SUPREME COURT OF QUEENSLAND

CITATION:	*Hillcoat v Keymon P/L & Anor* [2002] QCA 527
PARTIES:	**GRAHAM CHARLES HILLCOAT** (plaintiff/appellant) **v** **KEYMON PTY LTD** ACN 010 624 245 (first defendant/first respondent) **PERPETUAL TRUSTEES QUEENSLAND LIMITED** ACN 009 656 811 (second defendant/second respondent)
FILE NO/S:	Appeal No 2422 of 2002 SC No 662 of 1995
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2002
JUDGES:	McMurdo P, Mackenzie and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES - where appellant injured when an elevator in which he was travelling collapsed – where elevator in hotel undergoing renovations – where elevator found to be unsafe for the carriage of people – where premises owned by the first respondent but leased – where renovations conducted by the lessee - whether first respondent owed a non-delegable duty of care to ensure the lessee's renovation work was carried out competently – whether the appellant was in a position of vulnerability in his relationship with the first respondent *Property Law Act* 1974 (Qld), s 121(2) *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, considered *Jones v Bartlett* (2000) 75 ALJR 1, considered

Kondis v State Transport Authority (1984) 154 CLR 672, cited
WD & HO Wills v SRA (1998) 43 NSWLR 338, cited

COUNSEL: G R Mullins for the appellant
S C Williams QC for the first and second respondents

SOLICITORS: Shine Roche McGowan for the appellant
Gadens Lawyers for the first and second respondents

[1] **McMURDO P:** Mr Graham Hillcoat ("the appellant") was badly injured at the Queens Hotel, Maryborough on 2 May 1992 when an elevator, erected by builders renovating the hotel, collapsed. His Supreme Court action seeking damages from the owner of the hotel was dismissed with costs on 14 February 2002. He appeals from that decision on two grounds; first, that the learned primary judge failed to find that the owner owed a non-delegable duty to exercise its control to ensure that the lessee's renovation work was carried out competently so as to avoid a foreseeable risk of injury to the appellant and, second, that the learned primary judge should have found the appellant was in a position of vulnerability in his relationship with the respondent.

[2] At all material times, Venacorp Pty Ltd ("Venacorp"), who is not a party to the action, was the lessee of the hotel owned by the first respondent ("the respondent"). Venacorp employed the appellant as bar manager until shortly before the accident when he resigned; he continued as the nominated licensee, living on the premises with Venacorp's permission.

[3] On 12 February 1992, Venacorp applied to the Licensing Commission to renovate the premises by enlarging the licensed area upstairs through demolition of much of the existing accommodation. This application mis-stated that the plans were approved by the Maryborough City Council "(the Council").

[4] On 14 February 1992, Mr French, a director of Venacorp, wrote to the respondent requesting written approval to carry out the hotel renovation; he attached a plan which proposed a new lounge or nightclub on the upper floor. The plan did not include an elevator. On 18 February 1992 the respondent consented to the renovations on conditions that the builder had adequate insurance with a reputable company and that Venacorp be responsible for the cost of the renovations. The respondent's letter to Venacorp noted the respondent's belief that Venacorp already had the necessary approval from the Licensing Commission and the Council.

[5] Venacorp also wrote to the Council on 14 February 1992 requesting change of classification, site approval and parking exemptions for the renovation. On 18 February 1992 Venacorp lodged with the Council an Application for Approval for Building Work or Change of Classification, listing the first respondent as owner and "J Marstella Builders" as the builder. The Council gave site approval subject to payment of $15,000 on 22 March 1992. On 25 March 1992 a form 70 under the *Liquor Act* 1912 (Qld) was lodged in the name of and signed by the appellant as licensee and signed on behalf of the respondent as owner. Venacorp paid the town planning site approval fee on 3 April 1992. On 5 April, the appellant lodged plans with Council; these included some input from engineers and showed an elevator although it is not clear that this is the elevator in which the appellant was injured.

[6] On 13 April 1992 the Licensing Commission gave approval for the renovation work, subject to Council approval. On 21 April 1992 the Council gave approval to the application for change of classification of the upper floor of the hotel subject to conditions. Five days after the accident on 7 May 1992 the Council issued a building permit which listed Venacorp as owner and recorded J Marstella Builders, registration no 19224G2H, as builders and which required, amongst other things, a "Certificate of Engineers Structural Adequacy". It became clear during the trial that the builders engaged by Venacorp in the renovation were not J Marstella Builders and were not registered; Venacorp had fraudulently used that name and registration number. There was no suggestion the respondent knew anything of this fraud.

