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Legislative Council

LC Paper No. LS9/03-04

Panel on Administration of Justice and Legal Services

Referral from the Subcommittee on proposed resolution under section 7 of the Factories and Industrial Undertakings Ordinance

Review of legislative provisions

Introduction

The Subcommittee (the Subcommittee) on proposed resolution under section 7 of the Factories and Industrial Undertakings Ordinance (the Ordinance) has recommended that a referral be made to the Panel for follow-up.

Background

2. The Subcommittee was tasked to examine four sets of amendment regulations made by the Commissioner for Labour (the Commissioner) under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59). One of them was the Construction Sites (Safety)(Amendment) Regulation 2003 (the amendment regulation), which sought, among other things, to amend regulations 38A(1) and 44(1) of the Construction Sites (Safety) Regulations (CSSR) to make them enforceable in light of the Court of First Instance (CFI) judgment in an appeal case, *HKSAR v. Lam Geotechnics Limited.*

3. In essence, the CFI ruled as follows -

(a) The regulation-making power under which the CSSR were promulgated was conferred on the Commissioner by section 7 of the Ordinance. Under section 7, regulations could be made to prescribe means of ensuring safety of persons in industrial undertakings. Section 7(1)(o) enabled duties to be imposed on proprietors, contractors and persons employed and was the enabling power which must be regarded as ancillary to the specific enabling powers in paragraphs (a) to (n), and (p) of section 7(1). The Commissioner was obliged to prescribe the means of ensuring safety, or of securing the removal of danger. Until he did so, he could not make provision of such means the subject of a duty;

(b) The elements of the offence purportedly set out in regulation 44 were therefore incompletely defined because of the uncertainty in the words 'to the satisfaction of the Commissioner', which meant that those who were required to regulate their conduct according to the regulation could not ascertain, before a prosecution was brought, what fencing measures would satisfy the Commissioner. Accordingly, regulation 44 in its current form was ultra vires its enabling legislation.

4. As the same problem existed in regulation 38A(1), the amendment regulation sought to amend both regulations 38A(1) and 44(1) by prescribing the specific safety measures required under those regulations so as to ensure that they are within the scope of the enabling provisions in the Ordinance.

Issue for Referral

5. The legal adviser to the Subcommittee has pointed out that the court ruling might impact on other legislative provisions which contain the drafting formula 'to the satisfaction' of an enforcement authority, and has asked whether the Administration would consider reviewing all legislative provisions drafted with such a formula. The Administration has undertaken to bring the attention of the relevant enforcement agencies to the court ruling.

6. As the issue raised is outside its purview, the Subcommittee has recommended to the House Committee that the review of legislative provisions which contain the drafting formula 'to the satisfaction' of an enforcement agency be followed up by the Panel.

Enclosures

7. Copy of the court judgment, the relevant enabling provisions in the Ordinance and the CSSR regulations that have been amended are attached in Appendix I, II and III.

Prepared by

CHEUNG Ping-kam, Arthur
Senior Assistant Legal Adviser
Legislative Council Secretariat
29 October 2003

<u>Encls.</u>

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> These certificates are, we consider, having regard to the statutory provisions relating to them, of great evidential worth which is in no way lessened by the care evinced by the staff of the Department of Rating and Valuation in their preparation. It must not be overlooked that before the certificate is issued, the premises have been visited. True, the officials concerned measure the individual parts of the premises and attribute to each part a percentage user and they may well be wrong (as the trial judge thought they were here) in their attributions. They also, however, have an opportunity, by their visit of assessing the overall effect of the occupancy, an advantage not enjoyed by the trial judge. When the intimation (as to the right of appeal) to the tenant endorsed on the certificate is ignored, his position becomes the more untenable. The trial judge is, of course, entitled to look at all the evidence to see if the prima facie evidence afforded by the certificate is rebutted but it was for the respondent to show that it is rebutted not for the appellant to show that it is not.

Whilst the evidence of the nature of the occupation permit (which was issued in 1954) is of no great assistance to me given the *actual* use of the premises since before 1986, I have been assisted by the evidence before me relating to the size and profitability of the laundry business run by the defendant and, before him, by his sister-in-law Madam Cheung. It was plainly substantial.

I am quite satisfied that the primary user of the premises known as Ground Floor (including cockloft) 10A Davis Street Hong Kong during the relevant period was non-domestic — it was business user; that accordingly the premises fall within Pt V of the Ordinance, and the Notice to Quit dated 22 August 1997 brought the defendant's tenancy to an end on 28 February 1998.

Accordingly, I make the declaration sought by the plaintiff that the defendant was in wrongful and unlawful occupation of the premises between 28 February 1998 and 12 August 2000.

I make a costs order nisi in favour of the plaintiff.

Reported by Kennis Tai

HKSAR v LAM GEOTECHNICS LTD

COURT OF FIRST INSTANCE
MAGISTRACY APPEAL NO 379 OF 2000
BEESON J
8 SEPTEMBER, 20 NOVEMBER 2000

Health and Safety – Duty to fence machinery – No provision made for fencing criteria 'to the satisfaction of the Commissioner' – Whether onus on defence to prove satisfaction of Commissioner – Whether wording 'to the satisfaction of the Commissioner' too vague and uncertain – Whether regulation ultra vires – Construction Sites (Safety) Regulations (Cap 59) reg 44(1)(c)

Statutes – Subsidiary legislation – Construction Sites (Safety) Regulations reg 44(1)(c) – Duty to fence machinery – No provision made for fencing criteria 'to the satisfaction of the Commissioner' – Whether wording 'to the satisfaction of the Commissioner' too vague and uncertain – Whether regulation ultra vires – Construction Sites (Safety) Regulations (Cap 59) reg 44(1)(c)

公共衛生與市政事務－圍封機械的責任－沒有就圍封「至處長滿意」的標準作出規定－辯方是否有責任證明處長滿意－「處長滿意」一詞是否太含糊和不明確－規例是否越權－《建築地盤(安全)規例》(第59章)第44(1)(c)條

法規－《建築地盤(安全)規例》第44(1)(c)條－圍封機械的責任－沒有就圍封「至處長滿意」的標準作出規定－「處長滿意」一詞是否太含糊和不明確－規例是否越權－《建築地盤(安全)規例》(第59章)第44(1)(c)條

The appellant, the contractor responsible for a drilling rig, was summonsed for a contravention of reg 44(1)(c) of the Construction Sites (Safety) Regulations (CS(S)R) made under the Factories and Industrial Undertakings Ordinance (Cap 59). Under reg 44, a contractor had a duty to ensure that every dangerous part of the machinery was securely fenced to the satisfaction of the Commissioner of Labour. In ruling that the appellant had a case to answer, the magistrate held that reg 44 imposed on the defence or persons in the position of the appellant that the fencing arrangements would satisfy the Commissioner. The evidence showed that the fencing of drilling rigs was a matter for individual contractors before this incident, and there were no specific guidelines generally about the need for guards for drilling rigs. The appellant was convicted after trial.

