## DCPI 94/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 94 OF 2013

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##### BETWEEN

CHAN MAY MAY Plaintiff

### and

RAYMOND YU TAI CHUEN Defendant

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Before: Deputy District Judge Phillis Loh in Chambers (open to public)

Date of Hearing: 9 June 2014

Date of Reasons for Decision: 25 June 2014

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REASONS FOR DECISION

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1. This is the defendant’s application by summons dated 17 March 2014, amended on 3 April 2014, for unless order against the plaintiff on the ground of non-compliance of a discovery order dated 20 June 2013 (“the Discovery Order”) made by the Master.
2. The plaintiff opposed the summons on the ground that the Discovery Order has been complied with.

*Background*

1. The plaintiff claims damages for personal injuries sustained by her as a result of a sexual assault inflicted on her by the defendant on 17 April 2010 (“the Incident”).
2. Her evidence is that she has since the Incident suffered psychiatric symptoms for which she has sought treatment until to date. She has been attending regular counselling sessions with Ms Yu Pik Lai Alice, counselor (“Ms Yu”) since 15 March 2011 and psychiatric treatment from Dr Jimmy Dong, specialist in psychiatry, since 17 October 2011. Dr Dong made a diagnosis of Post Traumatic Stress Disorder and concluded that such was the result of her traumatic experience in the Incident.
3. The plaintiff, now aged 50, works as an insurance agent. A summary of her claim as pleaded in the Statement of Damages is as follows:-

PSLA $170,000

Aggravated damages $70,000

Pre-trial loss of earnings $139,159

Pre-trial loss of MPF benefits $6,957.95

Special damages (medical and treatment

expenses past and future) $247,575

Loss of society $50,000

Interest To be assessed

$683,691.95

1. The claim for pre-trial loss of earnings of $139,159 is as set out in the Statement of Damages the difference in annual income ($912,193 - $773,034) (net of expenses and after tax) received by the plaintiff in the 2 years of assessment (2009/2010 and 2011/2012) before and after the Incident. The loss of MPF benefits is 5% of the loss of earnings. She paid tax in the sums of $160,975 and $122,299 in those 2 years of assessment.
2. This is a rather modest claim given the tax records evidence showing high income of the plaintiff. She is not claiming future loss of earnings.

*The discovery saga*

1. In challenge of the plaintiff’s claim, the defendant sought at the Checklist Review on 20 June 2013 and was granted the Discovery Order in respect of the following documents:-

“1. Within 42 days from the date of this order, i.e. on or before 1 August 2013, the plaintiff shall make discovery by production of the following documents:-

1. All medical notes, records, including but not limited to meeting schedule, attendance record, medical receipts, progress report and/or evaluation report, and/or consultation notes and/or the like of the plaintiff by Dr Jimmy Yuet Sun Dong from 17 October 2011 up to date;
2. All consultation notes, records, including but not limited to meeting schedule, attendance record, receipts, progress report and/or evaluation report, and/or the like of the plaintiff by Ms Yu Pik Lai Alice from 10 March 2011 up to date;
3. All consultation notes, records, including but not limited to meeting schedule, attendance records, receipts, progress report and/or evaluation report, and/or the like of the plaintiff by Ms Tan Kong Sau from 19 April 2011 up to date;
4. All medical notes, consultation notes, records, including but not limited to meeting schedule, attendance record, medical receipts, progress report and/or evaluation report, and/or the like of the plaintiff other than those specified in paragraphs 1(a), (b) and (c) hereinabove from 19 April 2011 up to date;
5. All medical notes, records, including but not limited to meeting schedule, attendance record, medical receipts, progress report and/or evaluation report, and/or consultation notes and/or the like of the plaintiff’s psychiatric treatment in relation to the sexual harassment when the plaintiff was aged 10 to 13 year old;
6. All consultation notes, records, including but not limited to meeting schedule, attendance record, receipts, progress report and/or evaluation report, and/or the like of the plaintiff’s psychiatric consultation by counselor in relation to the sexual harassment when the plaintiff was aged 10 to 13 years old;
7. All police statements in relation to the sexual harassment when the plaintiff was aged 10 to 13 years old;
8. All medical notes, consultation notes, records, including but not limited to meeting schedule, attendance record, medical receipts, progress report and/or evaluation report, and/or consultation notes and/or the like of the plaintiff from the plaintiff aged 10 to 13 years old to 17 October 2011;
9. All of the plaintiff’s written representations to the Department of Justice submitting that the defendant should be prosecuted;
10. The employee’s tax return together with the supporting profit and loss account filed by the plaintiff with the Inland Revenue Department in respect of the tax year 2008/2009;
11. The employer’s tax return filed by the plaintiff’s principal;
12. The contract between the plaintiff and the plaintiff’s principal;
13. All wages and income records (including pay-slips, invoices and income receipts) relating the plaintiff’s work from 17 April 2009 up to date;
14. MPF records and statements of the plaintiff from 17 April 2009 up to date;
15. All bank statements of the plaintiff for from 17 April 2009 up to date; and
16. Record of attendance at work of the plaintiff as kept by the plaintiff’s principal from 17 April 2009 up to date.”
17. I was perplexed as to why the defendant had requested for such an extensive discovery, in particular under para 1(h) for medical notes and records dating back to 1970s (when the plaintiff was aged 10 to 13) and covering a period of some 30 to 40 years (!) in the absence of medical evidence on pre-existing medical or psychiatric conditions prior to the Incident.
18. Following from that order the defendant embarked on a lengthy discovery battle against the plaintiff. The plaintiff served a List of Document and her 1st Affidavit on 1 August 2013 disclosing documents in her possession. The defendant alleged non-compliance of the Discovery Order all along.
19. He took out a summons on 10 September 2013 for unless order for the first time for discovery of the outstanding documents under para 1 (a) to (d), (f), (h), (l), (n), (o) and (p) and some other new documents, failing compliance of which the plaintiff’s claim be struck out. The summons for unless order was adjourned for argument on 10 January 2014.
20. As a result of the adjourned hearing, the Master granted an extension of time for the plaintiff to comply with para 1(b), 1(d) and 1(o) of the Discovery Order. The Master further ordered under para 2:-

