11th December, 1987.

Before the Deputy Bailiff, assisted by Jurats J.A.G. Coutanche and M.J. Le Ruez.

BETWEEN	A.C. Mauger & Son (Sunwin) Limited	PLAINTIFF
AND	Werner Udo Herman Flath	DEFENDANT
AND	Derek Perceval Judge	THIRD PARTY

Advocate T.J. Le Cocq for the plaintiff
Advocate S.A. Meiklejohn for the defendant
Advocate K.H. Valpy for the third party

DEPUTY BAILIFF: This action commenced as a claim, on a simple summons, by the plaintiff actioning the defendant for payment of £13,479, due in respect of an account rendered.

The claim arose from a contract; the third party was the agent of the defendant; I see no difficulty from a legal aspect with regard to the question of agency and I cite Halsbury's Laws of England Fourth Edition Volume 1 at p. 437 - a paragraph not cited by Mr. Le Cocq, but included in the papers that he passed up -

> "729. Extent of authority.
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> The authority of an agent may be confined to a particular act or be general in its character. It will extend not only to acts expressly authorised but also to subordinate acts which are necessary or ordinarily incidental to the exercise of the express authority and to acts within the agent's ostensible authority. In no case, however, can the authority of the agent exceed the power of the principal to act on his own behalf. As between the agent and his principal, an agent's authority may be limited by agreement or special instructions, but, as regards third persons, the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties."

The Court has no doubt that the plaintiff reasonably believed the third party

to have all the usual and normal authority of an architect acting for his client, if builders could not rely on the general authority of the architectural profession to act for their clients, then the building industry would have a major problem.

By letter dated the 17th February, 1986, the third party invited the plaintiff to tender for certain work to the drainage system at Hotel des Pierres, Grève de Lecq, in the Parish of St. Ouen, owned by the defendant and his wife; the plaintiff tendered for the work in the sum of £15,979. The tender was accepted and the work was started. In the course of the work, and by consent, there was an omission which produced a saving of £2,500 so that the contract price was reduced to £13,479. The work was duly carried out, and, on the 18th April, 1986, the third party certified the work as complete and the sum of £13,479 as due and owing to the plaintiff. The amount remains unpaid.

As between the plaintiff and the defendant, we find that the contract was entered into between the defendant's agent on his behalf and the plaintiff for the carrying out of the work at a price, initially of £15,979, later revised downwards, by the omission of one soakaway, to £13,479; that the work was duly carried out; that the work done was satisfactory; that the third party's certificate was final and binding upon the parties; and that, therefore, the defendant is indebted to the plaintiff in the sum of £13,479.

The defendant, in his Answer, puts the plaintiff to full proof of his claim, but he goes further because, in addition in his pleadings, by which he is bound, he asks that he be discharged from the action and it is only in the alternative that he asks that the third party be condemned to pay all or any sums that he may be ordered to pay to the plaintiff. The defendant also denies that the sum claimed by the plaintiff is due and owing. To that extent, the Court considers the pleading of the defendant to be vexatious. The plaintiff has fully proved its claim.

Therefore, as between the plaintiff and the defendant, the Court orders that:

1) the defendant will pay £13,479 to the plaintiff;

2) in pursuance of the Interest on Debts and Damages (Jersey) Law, 1971, the defendant will pay to the plaintiff, interest at 10% per annum, on the sum of £13,479 from the 2nd May, 1986, to today; and

3) the defendant will pay the taxed costs of the plaintiff. The Court does not accept that there are exceptional circumstances such as to justify an order for full indemnity costs.

As between the defendant and the third party, the defendant alleges, in effect, that the third party was guilty of professional negligence in that the defendant said that the plaintiff would be able to carry out the work at a cost of £1,600; that the third party was authorised to accept the tender of the plaintiff in

the sum of £1,600; that the omission of one soakaway would lead to a reduction of about one third of £1,600; and that the third party failed in his duty to the defendant. The defendant then claimed an indemnity from the third party in respect of the balance of the plaintiff's claim over and above £1,600 less one third.

The burden of proof as between the defendant and the third party lies upon the defendant - he has to prove, on the balance of probabilities, that the third party was negligent, in that he exceeded his authority, expressed or implied.

There were some glaring discrepancies between the evidence given by the defendant and, in particular, his wife, on the one hand and the defendant's other witnesses on the other.

For example when Mr. Meiklejohn opened his client's defence he told us that the "other plank" of the defence as he called it was that the third party had certified the work as having been completed clearly based on the support used having been sheet piling as required by paragraph 10 of the specification, whereas the defendant would say that trench sheeting had been used; thus, Mr. Meiklejohn said the third party should not have certified the work and had failed in his duty.

Quite apart from the fact that the support of excavations is regarded in both the professions and the trade as a "risk item", there was no evidence to support this limb of the defence. The defendant could give no evidence on the question and Mr. Lyon, a highly qualified surveyor admitted that he caused Mr. Worth to prepare a revised and lower valuation of the work based only on rumour. We are surprised that a professional ethics enable a professional man to act on rumour, but be that as it may this Court does not. Moreover Mr. Champion, a witness called by the defence stated categorically that he used interlocking sheet piles and explained that one cannot drive trench sheeting into the ground but can drive in only piles.

In the circumstances the Court does not have to face the difficulty that this limb of the defence was not pleaded specifically in the defendant's Answer, because it fails completely on the evidence and Mr. Meiklejohn wisely did not pursue it in the closing address.

Both Mr. Champion and Mr. Prendergast were definite that they had been provided with a copy of the plan or drawing, the former to carry out the work, the latter to give a quotation but that neither had received the specification. Mrs. Flath was adamant that she had given Mr. Prendergast a copy of the specification before he prepared his quotation. If Mrs. Flath is correct then clearly Mr. Prendergast was grossly negligent when he prepared his quotation because he did not quote for sheet piling or indeed for any kind of support at all and he said in evidence in chief that he would have started work to find out the ground conditions and then would have gone to negotiate. In other words the costs of the sheet piling

would have been extra. The Court is in similiar difficulty regarding the telephone conversation between Mrs. Flath and Mr. Champion when he was asked, but declined, to quote. According to Mrs. Flath, Mr. Champion told her that he had already been sub-contracted by the plaintiff, he then asked her how much the quotation was for, she said sixteen hundred pounds, he said it was a fair price although it was more than the figure he had given to the plaintiff as his price. However, according to Mr. Champion, Mrs. Flath did not disclose the name of the plaintiff to him, he thought the price she mentioned was "a bit of a joke" because the job cost much more than that and he told her to get it done, and in fact he drew nine thousand pounds himself for the job.

We have to say, therefore, that there are unreliable features in the evidence adduced by the defence. Where there is a conflict of evidence between the defendant and his witnesses on the one hand and that of the third party on the other, the Court prefers that of the third party.

In the Court's judgment the third party did not act outside his express authority. Certainly the defendant has failed to prove his case on the balance of probabilities.

According, the prayer of the defendant's Answer must fail; the claim of the defendant against the third party is dismissed and the defendant will pay the taxed costs of the third party.

Authorities cited.

Pothier Traité des Obligations partie 1 Chapitre p.p. 23 to 25
Chitty on Contract (4th Edition) Chaper on Agency paragraph 2247
Halsbury's Laws of England (4th Edition) Volume 1 paragraphs 728, 729, 74, 817,819
Wright (Published 1844) The Law of Principal and Agent p.p. 258 and 259.