The appellant appealed against the conviction on three grounds: (i) reg 44 was ultra vires the enabling powers conferred on the Commissioner by the parent Ordinance by including the words 'to the satisfaction of the Commissioner' because it failed to prescribe the fencing criteria which would satisfy the Commissioner; accordingly, the magistrate was wrong in ruling that there was a

case to answer and that the appellant had the onus of ensuring secure fencing to the satisfaction of the Commissioner; (ii) even if the onus was on the appellant, it had discharged that onus; and (iii) the magistrate wrongly disallowed questions put by defence counsel to elicit evidence about the past policy and practice of the Commissioner relating to fencing of drilling rigs which satisfied him.

Held, allowing the appeal:

(1) The regulation-making power under which the CS(S)R were promulgated was conferred on the Commissioner by s 7 of the Factories and Industrial Undertakings Ordinance. Under s 7, regulations could be made to prescribe means of ensuring safety of persons in industrial undertakings. Section 7(1)(o) enabled duties to be imposed on proprietors, contractors and persons employed and was the enabling power which must be regarded as ancillary to the specific enabling powers in paras (a) to (n); and (p) of s 7(1). The Commissioner was obliged to prescribe the means of ensuring safety, or of securing the removal of danger. Until he did so, he could not make provision of such means the subject of a duty (at 374F-H, 375F-H).

(2) The elements of the offence purportedly set out in reg 44 were therefore incompletely defined because of the uncertainty in the words 'to the satisfaction of the Commissioner', which meant that those who were required to regulate their conduct according to the regulation could not ascertain, before a prosecution was brought, what fencing measures would satisfy the Commissioner. Accordingly, reg 44 in its current form was ultra vires its enabling legislation. *Attorney General v Chiu Chun Hoo* (Crim App 925/1983, unreported) not followed (at 375I-376B).

(3) If reg 44 did place an onus on the appellant of ensuring secure fencing to the satisfaction of the Commissioner, the appellant had established, on the balance of probabilities, that the Commissioner had been satisfied with the guarding arrangements and he had succeeded in discharging the onus. In determining this question, the court had to take into account the objective effect of the promulgation of the Commissioner's standards. In the present case, the Labour Department had failed to make known any requirements for guarding of machinery, whether generally to the industry or to the appellant. The rig in question was never examined by the inspectors and there were no specific written guidelines stating whether any guards were required. Further, the magistrate wrongly restricted the appellant from questioning on relevant matters, once he had ruled that there was an onus on the appellant to show that the Commissioner had been satisfied. That could only be done by reviewing on a wide ambit industry practices and the Labour Department attitude as manifested over a period of time (at 376C-D, 376I-377B, 377I-378A, 378F-379A).

Cases referred to

Attorney General v Chiu Chun Hoo (Crim App 925/1983, unreported) (HC)
John Summers & Sons Ltd v Frost [1955] AC 740, [1955] 1 All ER 870, [1955] 2 WLR 825 (HL)
R v Meyer Aluminium Ltd (MA 807/1984, unreported) (HC)
Utah Construction & Engineering Property Ltd v Pataky [1966] AC 629, [1965] 3 All ER 650, [1966] 2 WLR 197 (PC)

Legislation referred to

Construction Sites (Safety) Regulations (Cap 59) regs 44(1)(c), 45
Factories and Industrial Undertakings Ordinance (Cap 59) s 7(1), (2), (5)
Factories and Industrial Undertakings Regulations (Cap 59) reg 24(a)
Factories and Workshops Ordinance (No 18 of 1937)
Factories and Workshops Regulations 1937 regs 13(a), (b), (g)
Factories Act 1937 [Eng] ss 12, 14, 60

[*Editorial note*: for a discussion of the grounds for challenging subsidiary legislation generally, see further *Halsbury's Laws of Hong Kong* Vol 23, Statutes [365.119]; reg 44 of the Construction Sites (Safety) Regulations, reg 24(a) of Factories and Industrial Undertakings Regulations (Cap 59) and s 7(1) of the Factories and Industrial Undertakings Ordinance (Cap 59) provide, so far as material, as follows:

44. Fencing of machinery

(1) A contractor shall ensure that —

(a) every flywheel and moving part of any prime mover;
(b) every part of transmission machinery; and
(c) every dangerous part of other machinery (whether or not driven by mechanical power),

for which he is responsible is securely fenced to the satisfaction of the Commissioner unless it is in such a position or of such construction as to be as safe to every workman on the construction site as it would be if it were securely fenced.

(2) Where under para (1) parts of any machinery are required to be fenced, the contractor shall ensure that the fencing is kept in position while the parts are in motion or in use, except where the parts are necessarily exposed for examination or for any lubrication or adjustment shown by the examination to be immediately necessary.

7. Power of Commissioner to make regulations, etc.

(1) The Commissioner may in respect of industrial undertakings by regulation prescribe or provide for —

(h) means of ensuring the safety of persons in industrial undertakings and of relieving persons suffering from the effects of accidents in industrial undertakings; (*Replaced 4 of 1969 s 6*)
(i) means of securing the removal of any danger or defect;

...

imposing duties on proprietors, contractors and persons employed; (*Amended 52 of 1973 s 3*)

(p) generally, carrying into effect the provisions of this Ordinance.

24. Fencing of dangerous platforms, liquids, etc

In every notifiable workplace — (*50 of 1985 s 9*)

(a) all platforms, pits and openings in floors and every other place liable to be dangerous to persons; and

(b) ...,

shall be securely fenced to a height of not less than 900 millimetres or otherwise protected to the satisfaction of the Commissioner. (*LN 238 of 1984*)]

Appeal

This was an appeal by Lam Geotechnics Ltd against a conviction for failing to ensure that its drilling machinery was securely fenced to the satisfaction of the Commissioner of Labour contrary to reg 44(1)(c) of the Construction Sites (Safety) Regulations (Cap 59). The facts appear sufficiently in the following judgment.

James Collins (Liu Choi & Chan) for the appellant.

Henry Hung (Director of Public Prosecutions) for the respondent.

Beeson J: The appellant company appeals against its conviction for a contravention of s 44(1)(c) of the Construction Sites (Safety) Regulations (CS(S)R) made under the Factories and Industrial Undertakings Ordinance (FIUO) (Cap 59).

The particulars of the information were that the appellant on 6 January 1999, being the contractor responsible for a machine, namely a drilling rig at Kong Sin Wan Reclaimed Area ... 'did fail to ensure that every dangerous part of the machinery was securely fenced to the satisfaction of the Commissioner, such machinery not being in such a position or of such construction as to be as safe to every workman on the construction site as it would be if it were securely fenced.'

