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1967/17

IN THE PRIVY COUNCIL

No. 1 of 1966

O N A P P E A L
FROM THE SUPREME COURT OF HONG KONG

IN THE MATTER of Chien Sing-Shou (an Authorized Architect)
and the Building Authority:

- and -

IN THE MATTER of the Buildings Ordinance, 1955, sections 5
and 5B(1)(2):

- and -

- 10 IN THE MATTER of a Finding and Conviction and Consequential
Orders made by a Disciplinary Board appointed
under ss. 5(1)(2)(3) and 5 B of the Buildings
Ordinance which gave its decision and made
its Orders on the 22nd August, 1964.

C A S E FOR THE RESPONDENT

Record

1. This is an appeal by Chien Sing-Shou (hereinafter
called "the Appellant") from a judgment of the
Supreme Court of Hong Kong (Macfee and Creedon,
JJ.) dated the 29th July, 1965 refusing the
20 Appellant's application for an order of certiorari
to remove into the Supreme Court and quash an
adjudication and consequential order made on the
22nd August, 1964 by a Disciplinary Board appointed
under Section 5 of the Buildings Ordinance, 1955.

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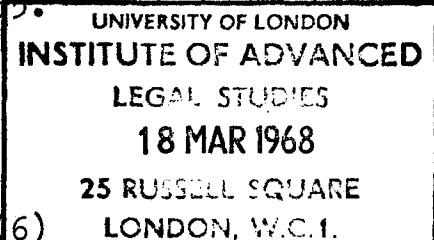
pp. 1-2

2. The following are the statutory provisions
relevant to the appeal:

BUILDINGS ORDINANCE, 1955

- 30 5. (1) For the purposes of subsection (6)
of section 3 and section 5B, the Governor
may, from time to time, on application made
to him by the Building Authority, appoint a
disciplinary board.

(2) Every such board shall consist of -



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- (a) three authorized architects;
- (b) the Building Authority or his representative; and
- (c) a legal adviser.

(3) The Building Authority or his representative shall be the chairman of any such disciplinary board and, where any such board is appointed for the purposes of section 5B, the legal adviser shall have the conduct of the inquiry.

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(4) For the purposes of any inquiry under section 5B, a disciplinary board appointed under this section shall have all such powers as are vested in the Supreme Court in relation to -

- a) enforcing the attendance of witnesses and examining them upon oath or otherwise;
- b) compelling the production of documents;
- c) ordering the inspection of premises; and
- d) entering upon and viewing premises.

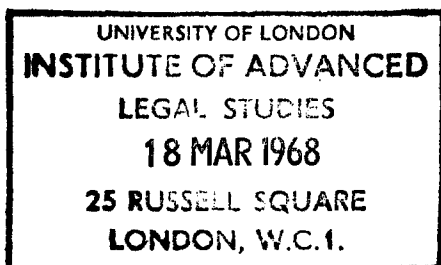
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X X X X

5B. (1) Where it appears to the Building Authority that an authorised architect has been convicted by any court of such an offence or has been guilty of such negligence or misconduct as -

- (a) renders the architect unfit to be on the architects' register; or
- (b) makes the further inclusion on the architects' register of the architect prejudicial to the due administration of this Ordinance; or

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- (c) renders the architect deserving of censure,

the Building Authority may bring the matter to the notice of a disciplinary board appointed under section 5.

10 (2) Where, after due inquiry, the disciplinary board is satisfied that the architect has been convicted of such an offence or has been guilty of such negligence or misconduct such board may -

- (a) order that the name of the architect be removed from the architects' register either permanently or for such period as the board thinks fit; or
- (b) order that the architect be reprimanded; and
- (c) order that its findings and order be published in the Gazette.

20 (3) (a) Any authorised architect aggrieved by any order made in respect of him under this section may appeal to a judge of the Supreme Court and upon any such appeal the judge may confirm, reverse or vary the order of the disciplinary board:

30 Provided that the judge may, notwithstanding that he is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if he considers that no substantial miscarriage of justice has actually occurred.