“2. If the plaintiff is unable to produce copies of any of the aforesaid documents in paragraph 1(b), 1(d) and 1(o) of the Order… dated 20 June 2013, the plaintiff do by 4:00 pm of 28 February 2014, file and serve a supplemental affirmation or affidavit confirming that such document(s) or category(ies) of documents are, or have at any time been, in her possession, custody or power; and if the same or any of them have been, but are not now in her possession, custody or power, stating when she parted with them and what have become of them with detailed reasons.”

1. Pursuant to para 2 of the 10 January 2014 order, the plaintiff served her 3rd Affidavit on 28 February 2014 explaining her inability to produce the summary notes of consultation (“the Summary Notes”) prepared by Ms Yu who had withheld disclosure of the same despite the oral and written requests made by the plaintiff and her solicitors since September 2013, and that the plaintiff had never had in her possession the Summary Notes.
2. Following from the Discovery Order, the parties attended further court hearings on 4 occasions on 3 September 2013, 10 January 20104, 3 March 2014 and 2 April 2014 upon the defendant’s summonses enforcing discovery. The defendant served 5 affidavits alleging non-compliance of the plaintiff who served a total of 4 affidavits in reply annexed with voluminous documents.
3. On 17 March 2014 the defendant issued the present summons for unless order for the second time against the plaintiff, which summons was amended on 3 April 2014 (to delete other directions more appropriate to be dealt with at the next Checklist Review). He also issued another summons dated 2 May 2014 against non-party Ms Yu for discovery of the Summary Notes.
4. As for the status of discovery, defendant’s counsel Mr Poon confirmed in court that the current non-compliance of the Discovery Order relates to para 1(b) and 1(o) as follows:-

Para 1 (b):

The Summary Notes withheld by Ms Yu;

Para 1(o):

Bank statements of 3 bank accounts held jointly by the plaintiff and her husband; and

Bank confirmations on the opening and closing dates of 15 of the plaintiff’s bank accounts out of the 22 bank accounts already disclosed.

*The Summary Notes (Discovery Order para 1(b))*

1. The allegation of non-compliance due to the plaintiff’s failure to produce the Summary Notes is devoid of merits. The plaintiff has served a 3rd Affidavit on 28 February 2014 as explained in paragraph 13 above in compliance of paragraph 2 of the 10 January 2014 order.
2. Mr Poon further argued that the plaintiff should have taken steps, e.g. by issuing a subpoena *duces tecum* or summons against Ms Yu in order to procure compliance of the Discovery Order.
3. This argument was rejected outright, there being no such required actions on the part of the plaintiff in the Discovery Order. The extensive criticisms of inaction in this regard made in the affidavits by the defendant against the plaintiff are wholly without basis.
4. In any event, the defendant had at the same hearing on 9 June 2014 and immediately before the hearing of the unless order summons under his summons for discovery against non-party obtained an order for discovery against Ms Yu who finally agreed to produce the Summary Notes.

