under his notice, as he does the condition of his own premises, the position is altogether different. If the condition of this stop-cock box were brought under the notice of the society, and they failed to repair it after that notice, I think that they would be liable. In that case there would be not a mere nonfeasance but a neglect of duty. But in this case there was no evidence that the condition of the box was brought under the notice of the society and therefore there was no negligence. Nor does there seem to me to be any evidence which would justify the Court in disturbing the finding of the jury, if we were asked to do so, that there was no neglect of duty on the part of the society in not informing themselves of the condition of the fittings.

Under these circumstances I agree that the action is not maintainable, and that the appeal must fail.

*Appeal dismissed with costs.*

Solicitors, for the appellants, *Levy & Fulton.*

Solicitors, for the respondents, *Stephen, Jaques & Stephen.*

Solicitor, for the Board of Water Supply and Sewerage, intervening, *H. S. Williams.*

C. A. W.

Cons/Dist *Update Constructions v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251

Foll *Concrete Constructions Group Ltd v D V P Engineering Pty Ltd* (1997) 14 BCL 168

Foll *Concrete Constructions Group Ltd v D V P Engineering Pty Ltd* (1997) 14 BCL 168

Foll *Trimis v Mina* (1999) 16 BCL 288

[HIGH COURT OF AUSTRALIA.]

LIEBE . . . . . APPELLANT;
PLAINTIFF,

AND

MOLLOY . . . . . RESPONDENT.
DEFENDANT,



ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

*Special case submitted by arbitrator—Arbitration Act* 1895 (*W.A.*), (59 *Vict. No.* 13), *secs.* 9 (*b*), 12—*Power to draw inferences of fact—Remitting incomplete award—"Extras"—Employer, architect and contractor.*

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It was stipulated in a building contract that no extra works beyond those included in the contract should be allowed or paid for without an order in writing from the employer and architect; the specification contained a similar provision. The contractor executed a number of works; some were upon written orders signed by the architect, expressed to be at the employer's direction, but not signed by him. A dispute having arisen upon a claim made by the contractor for the price of the extras, the matters in dispute were referred to arbitrators, and, they having disagreed, to an umpire, who stated a case for the opinion of the Court under the *Arbitration Act* 1895. There was a finding of fact that the written orders were not indorsed by the employer, but that he had such knowledge of those extras as might be fairly inferred from the fact that he was constantly on the works and took an active interest in them.

Upon a submission under the *Arbitration Act* the Court has power to draw all necessary inferences of fact.

*Held*, that the proper person to find the facts and draw the inferences necessary to decide liability to pay for the works in question was in this case the umpire, and that as the umpire had failed to draw the inference of fact necessary to decide the matter in dispute, the case should be referred back to him with a direction as to the nature of the matter to be decided.

THE respondent was the building employer under a certain contract, and the appellant was the contractor to erect the buildings, a large theatre and hotel in Perth, for over £30,000. Disputes arose over the liability of the employer to pay for certain works said by the contractor to be extras. The contract provided that no works beyond those included in the contract should be allowed or paid for without "an order in writing from the employer and architect"; and the specification provided that any extra works ordered by the architect or the proprietor should not be recognized or paid for unless an order in writing, stating the nature of the works and the amount fixed, was signed by the architect and indorsed by the proprietor. On the dispute being referred by the two arbitrators to the umpire, he found that the works in question were "extras" to the contract; that no order in writing, signed by both architect and employer were given for these; but that orders in writing were given by the architect for some of them, and verbal orders for the rest, and that the employer "had such knowledge of these extras as might be fairly inferred from the fact that he was constantly on the work and taking an active interest therein." The findings of the umpire were by agreement submitted to the Supreme Court in the form

of a special case stated by the umpire under the *Arbitration Act* 1895, sec. 9 (*b*), *McMillan* J. held that the finding of the umpire meant that the employer knew that the works which were being done were extras, and were being done on the instructions of the architect, and there could be inferred from the employer's standing-by and acquiescence a new agreement that the employer should pay for them as extras. Judgment was given for the contractor for the full amount of the extras as allowed by the umpire. This decision was reversed by the Full Court (*dub. Burnside* J.), and judgment entered for the employer, the Court holding that there was no finding by the umpire sufficient to make the employer legally liable. From this judgment of the Full Court the contractor appealed to the High Court.

*Pilkington* K.C. (with him *Northmore*), for the appellant. This special case having been stated under the power given by the *Arbitration Act*, 59 Vict. No. 13, sec. 9 (*b*), the hearing depends upon the Rules of Court—Western Australia Rules (Order XXXIII., rr. 1 and 7), corresponding to English Rules (Order XXXIV., rr. 1 and 7). The Court has power to draw necessary inferences of facts or of law. This was a special case stated in the "cause or matter" before the Court: See *Arbitration Act*, sec. 3; *Supreme Court Act* (44 Vict. No. 10), sec. 33, where "cause" and "matter" are defined. The corresponding English rules are treated in English practice as governing the references of special cases by arbitrators to the Court under similar sections of the English *Arbitration Act*. The special case, when submitted, was a "proceeding in Court," and *McMillan* J. was right in drawing the inferences of fact as he did. No doubt the arbitrators cannot state the case and ask the Court to infer the facts for them; but the Court may be asked to draw inferences of fact upon which questions of law may turn. The effect of making a submission a Rule of Court gives the Court jurisdiction over the award and the parties to the submission: *Russell on Awards* 8th ed., p. 45. The umpire has in this case left the position as to the respondent's knowledge and orders rather uncertain; but the rules provide that the Court may draw all necessary inferences of fact. The appellant does not claim to recover solely "under"

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or "by virtue of" the contract, but "under the circumstances, having regard to the terms of the contract." It was wrong to have entered a verdict for the respondent: *McMillan* J. was entitled to draw inferences of fact sufficient to justify his decision.

