

N O V A S C O T I A  
C O U N T Y O F H A L I F A X

To wit:

C.H. 10638

I N T H E C O U N T Y C O U R T  
O F D I S T R I C T N U M B E R O N E

BETWEEN:

TREVISO CONSTRUCTION COMPANY LIMITED,  
a body corporate,

Plaintiff

- and -

DAVID FRASER,

Defendant

Alan J. Stern, Esq., for the plaintiff.  
Daniel M. Campbell, Esq. and L. Steinberg, Clerk, for the  
defendant.

1976, January 26, O Hearn, J.C.C.:— The defendant is sued by the plaintiff for the agreed price, \$1,000.00, of installing forms for a concrete swimming pool, less \$20.00 allowed for the fact that the plaintiff did not supervise the pouring of the concrete. The defendant is a civil engineer and his defence is substantially that he was merely an agent or intermediary in the affair, the true principal being Mr.C. P. Mitchell. To understand how this came about it is necessary to go into the past history of the relationships between the plaintiff and the defendant.

In early 1973 the defendant was in partnership with Mr. Mitchell and they constructed a foundation for Mr. Eric Caines, employing the plaintiff to do the form work. Subsequently in that year the defendant was employed by O.C. O'Hara Distributors Limited to supervise the construction of swimming pools. The O'Hara company had a contract to build a pool for one Simpson and employed Fraser to supervise this. Mr. Mitchell was employed to do all the concrete work and plumbing and he says he initiated conversations with Giovanni Da Ross, President of the plaintiff company, in the Summer or early Fall of 1973. This was not followed up however, and when Mr. Mitchell decided

to proceed he says he asked the defendant to get a price from Mr. Da Ross. This was done by phone. Fraser says that he told Da Ross at the time that Mitchell had a job on behalf of O'Hara Distributors and asked him for a price. Fraser thinks this was in the Fall but agrees that it might have been in the Spring. Both parties agree that Fraser told Da Ross to get in touch with Mitchell and that, in fact, Mitchell laid out the job and told Da Ross what had to be done.

G. Da Ross and his brother, Arduino Da Ross, then proceeded to put up the forms with another brother Mario, as well as one worker, Graham Thomas, who speaks English. The Da Ross brothers are fairly recent immigrants from Italy and while Giovanni is competent in English it is, I think, a limited competency. Arduino is extremely difficult to understand in English and I think the difficulty is mutual.

I have a good solid doubt that the language difficulty is the cause of the confused situation here. I do not accept the contention that Fraser communicated to Da Ross who his true employer was, and I think that Da Ross was justified in the circumstances in accepting Fraser as the principal and Mitchell as a subcontractor or foreman, which is what Da Ross says he thought Mitchell's position in the contract was.

The swimming pool was put up on a property in the St. Margarets Bay district which is twenty miles or so away from Halifax and the source of commercially supplied concrete. The day that Mitchell was able to get a concrete supply he had Fraser call Da Ross but Da Ross was not able to supply either himself or any of his personnel to supervise the pour, which he acknowledged was the responsibility of the form man. At Fraser's suggestion Da Ross called Mitchell and Mitchell undertook, in the circumstances, to supervise the pour. At some point in the pour the wall got out of line near a corner and since there was no bracing material present, according to Mitchell, it could not be put back in place and subsequently,

it had to be repaired by one John Belliveau at a cost exceeding, probably, the price of the form work.


Fraser attributes the casualty to the fact that the form work was not strong enough, but later in his evidence he admitted that this could be corrected by proper bracing at the time of the pour, as Da Ross contended in his evidence. This was also admitted by Mitchell, who attributes the fact that the bracing was not done to the lack of bracing material there. There does not seem to be any authority on whose responsibility it was to provide bracing material but I would think it would be ultimately the responsibility of the person who undertook to supervise the pour to make sure that he had sufficient materials to deal with this kind of problem. Both Mitchell and Da Ross agree that it takes some experience to supervise a pour but that it does not require a great deal of training and that keeping the concrete straight is not a difficult job. So that as far as personal responsibility is concerned I think that Mitchell's failure to supervise the pour properly was the proximate cause of the casualty.

It is trite law that where an agent acts for an undisclosed principal, that is, a principal whose existence is undisclosed, so that the person contracting with the agent reasonably assumes him to be the principal then the person contracting with the agent may sue either the agent or the undisclosed principal on any cause of action arising out of the contract that he may have against the principal. I am quite satisfied that Da Ross considered Fraser to be the principal and had reasonable grounds to do so and no real ground to look elsewhere. After observing the witnesses and reviewing the evidence, I have no confidence at all that Mr. Fraser or Mr. Mitchell communicated to Mr. Da Ross the fact that Mitchell was the principal to look to, until after the partial failure of the wall. There are many telling elements here, including such details as that all actual communications about the contract were made through Fraser and the

long delay by Mitchell in responding to the bill that Fraser told Da Ross to send to Mitchell, in denying personal liability after the job was over.

In the result, Fraser (and his undisclosed principal, O. C. O'Hara Distributors Limited) have got what they contracted for. The defect in the wall consequent upon the breakdown of the forms through Mitchell's failure to supervise was corrected by the person responsible, Mitchell himself. In the circumstances it seems to me that the plaintiff is entitled to recover and it will have judgment for \$980.00 plus the cost of the action.

It is perhaps fortunate that the facts have turned out in this way, as otherwise one might contemplate a circularity of action involving not only the two principals to this action but O.C. O'Hara Distributors Limited and C. P. Mitchell as parties. Possibly they should have been joined but as it has turned out that was not necessary.

  
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Judge of the County Court of  
District Number One