usual clause of the general conditions defining the degree of possession of the site to be given to the contractor there was an addendum bearing upon the mode of access. This placed upon the contractor an obligation to ensure that his workmen and others brought by him to the site should at all times comply with all requirements which the engineer might from time to time make as to modes in or times at which he or they should enter upon the premises.

No directions were ever given under this clause by the defendant company's engineer. From the beginning the plaintiff company's workmen were carried backwards and forwards between the hostel and the site of their work through the main gates by two motor lorries and a utility truck belonging to that company. Four journeys a day were made by these vehicles by the workmen. It was the practice with other contractors. While this was going on the defendant company obtained from the plaintiff company tenders of schedules of rates for doing another twelve different pieces of work and arrangements were made orally for the execution of these respective jobs. These are the twelve contracts with which we are concerned in the appeal. Considerable urgency seems to have been felt about the work. It was constructional work to be done according to plans prepared by the defendant company or its advisers. Although substantial sums of money were involved and none of the jobs could be described as either trivial or as routine, they seem to have been regarded both as subsidiary and as straightforward. Formal contracts were not considered necessary

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and the plaintiff company was employed to do the work simply according to a plan supplied by the defendant and to the schedule of rates prepared by the plaintiff and assented to by the defendant. The defendant company sent an order form to the plaintiff company stating the work and the rates or else a letter, but in some cases that was a long time after the work had begun. The various pieces of work were undertaken at different times during the months from the beginning of June to the end of October 1944. They consisted in the construction of (1) a storage bin; (2) a residue bunker; (3) a retaining wall; (4) an exhauster house and naphtha plant; (5) some foundations for a track hopper and retaining walls; (6) a reinforced concrete pit for a coal elevator; (7) a bench of retorts; (9) another retaining wall behind some surge bins; (9) a foundation for a residue bunker; (10) still another retaining wall and a runway; (11) a workshop for a new generator station; and (12) the foundations for a No. 2 crusher house. This last order is the subject of a second and quite independent but minor question to be decided upon the appeal. The sites of these various jobs were widely distributed within the area and to reach them from the main gate involved traversing distances from a little under 600 yards to a little under 1200 yards, excepting the naphtha plant, which was only 5 minutes' walk away.

Labour was easy neither to get nor retain. To ask the men to walk to their jobs in their own time would have been futile. The schedules of rates were of course based to a great extent on labour costs, and this the defendant company must be taken fully to have understood. At the time when the rates were made up and agreed the practice was to bring the men in the manner described to and from the various jobs by motor vehicle. They left the hostel immediately after breakfast, the time of which was fixed to enable them to arrive punctually, though owing to delays over the meal they were sometimes a little late. They were taken back for lunch by motor lorry and they returned to work by the same vehicle. At the end of the day they made the journey to the hostel

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again by motor lorry. This practice was continued throughout the year. In February 1945 some gasoline fumes escaping from the vicinity of the refinery were ignited by the heat from the furnace of the boiler house. It occurred in the open but an explosion followed and a bystander was burned. Not long afterwards a man employed by the plaintiff company was seen smoking in the area at the gate. His foreman was with him. The area was regarded as a danger area and notices forbidding smoking were exhibited at the gate and at other points. There was a man posted at the gate with instructions to see that nobody passing through smoked. Some consideration seems to have been given by the defendant company to the possibility of accidents through the escape of fumes and their being ignited. As a result on 25th February 1945 the various contractors were called together and informed that motor lorries would no longer be permitted to drive through the gate carrying parties of workmen. Some objection was made, as it would seem, on the part of the plaintiff company on the ground of the extra cost it would mean. But the defendant company insisted. After that the men were required to leave the lorries before entering the gate. The reason for the defendant company requiring them to do so was what was considered the impossibility of making sure that none among the men crowded upon a lorry smoked as the vehicle passed through. Somewhat curiously, however, the defendant company suspended the production of gasoline not long after the embargo and yet did not lift the embargo during the suspension. The altered practice involved the plaintiff company in the payment of wages to the men covering the time occupied in making their way from the gates to their respective jobs. There is a dispute whether another road entering the area from the other end could not have been used as a satisfactory alternative. But witnesses condemned the road in their evidence, and it appeared that it had been tried and abandoned as an impracticable route for the purpose. On sufficient evidence it has been found that the road did not afford

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to the plaintiff reasonable access by mechanical transport. There is also a dispute as to the delay really caused by the prohibition of lorries laden with men. Again the issue has, on evidence, been found against the defendant. The plaintiff's loss, in the course of completing the contracts, as a result of the prohibition has been assessed at £1000.