[7] The appellant gave evidence that renovation work commenced in late January or February 1992. He continued to operate the hotel during the renovations and reported safety concerns to Venacorp's Mr French. From time to time, there was an engineer on site. The elevator, a three-sided steel cage with no door, was installed three or four weeks before the accident inside a storeroom. He saw it used only to transport goods, not passengers. It did not display a warning sign that it was a goods lift only. The elevator was found by the learned primary judge to be constructed "negligently and not in a competent and skilled fashion" and "unsafe for the carriage of people".[1] Shortly before the accident the inside stairs to the upper floor were removed by which time the building work was nearing completion.

[8] On the afternoon of the accident, Mr French asked the appellant if he was interested in assisting in the management of the future nightclub; over the next three or four hours they visited a number of hotels where they discussed this proposal; the appellant drank about eight half scotches. They returned to the Queens Hotel at around 8 pm. Mr French asked the appellant to accompany him to the first floor to inspect the renovation and to learn how to safely lock the new fire door, a matter within the appellant's responsibilities as licensee. Mr French said they would use the elevator. The appellant questioned whether it was tested and safe but Mr French assured him "it was tested to carry a man and 24 cartons of liquor". Mr French, who weighed about 16 stone, travelled in it without incident to the upper level; the appellant, who weighed approximately 18 stone, followed. Before it reached the upper level, it failed and crashed.

[9] Mr Geoffrey Williams, the respondent's representative, was not aware of the precise date renovation work commenced at the hotel but he would "not have been surprised" if it was before the respondent's approval was requested because Mr French "did things fairly impulsively". He knew the appellant was the licensee and believed he may have lived at the hotel, which he was aware was operating during the renovations. Mr Williams knew that demolition work had commenced when he was asked to sign the application to the Licensing Commission on 25 March 1992; although he had no specific recollection he must have then known that one of the assumptions in his letter consenting to the renovation work was wrong, namely that Venacorp had Licensing Commission approval. Mr Williams visited the hotel on two occasions to view in a general way the alterations and he met fortnightly with Mr French to discuss business but he did not learn that an elevator was or was to be installed as part of the renovation work. On his first visit the upper floor was "a bit of a mess … There was builders' materials and demolition material everywhere". The second visit was almost at completion of the project. During his visits he did

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1 Reasons for judgment, [29].

not inspect the property; inspections only took place yearly. He became aware of the accident and that an elevator had been installed during the renovations only some time after the appellant was injured. He did not think that it was his responsibility to check the quality of the renovation work; this would have been interference in Venacorp's business.

[10] He agreed that personal safety could be at risk during the renovations. There was no evidence, however, that he was aware of any actual safety concerns. He did not make enquiries with the Licensing Commission or the Council to establish if approval for the renovations had been given; nor did he speak with the builder to make sure there was a registered builder on site. He was then unaware of his obligations under the workplace safety legislation.

Control

[11] The appellant contends that the primary judge erred in finding that the respondent did not have a non-delegable duty to exert control over the premises because its consent of 18 February 1992 allowing Venacorp to undertake the renovations was conditional on Venacorp obtaining adequate insurance and there is no evidence that Venacorp obtained the necessary insurance. It is for the appellant to establish that a condition of the consent was not met; he has not done so. This contention fails at its source.

[12] The appellant's main contention is that as the respondent's consent to the renovations turned on conditions imposed for the protection of the respondent's property, the respondent maintained control over the premises and was obliged to ensure the renovation work was done by a registered builder and that the elevator was safe.

[13] The fact that the respondent was the owner/lessor of premises on which the appellant was injured does not automatically give rise to a non-delegable duty: *WD & HO Wills v SRA*.[2] The landlord's duty is not one of strict liability to ensure either an absence of defects or that reasonable care is taken by another in respect of existing defects; nor is it a duty to guarantee that the premises are as safe as they can reasonably be made: *Jones v Bartlett*.[3] Only those relationships which generate a special responsibility or duty between the parties to take care will give rise to a non-delegable duty: *Kondis v State Transport Authority*[4] discussed and approved in *Burnie Port Authority v General Jones Pty Ltd*[5] where Mason CJ, Deane, Dawson, Toohey and Gaudron JJ observed:

> "In most, though conceivably not all, of such categories of case, the common 'element in the relationship between the parties which generates [the] special responsibility or duty to see that care is taken' is that 'the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised'. It will be convenient to refer to that common element as

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2 (1998) 43 NSWLR 338, 357; cf *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, 488.

