

## Insights

# HK COURT CONFIRMS NARROW SCOPE OF DEFENCE AVAILABLE TO PROPRIETORS UNDER THE FACTORIES AND INDUSTRIAL UNDERTAKINGS ORDINANCE

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In *HK SAR v Gammon Construction Limited* (HCMA 97/2019) [2020] HKCA 752 (Date of Judgment: 7 September 2020), the Hong Kong Court of Appeal (the “**Court**”) dismissed a magistracy appeal against the conviction of a principal contractor (the “**appellant**”) involved in a fatal industrial accident. In this judgment, the Court held that:

- (a) A defendant charged with breaching the duty to ensure, “*so far as is reasonably practicable*”, the health and safety of workers only could rely on the statutory defence under section 18 of the Factories and Industrial Undertakings Ordinance (Cap 59) (“**Ordinance**”), but not the common law defence of “honest and reasonable belief” (as will be discussed in more detail below).
- (b) The duty to provide a safety management system under section 8(1) of the Factories and Industrial Undertakings (Safety Management) Regulation (Cap 59AF) (“**Regulation**”) is an absolute duty.

## Background

This case involved a fatal industrial accident during the construction of a viaduct between the Hong Kong – Zhuhai – Macao Bridge and the North Lantau Highway.

It was alleged that, when the accident occurred, the deceased worker (who was engaged by a subcontractor of the appellant) was standing on a working platform and leaning on the metal fence near the edge of a “segment”, which was the building block from which the bridge was built. The metal fence suddenly detached from the segment and the deceased fell into the sea together with the metal fence. Although he was wearing a lifejacket, he sank due to the weight of the metal fence and drowned.

After trial in the West Kowloon magistrates’ court, the appellant was found guilty of (a) failing to provide and maintain a safe system of work, (b) failing to provide necessary instruction and supervision for the health and safety at work of persons employed at an industrial undertaking, and

(c) failing to develop, implement and maintain a safety management system. The magistrate imposed a fine upon the appellant.

The appellant appealed against the conviction. The court's decisions on the appellant's first three grounds of appeal, which relate to the interpretation and nature of the Ordinance, are discussed below.

## **Provisions in the Ordinance said to have been breached**

The provisions under the Ordinance of which the magistrate found the appellant was in breach are as follows.

First, section 6A(1) sets out the general duties of a proprietor to "*ensure, so far as is reasonably practicable, the health and safety at work of all persons employed by him at the industrial undertaking*" (emphasis added). The statutory defence provided by the wording "*so far as is reasonably practicable*" is explained at section 18 of the Ordinance, which will be discussed below.

The specific duties that the magistrate found that the appellant was in breach of were set out in section 6A(2), which provides the duty of a proprietor to:

- (i) provide and maintain "*plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health*". [section 6A(2)(a)]
- (ii) provide "*information, instruction, training and supervision as is necessary 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(2)(c)]

Section 13(1) of the Ordinance, which sets out the liability for a proprietor, provides that:

*"Except as may be otherwise provided by regulations made under this Ordinance, the proprietor of every industrial undertaking in or in respect of which any offence against this Ordinance has been committed shall be guilty of a like offence, and shall be liable to the penalty prescribed for such offence."*

Secondly, the magistrate also found that the appellant was in breach of sections 8(1) and 34(2) of the Regulation, which provide that:

*"A proprietor or contractor specified in Part 1 of Schedule 3 shall develop, implement and maintain in respect of the relevant industrial undertaking a safety management system which contains the elements specified in Schedule 4." [section 8(1) of the Regulation]*

*"Any person who contravenes any of the provisions of section 8, ... or ... commits an offence and is liable on conviction to a fine of \$200,000 and to imprisonment for 6 months." [section 34(2) of the Regulation]*

## Grounds 1 and 2: the nature of section 18 of the Ordinance

The appellant's ground 1 of its appeal was that section 18 of the Ordinance is limited to casting the onus of proving what is reasonably practicable upon the defence, but does not operate to exclude the common law defence articulated in *Hin Lin Yee v HKSAR* and *Kulemesin v HKSAR*. Ground 2 is that the magistrate was wrong to hold that section 18 was the only defence available to the appellant, and that the magistrate erred in failing to consider whether the common law defence had been made out.

