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PRIVATE COLUMBARIA APPEAL BOARD

APPEAL NO. 1/2019

BETWEEN

SKY PACIFIC LIMITED

Appellant

and

PRIVATE COLUMBARIA LICENSING BOARD

Respondent

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

Presiding Officer : Dr WONG Ming-fung, William, SC, JP

Panel Members : Mr HUANG Ling-hang, Lincoln, JP

Mr LEUNG Kwong-hon, Philip, M.H.

Mr LI Wah-ming, Fred, S.B.S., JP

Sr TANG Chi-wang

Date of Hearing (held in public): 17 March 2020

Date of Handing down Decision with Reasons: 3 April 2020

DECISION

A. THE APPEAL

1. This is an appeal by Sky Pacific Limited (“**Sky Pacific**” or “**the Appellant**”) against the decision of the Private Columbaria Licensing Board (“**PCLB**”) which was issued vide a notice dated 7 May 2019 (“**the Decision**”) whereby PCLB refused Sky Pacific’s applications for (i) a

temporary suspension of liability (“TSOL”) and (ii) a licence (“Licence”) in respect of a pre-cut off columbarium submitted by Sky Pacific and Splendid Resources Inc. (“Splendid Resources”) (collectively, the “Applicants”) under the brand name and/or trade name known as “Oasis” (“Oasis”) at the subject premises specified in the applications (“Subject Premises”).

2. 潘志永(“Mr Poon”), a representative of the Appellant, informed this Appeal Board that Sky Pacific has no authority to represent Splendid Resources and it does not seek to represent any other parties than itself in the pursuit of the present appeal. Sky Pacific is the landowner of Lot no.113 and it only seeks to appeal against the Decision insofar as Lot no.113 is concerned.

3. This gives rise to a question of *locus* and/or standing. Mr Suen SC for the PCLB is right that when the appeal was filed it was filed on behalf of Oasis as a whole. In a sense, the present appeal is defective in the sense that there is no decision specific to Sky Pacific from which an appeal can be mounted. It is not at all clear to this Appeal Board how the Notice of Appeal could be validly filed with the consent of Splendid Resources in the first place.

4. Mr Suen SC for PCLB submitted that only one set of application form was submitted to the PCLB purportedly on behalf of the Applicants, whereas two sets of submissions were made for the Notification Scheme. The result is that the Applications were made in respect of Oasis *as a whole* as one single columbarium and there was *no* separate applications made in respect of *different* constituent parts of Oasis on a standalone basis. In these circumstances, the PCLB rightly treated and considered the Applications as one set of applications for Oasis *as a whole* (i.e. applications for TSOL and Licence in respect of a pre-cut-off columbarium for one single columbarium). In the absence of authority from Splendid Resources to make, pursue and proceed with the Applications, Sky Pacific *on its own* would have no standing and authority to make, pursue and proceed with the Applications purportedly for Oasis *as a whole* as one single columbarium. The Applications (and thereby the Appeal) simply fail *in limine*.

5. This is *a fortiori* the case in the present Appeal, which is formally lodged by Sky Pacific alone but not Splendid Resources.

B. ANALYSIS

6. The PCLB refused the Applications on the principal basis that the Applicants failed to prove to the satisfaction of the PCLB that the Subject Premises are a “pre-cut-off columbarium” as defined under section 2 of the Private Columbaria Ordinance (Cap. 630) (“**Ordinance**”).

7. Under section 2 of the Ordinance,

(1) “pre-cut-off columbarium” means “a columbarium [i] that was *in operation*, and [ii] in which *ashes were interred* in niches, immediately *before the cut-off time*”;

(2) “ashes” means “(a) *ashes resulting from the cremation of human remains*, and (except in section 5) includes synthetic diamonds, jewellery, ornaments and any other materials transformed from human ashes; and (b) includes the container of such ashes, as well as any items interred together with such ashes in the same container (if applicable), except for the following provisions - (i) section 68(3)(d)(iv) and (v); (ii) the definitions of eligible claimant and related item in section 6(2) of Schedule 5; and (iii) sections 10, 11(4)(b)(i) and 12(4) of Schedule 5”; and

(3) “cut-off time” means “8 a.m. on 18 June 2014”.

