

HONG KONG / JUDGMENT

LINFIELD LTD v. TAOHO DESIGN ARCHITECTS LTD AND OTHERS

COURT

Court of Appeal

DECIDED

21 March 2006

CASE / FILE NUMBER

CACV313/2004

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bjbj cacv 313/2004 in the high court of the hong kong special administrative region court of appeal civil appeal no. 313 of 2004 (on appeal from HCCT NO. 68 of 2001) BETWEEN LINFIELD LIMITED Plaintiff TAOHO DESIGN ARCHITECTS LIMITED 1st Defendant PROGRESS CONSTRUCTION LIMITED 2nd Defendant MICHELANGELO MARBLE LIMITED 3rd Defendant GREG WONG & ASSOCIATES LIMITED 4th Defendant BROOKE HILLIER PARKER (A FIRM) Third Party Before: Hon Rogers VP, Tang JA and Chung J in Court Date of Hearing: 7 8 March 2006 Date of Handing Down Judgment: 21 March 2006 J U D G M E N T Hon Rogers VP: This is an appeal from the judgment of Reyes J given on 3 September 2004. The plaintiff is the owner of a substantial piece of land in Plantation Road on the Peak. In the 1990 s, the plaintiff wished to develop the land by building houses in a luxury development to be known as The Belvedere . For the purposes of this appeal, it is irrelevant that the various contracts relating and incidental to the construction were made by another company, in this respect reference throughout will be to the plaintiff as if it were the relevant contracting party. The houses were built in two phases. Five houses were built first. Whilst those houses were being completed the plaintiff commenced the building of the sixth house. The plaintiff s complaint is that there were substantial defects in the construction of the houses. These related to a number of different aspects but the only remaining aspect which is relevant to this appeal relates to the cladding. The plaintiff sued the architect, i.e. the 1st defendant, the main contractor, i.e. the 2nd defendant, the subcontractor in relation to the limestone cladding, i.e. the 3rd defendant and the 4th defendant who is the Registered Structural Engineer () employed in the project. The project coordinator was joined as the third party. The action against the 1st and 2nd defendants and the third party has been stayed in favour of arbitration, which has taken place since the trial. The 1st defendant is insolvent. This action proceeded against the 3rd defendant and the 4th defendant. The judge held that the 3rd defendant was liable to the plaintiff and entered judgment for \$39,378,547. He dismissed the claim against the 4th defendant. The plaintiff has appealed against both aspects of that judgment. However, the appeal in respect of the 3rd defendant has not proceeded because the 3rd defendant has chosen to take no part in the appeal. The appeal therefore concerned only the 4th defendant. As already indicated, the claim in this case related to numerous defects which were said to have

been manifest in the houses when completed. As regards the claim against the 4th defendant, originally and at trial, the complaints were extensive and related to a number of aspects of the building. On this appeal the plaintiff has confined the complaints solely to those which related to the cladding and even that has been limited to a failure to ascertain the buildability of the cladding structure, namely an allegation that the cladding could not in practice be erected in accordance with the drawings which were submitted by the 4th defendant to the Building Authority and, secondly, an allegation that the 4th defendant did not supervise the erection of the cladding in the manner in which was required of it. In relation to those two matters Mr Clayton SC, who appeared on behalf of the plaintiff on this appeal but not in the court below, took what he said were the two best points in his client's favour and that if he did not succeed on those he did not consider that his client could succeed on any of the other matters. It might be said at this stage that those points can only be said to fall within more generalised allegations in the particulars in the statement of claim. At the root of the questions which arise on the appeal is whether the 4th defendant as the RSE, owed duties to the employer in respect of the stone cladding of the houses. There is no dispute in this case that the terms of the engagement of the 4th defendant were contained in a letter of 26 August 1994 and that they imposed on the 4th defendant no further duties than would be imposed on an RSE under the Buildings Ordinance, Cap. 123 (the Ordinance) as the Ordinance stood at the relevant time. For the purposes of the appeal, the parties have provided copies of the Ordinance and the Regulations in the form that is accepted on both sides as relevant for this appeal and reference is made to those in this judgment. In this regard, any duties which would arise in common law are treated as being similar. The judge examined the scope of the 4th defendant's duties both under contract and under common law in paragraphs 192 onwards of the judgment. He came to the conclusion that an RSE was responsible for the structural details in relation to a building and in relation to any plans which he submitted. He went on to say that although cladding was part of the building and part of the building works, it did not form part of the structure and was not a structural element of the building. In doing so, he recognised that the cladding constituted a load and that the fixing, or interface, between that and the external wall was a load bearing structure and was thus a matter which was of concern to the RSE. In my view, the judge was correct in his assessment. The judge had started, quite naturally, with a consideration of the provisions of the Ordinance in relation to the parties that would be involved in the construction of the building. Section 4 of the Ordinance provides as follows:

