

Factories and Industrial Undertakings Ordinance (Cap. 59)
Liabilities of Proprietors / Contractors

1. Factories and Industrial Undertakings Ordinance (Cap. 59) provides for safety regulation in relation to factories and industrial undertakings and employment of women, young persons and children therein.
2. Under section 2(1), a "proprietor", in relation to any industrial undertaking or notifiable workplace, includes the person for the time being having the management or control of the business carried on in such industrial undertaking or notifiable workplace and includes a body corporate and a firm and also the occupier of any industrial undertaking or notifiable workplace and the agent of such occupier.
3. Under the same section, an "industrial undertaking" includes, inter alia, any factory, mine or quarry, construction work, etc.
4. It is the duty of every proprietor of an industrial undertaking to ensure, so far as is reasonably practicable, the health and safety at work of all persons employed by him at the industrial undertaking (section 6A(1)). Section 6A(2) gives specific examples of the matters to which the proprietor's duty extends, e.g. the provision and maintenance of plant systems of work that are, so far as is reasonably practicable, safe and without risks to health, etc. A proprietor who contravenes section 6A commits an offence and is liable to a fine of \$500,000.
5. Section 13 further provides that:-
 - (a) The proprietor of every industrial undertaking in or in respect of which any offence against Cap. 59 has been committed shall be guilty of a like offence and shall be liable to the penalty prescribed for such offence;
 - (b) It shall be no defence to a prosecution of the proprietor of an industrial undertaking for an offence against Cap. 59 that the offence was committed without his knowledge or consent or that the actual offender has not been convicted of the offence.

Who is a Proprietor?

6. The court had held in recent cases that both principal contractors and sub-contractors on construction sites were proprietors under Cap. 59.

7. In *HKSAR v. Chun Wo Building Construction Ltd* [2001] 3 HKC 5, the appellant company was the registered contractor of a construction site and principal contractor of electrical works on the site. It was convicted by a magistrate for breach of regulation 19(1) of the Factories and Industries Undertakings (Electricity) Regulations (Cap. 59 sub. leg.) in that, it, being a proprietor, had taken no precautions whatsoever to eliminate undue risks to workers carrying out electrical works on the site. The conviction was upheld by the Court of First Instance. The duty imposed by the law was held to be non-delegable.

8. In *Chow Cheung Ching v. Right Base Construction & Engineering Co Ltd & Another* [2002] 2 HKLRD 738, the Court of First Instance (Deputy Judge Fung) ruled that the second Defendant, the principal contractor and occupier of a construction site, was a "proprietor" under section 2(1) of Cap. 59.

9. In this civil claim, the first Defendant was Plaintiff's direct employer and the second Defendant was the principal contractor and occupier of the site on which the industrial accident took place. The Plaintiff claimed against the second Defendant on the ground that, inter alia, the second Defendant was in breach of the statutory duty under regulation 10(4) under Part II "Duties of Proprietors" of the Factories and Industries Undertakings (Woodworking Machinery) Regulations (Cap. 59 sub. leg.). The court held that both Defendants were "proprietors" of the industrial undertaking under the relevant Regulations: the first Defendant being the person for the time being having the management or control of the business carried on in such industrial undertaking and the second Defendant being the occupier of the industrial undertaking. The court also held that the definition of "proprietor" was inclusive rather than exhaustive and any interpretation should be liberal and purposive rather than restrictive (at p. 745, para. 14).

10. Similarly, in *Chan Yu Chau v. Fong On Construction & Engineering Co Ltd & Others* (HCPI No. 753 of 2000, 4 June 2002), the Plaintiff (employee of the second Defendant) claimed against the first Defendant, the principal contractor responsible for the construction site where the industrial accident took place, for breach of statutory duty under regulations 10(4)(b) and 6 of

the Factories and Industries Undertakings (Woodworking Machinery) Regulations (Cap. 59 sub. leg.). The Court of First Instance (Deputy Judge Longley) held that the first Defendant was a proprietor and guilty of a breach of statutory duty.

Duties of a Contractor

11. In Cap. 59, a "contractor", in relation to construction work, means any person or firm engaged in carrying out construction work by way of trade or business, either on his own account or pursuant to a contract or arrangement entered into with another person, including the State or any public body (section 2(1) definition). In essence, the definition includes a sub-contractor.

12. The Construction Sites (Safety) Regulations (Cap. 59 sub. leg.) impose various obligations with respect to safety measures on contractors on construction sites. Any contractor (whether a main contractor and sub-contractor) who fails to comply with these requirements shall be guilty of an offence and different levels of penalty are prescribed for different contravention (regulation 68).

