

HONG KONG / JUDGMENT

ATTORNEY GENERAL v. HARBOUR ENGINEERING CO. LTD.

COURT

Court of First Instance

DECIDED

2 January 1986

CASE / FILE NUMBER

HCMA1098/1985

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bjbj HCMA001098/1985 Headnote Regulation 47(1) of Construction Sites (Safety) Regulation, Cap. 59. — Interpretation of "construction site" and "construction work." — "Specified Structures and works " in Third Schedule of Factories and Industrial Undertakings Ordinance, Cap. 59 not restricted to "Sizable" structures end works. — s. 19 of Interpretation and General Clauses Ordinance, Cap. 1. — Work being undertaken within definition of "electrical installation." IN THE HIGH COURT OF HONG KONG APPELLATE JURISDICTION MAGISTRACY APPEAL NO. 1098/85 (Case No. CBS 17691 of 1985)

BETWEEN The Attorney General Appellant and Harbour Engineering Company Ltd. Respondent

Coram: Deputy Judge Ryan of High Court in Cart Date of Hearing: 2nd January, 1986

JUDGMENT

This is an appeal by way of the case stated from a magistrate pursuant to section 105 of the Magistrate Ordinance Cap. 227. A summons upon information was issued against the Respondent Company in the following terms: - "For that you (the Respondent) on the 22nd day of October 1984 at the junction of Leighton Road and Matheson Street (Civil Works Term Contract CWT M/13 1983 for Hong Kong Island, Apleichau and Outlying Islands) in this Colony being the contractor responsible for a construction site at the junction of Leighton Road and Matheson Street (Civil Works Term Contract CWT M/13 1983 for Hong Kong Island, Apleichau and Outlying Islands) where workmen were employed and where such workmen were liable to come into contact with any live electric cable did both before the commencement of the work at the said site and during its progress fail to take such measures (either by rendering the cable electrically dead or

otherwise) as would have prevented the said workmen from being endangered by the cable; contrary to Regulation 47(1) and 68 (1)(a) of the Construction Sites (Safety) Regulations, Cap. 59." The facts are that the Respondent was the contractor responsible for excavation work the purpose of which was to locate a blocked concrete telephone-wire conduit buried underground at the site and to remove the block in it. This involved the breaking of the concrete conduit and the substitution of a plastic conduit. A trench 2.4 meters in length by 0.6 meter wide and 0.6 meter depth was dug by the employees of the Respondent to expose the conduit along Leighton Road. On the 22nd day of October 1984 while an employee of the Respondent was using a pneumatic drill to break loose the concrete slab covering the conduit, the drill came into contact with a live 11 kv underground electric cable resulting in an explosion which injured three of the Respondent's employees. At the conclusion of the hearing the magistrate addressed himself to the question of whether or not the site was a "construction site" within the meaning of the regulations, this being a necessary prerequisite to any conviction. The point does not appear to have been taken by the defence counsel. Regulation 47(1) of the Construction Sites (Safety) Regulations defines a construction site as a place where construction work is undertaken and any storage area in the immediate vicinity for plant or materials used for the the construction work. "Construction work" is defined in Section (1) of the Factories and Industrial Undertakings Ordinance Cap. 59 as follows:

- (a) The construction, erection, installation, reconstruction, repair, maintenance (including redecoration and external cleaning), renewal, removal, alteration, improvement, dismantling, or demolition of any structure or works specified in the Third Schedule;
- (b) Any work involved in preparing for any operation referred to in para. (a), including the laying of foundations and the excavation of earth and rock prior to the land of foundations;
- (c) The use of machinery, plant, tools, gear, and materials in connection with any operation referred to in para. (a) or (b). The Third Schedule sets out under the heading "Specified Structures and Works", the following:-
 - (1) Any building, edifice, wall, fence, or chimney, whether constructed wholly or partly above or below ground level.
 - (2) Any road, motorway, railway, tramway, cableway, aerial roadway, or canal.
 - (3) Any harbour works, dock, pier, sea defence work, or light house.
 - (4) Any aqueduct, viaduct, bridge or tunnel.
 - (5) Any sewer, sewage disposal works or filter bed.
 - (6) Any airport, or works connected with air navigation.
 - (7) Any dam, reservoir, well, pipe line, culvert, shaft, or reclamation.
 - (8) Any drainage, irrigation, or river control work.