[GRIFFITH C.J.—Is not the finding too vague to base a decision upon? The umpire ought to find whether, apart from the strict contract itself, the respondent agreed by words or conduct, by himself or his agent, to pay for these extras.]

"Extras" are all works "connected with" the buildings carried out under the contract, including works independent of those provided for by the strict words of the contract: *Goodyear* v. *Mayor &c. of Weymouth and Melcombe Regis* (1).

*McMillan* J. was right in drawing inferences of fact and in inferring an implied contract to pay for these extras, either on the ground of a new contract or a waiver of the conditions of the old contract, or on the ground of the conduct of respondent in lying by: *Hudson on Building Contracts*, 2nd ed., p. 371; *West* v. *Platt* (2); *Escott* v. *White* (3); *Hill* v. *South Staffordshire Railway Co.* (4); *Russell* v. *Watts* (5); *Ashburner on Equity*, p. 635. If the inferences of fact should more properly have been drawn by the arbitrators, the Court should remit the case to the arbitrators, either under sec. 12 of the *Arbitration Act* or under the Court's general power of remission: *North and South Western Junction Railway Co.* v. *Assessment Committee of the Brentford Union* (6).

*Haynes* K.C. and *Pennefather* K.C. (with them *Canning*), for the respondent. There was no power to draw inferences in this case, and respondent was not liable upon the facts stated therein. Order XXXIII., rr. 1-7, clearly refer to cases stated by agreement between the parties; r. 7 therefore cannot incorporate into this case a power to draw inferences. The class of cases which the Court can properly remit to the arbitrator is enumerated in *North and South Western Junction Railway Co.* v. *Assessment*

(1) 35 L.J. C.P., 12.
(2) 127 Mass., 367.
(3) 71 Ken. (10 Bush.), 169.
(4) L.R. 18 Eq., 154.
(5) 25 Ch. D., 559.
(6) 13 App. Cas., 592.

*Committee of the Brentford Union* (1) by *Lord Halsbury* L.C. The present case does not fall within that class; the arbitrator in that case only asked questions, and found no facts. The respondent cannot be held liable upon a general inference of knowledge of a great number of items, some of which were obviously extras and others were not. Works necessary to complete a contract are not extras even though not included in the specifications: *Williams* v. *Fitzmaurice* (2). The whole of the conditions in the contract safeguarding the owner against extras were ignored by the builder, who never obtained or demanded any order in writing from the architect for these extra works, nor demanded progress payments upon them, but at the completion of the contract put in a claim for £17,000 for extras. The owner should be protected by the express terms of the contract; and not be made liable to pay for extra works merely because he has seen them being done: *Jones* v. *Woodbury* (3); *Wallis* v. *Robinson* (4). Extras should be paid for only where the employer waives the condition that a written order should be obtained, or prevented the giving of the written order, or where the contractor alleges and proves fraud in the employer, or where the architect's certificate is conclusive as to liability to pay, or where the extras are independent works quite outside the written contract. The umpire found every fact that it was possible for him to find; and if upon those facts there is no liability on respondent, judgment must be given for him. There is no known instance of a remission back to the arbitrator for the reason that the award would justify a judgment for one side or the other. And the Court should not remit the case to the arbitrators with directions as to what facts should be found and in what manner: *North and South Western Junction Railway Co.* v. *Assessment Committee of the Brentford Union* (1). Whatever the state of the respondent's knowledge, he would not be liable unless on the ground of fraud, which was not found: *Willmott* v. *Barber* (5).

*Pilkington* K.C. in reply. The umpire has not applied his mind to the real question which was to be investigated and settled.

(1) 13 App. Cas., 592.
(2) 3 H. & N., 844.
(3) 48 Kentucky, 167, cited in *Hudson*, p. 358-9.
(4) 3 F. & F., 307.
(5) 15 Ch. D., 96, at p. 105.

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[BARTON J.—Remission should be made in any case where it is necessary for the sake of justice: *Doe* v. *Horner* (1).]

The appellant is entitled to the costs of this appeal, as it is similar to a successful application for a new trial: *Hamilton* v. *Seal* (2).

*Haynes* K.C. As to costs—The appellant is not entitled to the costs of the appeal; he never at any time asked to have the award remitted; the judgment which he obtained was not justified upon the terms of the award.

