

LOUIS K.Y. PAU & COMPANY, SOLICITORS

包建原律師事務所

4/F., The Chinese Club Building, Nos. 21-22 Connaught Road Central, Hong Kong

(Tel.): 2397 4088 (Fax): 2397 4118 e mail: Louis@pauandco.com.hk

香港中環干諾道中二十一至二十二號華商會所大廈四字樓

電話：二三九七 四零八八 傳真：二三九七 四一一八

Principal

PAU KIN YUEN LOUIS (B Soc. Sci)
包建原律師

Assistant Solicitors

CHAN CHOI LING (LL. B.)
陳彩玲律師

NGAN WAI KAM SHARON (LL.B. LL.M.)
顏慧金律師

Consultant

LI YEE LANE CINDY
李依蘭律師

CHAN YEE (B.A.(Hons.))
陳怡律師

POON YICK MAN (B.A., M. Phil., LL.B.)
潘奕文律師

本所檔號

Our Ref.:

CIV/10/3396/LP/LP/PYM

來函檔號

Your Ref.:

日期

Date: 17th November 2010

By Hand

Development Bureau
9/F, Murray Building
Garden Road, Hong Kong
(Attn : Miss Elaina Luk)

Dear Sirs,

Re: Yin Hing Monastery (the "Monastery")

We act for Hong Kong Yin Hing Monastery, the owner of the Monastery.

We refer to your letter to our client dated 3rd November 2010 soliciting for our client's comments.

For the Information proposed to be stated in Column 5, we note that the Government have previously declared as per the Planning Department's letter to our client dated 10th May 2010 that the Lot which the Monastery is situated 不包括在任何法定規劃圖則內, 作骨灰龕不需向城市規劃委員會申請 (not included in any statutory plans, not necessary to make any application to the Town Planning Board for the use as columbaria). Our client proposes the Government to copy the said wordings in Column 5.

For the Information proposed to be stated in Column 6, we stress our client's stance per our letter to the Food and Health Bureau dated 17th August 2010 and to the District Lands Office/Islands dated 17th September 2010. Pursuant to our client's instructions, we have obtained a legal opinion from Senior Counsel Mr. Chan, Edward K. S. The opinions of the Senior Counsel are highlighted as follows "-

1. The Lands Department had on 20th January 1986 by a letter to the Monastery warranted and represented that the Lands Department was not prepared to take any lease enforcement action against the storage of human ashes in the then existing structures of the Monastery. The Senior Counsel opined that the ambit of the said letter dated 20th January 1986 is wide enough to cover all the niches within the structures referred to in the letter dated 20th January 1986, no matter the niches are newly erected or then existing so long as they are within the structures at the Lot.



2. Senior Counsel has provided detailed opinions from various aspects on interpretation of “human remains” and “human ashes” and is of the view that Special Condition (31) of the relevant Government Lease does not have the effect of prohibiting the placing of ashes left after a thorough cremation of “human remains” on the Lot.

In this connection, we are instructed to extract the relevant paragraphs of said legal opinion from Senior Counsel in the Annex for your reference.

Further, the Monastery is designated as a Buddhist temple. It is not unusual for Buddhist temples, including many Buddhist temples in Hong Kong, to allow those lay believers and priests to deposit their ashes in the temples after having passed way. The Government has also encouraged the public to deposit the human ashes in monasteries, nunneries and temples (leaflet titled “What to do when some dies ...” published by Food and Environmental Hygiene Department).

In such circumstances, our client’s stance is that storage of human ashes in the Monastery does not contravene the user restrictions provisions in the relevant land lease.

Kindly take into consideration the legal opinion of Senior Counsel and the aforesaid comments and include our client’s columbarium in Part A of the Information on Private Columbaria.

Yours faithfully,



Louis K.Y. Pau & Co.

