[English Translation - 英譯本]

CACV 162/2021

[2023] HKCA 262

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF APPEAL**

CIVIL APPEAL NO 162 OF 2021

(ON APPEAL FROM HCPI NO 669 OF 2016)

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| BETWEEN | |  | |  |
|  | LIU HUA（劉華） | | Plaintiff | |
|  | and | |  | |
|  | DR LAU CHU PAK | | Defendant | |
|  | and | |  | |
|  | The Hong Kong Sanatorium &  Hospital Limited | | Third Party | |

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Before: Hon Chu VP and Yuen JA in Court

Date of Hearing: 28 September 2021

Date of Judgment: 27 February 2023

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**REASONS FOR JUDGMENT**

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Hon Chu VP (giving the reasons for judgment of the court):

1. *Introduction*
2. This is the plaintiff’s appeal against the decision[[1]](#footnote-1) of Marlene Ng J (“M Ng J”) made on 23 November 2020 dismissing her application for an order for disclosure of documents by a third party.
3. Questions of law on seeking an order for disclosure of documents by a third party who is not a party to an action are raised in this appeal and the plaintiff is unrepresented. Hence, we have appointed Mr Richard Khaw, SC and Mr Jeffrey Lee as amici curiae to assist the court in respect of the three questions of law (see paragraph 17 below).
4. On 28 September 2021, we made the following orders upon hearing all the submissions:
5. The plaintiff’s appeal was allowed.
6. The order made on 23 November 2020, and the costs orders made on 26 February 2021, 11 June 2021 and 27 August 2021 were set aside.
7. The Hong Kong Sanatorium & Hospital (“the Third Party”) was to file and serve within 56 days after the order was made an affidavit in HCPI 669/2016 to make further disclosure on the processing and retention of the real-time X-ray images taken by the X-ray machine automatically when the plaintiff was undergoing the electrophysiology study conducted by the defendant at Hong Kong Sanatorium & Hospital on 24 July 2013 and the relevant policies of the hospital.
8. The plaintiff was to lodge and serve within 14 days a written submission on the application for costs not exceeding 2 pages, and the Third Party to lodge and serve within 7 days thereafter the reply and a written submission on the application for costs not exceeding 2 pages.
9. We shall give the reasons for the above decision and decide on the costs of the application by way of summonses filed by the plaintiff and the Third Party in HCPI 669/2016 and the present appeal (together with the costs of the application for leave to appeal).
10. *Factual background*
11. The background of the present case has been set out in detail by M Ng J in paragraphs 1 to 18 of her decision. In short, the plaintiff commenced proceedings in HCPI 669/2016 to claim damages against the defendant. The plaintiff claimed that a case of medical negligence occurred when the defendant was conducting the electrophysiology study for her at the Hong Kong Sanatorium & Hospital on 24 July 2013, in which the defendant pierced her heart and caused a hole there.
12. The defendant denied that there was a case of medical negligence and pointed out that the plaintiff was suffering from congenital “patent foramen ovale”; that is to say, she has a small hole in her inter-atrial septum congenitally.
13. On 5 July 2019, upon the defendant’s application by summons, Master Roy Yu of the High Court ordered that the plaintiff’s statement of claim be struck out and her action be dismissed. The plaintiff lodged an appeal to the Court of First Instance against Master Yu’s decision.
14. On the other hand, as the Director of Legal Aid discharged the plaintiff’s legal aid certificate in HCPI 699/2016, the plaintiff lodged a legal aid appeal which was dismissed by Master C Chow of the High Court. The plaintiff applied for judicial review against the decision of Master C Chow (HCAL 781/2019). On 3 June 2020, Chow J of the Court of First Instance of the High Court (as he then was) dismissed the plaintiff’s application for judicial review. The plaintiff then lodged an appeal against the decision of Chow J (CACV 153/2020). Accordingly, M Ng J adjourned the plaintiff’s appeal against Master Yu’s decision sine die on 18 November 2020.
15. *Plaintiff’s application for disclosure of documents and information by Third Party*
16. On 31 August 2020, the plaintiff filed a summons, seeking an order requiring the Third Party to provide the following documents and information:
17. “The saved footage of the real-time X-ray images depicting the whole course of the electrophysiology operation automatically recorded by the X-ray machine on 24 July 2013 when [the defendant] was advancing the catheter to puncture the heart of [the plaintiff]”;
18. “The VCD containing the footage of the operation which was delivered to [the defendant] on 24 July 2013 in which [the defendant] said ‘there’s a hole’ during the operation”;
19. “The names of the 4 nurses and the X-ray technician present at the scene of the operation on 24 July 2013”; and
20. “The name(s) of the doctor(s) handling the magnetic resonance imaging on 18 October 2012 and 31 May 2013”.
21. The Third Party submitted the affirmation of Mr Lai Kam Wai (the “Lai 1 Affirmation”), which is a brief one containing 20 paragraphs only. The crucial part of the Lai 1 Affirmation was set out in paragraphs 32 to 34 of M Ng J’s decision as follows:

“ 32. Mr Lai explained that during the electrophysiology study, the doctor could simultaneously monitor the location of the electrode catheter inside the body of the patient via the X-ray machine from outside the body in order to advance the electrode catheter into the patient’s heart. The X-ray machine would display real-time images on the screen during the operation, and at the same time the X-ray machine would automatically record the real-time images displayed on the screen. After the operation, the X-ray technician could save the real-time X-ray images automatically recorded by the X-ray machine as video footage by pressing a button. However, since the quality of the real-time X-ray images automatically video-recorded by the X-ray machine was relatively low, they would be destructed automatically in about one week after the operation if the doctor did not give particular instructions to the X-ray technician. If the doctor considered that there was a need for high-quality images, he would himself press another button in the course of the operation to record them. There are two types of images, namely dynamic images and static images. Dynamic images would normally only last for one to several seconds. Both the dynamic and static images taken would be used for diagnosis and medical records.