It is convenient to consider at this point what rights of access to the sites of the various works for the plaintiff its servants and agents arose on the foregoing facts from the employment of the plaintiff to execute the works.

The rights of access must of course arise by implication as a matter of contract. We are not here dealing with any question of easement. That does not mean that even by way of analogy considerations which have led to implied grants of rights of way can have no relevance. On the contrary the nature of the road through the gates, its evident purpose and the regular use to which it was in fact put must suggest analogies to the considerations employed in cases where a grant has been implied of an easement of way over a defined and made road, existing on premises retained, for the apparent use of permises granted. What it does mean is that we are to consider not a question of enjoyment of property but the extent of the promise which must be imported into such a contract on the part of the employer in order to secure to the contractor a proper opportunity for the execution of the work and for the earning of the recompense for which he has stipulated.

The first matter for inquiry is whether the general conditions of the formal contract for the boiler house are to be regarded as incorporated by implication, so far as applicable, into the twelve oral contracts.

The defendant's contention was not pressed so far as to say that there was such an incorporation. It went no further than the proposition that it was necessary to take into account the clause enabling the engineer to make requirements as to the

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modes by which workmen should enter. It was necessary, so it was said, to take it into account as tending to show that if asked the defendant company would not have agreed to the plaintiff's having an uncontrolled right of choosing the mode by which workmen should enter. But the more definite question whether the parties did or did not intend to contract on the footing of the general conditions of the formal contract seems to me not only to be an anterior inquiry but one which must influence if not decide the question whether the more vague and indefinite use made of the clause by the defendant is admissible. I have no hesitation in saying that the parties did not mean to contract on the basis of the general or any other conditions of the formal contract. They were content in the case of each of the minor constructional jobs to rely on the plans and the schedules of rates and otherwise on general understanding and the obligations which, as they would think, naturally grew out of the situation. In that situation I think the authority given to the engineer by the formal contract for the erection of the boiler house played no part. They began with the full dress and formal contract, but in acting under it the practical conditions which obtained and the course of the operations must have and did become the paramount considerations. The existence of the hostel, the road from it through the main gate, the necessities imposed by the conditions in which the workmen lived, these were the fixed considerations which must have been accepted as common ground by the parties. The chief of the necessities so imposed was that of transporting the workmen to their jobs. That would affect both the availability of labour and the costing of the work.

The practical solution was in daily operation, namely the transportation by the various contractors of their men by motor vehicle through the gates by the road provided for that purpose. The defendant does not deny that an implication must be

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made at least that reasonable access to the various jobs for the plaintiff and its workmen must be afforded by the defendant. But on behalf of the defendant it is claimed that any reasonable mode of access is enough, that a reasonable route must be indicated for getting there and that otherwise it is enough that the men can get there with safety and in reasonable comfort.

The answer appears to me to be that the circumstances showed that the parties must in fact have contemplated the road and motor vehicles. The parties can be regarded as bargaining on the footing that one desired expeditious and workmanlike construction at reasonable rates and the other some certainty that he could perform the contract and thus earn as nearly as might be the remuneration at which his schedule of rates had been aimed.

Having regard to the importance for both of their purposes of transporting the men by the road through the gates, it is difficult to suppose that they contemplated anything else. It was the existing course of business at the place and in that course of business the plaintiff company was employed by the defendant to execute the various additional jobs.

No one thought of the entry of the men in lorries as an occasion of danger. The area near the gates was traversed all day by all sorts of traffic. It was altogether an after-thought. In these circumstances the implication must, in my opinion, be that reasonable access by the front road to motor vehicles carrying men would be given for the purpose of executing the works. If the men insisted on smoking as they came through or refused to submit to inspection to see that they did not do so that might be another matter. It would be no breach of the obligation to give reasonable access then to refuse them admittance. But no proof was offered of any such thing.

In my opinion a breach of implied obligation occurred.

Substantially this is the view taken by Herron J. In the Full Court, however, the view adopted was that the only

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implied term that should be introduced was simply that the plaintiff should have reasonable access for itself, its workmen and its material. This view made it necessary for the plaintiff to amend by adding twelve more counts alleging the implication in these terms. The defendant had never denied the propriety of making at lowest such an implication. The defendant's case had substantially been a denial of the implication which the plaintiff had alleged. The implication which commends itself to me is that upon which the plaintiff originally declared, except that the declaration mistakenly uses the word "omnibus" for "vehicle" and that it does not refer to the road specifically. The original declaration with respect to these causes of action consisted in what are now the first twelve counts.

