

HONG KONG / JUDGMENT

ATTORNEY GENERAL v. MARPLES INTERNATIONAL LTD

COURT

Court of First Instance

DECIDED

16 December 1987

CASE / FILE NUMBER

HCMA803/1987

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bjbj IN THE SUPREME COURT OF HONG KONG (Appellate Jurisdiction) MAGISTRACY APPEAL
NO. 803 OF 1987

BETWEEN ATTORNEY GENERAL Appellant MARPLES INTERNATIONAL LIMITED Respondent

Coram : Hon. Bewley, J. in Court Date of hearing : 24th November 1987 Date of delivery of
judgment: 16th December, 1987

JUDGMENT

This is a case stated by Michael Jennings, Esq., at the request of the Attorney General, the
appellant. The facts were that:-

1. Under a contract let by the Housing Authority the respondents were to carry out land reclamation work at Kellett Bay using fill to be taken from a "Borrow Area" near the Government Kennel. 2 The two sites are separated by a distance of one kilometre by road and
- 1 kilometre by sea and by the Wah Fu Estate. The fill was to be transported by sea.
3. At the Borrow Area the respondents were required to obtain all the fill to be used in the reclamation work. The operation involved the complete destruction of a mountain and its removal to Kellett Bay and, at the end of the operation, the respondents were to leave the Borrow Area as a flat area about 20 metres above sea level. The respondents were to have nothing to do with that flattened area.

4. At Kellett Day an area of land was to be reclaimed by the respondents and provided with a sea wall.
5. At the Borrow Area, obtaining the necessary material for the reclamation work involved the respondents moving their machinery around the mountain, which entailed creating temporary "haul" roads, the layout of which changed as work progressed.
6. There was an accident at the Borrow Area, in which a loader fell from the edge of a cut slope, called the 22 mpd bench, onto a lower level. The edge concerned had no guard-rail provided. The respondents were convicted under Regulation 38P(1)(a) of the Construction Sites (Safety) Regulations, made under the Factories and Industrial Undertakings Ordinance, Cap. 59, which provides:-
 - (1) The contractor responsible for a construction site shall ensure that every opening, corner, break, edge or other dangerous place through or from which any person on the site is liable to fall a distance of more than 2 metres is provided with either -
 - (a) a suitable guard-rail or guard-rails of adequate strength to a height of between 900 millimetres and 1 150 millimetres above the surface across which persons are liable to pass so erected as to prevent as far as possible the fall of persons; On review, counsel for the appellant contended that, because the ultimate destination of the rocks from the Borrow Area was the reclamation work at Kellett Bay, the Borrow Area itself was a construction site. The latter is defined by regulation 2 of the above regulations as "a place where construction work is undertaken and also any area in the immediate vicinity of any such place which is used for the storage of materials or plant used or intended to be used for the purpose of the construction work". "Construction work" is defined in section 2(1) of the Ordinance as:
 - (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 paragraph (a), including the laying of foundations and the excavation of earth and rock prior to the laying of foundations;
 - (c) the use of machinery, plant, tools, gear, and materials in connexion with any operation referred to in paragraph (a) or (b)." Reclamation is one of the works specified in the Third Schedule. The magistrate rejected Counsel's contention, being of the opinion that the concluding words of section 2(1)(b) 'including laying of foundations and excavation of earth and rock prior to laying of foundations' make it clear that the preparatory work intended to be covered by the definition of "construction work" is work on the site where the reclamation is to take place and not the Borrow Area, which is not contiguous or adjacent to such place. The questions of law posed by the magistrate for this court are: Firstly whether I was correct in holding as a matter of law that only preparatory work on the site where the reclamation is to take place is construction work within the meaning of section 2(1)(b) of the Factories and Industrial Undertakings Ordinance, Chapter 59, Secondly whether I was

correct in holding as a matter of law that the work being engaged in by the respondents at the Borrow Area was not construction work within the meaning of section 2(1) of the Factories and Industrial Undertakings Ordinance, Chapter 59; Thirdly whether I was correct in holding as a matter of law that the said Borrow Area was not a construction site within the meaning of Regulation 2(1)(a) of the Construction Site (Safety) Regulations Chapter 59. Counsel for the appellant, Mr. Bruce, points out that the same contractor is involved and that all the rock fill from the Borrow Area had the same destination and purpose. He submits, therefore, that the two areas, although physically separate, are so wholly and intimately bound up together that the Borrow Area may properly be said to be a construction site. Mr. Pennicott, for the respondent, concedes that the words "including the laying of foundation and the excavation of earth and rock prior to the laying of foundation" are not words of limitation and are only examples of what goes on during construction work but argues that, if that is the law, it could lead to absurdity where the Borrow Area was dual purpose, in the sense that when it supplied fill for reclamation it would be deemed to be a construction site and therefore must be fenced, but when it supplied rocks for crushing for some other purpose it would be in law a quarry, to which different regulations apply. Mr. Bruce says that, in those circumstances, it could not be regarded as a construction site, because the rock would not be used wholly for purposes within the 3rd Schedule. He limits his argument to sites so closely bound up with reclamation as this one. The objection to that argument is that subsection (6) uses the words "any work". In Mr. Pennicott's hypothesis excavating the rock to be used for reclamation would amount to "any work". The Borrow Area would thus be a construction site. However, when it was excavating rock for the crusher, it would be a quarry. I think, therefore, that the legislation does not contemplate work in a different location as being part of the same construction site. Had that been intended, it would have been easy for the draftsman to have said so. For these reasons I would answer the questions in the affirmative and dismiss the appeal. (E. de B. Bewley) Judge of the High Court Mr. A.A. Bruce, Senior Crown Counsel and Mr. Stephen Wong, Crown Counsel for Crown Appellant Mr. Ian Pennicott, inst'd by M/S McKenna & Co., for Respondent PAGE PAGE &`\$ H; THE SUPE setup Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong H; THE SUPE Title Microsoft Word Document MSWordDoc Word.Document.8

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