

HONG KONG / JUDGMENT

SKY KING MACHINERY ENGINEERING LTD v. CHINA HARBOUR ENGINEERING CO LTD

[2026] HKCA 816

COURT

Court of Appeal

DECIDED

5 May 2026

CASE / FILE NUMBER

CACV211/2023

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bjbjJ CACV 211/2023, [2026] HKCA 816 On Appeal From [2023] HKCFI 1516 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO 211 OF 2023 (ON APPEAL FROM INTELLECTUAL PROPERTY PROCEEDINGS NO 45 OF 2019) BETWEEN SKY KING MACHINERY Plaintiff ENGINEERING LIMITED and CHINA HARBOUR ENGINEERING Defendant COMPANY LIMITED SHARON ASIA WASTE SORTING Third Party ENGINEERING LIMITED (discontinued) Before: Hon Barma and Chow JJA and Mimmie Chan J in Court Dates of Written Submissions: 16 & 30 March and 8 April 2026 Date of Judgment: 5 May 2026

JUDGMENT

Hon Chow JA (giving the Judgment of the Court):

INTRODUCTION

There is before the Court the Defendant s Notice of Motion dated 2 March 2026 seeking leave to appeal the Court s judgment dated 2 February 2026 (the CA Judgment) to the Court of Final Appeal. The basic facts of this case and the Court s reasons for dismissing the Defendant s appeal against the judgment of Madam Recorder Sit, SC dated 9 June 2023 (the CFI Judgment) have been set out in the CA Judgment and will not be repeated here. In what follows, unless the context indicates otherwise, we shall continue to use the expressions and abbreviations as defined in the CA Judgment. In the Notice of Motion, the Defendant raises the following 4 questions said to be questions of great general or public importance which ought to be determined by the Court of Final Appeal: Question 1: In assessing whether the person who physically created a graphic work (being a kind of artistic work under the Copyright Ordinance (Cap 528) (the Ordinance)) should be regarded as the author or a joint author of the work, should the Court apply (a) the traditional

UK approach of considering whether he has expended any skill, labour and judgment in physically creating the same, or (b) the EU approach of considering whether there is intellectual creation on his part (which the Courts below effectively applied and adopted)? Question 2: Copyright protects expression of idea rather than the idea itself. What matters is that which is visually significant. Thus, in the case of a graphic work (in the context of the present case, detailed technical construction drawings), can the person who is solely responsible for the physical creation of the expression (i.e. the drawings), which requires particular skill, labour and judgment in such physical creation, and the created work is sufficiently original for copyright to subsist therein, albeit based on instructions and/or antecedent works, be regarded as a mere scribe? Further or alternatively, to what extent creation freedom, if at all, is required in order for the physical creator of such graphic work to be considered an author or joint author? Question 3: Does a work of architecture require artistic character in order to qualify as an artistic work under the Ordinance? Question 4: On the question of infringement, whether the court is entitled to determine whether there has been substantial copying of the pleaded works alleged to have been infringed by the alleged infringing works without first determining the scope of originality of (in other words, the extent of copyright subsisting in) the former works? In addition, the Defendant seeks to rely on the or otherwise limb in s 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance, Cap 484, in support of its application for leave to appeal. Pursuant to 3 of Practice Direction 2.1, the present application is dealt with and determined on paper without an oral hearing. DISCUSSION Under Section 22(1)(b) of the HYPERLINK "<https://www.elegislation.gov.hk/hk/cap484>" \t "_blank" Hong Kong Court of Final Appeal Ordinance, an appeal shall lie to the Court of Final Appeal at the discretion of the Court of Appeal or the Court of Final Appeal in any civil cause or matter if, in the opinion of the Court of Appeal or the Court of Final Appeal (as the case may be), the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court of Final Appeal for decision. Question 1: leave to appeal is refused for the following reasons The difference, or alleged difference, between the traditional UK approach (skill and labour test) and the EU approach (intellectual creation test) for determining whether a work is original for copyright protection was never argued before either the Recorder or the Court of Appeal, and thus there was no discussion of this issue in the CFI Judgment or CA Judgment. That this was the position cannot seriously be disputed by the Defendant. The Defendant faintly argues that [i]n considering whether the point was argued before the Recorder, one looks at the substance rather than the form. This is implicit recognition that the point sought to be raised is a new point. We reject the contention that the substance of the point was argued before the Recorder. The point sought to be raised now involves a distinct point of law. Either it was argued, or was not argued. In our view, it was not. On this ground alone, leave to appeal should not be granted by the Court of Appeal (*Secretary for Justice v Timothy Wynn Owen KC* (2022) 25 HKCFAR 288, at 25-26; *Basab Inc v Superb Glory Holdings Ltd*, CACV 256/2014, 10 February 2017, at 8). In any event, the Recorder did adopt the skill and labour test as the applicable test when considering the issue of originality (CFI Judgment, 67, 68 and 88). The Defendant's complaint that the Recorder applied the intellectual creation test at 85(8) and 86 of the CFI Judgment when considering whether the employees of Lambeth should be regarded as the author (or joint author) of the graphic works in