Two other sets of twelve counts were added at the trial but they can be now neglected. In the Full Court the new counts having been added judgment was entered upon them for the plaintiff. Of this the defendant vehemently complained before this court. The defendant's complaint is that the issue whether the refusal to admit lorries loaded with workmen through the main gate amounted to a complete denial of reasonable access had never been fought out.

In the view I take of the implication to be made it is unnecessary to examine this contention. At the trial before Herron J., who sat without a jury, the defendant did attempt to limit the issues to those arising upon the implications pleaded. Owing, however, to the questions of fact involved in the issue of damages, the trial covered many matters that would affect the reasonableness of the mode of access allowed. But if the Full Court did go too far that is not now material. Because one thing is quite certain, and that is that Herron J. tried fully the question of breach of the implication pleaded in the first twelve counts.

I think that the verdict of Herron J. on counts 1 - 12 should be restored.

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On count 13 an entirely different question arises. It is a common money count for the recovery of a sum of £150. The sum is claimed as on a quantum meruit as a balance due in respect of the construction of the foundations of the No. 2 crusher plant. For this work the plaintiff company submitted a schedule of rates on 26th July 1944. It was a plan called National Oil Proprietary No. 2330, or more simply N.O.P. 30, which had been supplied to the plaintiff. After the work had been in progress for more than six months it was discovered that through an oversight another plan which had been prepared had never been delivered to the plaintiff. The earlier plan was a preliminary or sketch plan and two further plans were prepared, N.O.P. 30B and N.O.P. 30C. The second departed from the first in important respects and the third again varied from the second.

The plaintiff's witnesses say that N.O.P. 30B was never received by the plaintiff and that N.O.P. 30C was the only other plan delivered. For the defendant it is agreed that through some error there was a delay in furnishing the new plan or plans, but it is said that both ultimately were delivered to the plaintiff. It is immaterial really which version is right because on either view it would be true that in the first place the schedule of rates had been made up on a plan which was not that according to which the work had eventually to be done, and, in the second place, the change and the delay in communicating the plan meant that some work was thrown away. On learning of the later plan the plaintiff at once took the stand that the schedule of rates was no longer appropriate. According to the evidence of one of the plaintiff's directors he told the defendant's manager that they could not do the work on the same schedule because it was more complex and meant a more detailed set out. The manager in effect said that he did not want a new schedule of rates but would be prepared, in addition to paying (scil. at the old rates) for all extra work to consider a lump sum claim at the end of the work.

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It is clear in my opinion that as soon as the plaintiff was required to execute the work according to another plan involving material changes the plaintiff was no longer bound by the schedule of rates settled for the purposes of work according to the earlier plan. There were differences which at least would have to be taken into account in estimating a rate and therefore the plaintiff was quite entitled to say that it did not contract to apply the schedule to the work as replanned. That meant that for the work the plaintiff was entitled to a quantum meruit. The original schedule of rates produced an estimated cost of £1561:7:6 omitting the cost of excavating above a certain ground level. For this excavation a rate or rates were given but the quantities were not measured or estimated. The cost of such excavation at those rates worked out in the result at £1259:4:0. According to one formulation the total claim for the actual work was £3237:10:5, of which £1978:6:5 represented the work other than that excavation. According to another formulation the total was £3246:10:5.

But beyond this the plaintiff claims that a sum should be paid because the rates adopted did not secure to it an adequate return. To obtain a reasonable sum a comparison is instituted by the plaintiff between the costs of the work with 10% added for profit, and the actual claim paid. The difference is put down at £150 in round figures. The figure is arrived at more roughly as a calculation of 5% on £3000.

A schedule of rates is ordinarily constructed according to the plaintiff by adding 10% to the estimated labour and material costs per unit of the particular work.

At the trial much attention was devoted to the questions - (a) whether the difference in the plans justified any change in the schedule of rates applicable to the work; (b) whether the claim of £3237:10:5 did not cover everything and was not reconcilable completely with the original estimate when the adjustments for

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changes were made; (c) whether the way the plaintiff's claim was put at the trial was covered by the explanations given in correspondence before trial.

Not a little confusion arose from the failure to distinguish between the cost entailed by additional work done and the increase in the rate per unit charged, for say concrete work, by reason of greater detail or complexity in the work specified. The former was not in question. The plaintiff's whole case in support of this count was that changes in the character of the work required made the unit rates inadequate and that a lump sum adjustment was necessary. The lump sum was reached or justified by, so to speak, an ex post facto calculation of what the estimate would have been.