33. Mr Lai pointed out that only 4 static and 4 dynamic X-ray images without any real-time video footage had been obtained from that study according to the record of the Hospital. Mr Lai confirmed in the Lai 1 Affirmation that the colleague(s) of the Cardiac Catheterization & Intervention Centre of the hospital responsible for handling the X-ray images of that study had never received any request from the defendant of the present case to save the real-time X-ray images as video footage. Mr Lai also confirmed that the real-time X-ray images taken in the course of that study were destructed automatically about one week later. Exhibit “LKW-2” annexed to the Lai 1 Affirmation of Mr Lai was a compact disc containing the real-time X-ray images taken in the course of that study, and all the dynamic and static X-ray images contained in that compact disc were taken on 24 July 2013.

34. Mr Lai also pointed out that on 23 January 2014 the plaintiff requested the Cardiac Catheterization & Intervention Centre of the hospital for the video compact disc of that study. According to the record of the hospital, all the dynamic and static X-ray images contained in the above Exhibit “LKW-2” had already been provided to the plaintiff in the form of a compact disc after WONG Kit Ling, a clerk of the Cardiac Catheterization & Intervention Centre, brought the plaintiff to the Accounts Department for the plaintiff to make payment on 23 January 2014. Mr Lai annexed Exhibit “LKW-3” to the Lai 1 Affirmation, namely a slip dated 23 January 2014 written by Kan Shuk Ling, the supervisor of the Cardiac Catheterization & Intervention Centre of the hospital and signed by the plaintiff to acknowledge his receipt.”

1. *Decision of M Ng J*
2. After the hearing, M Ng J handed down her judgment on 23 November 2020 to dismiss the plaintiff’s summons and made no order as to the costs of the summons[[2]](#footnote-2).
3. As to the legal principles[[3]](#footnote-3) in relation to the disclosure of documents by a third party, M Ng J took the following view:
4. Under section 42 of the High Court Ordinance (Cap 4) and Order 24 rules 7A and 8 of the Rules of the High Court (Cap 4A), the major factors that the court takes into account whether the discretion to order a third party to disclose documents should be exercised include the existence, relevance and necessity of the documents.
5. As to the existence of the document, if the third party confirms on oath that he does not have the document, which is required to be disclosed, in his possession, custody or power, such confirmation is conclusive at the interlocutory stage, and the third party is not required to supply the document which he has said on oath that he does not have or no longer have in his possession, custody or power: *UOB Kay Hian Futures (Hong Kong) Limited v Lai, Lawrence & Anor*[[4]](#footnote-4)*.*
6. The test generally applicable to Order 24 is also applicable to the relevance of the document.
7. As to the necessity of the document, no order for the disclosure of documents shall be made unless the court is of the opinion that the order is necessary either for fair disposal of the action or matter or for saving costs: *Zenjoy Limited v Contex Group Co, Limited & Anor[[5]](#footnote-5)*.
8. M Ng J dismissed the plaintiff’s application on the following grounds:
9. The plaintiff’s statement of claim and the action were struck out by Master Yu on 5 July 2019. The summons for disclosure of documents by the Third Party should be taken out only after the plaintiff’s appeal against the order of Master Yu is allowed.[[6]](#footnote-6)
10. The plaintiff failed to establish a convincing prima facie case that such documents had been or were in the possession, custody or power of the Third Party.[[7]](#footnote-7)
11. The plaintiff failed to prove that the Lai 1 Affirmation was inadequate.[[8]](#footnote-8)
12. The plaintiff relied on a press release (“Press Release”) dated 2 December 1998 by the Secretary for Health and Welfare on the Personal Data (Privacy) Ordinance (Cap 486). However, it has no binding effect on the Third Party and it does not deal with the retention of the real-time images displayed on the screen taken by the X-ray machine automatically in the course of advancing the electrode catheter into the patient’s heart. Furthermore, it has been explained in the Lai 1 Affirmation that the Third Party’s arrangement of the retention and destruction of data is based on its nature[[9]](#footnote-9).
13. The plaintiff relied on the Legislative Council Paper for discussion of the Panel on Health Services of the Legislative Council dated 11 June 2012 (the “Legislative Council Paper”). However, this paper on “Report on Public Consultation on the Legal, Privacy and Security Framework for Electronic Health Record Sharing” does not give any conclusion. Besides, it is not about the retention period of the medical records of private hospitals or the real-time images displayed on the screen taken by the X-ray machine automatically in the course of advancing the electrode catheter into the patient’s heart in private hospitals. This document is irrelevant to the plaintiff’s application.[[10]](#footnote-10)
14. The plaintiff relied on the Code of Practice for Private Hospitals, which stipulated that all medical records had to be accurate, sufficiently detailed, legible, current, complete and organised, including films or clinical photos and any adverse events, and the retention period of the records should depend on the nature of the record and the likelihood of legal proceedings. However, it is questionable as to whether this Code of Practice, which was published in 2019, is applicable to the course of the electrophysiology study conducted on 24 July 2013. Furthermore, the difference in nature between the low-quality real-time X-ray images automatically video-recorded by the X-ray machine and the high-quality dynamic and static images taken by the doctor, as well as the relevant arrangement of retention and destruction of those images have already been explained in the Lai 1 Affirmation.[[11]](#footnote-11)
15. The plaintiff filed the same summons in HCA 1259/2019 on 14 August 2020 against the same party seeking the same relief before she took out this summons. Hence, this summons should be dismissed as it was both unnecessary and duplicitous.[[12]](#footnote-12)
16. The plaintiff applied for leave to appeal which was refused by M Ng J on 26 December 2021 and was ordered to pay costs.[[13]](#footnote-13)
17. The plaintiff applied for leave to appeal again to the Court of Appeal[[14]](#footnote-14), and she was granted leave to appeal by the Court of Appeal on 8 April 2021.