Encl.

c.c Lands Department, District Lands Office/Islands – By Hand
19/F, Harbour Building, 38 pier Road, Hong Kong

LP/PYM

(Litigation/3396/letter to DevB – 17.11.10)

致： 發展局規劃組
香港中環美利大廈九樓
傳真： 2868 4530

有關延慶寺
新界大嶼山羌山

- 40
- 本人謹代表上述私營骨灰龕同意列載於私營骨灰龕資料(第二部分)內第五欄及第六欄的規劃及土地/契約資料。
 - 本人謹代表上述私營骨灰龕同意列載於私營骨灰龕資料(第二部分)內第五欄的規劃資料，但並不同意列載於第六欄的土地/契約資料。
 - 本人謹代表上述私營骨灰龕同意列載於私營骨灰龕資料(第二部分)內第六欄的土地/契約資料，但並不同意列載於第五欄的規劃資料。
 - 本人謹代表上述私營骨灰龕並不同意列載於私營骨灰龕資料(第二部分)內第五欄及第六欄的規劃及土地/契約資料。

註： 請只選取其中一項。如閣下選取多於一項，我們將按封面信所載的規劃及土地/契約資料於第二部分內公布。
政府對第二部分內的私營骨灰龕保留追究權利。政府公布資料並非代表已豁免任何法定規定及/或契約條款的違反。

簽署：

名稱(請以正楷填寫)：

(英文) Lau Ming Shun

(中文) 柳明心

職銜：

(英文) Director

(中文) 董事

公司/骨灰龕名稱：

(英文) Hong Kong Yin Hing Monastery Limited

(中文) 香港延慶寺有限公司

電話號碼：

2983 5627

公司蓋印：

For and on behalf of
HONG KONG YIN HING MONASTERY LIMITED
香港延慶寺有限公司

日期：

16-11-2010

Re : Lot No. 395 in DD 310 (the "Lot")
Yin Hing Monastery (the "Monastery")

Extract of the Advice by Edward Chan, Senior Counsel

Basic facts

1. By a New Grant No. 5748 dated 13 November 1974 (the "New Grant"), the Lot was granted to The Great Buddha Temple Limited. On or about 15 May 2007, The Great Buddha Temple Limited changed its name to Yin Hing Monastery (the "Monastery"). In fact the New Grant was made in consideration of the surrender of 2 existing lots. The area of the Lot granted is much larger than the area of the surrendered lots. It is not clear whether the area of the surrendered lots would form part of the Lot. However, it appears that nothing would turn on this point of the surrender and re-grant other than in relation to what was the condition of the Lot at the time of the grant, e.g. whether any structures were in existence on the Lot at the time of the grant.

2. The grant of the Lot was subject to the terms of the General and Special Conditions. For the purpose of this Advice, the important provisions of these Conditions are :

General Conditions

"8. The fulfillment by the grantee of his obligations under these General and Special Conditions shall be a condition precedent to the grant or continuance of the

tenancy and in the event of any default by the grantee in complying therewith such default shall be deemed to be a continuing breach and the subsequent acceptance by or on behalf of the Crown of any Crown rent or rates or other payment whatsoever shall not (except where the Crown has notice of such breach and has expressly acquiesced therein) be deemed to constitute any waiver or relinquishment or otherwise prejudice the enforcement of the Crown's right of re-entry ... ”

Special Conditions

- “2. The grantee shall in accordance with General Condition No.4 erect and maintain upon the lot a temple together with such ancillary buildings as may be approved by the Secretary for the New Territories and shall not at any time erect or maintain upon the lot any building other than buildings required for the purposes specified in special Condition No. 3 below.

3. The lot shall be used for a temple for purposes of the Buddhist faith with ancillary residential accommodation for members of the Buddhist priesthood, Buddhist laymen who are candidates for and intend to enter the Buddhist priesthood, devout lay Buddhists on religious retreat and such other categories of visitors as may from time to time be approved by the Secretary for the New Territories.

5. The grantee shall not assign, mortgage, charge, demise, underlet part with possession of or otherwise dispose of or encumber the lot or any part thereof or any

building or part of any building thereon or enter into agreement so to do, the lot having been granted on the special terms herein set forth for use for the particular purposes stipulated.

12. The design, disposition and height of any building to be erected on the lot shall be subject to the approval in writing of the Secretary for the New Territories.
14. Space shall be provided within the lot to the satisfaction of the Secretary for the New Territories for the parking of not less than 10 motor vehicles, and the space as provided shall not be used for any other purposes.
31. No grave shall be made on the lot, nor shall any human remains whether in earthenware jars or otherwise be interred therein or deposited thereon."