The judgment of the Court was delivered by

GRIFFITH C.J. This is an appeal from a decision of the Full Court of Western Australia, reversing a decision of *McMillan* J. on a case stated by an umpire raising the question whether the appellant was entitled to recover a sum of £5,000 and upwards from the respondent. The question arises on a building contract, under which the appellant, a contractor, was to build for the respondent, the owner, a theatre at a cost of over £30,000. At the conclusion of the contract, disputes having arisen, the matters in dispute were referred to arbitrators, and, they having disagreed, to an umpire. With respect to the sum now in question, which was claimed for extras, a difficulty arose in the mind of the umpire as to whether he ought to award in favour of the appellant or the respondent, and in accordance with the provisions of the *Arbitration Act* he stated a case for the opinion of the Supreme Court. After setting out the terms of the contract and specifications, and the submission, he stated certain facts as found by him, and upon those facts submitted this question for the opinion of the Court: "Whether upon the facts as herein stated the said Molloy (the respondent) is liable under the contract between the parties to pay the amount of the said works as set out in list 'C' or any part thereof to the appellant." By the specification of the contract it was expressly stipulated "that no alteration of any kind will be allowed to invalidate the contract, nor will any extra be allowed for any thing or things implied by the specification but the drawings and specification must be taken together.

(1) 8 A. & E., 235. (2) (1904) 2 K.B., 262.

In case of any extra work required to be done or ordered either by architect or proprietor such order must be in writing, stating the nature of the same together with the fixed amount, and to be signed by the architect and indorsed by the proprietor; otherwise no extra of any kind shall be recognized or paid for." In the general conditions of the contract it was specified by clause 6, "No works beyond those included in the contract shall be allowed or paid for without an order in writing from the employer and architect." Then followed a stipulation that if the contractor should be called upon to do work that he considered did not come within his contract and the architect refused to give an order, by which I understand an order in writing indorsed by the proprietor, he should nevertheless perform the work and give notice that he claimed to have the matter decided by arbitration. The works in question, amounting in value to over £5000, were, in one sense at any rate, extras. Whether works of that kind were contemplated in the specifications or drawings or not is a matter which it is not necessary to determine. The umpire found that no orders in writing indorsed by the owner were given in respect of any of them, but he also found that the employer, Molloy, had such knowledge of those extras as might be fairly inferred from the fact that he was constantly on the works and taking an active interest therein. Before *McMillan* J., and before the Full Court, it was contended that upon these facts it ought to be inferred that the owner, Molloy, entered into an implied contract to pay the fair value of these works as extra works, and so *McMillan* J. held. On the other hand it was contended that no such inference could be drawn, and that view was accepted by the Full Court. The law on the subject may be very briefly stated. There was a written contract between the parties, and these items cannot be brought within its terms in face of the express stipulation that "no extra shall be paid for unless ordered by an order in writing by the architect indorsed by the employer;" but that stipulation does not exclude altogether the implied doctrine of law that, when one man does work for another at his request, an implied obligation arises to pay the fair value of it. The question therefore is whether, notwithstanding the absence of written orders, the contractor is entitled to recover these sums, or in other words,

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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. But that as I have said is a question of fact, and the umpire, not the Court, is the judge of the facts. It is impossible, we think, for this Court, or for the Supreme Court to draw the necessary inference of fact. It must be drawn by the umpire himself, and upon his finding on the question of fact depends the right of the appellant to recover the amount claimed or any part of it. 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. That is one instance. Again, the architect might have been expressly authorized by the owner to order extra

work. Under such circumstances it would not be understood by either party that it was included in the lump sum specified in the contract. As, in the view which we take of the case, the matter must go back to the umpire, it is not desirable to state in further detail what would be sufficient evidence of an implied contract.

It follows that, the necessary inference of fact not having been drawn by the umpire, it is necessary that the matter should be referred back to him for reconsideration as to the material fact which he has not yet found, and the matter for his determination, we think, should be, "whether, irrespective of the express terms of the contract, it has been proved to the satisfaction of the umpire that the respondent, by himself or his authorized agent, promised, either expressly or by implication from his conduct, to pay for the works specified in list 'C' or any of them as extra works." If, on his reconsideration, any question of law arises which he desires to reserve for the opinion of the Supreme Court he can do so, but in the words of Lord *Halsbury* L.C.:—"In order to reserve it effectually and properly, he must affirmatively, and not in the alternative, find the facts upon which that question of law depends": *North and South Western Junction Railway Co.* v. *Assessment Committee of the Brentford Union* (1). Whether in any case an agent is authorized to make a contract or not is always a question of fact, the proof of which lies on the party alleging the authority. It will be necessary therefore for the umpire to ascertain in each instance, if an implied contract by an agent, and not by the principal, is set up, that the agent had authority to make it.

We think, therefore, that both the orders before us should be discharged, and that the award should be remitted to the umpire to determine the question I have stated; and we think also that under the circumstances there should be no costs of the proceedings before *McMillan* J. or before the Full Court or before us.

*Order appealed from discharged. Order substituted to the effect that the award be remitted to the umpire for reconsideration of the matter above stated.*

(1) 13 App. Cas., 592, at p. 594.