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1967/17

IN THE PRIVY COUNCIL No. 1 of 1966  
ON APPEAL FROM THE SUPREME COURT OF HONG KONG

IN THE MATTER OF CHIEN SING-SHOU  
 (an Authorised Architect)

- and -

the Building Authority

- and -

IN THE MATTER OF The Building Ordinance 1955  
 (Sections 5, 5B, Subsections (1) and (2))

- and -

IN THE MATTER OF a Finding and Conviction and  
Consequential

Orders made by a Disciplinary Board,  
appointed under Section 5 (Subsections  
(1) (2) and (3) and Section 5B of the  
Buildings Ordinance 1955 which gave  
its decision and made its Order on  
the 22nd August 1964: and

IN THE MATTER OF an Application by CHIEN SING-SHOU  
 for an Order of Certiorari

CASE FOR THE APPELLANT

Record

1. This is an Appeal from the judgment of the Supreme Court of Hong Kong given on the 29th July 1965 refusing the Appellant's application for an Order of Certiorari to remove into the Supreme Court and quash the Findings and Order made on the 22nd August 1964 by a Disciplinary Board appointed under the Buildings Ordinance 1955, whereby the Appellant was found guilty of negligence and it was ordered that he should be removed from the Architects' Register for a period of one year from the date of publication in the Gazette and that a summary of the Board's findings and the Order should be published in the Gazette on a specified date.

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2. The main questions involved in this Appeal are whether the Disciplinary Board had jurisdiction to try the charge brought against the Appellant and make the findings which it did make and whether the Board failed to hold due inquiry and was in breach of the rules of

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natural justice, insofar as the Legal Adviser of the Board did not give his advice on matters of law to the Board within the hearing of the parties or in such manner that his advice could form part of the record or otherwise be ascertainable by the parties for their consideration either at the hearing or for purposes of appeal.

3. Part of the scheme of the Buildings Ordinance 1955 is to require the appointment of an authorised architect in respect of all building and street works (Section 4(1)) in order to ensure that such works are carried out in accordance with regulations and approved plans (Section 4(3)) and the Building Authority (the Director of Public Works) is required to keep the architects' register of persons qualified to perform the duties of an authorised architect (Section 3(1)).

4. For the purposes of inquiry into disciplinary matters in respect of authorised architects, provision is made by Section 5(1)(2) and (3) of the Ordinance for the appointment by the Governor of a Disciplinary Board to consist of three architects, the Building Authority or his representative (who is to be Chairman of the Board) and a legal adviser such legal adviser to have the conduct of the inquiry.

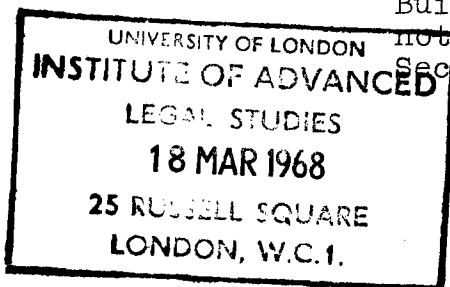
5. Section 5B of the Ordinance provides as follows -

(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

(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.



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- (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.

6. The Appellant was an authorised architect and on the 10th, 20th, 21st and 22nd August 1964 he appeared before the Disciplinary Board to answer the following charge p.23

"Statement of Offence

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

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. K.1175/62, dated the 11th day of August 1962 and K619/62 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".

The charge was subsequently amended to include in the Statement of Offence a reference to Section 27(3) of the Ordinance. p.192

7. Section 27(1) of the Ordinance provides: "Any contravention of the provisions of the sections specified in the table set out in this section, and each

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of the acts or omissions therein specified shall be an offence". Section 27(2) provides that any person who commits an offence set out in the following table shall be liable to a fine and to imprisonment. The acts or omissions amounting to an offence set out in Section 27 (2) (7) are "The material divergence or deviation from work shown in any plan approved by the Building Authority under this Ordinance".

8. By Section 27 (3) any person being a person directly concerned with any building works who permits the commission of any offence specified in that section shall be deemed to be guilty of such offence.

9. Section 27 (6) provides "Any prosecution under the provisions of this Ordinance may be commenced within six months of the commission of the offence or within six months of the same being discovered by or coming to the notice of the Building Authority".

10. Regulation 38 of the Buildings (Administration) Regulations 1959 provides, "the authorised architect appointed in respect of any building works shall give such periodical supervision and make such inspection as may be necessary to ensure that such works are being carried out in general accordance with the provisions of the Ordinance and regulations and with the plans approved in respect thereof....."

p.187 11. The charge against the Appellant was brought and  
p.189 presented by the Building Authority and the Appellant  
pleaded that he was not guilty of the offence alleged.

12. Prior to the hearing of evidence, it was submitted to the Board on behalf of the Appellant that what was alleged against the Appellant was the criminal offence of permitting material divergence or deviation from work shown in the approved plan, that a charge in respect of such an offence could only be tried in a criminal court and that the Disciplinary Board has no jurisdiction to enquire into that charge. The Building Authority agreed that the facts alleged disclosed a criminal offence and stated that the time within which a prosecution could have been brought had elapsed. The Board held that it had jurisdiction since the charge was one of negligence and it was immaterial that it had a criminal aspect.