The letter of 20 January 1986

3. Apparently a temple was erected on the Lot. It would appear that at least by 1986 some human ashes were stored in some structures at the Lot. It appears that there was some correspondence between the Monastery (then still known by the name of The Great Buddha Temple Ltd.) and the District Lands Officer Islands. The end result was that there was a letter dated 20 January 1986 from the District Lands Officer Islands which said :

“ ... This office is now not prepared to take lease enforcement action against the storage of human ashes within and confined to the existing structures at the above lot.

I must however warn you that the above does not confer on you any right or preclude from any action taken by other Government departments for your above activity. The Government reserves all its rights under the conditions of the above lot, including the right of re-entry, in case of any future breach of lease conditions.”

The recent complaints

4. By a letter dated 16 April 2010 the Lands Department informed the Monastery that there were complaints about the Monastery's operating a columbarium at the Lot. The mode of operation said to be objectionable was that the Monastery had advertised that niches at the Monastery were for sale/rent. It was also said that there were unauthorized building works and structures at the Lot. It was said in the operation would be in breach of Special Conditions 5, 12 and 31 of the Special Conditions of the Grant.

5. By a further letter dated 29 July 2010, the Lands Department further clarified its position. It was said that the niches where human ashes are deposited were in breach of SC (3) and (31). Any letting, sale or parting with possession of niches would constitute a breach of SC (5). However, the Lands Department also conceded that the placing of human ashes in niches within the then existing structures referred to in the letter of 20 January 1986 would not be relied on as breaches. In the same letter the Lands Department also said that there was a breach of SC (14) because no parking spaces were provided and also that there were structures erected on the Lot without approval and this would be in breach of SC (12).

6. The position of the Monastery as reviewed from its solicitor's letter to the Lands Department dated 17 August 2010 was that there were no niches in the Monastery except those within the then existing structures referred to in the Lands Department's letter dated 20 January 1986. Also by the same letter the Monastery maintained that there was no structure on the Lot erected without approval. If it is so, then plainly there could be no breach of SC (12).

7. It is plainly a question of fact as to whether there were any niches for the storage of human ashes other than those referred to in the Lands Department's letter of 20 January 1986.

Ambit of the letter of 20 January 1986

8. The letter of 20 January 1986 expressly said that the letter did not preclude any action taken by other Government departments. Since other than the Lands Department there is no other Government department threatening to take action the Monastery would not be subject to any enforcement action for breach of SC (31) under the Government grant if its activities in relation to "human ashes" are within the ambit of the letter of 20 January 1986.

9. The letter of 20 January 1986 expressly said that the Lands Department was not prepared to take lease enforcement action "against the storage of human ashes *within and confined to the existing structures*" at the Lot. It is not clear whether the reference to "the existing structures" is to mean the existing building structures or the existing niches. Furthermore, it may also be open to argument

as to whether the reference to "existing structures" should be confined to existing niches in which there were already human ashes being stored.

10. In my view, one can easily come to the conclusion that the reference to "existing structures" in the context of the 20 January 1986 letter should not be confined to only those niches where there were already human ashes being stored. This is because such reading and interpretation is not in agreement with what the sentence in the letter said. From the sentence, it is quite clear that the activity that was being directed at was the storage of human ashes. The qualification was the storage that was exempted must be "within and confined to the existing structures". Hence so long as the storage was made within and confined to the existing structures, such storage is not considered as offending. The sentence did not say that the exemption was only confined to the storage of human ashes which were already stored at the Lot. Thus if for instance as on 20 January 1986, there were still some niches which were empty, the Lands Department would not take action against the subsequent storage of human ashes in these niches.

11. But the next question is whether the "existing structures" should refer to the "existing niches structures" or the "existing building structures"? In my view although it is a permissible interpretation to say the niches could nevertheless be described as some sort of structures, when one talks about structures in the context of a lease, one would normally refer to building structures unless the context makes it clear that it is some other kind of structures that is

being spoken of.