*The bank statements (Discovery Order para 1(o))*

1. The plaintiff had by the time of service of her 3rd Affidavit on 28 February 2014 disclosed bank statements and information of 22 personal banks accounts. She also explained that she was waiting for the banks’ replies to her requests for outstanding bank statements of some of the accounts, which were later disclosed and further explained in her 4th Affidavit filed on 30 April 2014. By then, the plaintiff had disclosed a voluminous 801 pages of bank statements in respect of 22 personal bank accounts covering a period of almost 5 years from 17 April 2009 to date.
2. At the hearing, the defendant sought further discovery of bank statements of 3 bank accounts jointly held by the plaintiff and her husband, and bank confirmations of the opening and closing dates of some 15 bank accounts.
3. The plaintiff opposed disclosure of the 3 joint accounts which were jointly held with her husband but not under her sole name. Plaintiff’s counsel Mr Hariman argued that the bank statements bear both her name and her husband’s and were addressed to them jointly. They are therefore not “bank statements of the plaintiff” and do not fall within para 1(o) of the Discovery Order.
4. I rejected the plaintiff’s arguments regarding the joint accounts. The Discovery Order para 1(o) does not specify bank statements of the plaintiff “in her sole name”. She is a signatory of all 3 joint accounts and has full control of the money in the accounts. In my decision the bank statements of these joint accounts, albeit jointly held with her husband, do fall within the meaning of para 1(o) and should be disclosed. I found that there was non-compliance by the plaintiff of para 1(o) of the Discovery Order.
5. I then turned to the defendant’s request for discovery of bank confirmations of the opening and closing dates of 15 bank accounts already disclosed. When asked the relevance of the opening and closing dates of the bank accounts, Mr Poon explained that there were some lacuna periods without bank statements, raising the suspicion that some bank statements have not been produced.
6. This is nonsensical as the plaintiff has explained in detail in her affidavits that the lacunae of no bank statements were the result of (i) inactivity in the accounts; or (ii) that the accounts were not opened yet or had already been closed.
7. It is trite that discovery affidavits evidence is conclusive as to whether a party has or has had any documents other than those disclosed. (Hong Kong Civil Procedure 2014 at 24/7/1 p 566)
8. Only where the defendant has satisfied the court that there were clearly shown on the totality of material other undisclosed documents is the conclusive nature of discovery affidavits overturned. (*Alexina Investments Limited v Keysbery Limited*, HCA 6359/1992; 27 March 2001)
9. When asked the importance of the missing bank statements, if any, and how they would assist the defence case in challenge of the plaintiff’s claim herein, Mr Poon confirmed that the bank statements would be relevant to the defence challenge of the plaintiff’s claim for pre-trial loss of earnings only. He submitted that as large sums of money were seen going in and out of some of the plaintiff’s bank accounts, these might go to show that the plaintiff had in fact made higher earnings during the post-Incident period. The defendant would require a full picture and history of all the plaintiff’s bank statements, and if necessary, make further enquiries and discovery on the large money transactions, in order to validly challenge her claim for loss of earnings.
10. This is fishing for evidence and must not be allowed. The plaintiff has in her first List of Documents filed on 1 August 2013 made disclosure of documents of employees’ tax returns, work contract/ conditions, all wages and income records and MPF records and statements relevant to her claim for pre-trial loss of earnings in compliance with para 1(j), 1(l), 1(m) and 1(n) of the Discovery Order. It was inconceivable why the defendant would require all bank accounts of the plaintiff covering a period of some 5 years in challenge of the plaintiff’s modest claim for pre-trial loss of earnings and MPF benefits of some $146,000 odd. Mr Poon submitted that the defendant had to be cautious as the plaintiff may revise her claim later to include much larger claims for past and future losses of earnings.
11. This is speculative and in my view demonstrates the unreasonable attitude of the defendant in seeking extensive discovery of the plaintiff’s finance which is irrelevant to the issues in dispute.
12. I also found that the request for bank confirmations on opening and closing dates of 15 bank accounts clearly goes beyond the ambit of paragraph 1(o) of the Discovery Order and is unwarranted. There was no non-compliance due to the plaintiff’s failure to produce the bank confirmations.