question is based on an incorrect reading of the CFI Judgment. In those paragraphs, the Recorder was considering, amongst other matters, the veracity of Jacky Wong's evidence, including his assertion that Lambeth's role was that of designing the entire structural system of the TKO137 PFSF. The Recorder rejected Jacky Wong's evidence for the reasons mentioned at 53-56 and 85 of the CFI Judgment, and it was in that context that the Recorder said the following at 85(8): As Mr Liao submitted, Jacky Wong's evidence was all-or-nothing he said he created the (structural) design and his team executed it. As such, my rejection of his evidence means that there is no factual foundation to say that he or the Lambeth team had a creative role in some aspect of the SF 2003 Plans. It is incorrect to suggest that the Recorder adopted or applied the intellectual creation test when considering whether Lambeth should be regarded as the author or joint author of the plans in question. As mentioned by the Court of Appeal at 104 of the CA Judgment, there was simply no evidence accepted by the Recorder that Jacky Wong or Lambeth or Gammon made any contribution in creating the SF 2003 Plan other than merely following TP Wong's directions and instructions. The Recorder also found that Lambeth's role was no more than one of scribe. On these findings, there was no basis for holding Gammon or Lambeth to be co-authors or co-owners of the copyright subsisting in the SF 2003 Plans. In other words, the reason why the Recorder rejected the Defendant's contention that Lambeth was the author or joint author of the relevant plans was that there was no evidence accepted by the Recorder that Lambeth had made any contribution, whether of skill or labour, to the creation of the plans other than merely following TP's Wong's directions and instructions and its role was no more than one of scribe, not because she applied the intellectual creation test. The conclusion that Lambeth was not an author of the relevant plans was reached on the basis of the Recorder's assessment of the evidence, which assessment was upheld by the Court of Appeal. The Defendant should not be permitted to raise a challenge to this conclusion in the Court of Final Appeal, in view of the concurrent findings of fact by the Recorder and the Court of Appeal on this matter. Question 2: leave to appeal is refused for the following reasons By this question, the Defendant argues that, although the concept of mere scribe exists in copyright law, it is almost only in the context of literary works, and raises the issue as to how that concept is to be applied in the context of artistic works, if at all. Again, the issue of whether the concept of mere scribe can have application in the context of artistic works was never argued before either the Recorder or the Court of Appeal. In any event, we accept the Plaintiff's submission that there is no basis for the contention that the concept of mere scribe can have no application in the context of artistic works. In *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818, at 835, Laddie J said the following: In my view, to have regard merely to who pushed the pen is too narrow a view of authorship. What is protected by copyright in a drawing or a literary work is more than just the skill of making marks on paper or some other medium [emphasis added]. Similarly, in Laddie, Prescott and Vitoria, *The Modern Law of Copyright* (5th ed), at 4.78, under the sub-heading of Who is the author of an artistic work? : the learned editors state: As with literary works, a mere amanuensis who exercises no independent skill and labour will not be an author. As a matter of principle, we see no reason why the concept of mere scribe can have no application in the context of artistic works. As for the question of whether Lambeth was a mere scribe in the present case, the Recorder made a finding of fact on this question, and the Court of Appeal upheld the Recorder's

