Privy Council Appeal No. 1 of 1966

Chien Sing-Shou – – – – – – – – – *Appellant*

v.

The Building Authority – – – – – – *Respondent*

FROM

THE SUPREME COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1967

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD WILBERFORCE
LORD PEARSON

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

The appellant who is an authorised architect appeared before the Architects Disciplinary Board on a charge of negligence. The case against him was brought by The Building Authority. There was a hearing by the Board on 10th, 20th, 21st and 22nd August 1964. The Board found that he had been guilty of negligence. They ordered that he should be removed from the architects' register for a period of one year from the date of publication in the Gazette. The appellant did not appeal against the decision but he obtained leave to apply to the Supreme Court for an Order of Certiorari to remove and quash the decision of the Disciplinary Board. On 29th July 1965 his application was refused. From that refusal he now appeals.

Under the Buildings Ordinance (No. 68 of 1955), as amended, the "Building Authority" is the "Director of Public Works". Under section 5B of the Ordinance it is provided 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.

(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.

(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:

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.

(*b*) The practice in relation to any such appeal shall be subject to any rules of court made under the Supreme Court Ordinance."

The Governor is empowered for the purposes, *inter alia*, of section 5B, on application made to him by the Building Authority to appoint a Disciplinary Board. It is provided in section 5 as follows:

" (2) Every such board shall consist of—

(*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.

(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."

The charge which was made against the appellant was in the following terms:

" 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 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."

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

Section 4 of the Ordinance is as follows:

"(1) Every person for whom building works or street works are to be carried out shall appoint an authorized architect in respect thereof.

(2) If an authorized architect so appointed becomes unwilling to act or unable, whether by reason of the termination of his appointment or for any other reason, to act, the person for whom the building works or street works are to be or are being carried out shall appoint another authorized architect in his stead.

(3) An authorized architect so appointed shall—

(*a*) supervise the carrying out of the building works or street works, as the case may be, in the manner prescribed by regulations;

(*b*) notify the Building Authority of any contravention of the regulations which would result from the carrying out of any work shown in any plan approved by the Building Authority in respect of the building works or street works; and

(*c*) comply generally with the provisions of this Ordinance."

Section 27 (1) deals with offences and provides that any contravention of the provisions of the sections specified in the table set out in the section and each of the acts or omissions therein specified is to be an offence. The offence which is specified in section 27 (2) (7) (carrying a liability to a fine of 2,000 dollars and to imprisonment for six months) is thus defined "The material divergence or deviation from work shown in any plan approved by the Building Authority under this Ordinance". By section 27 (3) it is provided that any person being a person directly concerned in or with any building works, street works, lift works or escalator works, who permits the commission of an offence specified in the section is to be deemed to be guilty of the offence and is to be liable to the prescribed penalty.

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. . . ."

At the start of the hearing before the Disciplinary Board on 10th August 1964 Counsel for the appellant took a point that the Statement of Offence was bad for duplicity. After a short adjournment the Board ruled against the submission and stated that the only offence alleged was negligence under section 5B (1), that section 4 (3) and Regulation 38 pointed to an architect's duties, and that the particulars of the offence of negligence fell under section 27 (1) and under section 27 (2) (7). Counsel for the appellant then took the point that the Tribunal had no jurisdiction to deal with the charge because it was in reality a charge of a crime and so could only be tried in a criminal court. It was common ground that a prescribed time limit for the bringing of a criminal charge had passed. After a further short adjournment the Board ruled that the charge was one of negligence, that the fact that it had a criminal aspect was immaterial and that the Board had jurisdiction under section 5B.

After the conclusion of the evidence on 22nd August Counsel for the appellant in the course of his address to the Board made the submission that it was desirable in the interests of natural justice that there should be a summing-up by the Legal Adviser to the Board in the presence of the parties. After an adjournment the Board ruled that the Legal Adviser was not to be compared to a Legal Assessor or a Judge Advocate because by section 5 (2) his status was that of a full member of the Board like any other member of the Board. The Board pointed out that their procedure in the past had not involved that the

Legal Adviser, before the retirement of the Board, should give legal advice to the Board in the presence of the parties. They stated that he had of course joined in their deliberations and had done so with particular reference to any legal aspects of a case. They did not propose to depart from their practice.

After an adjournment following upon the conclusion of the addresses of Counsel (the Building Authority as well as the appellant was represented by Counsel) the Board gave its decision in the following terms:

> "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.
>
> 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 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."