8. This Appeal Board has listened to the submissions and evidence of Mr Poon and Mr Tang for the Appellant carefully and has duly considered their submissions and evidence. All members of the Appeal Board unanimously come to the view that this appeal must be dismissed. Apart from the issue of *locus* or standing, first, the Appellant, Sky Pacific, has not demonstrated that there were any ashes interred in niches operated by

it. Although in its Notice of Appeal which included a letter of objection to the refusal of application by the PCLB, the Appellant submitted that two graves, namely, Graves 64 and 71 were interred with human ashes, Mr Poon for the Appellant, Sky Pacific, very fairly informed this Appeal Board that the Appellant does not rely on Graves 64 and 71 as they were interred outside the land of the Appellant.

9. This Appeal Board accepts Mr Kwan, a witness for the PCLB, as a credible and honest witness. He was cross-examined by Mr Poon of the Appellant. It was not put to Mr Kwan that Mr Mak Chi-yeung (“**Mr Mak**”), purportedly a manager of Oasis (see paragraphs 21 and 22 below), ever said that there were ashes resulting from the cremation of human remains interred in the Appellant’s land. In fact, there was positive evidence to which this Appeal Board accepts to be accurate that Mr Mak specifically mentioned that it was difficult to prove that there were ashes resulting from the cremation of human remains because of the destruction of DNA in the process.

10. In the inspection process carried out by Mr Kwan in the presence of Mr Mak, there is no positive evidence that ashes resulting from the cremation of human remains were interred. The eight plates that Mr Kwan inspected have no names or photos or information of any deceased person inscribed.

11. This Appeal Board also takes into consideration that all along the Appellant refused to make declarations that human ashes were interred. No such confirmation were made during surveys on 28 June 2014 and 11 July 2014.

12. The burden rests on the Appellant as applicant to demonstrate that it has satisfied the conditions as set out in section 2 of the Ordinance. We are of the view that on this ground alone, the Appeal should be dismissed.

13. Secondly, Mr Poon for the Appellant also fairly and honestly informed this Appeal Board that the Appellant has ceased any attempt to sell niches or graves in the columbarium since 2012 as there were then ongoing litigation. Understandably, the Appellant did not want to risk

A		A
B		B
C	forfeiture of its land for breach of leasing conditions. So there were no records of any selling activities.	C
D	14. The only activity that Mr Poon relied upon to say that the Appellant has operated immediately before the cut-off time is legal proceedings. We are of the view that the fact that the Appellant, as a company, was involved in litigation, does not mean that it has operated a columbarium. There is no evidence that it has.	D
E		E
F		F
G	15. Mr Suen SC helpfully drew this Appeal Board's attention to a series of documents which shows that consistent with Mr Poon's evidence, no columbarium was in operation immediately before the cut-off time on 18 June 2014. These include a letter dated 28 May 2019 from the Appellant, an undated letter from the Appellant received on 28 January 2019, letter dated 9 April 2019 from the Appellant and minutes of 11 April 2019 meeting.	G
H		H
I		I
J		J
K	16. Paragraph 2 of Mr Poon and Mr Tang's witness statement also confirms the same.	K
L		L
M	17. What Mr Poon submitted was that the Appellant had done all the preparatory works to commence the operation of a columbarium but it wanted to do it legally and was therefore fighting court cases during the material time. It would be irresponsible to customers who purchased any graves from the Appellant when there was uncertainty on its legal right to do so. This is all very correct. However, an <i>intention</i> to operate a columbarium cannot be equated with an <i>actual operation</i> of one. In fact, there is positive and credible evidence that the Appellant made a deliberate decision to stop operation because of the legal risks involved. In the circumstances, the Appeal Board concludes that there is no evidence of actual operation prior to the cut-off time. For the avoidance of doubt, this Appeal Board makes it clear that the pure conduct of litigation concerning land usages is not operation. At best, it is a step in preparation for operation. It is like when a restaurant is still fighting a case for a liquor licence, it could not be said to be in the operation of liquor business. On this ground alone, the Appeal should be dismissed.	M
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C. GROUND OF APPEAL

18. The grounds of appeal as set out in the Notice of Appeal dated 28 May 2019 are as follows:

(1) “We object PCLB had not examined the key information prior to make a decision” (“**Ground 1**”);

(2) “We object PCLB mislead the public in the presentation during public hearing” (“**Ground 2**”).