12. In *South Wales Aluminium Co. Ltd. v Assessment Committee for The Neath Assessment Area* [1943] 2 All E.R. 587 at 592H, Atkinson J said :

“ ... There is nothing to suggest here that the word “structure” is not to be used in its ordinary sense. As used in its ordinary sense I suppose it means something which is constructed in the way of being built up as is a building; it is in the nature of a building. It seems to me it is not in the nature of a building, or a structure analogous to a building, unless it is something which you can say quite fairly has been built up. I do not think that is the only guide or the only test, but, roughly, I think that must be the main guide : how has it got there: Is it something which you can fairly say has been built up? I do not think that it depends at all on whether it is fixed to the ground. That may be a relevant consideration ... ”

13. In the present case, there is no information as to whether in 1986 the human ashes stored at the Lot were stored in niches, and if they were, whether the niches were built up niches or whether they were pre-fabricated racks installed inside the structure of the Monastery. However, what is clear is that in the letter of 20 January 1986, there was no reference to any niches. The caption of the letter said : “Lot no. 395 in DD 310 Yin Hing Monastery Lik Wu, Lantau”. The pertinent sentence said “... storage of human ashes within and confined to the existing structures at the above lot.” In my view, even assuming that the human ashes were stored in niches in 1986, the letter said “within and confined to the existing structures at the above

lot” and not “within and confined to the existing niches at the above lot” or “within and confined to the existing niches at the structures at the above lot”.

14. Thus in my view, so long as the niches used for the storage of “human ashes” were within those structures in existence on 20 January 1986, the Lands Department had by its letter of 20 January 1986 said that no enforcement action will be taken. There is no reason for the Lands Department to go back on its words. In fact it would appear that this was the stance taken by the Lands Department in its letter of 29 July 2010 where it was said that “... The exception are niches within the then existing structures referred to in a letter dated 20.1.1986 ...”. Thus so long as the niches are within the structures referred to in the letter of 20 January 1986, it does not matter that the niches are newly erected so long as they are within the structures at the Lot.

The effect of SC (31)

Whether human remains include ashes of human remains after cremation?

15. It is trite law that the terms of a covenant in a lease are to be construed with reference to the surrounding circumstances at the time of the grant of the lease. However, in relation to SC (31), it is tolerably clear that this clause was one of the standard clauses inserted in the New Grants in the New Territories ever since about 1924.

16. The idea of prohibiting the use of the land as graves or

for the placing of human remains was first introduced by the Government in grants subject to the General Conditions of G.N. 570 of 1924. General Condition 15 of GN 570 of 1924 read :

“Without the consent of the District Officer no grave shall be made on, nor shall any human remains be interred in, or deposited on the lot sold either in earthenware jars or otherwise.” [i.e. GC 15]

17. It is immediately apparent that SC (31) in our case was modeled on GC 15 of GN 570 of 1924. Thus although GN 570 of 1924 was drafted with reference to the surrounding circumstances existing in 1924, it is difficult to see that the words of SC (31) in our present case were intended to have a different meaning from those in GC 15 of GN 570 of 1924 even though SC (31) was drafted in 1974. This is especially so in relation to the meaning of the words “human remains”. It is difficult to conceive a reason for a different meaning to be given to those words in numerous other new grants made since 1924 and this New Grant 5748 made in 1974.

18. Assuming what is put inside the containers placed in the niches at the Monastery are ashes left after the cremation of human remains the question is whether the placing of such containers with such ashes would be a breach of SC (31). SC (31) prohibits the making of graves on the Lot. In my view, whether what is in the containers placed inside the niches is human remains or not, plainly the niches even with the name plates of the deceased persons in front of them, could not be said to be graves. “Graves” and “human remains” were separately mentioned in SC (31). Again SC (31)

prohibits the interring of any human remains in the Lot. Since the condition itself draws the distinction between "interred in" and "deposited on", I am of the view that whether the ashes are to be considered as human remains or not, the placing of containers containing ashes in the niches could not be interring human remains in the Lot. The only issue is whether it would amount to depositing human remains on the Lot. This would depend on whether on true construction of SC (31), the words "human remains" therein are wide enough to include ashes left after the cremation of human remains.