- (9) Any water, electrical, gas, telephone, telegraphic, radio, or television installation or works, or any other works designed for the manufacturing or transmission of power, or the transmission or reception of radio sound waves.
- (10) Any structure designed for the support of machinery, plant, or power transmission lines. In considering this matter I have reminded myself of the General principle of interpretation provided by Section 19 of the Interpretation and General Clauses Ordinance Cap. 1 that:- "An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit. Section 2 of Cap. 1 provides. "Save where the contrary intention appears either from this Ordinance or from the context to any other Ordinance or instrument, the provisions of this ordinance shall apply to this Ordinance and to any other Ordinance in force" Section 19 applies to the legislation now under consideration and I am required to give to that legislation such fair large and liberal construction and interpretation as will best ensure the attainment of the object of the legislation according to its true intent, meaning and spirit. The purpose of Regulation 47(1) Cap. 59 is to provide for the safety of workmen who are liable to come into contact with any electric cable while engaged in construction work. To enable this objective to be achieved "construction work" has been given a very wide definition and includes work which would not in common parlance be regarded as coming within that term. The intention of the legislation is to give to such workmen as wide a protection as possible. This was in fact recognised by the magistrate in his decision where he states: - "But there has been an attempt, very properly, by the legislation to catch a wide number of operations within its net, and for this purpose the legislative technique of wide ranging definition has been adopted." However, having said that, he then went on to give a very restricted interpretation to the legislation. The case stated sets out his opinion as follows: - (8)(ii) That the principal ordinance, Cap. 59 only empowers the Third Schedule to specify "structures" or "works" and all the descriptions must to be read ejusdem generis with every other description under the Third Schedule and that only sizeable structures of undertakings are within its purview. (iii) That pure excavation of earth is very remote from being contemplated in the definition of "construction work", unless it occurs in the association with something such as the laying of foundations, and not in its own right. (iv) That the concrete of a conduit containing, telephone lines is not a telephone installation.
- (v) That a portion of a telephone line or its concrete encasing is not a "structure or works" ejusdem generis with the structures and works refer to throughout the Third Schedule. That the words telephonic installation or works in the Third Schedule refers to nothing less than a sizeable structure or undertaking. The magistrate held that the work being engaged in by the Respondent was not construction work and the said site was not a "construction site" in Regulation 2(2) of the Construction Sites (Safety) Regulations and dismissed the information. Halsbury's Laws of England 4th edition vol. 44 at page 535 has this to say about the ejusdem generis rule: - "877. Ejusdem generis rule. As a rule, where in a statute there are general words following particular and specific words, the general words must be confined to things

of the same kind as those specified, although this, as a rule of construction, must be applied with caution, and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the ejusdem generis rule to apply, the specific words must constitute a category, class or genus and the general words must not by their nature exclude themselves from the category, class or genus, so that, for example a superior thing will not be held to be within a class of inferior things. If the particular works exhaust the whole genus, the general works must be construed as referring to some larger genus. It seems that the ejusdem generis rule can have no application where the general words precede the enumeration of particular instances, and may not be relevant for the construction of international conventions." In Section 2(1) the general words "structure and works" are followed by the specific words setting out the instances which come within the general definition. The ejusdem generis rule does not therefore apply. In addition in attempting to apply such a rule the magistrate has not given such fair, large and liberal construction and interpretation to the legislation as will best ensure the attainment of its objects, according to its true intent, meaning and spirit. Even if that were not so I can find nothing in the legislation which supports the magistrate's opinion that the words "telephonic installation" refers to nothing less than a sizeable structure or undertaking. The definition of "construction work covers a wide variety of structures and undertakings. For example included within the definition are the external cleaning of any wall - not a sizeable wall but any wall - the removal of any fence, the maintenance of any sewer, the construction of any well, the renewal of any pipe line, the repair of any road, the decoration of any dwelling, the replacement of any water installation and the renewal or removal of any telephonic installation. With the greatest respect to the magistrate and to Mr. Whitehead who supported the magistrate's findings the approach of the magistrate is to put words of limitation on the legislation which simply did not exist. To accept the magistrate's opinion would leave the court in such cases to decide when does a wall become a sizeable wall, when does a sewer become a sizeable sewer, when does a chimney become a sizeable chimney and so on. The difficulties with such an interpretation must be obvious. I therefore disagree with the magistrate's opinion set out in paras. 8(ii)(v) and (vi). This case does not involve a matter of pure excavation and para. (iii) is irrelevant. In the agreed facts the conduit was described as "a blocked concrete telephone-wire conduit". I am of the view that the telephone lines and the concrete of the conduit in which those wires are laid together constitute a telephonic installation and I find that the magistrate was wrong to treat the concrete casing as a separate item from the wires which it was intended to protect. I disagree with his finding in para. 8(iv). The work that was being carried out was for the installation, repair, reconstruction or renewal of that telephonic installation - or at the very least was work involved in preparing for such installation etc. I am satisfied that the work being carried out by the Respondent was construction work within the meaning of Section 2(1) of the Factories and Industrial Undertakings Ordinance Cap. 59. Accordingly the workmen were employed at a construction site within the meaning of Regulation 47(1) of the Construction Site (Safety) Regulations Cap. 59. I am asked to answer the following questions

- (1) Was I correct in holding as a matter of law that only sizeable undertaking are within the purview of the Third Schedule of the Factories and Industrial Undertakings Ordinance Cap. 59. My answer to this question is no.
- (2) Was I correct in holding as a matter of law that the work being engaged in by the Respondent was not construction work within the meaning of Section 2(1) of the Factories and Industrial Undertakings Ordinance Cap. 59. My answer to this question is no.
- (3) Was I correct in holding as a matter of law that the said site was not a construction site within the meaning of Regulation 2(1)(a) of the Construction Site (Safety) Regulations Cap. 59. My answer to this question is no. The magistrate has yet to make a finding as to whether the Crown has proved that the workmen in this case were workmen who were liable to come into contact with the electric cable. The case is therefore remitted back to the magistrate for his finding on this point and for his verdict. (T. J. Ryan) Deputy High Court Judge PAGE PAGE
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