19. All members of the Appeal Board are of the views both grounds cannot be established. Ms Yim, another witness for the PCLB, is offered for cross-examination. Mr Poon for the Appellant did not choose to cross-examine her. We accept all of Ms Yim’s evidence as being true and accurate. We are of the view that PCLB has examined the key and all relevant information before making its decision.

20. We also fully accept the matters set out in PCLB’s Response dated 20 June 2019. We do not accept that the PCLB misled the public in the presentation during public hearing.

Ground 1

21. On 20 June 2014, Mr Mak, a manager of Oasis, submitted two Notification Forms to participate in the Notification Scheme for Pre-Bill Columbaria in respect of two locations, namely Land Lots A and Land Lot B, being land lots owned by Splendid Resources (for Land Lots A and Land Lot B) and Sky Pacific (for Land Lot B).

22. On 28 June 2014, staff of the Food and Environmental Hygiene Department (“**FEHD**”) conducted a pre-survey visit to the sites, accompanied by Mr Mak and two staff of the Applicants. According to §§5-6 of the Witness Statement of 關祐基 (“**Mr Kwan**”) (being a representative from FEHD):

A			A
B			B
C	(1)	There were a total of eight stone plates lying flat on the ground in the plot of land visited. No name and inscription of any kind was found on the stone plates. According to Mr Mak,	C
D		there were allegedly about 2,800 similar stone plates which were all covered by wild vegetation, and the eight stone plates	D
E		were unveiled after the workers had removed the wild vegetation thereon some days before the visit. However,	E
F		FEHD staff could not see the alleged 2,800 stone plates mentioned by Mr Mak.	F
G			G
H	(2)	Mr Mak was asked to open the vault under one stone plate by the FEHD staff. Upon opening the vault, a plastic bottle wrapped by a bag (made of cloth) was seen. Mr Mak claimed	H
I		that the bottle contained “ashes”. When asked by FEHD staff whether these were human ashes, he responded that he could	I
J		not tell as the laboratory told him that no DNA could be retrieved from human ashes. When asked by FEHD staff	J
K		whether there was any sold niche, Mr Mak replied “no”.	K
L			L
M	23.	On 11 July 2014, there was a further survey visit and inquiries conducted by the FEHD staff, including Mr Kwan, accompanied by Mr Mak. According to §7 of the Witness Statement of 關祐基, again, no name	M
N		and inscription of any kind was found on the stone plates.	N
O	24.	On 29 March 2018, the Applicants submitted an application form with supplemental information for a Licence in respect of a pre-cut-off columbarium and TSOL. According to the records in the Land Registry as	O
P		examined by the Private Columbaria Affairs Office (“PCAO”), all the land	P
Q		lots covered by the Applications (except Lot no.113 which is held by Sky Pacific) are owned by Splendid Resources.	Q
R			R
S	25.	On 27 December 2018, the PCAO wrote to the Applicants notifying them that the application form submitted on 29 March 2018 had failed to	S
T		provide any material information or supporting documents to substantiate the claim that Oasis was a pre-cut-off columbarium. The Applicants were	T
U		asked to provide to PCLB on or before 28 January 2019 with a full set of	U
V			V