*E. Plaintiff’s grounds of appeal*

1. The plaintiff advanced 14 grounds in the Notice of Appeal, and later compressed them into 8 grounds in the submission. Her grounds of appeal may be summarized as follows:
2. M Ng J misunderstood the rules regarding an order for disclosure by a third party and the legislative intent. (“Ground of appeal (1)”)
3. M Ng J ignored the evidence in support of the plaintiff’s request for disclosure of the saved VCD by the Third Party. (“Ground of appeal (2)”)
4. M Ng J ignored the fact that the defendant and the Third Party had acted against the plaintiff’s will and injured her heart, and thus damaged the plaintiff’s right to litigate and access to justice, and infringed the plaintiff’s human rights guaranteed by Article 25 of the Basic Law. (“Ground of appeal (3)”)
5. M Ng J ignored the preliminary evidence adduced by the plaintiff showing that a hole of 13mm was caused by the defendant on 24 July 2013. (“Ground of appeal (4)”)
6. M Ng J ignored the fact that the Third Party and the defendant have in their custody and possession the two VCDs containing the footage of the course of the electrophysiology study conducted on 24 July 2013. (“Ground of appeal (5)”)
7. M Ng J wrongly considered unrelated matters or erred in accepting the explanation offered by the Third Party, namely (a) in the end the VCD only contained 4 static and 4 dynamic X-ray images; and (b) the saved footage was destructed automatically within one week after the operation. (“Ground of appeal (6)”)
8. M Ng J ignored the fact that it should not be necessary for a patient to obtain his or her own medical documents by way of legal proceedings. (“Ground of appeal (7)”)
9. M Ng J ignored the fact that the failure of the application by summons would cause the plaintiff unable to lodge an appeal against the order made by Master Yu. (“Ground of appeal (8)”)

*F. The legal issue of seeking disclosure of documents in litigation from a third party*

1. On 14 April 2021, Lam VP (as he then was) directed Mr Khaw, SC and Mr Lee, who appeared as amici curiae, to assist the court in respect of the following questions of law:

(1) Concerning the legal principles discussed in paragraphs 55 to 57 and their application in paragraphs 64 to 80 of M Ng J’s judgment, is there sufficient basis for the plaintiff, who relies on the Press Release, the Legislative Council Paper, Code of Practice for Private Hospitals and the laws in relation to patients’ personal data and right to know mentioned in paragraphs 75 to 77, to challenge what is said in the Lai 1 Affirmation that the footage of the course of the operation was automatically destructed after about one week? (“Question 1”)

(2) If the court is of the view that there is sufficient basis for the plaintiff to challenge what is said in the Lai 1 Affirmation due to the abovementioned matters or laws or other reasons, is it still necessary for the court to accept that such affirmation is conclusive, or can the court apply the principle set out in *UOB Kay Hian Futures (Hong Kong) Limited v Lai, Lawrence & Anor* in paragraph 45 (quoted in paragraph 57 of M Ng J’s judgment) to order the Third Party to give further explanation or disclose the course of handling the plaintiff’s case by the hospital? (“Question 2”)

(3) Is the court bound by the relief in section 42 of the High Court Ordinance (Cap 4) and Order 24 rules 7A(2) of the Rules of the High Court (Cap 4A) when handling the plaintiff’s application for disclosure of the names of the attending nurses and X-ray technician, or can the court provide any necessary relief by using other inherent powers of the High Court at common law? (“Question 3”)

*F.1 Question 1*

1. Question 1 can be sub-divided into two issues, namely the legal principles and the facts:
2. The legal principles involve (1) the conclusiveness of the discovery affirmation by the third party who is not a party to the litigation, and the scope of the reference documents and materials to which the court can refer for assessing the conclusiveness and adequacy of the affirmation, and (2) whether the Press Release, the Legislative Council Paper, Code of Practice for Private Hospitals and the laws in relation to patients’ personal data and right to know on which the plaintiff relies (collectively referred to as “the Materials”) are the documents and materials to which the court can make reference.
3. Regarding the facts, whether “the Materials” have constituted a sufficient basis for challenging what is said in the Lai 1 Affirmation that the footage of the course of the operation was automatically destructed after about one week if the court could make reference to them.

