



Summary of Judgment

Memorial Park Hong Kong Limited (“Plaintiff”) v Secretary for Justice

CACV 436/2018; [2021] HKCA 262

Decision : **Plaintiff’s appeal dismissed**
Date of Hearing : **12.9.2019**
Date of Judgment/Decision : **9.3.2021**

Background

1. The Plaintiff was the operator of a private columbarium on leased government land lots in the New Territories (“the Lots”). The relevant lease contains clauses, General Conditions (“GCs”) and Special Conditions (“SCs”) prohibiting:-
 - the deposit of **“human remains”** on the Lots (GC 15 and Clause 7(5));
 - the **“underletting”** or **“parting possession”** of the Lots without the Government's permission (GC 16);
 - the **erection of buildings** on the Lots (SC 1(a)); and
 - **addition / alteration to buildings** on the lots (SC 3).
2. In 2008, the Plaintiff carried out renovation works to a building straddling the Lots and installed about 3,300 columbarium niches therein.
3. Since then, there had been complaints and enquiries from the public as to the operation of a columbarium on the Lots, leading to disputes between the Plaintiff and the Government as to whether the Plaintiff had breached the relevant lease conditions.
4. In 2010, the Plaintiff commenced court proceedings at the Court of First Instance seeking (inter alia) declarations that (a) the “human remains” clause did not prohibit the deposit of cremated human ashes, and (b) alternatively, the Government had in the past abandoned the enforcement of the human remains clauses and other lease conditions.
5. The court proceedings had been inactive pending determination on similar issues (including construction of the “human remains” clause) in other cases. The trial took place on 15.8.2018.
6. On 30.8.2018, the trial judge (Marlene Ng J) handed down a judgment (“the Judgment”) dismissing the Plaintiff’s claim and granting declarations sought by the Government, including (a) declarations that the Plaintiff had breached all of GC 15 / Clause 7(5), GC 16, SC 1(a) and SC 3 on the Lots, and (b) a declaration that the Plaintiff shall remove all human remains from the Lots and take necessary steps to refund monies spent by its customers on the niches.



7. On 4.9.2018, the Plaintiff brought an appeal with the Court of Appeal (“CA”) against the Judgment.
8. On 27.8.2019, shortly before the hearing of the appeal, the Plaintiff sought leave to issue a summons seeking a stay of the appeal (“Leave Application”), pending the outcome on its application for licences under the Private Columbaria Ordinance (Cap. 630).

Main issues in dispute

9. The key issues in dispute were as follows:-
 - (a) Whether the “human remains” clause (GC 15 / Clause 7(5)) covered cremated human ashes;
 - (b) Whether the Government had abandoned enforcement in respect of breach of SC 1(a) against erection of buildings; and
 - (c) Whether the Plaintiff had breached GC 16 (against underletting / parting possession of the Lots) and SC 3 (against addition / alteration to buildings).

Department of Justice’s Summary of the Court’s rulings

(full text of the CA’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=134039&QS=%2B&TP=JU)

10. On the main issue concerning construction of the “human remains” clause (GC 15 / Clause 7(5)), the CA ruled against the Plaintiff based on the following:-
 - In the case of *Regal Shining Ltd v Secretary for Justice [2016] 3 HKC 291*, the CA had already ruled that the “human remains” clause, properly construed, covered not only human bodies or bones but also cremated ashes;
 - The Plaintiff wrongly sought to distinguish *Regal Shining* on the basis that the court in that case did not have the chance to consider the Cremation Ordinance (“Ordinance”) enacted in 1914 and the Cremation and Gardens of Remembrance Regulations (“Regulations”), both of which featured distinct references to “human remains” and “ashes”. The Ordinance and Regulations were of no assistance in the present case, since the objective context in which the words “human remains” and “ashes” were used in the Cremation Ordinance / the Regulations was materially different from that in the “human remains” clause; and
 - The Plaintiff also failed to distinguish *Regal Shining* based on any differences in the “prevailing circumstances” in cremation practice between the 1940s (i.e. when the New Grants for the Lots were made in the present case) and 1953 (when the New Grant was made in the *Regal Shining* case).
11. On the issue of abandonment, the CA rejected the Plaintiff’s argument that the Government had abandoned enforcement against breach of SC 1(a) (re: erection of buildings). This was because the Plaintiff had not discharged its burden of



proving that the Government had acquired the requisite knowledge of the breach for a substantial period of time.

12. On breaches of GC 16 (re: underletting / parting possession of the Lots) and SC 3 (re: addition / alteration to buildings on the Lots), the CA ruled that there was insufficient evidence filed in the proceedings in relation to such breaches. Therefore, the CA set aside the relevant declarations granted in favour of the Government by the trial judge.
13. In addition, the CA set aside the part of the declaration granted by the trial judge that the Plaintiff must refund all monies to its customers who had purchased niches. This was so, since the issue of whether refund should be made concerned matters of contract between the Plaintiff and its customers.
14. Notably, on the issue of costs, the CA granted indemnity costs in favour of the Government in relation to the Leave application for stay of the appeal. In particular, the CA criticized the Plaintiff's delay in making the application for stay and the conduct of the Plaintiff's solicitors (e.g. not copying the Government in its correspondence with the Court), and generally warned against conduct which increased the costs of the proceedings and occasioned wastage of judicial resources. Since the Plaintiff has substantially failed in the appeal, the CA ordered (on a *nisi* basis) the Plaintiff to pay 80% of the Government's costs of the appeal, to be taxed if not agreed, with certificate for two counsel.

Civil Division

Department of Justice

9 March 2021