A		A
B		B
C	supporting documents to prove that Oasis is a pre-cut-off columbarium as defined under the Ordinance.	C
D	26. On 28 January 2019, the PCAO received a letter signed by a	D
E	“Managing Director”, but without identification of the name of the	E
F	signatory or the company on behalf of which the letter was issued. Further, the signature thereon differed from that of the purported “authorized person” in the application form.	F
G	27. On 4 February 2019, the PCAO emailed the purported “authorized person” on the application form, Ms Bai Guilan (“ Ms Bai ”), at the email	G
H	address provided thereon, requiring her response, but no response whatsoever has been received.	H
I	28. On 7 March 2019, the PCLB Secretary wrote to the Applicants, inviting them to attend the open meeting scheduled to be held on 11 April 2019.	I
J		J
K		K
L	29. On 12 March 2019, the PCLB Secretary received a reply slip signed by a Mr Tang Chun Lun (“ Mr Tang ”), stating that he would attend the open meeting. However, the reply slip contained no identification of any company name or title of post of Mr Tang, and no documentary proof was attached to show that Mr Tang was duly authorized to act for and on behalf of the Applicants to attend the open meeting on 11 April 2019.	L
M		M
N		N
O	30. Thus, on 29 March 2019, the PCLB Secretary issued two letters to the Applicants, (i) seeking clarification on attendance at the open meeting on 11 April 2019 and proper written authorization documents, and (ii) enclosing a copy of the submission paper and PowerPoint presentation prepared by the PCAO for consideration by the PCLB.	O
P		P
Q		Q
R	31. It was not until 9 April 2019 that Sky Pacific (in the absence of Splendid Resources) unilaterally wrote a letter requesting postponement of the open meeting. The letter alleged that Sky Pacific had appointed Mr Tang to replace Ms Bai as its representative to continue with the Applications and attached copies of the authorization documents.	R
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32. In response, the PCLB Secretary sent a letter to the Applicants by hand on 10 April 2019 to inform them that the open meeting would be held on 11 April 2019 as scheduled.

33. Mr Tang turned up at the open meeting on 11 April 2019 as the representative of Sky Pacific. Mr Tang, in oral evidence, confirmed that he could not recall whether he had seen the PowerPoint presentation.

34. On 7 May 2019, the PCLB Secretary issued the Notice of Decision to the Applicants.

35. By reasons of the events set out above, this Appeal Board is of the view that the PCLB has taken into account all relevant information and materials in making the Decision.

36. Additionally, Mr Suen SC for PCLB also submitted and we accept that the PCLB has also taken into account, *inter alia*, the following information before making the Decision:

(1) The application form used by the Applicants for submitting the Applications is “*Application Form for Licence and Other Specified Instruments for Pre-Cut-Off Columbarium under the Private Columbaria Ordinance (Cap. 630)*” specified by the PCLB. This application form is for submitting specified instrument applications in respect of pre-cut-off columbarium under the Ordinance.

(2) A document entitled “Proof of pre-bill columbaria qualification” attached to the application form submitted by the Applicants on 29 March 2018. That document does *not* contain any substantive information to prove that a columbarium named as Oasis was in operation at the Subject Premises (at the address stated in the application form) *immediately before 8 a.m. on 18 June 2014* and there were ashes (as defined under section 2 of the Ordinance) interred in niches at the Subject Premises *immediately before 8 a.m. on 18 June 2014*;

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- (3) Information submitted by the operator of Oasis to the FEHD under the Notification Scheme for Pre-Bill Columbaria in 2014 and information collected during on-site surveys conducted by the staff of the FEHD under that scheme, including the following:
- (i) in the two Notification Forms in respect of two locations, namely Po Toi Island Various Lots and Po Toi Island Lot no. 113 submitted by the Applicants on 20 June 2014, the word “骨” was deliberately deleted from “龕位最早安放骨灰的日期” in the Chinese version and there was no entry for the fields of “No. of Sold and Occupied Niches” and “No. of Sold but Not Yet Occupied Niches”;
 - (ii) in the revised Notification Forms submitted by the Applicants on 27 June 2014, the word “骨” was deliberately deleted from “龕位最早安放骨灰的日期” and the words “售出並” and “骨” were deliberately deleted from “售出並已安放骨灰的龕位數目” in the Chinese version of the two forms; and the words “Sold and” were deliberately deleted from “No. of Sold and Occupied Niches” in English version of the Notification Form in respect of Various Lots;
 - (iii) during the pre-survey visit conducted by the FEHD’s staff on 28 June 2014, the FEHD’s staff noted that the land lots concerned were covered by wild vegetation and only eight stone plates could be seen by the FEHD’s staff (see §5 of the Witness Statement of 關祐基). According to the operator’s representative, those eight stone plates were unveiled after his workers had removed the wild vegetation some days before the visit;
 - (iv) during the site survey conducted by the FEHD’s staff on 11 July 2014, accompanied by the operator’s representative, no names or photos of any dedicated