There was no dispute about the facts of the case. The site was in an area being considered for the construction of a highway to link the northern shore and western shore of Hong Kong Island. The appellant was engaged by the HKSAR Government to determine the alignment for part of the route. To carry out this task soil samples were required from areas along the route.

A labour sub-contractor (PW3) working for the appellant was with his employee (PW4) using a drilling rig to obtain soil samples at the site. The appellant owned the drilling rig which had a shaft which revolved at 1000 to 2000 revolutions per minute, with a guard to fence off the shaft. The guard did not provide complete fencing; a gap of about 24cm was not covered. PW4 was standing near the rig when he slipped, his clothing came into contact with the exposed part of the rotating shaft and his right arm was torn off.

Grounds of appeal

The main ground of appeal was that the magistrate erred in law by ruling that appellant had a case to answer, insofar as he held the words 'shall ensure that ... every dangerous part of ... machinery for which he is responsible is securely fenced to the satisfaction of the Commissioner ...,' in the subsidiary legislation on which the relevant criminal liability was founded, should be construed as affording a defence, which appellant had the onus of establishing on a balance of probabilities.

The appellant argued that the elements of the offence were incompletely defined by reg 44, because of ambiguity and uncertainty inherent in the words — 'to the satisfaction of the Commissioner', which qualified the absolute obligation to ensure that dangerous parts of machinery were securely fenced. Further, persons, including the appellant, who were required to regulate their conduct in accordance with reg 44, could not ascertain, unless and until a prosecution was instituted, what fencing measures, falling short of complete observance of the unqualified obligation to ensure secure fencing, would satisfy the Commissioner.

The appellant argued that the regulation was ultra vires enabling powers conferred on the Commissioner by the parent Ordinance, because by including the words 'to the satisfaction of the Commissioner', it failed to prescribe with sufficient particularity the elements of a criminal offence, either the means of ensuring the safety of persons in industrial undertakings, or, the means of securing the removal of any danger or defects.

The elements of the offence were not sufficiently defined unless fencing criteria which would satisfy the Commissioner for the purposes of reg 44 were prescribed by law, or alternatively, if not prescribed by law, the Commissioner had previously taken sufficient steps to notify what his criteria were, either generally, or, at least, to the appellant company.

The prosecution had to prove beyond reasonable doubt that the appellant had failed to fence according to such criteria. Failure to fence to the satisfaction of the Commissioner could not be established simply by the Commissioner instituting a prosecution for contravention of reg 44. Counsel for the appellant submitted that the charge should be struck out or, alternatively, that the court should find the prosecution had not established a prima facie case against the appellant.

Ground 2

The second argument was that even if the court decided the magistrate rightly held reg 44 imposed an onus on the appellant to show the Commissioner was satisfied with the fencing arrangements, the appellant had discharged that onus. The appellant relied on the arguments made to

the magistrate as to the correct approach to be adopted by the court, in deciding whether the Commissioner has indicated expressly or impliedly that he is satisfied with fencing arrangements.

Ground 3

This ground, (which assumed that the magistrate was right in law as to the burden cast on the appellant) was that the magistrate wrongly disallowed questions put by defence counsel when cross-examining prosecution witnesses to elicit evidence about the past policy and practice of the Commissioner relating to fencing of drilling rigs which satisfied him. Defence counsel's attempts to adduce evidence to discharge the onus, had been impeded or prejudiced.

Consideration of Ground 1

Regulation 44

Regulation 44 of the CS(S)R, including the words 'to the satisfaction of the Commissioner' derives from the Factories and Workshops Regulations, made under the Factories and Workshops Ordinance No 18 of 1937, which came into force on 1 January 1938. The Ordinance appears to have followed the United Kingdom Factories Act 1937, although in simpler form.

The 1937 Hong Kong Regulations regarding the duty to provide protection from dangerous parts of machinery are expressed differently from their equivalents in the UK legislation.

Mr Collins, for the appellant, contended that reg 44 is apparently the sole survivor of a style of legislative drafting and an administrative outlook from a period in the colonial era when, he opined, challenges to the vires of subsidiary legislation were rare, with the emphasis more on administrative control than on the observance of strict niceties of the law.

Regulations 13(a) and (b) of the 1937 Regulations follow closely ss 12 and 14 of the UK Factories Act 1937. The appellant accepted the principle in *John Summers & Sons Ltd v Frost* [1955] AC 740 that a provision which requires, for example 'every dangerous part of any machinery should be securely fenced' imposes an absolute obligation which must be fulfilled, even if the practical consequence of so doing is that the machinery becomes commercially unusable.

However, the 1937 Regulations (reg 1) defined 'securely fenced' to mean 'securely fenced to the satisfaction of the Commissioner'. It was submitted that that definition radically changes the character of the offences constituted by contraventions of regs 13(a), (b) and (g) of the 1937 Regulations and their contemporary legislative descendant, which is reg 44 of the CS(S)R.

Although the duty remains absolute, it is modified to the extent that the absolute obligation to fence is to be in a manner which meets the Commissioner's satisfaction. This requires, necessarily, that the measures, standards or criteria which would, or do, satisfy the Commissioner in respect of any particular circumstances coming within the ambit of the regulation, shall be made known before any prosecution for a contravention. If not, a person subject to the duty does not know what he must do to fulfil it and is unable to ensure he does not risk breaking the law.

The appellant contended that if the Commissioner possesses and exercises a quasi-legislative power to determine by administrative decision what state of affairs amounts to the commission of a criminal offence, he can keep the elements of actus reus hidden. This gives him a dispensing power to decide, at his discretion, that a particular state of affairs is, or is not, a contravention of the regulation.

The respondent argued, both at trial and on appeal, that by the actual decision to prosecute, the Commissioner, the prosecuting authority under the Ordinance, has given sufficient indication that the fencing is not to his satisfaction. The appellant argued, in my view rightly, that such reasoning cannot be correct.

The appellant submitted that the Commissioner must reveal in advance, not *ex post facto*, what does satisfy him; if not, the offence tainted with uncertainty. Those who bear the duty thus risk criminal liability for what the appellant termed 'an indefinite spectrum of factual scenarios'. The appellant argued that reg 44 as a provision of subsidiary, not primary, legislation, was subject to the *ultra vires* doctrine.

Viewing comparable legislative provisions does not help decide the point as the words 'to the satisfaction of the Commissioner' are used rarely. There do not appear to be any cases in which these words, in the context of reg 44, have been examined. At an earlier time, reg 45 of the CS(S)R provided that working platforms, openings in floors and 'every other place liable to be dangerous to persons' should be 'securely fenced to a height of not less than three feet, or otherwise protected to the satisfaction of the Commissioner.'

In *Attorney General v Chiu Chun Hoo* (Crim App 925/1983, unreported), Cons JA held that this provision created one offence, and not as was argued before him, two separate and distinct offences. All the prosecution had to do under reg 45 was prove that the place, being a place within the scope of the provision, was not securely fenced to a height of at least three feet. Whether the fencing was secure was a matter for the court to determine on the evidence. That provision thus set out clearly the criterion so those subject to it knew how to satisfy it.