40 (b) The practice in relation to any such appeal shall be subject to any rules of court

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made under the Supreme Court Ordinance.

X X X X

27. (1) Any contravention of the provisions of the sections specified in the table set out in this section, and each of the acts or omissions therein specified shall be an offence.

(2) Any person who commits an offence set out in the following table shall be liable to a fine of Two thousand dollars and to imprisonment for six months and in the case of an offence consisting of a failure to comply with an order of the Building Authority given under subsection (2) of section 16 shall be liable in addition to a fine of one hundred dollars for each day during which it is proved to the satisfaction of the court that the failure to comply with the order has continued.

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Offences

.....
.....

(7) The material divergence or deviation from work shown in any plan approved by the Building Authority under this Ordinance.

.....
.....

INTERPRETATION ORDINANCE

34. (1) A provision in an enactment which constitutes or results in the constitution of an offence shall, unless such offence is declared to be treason, felony or misdemeanor or the words "upon indictment" appear, be deemed to include a provision that such offence shall be punishable upon summary conviction.

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3. (a) The Appellant appeared before a Disciplinary Board appointed by the Governor on the 20th August, 1964 and successive days. The Disciplinary Board (hereinafter referred to as "the Board") was appointed to enquire into and adjudicate upon the issue set out by way of charge as follows:-

CHIEN Sing-Shou

Statement of Offence

p. 23
Ls. 3-21

10 Negligence contrary to section 5B(1) of the Buildings Ordinance, 1955, as read with section 4(3) and sections 27(1) and (2) (7) and Regulation 38 of the Buildings (Administration) Regulations, 1959.

Particulars of Offence

20 CHIEN Sing-Shou being an authorised architect between the 29th day of August, 1962 and the 4th day of January, 1964, was guilty of negligence in permitting material divergences or deviations from work shown in plans approved by the Building Authority under the Buildings Ordinance, 1955 under Permits Nos. K1175/62, dated the 11th day of August, 1962 and K.619/62 dated the 19th day of August, 1963, issued under the Buildings Ordinance, such negligence rendering CHIEN Sing-Shou unfit to be on the Architects' Register or alternatively deserving of censure.

30 (b) The hearing by the Board was held on the 10th and from the 20th to the 22nd August, 1964. The Appellant was represented by counsel.

p.23
Ls. 23-28

(c) Counsel for the Appellant challenged the Board's jurisdiction to enquire into, and adjudicate upon, the issue set out by way of charge on the principal ground that the Board had no jurisdiction to adjudicate on an issue the particulars of which also disclosed the commission of criminal offences.

p. 189
Ls. 1-12

40 (d) The Board ruled -

p. 189
Ls. 19-26

Record

"This is a charge of negligence and it is quite clear that this Board does have jurisdiction under Section 5B. The fact that the charge has a criminal aspect is immaterial....."
....."

(e) After the hearing of all the evidence, Counsel for the Appellant in his closing address made application to the Board in the following terms, as noted by the legal adviser -

p. 195
Ls. 16-19

"It is desirable in the interests of natural justice for a summing up in the presence of parties by the L.A. to the Board. Necessary for purposes of appeal. No one is infallible."

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p.195; Ls.22-41
p.196, Ls. 1-11

The Board ruled that the giving of legal advice by the legal adviser to co-members of the Board after retirement was not contrary to any rule of natural justice.

(f) The Board's adjudication was given by the legal adviser, as follows:-

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p.197
Ls. 7-20

'L.A. The Board has very carefully considered all the evidence (including the correspondence, plans, calculations and other exhibits) and all the arguments put forward by Counsel. The Board has also had the opportunity of seeing and hearing the witnesses and has been able to judge their credibility. The Board has also been able to use the knowledge and experience of its Chairman and of its three members who are practising architects, to weigh the full significance of all the facts and to draw its own conclusions therefrom.