The applicable principles of construction of Government Grant

19. As the instrument for construction is the terms and conditions of a grant by the Government, the principles for the construction of such instrument are slightly different from the case of the construction of an agreement for sale or a grant between private individuals. While the general principle governing the construction of all documents, namely, to ascertain the intention of the parties from the words they expressed in the instrument and that the instrument must be construed as a whole will apply, there are three other principles which are specifically applicable to the construction of grants from the Government. These other principles were set out in the judgment of Slade J in *Earl of Lonsdale v Attorney General* [1982] 1 WLR 882 which was a case concerning the construction of a Crown grant of a mining lease in 1880. The principles are :

- (a) In construing the instrument, the Court must do its best to place itself in thought in the same factual

background as the parties were at the time when they entered into the transaction (see page 899H). This proposition is supported by decisions of high authorities cited in the judgment of Slade J : Lord Wilberforce in *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen (trading as H.E. Hansen-Tangen)* [1976] 1 WLR 090 at 995-996 and also at page 997 referring to *Charrington & Co. Ltd. v Wooder* [1914] AC 71; Lord Herschell in *Southland Frozen Meat and Produce Export Co. Ltd. v Nelson Brothers Ltd.* [1898] AC 442 at 444.

(b) Contrary to the ordinary rule applicable to grants by the subjects, grants by the Crown usually fall to be construed in the manner most favourable to the grantor (see page 901A). In support of this proposition Slade J referred to Romilly M.R. in *Attorney General v Ewelme Hospital* (1853) 17 Beav 366, 385, Cockburn C.J. in *Feather v The Queen* (1856) 6 B & C 257, at 283-284; Viscount Biurkenhead L.C. in *Viscountess Rhondda's Claim* [1922] AC 339 at 353; Halsbury's Laws of England 4th ed (1974) § 1049. According to Slade J, the effect of the authorities is that :

“ ... if the wording of a grant by the Crown is clear and unequivocal, the grantee is entitled to rely on it as much as if the grantor had been any other subject of the Crown; if, on the other hand the wording is obscure or equivocal, the court must lean towards the construction more favourable to the Crown, unless satisfied that

another interpretation of the relevant words in their context is the true one." (see page 901F).

(c) If a particular word employed in a written instrument bears an "ordinary, plain and popular sense", the burden of displacing this ordinary sense will fall on any person who seeks to assert that, in a particular context, the word does not bear such meaning (see page 901G).

Principle (a) – the surrounding circumstances

20. In the present case, SC (31) was made in 1974. But its terms are nearly identical with GC15 of GN No. 570 of 1924 published in 1924. Certainly there will be a lot of differences in the surrounding circumstances between 1974 and 1924. But in view of the fact that it would appear to be a policy of the Government to insist on having a covenant in terms identical or nearly similar to GC15 of GN570 of 1924, and in view of the fact that it would be extremely unlikely that the words "human remains" should be understood differently in SC (31) from the same words in nearly all other new grants since 1924, in my view one should really have regard to the surrounding circumstances in 1924 to find out what was intended to be prohibited as "human remains".

21. In construing GC 15 and SC (31), it is important to bear in mind the various ways of how human remains may be dealt with especially in 1924. For burial, the traditional common practice is

that the corpse would be placed inside a coffin and the coffin with the corpse (the human remains) inside is then buried into the land beneath the soil. In south China, including Hong Kong, it is often thought necessary that after a certain period of time when the flesh of the corpse had all degenerated with the skeleton bone remaining, then the corpse would be exhumed and after cleaning and the removal of all the remaining flesh and tissue, the skeleton would be put inside an earthenware jar and be buried underneath the soil again. Sometimes, we do find that in the New Territories, the earthenware jar with the skeleton inside is simply placed on the ground. The place with the buried coffin (with human remains inside) or the buried containers (with the skeleton inside) is known as the grave.

22. There could be little doubt that there is a lot of difference between the surrounding circumstances today or in 1974 on the one hand, and those in 1924 on the other. First, although cremation in 1974 might well be one of the popular means of disposing the body of a deceased person, it was, to say the least, far less popular in 1924. In fact I am not sure if there was any service available for the cremation of human remains into ashes in 1924. As far as I am aware, the Government had not provided any cremation facilities or services until about 1962. I understand that while it is not difficult to burn away the flesh of the human remains leaving the skeleton, it requires very high temperature in order to reduce the human remains into ashes, and I wonder if the technology available in 1924 would be able to achieve that. I have also heard of the suggestion that in fact the ashes now collected from Government crematorium have been subject to a process of crushing and grinding after the cremation of the

human remains. But even so, I think one must proceed on the basis that the cremation has been complete and that the ashes are the product of the cremation. In any case, if the position was that in 1924 cremation of human remains into ashes was not, or was hardly heard of, it would be a strong factor to show that when GC 15 of GN 570 of 1924 spoken of human remains, it was not anticipated that ashes of the cremated human remains would be included.