Cons JA considered that the additional words 'or otherwise to the satisfaction of the Commissioner' merely provided a defendant with 'a

possible means of escape from the liability that would otherwise fall upon him'. The prosecution had to prove the failure to fence to the requisite height, thereafter it was for the contractor to show, if he could, that the Commissioner was satisfied by some other action on his part.

A similar provision occurs in reg 24(a) of the Factories and Industrial Undertakings Regulations, also made under (Cap 59) (FIUO). In *R v Meyer Aluminium Ltd* (1985) (MA 807/1984, unreported) the meaning of the regulation was considered. An employee fell into an unfenced stairwell and was killed. There was evidence that the Commissioner's inspectors had visited the site on earlier occasions but did not complain about the state of the stairwell. Leathlean J said 'if the appellant had succeeded in proving upon the balance of probability that the stairwell was protected to the satisfaction of the Commissioner it was entitled to be acquitted'. That case was remitted to the magistrate to make findings 'whether the evidence that none of the inspections prior to the accident prompted any complaint by the Commissioner about the stairwell warrants the inference that the stairwell was protected to the satisfaction of the Commissioner'.

Regulation 44 of the CS(S)R differs in structure. The duty is not laid down by reference to clearly specified criteria. There is no question of 'or otherwise to the satisfaction of the Commissioner'. The prosecution under reg 44 must prove all the elements of the offence. According to the appellant, the provision does not cast a burden on a defendant to show on a balance of probabilities that the Commissioner was satisfied.

The application of the doctrine of ultra vires to reg 44

The regulation-making power under which the CS(S)R were promulgated is conferred by s 7 of the FIUO on the Commissioner. By s 7(5) regulations made can provide that contravention of specified provisions shall be an offence and may provide penalties for those offences.

Mr Collins identified three regulation-making powers in s 7(1)(h)(i) and (o) as providing appropriate *vires* for reg 44. Section 7(1)(h) enables regulations to prescribe 'means of ensuring safety of persons in industrial undertakings'; s 7(1)(i) enables the prescription of 'means of securing the removal of any danger or defect'. Section 7(1)(o), which appears the most relevant, enables duties to be imposed on proprietors, contractors and persons employed.

Section 7(2) enables the Commissioner to make 'special regulations' as appears to him to be reasonably practicable to meet the necessity of particular cases where he is satisfied that it is warranted. This power is expressed to be without prejudice to the generality of the power to make regulations under sub-s (1). Section 7(2) is almost identical to s 60 of the Factories Act 1937, which conferred a similar power on the Secretary of State in the United Kingdom.

In *Attorney General v Chiu Chun Hoo* (supra), Cons JA distinguished an authority on which the contractor in that case had sought to rely; the case of *Utah Construction & Engineering Property Ltd v Pataky* [1966] AC 629, an appeal from the Supreme Court of New South Wales to the Privy Council. That case held a regulation requiring that 'every drive and tunnel should be securely protected and made safe for the persons employed therein' to be *ultra vires*.

The enabling powers in *Utah Construction* authorised regulations for the manner of carrying out excavation work and safeguards and measures to be taken to secure the safety of persons doing such work. The Privy Council struck down the regulation as being unjustified under either provision, as it did not empower the imposition of a duty on employers to make a tunnel or drive absolutely safe and secondly, because the regulation did not indicate what measures ought to be taken.

Cons JA distinguished reg 45 CS(S)R, which he was considering, from the defective regulation in *Utah Construction*, because it did not require the contractor to make the place absolutely safe, but only to meet the designated fencing criterion. 'If he did that, he is immune from prosecution. He may instead, as already indicated, approach the Commissioner for dispensation. But in either of the events *he will know what he has to do.*' (*Attorney General v Chiu Chun Hoo*, supra) (emphasis supplied)

Mr Collins, submitted that under reg 44, the contractor does not know what to do and he should not be driven, as the respondent suggested, to seek the Commissioner's approval every time he is in doubt about whether he has complied properly with the regulation.

Cons JA expressed doubt whether para 7(1)(o) of FIUO took the Commissioner's powers any further than those granted to him by the remaining paragraphs of s 7(1). Mr Collins submitted that such doubt was well-founded, because s 7(1)(o) is an enabling power which must be regarded as ancillary to the specific enabling powers in paras (a) to (n). Para (p) which follows, is of a similar nature, generally carrying into effect the provisions of this Ordinance.

If that is so, Mr Collins suggests that the Commissioner is obliged to prescribe the means of ensuring safety, or of securing the removal of danger. Once he has done that, he may, under para (o), make the provision of such means the subject of a duty. It is submitted that reg 44 of the CS(S)R is *ultra vires* the FIUO since it does not prescribe the means of securing safe fencing.

Having considered the arguments advanced I am satisfied that the elements of the offence purportedly set out in reg 44 are incompletely defined because of the uncertainly in the words 'to the satisfaction of the Commissioner', which means that those who are required to regulate their

conduct according to the regulation cannot ascertain, before a prosecution is brought, what fencing measures would satisfy the Commissioner.

I find that reg 44 is ultra vires the enabling powers conferred on the Commissioner of Labour by the Factories and Industrial Undertakings Ordinance (Cap 59). Accordingly the charge against the appellant is struck out and the conviction quashed.

As I have allowed the appeal on appellant's first ground it is not strictly necessary that I go on to consider the other two grounds of appeal. However I think it helpful to consider and rule on them. For the second ground, I am satisfied that the appellant had established, on the balance of probabilities, from the evidence that was before the magistrate, that the Commissioner had been satisfied with the guarding arrangements and the appellant had succeeded in discharging the onus.

As what satisfies the Commissioner, must be something peculiarly within his own knowledge, it may be that he is satisfied at different times with different standards of protection. Counsel contended that as the standards under reg 44 are not prescribed by law, that was the effect of the words 'to the satisfaction of the Commissioner'. The court had to take into account the objective effect of the promulgation of the Commissioner's standards, insofar as he regards them as acceptable. It is not only what the Commissioner or his agents say definitely, but also what they fail to say, especially where they have had a clear opportunity to comment on some particular standard. It is not enough, argues the appellant, for the Commissioner to declare *after* a prosecution has been initiated what he says *was* the acceptable standard at the time of the alleged offence.

In the present case it is submitted that the evidence at trial showed the Labour Department had failed to make known any requirements, whether generally to the industry, or to this contractor. The appellant had been using drilling rigs over a period of 25 years without having attracted any opprobrium from the Commissioner as to the method of use or site practices. No recommendations had been made to the appellant, or to the industry to introduce, for example, telescopic guards which better protected the revolving shaft. The use of any form of guard was a comparatively recent practice; fixed guards had been used only for the last 10 years by appellant and others in the industry. Despite what must have been dozens of visits by occupational safety officers to construction sites where such rigs were operating, no cautions had been given, nor had prosecutions been instituted under reg 44.

