

LIEBE v MOLLOY
(1906) 4 CLR 347 – High Court of Australia

FACTS

Liebe, the builder, entered into a contract with Molloy, the employer, to erect buildings for over \$30,000. The contract provided that no works beyond those included in the contract should be allowed or paid for without an order in writing signed by both the architect and the proprietor. The builder claimed payment for certain works said by him to be extras. There had been no order in writing for these works as required by the contract. They had been ordered by the architect, either in writing signed by him alone, or orally. A dispute arose and there was a finding before arbitrators that the written orders were not endorsed by the employer, but that the fair inference was that he had knowledge of the extra work. The builder submitted that the employer had entered into an implied contract to pay the fair value of the works “as extra works”.

ISSUE

Whether the contractor could recover payment for variations to the work without an order in writing from the employer and the architect when such a written order was by the terms of the contract a condition precedent to payment.

FINDING

The High Court held that if the proper inferences from were:

- (i) that the employer had actual knowledge of the extra works as they were being done;
- (ii) knew that they were outside the contract; and
- (iii) knew that the builder expected to be paid for them as extras

then a contract to pay for them could properly be implied. If, however, the fact was that the owner did not know the particular works were extras or did not know or believe that the builder expected to be paid for them, then it would be proper to conclude that no contract to pay for them should be implied.

QUOTE

Griffith CJ said at 353-354: “The question therefore is whether, notwithstanding the absence of written orders, the contractor is entitled to recover these sums, or in other words, whether under the circumstances of the case an implied contract to pay for them is to be inferred. That is an inference of fact to be drawn by the tribunal which is called upon to determine the matter, that is, the umpire. Now, the only fact found is that the employer had such knowledge as to these works as may be fairly inferred from the fact that he was constantly on the work, and taking an active interest therein. But a further inference must be drawn before a liability to pay arises, namely, that there was an implied contract to pay. It might be inferred, on the one hand, that, having regard to the nature of the works, the fact of the owner’s presence, and the nature of the interest he took, he knew that they were outside the contract, and knew that the contractor expected to be paid for them as extras. On the other hand, it might be inferred as to all or some of them that he did not know that they were extras, or did not know or believe that the contractor expected to be paid for them. ... An implied contract may be proved in various ways. When a man does work for another without any express contract relating to the matter, an implied contract arises to pay for it at its fair value. Such an implication of course arises from an express request to do work made under such circumstances as to exclude the idea that the work was covered by a written contract. So it would arise from the owner standing by and seeing the work done by the other party, knowing that the other party, in this case the contractor, was doing the work in the belief that he would be paid for it as extra work. If the umpire was of opinion that any of this work was done under such circumstances that the owner knew or understood that the contractor was doing the work in the belief that he would be paid for it as extra work, then the umpire might, and probably would, infer that there was an implied promise to pay for it.”

IMPACT

This case stands for the proposition that if the work claimed for had been work required by the contract to be done, then the builder could not recover for it, because he had not complied with the contractual requirements. However, if the work was work which the builder was not required to do by the contract (i.e. outside the contract) then a builder may recover on the basis of quantum meruit if the employer: (i) had actual knowledge of the extra works as they were being done, (ii) knew that they were outside the contract, and (iii) knew that the builder expected to be paid for them as extras.

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