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The Impact of the Workplace Safety and Health Act 2006 on the developer

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ABSTRACT

Legislation regulating safety and health in the construction industry under the Factories Act essentially imposed on the contractor as the occupier of the construction site to be responsible. The developer is generally not involved. With the enactment of the Workplace Safety and Health Act (WSHA) in Singapore which repealed the Factories Act, the WSHA has shifted its focus on the contractor to include the developer in its capacity as the employer of persons who may work at the construction site and in its capacity as principal of the development because of its engagement of contractors and subcontractors to vicariously perform the work of construction. Under the WSHA and its Regulations, the developer is required to bear the burden and cost of implementing risk management procedures and measures to ensure that the workplace is safe and healthy to work in. These costs are likely to be passed to others by the developer resulting in the developer not being out of pocket.

Keywords:

Safety; Health; Risk Management; Developer

1. INTRODUCTION

The legislation regulating safety and health are of two types. First, the Factories Act, which has now been repealed and replaced by the Workplace Safety and Health Act 2006 (WSHA), regulates safety and health of those who work within the premises of the construction site during the construction stage of a project. Second, the Building Control Act regulates design, workmanship and materials to ensure the safety and health of users of the completed structure.

Generally, before the enactment of the WSHA, the developer of a project in Singapore has no direct concerns in respect of safety and health

matters. In the design stage, the Building Control Act imposes on the designers who are engaged by a developer, a duty to design so that the completed structure is safe for use. This cost of compliance is likely to be included in the sale of the completed units of the project.

During the construction stage, the repealed Factories Act imposes several statutory duties on the contractor who is an occupier of a construction site under the Factories Act so that the workers who work on site are safe and healthy. Presumably, the cost of compliance with the Factories Act is a cost that forms part of a contractor's tender sum. An item of cost in the tender sum would be the cost of maintaining an insurance cover that includes the insurance cover required by the Workman Compensation Act. These are the likely cost relating to safety and health that appears to be borne by a developer. In as far as the developer is concerned, this would form part of the construction cost that is passed to the purchaser of the units in the project that is developed for sale.

Indeed, the developer's indirect cost relating to safety and health may be limited to what is included by the contractor in his tender sum. It is unlikely that the developer would be liable for any other costs flowing from the risk of safety and health. As an example for analysis, an accident that happens on site that result in deaths and/or injuries where a stop work order is issued would hardly affect the developer.

As regards the stoppage that may lead to a delay in the completion of the works, the developer is compensated with the liquidated damages that a contractor is likely to be liable to pay under most if not all contracts. Any person killed, injured or suffered damage cannot look towards the developer for compensation since the developer is not vicariously liable for an independent contractor's tortious wrongs. The only situation in which the developer may be liable is when the death, injury or legal damage was caused by the interference of the developer by itself or through his agents or servants.

Upon completion of the structure, the developer is responsible for the maintenance of the common property under the Building and Common Property Maintenance and Management Act so that it is safe for the subsidiary proprietors to live in. Whilst the developer is given the necessary statutory responsibility, the cost to carry out any works is borne by the subsidiary proprietors.

Accordingly, there is no real incentive for the developer to actively concern itself with matters of safety and health. However, with the enactment of the WSHA, developers as stakeholders in the construction industry are made liable in two main capacities, namely, as a principal in the chain of main contracts and subcontracts; and as an employer whose undertaking is that of a developer and sometimes owner of the building as well in addition to any other statutory role imposed on a developer. For the moment, the statutory duty of the developer under WSHA does not extend beyond the completion of the construction stage as the definition of workplace remains that of a factory under the repealed Factories Act.

As and when the definition of workplace is extended to any place where work is carried out, then the statutory duty of the developer is likely

to extend to the safety and health of employees and non-employees who are affected by the undertaking of the developer. Some observations may be made from the English case where an owner developer in the form of Port Ramsgate was successfully prosecuted and convicted as an employer under the Safety and Health at Work Act 1974

This paper analyses the relevant details of the WSHA and the related Regulations on risk management with a view of identifying the developer's scope of its statutory duty in relation to its undertaking. This is done with a view of charting the shift in the cost burden from being indirect to direct as well as any additional cost burden. An argument is also canvassed that whilst the WSHA does not allow a civil action to be framed based on a breach of the developer's statutory duty under the Act, it does not expressly disallow a civil action in respect of a breach of the developer's statutory duty under the WSH regulations. Therefore, the carrying out of the duties under the WSH Regulations may expose the developer to a negligence suit for breaching the said duties in respect of risk management.