- (1) Every person for whom building works or street works are to be carried out shall appoint- an authorized person as the co-ordinator of such building works or street works; and a registered structural engineer as a consultant to the authorized person on the structural elements of such building works or street works if so required under this Ordinance. Thus the authorized person, who is the architect, is responsible for as the coordinator of the building works in general. The RSE is a consultant to the architect in relation to the structural elements of the building. In this regard, subsection
- (3) adds no more to the obligations. That reads:

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- (3) Any authorized person and any registered structural engineer appointed or nominated under subsection (1) or (2) shall-
- (a) supervise the carrying out of the building works or street works, as the case may be, in the prescribed manner;
 - (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 this Ordinance. It is of significance that under the Building (Administration) Regulations (B(A)R) section 37 provides, again, that there is a distinction between the responsibilities of the architect and the RSE. The architect is required to give periodical supervision and make such inspections as are necessary in relation to the building works. Whereas the RSE has responsibility in relation to the structural works. That section reads as follows:
 - (1) The authorized person appointed in respect of any building works or street works shall give such periodical supervision and make such inspections 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 by the Building Authority and with any order made or condition imposed, pursuant to any provision of the Ordinance or regulations in that behalf, by the Building Authority.
 - (2) Where a registered structural engineer has been appointed in respect of such works the registered structural engineer shall be responsible for such periodical supervision of the structural works and shall make such inspections of the same as may be necessary to ensure that they are being carried out in general accordance with the provisions of the Ordinance and regulations and with the plans approved in respect thereof by the Building Authority and with any order made or condition imposed, pursuant to any provision of the Ordinance or regulations in that behalf, by the Building Authority. For completeness, mention can be made at this stage of the registered contractor. His position is dealt with under section 9 of the Ordinance and he is required to give continuous supervision to the carrying out of the building works. That reads:
 - (1) Every person for whom building works or street works are to be carried out shall appoint a registered contractor in respect thereof.
 - (2) If a registered contractor appointed in respect of building works or street works 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, as the case may be, are to be or are being carried out shall appoint another registered contractor in his stead.
- (3) A registered contractor so appointed shall-.
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- (a) give continuous supervision to the carrying out of the building works or street works, as the case may be;
- (b) notify the Building Authority of any contravention of the regulations which would result from the carrying out of the 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. The question then arises as to whether the cladding constitutes part of the structural works or elements. Under the Building (Construction) Regulations (B(C)R) the walls of the building are dealt with in Part VIII. Under section cladding is defined as meaning a facing or architectural decoration additional to the external walls of any building . Section 39 of those Regulations draws a distinction between cladding and the structure. That reads as follows:
 - (1) Cladding shall-
 - (a) be constructed entirely of such non-combustible materials, of such thickness, strength and durability, and shall be fixed and supported in such manner and in such sequence as to provide long term stability and integrity; and
 - (b) be provided with sufficient permanently flexible joints horizontally and vertically to allow for differential movement in the cladding and in the structure to which it is attached.
 - (2) Any metal dowels and fixings securing the cladding shall be suitable, permanent and adequately protected from corrosion. Cladding is not, on the face matter, load bearing. Load bearing is defined in the interpretation section as relating to any part of a building or building works which bears a load other than that due to its own weight and to wind pressure on its own surface. In the course of argument, Mr Clayton placed emphasis on section 4 of the B(C)R: The structure of every building, street, building works and street works shall be capable of safely sustaining and transmitting to the ground the combined dead loads, imposed loads and wind loads, determined in accordance with the provisions of Part III, in such a manner as not to-
 - (a) cause any deflection, deformation or other movement, which would impair the stability of, or cause damage to, the whole or any part of that building, street, building works or street works or any other building, structure, land, street or services; or
 - (b) exceed the appropriate limitations of design stresses of the whole or any part of that or any other building, street, building works or street works. In seeking to rely on section 4 of the B(C)R, Mr Clayton suggested that the proper construction dictated that cladding came within the structure of the building. But in my view, Mr Manzoni, who appeared on behalf of the 4th defendant, was correct in saying that section 4 is directed to the load bearing capacity of the structure of the building. It is directed to the matters of sustaining and transmitting the loads, specifically, the dead loads, the imposed loads and the wind loads, to the ground. Dead load is defined in section 2 as meaning the weight of walls, floors, roofs, finishes, permanent partitions and other permanent construction. As already noted a