The court's attention was drawn to the evidence of various witnesses in this regard. PW2 was an Occupational Safety Officer who had no special knowledge of drilling rigs, nor had he ever inspected one prior to this accident. He had received no specific instructions as to what constituted fencing 'to the Commissioner's satisfaction'. Appellant's counsel

complained that his attempts to pursue this line of cross-examination were blocked by the magistrate, after prosecuting counsel objected.

The proprietor of the sub-contracting company (PW3) operating the rig, had had 10 years experience operating such rigs and had used this particular type for 1½ years. He said the rig was normal as was the safety guard; other guards he encountered were of the same type. Labour Department inspectors inspecting the site had never examined the rig, or offered advice about related safety measures.

PW5 was a Principal Safety Officer of the Labour Department. This witness recommended that the machine should be equipped with an adjustable guard, but that, suggested the appellant, was with the benefit of hindsight. He did not say what the Commissioner's specific requirements were prior to the accident. He confirmed that until a few years ago adjustable guards on drilling rigs might not have been very common and were not common before the accident. He did not say that the Labour Department promoted the use of such guards before this accident. He confirmed that no relevant code of practice was promulgated by the Department and its only brochure about the guarding of machinery related to factory machinery. There were no specific written guidelines, whether in the form of subsidiary legislation, codes of practice, or booklets, stating that drilling rigs should have adjustable guards, or indeed any guard.

The trial transcript shows this witness appeared reluctant, or unable, to explain what he understood by the words 'to the satisfaction of the Commissioner'.

The defence called as witness the appellant's safety consultant, who produced inspectorate reports from the Labour Department for the period 1996 until 21 January 2000. None raised any complaint about rigs nor was any requirement for guards on drilling rigs noted. Only in January 2000, some eight months after this accident, was the matter raised.

The safety consultant said that non-adjustable guards only became usual some five years before the accident, at the time of the airport construction. The Labour Department was not the motivating force for introducing such guards, rather it was an industry move towards greater safety. He confirmed there had been no complaint about the fixed guard, a standard type, fitted to this particular rig. This witness said that adjustable guards were used very rarely, and were still uncommon even at the time of the trial.

Overall it appeared that before 6 January 1999, the fencing of drilling rigs was a matter for individual contractors. The requisite standards were not mentioned in inspectorate reports, at least in appellant's case, nor had the Labour Department advised the industry generally about the need for guards.

I am satisfied from the evidence that if reg 44 did place an onus on the appellant, that the appellant had discharged it. Given that the magistrate considered this onus was cast on the appellant, it is unfortunate that he prevented the appellant questioning witnesses on matters relevant to discharging it.

This leads to the appellant's third ground of appeal, that, even if the court holds the evidence does not go far enough to discharge the onus, the appellant was prevented unfairly by the rulings of the magistrate from placing relevant issues before the court.

Appellant's counsel submitted that evidence of industry-wide practices and of the safety inspectorate's dealings over the years with the appellant were relevant to discharging the onus, in particular the history of this drilling rig. The transcript shows that the magistrate blocked questions about the purpose of routine visits by inspectors and whether they provided advice to contractors; that he confined attempts to question PW3 about inspection visits over his 10 years experience to the operation of that rig at the particular site; that he stopped questioning of the prosecution's expert witnesses about steps the Labour Department took to make known to contractors the standards that operators of machinery should observe; as well as questions about the number of drilling rigs the appellant operated and questions about inspectorate reports on the appellant. The magistrate did not appreciate that even though a report did not refer to a particular rig, the contents of the report might, nonetheless, be relevant to discharging the onus the appellant bore.

The magistrate unnecessarily restricted the appellant in adducing the evidence necessary to satisfy the requirements of reg 44, as he himself had interpreted it. Once he had ruled that the appellant bore the onus, it was incumbent on the magistrate, subject to the usual rules of admissibility and relevance, to allow the appellant to adduce evidence, to show the attitude of the Labour Department and the standards of the industry, both as known to the industry operators and also as promulgated, if promulgated at all, by the Labour Department's Occupational Safety Inspectors. To confine witnesses to the specific drilling rig and to the particular site, when the appellant had to show on a balance of probabilities, what satisfied the Commissioner in terms of reg 44 was unfairly restrictive.

Accordingly, I allow the appeal on the basis of the appellant's first ground and conclude that reg 44 in its current form is *ultra vires* its enabling legislation. If that had not been so, the appellant would have succeeded on the second ground of appeal as the evidence at trial showed that the appellant had done all it could to establish on the balance of probabilities that the guard fencing was to the satisfaction of the Commissioner. For ground 3, the magistrate wrongly restricted the appellant from questioning on relevant matters, once he had ruled there

was an onus on appellant to show that the Commissioner had been satisfied. That could only be done by reviewing on a wide ambit industry practices and the Labour Department attitude as manifested over a period of time.

The fine paid by the appellant is ordered to be returned.

Reported by Richard Chan

(19) For the avoidance of doubt, it is hereby declared that subsection (5)(*b*) shall not operate to entitle an employer to terminate the contract of employment of an employee otherwise than in accordance with the provisions of the Employment Ordinance (Cap. 57) in the case of an employee within the meaning of section 2(1) of that Ordinance.

(Added 53 of 1999 s. 3)

(19) 為免生疑問，現宣布：就《僱傭條例》(第 57 章) 第 2(1) 條所指的僱員而言，除按照該條例的條文外，第 (5)(*b*) 款的施行並不令任何僱主有權終止任何僱員的僱傭合約。

(由 1999 年第 53 號第 3 條增補)

6C. Meaning of "at work" (工作時)

For the purposes of sections 6A, 6B and 6BA, a person is at work throughout the time when he is in the course of employment, but not otherwise.