Having investigated the question as completely as the somewhat inexact nature of the claim permitted, Herron J. found the issue in favour of the plaintiff. I have gone over the same ground and though I think there are some unsatisfactory features in the proof of the claim, I think that His Honour's conclusion should be upheld.

In the first place, it is clear as a matter of law that the plaintiff is entitled to be paid in accordance with a quantum meruit and not according to rates fixed by agreement. The fixing of those rates fell to the level of an evidentiary fact. In the next place, to make an ex post facto estimate of the quantum meruit made necessary some such process as was adopted and the mere fact that it appears to assure some rate of profit that otherwise the plaintiff might or might not have been successful in realizing is not a decisive objection. I do not think that the criticisms made of the evidence in the Full Court are sufficiently well founded to destroy the effect of the testimony or of the proofs.

For these reasons I am of opinion that the verdict of Herron J. on the thirteenth count ought not to have been set aside. I would dismiss the defendant's appeal and allow the plaintiff's cross appeal. I think that the order of the Full Court should be varied in the manner asked by the notice of cross appeal.

NATIONAL OIL PTY. LTD.

V.

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JUDGMENT

WILLIAMS J.

NATIONAL OIL PTY. LTD.

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JUDGMENT WILLIAMS J.

This is an appeal by the defendant in an action tried in the Supreme Court of New South Wales by Herron J. without a jury in which His Honour found a verdict for the plaintiff, the respondent on this appeal, on counts 1 to 12 inclusive for £1,000 and on count 13 a verdict for the plaintiff for £150 and ordered judgment to be entered for the plaintiff for £1,150 on these 13 counts, and found a verdict for the defendant on counts 15 to 38 inclusive and ordered judgment to be entered for the defendant on these counts. The defendant appealed to the Full Court of New South Wales which ordered that the plaintiff should be given leave to add 12 new counts numbered 39 to 50, that the defendant should be given leave to plead to these counts in accordance with the draft pleas submitted to the Court, that when the amendments had been made issue should be deemed to be joined on the new pleas and that the plaintiff should pay the costs of all amendments made at the trial or on appeal. The Full Court further ordered that a verdict be entered for the defendant on counts 1 to 13 inclusive and 15 to 38 inclusive, that a verdict be entered for the plaintiff for the sum of £1,000 on counts 39 to 50 inclusive, and that the defendant should pay one half of the plaintiff's general costs of the trial and one-third of the plaintiff's general costs of the appeal.

The history of the case is given in the reasons for judgment of Herron J. and of Their Honours, Jordan C.J., Davidson J. and Street J. in the Full Court and I do not propose to go over the same ground. It is sufficient to say that at all material times the defendant company occupied an area close to

Glen Davis in New South Wales about 1,100 yards long and on an average 600 yards wide situated in a valley with steep hills on either side. There were two modes of access to the area, one by a front gate approached by a good road which continued onto the property, and the other at the back of the property which could only be reached by an inferior and inconvenient road. The plaintiff was engaged in doing certain work for the defendant on this property. The first and most substantial contract for the building of a boiler house at an estimated cost exceeding £28,000 was embodied in a deed dated 20th April 1944 containing a number of elaborate conditions. One of these conditions, clause 14, provided that the plaintiff was to be given such limited possession of the site as was necessary to enable the plaintiff to perform the contract without unnecessary interference with any work that might be simultaneously conducted on or about the site by the defendant or some other contractor on its behalf, and the plaintiff agreed that he would ensure that his workmen should at all times comply with all requirements which the defendant's engineer might from time to time make as to the modes in or the times at which they should enter the defendant's premises and that such workmen would at all times refrain from entering or remaining upon any portion of the defendant's premises other than the site without the permission of the engineer.

After work had commenced on this contract 12 additional and relatively minor contracts not embodied in any formal documents were entered into for the doing by the plaintiff of other works within the area. At the time these contracts were entered into the plaintiff was engaged in erecting the boiler house in accordance with the first contract and its workmen were housed in a hostel situated about 1,400 yards from the front gate of the area. This was the only practicable means of housing them, and the only practicable way of their getting a midday meal was for them to go back from their work to the

hostel, get it there, and then return.