cladding is treated under the regulations as being a finish, as indeed it is. It is excluded from the definition of load bearing because the cladding only carries its own weight and that of wind pressure on its own surface. Hence in so far as the B(C)R is concerned cladding is a load but is non-load bearing. Turning back to section 4, it is necessary to analyse which part of the building performs the function of sustaining and transmitting the various loads to the ground. As stated above, the cladding itself is non-load bearing and constitutes, in itself, a load; that load is sustained and transmitted to the ground by the fixings and then by the outside walls. Another way of looking at it is that the cladding itself does not constitute part of the structure of the building since no load would be sustained or transmitted to the ground if the cladding were not present. There is nothing, therefore, in section 4 which makes the cladding part of the structure of the building, it is an architectural finish. Given that the RSE is concerned with the structure of the building, in the context of section 4 that must mean the ability of the building to sustain and transmit the loads to the ground. The RSE is not concerned with the architectural finishes, as such, which may, and no doubt will in nearly all cases, constitute a load in themselves. It was said that the judge overlooked the purposive construction of the Ordinance and the related Regulations, but I do not consider that that was so. It was argued that if the 4th defendant's construction of the Ordinance was correct then there would be no person who was responsible for the construction and safety of the cladding. As already demonstrated clearly the registered contractor had continuous supervision responsibilities in relation to the building works and the architect, as the authorized person, had overall responsibility in respect of the building works. In contrast, the registered structural engineer's responsibilities were in respect of the structural works. One of the matters which was at the forefront of the argument on behalf of the plaintiff was that the 4th defendant had signed design drawings which it had forwarded to the Building Authority. The drawings had been prepared by the 3rd defendant. It is quite clear on perusing them that they were directed to the structural elements of the buildings. Reliance was placed on the fact that section 12 of the B(A)R provided that the person submitting plans to the Building Authority had to assume responsibility for them and section 18A provided that the person submitting the plans had to certify them. But that cannot make the RSE, who was a consultant to the architect on the structural elements of the building, responsible for matters other than the structural aspects of the building. Neither could the Practice Notes issued by the Building Authority to the authorized persons and RSEs alter the statutory responsibilities. The argument proceeded further that when the Building Authority approved the plan, he indicated that when giving consent to commencement of the works, he would require information as to the physical properties of the limestone cladding and he intended to impose conditions as to supervision of the works. As Mr Manzoni submitted, it appears that section 17 provides the Building Authority with a way of requiring information and imposing conditions both at the time of giving approval to plans and at the time of giving consent to commence the works. Of particular point in this case was that under rubric 6 in column A, which refers to building works involving structural use of materials, the Building Authority is empowered to impose conditions and requirements which are not limited to the structural use of materials and may go wider. The fact that under section 17 of