*F.1.1 Legal Principles*

1. In the present case, M Ng J cited paragraph 45 of *UOB Kay Hian Futures (Hong Kong) Limited v Lai, Lawrence & Anor*[[15]](#footnote-15), and considered that the court could challenge the conclusiveness and adequacy of the discovery affirmation based on three types of materials, namely (a) the pleadings, the list of documents, the affirmation verifying the list of documents and the documents themselves, or the documents referred to therein; (b) documents from any other source showing the existence of other documents which could be disclosed but not yet disclosed; and (c) undisclosed documents apparently excluded from disclosure by a party under a misconception of the case.
2. The Third Party cited *Jones v The Monte Video Gas Company*[[16]](#footnote-16)*；Fayed & Ors v Lonrho Plc (No.3)* [[17]](#footnote-17)；*Berkeley Square Holdings Ltd & Ors v Lancer Property Asset Management Ltd & Ors*[[18]](#footnote-18)；and *Mathew & Malek, Disclosure* (5th ed) §6.22 and submitted that the affirmation made by the disclosing party is conclusive and unchallengeable unless the materials for challenging the conclusiveness of the discovery affirmation were provided by the disclosing party. The amici curiae disagreed with this submission. Mr Khaw submitted that the three types of documents and materials in *UOB* which could be used to challenge the discovery affirmation were not necessarily from the disclosing party. We agree with this proposition.
3. Mr Khaw further submitted that the court should be flexible in considering the conclusiveness and adequacy of the discovery affirmation, and reference should not be made only to the three types of documents and materials mentioned in *UOB*. The English authorities, namely, *British Association of Glass Bottle Manufacturers Ltd v Nettlefold*[[19]](#footnote-19) and *West London Pipeline and Storage Ltd v Total UK Ltd & Ors*[[20]](#footnote-20), and the two cases from other common law jurisdictions, namely, *Mark Fishing Co Ltd v United Fishermen & Allied Workers Union*[[21]](#footnote-21) and *Duncan v Governor of Portlaoise Prison*[[22]](#footnote-22), were cited in support of his view.
4. In *British Association of Glass Bottle Manufacturers Ltd,* the House of Lords widened the range of situations and the scope of reference that the court could consider regarding the conclusiveness of discovery affirmation by adding two situations; namely, that the deponent misunderstood the case, and that the deponent had agreed in a document (including the documents other than the pleadings and his affidavit) that there were other case-related and important documents. The House of Lords[[23]](#footnote-23) also pointed out that there is no hard and fast rule as to how the disclosure of documents and information should be dealt with by the court in all circumstances. In *West London Pipeline and Storage Ltd*[[24]](#footnote-24), it was alleged by one of the parties in the discovery affirmation that the document, upon which the application for specific discovery was made, was protected by litigation privilege. In discussing the conclusiveness and integrity of the affirmation, the court summarised the relevant legal principles and suggested that the discovery affirmation was generally conclusive at the interlocutory stage unless other evidence before the court was able to confirm that the affirmation was incorrect or incomplete.
5. In *Mark Fishing Co Ltd*, the British Columbia Court of Appeal of Canada was of the view that in ascertaining whether or not a party to the litigation had made full and complete disclosure, the court should not be bound by the approach established in *Jones v Monte Video Gas Co* (that is to say, that one could only make reference to the contents of the discovery affirmation and the documents mentioned therein, and the pleadings of the disclosing party), but should be able to make reference to the affirmation and materials provided by the party seeking disclosure in support of the application.[[25]](#footnote-25) The High Court of Ireland shared the same view in *Duncan* and suggested that in administering justice the court should be vested with the power and necessary mechanism to examine the accuracy and adequacy of the discovery affirmation.[[26]](#footnote-26)
6. We agree with Mr Khaw’s submission that all the authorities mentioned above show that the materials to which the court can make reference in assessing the conclusiveness and adequacy of the discovery affirmation should not be limited to the three types mentioned in *UOB*. The court should, depending on the circumstances of the case and the evidence and materials adduced, deal with the issue flexibly.
7. In our view, based on the following, it is particularly important for the court to retain flexibility in the scope of materials to which reference can be made in examining the conclusiveness and adequacy of the discovery affirmation involved in the disclosure of the third party who is not a party to the litigation.
8. First of all, in the disputes over the disclosure of documents between the parties, even though the statement in the discovery affirmation of one of the parties is conclusive at the interlocutory stage (for example, the statement that the documents are not in its possession, custody or power), the opposing party can still at the substantive trial challenge the contents of the discovery affirmation and cross-examine the deponent to assist the court in finding the facts. Moreover, the principle of the discovery affirmation being conclusive at the interlocutory stage aims at preventing the court from, before the substantive trial, prejudging the issue on the facts that whether a party to the litigation has concealed any documents and thus may cause injustice: see pages 10–11, *Lonrho Plc (No 3).*
9. Secondly, while the discovery affirmation of a party is conclusive at the interlocutory stage, the other party who is not satisfied with the affirmation can still, pursuant to Order 26 of the Rules of the High Court, serve on the other party interrogatories requesting the other party to give more particulars. This is to prevent the disclosing party from improperly concealing the particulars: see *Jones v The Monte Video Gas Company*, pages 558–559.
10. Nevertheless, the application for disclosure against a third party who is not a party to the litigation is a different matter. First of all, as between a party to the litigation and the third party, the distinction between the interlocutory stage and the substantive trial does not exist. Secondly, it is not necessary for the third party to shoulder the evidential burden or to be cross-examined at the substantive trial since it is not a party to the litigation. Besides, the question whether the third party has concealed from disclosing documents to one of the parties to the litigation is an independent one, not to be dealt with at the substantive trial by the court. Therefore, the court would not cause any injustice to the parties by dealing with the dispute regarding the disclosure of documents between the party to the litigation and a third party prior to the substantive trial.
11. On the other hand, the court has no power under Order 26 of the Rules of the High Court to grant leave to the service of interrogatories on a third party. Therefore, there would be no avenue for the party asking for disclosure to ask the third party for further particulars in order to prevent the third party from improperly concealing the information. In fact, since the third party is not a party to the litigation, the first type of documents in *UOB* (namely, the pleadings, the list of documents, the affirmation verifying the list of documents and so on) is inapplicable.