23. Another crucial important factor in applying principle (a) is to find out the purpose of including GC 15 in GN. 570 of 1924. Again the time frame must be in 1924. It is plain from the terms of GN 570 of 1924 that the terms set out therein were meant to govern the sale of land in the New Territories. One wonders why it was thought that there should be a clause in the terms of the Government lease to be granted to control the erection of grave or the interring or depositing of human remains on the land granted. One of the probable reasons is that the Government was concerned that the burials of human bodies should be controlled for hygienic consideration. If this is so, then it would be a factor in support of the contention that human remains should not include ashes of cremated human remains. If on the other hand, the main consideration for the imposition of such a clause was that the Government would consider that for town planning consideration there should be some separation of land being used as columbarium or cemetery or ancestral worship from other users completely unassociated with the dead, then this would be in support of the wide construction of "human remains" to include ashes from cremated human remains. In this regard, the prevalence of buildings or places in the New Territories being used as

columbarium in 1924 would be an important consideration. If there were no or very few buildings or places being used as columbarium in 1924, then the natural inference would appear to be that there was little reason for controlling them by the terms of Government leases.

24. Whatever is the purpose for the insertion of GC 15 in GN 570 of 1924, one can be reasonably certain that the purpose could not be to avoid the problems associated with the blighting of the land by the requirement of a faculty for the exhuming of human remains or ashes from human remains once the same is buried or deposited on the land, because the requirement of a faculty to exhume human remains or ashes of human remains is derived from and governed by ecclesiastical law which is never part of the law in Hong Kong. In Hong Kong the common law does not prevent buried human remains let alone jars containing ashes of cremated human remains from being exhumed.

25. However in the New Territories, one must also consider the position under Chinese Customary Law. I do not claim any expertise in Chinese Customary Law, but as far as I am aware, while the remains of the ancestors are not to be exhumed easily and there may well be the requirement that the exhuming of the remains of a person is not to be done without the consent of his decedents, there is nothing in the Chinese Customary Law to extend the requirement to the movement of the ashes of a cremated body because cremation was not an acceptable means of disposal of the body after death in Chinese Customary Law for the indigenous people in Hong Kong. Cremation has always been used for Buddhist monks or nuns but not for the

ordinary people. While it is said that for some really high power monks there would be a piece of "shea li" left after the cremation of his body, and that the "shea li" would be treated as a sacred substance, as far as I am aware there has never been any rule or custom to say that the "shea li" or the ashes left after cremation could not be moved without any special permission once they are placed or deposited at a certain spot.

26. If the land may be blighted by the interring or depositing of human remains or ashes of human remains such that the Government as the reversioner of the land granted would not be able to freely remove them or to treat them as part of the land after the termination of the term of the Government lease, then this may be a reason for inserting a clause in the grant to prevent the land from so blighted. Also, if this is the reason, then this would support the contention that the purpose of GC 15 is to prevent the land from being blighted and that GC 15 should be so construed as to prevent the interring or depositing of ashes resulted from cremation of human remains also as otherwise the purpose of the clause would be defeated.

27. However, unless I have misunderstood the position in Chinese Customary Law, the blighting of land by the interring of human remains is not a problem in Hong Kong at all. Further, in any event it has never been the concern of the Government that the land might be blighted by the burial of human bodies. There must be a lot of graves in the New Territories in 1898 and the Government then had no difficulty in legislating that all lands in the New Territories belong to the Crown and the granting of Government leases also for the burial

land. There was no clause in the Block Crown leases similar to GC 15 of GN 570 of 1924, although no doubt some lots granted under a Block Crown lease would have graves on them.

28. It is also of interest to note that GC 15 prohibits the erection of graves and the depositing of human remains. It does not seek to prohibit the placing of ancestral tablets for worshipping purposes. This is some indication, albeit not a strong one, that it was not intended to use GC 15 as a means of controlling the use of the land for the worshipping of the dead.