*Variation of the Discovery Order*

1. There was substantial discovery by the plaintiff. The only non-compliance concerns para 1(o) of the Discovery Order in respect of bank statements of the 3 joint accounts as held herein.
2. For reasons stated in paragraphs 30 and 31 above, I took the view that the bank statements of the 3 joint accounts should no longer be necessary or relevant, now that there had been a change of circumstances since the date of the Discovery Order in that the plaintiff had made adequate discovery of documents on relevant earnings in compliance with para 1(j), 1(l), 1(m) and 1(n) of the Discovery Order.
3. In the course of the hearing, I expressed my intention to vary the Discovery Order to exclude the 3 joint accounts. I proposed this variation in my exercise of the court’s power under Order 24 rule 17 as discussed in the Decision of Hon L Chan J in *Bruce James Stinson v Gu Ming Gao* (HCA 2352 of 2012; 15 April 2014), and under its inherent jurisdiction in case management in accordance with Order 24 (Hong Kong Civil Procedure at 24/0/12) and Order 1A rule 2 in order to give effect to the underlying objectives of the CJR stated in Order 1A rule 1 as follows:

“(a) To increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;

1. To ensure that a case is dealt with as expeditiously as is reasonably practicable;
2. To promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
3. To ensure fairness between the parties;
4. To facilitate the settlement of disputes; and
5. To ensure that the resources of the Court are distributed fairly.”
6. I invited counsel to consider my request and address the court on the matter before I stood down.
7. When the hearing resumed, Mr Hariman expressed the plaintiff’s support of my proposed variation. Mr Poon reiterated the need for discovery of the bank statements of the plaintiff’s 3 joint accounts in order for the defendant to have a full picture of the plaintiff’s finance, but he took a neutral stance with regard to my proposed variation.
8. This is not an ancillary relief matter in which the parties are required to disclose full pictures of all their finances and assets. The real issue in dispute to which the earnings documents pertain is whether the plaintiff could prove pre-trial loss of earnings claimed in the sum of $146,000 odd. In light of the plaintiff’s discovery of the documents on earnings in compliance with para 1(j), 1(l), 1(m) and 1(n), and bank statements of 22 personal bank accounts under para 1(o) of the Discovery Order, bank statements of the 3 joint accounts were no longer necessary.
9. I was satisfied that sufficient cause had been shown to found a variation under Order 24 rule 17. I accordingly made an order of variation to the Discovery Order to exclude the bank statements of the 3 joint accounts of the plaintiff and her husband.

*Whether an Unless Order should be made*

1. As for the circumstances under which an unless order should be made, Mr Hariman referred me to paragraphs in Hong Kong Civil Procedure 2014 at 3/5/6 p 61 and the case of *AXA China Region insurance Co Ltd v Pacific Century Insurance Co Ltd* (No. 2) [2005] 3 HKC 359 by Chu J (as she then was) at 381I-382B para 71 which reads:-

“… an Unless order is an order of last resort and should only be made where there is a history of failure to comply with the Rules or court orders. There is at the same time no dispute that the court has a discretion not to enforce strict compliance of an order”

The plaintiff AXA in that case alleged that the defendant PCI had failed to fulfill and comply with discovery and disclosure obligations and sought an unless order against the latter that carried the sanction of the defendant’s   
Defence being struck out. The court refused to exercise its discretion to do so as it was considered:-

“(i) Considerable time and resources to the discovery and disclosure obligations had been devoted;

(ii) The long process is not necessarily equated with a history of failure to comply with court orders;