*F.1.2 Can reference be made to “the Materials”?*

1. The materials relied on by the plaintiff to challenge the correctness and completeness of the Lai 1 Affirmation can be summarized as follows:
2. Press Release

The reply made by the then Secretary for Health and Welfare in response to the question raised by a member of the Legislative Council has been recorded in the Press Release dated 2 December 1998. The Secretary said,

“All public and private hospitals, clinics and private practitioners should comply with the principles and provisions prescribed in the Personal Data (Privacy) Ordinance (Cap. 486) in collecting, retaining and releasing patients’ information and case histories. According to such principles, a data user should only collect personal data that is related to his/her function. The amount of data collected should not be more than necessary and should not be kept longer than is required for the purpose it is to be used.

Based on the Personal Data (Privacy) Ordinance, the Hospital Authority (HA) and the Department of Health (DH) have issued guidelines to their respective hospitals and clinics on how to handle and protect medical records, and on the retention period of the records. According to the guidelines, the medical records of hospitals and clinics should only keep information relating to patients' health and treatment procedures. HA's guidelines also set out in detail the information to be recorded, such as patient's admission date, medical history, reports of physical examination, clinical observations, therapeutic orders, medical procedures, test results and medication administration record. DH’s medical records also keep similar information. Regarding the retention period of medical records, it depends on the nature of the information contained therein. To cater for situations where patients may return for medical consultation or request access to their medical records, HA and DH have prescribed that, in normal circumstances, medical records should be kept for six years.

DH has requested private hospitals to be aware of and act according to the requirements of the law. The Hong Kong Medical Association has also compiled an information note introducing the Ordinance for members' reference, and has made recommendations on how to carry out the requirements of the Ordinance.”

In short, the above document suggests that medical records should be kept for 6 years in normal circumstances.

1. The Legislative Council Paper

The Legislative Council Paper dated 11 June 2012 of the Panel on Health Services of the Legislative Council is about the “Report on Public Consultation on the Legal, Privacy and Security Framework for Electronic Health Record Sharing”. It is mentioned in the Legislative Council Paper that under the Limitation Ordinance (Cap 347), the limitation period for an action related to tort is 6 years from the date on which the cause of action arises. It is also recommended that 10 years will be a reasonable length of period for retaining the Electronic Health Record of a patient.

1. The Code of Practice for Private Hospitals 2019

The plaintiff relied on the Code of Practice for Private Hospitals made in 2019. M Ng J had reservations as to its applicability. We agree with the Third Party that this Code of Practice is inapplicable as it did not exist when the plaintiff was undergoing the procedure in question on 24 July 2013.

However, Mr Khaw submitted that the Department of Health already issued the Code of Practice for Private Hospitals, Nursing Homes and Maternity Homes in April 2010, and compliance with the requirements under this Code of Practice by the Third Party was a condition for its registration. This document was not provided to M Ng J for her consideration.

The Code of Practice 2010 stipulated as follows: (a) the policies and procedures of an establishment are clearly set out in an understandable language (Clause 6.2.1); (b) the policies and procedures for handling of information and patient’s rights are developed, and there is a register of such policies and procedures (Clauses 6.2.2 (vi) and (vii) and 6.2.3); (c) there are written policies and procedures to protect the rights of the patients including the right to obtain information on one’s own diagnosis, treatment, progress and investigation results (Clause 7.2.1(i)); (d) the patients have a right to know the name and rank of the staff providing services (Clause 7.2.3); (e) a comprehensive medical record is maintained for each patient (Clause 310.1 [sic.]); (f) all medical records are accurate, sufficiently detailed, legible, current, complete and organised to enable the medical practitioner responsible for the patient to provide continuing care to the patient, to review the diagnostic and therapeutic procedures performed and the patient’s response to treatment (Clause 10.2.1(i)); (g) the record of the patient comprises the following but not limited to films or clinical photos, any adverse incident, including injuries to the patient (Clauses 10.2.2 (vi) and (xii) and 6.2.3); and (h) a policy is set to retain medical records for a certain period of time; the period depends on the nature of the record and the likelihood of legal proceedings; the administration can consult its legal advisor on how long should specific types of records be stored (Clause 10.3.1). These clauses are not much different from the requirements[[27]](#footnote-27) contained in the Code of Practice published in 2019.

1. Laws in relation to patients’ personal data and right to know

Concerning the laws in relation to patients’ personal data and right to know, although Principle 2 prescribed in the Personal Data (Privacy) Ordinance (Cap 486) in retaining information does not expressly provide for the period of retaining patients’ personal data, it stipulates that the data must not be kept longer than is necessary for the fulfilment of the purpose for which the data is used. In other words, the period of retaining the data depends on the purpose for which the data is used. In the present case, apart from giving treatment to the patients, the purposes of storing the patients’ personal data also include handling possible litigation and complying with other legal or administrative requirements.