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persons or niche serial number for identification were inscribed on any stone plates placed on the ground in the Subject Premises (see §7 of the Witness Statement of 關祐基);

- (v) in the email dated 22 August 2014 from the operator (see p.R345 of p.R345-R346), it was stated that “*none of the family ground niches are sold yet, and thus no legal docents were exchanged between the third parties*”. The operator has not provided any documents or information to prove that the operator has entered into any agreement or arrangement with any person/party for interring ashes in the “family ground niches” at the Subject Premises immediately before 8 a.m. on 18 June 2014 or to relate any “family ground niches” to the identity of any particular deceased person to prove that ashes (as defined in section 2 of the Ordinance) were interred in any “family ground niches” immediately before 8 a.m. on 18 June 2014; and
- (vi) in the letter dated 13 November 2014 from the operator, it was stated that “*we choose to provide the attached copies of the surveyor report from Target Land Surveyor Ltd. for your file. These documents were given to us on the 12th March 2012, when the survey was done right at the time of the gazette of the Po Toi DPA. After the gazette of the DPA, all works on our Po Toi Island land lots were put on a halt as compliance*”. The survey report, which consisted of only a summary of concrete slabs, maps for photo ID reference and photos showing slabs on ground, does *not* contain any information to prove that a columbarium named as Oasis was in operation at the Subject Premises *immediately before 8 a.m. on 18 June 2014* and there were ashes (as defined under section 2 of the Ordinance) interred in niches at the Subject Premises immediately before 8 a.m. on 18 June 2014;

A			A
B			B
C	(4)	The PCAO wrote to the Applicants on 27 December 2018, informing them that the application form submitted by them on 29 March 2018 failed to provide any material information or supporting documents to substantiate the claim that Oasis was a pre-cut-off columbarium and asked the Applicants to provide the PCLB with the requisite supporting documents.	C
D			D
E			E
F			F
G	(5)	In response to the PCAO's letter of 27 December 2018, an undated letter was received on 28 January 2019 from a so-called "Managing Director" with no company name and name of the signatory (see p.R469-R506). In that letter, it is stated that " <i>The whole operation was put on a halt after June 2012</i> " and " <i>...our operation had come to a halt long time ago...</i> ", and that "(1) As at to-day, we wish to provide you with the identity of the two deceased persons being interred in the premises. They are 羅勝明 and 鄭由. (2) In view of the fact our operation had come to a halt long time ago, we are at this moment unable to provide you with detailed information regarding the deceased interred in the premises. Currently, we are trying to trace such information; (3) We enclose herewith a plan at <u>Appendix 6</u> showing the photos and the locations of the two deceased's niches mentioned in 3(1); (4) Same as 3(2), we are at this moment unable to provide you with records regarding the deceased interred in the premises. Currently, we try to find any relevant records".	G
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P			P
Q			Q
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T			T
U			U
V			V

The above letter does not contain any information to prove that a columbarium named as Oasis was in operation at the Subject Premises immediately before 8 a.m. on 18 June 2014 and there were ashes (as defined under Section 2 of the PCO) interred in niches at the Subject Premises immediately before 8 a.m. on 18 June 2014. The letter also does not state that what were interred relating to 羅勝明 and 鄭由 at the Subject Premises were ashes and does not contain any information to prove the date of interment.

