

立法會
Legislative Council

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**Paper for the meeting of the
Bills Committee on Noise Control (Amendment) Bill 2001
on 27 May 2002**

At the meeting of the Bills Committee on 22 April 2002, members discussed whether developers and principal contractors would be liable to prosecution for offences relating to construction work without a construction noise permit. The Legal Service Division was instructed to prepare a paper.

Statutory Provisions

2. The offences relating to construction work without a construction noise permit are provided in sections 6 and 7 of the Noise Control Ordinance (Cap. 400) (attached in the Annex). Members may note that the wording common to the offences is "any person who at any place carries out, or causes or permits to be carried out" a prohibited act commits an offence.

General Position

3. In Hong Kong, a person for whom building works are to be carried out ("the developer") is required under the Buildings Ordinance (Cap. 123) to appoint an authorized person (defined in the Ordinance) as the coordinator of such building works. The person is also required to appoint a registered building contractor to carry out building work for him. Under the Buildings Ordinance the building contractor has certain duties, including provide continuous supervision to the carrying out of the works. Usually the building contract would pass the control of the site to the building contractor for the purposes of the works. The building contractor would engage other contractors to carry out parts of the work ("the principal contractor" and "subcontractors"). The developer, principal contractor and subcontractors usually are independent legal entities.

4. In the context of offences relating to construction work without a construction noise permit, "any person" irrespective of capacity would be liable if he is involved in the prohibited act. Prima facie, a worker who carries out the act, the person who orders the work to be done, or the person in charge who permits the work to be done, would be caught by section 6 or 7. In general, criminal liability is only imposed on a person who intended to bring about or recklessly brought about the elements which constituted the crime ("mens rea"). A person is not liable for an act committed by another unless there are circumstances

that the law makes him also liable. For example, the person counseled or procured the commission of the criminal act by another would be liable. A person may also be liable for the criminal act of another if a strict liability offence is imposed on him.

Judicial Decision on Liability in Offences Relating to Construction Work without a Construction Noise Permit

5. In respect of offences under sections 6 and 7 of the Noise Control Ordinance, the court has held in HKSAR v Paul Y - ITC Construction Limited [1998] 3 HKC 189 ("the Paul Y case") that the legislation imposes strict liability on a principal contractor.

6. The facts of the case are typical. Paul Y - ITC Construction Limited ("the Appellant") was the principal contractor on a construction site. Also on the site were about 16 subcontractors and a large number of sub-subcontractors. All of them had employed a large number of workers to work on the site. The Appellant faced two summonses in the magistrate's court. The first was in respect of the offence of causing the use of powered mechanical equipment on a general holiday without a construction noise permit, contrary to section 6(1)(a) and (5) of the Noise Control Ordinance. The second was in respect of the offence of causing construction work to be carried out on a general holiday without a construction noise permit, contrary to section 6(2)(a) and (5). The magistrate convicted the Appellant of both summonses and imposed a fine of \$10,000 each. The Appellant appealed against conviction in respect both summonses.

7. When considering whether sections 6(1) and (2) were offences of strict liability, the Court of Appeal summarized the law relating to strict liability offences as follows:-

- "(1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence;
- (2) the presumption is particularly strong where the offence is 'truly criminal' in character;
- (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;
- (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern;
- (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the object of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

8. On applying the law to the facts of the case, the Court of Appeal held:-
- (a) the first point requires no further amplification;
 - (b) the offences were not 'truly criminal' in their nature, bearing in mind the stated object of the legislation in the preamble to the Ordinance, and that the offences spring not from any inherent evil in the conduct prohibited, but from the fact that such conduct is prohibited; (i.e. presumption of mens rea is not strong)
 - (c) the legislation did not intend to require proof of knowledge that the particular breaches were committed. The reason for the Court to hold this view is that for matters concerning regulation of an activity involving potential danger to public health, safety or morals in which citizens have a choice to participate or not, the court may feel driven to infer that the legislature intends to impose a higher duty or care on those who choose to participate, and to place on them an obligation to take whatever measures necessary to prevent the prohibited act, without regard to considerations of cost or business practicability;
 - (d) offences relating to noise control were concerned with public well-being and very closely associated to concerns of public health. Unless properly controlled in Hong Kong, unauthorised noise is likely to disrupt the lives of ordinary people, leading in a number of ways to deterioration in health quite apart from the obvious nuisance it poses to the public;
 - (e) it would effectively render the legislation useless and powerless if only those persons who were actually working on the site could be prosecuted. Only strict liability can be regarded as an effective means of promoting the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited acts.

9. The Court of Appeal held that the offences in sections 6(1) and (2) carried strict liability. It is likely that the other offences in sections 6 and 7 would also be so held since the identical wording is used the same context.