1. According to the legal principles discussed above, we are of the view that the court should be flexible in considering the materials to which reference can be made in assessing the adequacy of the Lai 1 Affirmation. “The Materials” set out above are independent, objective documents which are available to the public at any time upon request. Their contents are about how hospitals keep and store the patients’ medical records and how they protect the patients’ right to request for medical records, which are related to the matter of the plaintiff seeking disclosure from the Third Party. We agree with Mr Khaw that the court can make reference to them in assessing the adequacy of the disclosure in the Lai 1 Affirmation.

*F.1.3 Is the disclosure in the Lai 1 Affirmation adequate?*

1. Paragraph 6 of the Lai 1 Affirmation reads:

“The real-time X-ray images automatically video-recorded would be destructed automatically within approximately one week after the operation if the doctor does not give particular instructions to the X-ray technician.”

However, the basis for such an arrangement is not explained in the Lai 1 Affirmation; for example, whether it is based on the Hospital’s guidelines or policies, upon which considerations these guidelines or policies are made, and how the hospital considers that it may just rely on the own judgment of the doctor in charge of the operation to decide which images should be retained in view of the requirements of “the Materials” for keeping and storing the patients’ medical records and protecting the patients’ right to the medical records. The hospital’s policies for storing the patients’ medical records, including how to handle the risk of possible litigation, are not stated in the Lai 1 Affirmation.

1. Paragraph 12 of the Lai 1 Affirmation reads:

“I confirm that [the hospital] had never come to know before 23 January 2014 that the plaintiff had any discontent with that study, and did not receive any complaint from the plaintiff in any way against Dr Lau or that study”.

However, Mr Lai only assumed the duty of coordinator of the Cardiac Catheterization & Intervention Centre in 2016. He did not mention in his affirmation the factual basis upon which he made the above confirmation, including whether reference had been made to the hospital’s files or enquiries had been made with the medical staff involved in the procedure in question and so on.

1. Mr Wong, counsel representing the Third Party, pointed out in paragraph 23(3) of his skeleton submission that it was impossible to expect the hospital to keep the low-quality images that were automatically video-recorded by the X-ray machine where litigation was not expected. However, it is not mentioned in the Lai 1 Affirmation whether the hospital expected the patients who intended to lodge complaints about the course of the examination or the doctors or the medical staff would definitely do so within one week, nor is it mentioned what the hospital’s policies on management of the risk of medical litigation are. At the same time, the hospital’s guidelines or policies for the retention of medical records (including real-time X-ray video-recorded images) when there are abnormal or adverse circumstances in the course of examinations, operations or other medical procedures are not explained in the Lai 1 Affirmation.
2. Based on the above analysis and reasons, it is difficult for this court to accept the completeness, adequacy and conclusiveness of the Lai 1 Affirmation. We are of the view that the Third Party should make further disclosure on the processing and retention of the X-ray real-time images taken by the X-ray machine automatically when the plaintiff was undergoing the electrophysiology study conducted by the defendant at the hospital on 24 July 2013 and the relevant policies of the hospital.

*F.2 Question 2*

1. As noted above, we have reservations about the conclusiveness and adequacy of the Lai 1 Affirmation, and we are of the view that the Third Party shall make further disclosure on the processing and retention of the X-ray real-time images taken by the X-ray machine automatically and the relevant policies of the hospital.
2. Mr Khaw, citing *West London Pipeline and Storage Ltd* and *Yau Chiu Wah v Gold Chief Investment Ltd & Anor* [[28]](#footnote-28) in support, submitted that in such circumstances the court should have the power to order the disclosing party to make further disclosure by way of affirmation.
3. Mr Wong very fairly agreed that the court has such power, but he invited the court not to exercise such discretion to order the Third Party to submit further discovery affirmation. He submitted that under Order 24 rule 8(2) of the Rules of the High Court, either for disposing fairly of the present case or for saving costs, it would be unnecessary to make an order for the Third Party to submit further discovery affirmation because that would not assist any further in proving whether the plaintiff’s injury was caused by the negligence of the defendant; furthermore, the Third Party had repeatedly said that the hospital was unable to provide the VCD that the plaintiff alleged and asked for because it did not exist. Therefore, the court would not find material assistance in resolving the issues of the case by making an order for the Third Party to give further explanation.
4. We do not agree with the submission put forward by Mr Wong.
5. First of all, Order 24 rule 8(2) of the Rules of the High Court is not applicable. The rule is about whether discovery should be ordered by the court, which has nothing to do with whether the court should order the disclosing party to make further disclosure. As pointed out by Mr Khaw, although the Lai 1 Affirmation was produced in another action (HCA 1259/2019) in support of the Third Party’s application for striking out the plaintiff’s claim in that action, it was considered a discovery affirmation in reply to the plaintiff’s application for disclosure to be made by the Third Party in the hearing before M Ng J. The Third Party also submitted that its contents were conclusive. In these circumstances, what the court should consider is no longer Order 24 rule 8(2) but the conclusiveness and adequacy of the Lai 1 Affirmation as a discovery affirmation, and whether the Third Party is required to make further disclosure if the Lai 1 Affirmation is not conclusive and adequate.
6. Secondly, based on the discussion in F.1.3 above, we do not agree that it would be unnecessary to make an order for the Third Party to make further disclosure other than the Lai 1 Affirmation or it would be of no material assistance to the issues involved in the litigation by making such an order.
7. We find that we should exercise the discretion to ask the Third Party to file and serve an affirmation in HCPI 669/2016 for making further disclosure on the processing and retention of the X-ray real-time images taken by the X-ray machine automatically when the plaintiff was undergoing the electrophysiology study conducted by the defendant at Hong Kong Sanatorium & Hospital on 24 July 2013 and the relevant policies of the hospital.