29. With specific reference to SC (31) in 1974, one must remember that the Lot was granted specifically for the purpose of its being used as a Buddhist temple. As far as I know, it is customary that when a Buddhist monk dies, the usual practice is that the body would be cremated. Although I could not be very sure, I think that it is customary that the cremated ashes of the monks of a monastery would be kept at some land belonging to the monastery. Certainly for high power monks where the cremated body would leave "shea li", the "shea li" would invariably be kept inside the monastery. In terms of the way for the production of the "shea li" and the ashes left behind after the cremation, I could not see much difference in their either being or not being considered still to be human remains. In other words, if ashes could be said to be human remains, I see no reason for saying that "shea li" should not. In SC (31), there was no distinction drawn between human remains of monks residing in the monastery or even "shea li" of monks of the monastery on the one hand and ashes left from cremation of outsiders on the other. The question is

whether ashes of monks from the monastery and “shea li” are intended to be prohibited from being placed on the Lot. In my view, it is extremely odd that SC (31) is intended to interfere with the long established practice and tradition of the Buddhist monastery. This would certainly support the view that “human remains” in the context of SC (31) should not be construed as including ashes left after cremation of human bodies.

Principle (c) – ordinary, plain and popular sense

30. There is no definition given for the words “human remains” in GN 570 of 1924 or in The General and Special Conditions of this New Grant. The statutory definitions of “human remains” and “ashes” in Cap. 132M Cremation and Gardens of Remembrance Regulation, viz :

““human remains”: means the dead body of any human being or any still-born child, but does not include ashes resulting from the cremation thereof;

“ashes” mean ashes resulting from the cremation of human remains;”

implicitly acknowledge that “remains” may otherwise be understood in 1974 to include also “ashes resulting from the cremation of remains” or there may be some ambiguity as to whether the “ashes” should be considered as “human remains”. The argument is that it is because of the possible ambiguity that the statute would make it clear that “ashes” are not to be considered as human remains for the

purpose of Regulation under which "human remains" and "ashes" as defined in the Regulation are to be differently dealt with.

31. However in section 11(1) of the Private Cemetery Regulation (1960) where there is a prohibition of the depositing of human remains in a vault in a private cemetery unless such remains are encoffined, there is a proviso to say that skeletal remains and ashes after cremation may be encoffined in an urn. The proviso concerning ashes would suggest that ashes would otherwise be caught as human remains in the earlier part of the section. Hence if one looks at section 11 of the Private Cemetery Regulation, then one may say that it was recognised in this 1960 Regulation that human remains would include ashes after cremation.

32. In the Chinese Permanent Cemeteries Rules (1975), "human remains" is defined in the same way as in the Cremation and Gardens of Remembrance Regulation. However "ashes" is not defined at all. In sections 17 and 19 of this Rule, "ashes" was referred to as cremated remains. Thus it might be said that there was recognition that there is a distinction between the 2.

33. Other than the acknowledgment of the possible ambiguity, I do not think that the consideration of the statutory definitions of "ashes" and "human remains" and the use of these words in the subsidiary legislations considered above would have much bearing on the construction of the words "human remains" as used in GN 570 of 1924 and it follows that it would not have much bearing on the construction of SC (31). Plainly the context of the use of the words

is quite different. Further, the surrounding circumstances must also be different in that GN 570 of 1924 was drafted in 1924 while these other subsidiary legislations were drafted after 1960.

Ordinary dictionary meaning

34. The relevant meaning of the word “remains” as given by the Shorter Oxford Dictionary is “(part or parts of) a person’s body after death”. On this meaning, it is difficult to see how the ashes left after the cremation of a person’s body could still be called “human remains”. The fact that the ashes originate from the human remains does not mean that ashes are human remains, in as much as human remains could not be said to be human beings, and ashes from burnt firewood could not be said to be firewood. I think one of the difficulties of treating ashes resulting from the cremation of human remains as human remains is that physically the ashes do not have any traces of similarity in outlook with human remains, and as far as I know, even the chemical properties of ashes and human remains are also completely different. My understanding is that human remains are still organic substances, out of which it is possible to extract the human DNA, but the ashes after cremation would be inorganic and it is not possible to extract the human DNA from them. If my understanding is correct and further if it is correct to say that in fact it is not really possible to differentiate ashes resulting from human remains from ashes resulting from say, the cremation of animal carcasses, then in my view, this is a very strong reason to support the view that ashes in the ordinary plain and popular sense could not be said to be human remains and vice versa.