The dispute between the parties centres round the terms of the contract to be implied between the parties relating to the manner in which the plaintiff's workmen, servants and agents should have access to the sites of the work to be done under the 12 additional contracts. Herron J. held that a contract must be implied in the terms set out in counts 1 to 12 that is to say that, whilst the works were being carried out, the defendant would permit the plaintiff to transport its workmen, servants and agents by motor lorries from the public highway adjacent to the defendant's land on to that land and discharge them at the sites of the respective works. The Full Court held that the only contract that could be implied was that the defendant would afford the plaintiff's workmen, servants and agents reasonable access to the respective sites. The Full Court allowed counts 39 to 50 to be added alleging implied contracts to grant reasonable access and breach of these contracts, and then proceeded to hold on the evidence already given before Herron J. that there had been breaches of these contracts. The Full Court also held that there was no evidence to support the verdict of £150 on the 13th count.

The defendant by its notice of appeal to this Court complained that the Full Supreme Court was in error in giving the plaintiff leave so to amend its declaration, that counts 39 to 50 inclusive raised issues that were not before the trial judge, and that the Full Court should have held that on the facts and circumstances of the case the defendant gave the plaintiff reasonable access. The plaintiff cross appealed and asked that the verdicts of Herron J. on counts 1 to 13 should be restored.

Admittedly the plaintiff's workmen, servants and agents had to reach the sites of the works to be done under the 12 additional contracts and some right of access would necessarily

have to be implied. The main contention for the defendant was that in making the implication it was necessary to have regard to all the surrounding circumstances, that the most important of these circumstances was that clause 14 of the principal contract expressly regulated the plaintiff's right of access to the site of the boiler house, and that in implying the right of access under the 12 additional contracts the express provisions of clause 14 of the principal contract was the most important surrounding circumstance to be taken into account. It was contended that the parties could not have intended that the plaintiff should have a greater right of access to the sites of the works to be done under the 12 additional contracts than it had to the site of the work to be done under the principal contract. It was therefore contended that the defendant was within its legal rights in refusing to allow the plaintiff's workmen to be carried in motor lorries to the respective sites of these works and that it was not a breach of these contracts to require the plaintiff's workmen to dismount from the lorries at the front gate and walk to and from the sites.

But the parties did not choose to embody their agreement with respect to the 12 additional works in a formal contract and, in the absence of such a formal contract, I fail to see why clause 14 of the principal contract has any particular importance as a circumstance surrounding the making of these contracts. The proper implication is that which should be made in order to give the twelve contracts such business efficacy as both parties must have intended that they should have, and it seems to me that the most important circumstances surrounding their making were that at the time they were entered into the plaintiff's workmen, servants and agents had to go to and from the respective sites of the works twice a day, that a considerable amount of working time would be lost which was not allowed for in the estimated costs if the workmen had to walk from the front gate to the respective sites and back twice a day, and that at the time the 12 contracts

were entered into the plaintiff's workmen were being carried on lorries to the site of the main contract. It must have been intended by the parties that the men should be carried to the other 12 sites in the same manner. This was the only practicable manner in which the workmen could go to and from the sites expeditiously twice a day if a considerable period of the working day was not to be lost while the men walked to and from the front gate. There was probably a cross implication that the plaintiff would see that his workmen, if requested, would not smoke in any danger area. This may or may not have been an implied term going to the root of each contract. Assuming that it did go to the root, the defendant did not cancel the contract and there was no claim for and no evidence of damage from its breach.

In my opinion the implied term was properly pleaded in the first 12 counts and Herron J. was right in finding a verdict for the plaintiff on these counts, so that the objection to the Full Court allowing counts 39 to 50 to be added to the declaration and then giving judgment on these counts does not arise. Even if the Full Court was right in holding that the implied term was an agreement to give reasonable access, the evidence as to the practicability of the back route and of walking to and from the front entrance was fully gone into, and the only evidence on these points that it could be suggested might have been further pursued was the evidence of Finch that the lorries followed the men as they walked through the danger area and picked them up when they were beyond it. But this was evidence that was material in relation to counts 1 to 12 on the quantum of damages, because if it had been accepted it would have lessened the time lost by the plaintiff's workmen in getting to and from the respective sites and therefore would have reduced the amount of damage suffered by the plaintiff. It is evidence that is opposed to the whole of the rest of the evidence and it is plain that the defendant did not rely on it or pursue it as material on this point. I can see no objection therefore to the course

adopted by the Full Court of allowing counts 39 to 50 to be added and then deciding the case on the evidence already given before Herron J. But, as I have already said, in the peculiar circumstances of the case, I am of opinion that Herron J. was right in finding verdicts for the plaintiff on counts 1 to 12. I am also of opinion that there was sufficient evidence to support his verdict on count 13.

For these reasons I would dismiss the appeal and allow the cross appeal.