*F.3 Question 3*

1. After the plaintiff has been granted leave to appeal by this court, the Third Party on 4 May 2021 provided the names of the medical staff and X-ray technician to the plaintiff through its solicitors. Question 3 is therefore academic.
2. We should only point out, as both Mr Khaw and Mr Wong agree, that the court can exercise its inherent jurisdiction based on the *Norwich Pharmacal* principle[[29]](#footnote-29) at common law and order the hospital to disclose the names of the medical staff involved in the procedure upon the plaintiff. We agree with that view not only because the *Norwich Pharmacal* principle is flexible and capable of adapting to new circumstances[[30]](#footnote-30) but also because when the plaintiff was undergoing the electrophysiology study, the medical staff and X-ray technician at the scene were in fact participating in, facilitating and being involved in the procedure, and they were not unrelated bystanders[[31]](#footnote-31). Therefore, the proposition submitted by the Third Party (paragraph 36) that the court must consider protecting the privacy of the hospital staff before deciding to exercise the discretion to make the order for disclosure clearly cannot stand. Furthermore, as pointed out by Mr Khaw, privacy should not prevail over the need for a fair trial; see: *Walker v Eli Lilly & Co & Ors* [1986] Lexis Citation 1541, page 2, paragraphs 2 to 3, and *Chan Yim Wah Wallace v New World First Ferry Services Ltd* [2015] 3 HKC 382, paragraph 85.
3. We also agree with Mr Khaw’s submission that the court can also order the Third Party to disclose the names[[32]](#footnote-32) of the medical staff and X-ray technician involved in the procedure to the plaintiff pursuant to section 42 of the High Court Ordinance (Cap 4) and Order 24 rules 7A(2) of the Rules of the High Court (Cap 4A).

*G. Plaintiff’s grounds of appeal*

1. The discussion in Part F above is sufficient for the disposal of this appeal. We would deal with the grounds of appeal put forward by the plaintiff briefly.
2. Grounds of appeal (1) and (2): These two grounds are about the rules of requesting a third party who is not a party to an action to make disclosure. We have discussed and decided on the relevant rules and the circumstances in which the conclusiveness and adequacy of the disclosing party’s discovery affirmation can be challenged.
3. Grounds of appeal (3) and (4): It is an issue in HCPI 669/2016 whether or not the plaintiff’s heart had been pierced to form a hole. It was not an issue that M Ng J could make a decision on or accept as admitted or undisputed facts at the interlocutory stage. We do not agree that M Ng J’s decision has damaged the plaintiff’s right to litigate and access to justice, or has infringed the plaintiff’s human rights guaranteed by the Basic Law.
4. Grounds of appeal (5) to (8): These grounds of appeal are based on the plaintiff’s assertion that the two VCDs containing the course of the electrophysiology study are in the possession of the Third Party. However, it is expressly stated in paragraph 7 of the Lai 1 Affirmation that the hospital did not have in its possession the two VCDs mentioned by the plaintiff. Although we have ordered the Third Party to make further disclosure, this concerns the reason why the hospital failed to keep and store the record of the whole course of the operation and the X-ray real-time images taken by the X-ray machine automatically, which is a separate issue. It does not mean that we agree with the plaintiff’s assertion that the two VCDs containing the course of the electrophysiology study are in the possession of the Third Party.
5. In summary, the plaintiff’s grounds of appeal fail. Nevertheless, we allow the plaintiff’s appeal based on the reasons mentioned in Part F above and order the Third Party to make further disclosure in accordance with paragraph 3(3) above.
6. *Costs*
7. The plaintiff sought to recover the costs of the present appeal, the disclosure application in HCPI 669/2016 and the application for leave to appeal arising therefrom, CAMP 76/2021 and CAMP 377/2021. The action in CAMP 76/2021 is the plaintiff’s application for leave to appeal to the Court of Appeal against the judgment of M Ng J on 23 November 2020 (see paragraph 14 above). CAMP 377/2021 is the plaintiff’s application for leave to appeal to the Court of Appeal against an order for costs made by M Ng J in respect of her application for leave to appeal (see paragraph 15 above), and no judgment has yet been given in respect of this application.
8. The Third Party opposed the plaintiff’s application for costs. The Third Party submitted that this court should dismiss the summons filed on 8 September 2021 in CAMP 377/2021 and make no order as to costs in order to save time and costs. The Third Party asked for the costs of the present appeal and other actions (including the costs incurred in submitting further discovery affirmation in accordance with the order of this court) to be paid to the Third Party by the plaintiff.
9. It is stipulated in Order 62 rule 3 (12) of the Rules of the High Court (Cap 4A):

“Where an application is made in accordance with Order 24, rule 7A or Order 29, rule 7A, for an order under section 41, 42 or 44 of the Ordinance, the person against whom the order is sought shall be entitled, unless the Court otherwise directs, to his costs of and incidental to the application and of complying with any order made thereon…”

