

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Thomas George Molloy v. Frederic Wilhelm
Gustav Liebe, from the Supreme Court of
Western Australia; delivered the 7th May,
1910.*

Present at the Hearing :

LORD MACNAGHTEN.

LORD COLLINS.

LORD SHAW.

SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

This Appeal, which was heard *ex parte*, is an Appeal from a Judgment of the Supreme Court of the State of Western Australia dismissing with costs a motion on behalf of the Appellant that one paragraph of a supplementary award be set aside.

The controversy which resulted in this Appeal was a dispute over a building contract for the erection of a theatre, hotel, and other buildings on land belonging to the Appellant in Perth, Western Australia. The Respondent, Liebe, was the contractor; the Appellant, Molloy, was the building owner and the employer.

Differences arose between the parties as to the amount due under the contract and in respect of works executed by the contractor in connection therewith. These differences were referred to the award of Michael Francis Cavanagh as Umpire.

The principal question related to a claim on account of extras. The contract contained a stringent clause providing that no works beyond

those included in the contract would be allowed or paid for without an order in writing from the employer and architect.

The Umpire made his Award on the 16th of January, 1906. He set forth the extras in a list marked "C," and he found as facts : (A) That the works comprised in list "C" were extras. (B) That no orders or authority in writing had been given or endorsed by the employer for any of the extras mentioned in list "C." (C) That orders in writing had been given by the architect alone for a number of these extras. (D) That where works had not been ordered in writing by the architect they had been verbally ordered by him. (E) That all the extra works in the list had been performed by the contractor, and that the amount set opposite to the respective items was the fair and true value for such extra works. Then he proceeded as follows:—

"(F) I find that the employer, the said Thomas George Molloy, has such knowledge of these extras forming the said list 'C,' as may be fairly inferred from the fact that he was constantly on the works and taking an active interest therein.

(G) I also find that the employer, the said Thomas George Molloy, had no knowledge that the written orders given by the architect for such works were given by the architect to the contractor, the said Frederic Wilhelm Gustav Liebe ;"

and he submitted for the opinion of the Court the question whether upon the facts as therein stated the employer was liable under the contract between the parties to pay the amount of the said works as set out in the said list or any portion thereof to the contractor.

The matter in the first instance came before McMillan, J., who answered the question in the affirmative.

The case was then taken to the Supreme Court. The judgment of the Court below was reversed, and judgment was entered for the Appellant, Molloy, with costs of the Appeal and below.

From this decision there was an Appeal to the High Court. The High Court directed that the Order appealed from should be discharged, and that the following Order should be substituted as the Order of the Supreme Court; namely, that the said Award be remitted back to the said Umpire to find whether, irrespective of the express terms of the contract, it has been proved to his satisfaction that the Respondent, Molloy, by himself or his authorised agent, promised, either expressly or by implication arising from his conduct, to pay for the works specified in list "C," or any and which of them as extra works, and each party was ordered to pay his own costs of the motion to the High Court, the Appeal to the Supreme Court, and the proceedings before McMillan, J.

The Judgment of the Court was delivered by the Chief Justice. The learned Chief Justice pointed out that the question was whether under the circumstances of the case an implied contract was proved to the satisfaction of the tribunal which had to determine the matter, that was, the Umpire. He explained that an implied contract might be proved in various ways, and he gave instances.

In pursuance of the Order of the High Court the Umpire made his further Award on the 17th of December, 1906, and thereby, after stating that he had reconsidered all the items in list "C," and had reviewed the evidence on each item separately, and the Judgment of the High Court, he divided the items in list "C" into three categories. With regard to certain works he found

that payment could not be allowed, and disallowed the same accordingly. With regard to other works he found that the architect had ordered them, and that he was duly authorised by the employer to order such works. But with regard to certain works mentioned in list "C," and specified in paragraph 1 of his supplementary Award, he found that the execution thereof was insisted upon by Molloy, he claiming that these works were included in and were a portion of the contract. And further, he found that Molloy was told at the time by the contractor that these works were extras, and would be charged as such. And he found that the said works were extras to the contract, irrespective of the express terms thereof, and that Molloy was liable for the payment of the total amount of the said items as extras. And he awarded that Molloy should pay forthwith to Liebe the sum of £1,670. 10s. 3d., being the amount of the said items.

The Appellant, Molloy, then moved to set aside paragraph 1 of the supplementary Award. The Supreme Court dismissed the motion with costs, holding that the Award sufficiently complied with the direction of the High Court.

Their Lordships agree with the Judgment of the Supreme Court. It would have been quite enough for the Umpire to have directed Molloy to pay Liebe the sum of money mentioned in paragraph 1 without giving any reason for the direction. But the reason stated by the Umpire seems to be plain enough. Molloy insisted on the works being done, maintaining that they were not extras. The contractor on the other hand maintained that they were. As Molloy insisted on the works being done, in spite of what the contractor told him, the Umpire naturally inferred (and it was for him to draw the inference) that the employer impliedly promised that the works

would be paid for either as included in the contract price or, if he were wrong in his view, by extra payment to be assessed by the architect. It is difficult to see how the Umpire could have drawn any other inference from the facts as found by him, without attributing dishonesty to Molloy.

Their Lordships will, therefore, humbly advise His Majesty that this Appeal should be dismissed.

As the Respondent did not appear there will be no costs of the Appeal.

In the Privy Council.

THOMAS GEORGE MOLLOY

v.

**FREDERIC WILHELM GUSTAV
LIEBE.**

London:
Printed for His Majesty's Stationery Office,
By LOVE & MALCOMSON, LTD., Dane Street,
High Holborn, W.C.
1910.