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司法及法律事務委員會

立法會秘書處為2006年4月24日會議擬備的背景資料簡介

檢討載有令執行當局"感到滿意"這草擬方式的法例條文

目的

本文件旨在提供背景資料，述明司法及法律事務委員會("事務委員會")過去就檢討載有令執行當局"感到滿意"這草擬方式的法例條文所作的討論。

轉介事務委員會的事項

2. 此事項由根據《工廠及工業經營條例》(第59章)第7條提出的決議案小組委員會("小組委員會")於2003年8月轉介事務委員會。小組委員會負責審議多項修訂，包括對《建築地盤(安全)規例》(第59I章)第44(1)條提出的修訂建議。此項修訂是因應原訟法庭對香港特別行政區訴Lam Geotechnics Limited(HCMA 379/2000)一案的裁決而提出，使該條文可在法律上實施。

背景

3. 法例第59章第7條賦權勞工處處長("處長")藉規例訂明具體方法，以確保在工業經營中的人安全及危險或欠妥之處得以消除。第59I章第44條根據法例第59章第7條訂立，規定承建商須確保機械已安全圍封"至令處長滿意"。

4. 在Lam Geotechnics一案中，上訴人就其被裁定違反法例第59I章第44(1)(c)條的定罪判決提出上訴，獲原訟法庭判上訴得直。原訟法庭裁定法例第59I章第44條中"至令處長滿意"一語的意思有欠明確，未有完全清楚界定該條文所列的罪行元素；換言之，受該條文規管的人在當局提出檢控前，未能事先確定何種圍封措施可令處長滿意。原訟法庭裁定法例第59I章第44條*超越*了法例第59章第7條的賦權範圍。上述判詞載於**附錄I**，供委員參閱。

5. 因應此項裁決，當局已修訂規例第44(1)條，訂明所規定的具體安全措施，並將“至令處長滿意”一語從該規例中刪除，以消除該語句的不明確之處。該項修訂已於2003年11月28日生效。由於該項法庭裁決或會影響到其他載有令執行當局“感到滿意”這草擬方式的法例條文，小組委員會將此事交由事務委員會跟進。

事務委員會的討論

有關會議

6. 事務委員會曾於2003年12月18日及2005年7月12日的會議上討論此事。

問題涉及的範圍

7. 在2003年12月18日的會議上，政府當局就附屬法例中載有令執行機構“滿意”一語的條文這問題，向委員簡述問題涉及的範圍，又告知委員其對檢討這類條文的初步看法。吳靄儀議員及余若薇議員指出，要全面檢討這類條文，工作極其艱巨，因此政府當局在展開進一步行動前，應首先信納這問題確實存在。余若薇議員亦指出，政府當局並無就該案提出上訴，未必意味其接納此項裁決。何俊仁議員表示，政府當局應研究原訟法庭作此裁決的理據，盡快提出意見。鑒於委員提出的上述關注，事務委員會要求政府當局分析Lam Geotechnics一案的判詞，以期評估該項裁決對其他類似法例條文的影響，再決定應否就有關的法例條文進行全面檢討。

8. 在2005年7月12日的會議上，政府當局告知委員，當局接納法庭對Lam Geotechnics一案的裁決，附屬法例的條文若載有有關草擬方式，可引起對其明確性及超越賦權範圍問題的關注。政府當局向委員解釋，載有令執行當局“感到滿意”這草擬方式的法例條文，實際上可基於兩個理由受到質疑 ——

(a) 因應Lam Geotechnics一案，載於附屬法例的這類條文或未能充分具體地訂明罪行的元素，亦超越賦權條例的範圍。

(b) 鑒於岑國社訴香港特別行政區[2002] 2 HKLRD 793一案，就人權角度而言，關於這類條文是否有效，亦可引起法律是否明確的問題。這類條文可基於其內容過於空泛、不明確又界定不清，不符合《基本法》第三十九條或《香港人權法案》第十一(一)條的規定而受到質疑。這會影響到附屬法例中在賦權範圍問題方面經得起質疑的條文，亦會影響到主體條例的條文。

9. 政府當局於2005年7月12日的會議上告知委員，當局找到86條附屬法例及10條主體法例，當中載有類似至令執行當局“感到滿意”一語草擬方式的條文。經初步檢討，當局發現該96條條文似乎沒有清楚列明所訂罪行的元素。該96條條文列載於政府當局為2006年4月24日事務委員會下次會議提供的文件[立法會CB(2)1750/05-06(02)號文件]的附件中。

10. 余若薇議員指出，法例條文如載有同類的草擬方式，如“處長認為合適”等，亦會導致類似Lam Geotechnics一案的問題。政府當局回應時表示，當局知悉亦有其他類似的草擬方式，如載有執行當局“可接受”或執行當局“認為”等字眼，但這類條文不多，而且部分與罪行無關。政府當局認為，這類條文須作個別研究。

檢討法例條文

11. 吳靄儀議員及李柱銘議員於2005年7月12日的會議上指出，既然該草擬方式已令某些法例含糊不清，導致檢控困難，當局應盡快進行全面檢討。李柱銘議員關注到，有些人或會因此項法例漏洞而有心挑戰法律。由於有關法例條文大多涉及公眾衞生及安全事宜，政府當局實無法承擔市民集體就法律提出質疑的風險。吳靄儀議員促請政府當局就檢討該等條文並提出法例修訂設定時間表，並建議政府當局成立內部特別工作小組，以求早日完成此項工作。

