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PRIVATE COLUMBARIA APPEAL BOARD

APPEAL NO. 2/2022

BETWEEN

TUNG KWOK SHIM LAM

Appellant

and

PRIVATE COLUMBARIA LICENSING BOARD

Respondent

Private Columbaria Appeal Board (“**Appeal Board**”) -

Presiding Officer : Dr William WONG Ming-fung, S.C., J.P.

Panel Members : Mr Nevin HO Chi-lok

Mr Timothy MA Kam-wah, M.H., J.P.

Mr Aidan TAM Lon-foong

Sr TANG Chi-wang

Date of Hearing (held in public): 6th July 2023

Date of Handing down Decision with Reasons: 31st August 2023

DECISION

THE APPEAL

1. Mr Leung Yiu Hon (梁耀漢 (別名:釋性耀) “Mr Leung”) as the “Authorised Representative” of the Appellant (東覺禪林, “Tung Kwok Shim Lam”) filed a notice of appeal dated 18 November 2022 (“the Notice of Appeal”) against the Licensing Board’s second decision dated 28 October 2022 (“the 2nd Decision”).

2. By the 2nd Decision, the Licensing Board dismissed the Appellant's application ("the Application") for the issue of two specified instruments ("the Specified Instruments"), namely (1) an exemption in respect of a pre-cut-off columbarium and (2) a temporary suspension of liability in respect of a pre-cut-off columbarium.

3. The Application was first made on 26 March 2018. On 4 September 2020, the Licensing Board issued its first decision dismissing the Application ("the 1st Decision").

4. The Appellant appealed against the 1st Decision on 26 September 2020 (PCAB No. 3 of 2020, "the Previous Appeal"), which was heard by the Appeal Board on 3 June 2021. On 30 June 2021, the Appeal Board handed down its Decision ("the Previous Appeal Decision"), remitting the case back to the Licensing Board "*to reconsider the Application on the question of locus standi of the Applicant in view of our views thereon expressed [in the Previous Appeal Decision] and that the Licensing Board shall reconsider the Application of the Appellant as a whole afresh on a de novo basis*": see §47(1) of the Previous Appeal Decision.

5. Accordingly, the Licensing Board proceeded to reconsider the Application as directed by the Appeal Board.

6. On 29 September 2022, upon the Licensing Board's invitation, Mr Leung on behalf of the Appellant attended (via video conferencing facilities) a meeting held for the purposes of deliberating the Application ("the Meeting"). During the Meeting, Mr Leung was given the opportunity to and did make submissions in response to the outstanding issues of the Application: see the Minutes of the Meeting.

7. On 28 October 2022, the Licensing Board issued the 2nd Decision to Mr Leung, in which it dismissed the Application on the grounds that the Appellant failed to satisfy the requirements set out in sections 20(1)(f), 20(1)(h), 20(1)(g), 22, 23(1), 23(2), 25, and sections 2(1) and 2(2) of Schedule 3 of the Private Columbaria Ordinance (Cap 630) ("the PCO"). Details of the reasons for dismissing the Application are set out at §§7-41 of the 2nd Decision.

GROUND OF APPEAL

8. In the Notice of Appeal, the Appellant relies on 4 grounds of appeal to challenge the 2nd Decision:

- (1) The Licensing Board has erred “in law and in fact” in dismissing the Application, and the 2nd Decision is null and void.
- (2) The 2nd Decision contradicts the Previous Appeal Decision, especially paragraphs 15, 17, 20 and 47(1) therein, and is therefore null and void.
- (3) The 2nd Decision is contrary to the overall policy and vision of the Government, is not “*in the interest of justice*”, and is therefore null and void.
- (4) The Appellant has basically and factually satisfied the requirements under the PCO, and should be granted the Specified Instruments.

ANALYSIS

9. First, the Appellant asserts that the Licensing Board has erred “in law and in fact” in dismissing the Application. Mr Leung, no doubt, a very devoted Buddhist, impresses us with his dedication and self-sacrifice for the common good for preserving the existing private columbarium. Mr Leung submitted and we agree that the Appellant has no intention of selling any new places of private columbarium to the general public. The Appellant is genuinely concerned that the existing or pre-bill private columbarium would be adversely affected. This appeal board has expressed concerned that this is a matter that has to be resolved sensibly and amicably with the prime objective of achieving social harmony in our society.