(Added 71 of 1989 s. 5. Amended 53 of 1999 s. 4)

6C. "工作時" (at work) 的涵義

就第 6A、6B 及 6BA 條而言，任何人在受僱工作期間的整段時間，即為在工作時，此外則並非在工作時。

(由 1989 年第 71 號第 5 條增補。由 1999 年第 53 號第 4 條修訂)

7. Power of Commissioner to make regulations, etc.

(1) The Commissioner may in respect of industrial undertakings by regulation prescribe or provide for—

(*a*) prohibiting or controlling the employment of all persons or any class of persons in dangerous trades or scheduled trades;
(*b*) prohibiting or controlling the employment of women, young persons and children in industrial undertakings, and requiring registers to be kept of women, young persons and children employed in industrial undertakings;
(*c*) imposing obligations for securing compliance with the provisions of this Ordinance upon persons who employ women, young persons or children in industrial undertakings and upon the agents and servants of such persons;
(*d*) defining the duties and powers of all officers appointed under section 3; *(Amended 10 of 1965 s. 5)*
(*e*) exempting any industrial undertaking from the operation of this Ordinance or any part thereof;
(*f*) the forms to be used for the purposes of this Ordinance and the manner of publishing such forms; *(Replaced 50 of 1985 s. 3)*
(*g*) means of securing hygienic conditions;
(*h*) means of ensuring the safety of persons in industrial undertakings and of relieving persons suffering from the effects of accidents in industrial undertakings; *(Replaced 4 of 1969 s. 6)*
(*i*) means of securing the removal of any danger or defect;
(*j*) requiring notifications to be made in relation to accidents and such dangerous occurrences as may be specified in the regulations;

7. 處長訂立規例等的權力

(1) 處長可就工業經營而藉規例訂明或規定以下事宜——

(*a*) 禁止或管制僱用任何人或任何一類人從事危險行業或附表所列行業；
(*b*) 禁止或管制僱用婦女、青年及兒童在工業經營中工作，並規定須備存有關受僱在工業經營中工作的婦女、青年及兒童的登記冊；
(*c*) 對於僱用婦女、青年或兒童在工業經營中工作的人及其代理人和傭工，施加義務以確保本條例的條文獲得遵從；
(*d*) 界定根據第 3 條被委任的所有人員的職責及權力； *(由 1965 年第 10 號第 5 條修訂)*
(*e*) 豁免任何工業經營，使其不受本條例或其任何部分的實施所影響；
(*f*) 為施行本條例而使用的表格，以及公布此等表格的方式； *(由 1985 年第 50 號第 3 條代替)*
(*g*) 確保環境衞生的方法；
(*h*) 確保在工業經營中的人安全的方法和減輕在工業經營中的意外受害者所受損害的方法； *(由 1969 年第 4 號第 6 條代替)*
(*i*) 確保任何危險或欠妥之處得以消除的方法；
(*j*) 規定遇有規例中所指明的意外及危險事故時必須呈報；

(*k*) precautions to be taken against fire and providing for means of escape from fire;

(*l*) the taking for purposes of analysis of samples of materials or substances used or handled;

(*m*) requiring notifications to be made in relation to the occurrence amongst person who have been or are employed in industrial undertakings of such diseases as may be specified in such regulations;

(*n*) requiring the medical inspection by a Health Officer or by a medical practitioner employed by the proprietor of the industrial undertaking concerned of any person or of any class of person employed or intended to be employed in any industrial undertaking, and the keeping of records of any such inspections; *(Amended 4 of 1969 s. 6)*

(*o*) imposing duties on proprietors, contractors and persons employed; *(Amended 52 of 1973 s. 3)*

(*oa*) without prejudice to the generality of paragraph (*o*), requiring proprietors and contractors (including any class of proprietors and contractors)—

(i) to develop, implement and maintain any management system that relate to the safety of personnel in their industrial undertakings;

(ii) to prepare and revise safety policy statements in relation to the general safety policy of their industrial undertakings and make such statements available to persons employed;

(iii) to establish safety committees to identify, recommend and review measures to improve the safety and health of persons employed;

(iv) to employ, or otherwise use the services of, persons specified in regulations made under this section to assess the effectiveness of any management system referred to in subparagraph (i) as implemented; *(Added 53 of 1999 s. 5)*

(*ob*) in relation to any registration of persons referred to in paragraph (*oa*)(iv) or who operate schemes to train those persons (including any class of those persons)—

(i) the keeping of a register;

(ii) the specification of conditions (including requirements) for registration;

(iii) the recognition by the Commissioner of any scheme having regard to the scheme operator;

(iv) the better and more effectual carrying out of the scheme of registration; *(Added 53 of 1999 s. 5)*

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(*k*) 須採取的防火措施及提供走火通道；

(*l*) 為分析用而取去被使用或處理的物料或物質的樣本；

(*m*) 規定曾受僱或正受僱於工業經營的人週染有規例中所指明的疾病時必須呈報；

(*n*) 規定由衞生主任或由有關的工業經營東主所聘用的醫生，對受僱或擬受僱於工業經營工作的任何人或任何一類人進行身體檢查，並規定須備存關於該等檢查的紀錄； *(由 1969 年第 4 號第 6 條修訂)*

(*o*) 對東主、承建商及受僱的人施加責任； *(由 1973 年第 52 號第 3 條修訂)*

(*oa*) 在不損害 (*o*) 段的一般性的原則下，規定東主及承建商 (包括任何一類東主及承建商) 須——

(i) 發展、實施和維持任何關乎其工業經營中人員的安全的管理制度；

(ii) 就其工業經營的一般安全政策擬備和修訂安全政策説明書，並須將該等説明書提供予受僱的人；

(iii) 設立安全委員會，以找出、建議和檢討改善受僱的人的安全和健康的措施；

(iv) 僱用根據本條訂立的規例所指明的人或以其他方式使用上述的人提供的服務，就第 (i) 節提述的任何管理制度，評估已實施的該管理制度的效用； *(由 1999 年第 53 號第 5 條增補)*

(*ob*) 就 (*oa*)(iv) 段提述的人或營辦訓練該等人 (包括該等人中任何一類的人) 的計劃的人的註冊——

(i) 備存註冊紀錄冊；

(ii) 指明註冊條件 (包括指明所需的規定)；

(iii) 由處長在顧及某計劃營辦人的情況下承認有關計劃；

(iv) 更佳和更有效地實行註冊計劃； *(由 1999 年第 53 號第 5 條增補)*

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(*oc*) means of assessing by the Commissioner the performance of persons referred to in paragraph (*ob*); *(Added 53 of 1999 s. 5)*

(*od*) the appointment of a disciplinary board panel and a disciplinary board by the Secretary for Economic Development and Labour with— *(Amended L.N. 106 of 2002)*

(i) all such powers that are necessary for the purposes of conducting any hearing before the board;

(ii) power to exonerate or discipline the person concerned (including the power of cancellation of registration, suspension of registration, the imposition of a fine not exceeding $10,000 or reprimanding the person concerned);

(iii) power to make any order with respect to costs; *(Added 53 of 1999 s. 5)*

(*oe*) decisions in relation to which appeals may be made to the Administrative Appeals Board (including consequentially amending the Schedule to the Administrative Appeals Board Ordinance (Cap. 442)); *(Added 53 of 1999 s. 5)*

(*p*) generally, carrying into effect the provisions of this Ordinance.

(2) (*a*) Where the Commissioner is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in industrial undertakings is of such a nature as to cause risk of bodily injury to persons employed in connexion therewith, or any class of those persons, he may, without prejudice to the generality of the power to make regulations under subsection (1), make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case and in particular such special regulations may—

(i) prohibit or control the employment of all persons or any class of persons in connexion with any manufacture, machinery, plant, process, or description of manual labour; or

(ii) prohibit or control the use of any material or process;

and may impose duties on proprietors, contractors, employed persons and other persons. *(Amended 52 of 1973 s. 3)*

(*b*) Special regulations so made may apply to all industrial undertakings in which the manufacture, machinery, plant, process, or description of manual labour is used or to any specified class or description of such undertaking, and may provide for the exemption of any specified class or description of undertaking either absolutely or subject to conditions.