The appellant did not appeal. His application for leave to apply for an order of certiorari was based upon three grounds. It will be convenient to record them because the submissions before their Lordships' Board were based upon the same grounds. They were formulated as follows:

> "1. The Board had no jurisdiction to try the said charge in that the whole or part of it constituted a criminal offence triable only summarily by a Court of criminal jurisdiction (the trial of which said charge was statute-barred).
>
> 2. The subject matter of the Inquiry was beyond the scope of the authority of the Board by reason of its nature (and/or part of it). Alternatively, the Board purported to try a matter outside its jurisdiction under colour of a charge over which it might have had jurisdiction.
>
> 3. The Board failed to hold a "Due Inquiry" in that in breach of the rules of natural justice the Legal Adviser (who had the conduct of the Inquiry) did not give, within the hearing of the parties, any or sufficient legal advice to the Board of which he was a member, on the many points of law arising in the course of the said Inquiry, or in such a manner that his advice could form part of the record or be ascertained from the record for the purposes of the parties either at the hearing before the Board, or of Appeal."

In a careful judgment delivered on 29th July 1965 the Supreme Court (Macfee and Creedon JJ.) gave their reasons for refusing the application. Their Lordships are in agreement with the judgment of the Supreme Court. Their Lordships' conclusions in regard to the three grounds are as follows:

1 and 2. These are related points and can conveniently be considered together. It was contended that the Disciplinary Board took upon themselves the task of deciding whether a criminal offence had been

committed: that this was demonstrated by the form in which the charge against the appellant was framed with its "Statement of Offence" and its "Particulars of Offence": that the references to section 27 were inapposite if negligence alone was being asserted: that their inclusion gave emphasis and prominence to alleged liability of a criminal nature: that apart from the insertion of the word "negligence" the statement and particulars of offence were wholly and indeed only apt in relation to an allegation of a criminal offence: and that the references in the Statement of Offence to section 4(3) and to Regulation 38 were not followed up by any particulars suggesting that they had been contravened. In amplification of these contentions it was submitted that reliance could only be placed on conduct or misconduct which would constitute a criminal offence if first there was a conviction before a criminal court. In short it was urged that the Board had purported to try the appellant and to find him guilty of a criminal offence and in so doing had acted without jurisdiction. Their Lordships cannot accept these contentions. The objection already noted which was taken at the hearing before the Board was correctly disposed of by the Board. The charge made against the appellant and the only charge was fairly and squarely a charge of negligence.

In certain circumstances conduct which is negligent conduct could also be criminal conduct. If a charge of negligence is preferred it can be no answer to say that a criminal charge might at an earlier date have been preferred. On an allegation of negligence or of misconduct the enquiry is one as to whether the facts support the allegation and as to whether the negligence or misconduct is of such a nature as to bring it within the words and provisions of section 5B. The inquiry as to whether the appellant was guilty of negligence would be frustrated if exclusion were required of any matter which could or might have possessed a criminal aspect. The opening words of section 5B show that the Disciplinary Board may be engaged in two types of cases. In the first an authorised architect will have been convicted by some court of some offence and the Board will have to consider whether the conviction renders the architect unfit to be on the architects' register or makes his further inclusion on the architects' register prejudicial to the due administration of the Ordinance or renders the architect deserving of censure. In the second the Board will have to consider whether the architect has been guilty of such negligence or misconduct as renders him unfit to be on the architects' register or makes his further inclusion on the register prejudicial to the due administration of the Ordinance or renders him deserving of censure. There are no words which exclude conduct which might be criminal from the "negligence or misconduct" referred to in section 5B. Their Lordships see no reason to read any words of limitation into the section. In dealing with the charge of negligence which was framed against the appellant the Disciplinary Board did not exceed their jurisdiction.

3. The third contention of the appellant was that the Board did not hold "due inquiry" to comply with section 5B(2).

During the hearing before the Disciplinary Board Counsel for the appellant made certain submissions which involved or may have involved matters of law or procedure and, as already noted, the Board from time to time adjourned for a short while for deliberation in private after which the Legal Adviser stated the Board's ruling or decision on the point raised. It was contended on behalf of the appellant that any advice on matters of law that the Legal Adviser may have given should have been given in the presence of the parties and in such a way that his advice could form part of or otherwise be ascertained from the record. A failure to follow such procedure, so it was contended, amounted to a breach of the rules of natural justice with the result that there had been no "due inquiry". Any communication to the Board by the Legal Adviser should, it was contended, as a matter of obligation have been made in the presence of the parties in manner comparable to that laid down by Regulation 33 of the Medical Practitioners (Registration and Disciplinary Procedure) Regulations 1957 which were made in the exercise

of the powers conferred by section 31 of the Medical Registration Ordinance 1957 (No. 25 of 1957). Regulation 33 is in the following terms:

> "(1) When the Legal Adviser advises the Council on any question of law as to evidence, procedure or any other matter, in any inquiry under section 20 of the Ordinance he shall do so in the presence of every party to the proceedings or the person representing each party or, if the advice is tendered after the Council has commenced to deliberate as to its findings, every such party or persons as aforesaid shall be informed of the advice that the Legal Adviser has tendered.
>
> (2) In any case where the Council does not accept the advice of the Legal Adviser on any such question as aforesaid, every such party or person shall be informed of this fact."