finding. We see no basis why the Defendant should be permitted to challenge this finding of fact in the Court of Final Appeal. Question 3: we are satisfied that this is a question of law of great general or public importance, and it was argued before the Recorder and the Court of Appeal. In our view, this question ought to be submitted to the Court of Final Appeal for decision. Question 4: by this question, the Defendant seeks to challenge the Recorder's findings of substantial reproduction, complaining that the Recorder failed to determine the scope of originality of (in other words, the extent of copyright subsisting in) the SF 2003 Plans and/or P's Installation. As in the case of Questions 1 and 2, the issue raised under Question 4 is a new point not previously taken. In any event, the Defendant's complaint has no substance. The Recorder correctly summarised the relevant principles for determining the issue of substantial reproduction (CFI Judgment, 113-116), in particular (i) the need to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work, and (ii) whether what has been taken constitutes all or a substantial part of the copyright work. The Recorder went on to consider these 2 matters, and found both elements of copying and substantiality proved (CFI Judgment, 117-120). There is no basis to challenge the Recorder's approach or conclusion. The Defendant's contention that because the majority parts of some of the SF 2003 Plans were copied from the pre-existing KT Plans, the reproduction of such parts in such SF 2003 Plans which were not original will not normally be a reproduction of substantial part of the work is unsustainable, in view of the Recorder's findings, inter alia, that (i) the copyright subsisting in the KT Plans belonged to the Plaintiff, (ii) the SF 2003 Plans were created based on, inter alia, the KT Plans, and (iii) the Plaintiff was the owner of the copyright subsisting in the SF 2003 Plans. In short, Question 4 does not raise any question of great general or public importance, and is also not reasonably arguable. In summary, save in respect of Question 3, we refuse to grant leave to appeal in respect of the remaining questions because they raise new issues which were not argued before the Recorder or the Court of Appeal, involve impermissible challenge to concurrent findings of fact, do not arise on the facts as found by the Recorder, are not reasonably arguable, and/or are not questions of great general or public importance. Lastly, it is the well-settled practice of this Court to defer to the Appeal Committee of the Court of Final Appeal to consider whether leave to appeal ought to be granted under the or otherwise limb, and we see no good reason to depart from this practice in the present case.

DISPOSITION

Leave to appeal is granted in respect of Question 3 only, upon the terms in 1 to 6 of the Standard Order set out in Schedule 1 to Practice Direction 2.3. In relation to the costs of the application, in view of the fact that the Defendant has succeeded in obtaining leave to appeal on only 1 out of 4 proposed questions, we make an order that the Defendant shall pay three quarters of the Plaintiff's costs of the application, and the remaining one quarter of the parties respective costs of the application shall be in the cause of the appeal. We have considered the Plaintiff's Statement of Costs for Summary Assessment dated 30 March 2026, and the Defendant's Statement of Costs for Summary Assessment dated 8 April 2026. The Plaintiff's costs are summarily assessed at HK\$200,000, and the amount of costs to be paid by the Defendant to the Plaintiff shall be the sum

The Defendant's costs are summarily assessed at HK\$300,000, one quarter of which (HK\$75,000) shall be in the cause of the appeal.

The above costs order, including the summary assessments, is an order nisi, which shall become absolute unless an application is made to vary the same within 14 days from the date of this judgment.

(Aarif Barma) (Anderson Chow) (Mimmie Chan)

Justice of Appeal Justice of Appeal Judge of the Court of First Instance Mr Christopher Chain SC leading Mr Martin Lau, instructed by Y.S. Lau & Partners, for the Plaintiff Mr Stewart Wong SC leading Mr Philips B F Wong, instructed by Wellington Legal LLP, for the Defendant

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