The Principal Contractor is Liable as it "Causes" the Prohibited Act

10. To be liable under section 6(1) and (2), the principal contractor must have caused or permitted the prohibited act. In the Paul Y case, the Court of Appeal found that the Appellant had caused the relevant breaches based on the following facts: the Appellant employed a sub-agent to monitor and report on the progress of the work, the sub-agent monitored the work by observation and giving instructions to workers employed by the

Appellant. The sub-agent had to go to the site for inspection every day. When workers violated the regulation, he had the authority to ask them to stop. When workers had work to do there, including workers not employed by the Appellant, the sub-agent had to go to the site, although he had no control over workers not employed by the Appellant. Also, the subcontractors had to report to the Appellant at the contractors' meetings. The Appellant's task was to coordinate the work that was being done by the various sub-contractors and draw it together in terms of the contractual obligations to complete the work on the site.

11. The Court held that the principal contractor had the same responsibility as if it had done the work itself because it initiated the work; it was responsible for the whole site and had a financial interest in the work being carried out. Although it had contracted out the work to other sub-contractors and it was the workers who were the perpetrators of the offences, the Court held that the principal contractor had caused the offences to be committed by employing the sub-contractors, and thereby the workers, to do the work. By these the Court found a direct link between the Appellant and those who were carrying out the work.

Conclusion

12. In the light of the Court of Appeal decision in the Paul Y case, it would seem that a principal contractor is liable for offences relating to construction work without a construction noise permit because by virtue of its roles in the works it would be considered as having caused the prohibited act and strict liability is imposed on it. As to a developer, because it is not normally involved in the control of the construction site and work, it is less likely that they could be proved to have caused or permitted the work. Ultimately, whether a person has carried out, or caused or permitted to be carried out a prohibited act would be determined according to the applicable law and the facts of the individual case.

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Encl

Noise from Construction Sites

建築地盤發出的噪音

6. Noise from construction sites

(1) Subject to subsection (6), any person who at any place between the hours of 7 p.m. and 7 a.m., or at any time on a general holiday, uses, or causes or permits to be used, any powered mechanical equipment for the purpose of carrying out any construction work other than percussive piling—

- (a) in respect of which a construction noise permit is not in force; or
- (b) otherwise than in accordance with the conditions of a construction noise permit in force in respect thereof,

commits an offence.

(2) Subject to subsection (6), any person who at any place within a designated area between the hours of 7 p.m. and 7 a.m., or at any time on a general holiday, carries out, or causes or permits to be carried out, any construction work prescribed for the purposes of this subsection— (Amended 2 of 1994 s. 3)

- (a) in respect of which a construction noise permit is not in force; or
- (b) otherwise than in accordance with the conditions of a construction noise permit in force in respect thereof,

commits an offence.

(3) Subject to subsection (6), any person who at any place between the hours of 7 a.m. and 7 p.m. on any day, not being a general holiday, carries out, or causes or permits to be carried out, any percussive piling—

- (a) in respect of which a construction noise permit is not in force; or
- (b) otherwise than in accordance with the conditions of a construction noise permit in force in respect thereof,

commits an offence.

(4) Subject to subsection (6), any person who at any place between the hours of 7 p.m. and 7 a.m., or at any time on a general holiday, carries out, or causes or permits to be carried out, any percussive piling commits an offence.

(5) Subject to subsection (6), any person who commits an offence under this section shall be liable—

- (a) on first conviction to a fine of \$100,000;
- (b) on second or subsequent conviction, to a fine of \$200,000,

and in any case to a fine of \$20,000 for each day during which the offence continues. (Amended 2 of 1994 s. 9)

(6) The owner, tenant or occupier of domestic premises may perform construction work in those premises without a construction noise permit being in force in respect thereof provided that—

- (a) the construction work is performed only by the owner, tenant or occupier, as the case may be;

6. 建築地盤發出的噪音

(1) 除第(6)款另有規定外，任何人於下午7時至翌日上午7時，或於公眾假日的任何時間，在任何地方使用，或促使或准許使用，任何機動設備進行任何非撞擊式打樁工程的建築工程，並在使用該等設備時，出現以下情形，即屬犯罪——

- (a) 未持有與該工程有關的有效建築噪音許可證；或
- (b) 不按照與該工程有關的有效建築噪音許可證上所列條件。

(2) 除第(6)款另有規定外，任何人於下午7時至翌日上午7時，或於公眾假日的任何時間，在指定範圍內的任何地方進行，或促使或准許進行，任何為施行本款而訂明的建築工程，並在進行工程時，出現以下情形，即屬犯罪—— (由1994年第2號第3條修訂)

- (a) 未持有與該工程有關的有效建築噪音許可證；或
- (b) 不按照與該工程有關的有效建築噪音許可證上所列條件。

(3) 除第(6)款另有規定外，任何人於非公眾假日的任何一日，由上午7時至下午7時，在任何地方進行，或促使或准許進行，任何撞擊式打樁工程，並在進行工程時，出現以下情形，即屬犯罪——