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Ls. 21-42

Find-ings

Ordinary grade concrete and mild steel bars were used, whereas the plans and calculations required Grade A concrete and B.S. No. 785 steel of a working stress (or tension) of 22,000 lbs. per sq. in. The Board finds that this means medium high tensile steel or high tensile steel, and that 40

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10 the use of ordinary grade concrete and mild steel bars constituted material divergences or deviations. The Board also finds that the Defendant himself knew of these divergences or deviations and that he permitted them (and it does not believe that he did not know about the steel till 18th (or mid) December or about the grade of concrete till after this, on 21st, 22nd or 23rd December). The Board finds that he was negligent in this respect as charged.

Accordingly the Board is satisfied that the facts alleged in the charge have been proved, and finds the Defendant to be guilty of the charge accordingly.'

20 (g) The Board made an order consequent upon the adjudication, that the Appellant's name be removed from the architects' register for one year and a summary of the findings and order be published in the Gazette.

p.198
Ls. 12-29

30 (h) On the 26th November, 1964, the Full Court of the Supreme Court of Hong Kong (Hogan, C.J. Macfee and Huggins, JJ.) granted leave to the Appellant to apply for an order of certiorari to remove into the Supreme Court and quash the 'decision, conviction and consequential order' made on the 22nd August, 1964 by the Disciplinary Board.

p.6 Ls.19-39
p.7 Ls. 1-22

(i) On the 10th May, 1965 and subsequent days the Appellant's application was heard by the Supreme Court (Macfee and Creedon, JJ.).

p. 8 L.5

(j) On the 29th July, 1965 the judgment of the Court was delivered and the application by the Appellant refused.

pp. 8 - 21

40 4. The judgment of the Court was delivered by Macfee, J. He said there had been no 'conviction', nor had the Board had any power to 'convict'. He set out the facts, and the grounds of the application as given in the

p.9 Ls.16-17

p.9 Ls.18-31
p.10 Ls.1-19

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pp. 12-18

statement filed under Order 23 Rule 2(2). He then dealt first with the third of these grounds, viz. that there had not been 'due inquiry' by the Board, because the legal adviser had not given legal advice to the Board within the hearing of the parties.

p. 12-13

p. 13

Ls. 28-33

5. Dealing with this point, the learned Judge set out the constitution and powers of the Board under subsections 5 and 5B of the Buildings Ordinance. Exception was taken, he said, to the possibility that the legal adviser might have given legal advice to the Board after the Board had adjourned prior to the announcement of the decision. The cases cited fell into two classes. Those of the first class concerned the reception of factual information from one party when the other party had no opportunity to comment on it; those cases were irrelevant. The cases of the second class established that, where a judge sat with a jury, or some other fact-finding body, any communication between them relating to the matter under consideration must be made known to the parties. None of these cases applied to the present case, in which the legal adviser was a member of the Board and so quite properly retired with the other members to arrive at a decision.

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Ls. 30-38

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Ls. 39-43

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Ls. 4-8

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Ls. 20-47

6. The nearest English analogy was the case of an appeal committee of quarter sessions with a legally qualified chairman. The chairman might frequently have to give legal advice to the other justices when he retired with them, but it had never been suggested that natural justice required that he should give such advice in public, or should announce in court what legal advice he had given. The legal adviser was as much a member of the Board as any of the other members, and his contribution to the deliberation did not need to be confined to legal matters. It would be very difficult for him, at the conclusion of the deliberations, to announce in court every aspect of the matter on which he had given legal advice, and the precise nature of that advice.