the Ordinance the Building Authority can request further information or impose conditions cannot extend the RSE's responsibilities to areas which are not within his purview. In the reply speech, Mr Clayton sought to suggest that the Building Authority had required the RSE to provide information as to the physical properties of the cladding itself. However, an examination of the correspondence in relation to House 6 shows that the initial request was made to the architect and the 4th defendant was merely a conduit to provide that information. It might be observed that it is perhaps not unnatural that an RSE would be consulted by an architect when the architect had been asked to provide information as to the properties of any material. In any event, it appears that the 4th defendant was, indeed, acting as a conduit for information that was obtained through the cladding subcontractor. The judge had held at paragraph 115 of the judgment that it was the architect that had applied to the Building Authority for consent to commence the Fixing of Limestone Cladding Phase II House. In my view, nothing in the documents which emanated from the Building Authority or in the correspondence alters the position that it was the architect who was responsible for the cladding and the RSE that was responsible for the fixing elements which would hold the cladding. Furthermore, the evidence clearly pointed to that; even the only relevant witness on behalf of the plaintiff who spoke as to the responsibility of the RSE, Mr Ng, was unable to say otherwise. The allegation of negligence in relation to the buildability The first ground upon which it is alleged that the 4th defendant was negligent and responsible to the plaintiff was that it was said that the 4th defendant had not considered whether the design of the cladding system was buildable in practice. There is no dispute that the 4th respondent forwarded design drawings to the Building Authority and that some of those related to the fixing system for the cladding. Those drawings were prepared by the 3rd defendant and given to the 4th defendant to transmit to the Building Authority. It is clear and conceded that, as set out in the judgment, the 4th defendant was not involved in any way in the selection of the particular type of cladding nor in the design of the fixings by which it was to be affixed to the building. The 4th defendant was neither involved in the selection of the stone, nor in selecting the particular quarry from which it came, nor in selecting the particular blocks which would be used, nor in relation to the cutting of the stone, nor in relation to the selection of the particular slabs that would be used for the cladding. All these matters are no doubt extremely important when it comes to considering the strength of the cladding itself. These matters were all decided, as the judge found, between the plaintiff, the architect and the 3rd defendant. It was the 4th defendant's case that its function was to consider the drawings on a technical basis and to assess whether the fixings, being part of the structure of the buildings, i.e. part of the load sustaining and transmitting fabric, were appropriate to sustain the load that would be imposed by the cladding. At trial, there had been a number of different allegations in respect of the cladding, but for the purposes of this appeal they have fallen away. What remains is an allegation that the drawings show angle-brackets of 5 mm thickness which supported the cladding and a gap of only 6 mm between the slabs of the cladding which was above and below the angle-brackets. There would be dowel pins which would be inserted into the angle-brackets which would extend both upwardly and downwardly and in other

