立法會
Legislative Council

LC Paper No. CB(2)1750/05-06(01)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 24 April 2006

Review of legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency

Purpose

This paper provides background information on the past discussions of the Panel on Administration of Justice and Legal Services (AJLS Panel) on the review of legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency.

Referral to the AJLS Panel

2. The issue was referred to the AJLS Panel in August 2003 by the Subcommittee on Proposed Resolution under Section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59), which was tasked to examine, inter alia, proposed amendments to regulation 44(1) of the Construction Sites (Safety) Regulations (Cap. 59I) to make it enforceable in the light of the judgment of the Court of First instance (CFI) in HKSAR v Lam Geotechnics Limited (HCMA 379/2000).

Background

3. Section 7 of Cap. 59 empowers the Commissioner for Labour to prescribe, by regulation, specific means of ensuring the safety of persons in industrial undertakings and of securing the removal of danger or defects. Regulation 44 of Cap. 59I, made under section 7 of Cap. 59, required a contractor to ensure that machinery was securely fenced "to the satisfaction of the Commissioner".

4. In the Lam Geotechnics case, the appellant appealed against a conviction for a contravention of regulation 44(1)(c) of Cap. 59I. CFI allowed the appeal. It ruled that

the elements of the offence purportedly set out in regulation 44 of Cap. 59I were 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. CFI found that regulation 44 of Cap. 59I was *ultra vires* section 7 of Cap. 59. A copy of the judgment is in **Appendix I** for members' reference**.**

5. In the light of this ruling, regulation 44(1) had been amended to prescribe the specific safety measures required. The phrase "to the satisfaction of the Commissioner" had also been deleted from the regulation so as to remove the uncertainty inherent in the phrase. The amendment came into operation on 28 November 2003. As the court ruling might impact on other legislative provisions which contained the drafting formula "to the satisfaction" of an enforcement authority, the Subcommittee had referred the issue to the AJLS Panel for follow-up.

Discussions of the AJLS Panel

Relevant meetings

6. The issue was discussed by the AJLS Panel at its meetings on 18 December 2003 and 12 July 2005.

Extent of the problem

7. At the meeting on 18 December 2003, the Administration briefed members on the extent of the problem with respect to provisions in subsidiary legislation containing the phrase "to the satisfaction" of an enforcement agency, as well as its preliminary view on the conduct of a review of those provisions. Hon Margaret NG and Hon Audrey EU pointed out that a comprehensive review of the legislative provisions concerned would be an onerous task. The Administration should, therefore, first satisfy itself that a genuine problem existed before proceeding further. Hon Audrey EU also pointed out that the fact that the case was not appealed would not necessarily mean that the Administration accepted the ruling. Hon Albert HO opined that the Administration should study the grounds for CFI's ruling and come up with a view as soon as possible. In view of these concerns, the Panel requested the Administration to undertake an analysis of the judgment in the Lam Geotechnics case with a view to assessing the extent of its impact on other similar legislative provisions before deciding whether to conduct a comprehensive review of the legislative provisions.

8. At the meeting on 12 July 2005, the Administration informed members that it accepted the judgment in the Lam Geotechnics case that a legislative provision in subsidiary legislation containing the drafting formula in question might raise concern about certainty and vires issues. The Administration explained to members that a

legislative provision with the drafting formula "to the satisfaction" of an enforcement agency could in fact be challenged on two grounds –

(a) In the light of the Lam Geotechnics case, such a provision contained in a subsidiary legislation might fail to prescribe with sufficient particularity the elements of an offence and be *ultra vires* the enabling Ordinance.

(b) In view of Shum Kwok Sher v HKSAR [2002] 2 HKLRD 793, the validity of such a provision might also raise an issue of legal certainty from the human rights perspective, in that the provision might be challenged on the ground that it was too vague, uncertain and ill-defined to comply with the requirements of Article 39 of the Basic Law or Article 11(1) of the Hong Kong Bill of Rights. This would affect those legislative provisions contained in subsidiary legislation that stood up to challenges on vires grounds as well as those contained in principal legislation.