13. During the course of the hearing submissions involving matters of law were made on occasions to the Board following which there was an adjournment while the Board deliberated in private and on the resumption of the hearing the Legal Adviser stated the Board's ruling or decision. In his final address, counsel for the Appellant made submissions of law and fact to the Board and concluded by submitting that the summing up to the Board by the Legal Adviser should be made in the presence of the parties. The Board rejected this submission, and having first adjourned to deliberate in private, ultimately decided that it was satisfied that the facts alleged in the charge had been proved and found the Appellant to be guilty of the charge and made the Orders above-mentioned.

p.189 p.192  
pp.194-195  
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14. The Appellant obtained leave from the Supreme Court to apply for an order of certiorari to bring up and quash these findings and orders of the Board and on the 10th, 11th, 12th and 13th May 1965 the said Application was heard and on the 29th July 1965 the judgment of the Supreme Court, refusing the Appellant's application, was given.

pp.6-7  
pp.9-21

15. Before the Supreme Court it was contended on behalf of the Appellant that the Board had no jurisdiction to try the charge, the subject matter of which was beyond the scope of its authority because in its terms and in fact the charge consisted in whole or in part of a specific criminal offence which could only be tried by a court of criminal jurisdiction and the fact that it was such a criminal offence was not altered so as to give the Board jurisdiction by asserting that such conduct amounted to negligence; further, because the fact that the offence had become statute barred did not confer jurisdiction on the Board and because on the proper construction of Section 5B (1) the Board had no power or authority to inquire into or make any finding of guilt in respect of negligence or misconduct which amounted to criminal offences under the Ordinance.

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p.18-19

16. The Supreme Court (Macfee and Creedon JJs) rejected these contentions, holding that the Board was master of its own procedure, that the precise wording of the charge was of less import than that the Appellant should have had his attention drawn to the exact nature of the matter into which it was proposed to inquire, and that

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the essence of the charge was "negligence". The Court further held that in the case of the conviction of an authorised architect for an offence set out in the table of Section 27 of the Ordinance, the Building Authority had an absolute discretion whether or not to invoke the powers of the Board to consider whether or not, by reason of such conviction, he ought to be removed from the architects' register or reprimanded and since the Board had power to impose such sanctions where there had already been a conviction for such offence it necessarily had power to impose them for conduct which had not been the subject of a prosecution.

p.10 p.14 17. It was further contended on behalf of the Appellant that by reason of the Legal Adviser's failure to give his advice on the matters of law involved in the presence of the parties or otherwise in such manner that his advice could form part of or otherwise be ascertained from the record, the Board was in breach of the rules of natural justice and accordingly the Board had failed to hold "due inquiry" within the meaning of Section 5B(2) of the Ordinance. It was submitted on behalf of the Appellant that any communication to the Board whether of fact or law relating to the proceedings must be made known to the parties and that, as with criminal or civil trial by judge and jury, failure to disclose such communication would vitiate the proceedings. It was further submitted that the existence of this obligation to give advice in the presence of the parties was expressly recognised by English and Hong Kong legislation respecting disciplinary proceedings affecting other professions and that the apparently exceptional case of a justices' clerk advising the justices on law in private was no true exception since the justices could be obliged to reveal the result of any such advice by their reasons given on appeal by way of case stated.

pp.14,15

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p.14 18. The Supreme Court accepted the Appellant's submissions that if there had been a breach of the rules of natural justice there would have been a failure to hold "due inquiry" and that it should be assumed that in their deliberations leading to their findings and decision the Board received advice on matters of law from the Legal Adviser, albeit that the statement of findings made by the Board contained no reference to any such specific rulings or conclusions. The Court held, however, that

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pp.16-17

there was no obligation on the Legal Adviser to the Board as constituted under the Ordinance to relate in public or make public his advice on matters of law, that the principles to be derived from the cases involving trial by judge and jury did not apply since the judge did not retire with the jury whereas the Legal Adviser under the Ordinance was a member of the Board who would retire and deliberate with it, and that the position of the legal adviser in disciplinary tribunals affecting other professions under other legislation was different in that he was not a member of that disciplinary body. The Court further held that the nearest analogy to the Legal Adviser's relationship to the Board is that of the legally qualified Chairman in quarter sessions appeals committee who would advise the other justices in committee in private on matters of law. The Court accepted that in relation to such appeals to quarter sessions appeals committee and to hearings before the justices in petty sessions, an aggrieved party could discover the reasons on an appeal by way of case stated and added that it might well be that the absence of any such facility was a handicap to any appellant under Section 5B(3) of the Ordinance but stated "we do not see that the rules of natural justice are thereby necessarily transgressed".

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19. On the 7th January 1966 the Supreme Court (Huggins and Creedon JJ) ordered that the Appellant have leave to appeal to Her Majesty in Council.

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20. The Appellant submits that the judgment of the Supreme Court should be reversed and the order of certiorari to remove and quash the findings and order of the Disciplinary Board should go for the following among other :

R E A S O N S

- (1) BECAUSE the charge against the Appellant consisted in whole or in part of a criminal offence under the Ordinance and the Disciplinary Board had no jurisdiction to try it.
- (2) BECAUSE the Disciplinary Board had no authority to make the findings and orders made by it.
- (3) BECAUSE in refusing to make known in public the advice on matters of law given by the Legal

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Adviser to the Board, when no other procedure existed to enable the parties to discover the nature and content of that advice, the Board was in breach of the rules of natural justice and failed to hold due inquiry.

- (4) BECAUSE the judgment of the Supreme Court of Hong Kong was wrong.

William E. Denny



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CASE FOR THE APPELLANT

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