2. FEATURES OF WSHA

The current Singapore WSHA appears to be modeled after the UK Health and Safety at Work etc Act 1974, more than 30 years later. The UK Act itself was based on the recommendations of the Robens Report 1972. Also based on the Robens Report is the Australian family of health and safety statutes. They have since undergone changes as well. Even in Malaysia, the equivalent statute existed since 1994 and is called Occupational Safety and Health Act 1994 [Act 514].

The declared reasons for enacting the WSHA are extracted from the speech of Mr Ng Eng Hen, the Singapore Minister for Manpower in his second reading of the WSH Bill in Parliament on 17 January 2006. This declared intention might be used in aid of the interpretation of the Act as provided by section 9A of the Interpretation Act. The Minister spoke about fundamental reforms being required.

> "5. …Three fundamental reforms in this Bill will improve safety at the workplace. First, this Bill will strengthen proactive measures. Instead of reacting to accidents after they have occurred, which is often too little too late, we should reduce risks to prevent accidents. To achieve this, all employers will be required to conduct comprehensive risk assessments for all work processes and provide detailed plans to minimise or eliminate risks.
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> 6. Second, industry must take ownership of OSH standards and outcomes to effect a cultural change of respect for life and livelihoods at the workplace. Government cannot improve safety by fiat alone. Industry must take responsibility for raising OSH standards at a practical and reasonable pace.

> 7. Third, this Bill will better define persons who are accountable, their responsibilities and institute penalties which reflect the true economic and social cost of risks and accidents. Penalties should be sufficient to deter risk-taking behaviour and ensure that companies are pro-active in preventing incidents. Appropriately, companies and persons that show poor safety management should be penalised even if no accident has occurred."

Thus, with the enactment of the WSHA and the consequent repeal of the Factories Act, there is a change in the emphasis on how responsibility for safety and health matters may be allocated. In this section, several main features of the WSHA are examined.

First, whereas the Factories Act limited its coverage to factories as defined, the WSHA extended the applicability of the Act to any place of work. Second, whereas the Factories Act imposed the main duties on the occupier, the WSHA makes all the relevant stakeholders accountable. Third, whereas the Factories Act used a prescriptive approach, the WSHA imposes a performance-based requirement. Fourth, whereas the Factories Act relies on a reactive enforcement regime, the WSHA requires preventive and proactive measures to be taken. Fifth, whereas the Factories Act generally imposed nominal penalties, the WSHA is intended to inflict penalties that reflect the true cost of an accident.

Factory to workplace

Under the Factories Act, the intention of the statute was to regulate the behaviour of the occupier within the boundaries of what is known as a factory. The WSHA sought to extend the scope of regulation to retain premises categorised as a factory as well as other places of work. Accordingly, the term "workplace" is used. By virtue of section 5(1), the definition of *workplace* is to include a *factory*.

Further, a workplace is defined as any premises where a person is at work or is to work. Section 5(1) where "at work" is given a very wide interpretation by section 4(1) as set out below.

> "Section 4(1)
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> "at work" means —
> in relation to an employee, all times when the employee is performing work in connection with any trade, business, profession or undertaking carried on by his employer, wherever that work is carried out;
>
> in relation to a self-employed person, all times when the person is performing work as a self-employed person, wherever the work is carried out; and

in any other case, all times when the person is performing work at the direction of the other person who engaged him, wherever the work is carried out;"

Occupier to stakeholders

As compared to the Factories Act where the occupier is the focus of liability, WSHA added ten other categories of persons who may be made liable under the Act under section 10(a). Further, one person may bear more than one type of liability under section 10(b) and the same liability may be imposed on more than one person under section 10(c).

"Duties according to different capacities

Section 10.

For the avoidance of doubt, it is hereby declared that —

(a) a person may at any one time be 2 or more of the following:
an employer;
a contractor;
a subcontractor;
a principal;
a self-employed person;
an occupier of a workplace;
a designer, manufacturer or supplier of any machinery, equipment or hazardous substance for use at work;
an erector, installer or a modifier of machinery or equipment for use at work;
an owner, a hirer or lessee of machinery moved by mechanical power or a person who maintains such machinery for use at work,
and this Act may impose duties or liabilities on the person accordingly;

(b) this Act may at any one time impose the same duty or liability on 2 or more persons, whether in the same capacity or different capacities; and

(c) a duty or liability imposed by this Act on any person is not diminished or affected by the fact that it is imposed on one or more other persons, whether in the same capacity or in different capacities."