1. In general, when the court makes an order, say, based on the *Norwich Pharmacal* principle for a third party who is not a party to the action to make disclosure, the court would at the same time award such third party the costs of and incidental to the application: *Totalise Plc v Motley Fool Ltd*[[33]](#footnote-33). Therefore, as a matter of principle, the plaintiff should pay the Third Party the costs of and incidental to her summons of the application for disclosure and the submission of discovery affirmation (including the further discovery affirmation) by the Third Party upon her request.
2. On the other hand, the Third Party took a neutral stance in the hearing of the plaintiff’s summons before M Ng J, but opposed the plaintiff’s application and appeal in the subsequent application for leave to appeal and the present appeal. The general principle of civil procedure is that costs follow the event. Since the plaintiff’s appeal is allowed, she should be awarded the costs.
3. In the circumstances as a whole, we consider that the plaintiff and the Third Party shall each bear its own costs. It is in our view a fair and appropriate approach.
4. Therefore, we make no order as to the costs of the present appeal, CAMP 76/2021, the summonses filed on 31 August 2020 and 1 December 2020 in HCPI 669/2016 and the application incidental thereto.
5. We also dismiss the summons filed on 8 September 2021 in CAMP 377/2021 and make no order as to costs.

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| （Carlye Chu）  Vice President | （Maria Yuen）  Justice of Appeal |

The Plaintiff, unrepresented, attending in person.

Mr Simon Wong and Ms Samantha Lau, instructed by Deacons, for the Third Party.

Mr Richard Khaw, SC and Mr Jeffrey Lee, amici curiae.

Translated by the Judgment Translation Unit of the Judiciary and vetted by Mr. Walter Lee, solicitor.

1. [2020] HKCFI 2946 [↑](#footnote-ref-1)
2. It is a decree nisi which was made absolute on 11 June 2021. [↑](#footnote-ref-2)
3. Paragraphs 51 to 61 of the judge’s decision [↑](#footnote-ref-3)
4. HCA1946/2011, 4 June 2015 (unreported) [↑](#footnote-ref-4)
5. Paragraph 26, HCA 1339/2019, 22 October 2019 (unreported) [↑](#footnote-ref-5)
6. Paragraph 62 of the judge’s decision [↑](#footnote-ref-6)
7. Paragraph 64 of the judge’s decision [↑](#footnote-ref-7)
8. Paragraphs 72 to 74 of the judge’s decision [↑](#footnote-ref-8)
9. Paragraph 75 of the judge’s decision [↑](#footnote-ref-9)
10. Paragraph 76 of the judge’s decision [↑](#footnote-ref-10)
11. Paragraph 77 of the judge’s decision [↑](#footnote-ref-11)
12. Paragraphs 83 to 86 of the judge’s decision [↑](#footnote-ref-12)
13. [2021] HKCFI 456 [↑](#footnote-ref-13)
14. CAMP 76/2021 [↑](#footnote-ref-14)
15. The original text reads: “But if the affidavit is shown to be insufficient by its content or by admissions made in the proceedings, in such a case a further affidavit may be ordered. ‘[The discovery] affidavit is not regarded as conclusive only where it can be shown that there has been insufficiency of discovery. The insufficiency can be demonstrated by (a) the pleadings, the list and affidavit of documents themselves, or documents referred to therein; (b) any other source that constitutes an admission of the existence of a discoverable document not s far discovered; (c) an apparent exclusion of documents from discovery by a party under a misconception of the case: *Matthews & Malek, Disclosure* [(4th ed),] §6.43’.” [↑](#footnote-ref-15)
16. (1880) 5 QBD 556, 559 [↑](#footnote-ref-16)
17. *The Times*, 24 June 1993, p. 347 [↑](#footnote-ref-17)
18. [2021] EWHC 849 (Ch), §§23–26 [↑](#footnote-ref-18)
19. [1912] AC 709, 714 [↑](#footnote-ref-19)
20. [2008] EWHC 1729 (Comm); [2008] 2 CLC 258, 289 [↑](#footnote-ref-20)
21. (1968) 68 DLR (2d) 410, 411–415, 419–424 [↑](#footnote-ref-21)
22. [1997] 1 IR 558, 572–574 [↑](#footnote-ref-22)
23. Page 714 [↑](#footnote-ref-23)
24. Paragraph 86(c) [↑](#footnote-ref-24)
25. Pages 411–415, 419–424 [↑](#footnote-ref-25)
26. Pages 572–574 [↑](#footnote-ref-26)
27. See Clauses 3.1.1, 3.1.2, 3.1.3, 3.2.1 and 12.2.2 [↑](#footnote-ref-27)
28. [2002] 1 HKC 383 [↑](#footnote-ref-28)
29. *Norwich Pharmacal v Customs & Excise* [1974] AC 133 [↑](#footnote-ref-29)
30. *Chang Wa Shan v Chan Chun Chuen* [2009] 6 HKC 201, paragraph 11 [↑](#footnote-ref-30)
31. *Leung Yiu Ting v MTR Corporation Ltd* [2020] HKCFI 460, paragraphs 15-19 [↑](#footnote-ref-31)
32. Mr Khaw cited paragraphs 21 to 28, *Kerner v WX & Anor* [2015] EWHC 1247 (QB). [↑](#footnote-ref-32)
33. [2002] 1 WLR 1233 paragraphs 29 and 30 [↑](#footnote-ref-33)