In keeping with these contentions Counsel for the appellant had (as already noted) submitted at the hearing before the Board that it was desirable in the interests of natural justice that there should be a summing-up to the Board by the Legal Adviser in the presence of the parties.

Their Lordships cannot accept these contentions. If a Disciplinary Board is appointed it consists of three authorized architects, the Building Authority or his representative and a Legal Adviser. After due inquiry it is for the Board to come to a conclusion under section 5B (2). The Legal Adviser is constituted a full member of the Board. The other members are likewise full members of the Board. In fact it does not appear to have been likely that in the present case any legal advice was given to the Board by the Legal Adviser save to such extent as is apparent on the record exhibited in the proceedings. The findings of the Board appear to have been pure findings of fact. If in reaching them one or more of the architects, when the Board was deliberating in private, gave his view on some matter of architectural knowledge it could hardly be contended that there was an obligation to repeat that view in the presence of the parties. The members of the Board are chosen to exercise a judicial function. They must act fairly in ascertaining and considering the facts. They must give every opportunity to the parties to deal with all relevant matters. But the members of the Board are not under obligation to repeat in public anything or everything said in the privacy of their deliberations. It is said however that there could be the possibility that the Legal Adviser during the deliberation of the Board would give legal advice to the other members of the Board on matters relating to the proceedings. It is to be noted (see section 5) that the Building Authority or his representative is the chairman of a Disciplinary Board and that where a Board is appointed for the purposes of section 5B the Legal Adviser has the conduct of the inquiry. If some special point is raised the Legal Adviser will doubtless give the parties or their legal representatives every opportunity to make submissions in regard to it. After deliberation the Legal Adviser will doubtless state what conclusion the Board has reached in regard to it. If in the course of deliberation some new point emerged with which the parties or their representatives had not had opportunity to deal such opportunity would doubtless be given them. At all times however the Legal Adviser occupies the position of being a full member of a body charged with the duty of acting judicially in making due inquiry. There was no obligation on him to make a summing up of the case to his colleagues on the Board in the presence of the parties. His position is different from that which is occupied by the Legal Adviser to the Medical Council of Hong Kong. The Legal Adviser to the Medical Council is not a member of that body. His duties are specially prescribed by the Medical Practitioners (Registration and Disciplinary Procedure) Regulations 1957. The absence in the Buildings Ordinance of any provision compared to that of Regulation 33 (referred to above) of the Medical Practitioners Regulations but serves to show the contrast between the roles of the two

respective Legal Advisers. There are statutory provisions in regard to the dental profession in Hong Kong which are comparable with those in relation to the medical profession.

Cases which have been concerned with the correct procedure to be followed where, if there is a trial with a jury, the jury make some communication (such cases as *R. v. Willmont* 10 C.A.R. 173, *R. v. Green* 34 C.A.R. 33, *R. v. Furlong* 34 C.A.R. 79, *Fromhold v. Fromhold* (1952) 1 T.L.R. 1522, *R. v. Harry Davis* 44 C.A.R. 235), have no application to the present case. The position of the Legal Adviser is not to be compared with that of a jury. He is not to be regarded as someone separate and apart from his fellow members of the Disciplinary Board. Nor in the present case as was frankly agreed is there any material from which it can be deduced that the Legal Adviser did in fact have occasion to give legal advice to his colleagues on some point of law not referred to in the notes of the proceedings.

Referring more particularly to the formulated ground for seeking an order of certiorari it is to be observed that it is complained that not sufficient legal advice was given to the Board within the hearing of the parties on the many points of law arising in the course of the Inquiry. It has already been recited that a contention was advanced before the Board that the statement of offence was bad for duplicity. The point was argued: the Board then adjourned for deliberation: they then gave a clear ruling. In their Lordships' view there was no error of procedure and there was no obligation on the Legal Assessor to do more than was done. Similar procedure was adopted when the contention was advanced that the Board were being asked to deal with a criminal charge and lacked jurisdiction to do so. An argument appears to have been addressed to the Board as to the meaning of the word "satisfied" in section 5B (2) and it also appears to have been argued that the Board had to be unanimous. Their Lordships cannot think that the meaning of the word "satisfied" could have presented any difficulty and there is no indication that any occasion arose for any ruling as to whether the Board had to be unanimous. In their Lordships' view the complaint that there was a failure to hold "due inquiry" was devoid of substance and was rightly rejected by the Supreme Court.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the respondent.

37839—2 Dd. 178074 80 7/67

In the Privy Council

Chien Sing-Shou

v.

The Building Authority

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1967