10. Indeed, as Mr Fung SC for the Respondent to this appeal pointed out to us that in the LegCo Brief on the Private Columbaria Bill dated 18 June 2014 (“LegCo Brief”) in the legislative brief, it is stated in no uncertain terms that:

“我們首先要明白，擬議的發牌制度並非靈丹妙藥，無法解決過往留存下來的所有問題。我們也無法為一些最終可能出現的棘手情況提供圓滿的解決方法。我們已於二零一二年三月、二零一二年十二月及二零一三年十一月就諮詢結果、法例框架及有關工作的時間表向立法會匯報進展。”

11. This appeal board’s duty is to decide the present appeal according to the law.

12. Mr Leung submitted that the provisions in the PCO are couched in “sensitive” (體恤), “pragmatic” (務實) and “relaxed” (寬鬆) language and that the Licensing Board should have exercised its discretion under sections 20, 21 and 22 of the PCO in a sensitive, pragmatic and relaxed manner when considering the Application to avoid social disruption accordance.

13. Whilst we agree that insofar as discretion is involved, such discretion should be exercised in a rational and sensible manner, it is also important to point out that the discretion has to be exercised within the four corners of the relevant legislative provisions. The Respondent cannot rewrite the law. It has to make decisions on any application of the present nature by reference to the requirements as set out in sections 20, 21, 22 of the PCO. Hence, we do not think that the Respondent has erred in law and in fact in dismissing the Application.

14. Similarly, whilst we agree that the Licensing Board must act in the interest of justice and in accordance with public interest, we cannot identify any basis to say that the Licensing Board has not acted in the interest of justice and in accordance with public interest. One essential element in acting in the interest of justice and public interest is to act in accordance to the law. The Respondent has done just that.

15. In fact, we have serious concern about the locus standi of Mr Leung to present the Appellant as a matter of law. We note that the de facto control of the Appellant is at present under litigation which is yet to be concluded. It is not for this appeal board to pre-judge that very issue. Whilst we can understand that Mr Leung genuinely believe that he is the de facto manager and representative of the Appellant, as a matter of public record, Mr Leung is not the representative of the Appellant.

16. Further, in relation to land-related requirements:

(1) An applicant for an exemption needs to establish that the operation of the columbarium does not involve unlawful occupation of unleased land and that the requirements in respect of the columbarium under the lease, short term tenancy or other instrument, under which the columbarium premises are held directly from the Government, are complied with.

(2) The Government lease of the land on which the existing columbarium is situated does not allow the land to be used for columbarium use. This remains to be the problem. Accordingly, the Licensing Board cannot be said to be wrong in concluding that the Appellant has not satisfied the above requirements.

17. In relation to the right to use the columbarium premises:

(1) An applicant for an exemption needs to establish that (a) the applicant holds the columbarium premises directly from the Government under a lease or has a right to continue to use the premises for at least 5 years from the effective date of the exemption, and (b) the owner of the columbarium premises has, or all the joint owners or co-owners of the columbarium premises, have, given authorisation or consent for the premises to be used as a columbarium.

(2) The land subject to the Application is located in Lot No 610 (remaining portion) and Lot No 1188 in DD 453. According

to the Land Registry's records, (a) the registered owner of Lot No 610 (remaining portion) in DD 453 is Tung Kwok Shim Lam Limited and (b) the registered owner of Lot No 1188 in DD 453 is Tsuen Wan Tung Po Tor Monastery Limited, and not the Appellant. (see §3 of Respondent's written submission).

(3) Mr Leung is not a director of Tung Kwok Shim Lam Limited and Tsuen Wan Tung Po Tor Monastery Limited.

(4) The Licensing Board is correct in reaching the conclusion that the Appellant has not satisfied the relevant requirements regarding the right to use the columbarium premises.

(5) We note Mr Leung's submission that the Appellant has been in actual occupation of the subject premises including the building of concrete boundary fence. However, as a matter of law, short of a court declaration on claims based on adverse possession, this appeal board can only proceed on the basis of the official records as set out above.