35. The next thing to consider is the dictionary meaning of the word "ashes". In the Concise Oxford dictionary, the meaning given to "ashes" is "remains of human body after cremation". The Shorter Oxford gives the meaning as "that which remains of a human body after cremation". The Collins Cobuild English dictionary gives the meaning as "a dead person's ashes are their remains after their body has been cremated".

36. I take note that in all the reputable dictionaries when explaining the meaning of "ashes" there is a reference to "human remains" or "remains of human body". However it is notable that in all cases, ashes are not considered as the same as "human remains" or "remains of human body". Ashes are simply what are left after the cremation of the remains of human body. There could be no dispute about this meaning and all the dictionaries have just said that. However could one simply say that "ashes" is a kind of "human remains"?

37. To answer the question posted in the last paragraph, one would have to consider whether as a matter of ordinary language, one would still consider "ashes" as "human remains" after the process of cremation. This is of course the ultimate question that we have to answer. As a general observation, while after a long period of burial, the human remains contained in a coffin would still be human remains even though all that is left would be the skeleton bones, I would consider that it is not correct to say that after the process of burning the material subject to the burning would necessarily remain to be the same material. A piece of iron after being burnt (or subject to heat)

would probably remain to be iron. Of course it may become steel if there is the right substance being added to it during the heating process. However for many other substances, the substance would become something different after the burning or some artificial process. For instance, in the case of charcoal, we all know that charcoal is made from wood after subjecting it to a process of burning. Certainly in the ordinary language we do draw a distinction between charcoal and wood and when we speak of wood, we do not normally include charcoal. In this respect, the word "charcoal" is explained in the Concise Oxford dictionary as "black porous residue of partly burnt wood, bones, etc., form of carbon". The example of "charcoal" and "wood" would show that even for partly burnt wood, the resulting substance is not usually considered as remaining to be wood any more. Certainly we do not consider "charcoal" to be "bone" even though "charcoal" could be formed by partly burnt bones. Likewise the Concise Oxford dictionary also explains "ash" as "Powdery residue left after combustion of any substance". But if we burnt a piece of wood or paper into ash, the wood or paper would cease to exist, and we would not call the ash "wood" or "paper" simply because it originates from a piece of wood or paper.

38. Thus the fact that the dictionaries explain "ashes" by referring to "human remains" as being the source for the ashes does not mean that "ashes" should properly be considered as "human remains". In fact in ordinary daily identification of substance, we look at the appearance, its texture and form and sometimes also its composition. From all these points of view, ashes and human remains are miles apart.

39. On the basis that the “ashes” stored on the land in question were the result of a complete combustion of the “human remains” in the cremation process, the “ashes” differ from the original “human remains” in that one could say that there is a complete transformation of the organic “human remains” into an inorganic substance and it is difficult to detect that the origin of the ashes is from a human body. From this perspective it is difficult to see why “ashes” should still be considered as “human remains”.

The authorities

40. While there were some decisions within the ecclesiastic jurisdiction of the Court where the Court had considered the meaning of “human remains”, I am not aware of any judicial authorities dealing with the point of whether ashes left after the cremation of human remains should still be considered as “human remains”.

Principle (b) – construction most favourable to the Government

41. This principle only comes into play if there is an ambiguity in the meaning of the words “human remains” as to whether it should include “ashes” resulting from the cremated human remains. No doubt the subsidiary legislations considered above may lend some support to the contention that there were ambiguities in whether remains would cover ashes resulting from the cremation of the remains. Having regard to the fact that the definition in the subsidiary legislations is for the purpose of the interpretation of that subsidiary legislation only and having regard to the fact that what we

have to face here is the interpretation of a set of general conditions for the grant of lease in 1924, I am of the view that the assistance that one can derive from the subsidiary legislations is very little. In short, I do not see any sufficient ambiguity to trigger of this principle.

Conclusion on SC (31)

42. I am of the view that SC (31) does not have the effect of prohibiting the placing of ashes left after a thorough cremation of "human remains" on the Lot.