- (a) 未持有與該工程有關的有效建築噪音許可證；或
- (b) 不按照與該工程有關的有效建築噪音許可證上所列條件。

(4) 除第(6)款另有規定外，任何人於下午7時至翌日上午7時，或於公眾假日的任何時間，在任何地方進行，或促使或准許進行，任何撞擊式打樁工程，即屬犯罪。

(5) 除第(6)款另有規定外，任何人犯本條所訂的罪行——

- (a) 經第一次定罪，可處罰款 \$100,000；
- (b) 經第二次或其後定罪，可處罰款 \$200,000，

而無論任何情形，繼續犯罪則可按犯罪期間處罰款每日 \$20,000。 (由1994年第2號第9條修訂)

(6) 住用處所的業主、租戶或佔用人，可在未備有有效的建築噪音許可證的處所進行建築工程，但——

- (a) 該建築工程須僅限於由業主、租戶或佔用人(視屬何情況而定)進行；

- (b) the only powered mechanical equipment used for the construction work is portable and designed for operation while held by hand without any other form of support; and
- (c) only one item of powered mechanical equipment is in use in the premises at any one time. (Replaced 2 of 1994 s. 3)

7. Noise from construction work contrary to regulations

(1) Any person who at any place on any occasion carries out, or causes or permits to be carried out, any construction work contrary to any noise control regulations made under section 27(1) for the purposes of this section commits an offence.

(2) Any person who commits an offence under this section shall be liable—

- (a) on first conviction to a fine of \$100,000;
- (b) on second or subsequent conviction, to a fine of \$200,000,

and in any case to a fine of \$20,000 for each day during which the offence continues. (Amended 2 of 1994 s. 9)

8. Construction noise permits

(1) The Authority may issue construction noise permits and may impose in relation to any construction noise permit any condition he thinks fit.

(2) An application for a construction noise permit shall be made to the Authority in the prescribed form and manner and be accompanied by the prescribed fee.

(3) In considering an application under this section, the Authority shall be guided by any Technical Memoranda issued from time to time under section 9(1).

(4) Not later than 28 days after an application made under this section is received by the Authority, he shall issue a construction noise permit or serve on the applicant written notice of his refusal to issue the permit, and if at the end of those 28 days he has done neither of those things a permit shall be deemed to have been issued.

(5) The Authority may refuse to issue a construction noise permit if the issue of a permit would be contrary to any principle, procedure, guideline, standard or limit set out in any Technical Memoranda issued from time to time under section 9(1). (Amended 37 of 1997 s. 2)

(6) Where the Authority issues a construction noise permit, the Authority shall serve written notice of that decision on the applicant and in the case of a permit subject to conditions issued in respect of percussive piling, shall adequately state in the notice the reasons for the imposition of those conditions.

- (b) 可用作建築工程的唯一機動設備為便攜式的和在設計上不必其他形式支撐而能手提操作的；及
- (c) 在任何一段時間內，有關的處所只能有一項機動設備正在使用。（由 1994 年第 2 號第 3 條代替）

7. 違反規例的建築工程噪音

(1) 任何人於任何時候、任何地方進行，或促使或准許進行的任何建築工程，是會違反為施行本條而根據第 27(1) 條所訂立的任何噪音管制規例的，即屬犯罪。

(2) 任何人犯本條所訂的罪行——

(a) 經第一次定罪，可處罰款 \$100,000；

(b) 經第二次或其後定罪，可處罰款 \$200,000，

而無論任何情形，繼續犯罪則可按犯罪期間處罰款每日 \$20,000。（由 1994 年第 2 號第 9 條修訂）

8. 建築噪音許可證

(1) 監督可發出建築噪音許可證，並可就任何建築噪音許可證施加其認為適當的條件。

(2) 申請建築噪音許可證，須按訂明格式及方式向監督提出，提出申請時，須同時繳交所訂明的費用。

(3) 監督在考慮根據本條提出的申請時，須以根據第 9(1) 條不時發出的技術備忘錄為指引。

(4) 監督接獲根據本條提出的申請後，須在不遲逾 28 日的期間內發出建築噪音許可證，或向申請人送達關於拒發許可證的通知書；但若在該 28 日期限屆滿時，監督仍未發出許可證或向申請人送達通知書，則須當作為已發出許可證。

(5) 如發出建築噪音許可證會違反根據第 9(1) 條不時發出的技術備忘錄上所載的準則、程序、指引、標準或限度，則監督可拒絕發給該許可證。（由 1997 年第 37 號第 2 條修訂）

(6) 如監督決定發出建築噪音許可證，須將其決定以通知書送達申請人；如許可證是為撞擊式打樁工程而發出，並須受條件規限者，監督須在通知書內充分述明施加該等條件的理由。