18. In relation to fire safety:

(1) An applicant for an exemption and a temporary suspension of liability needs to establish that the columbarium complies with the fire safety requirements for private columbaria.

(2) Despite great efforts by the Appellant, it has not submitted sufficient documentary evidence to show that it has complied with the fire safety requirements.

19. In relation to building-related requirements:

(1) An applicant for an exemption needs to establish either (a) the columbarium complies with the building-related requirements or (b) the non-compliant structures necessary for, or ancillary to, the operation of the columbarium are structures certifiable

for a pre-cut-off columbarium, and the requirements applicable to the structures specified in section 4(3) of Schedule 2 of the PCO are complied with.

(2) On 24 May 2022, the Buildings Department indicated that the Appellant needed to provide certain outstanding information (including certain documents and plans) to determine whether the building-related requirements could be satisfied. However, the Appellant did not provide such information to the Buildings Department.

(3) We agree that the Appellant's reliance on documents previously submitted by Mr Leung in 2020 cannot satisfy the queries made by the Buildings Department in May 2022.

20. Finally, in relation to impact on the environment:

(1) An applicant for an exemption needs to prove that the columbarium complies with the environmental related requirements on air pollution, drainage facilities/sewage processing and noise control.

(2) The Appellant has not provided the requisite documents to show that the environmental related requirements are satisfied.

21. We fully appreciate that the Appellant has tried its very best to satisfy the relevant statutory requirements including the assistance of various voluntary individuals and professionals in a publicly spirited manner. However, as a matter of law and fact, it is a factual question as to whether the relevant statutory requirements are satisfied. The answer in this case is in the negative.

22. Finally, we do not consider that, as a matter of law, it is correct that the Licensing Board has not followed §§15, 17, 20 and 47(1) of the Previous Appeal Decision in PCAB 3/2020.

23. In §15 of the Previous Appeal Decision, the Appeal Board said “According to what the [Appellant] had told the Licensing Board as to his *de facto* and extensive control and management of the Monastery as its supervising officer including the existing columbaria therein over the past years, the [Appellant] could have satisfied Regulation 2(1), Schedule 3, PCO *qua* his *de facto* status in the Monastery”.

24. In §17 of the Previous Appeal Decision, the Appeal Board referred to the decision of *Sik Chiu Yuet v Secretary for Justice* [2018] 4 HKLRD 194 and said that “the question on a person’s *locus standi* as an applicant for an application under PCO should be construed widely and purposively in the present case”. In §20 of the Previous Appeal Decision, the Appeal Board referred to section 57A(a)(iii) of the Trustee Ordinance (Cap 29) (“the TO”) and §40 of the judgment in the *Sik Chiu Yuet* case.

- (1) In *Sik Chiu Yuet*, a Buddhist monk (S) commenced proceedings in the High Court by way of originating summons seeking relief in respect of the administration of a charitable trust known as Man Wa Tong (MWT), which held and managed a Buddhist temple (the Temple) at Fu Yun Shan in Tsuen Wan. MWT’s managers applied to strike out the originating summons on the ground that S had no standing to bring those proceedings, and succeeded in the Court of First Instance. The case turned on whether S was a person “otherwise interested in the trust” within the meaning of section 57A(a)(iii) of the TO. S relied on the fact that he was a director of another entity (the Memorial Hall) which managed another Buddhist temple in Fu Yun Shan, that he was the keeper of another Buddhist institution there (the Grotto), and that there was a close relationship amongst the Temple, the Memorial Hall and the Grotto. The Court of Appeal held that the expression “persons otherwise interested in the trust” in section 57A(a)(iii) of the TO must not be construed too narrowly and that the matter should be reconsidered by the judge below in the light of the Court of Appeal’s judgment and further evidence to be filed by S.