A			A
B			B
C	(6)	Information provided in the letter dated 9 April 2019 from Sky Pacific, attaching an Appendix (II) with title “蒲台緣 紀念公園 – 園區及附近墓穴登記” in which under the column	C
D		“殮葬方式” some Chinese words “墓地”, “金塔” and “墳頭”	D
E		and some photos are shown under the column “圖像”. According to §16 of the Witness Statement of 嚴清霞, usually,	E
F		the Chinese words “墓地”, “金塔” and “墳頭” refer to	F
G		places/structures in which human remains (other than human ashes) are buried/kept. The letter does not state ashes were	G
H		kept in those “墓地”, “金塔” and “墳頭” and also does not	H
I		provide any information on the dates of interment of ashes (if	I
J		any) at the Subject Premises.	J
K		It is therefore groundless for Sky Pacific to contend in §3 of	K
L		its Statement that the information in this letter was not	L
M		examined by PCLB before making the Decision; and	M
N	(7)	The response made by Mr Tang, who was authorized by Sky	N
O		Pacific to attend the open meeting as its representative, at the	O
P		open meeting on 11 April 2019. At the open meeting, Mr	P
Q		Tang did <i>not</i> mention any information that can prove that a	Q
R		columbarium named as Oasis was in operation at the Subject	R
S		Premises <i>immediately before 8 a.m. on 18 June 2014</i> and there	S
T		were ashes (as defined under section 2 of the Ordinance)	T
U		interred in niches at the Subject Premises immediately before	U
V		8 a.m. on 18 June 2014.	V
		<i>Ground 2</i>	
	37.	The Appellant’s allegation that the PCLB had misled the public was	
		premised on the ground that the submission paper for consideration of the	
		Application at the open meeting held on 11 April 2019 and the PowerPoint	
		presentation to be made thereat contained incorrect information, inter alia,	
		as to the number of ground niches, layout of the land lots and the number	
		of niche slabs in each lot.	

A		A
B		B
C	38. We are also of the view that the PCLB has not misled the public in the presentation during the open meeting held on 11 April 2019 for <i>inter alia</i> the following reasons:	C
D		D
E	(1) A copy of the submission paper for consideration of the Applications by the PCLB at the open meeting on 11 April 2019 and the PowerPoint presentation to be made by the PCAO at the open meeting was sent to the Applicants by registered post on 29 March 2019 at the correspondence address provided by them on the application form: see Witness Statement of 嚴清霞, §§14-15.	E
F		F
G		G
H		H
I	(2) The PCLB has not received any response from the Applicants either in writing or verbally before or during the open meeting to state that any part of the submission paper or the PowerPoint presentation is misleading. The letter dated 9 April 2019 from Sky Pacific did not mention that any content of the above-mentioned paper and PowerPoint presentation was not factually correct.	I
J		J
K		K
L		L
M	(3) At the open meeting held on 11 April 2019, the PowerPoint presentation was shown, and the Chairperson of the PCLB asked Mr Tang whether he had any response to make and Mr Tang did not suggest that any information in the submission paper or the PowerPoint presentation was not factually correct (see §§2-5 of the record of the minutes of the open meeting, and Witness Statement of 嚴清霞, §19). Mr Tang merely stated that he could not remember whether he had seen the PowerPoint presentation. We accept the evidence of Ms Yim being correct and true.	M
N		N
O		O
P		P
Q		Q
R		R
S	39. In the circumstances, we do not accept the Appellant's case that it had never received the PowerPoint presentation.	S
T		T
U	40. In any event, the PCLB cannot be faulted if Sky Pacific could have taken or made (but has failed to take and make) reasonable steps and all	U
V		V

necessary inquiries to ensure that documents sent to the correspondence address of the Applicants as stated in the application form would reach its attention.

D. DISPOSITION

41. For all the reasons stated above, the Appeal is dismissed.

42. The above decision of this Appeal Board is to take effect on 3 April 2020.

(Signed)

Dr WONG Ming-fung, William, SC, JP
(Presiding Officer)

(Signed)

Mr HUANG Ling-hang, Lincoln, JP

(Signed)

Mr LEUNG Kwong-hon, Philip,
M.H.

(Signed)

Mr LI Wah-ming, Fred, S.B.S., JP

(Signed)

Sr TANG Chi-wang

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Appellant : Represented by Messrs TANG Chun-lun and 潘志永
Respondent : Represented by Mr Jenken SUEN SC and Ms Ebony LING,
Counsel instructed by Gallant