3 (2000) 75 ALJR 1, [193].

4 (1984) 154 CLR 672, 685-687.

5 (1994) 179 CLR 520, 550-551.

> 'the central element of control'. Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person."

See also *Northern Sandblasting Pty Ltd v Harris*.[6]

[14] The relationship between the respondent and Venacorp was governed by the lease which included obligations upon the lessee to comply with regulations and ordinances "particularly the *Liquor Act*, 1912, the *Health Act*, 1937, the *Factories and Shop Act*, 1960, and the *Local Government Act*, 1936";[7] to permit the lessor, its agents or workmen to enter upon the premises to carry out work necessary for the preservation or improvement of the premises provided that as little inconvenience as practicable was caused to the lessee;[8] and to appoint the lessor its lawful attorney so that the lessor can exercise its rights, remedies and powers of re-entry and to protect its rights under the lease.[9] The lease also required the lessor's written consent before allowing the lessee to make structural alterations or additions, which then became the property of the lessor.[10] Under s 121(2) *Property Law Act* 1974 (Qld) a lessor cannot unreasonably withhold such consent but can impose reasonable conditions on the consent.

[15] Once the appellant gave its written consent to the work, the renovations were planned, and completely orchestrated by Venacorp. The appellant was not involved in any way in the renovation work which it understood was to be paid for by Venacorp. The appellant knew nothing of the elevator and so could not have known it was unsafe. It is true the respondent's consent to the renovations was conditional but there is no evidence the conditions imposed were not met or that Mr Williams or anyone else acting on behalf of the respondent became aware of any matters that required it to withdraw its consent or exercise its control as lessor prior to the accident.[11] The respondent's subsequent knowledge that Venacorp commenced the renovations before obtaining Licensing Commission approval did not require it to withdraw its consent or to exercise control as lessor. It was not obliged under the lease or at common law to ensure that Venacorp's renovation work was carried out by a registered builder. In any case, on the facts it is likely that enquiries would have revealed the builders were "J Marstella Builders" who were registered builders. There is no evidence that the respondent knew of Venacorp's deceitful holding out that the builder was registered. As an absentee lessor with limited rights of inspection under the lease, the respondent cannot be expected to have acted as a private detective.

[16] On the facts here, the respondent did not maintain such control over the premises as to require it to ensure its lessee's renovation work was done by a registered builder and that the elevator, installed during the renovations without its knowledge, was safe.

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6 (1997) 188 CLR 313, 399-404, esp at 402-403.

7 Cl 8.01; the *Health Act* 1937 (Qld) and the *Factories and Shop Act* 1960 (Qld) (repealed) incorporated matters of workplace safety.

8 Cl 21.01.

9 Cl 23.01.

10 Cl 24.01.

11 See *Jones v Bartlett*, ibid, Gaudron J at [88].

Vulnerability

[17] Questions of control and vulnerability are intrinsically interwoven: *Burnie Port Authority v General Jones Pty Ltd*,[12] *Jones v Bartlett*.[13] The appellant was vulnerable in his relationship with Venacorp, a potential and past employer, which provided him with accommodation in the hotel enabling him to carry out his duties as licensee; no doubt he felt some obligation to follow Mr French in the elevator to the upper level to learn his new duties and to ignore his own concern about the safety of the elevator.

[18] On the facts here, the appellant was in some ways in a position of greater control of the renovations than the respondent: he was aware that the renovations could affect his obligations as licensee; he reported some concerning safety issues to Venacorp's Mr French; he was not satisfied with the quality of all the renovation work, some of which he thought was done "very sloppily". He saw the respondent's representative on site on more than one occasion but he did not raise any of these safety concerns with him. In these circumstances, the appellant could not have reasonably expected the respondent (rather than Venacorp) to ensure the renovation work was carried out competently; both the respondent and the appellant were entitled to consider this was solely Venacorp's responsibility. The appellant's relationship with the respondent, however, was not one of vulnerability because the respondent, unlike Venacorp, was not in control of the renovation.

[19] The facts here do not establish that the respondent owed the appellant a non-delegable duty to ensure that renovations carried out by its lessee, Venacorp, were done in a competent manner so as to avoid the risk of injury to the appellant.

[20] I would dismiss the appeal with costs.

[21] **MACKENZIE J:** I agree with the President's reasons and the orders proposed by her.

[22] **HOLMES J:** I agree with the reasons for judgment of McMurdo P and with the orders she proposes.

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12 Ibid, per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, 551-552.

13 Ibid, Gaudron J, [91]-[92].