instances, sideways, and be located in holes in the cladding slabs above and below (alternatively, sideways of) the fixing brackets. This appeal was presented on the basis that it was accepted that it was not physically impossible to build the cladding system shown in the drawings. What was said was that it was impractical and that no allowance had been made for building tolerances or the relevant movement of the elements of the design such that because the fixing brackets could deflect by approximately half a millimetre the design was impractical in practice and, furthermore, the holes in the cladding slabs into which the dowel pins were to be inserted were unlikely in practice to coincide with the positioning of the dowel pins thus making it likely that stresses on the cladding would cause the cladding to break. The arguments in respect of buildability which were advanced at the trial were far more extensive than on this appeal. The judge came to his conclusions as to buildability at paragraphs 228 onwards of the judgment. At paragraph 229 he said: I do not see how it formed any part of GWA's duty as RSE to advance a view as to the likelihood or otherwise of a specialist stone contractor such as MML being able to erect cladding in accordance with its designs. Matters might have been different if the structural design was an obvious physical impossibility, but that is not the case here. As Ms. Cheng accepts, MML's design was physically possible. It was only that the drawings gave little room for error. But, if MML had contractually undertaken to perform work to such degree of precision, it was not GWA's role to say in September 1996 that MML could not conceivably deliver what it had undertaken. If MML's workmanship fell below the requisite mark, that would be MML's fault, not GWA. As the judge went on to say, if the RSE had to cater for all types of carelessness, even bungling in a foreseeable way, because there were so many ways in which a process could be bungled, it was difficult to see how the process could stop. In my view, the judge was correct. It might also be said that in a development of this size consisting of what were comparatively very few houses being built seemingly unconstrained by considerations of cost, it would not be unreasonable to suppose that the particular specialist contractor would make every effort to comply even with the most exacting standards if that is what the contractor in question had put forward as being feasible. Furthermore, there appears to me to be a significant difficulty in the plaintiff's case as regards establishing that the RSE should have considered that the design of the cladding system was not buildable in practice. The plaintiff's main witness was Mr Hartog who was a cladding specialist but not an RSE. The judge commented on his evidence at paragraph 301 of the judgment and it only needs to be said that the judge found his evidence as to the general background of limestone and its characteristics helpful but beyond that he considered that substantial parts of the report from Mr Hartog seemed more in the nature of advocating a particular position and not giving impartial expert evidence. The judge concluded by saying that Mr Hartog's views had to be treated with much caution when assessing the rights and wrongs of the various parties. Nevertheless, in giving his evidence Mr Hartog did say that some of the matters which he raised as defects in the design were unlikely, in his view, to be known to engineers in conventional engineering practice.

Lack of Supervision It was accepted that the RSE supervised the bolting of the angle brackets to the wall of the buildings on a periodic basis, the argument on the appeal was that the 4th defendant did not supervise the installation of

the cladding itself, including the insertion of the dowel pins in the angle brackets. It was said that had it done so it would have been obvious that slots had been cut into the stone at the locations of the dowel pins and also to accommodate the angle brackets. In respect of the cladding itself the judge was clearly of the view, and in my view correctly, that the cladding was not part of the RSE's responsibility. Both the architect and the 3rd defendant had clear responsibilities in that regard. If the cladding was badly prepared or installed or otherwise defective that was a matter which was not part of the RSE's responsibility. In respect of the dowel pins the judge held at paragraph 257 of the judgment that it was a matter of the 3rd defendant's workmanship and not a matter of structural detail for which the RSE had responsibility. Again I consider the judge was correct, it has not been shown that there was anything wrong with the dowel pins, or that any were missing. What has been shown is that the cladding was not cut accurately enough for the holes in the cladding to coincide with the dowel pins. Furthermore, it appears that the criticism in this respect was something which was raised in closing submissions and had not been put to the 4th defendant's witnesses. It is by no means clear that the plaintiff has established that the 4th defendant did not have regard to the dowel pins during the course of construction. In any event, it would appear that the complaints in this regard amounted to a complaint that the cladding exhibited defects namely cuts and spalls. In my view, the judge was correct in his assessment. I see no ground for allowing this appeal. I would dismiss this appeal with an order nisi of costs in favour of the 4th defendant. Hon Tang JA: I agree and have nothing to add. Hon Chung J: I agree. (Anthony Rogers) Vice-President (Robert Tang) Justice of Appeal (Andrew Chung) Judge of the Court of First Instance Mr Peter Clayton SC, instructed by Messrs Lovells, for the Plaintiff/Appellant Mr Charles Manzoni, instructed by Messrs CMS Cameron McKenna, for the 4th Defendant/2nd Respondent PAGE - A B C D E F G H I J K L M N O P Q R 1udk 1udk 2QX[2QX[2QX[H; < jFen & 6" ABC Final Judiciary ABC-Final (fair)1.dot setup Microsoft Word 9.0 Judiciary ABC Final Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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