Section 18, which sets out the onus of proof of a proprietor, provides that:

### **"18. Onus of proving limits of what is practicable, etc.**

*(1) In a proceeding for an offence under a provision in this Ordinance consisting of a failure to comply with a duty or requirement to do something so far as is necessary, where practicable, so far as is reasonably practicable, or so far as practicable or to take all reasonable steps, all practicable steps, adequate steps or all reasonably practicable steps to do something, the onus is on the accused to prove that it was not necessary, not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that he has taken all reasonable steps, or practicable steps or done the appropriate thing to satisfy the duty or requirement.*

*(2) In a proceeding for an offence under a provision in this Ordinance consisting of an exemption from compliance with a duty or requirement to do something where it is impracticable, not reasonably practicable or rendered impracticable to comply with that duty or requirement, the onus is on the accused to prove that it was impracticable or not reasonably practicable to do more than was in fact done to comply with the duty or requirement."*

The appellant contended that both offences under sections 6A and 13 of the Ordinance should fall under the third category in *Kulemesin*, which states that a valid defence is made out if the defendant could show "*on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, he would not be guilty of the offence*" ("**the common law defence**").

The Court rejected this contention by the appellant. The Court held that section 18 does not leave room for the common law defence. In explaining its decision, the Court pointed out that the appellant's contention would defeat the important objects of the Ordinance if a defendant could raise a valid defence by arguing that, even if he could not prove that it was not reasonably practicable to do more, he honestly and reasonably believed it was enough. The Court held that the statutory defence was not consistent with the common law defence.

Therefore, the Court concluded that the appellant only could rely on the statutory defence in section 18.

### **Ground 3: the nature of liability imposed by sections 8(1) and 34(2) of the Regulation**

The appellant contended that the magistrate erred in finding that this charge attracted absolute liability (to which no defence is available). The appellant submitted that, given the severity of the penalty (the offence attracts a maximum sentence of 6 months' imprisonment), and the wideness of the offence, the offence should be one for which the common law defence was available.

Looking at sections 8(1) and 34(2) of the Regulation, the Court noted that there were no words qualifying the duty on the contractor, such as to take all necessary, reasonable, practicable or reasonably practicable steps to satisfy the duty (which are found in section 18 of the Ordinance). Nor do the provisions provide a defence based on the defendant's knowledge or intent, unlike other provisions in the Regulation.

As regards the appellant's contention that the severity of the penalty suggests that this offence should not be one of absolute liability, the Court was of the view that the imposition of absolute liability was justified for the statutory purpose of imposing a stringent duty on contractors to ensure the safety of all personnel at such large scale industrial undertakings. The Court also pointed out there were other strict liability offences of the similar nature to section 8(1) of the Regulation which also impose a penalty of imprisonment.

Therefore, the Court concluded that an offence under section 8(1) of the Regulation was one of absolute liability.

### **Takeaway points**

It can be seen from this case that the level of statutory protection for construction workers is a high one, which will be protected strictly by the Hong Kong courts when interpreting and applying the relevant statutory provisions.

Where a contractor is charged with failing to do something, "so far as is reasonably practicable", to ensure the health and safety of workers, the contractor can rely only on the statutory defence in section 18, which has a limited scope. The contractor is not entitled to raise a valid defence on the basis of his honest and reasonable belief. Contractors are advised to review their internal policies and protocols, and do so by reference to the Labour Department's ["A Guide to the Factories and Industrial Undertakings Ordinance \(Section 6A\) - General Duties of Proprietors"](#), which provides a checklist on the general duties of proprietors under section 6A of the Ordinance.

Further, this case confirms that a contractor's obligation to develop, implement and maintain a safety management system is an absolute obligation. Contractors are advised to review their safety management system against the "elements" under Schedule 4 of the Regulation, which states that a safety management system should include a safety policy, safety training, and inspection programme.

## RELATED CAPABILITIES

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## MEET THE TEAM



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