12. 政府當局在2005年7月12日的會議上表示，當局打算對載有有關草擬方式的法例條文進行檢討。政府當局指出，就某些法例條文而言，使用這草擬方式或已可達到滿意效果。因此，在進行檢討時，必須逐項評估，以決定有關條文是否有需要作出修訂。

13. 政府當局亦解釋，與此同時，刑事檢控專員已提醒所有檢控主任注意Lam Geotechnics一案的法庭裁決。如有關於載有這草擬方式(或類似方式)的條文所訂罪行的證據，檢控主任會研究該條文，以決定是否提出檢控，如檢控主任關注到有關條文是否有效而決定不提出檢控，他會建議有關政策局／部門修訂該條文。政府當局又表示，當局會就此事進行內部諮詢，並會向事務委員會匯報將予採取的做法。

最新情況

14. 政府當局會於2006年4月24日的下次會議上，向事務委員會簡報其就載有有關語句的法例條文所作檢討的結果。

相關文件

15. 其他相關文件一覽表載於**附錄II**。該等文件可在立法會網站(http://www.legco.gov.hk)閱覽。

立法會秘書處
議會事務部2
2006年4月18日

HCMA 379/2000

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

MAGISTRACY APPEAL NO. HCMA 379 OF 2000
(ON APPEAL FROM WSS 13454 OF 1999)

BETWEEN

	HKSAR	Respondent
	and	
	LAM GEOTECHNICS LIMITED	Appellant

Before: Hon Beeson J in Court
Date of Hearing: 8 September 2000
Date of Handing Down Judgment: 20 November 2000

J U D G M E N T

The Appellant company appeals against its conviction for a contravention of Section 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 (PW 3) working for the Appellant was with his employee (PW 4) 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 24 cm was not covered. PW 4 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 Regulation 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 Regulation 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 Regulation 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 Regulation 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 Regulation 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 Regulation 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) & (b) of the 1937 Regulations follow closely sections 12 & 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 Regulations 13(a), (b) and (g) of the 1937 Regulations and their contemporary legislative descendant, which is Regulation 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 is 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 Regulation 44, have been examined. At an earlier time, Regulation 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 3 feet, or otherwise protected to the satisfaction of the Commissioner."

In *Attorney General v. Chiu Chun-hoo*, Criminal Appeal No. 925 of 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 Regulation 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 3 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 Regulation 24(a) of the Factories and Industrial Undertakings Regulations, also made under Cap. 59 (FIUO). In *R v. Meyer Aluminium Ltd* (1985) Magistracy Appeal No. 807 of 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 Regulation 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 Regulation 44.

The regulation-making power under which the CS(S)R were promulgated is conferred by section 7 of the FIUO on the Commissioner. By section 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 section 7(1)(h)(i) and (o) as providing appropriate *vires* for Regulation 44. S. 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". S. 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 subsection (1). Section 7(2) is almost identical to section 60 of the Factories Act 1937, which conferred a similar power on the Secretary of State in the United Kingdom.

In *A-G 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. Janos 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 <u>he will know what he has to do</u>." (*Attorney General v. Chiu Chun-hoo* @5) (emphasis supplied)

Mr Collins, submitted that under Regulation 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 paragraph 7(1)(o) of FIUO took the Commissioner's powers any further than those granted to him by the remaining paragraphs of section 7(1). Mr Collins submitted that such doubt was well-founded, because section 7(1)(o) is an enabling power

which must be regarded as ancillary to the specific enabling powers in paragraphs (a) to (n). Paragraph (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 paragraph (o), make the provision of such means the subject of a duty. It is submitted that Regulation 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 Regulation 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 Regulation 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 Regulation 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 <u>after</u> a prosecution has been initiated what he says <u>was</u> 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 Regulation 44.

The Court's attention was drawn to the evidence of various witnesses in this regard. PW 2, the Occupational Safety Officer 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 (PW 3) 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.

PW 5 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 guide-lines, 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 8 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 Regulation 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 PW 3 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 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 Regulation 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 Regulation 44, was unfairly restrictive.

Accordingly, I allow the appeal on the basis of the Appellant's first ground and conclude that Regulation 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.

(C-M Beeson)
Judge of the Court of First Instance

Mr Henry Hung, GC, for the DPP

Mr James Collins, instructed by Messrs Liu Choi & Chan, for the Appellant

附錄II

檢討載有令執行當局"感到滿意"這草擬方式的法例條文

相關文件

立法會文件編號		文件
政府當局提供的文件		
CB(2)693/03-04(01)	——	政府當局提供題為"就載有令執行機構'滿意'這種草擬方式的法例條文進行檢討"的文件
CB(2)2224/04-05(01)	——	政府當局提供題為"就載有令執行機構'滿意'一詞(該草擬方式)的法例條文進行檢討"的文件
立法會秘書處擬備的文件		
LS9/03-04	——	法律事務部就"根據《工廠及工業經營條例》第7條動議的決議案小組委員會轉介的事項——法例條文的檢討"擬備的文件
司法及法律事務委員會會議的紀要		
CB(2)1104/03-04	——	2003年12月18日會議的紀要
CB(2)2621/04-05	——	2005年7月12日會議的紀要
根據《工廠及工業經營條例》第7條提出的決議案小組委員會會議的紀要		
CB(2)2994/02-03	——	2003年7月31日會議的紀要