(2) Section 57A(a)(iii) of the TO provides:

“57A.Charitable trusts

Without prejudice to the generality of sections 56 and 57, the court may provide such relief, make such order, or give such direction, as it thinks just relating to a charitable trust upon an application made to it—

(a) *by—*

- (i) *2 or more persons who have the consent in writing of the Secretary for Justice to make the application;*
- (ii) *the Secretary for Justice; or*
- (iii) *all or any one or more of the trustees or persons administering the trust, or persons claiming to administer the trust, or persons otherwise interested in the trust; and*

(b) *either—*

- (i) *complaining of a breach of the trust or supposed breach of the trust; or*
- (ii) *for the purposes of the better administration of the trust.”*

(3) From its plain language, section 57A of the TO allows certain prescribed persons to make an application to court in relation to a breach, or for the purpose of better administration, of a charitable trust. Section 57A was added to the TO by section 3 of Trustee (Amendment) Ordinance 1997. According to the Explanatory Memorandum of the Trustee (Amendment) Bill 1997, one of the purposes of the Bill was to “*add a new section 57A ... to replace the Charities Procedure Act 1812 (1812 c. 101 U.K.) ... [and the] new section entitles 2 or more persons who have the consent of the Attorney General to do so to make an application to the court to seek relief, an order or a*

direction from the court where there is, inter alia, a breach of a charitable trust". Such applications under section 57A of the TO would need to be made by way of an originating summons pursuant to the Rules of the High Court Order 120 rule 3.

(4) We agree that section 57A of the TO cannot be relevant in the Licensing Board's consideration of the Application. Section 57A of the TO merely provides a procedure for obtaining reliefs or directions from the court in relation to a charitable trust: e.g. *Lai Chik Kun Michael et al v The Baptist Convention of Hong Kong* [2022] HKCFI 728 at §§55, 58 (Wilson Chan J). It provides no assistance to the Licensing Board for the determination of the merits of the Application.

(5) The *Sik Chiu Yuet* case is authority for the proposition that the expression "*persons otherwise interested in the trust*" in section 57A(a)(iii) of the TO must not be construed too narrowly. Such an expression is not found in the PCO.

25. In §47(1) of the Previous Appeal Decision, the Appeal Board made the order that the case "*be remitted and sent back to the Licensing Board to reconsider the Application on the question of locus standi of the [Appellant] in view of our views thereon expressed above and that the Licensing Board shall reconsider the Application of the [Appellant] as a whole afresh on a de novo basis*".

(1) We note that the Licensing Board has reconsidered the Application as a whole afresh on a *de novo* basis. It has also considered the question of *locus standi* of the Appellant (§§33-34 of the 2nd Decision).

(2) Having considered all the relevant legal principles and arguments, including those set out in the Previous Appeal Decision, the Licensing Board concluded that:

(a) Mr Leung has not adduced any sufficient or cogent evidence to show that a trust or trust organisation in the name of “Tung Kwok Shim Lam” has been in existence (§34(ii) of the 2nd Decision).

(b) Mr Leung has not provided any sufficient or cogent evidence to show that he has a legal right in representing the Appellant, including any evidence that the company Tung Kwok Shim Lam Limited (“the Company”) had appointed him (who is not a director of the Company) as the authorised person to act on behalf of the Appellant in applying for the Specified Instruments (§34(iii) of the 2nd Decision).

(3) The Appellant has produced nothing to challenge these conclusions. There is similarly nothing to support the Appellant’s assertion that Mr Leung is the “*de facto manager and/or trustee and/or beneficiary*” of the Appellant.

26. For the above reasons, we agree that there was no determination in this paragraph that Mr Leung had de facto and extensive control and management of the Appellant. In any event, it does not matter as this appeal board does consider the substantive merits of the present appeal.

DISPOSITION

27. This appeal board fully appreciates that Mr Leung has done all that he possibly could for and on behalf of the Appellant, but we, as the appeal board, has to make decision based on the law. As far as Buddhist teaching goes, it is important to the values of 放下我執，緣起緣滅.

28. Accordingly, the present appeal is dismissed and we hope that this matter can be resolved amicably and sensibly for the general good of the public.

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(Signed)

Dr William WONG Ming-fung, S.C., J.P.
(Presiding Officer)

(Signed)

Mr Nevin HO Chi-lok

(Signed)

Mr Timothy MA Kam-wah, M.H.,
J.P.

(Signed)

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(Signed)

Sr TANG Chi-wang

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Appellant : Represented by Mr Leung Yiu Hon (梁耀漢 (別名:釋性耀))

Respondent : Represented by Mr Eugene Fung and Ms Eva Leung of
counsel instructed by Messrs. Gallant.

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