Prescriptive to performance based

Whilst the Factories Act generally prescribed what the occupier is required to do under the Act, the WSHA is concerned about achieving a particular result, that is, a safe and healthy state in respect of those who have to

carry out work at the workplaces. References are made to the duties of the three main players to illustrate this.

Thus, by section 11, the occupier is required "to take, so far as reasonably practicable, such measures to ensure [the specified placed] are safe and without risk to health". It must be noticed that the WSHA does not tell the occupier how to achieve the performance standard but requires him to ensure that the performance standard required is achieved.

This is also true for the employer who have employees working at the workplace and for whom the employer is responsible. It is expressly provided by section 12(1) that the employer is "to take, so far as reasonably practicable, such measures as are necessary to ensure the safety and health of his employees at work". The performance standard is applicable both to the employee as well as the non-employee. Thus, by section 12(2), the employer must "take, so far as reasonably practicable, such measures as are necessary to ensure the safety and health of persons (not being his employees) who may be affected by any undertaking carried on by him in the workplace".

The last example is that of the principal who is required "to take, so far as reasonably practicable, such measures as are necessary to ensure the safety and health of [the specified category of people] at work" under section 14(1) as well as "to take, so far as reasonably practicable, such measures as are necessary to ensure the safety and health of persons (other than the specified category of people) who may be affected by any undertaking carried on by him in the workplace" under section 14(3).

Reactive to preventive and proactive

Another important shift in the approach taken can be seen in the Workplace Safety and Health (Risk Management) Regulations 2006 (S141 of 2006). Instead of imposing measures to be taken without consideration of factors affecting the likelihood of an accident happening in a given situation, WSHA 2006 requires a risk management approach.

The duty to carry out risk management is imposed on only three of the nine types of persons, namely the employer, the self-employed person and the principal. The first line of risk management is risk assessment. By regulation 3(1), the employer, self-employed person and principal is required to conduct a risk assessment in relation to the safety and health risks posed to any person who may be affected by his undertaking in the workplace concerned.

After the assessment is completed, reasonably practicable steps must be taken to eliminate any foreseeable risk to any person who may be affected by his undertaking in the workplace as prescribed by regulation 4(1). If it is not possible to eliminate the risk, then regulation 4(2) requires that reasonably practicable measures be implemented to minimise the risk as well as requires safe work procedures to control risk.

Nominal penalty to true cost

As mentioned in the Minister's speech in Parliament, the regime of penalties in the WSHA is no longer to be nominal but must be effective to prevent reoccurrence of accidents. As the Singapore act is modeled after the UK Act including its philosophy, it is helpful to onte how the courts in Uk have dealt with the issue of sentencing in the absence of any Singapore case law.

In *R v Balfour Beatty Rail Infrastructure Services Ltd* [2006] EWCA Crim 1586 the English Court of Appeal (Criminal Division), the court held that,

"42. Section 3 of the 1974 Act requires positive steps to be taken by all concerned in the operation of the business of a company to ensure that the company's activities involve the minimum risk, both to employees and to third parties. Knowledge that breach of this duty can result in a fine of sufficient size to impact on shareholders will provide a powerful incentive for management to comply with this duty. This is not to say that the fine must always be large enough to affect dividends or share price. But the fine must reflect both the degree of fault and the consequences so as to raise appropriate concern on the part of shareholders at what has occurred. Such an approach will satisfy the requirement that the sentence should act as a deterrent. It will also satisfy the requirement, which will rightly be reflected by public opinion, that a company should be punished for culpable failure to pay due regard for safety, and for the consequences of that failure.

43. A breach of the duty imposed by section 3 of the 1974 Act may result from a systemic failure, which is attributable to the fault of management. It may, however, be the result of negligence or inadvertence on the part of an individual, which reflects no fault on the part of the management or the system that they have put in place or the training that they have provided. In such circumstances a deterrent sentence on the company is neither appropriate nor possible. Where the consequences of an individual's shortcoming have been serious, the fine should reflect this, but it should be smaller by an order of magnitude than the fine for a breach of duty that consists of a systemic failure."