9. The Administration also informed members at the meeting on 12 July 2005 that it had identified 86 provisions in subsidiary legislation and 10 provisions in principal legislation containing drafting formulas similar to the phrase "to the satisfaction" of an enforcement agency. After a preliminary review of the 96 provisions, it appeared that the elements of offence under those provisions were not clearly set out. These 96 provisions are listed in the Annex to the Administration's paper for the forthcoming Panel meeting on 24 April 2006 [LC Paper No. CB(2)1750/05-06(02)].

10. Hon Audrey EU pointed out that legislative provisions containing other drafting formulas such as "as the Commissioner thinks fit" could also lead to similar problem as in the Lam Geotechnics case. The Administration responded that it was aware of other similar drafting formulas such as those containing the words "acceptable to" an enforcement agent or "in the opinion of" an enforcement agent. However, there were not many such provisions, and some of them were not offence provisions. The Administration considered that such provisions would have to be looked at individually.

Review of legislative provisions

11. At the meeting on 12 July 2005, Hon Margaret NG and Hon Martin LEE pointed out that as the ambiguity in the law resulting from the drafting formula had led to problems in prosecution, a comprehensive review exercise should be undertaken as soon as possible. Hon Martin LEE expressed concern that because of the legislative loophole, some people might be prepared to flout the law. The Administration could not afford to take the risk of mass legal challenge, as many of the legislative provisions involved public health and safety matters. Hon Margaret NG urged the Administration to set a timetable for reviewing the provisions and introducing legislative amendments.

She suggested that a special working team within the Administration be formed for the early completion of the task.

12. The Administration indicated at the meeting on 12 July 2005 that it was inclined to conduct a review of the legislative provisions containing the formula in question. The Administration pointed out that for some of the legislative provisions, the use of the drafting formula might be satisfactory. Hence, in taking forward a review exercise, the provisions had to be assessed individually to determine if amendment was necessary.

13. The Administration also explained that in the meantime, the Director of Public Prosecutions had alerted all prosecutors of the court ruling in the Lam Geotechnics case. If there was evidence of an offence under a provision containing the formula (or a similar formula), the provision would be examined to decide whether or not prosecution would proceed and, where prosecution would not proceed because of concerns about the validity of the provision in question, a recommendation would be made to the bureau/department concerned to amend the provision. The Administration further advised that it would undertake internal consultation on the matter and report to the Panel on the approach to be taken.

Latest Position

14. The Administration will brief the Panel on the result of the review it had conducted on the legislative provisions containing the phrase in question at the coming meeting on 24 April 2006.

Relevant papers

15. A list of other relevant papers is in **Appendix II**. These papers are available on the LegCo website (http://www.legco.gov.hk).

Council Business Division 2
Legislative Council Secretariat
18 April 2006

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 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 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

Appendix II

Review of legislative provisions containing the drafting formula "to the satisfaction" of an enforcement agency

Relevant papers

LC Paper No.		Papers/Documents
Paper provided by the Administration		
CB(2)693/03-04(01)	--	Administration's paper on "Review of legislative provisions containing the drafting formula 'to the satisfaction' of an enforcement agency"
CB(2)2224/04-05(01)	--	Administration's paper on "Review of legislative provisions containing the phrase 'to the satisfaction' of an enforcement agency (the drafting formula)"
Paper prepared by the LegCo Secretariat		
LS9/03-04	--	Paper prepared by the Legal Service Division on "Referral from the Subcommittee on Proposed Resolution under Section 7 of the Factories and Industrial Undertakings Ordinance – Review of legislative provisions"
Minutes of meetings of Panel on Administration of Justice and Legal Services		
CB(2)1104/03-04	--	Minutes of meeting on 18 December 2003
CB(2)2621/04-05	--	Minutes of meeting on 12 July 2005
Minutes of meeting of Subcommittee on Proposed Resolution under Section 7 of the Factories and Industrial Undertakings Ordinance		
CB(2)2994/02-03	--	Minutes of meeting on 31 July 2003