(3) All regulations made by the Commissioner shall be submitted to the Chief Executive, and shall be subject to the approval of the Legislative Council. *(Amended 54 of 2000 s. 3)*

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(*oc*) 處長評估 (*ob*) 段提述的人的表現的方法； *(由 1999 年第 53 號第 5 條增補)*

(*od*) 由經濟發展及勞工局局長委出紀律審裁委員團及具以下權力的紀律審裁委員會—— *(由 2002 年第 106 號法律公告修訂)*

(i) 為在該委員會席前進行任何聆訊所需的一切權力；

(ii) 寬免所涉的人的罪責或對該人施以紀律處分的權力 (包括取消註冊、暫時吊銷註冊、施加不超過 $10,000 的罰款或譴責所涉的人的權力)；

(iii) 在訟費方面作出任何命令的權力； *(由 1999 年第 53 號第 5 條增補)*

(*oe*) 規定可就何種決定向行政上訴委員會提出上訴 (包括可藉規例而對《行政上訴委員會條例》(第 442 章) 的附表作出相應修訂)； *(由 1999 年第 53 號第 5 條增補)*

(*p*) 概括而言，使本條例條文得以施行。

(2) (*a*) 如處長信納工業經營中所採用的任何製造作業、機械、工業裝置、工序或任何一類體力勞動的性質，會對受僱從事與之有關的工作的人或其中任何一類人造成身體傷害的危險，則在不損害第 (1) 款所賦予訂立規例的權力的概括性的原則下，處長可訂立他覺得合理切實可行及足以應付情況需要的特別規例，而該等特別規例尤其可訂明——

(i) 禁止或管制僱用任何人或任何一類人從事與任何製造作業、機械、工業裝置、工序或任何一類體力勞動有關的工作；或

(ii) 禁止或管制使用任何物料或工序；

並可向東主、承建商、受僱的人及其他人施加責任。 *(由 1973 年第 52 號第 3 條修訂)*

(*b*) 在如此情況下訂立的特別規例，可適用於採用有關的製造作業、機械、工業裝置、工序或任何一類體力勞動的所有工業經營，或該等工業經營中的任何指明類別或類型，該特別規例並可訂明，對某指明類別或類型的工業經營給予無條件或有條件的豁免。

(3) 處長訂立的規例均須呈交行政長官，並須經立法會批准。 *(由 2000 年第 54 號第 3 條修訂)*

認可活頁版，由香港特別行政區政府印務局局長印刷及發行

議決在對勞工處處長於2003年5月28日訂立的《2003年建築地盤(安全)(修訂)規例》作出下述修訂後，批准該規例

2nd draft : 24.7.2003

38A. ~~工作地方的安全~~

~~(1) 在不影響本部其他條文的原則下，負責任何建築地盤的承建商須確保該地盤內每個工作地方對在該地方工作的人而言，在合理切實可行範圍內屬盡量安全和盡量保持安全。~~

負責建築地盤的承建商確保工作地方安全的職責

(1) 在不影響本部其他條文的原則下，負責任何建築地盤的承建商須在合理切實可行範圍內 —

(a) 找出在該建築地盤內高處工作的人的危險狀況；

(b) 糾正任何在該建築地盤內高處工作的人的危險狀況；及

(c) 防止任何在該建築地盤內高處工作的人遇到各種危險狀況。

《2003年建築地盤(安全)(修訂)規例》

000002 (根據《工廠及工業經營條例》(第 59 章)第 7 條在須經立法會批准的規限下訂立)

議決在對勞工處處長於 2003 年 5 月 28 日訂立的《2003 年建築地盤(安全)(修訂)規例》作出下述修訂後，批准該規例

(2) 負責任何建築地盤的承建商須確保在合理切實可行範圍內，盡量在該地盤內每個工作地方提供適當和足夠的安全進出口並妥為維修該等進出口。

(3) 除第 (4) 款另有規定外，負責任何建築地盤的承建商須採取適當和足夠的步驟，以確保在合理切實可行範圍內，盡可能沒有人得以進入該地盤內任何~~不安全的~~地方。

(4) ~~任何人如進行旨在使任何地方安全的工作，而已採取所有~~切實可行的步驟以確保該人於進行該工作時安全，則就該人而言，第 (3) 款並不適用。

~~(1A) 就第(1)款而言，"危險狀況"~~ (hazardous conditions)包括以下可引致任何人從高處墮下的危險的狀況 —

(a) 在工作地方的邊緣或孔洞不設防護；

(b) 工作地方的設計及構造不妥善；

(c) 工作地方的承托或錨定不足或不穩固；

(d) 工作地方的維修不妥善；

(e) 任何工作平台(吊船除外)不符合附表 3 內適用於該工作平台的條文。

~~合理~~

有危險狀況

凡任何人爲糾正任何危險狀況而進行工作，如已採取所有合理

《2003 年建築地盤(安全)(修訂)規例》

000003 (根據《工廠及工業經營條例》(第 59 章)第 7 條在須經立法會批准的規限下訂立)

議決在對勞工處處長於 2003 年 5 月 28 日訂立的《2003 年建築地盤(安全)(修訂)規例》作出下述修訂後，批准該規例

(4A) 就本條而言，"危險狀況" (hazardous conditions) 包括以下可引致任何人從高處墮下的危險的狀況 —

(a) 在工作地方的邊緣或孔洞不設防護；

(b) 工作地方的設計及構造不安善；

(c) 工作地方的承托或錨定不足或不穩固；

(d) 工作地方的維修不安善；

《2003 年建築地盤(安全)(修訂)規例》

000004 (根據《工廠及工業經營條例》(第 59 章)第 7 條在須經立法會批准的規限下訂立)

議決在對勞工處處長於 2003 年 5 月 28 日訂立的《2003 年建築地盤(安全)(修訂)規例》作出下述修訂後，批准該規例

(5) 為免生疑問，現宣布 —

(a) 第(1A)款並不影響第(1)款的一般性；

(b) 第(1A)款中對工作平台的提述，就屬吊船的工作平台而言，並不影響《工廠及工業經營(吊船)規例》(第 59 章，附屬法例 AC)的條文的實施。

(e) 任何工作平台(吊船除外)不符合附表 3 內適用於該工作平台的條文。

(4A)

、(3) 及(4)