3. IMPACT ON DEVELOPER

Generally, developers for the purpose of this paper may be classified into two types for the analysis of their responsibility under the WSHA. The first type of developers develops land that is not subject to the Land Titles (Strata) Act and does not involve the creation of a management corporation under the Building Maintenance and Strata Management Act whose responsibility is generally for the maintenance of common property in the

development. The second type of developers develops land with the reverse effect where, generally, the developers would play the role of the management corporation from the completion of the works until the management corporation is formed and is ready to take over the statutory duty of maintenance from the developer.

Before the enactment of the WSHA, safety and health matters are the direct concern of the contractor and not the developer. In this case, it does not matter which category the developer belonged to. With the enactment of the WSHA and its regulations, new duties have been created that has an impact on the developer. Essentially, the developer may fall into the category of the principal and the employer.

However, the developer's responsibility as a principal is activated only if the group of people specified in section 14(1)(a),(b) and (c), that is, the contractor, the subcontractor and the employees employed by such contractor or subcontractors, are working under the direction of the developer as to the manner in which the work is carried out.

In both instances of the roles of principal and employer, the developer would owe a duty in respect of those who are neither in the specified group under section 14 nor an employee. However, this group would be limited to those who are affected by any "undertaking" carried out by the developer in the "workplace". Thus, the undertaking of the second type of developers would be greater than the first type of developers since there is an additional undertaking in the form of a statutory duty imposed on the developer as predecessor of the management corporation in respect of the maintenance of the common property of the said development.

In this section, three stages would be examined in terms of the scope of the impact of the WSHA and its Regulations on the developer, namely, the design stage, the construction stage, and the post completion stage. The WSHA is applicable at the moment to workplaces that are factories. This is expected to extend to cover any place where work is carried out. Thus for the moment, the developer's concern is limited to the construction stage and in respect of the construction site. When the WSHA is extended to any place where work is carried out, then the developers in Singapore would be wise to learn from the experience of the owner-developer, Port Ramsgate, in UK where they were found liable as employers in the equivalent safety and health Act to both employees and non-employees who were affected by their undertaking. Like the WSHA, the Risk Management Regulations for the moment applies to only construction sites.

Therefore, during the design stage, only developers who retained the completed structure would be affected by the WSHA when the definition of workplace is extended to cover the completed structure since in all likelihood, the developer's employees would be working within the premises of the completed structure. When this happens, the WSHA would require such developer to ensure that there is no defective design that would prevent the developer from achieving a safe and healthy workplace in the form of both the construction site and the completed structure. The developer would be affected under both the roles of principal and employer. In the case of the developers who would have sold the

completed structure, such a developer would not be affected by the WSHA as the completed structure would not be a workplace for the developer's employees.

In respect of the construction stage, the construction site is a factory, and therefore a workplace regulated by the WSHA and its Regulations. First, the developer as principal and employer would have to carry out risk management as required by the Regulations. Second, the developer, again as principal and employer, must take reasonably practicable measures as necessary to ensure that the group of people specified in section 14(1)(a),(b) and (c), that is, the contractor, the subcontractor and the employees employed by such contractor or subcontractors, the employees and those who do neither belonged to the section 14(1) group nor are employees of the developer are safe and healthy as prescribed in the respective provisions.

In addition, at the construction stage, the WSHA would require the developer to ensure that there is no defective construction that would prevent the developer from achieving a safe and healthy workplace in the form of the completed structure. The developer would be affected under both the roles of principal and employer. Again, in the case of the developers who would have sold the completed structure, such a developer would not be affected by the WSHA as the completed structure would not be a workplace for the developer's employees.

The last stage is the post construction stage where there exist, completed structures. Until the definition of workplace in the WSHA is extended to cover any place where work is carried out, the developer would not be governed by the said WSHA upon the completion of the works and the construction site is no longer a factory. However, should the completed structure become a workplace, the developer who sells the development would no longer be regulated by the safety and health legislation subject to the developer's role given by the Building Maintenance and Strata Management Act requiring it to maintain the common property of the development. Where the completed structure becomes a workplace as governed by the WSHA and its regulations, then the developer who chooses to retain the completed structures and uses them as workplaces in respect of its undertaking would have to comply with the requirements of the WSHA and its Regulations.

4. OBSERVATION

In this section, an attempt is made to compare the developer's position under the Factories Act and the likely additional cost to be incurred by the developer that are consequent to the implementation of the WSHA and its Regulations.