Strict Liability / Absolute Duty

13. In *Gammon (Hong Kong) Ltd v. AG of Hong Kong* [1985] 1 AC 1, the Appellants appealed to the Privy Council against a decision of the Hong Kong Court of Appeal with respect to a material deviation from the plans approved under the Buildings Ordinance (Cap. 123). The relevant provisions of the Buildings Ordinance imposed a strict liability for any material deviation from approved plans.

14. The Privy Council set out the principles for imposing strict liability in criminal law as follows:-

- (a) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence;
- (b) the presumption is particularly strong where the offence is "truly criminal" in character;
- (c) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;

- (d) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;
- (e) 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 objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. (at p. 14)

15. In *AG v. Shun Shing Construction and Engineering Co Ltd* [1986] HKLR 311, the Hong Kong Court of Appeal also examined the application of legislative provisions creating strict liability in the context of a failure to ensure that a power driven winch was used in accordance with the then regulation 37(1) (now repealed) of the Construction Sites (Safety) Regulations (Cap. 59 sub. leg.). In this case, the requirement under the relevant regulation was for the contractor to "ensure" compliance. The Court of Appeal held that the word "ensure" meant "make sure" and if the prohibited act occurred, there had necessarily been a failure to ensure that it did not occur. The court further said:-

"The whole scheme of the legislation is that the head contractor shall have the same responsibility for some of the statutory safety precautions when work is done by a sub-contractor as if the head contractor had done the work itself. The reasoning behind this is that it will assist in the enforcement of the regulations by encouraging the head contractor to do more by 'supervision or inspection ... or by exhorting those whom [it] may be expected to influence or control, which will promote the observance of the regulations'." (at pp. 314-315)

Examples of Proprietor's / Contractor's Liability

(a) *Factories and Industrial Undertakings Regulations (Cap. 59 sub. leg.)*

16. Under regulation 24, in every notifiable workplace, all platforms, pits and openings in floors and every other place liable to be dangerous to person, and all vessels containing any scalding, corrosive or poisonous liquid shall be securely fence to a height of not less than 900 millimetres or otherwise protected to the satisfaction of the Commissioner for Labour. The proprietor of any industrial

undertaking or of any notifiable workplace in respect of which any of the provisions of regulation 24 is contravened shall be guilty of offence and liable to a fine of \$200,000 and to imprisonment for 12 months where the offence was committed without reasonable excuse, and to a fine of \$200,00 in any other case (regulation 45(1)(c)).

17. Under regulation 25(1), no young person shall be permitted to clean any dangerous part of the machinery in a notifiable workplace while the machinery is in motion by the aid of any mechanical power. Under regulation 25(2), no young person shall be permitted to clean any mill-gearing while such mill-gearing is in motion for the purpose of propelling any part of the machinery in a notifiable workplace. The proprietor of any industrial undertaking or of any notifiable workplace in which any person is permitted to do anything in contravention of these provisions shall be guilty of an offence (regulation 45(1)) and liable to a fine of \$50,000 (regulation 45(2)(b)).

(b) ***Constructions Sites (Safety) Regulations (Cap. 59 sub. leg.)***

18. For the purposes of the Construction Site (Safety) Regulations, a contractor is responsible for a construction site if he is undertaking construction work there or, where there is more than one contractor undertaking construction work at the site, if he is the principal contractor undertaking work there. A contractor is also responsible for any plant referred to in these Regulations if it is located at a construction site for which he is responsible (regulation 2(2)).

(c) ***Factories and Industrial Undertakings (Goods Lifts) Regulations (Cap. 59 sub. leg.)***

19. The definition "owner", in relation to a lift, includes the proprietor of an industrial undertaking in which the lift is used, the lessee or hirer of the lift, and any agent or person in charge or having the control or management of the lift (regulation 3).

20. The owner of a lift shall ensure that it is not put into operation or used unless it is of good mechanical construction and made of strong and sound materials and it is properly maintained (regulation 4). Any owner of a lift who contravenes the above provision shall be guilty of an offence and liable on conviction to a fine of \$200,000. (regulation 11).

(d) ***Factories and Industrial Undertakings (Electricity) Regulations (Cap. 59
sub. leg.)***

21. The Regulations provide for the general safety requirements and specific requirements in relation to matters such as switches, conductors, electric motors, switchboards, switchboard apparatus, protective equipment, lighting, special risks and substation. Regulation 31(1) provides that it shall be the duty of the proprietor of every industrial undertaking to which those regulations apply to ensure that they are complied with. If any such provision is contravened the proprietor of the industrial undertaking where the contravention occurs commits an offence and is liable to a fine of \$50,000.

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