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p. 17

Ls. 1-10

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p. 17

Ls. 26-47

7. The learned Judge referred to other statutes,

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- providing for the appointment of a legal assessor or adviser to a disciplinary tribunal and requiring his legal advice to be given in the presence of the parties or to be communicated to them. The Buildings Ordinance, by contrast, contained no such provisions, and under it the legal adviser was himself a member of the Board. The Court concluded that it had not been shewn that the Board had failed to observe the rules of natural justice or had failed to hold a 'due inquiry'.
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8. Macfee, J. then turned to the first and second grounds, both of which involved the question whether the Board had had jurisdiction. The argument was that the 'charge' against the Appellant alleged a failure to comply with Section 27; Section 27 created offences no different from other offences created by common law or by statute; so Section 27, and Section 34 of the Interpretation Ordinance, took the matter out of the hands of the Board and prescribed the mode of trial; the words 'other than offences under this Ordinance' should be read into Section 5B(1) of the Buildings Ordinance.
- 20
9. The learned Judge said the essence of the 'charge' was negligence, the general words merely indicating the circumstances in which negligence was alleged. An architect was liable to be fined or imprisoned for any of the offences set out in the table to Section 27. He might then be faced with an inquiry before a Board under Section 5B(1), and might have his name removed from the Register. It would be doing undue violence to Section 5(B)(1) to read into it the words, 'other than offences under this Ordinance'. If a Board could impose the sanctions permitted by Section 5(B)(2) upon an architect who had already been fined or imprisoned, it followed a fortiori that the same sanctions might be imposed when there had not been a prosecution. The Board had therefore had jurisdiction to hear the complaint against the Appellant.
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10. The Building Authority (herein called 'the Respondent') respectfully submits that there was

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 Ls. 27-44

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 Ls. 28-35

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 Ls. 39-47

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no failure of the Board to make 'due inquiry'. The Buildings Ordinance does not require the legal adviser to instruct the other members of the Board on questions of law in the presence of the parties, nor do the rules of natural justice require him to do so. The legal adviser is a member of the Board, and is therefore entitled to take a full part in its private deliberations. He is not, like a judge or an assessor, a legal expert outside the fact-finding body with a duty to direct that body on legal matters. He is a member of the Board. The Board is a single body, entitled to deliberate in private upon all questions raised by the case before it before giving its finding and decision in public. 10

11. The plain language of Section 5B of the Buildings Ordinance gives to a Disciplinary Board, in the Respondent's respectful submission, jurisdiction in any case in which it appears to the Building Authority that an architect has been guilty of the negligence or misconduct specified in the section. If that negligence or misconduct is such as to constitute some offence, the jurisdiction of the Board remains unaffected. If the authorities responsible for prosecutions decide not to proceed against an architect for conduct which might constitute an offence under Section 27, it remains open to the Building Authority to bring the matter to the notice of a Disciplinary Board under Section 5B. Section 5B does not constitute, or result in the constitution of, any offence, and Section 34 of the Interpretation Ordinance has nothing to do with it. 20 30

12. The Respondent respectfully submits that the judgment of the Supreme Court of Hong Kong was right and ought to be affirmed, and this appeal ought to be dismissed with costs, for the following (among other)

R E A S O N S

1. BECAUSE the Disciplinary Board made 'due inquiry': 40
2. BECAUSE the legal adviser was not either to

say or to repeat before the parties anything he might say to the other members of the Disciplinary Board:

3. BECAUSE it does not appear that there was any error of law or failure of natural justice in the proceedings of the Disciplinary Board:
4. BECAUSE the allegation against the Appellant fell within the terms of Section 5B of the Buildings Ordinance:
5. BECAUSE the allegation against the Appellant was of negligence, not of any criminal offence:
6. BECAUSE of the other reasons given in the judgment of the Supreme Court.

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J. G. LE QUESNE

DAVID REED WILCOX

No. 1 of 1966
IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE SUPREME COURT OF HONG KONG

IN THE MATTER of Chien Sing-Shou (an
Authorized Architect) and the Building
Authority

- and -

IN THE MATTER of the Buildings
Ordinance, 1955, sections 5 and
5B(1)(2):

- and -

IN THE MATTER of a Finding and
Conviction and Consequential Orders
made by a Disciplinary Board appointed
under ss. 5(1)(2)(3) and 5B of the
Buildings Ordinance which gave its
decision and made its Orders on the
22nd August, 1964.

C A S E FOR THE RESPONDENT

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