As noted in the Introduction of this paper, under the repealed Factories Act, the involvement of the developer is limited to any indirect costs relating to safety and health which the contractor includes in his tender. It is likely that this cost be passed to purchasers in those

developments where one or more units is meant to be sold off to purchasers. Further, should there be any work stoppages as a result of the infringement of the repealed Factories Act, the full burden as to any costs incurred is borne by the contractor. This is so because the contractor is liable for any liquidated damages imposed for late completion under the building contract with the developer should a work stoppage arising from the occurrence of any incident governed by the Factories Act. Thus, it may be observed that the developer, under the repealed Factories Act could afford to be indifferent as regards whether the construction site is safe and healthy for those who work there.

Under the WSHA, where the definition of workplace is limited to a factory, the developer is likely to assume the role of the employer and principal. It would be observed that during the construction stage, the developer would have to incur additional cost to comply with the duties imposed on him as both employer and principal under the Risk Management Regulations as read with the WSHA. In the event of non-compliance, the developer is exposed to the penalties that reflect the true cost that represents the economic loss suffered by the said failure to comply. However, it is to be noted that under the WSHA, the intention of Parliament is to impose criminal liability but not civil liability. By section 60, it is expressly provided that, “Nothing in the Act shall be construed as conferring a right of action in any civil proceedings in respect of any contravention…”. Having said that, there is no express provision to apply this immunity to subsidiary legislation.

However, the employer would have to assume greater responsibility should the definition of workplace extend beyond a factory to include a place where work is carried out. A lesson may be learnt from the UK case involving Port Ramsgate as regards how the safety and health legislation was used in a case that is essentially a defective design case. It is observed from that case that the duty of the developer/owner would extend to ensuring that the measures taken at the design stage would, when the completed structure is used as a workplace, be safe and healthy for those employees of the developer working therein as well as for the non-employees who are affected by the undertaking of the developer at the said workplace. This may also be extended to cover the construction stage, that is, the developer is to ensure that the measures taken at the construction stage would be safe and healthy for those affected when the completed structure is used as a workplace.

5. CONCLUSION

In the analysis above, the WSHA and its Regulations have extended the responsibility for safety and health in three main ways. First, the WSHA extended the scope of the Factories Act in respect of the people responsible. Hence the developer has been identified as one of the stakeholders who must bear responsibility as a principal and as an employer. The developer must now incur cost that is required to satisfy the

risk management requirements set out in the Regulations. The developer must also take measures so far as reasonably practicable to ensure that the peoples specified are safe and healthy.

Second, the WSHA extended the scope of the Factories Act in respect of the places regulated. Hence, the developer is not only responsible for the safety and health of the construction site as principal and employer but should the developer retain the completed structure, that completed structure may also be subject to WSHA if it is used as a workplace. Further, even if the developer sells the completed structure, he may be responsible under the Building Maintenance and Strata Management Act in respect of its statutory undertaking imposed on it to maintain the common property of the development. The developer must now incur the necessary cost to comply with the requirements of the WSHA and its Regulations not only in respect of the construction stage but also in relation to the design and post construction stages as explained above.

Third, the WSHA extended the scope of the Factories Act in respect of the categories of people for whom safety and health is being regulated. Hence the developer is not only responsible for its employee/workers but non-employees who are affected by its undertaking. This extended coverage would inevitably increase the cost of the measures to be taken to comply with the WSHA and its Regulations.

As the WSHA and its Regulations adopt a preventive and proactive approach, the developer would have to incur cost “up-front” to ensure a result of a safe and healthy workplace. This may raise the productivity of the Contractor at the construction site but is unlikely to affect the developer significantly. Further, should compliance with the WSHA and its Regulations thereby avoid work stoppages, again, the developer derives no direct benefit since the developer is covered under the building contract with the contractor for the contractor to compensate the developer for delayed completion by way of liquidated damages.

However, there is no real concern for the developer as in most cases, it is likely that in the case of the developer who intends to sell the development, the additional cost would be passed to purchasers of the development. As for the developer who retains the completed structure, it is also likely that in most cases, such owners/developers would pass their costs to whoever may be the consumers of the business they are in that requires the use of the completed structure. In any event, the greatest beneficiaries must be those who have to work on the construction site, whose lives and limbs must be worth the protecting as they have made the profit margins of the developers possible.