44. 圍封機械

(1) 承建商須確保，他所負責的以下機械的有關部分均加以安全圍封至令處長滿意——

(*a*) 原動機的每個飛輪及活動部分；

(*b*) 傳動機械的每個部分；及

(*c*) 其他機械 (不論是否藉機械動力推動) 的每個危險部分，

但如該機械的有關部分的位置及構造，使其對建築地盤內的每名工人均屬安全，猶如該部分已予安全圍封一樣，則不在此限。

(1) 負責任何原動機、傳動機械及其他機械(不論是否藉機械動力推動)的承建商及任何直接控制涉及使用該原動機、傳動機械及其他機械的任何建築工程的承建商，須確保 —

(a) 該原動機的每個飛輪及活動部分；

(b) 該傳動機械的每個部分；及

(c) 該其他機械的每個危險部分，

均加以有效防護，除非該等部分的位置或構造對在該建築地盤內的每名工人，均如已加以有效防護般安全。

(1A) 第(1)款中對有效防護的提述，指使用以下一種或多於一種方法加以有效防護 ——

(a) 自動式護罩；

(b) (在不抵觸第(1B)款的條文下)固定式護罩；

(c) 互鎖式護罩；

(d) 觸覺式護罩；

(e) 雙手控制裝置。

(1B) 第(1A)(b)款所述的任何固定式護罩，可按照《工廠及工業經營(機械的防護及操作)規例》(第 59 章，附屬法例 Q)第 6 條設有孔口。

Appendix III

LC Paper No. CB(2)2939/02-03(01)

CAP. 59 *Construction Sites (Safety) Regulations*

38A. ~~Safety of places of work~~

~~(1) Without prejudice to the other provisions of this Part, the contractor~~ responsible for any construction site shall ensure that every place of work on the site is, so far as is reasonably practicable, made and kept safe for any ~~person working there.~~

CONSTRUCTION SITES (SAFETY)(AMENDMENT) REGULATION 2003

000001

(Made under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59) subject to the approval of the Legislative Council)

Duty of contractor responsible for construction site to ensure safety of places of work

(1) Without prejudice to the other provisions of this Part, the contractor responsible for any construction site shall, so far as reasonably practicable –

(a) identify the hazardous conditions of persons working at a height in the construction site;

(b) rectify any hazardous conditions of persons working at a height in the construction site; and

(c) safeguard any person working at a height in the construction site against all hazardous conditions.

RESOLVED that the Construction Sites (Safety) (Amendment) Regulation 2003, made by the Commissioner for Labour on 28 May 2003, be approved, subject to the following

2nd draft : 24.7.2003

(2) The contractor responsible for any construction site shall ensure that, so far as is reasonably practicable, suitable and adequate safe access to and egress from every place of work on the site is provided and properly maintained.

(3) Subject to paragraph (4), the contractor responsible for any construction site shall take suitable and adequate steps to ensure that, so far as is reasonably practicable, no person gains access to any ~~unsafe place on the site.~~

(4) Paragraph (3) shall not apply in relation to a person engaged in work for the purpose of ~~making any place safe if all~~ practicable steps have been taken to ensure the safety of that person whilst engaged in that work.

CONSTRUCTION SITES (SAFETY)(AMENDMENT) REGULATION 2003

000002

(Made under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59) subject to the approval of the Legislative Council)

~~(1A) For the purpose of paragraph (1),~~ "hazardous conditions" (危險狀況) includes the following conditions that may give rise to a risk of fall of person from height -

(a) unprotected edge or opening at a place of work;

(b) improper design and construction of a place of work;

(c) inadequate or insecure support or anchoring of a place of work;

(d) improper maintenance of a place of work;

(e) any working platform (other than a suspended working platform) that fails to comply with the provisions of the Third Schedule applicable to ~~it.~~

↑ ~~reasonably~~

RESOLVED that the Construction Sites (Safety) (Amendment) Regulation 2003, made by the Commissioner for Labour on 28 May 2003, be approved, subject to the following

↓ place on the site where any hazardous conditions are present

↑ rectifying any hazardous conditions if all reasonably

CONSTRUCTION SITES (SAFETY)(AMENDMENT) REGULATION 2003

(Made under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59) subject to the approval of the Legislative Council)

000003

RESOLVED that the Construction Sites (Safety) (Amendment) Regulation 2003, made by the Commissioner for Labour on 28 May 2003, be approved, subject to the following

(4A) For the purpose of this regulation, "hazardous conditions" (危險狀況) includes the following conditions that may give rise to a risk of persons falling from a height -

(a) unprotected edge or opening at a place of work;

(b) improper design and construction of a place of work;

(c) inadequate or insecure support or anchoring of a place of work;

(d) improper maintenance of a place of work;

CONSTRUCTION SITES (SAFETY)(AMENDMENT) REGULATION 2003

(Made under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59) subject to the approval of the Legislative Council)

000004

RESOLVED that the Construction Sites (Safety) (Amendment) Regulation 2003, made by the Commissioner for Labour on 28 May 2003, be approved, subject to the following

(5) For the avoidance of doubt, it is hereby declared that -

(a) paragraph ~~(1A)~~ does not prejudice the generality of ~~paragraph (1)~~;

(b) the reference to working platform in paragraph ~~(1A)~~ does not prejudice the operation of the provisions of the Factories and Industrial Undertakings (Suspended Working Platforms) Regulation (Cap. 59 sub. leg. AC) in relation to a working platform which is a suspended working platform.

(e) any working platform (other than a suspended working platform) that fails to comply with the provisions of the Third Schedule applicable to it.

↑ (4A)

↓ paragraphs (1), (3) and (4)

000005

44. Fencing of machinery

~~(1) A contractor shall ensure that—~~

(*a*) every flywheel and moving part of any prime mover;
(*b*) every part of transmission machinery; and
(*c*) every dangerous part of other machinery (whether or not driven by mechanical power),

for which he is responsible is securely fenced to the satisfaction of the Commissioner unless it is in such a position or of such construction as to be as safe to every workman on the construction site as it would be if it were securely ~~fenced.~~

(1) The contractor responsible for any prime mover, transmission machinery and other machinery (whether or not driven by mechanical power), and any contractor who has direct control over any construction work which involves the use of the prime mover, transmission machinery and other machinery, shall ensure that -

(a) every flywheel and moving part of the prime mover;

(b) every part of the transmission machinery; and

(c) every dangerous part of the other machinery,

are effectively guarded unless they are in such a position or of such construction as to be as safe to every workman on the construction site as they would be if they were effectively guarded.

000006

(1A) The reference to effectively guarded in paragraph (1) means effectively guarded by one or more of the following methods -

(a) an automatic guard;

(b) subject to paragraph (1B), a fixed guard;

(c) an interlocking guard;

(d) a trip guard;

(e) a two-hand control device.

(1B) An opening may be provided in any fixed guard mentioned in paragraph (1A)(b) in accordance with regulation 6 of the Factories and Industrial Undertakings (Guarding and Operation of Machinery) Regulations (Cap. 59 sub. leg. Q).'.