1. The defendant had been responsive on occasions when failings and non-compliance were identified;
2. The scope of search under the order for discovery was not insubstantial;
3. Objection was raised late and after considerable time and resources had already been spent on complying with the order; and
4. It could not be said without strict compliance with the order the plaintiff runs the risk of being deprived of a fair trial.”
5. In the present case, the defendant sought substantial discovery; the plaintiff has devoted considerable time and resources to ensure compliance. The only outstanding documents relate to bank statements of the 3 joint accounts which documents I held no longer necessary in light of the plaintiff’s substantial compliance.
6. Whilst seeking unless order on the basis that the plaintiff had failed in her duty of strict compliance of the Discovery Order, Mr Poon did not even begin to tell the court how, without strict compliance or in the absence of bank statements of the plaintiff’s 3 joint accounts, given discovery had been made of 22 other personal accounts, the defendant would be prejudiced or would run the risk of being deprived of a fair trial.
7. In my decision, this is far from the case here. The plaintiff’s non-compliance of the Discovery Order, namely failure to disclose the 3 joint accounts, out of a total of 25 bank accounts held under her name, and in light of the extensive discovery of other relevant materials, is minor. The application for unless order carrying a sanction of striking out the plaintiff’s claim on the basis of the minor non-compliance is wholly disproportionate, unwarranted and without merits. I have no hesitation dismissing the defendant’s summons for unless order.
8. I note with regret such a bad example in which discovery is not sensibly controlled, but has been allowed to be used as an oppressive weapon. It has been pursued without due regard to economy and efficiency in terms of usefulness of the information which is likely to be obtained from the documents the defendant incessantly sought. The time resources and costs incurred by the parties are wholly disproportionate to the claim.
9. Parties in seeking discovery should bear in mind the trite legal principles in the comprehensive summary set out in the Decision of Mr Registrar Lung in *The Incorporated owners of Kodak House II and No. 321 Java Road v Kai Shing Management Services Limited* (HCA 711/2011; 9 October 2012) as follows:

“9.   The legal principles are trite. In a recent decision by Deputy Judge Sakhrani in *Joyce T.Ongsip trading as L.T. Enterprise Co. v. Primatronic Limited* HCA611/2010 delivered on 20 September 2012, the learned Deputy Judge has set out the relevant principles, which are apt for the present discussion:

“14. A party seeking an order for discovery must make out a *prima facie* case that:

(1) the specified document or class of documents exist;

(2) the party against whom discovery is sought has or had the documents in his possession, custody or power;

(3) the documents relate to a matter in question in the action; and

(4) discovery is necessary either for disposing fairly of the cause or matter or for saving costs.

(per To J at paragraph 11 of his judgment in *Tullett Prebon (Hong Kong) Ltd v Chan Yeung Fong Nick & Ors* HCA 2197 of 2009, 9 June 2011)

15. As was held in *Deak & Co (Far East) Ltd v NM Rothschild & Sons Ltd & Ors* [1981] HKC 78, even if existence, possession etc. and relevancy were established, discovery would only still be granted if it was necessary for fairly disposing of the cause or matter.

16. It is also useful to bear in mind what Burrell J said in his Decision dated 18 January 2002 in *Mariner International Hotels Ltd v Atlas Ltd & another* (HCA 10714, 10752 and 10821 of 1998). At paragraph 11, Burrell J said:

“The task of the court will often be to determine when “doing justice to the claim” stops and “fishing” or, to use another analogy “the scatter gun approach” starts. At that point the onerous nature of the discovery exercise passes from the necessary and permissible to the unnecessary and impermissible”.

17. The pleadings in an action define the issues to be tried.

18. I would also refer to what Cheung JA said in *Paul’s Model Art Gmbh & Co KG v U.T. Limited & Ors* (CACV 139 of 2005; 14 December 2005) at paragraph 25 of his judgment:

“25  The real issue that has been focused at this hearing is whether the documents sought to be disclosed are relevant to the issues in this case between the plaintiff and the 4th defendant.  In this context the issue must be one identified in the pleadings.  *Sun Yuet Tai Ltd v British American Tobacco Co (HK) Ltd* (CACV No 95 of 1999).  On the other hand the fact that an issue is raised in the pleadings is not determinative as to whether it relates to a matter.  Discovery is not required of documents which relate to irrelevant allegations in pleadings which even if substantiated could not affect the result of the action: *Allington Investments Corp & Others v First Pacific Bancshares Holdings Ltd & Another* [1995] 2 HKC 139.”

19. I would also agree with the observations of Deputy Judge Mimmie Chan (as she then was) in *Sunny Tadjudin v Bank of America, National Association* (HCA 322 of 2008; 22 December 2011) when she said at paragraph 7 of her judgment:

“7. It is also clear that post CJR, the Court should give effect to the underlying objectives of the rules and procedures when it exercises its powers under Order 24 and when it interprets the provisions of Order 24. In deciding whether any document relates to a matter in question in the action, whether any document is or has been in the possession, custody or power of a party, and whether discovery of a document sought is necessary either for disposing fairly of the cause or matter or for saving costs, the Court should always bear in mind the objectives of cost effectiveness, expeditious disposal of cases, proportionality, procedural economy and ensurance of fairness between the parties.””

10.   I would like to further elaborate the importance of defining the live issues in the action.  Mr. Justice Ma CJHC (as he then was) said in *Wing Hang Bank Limited v Crystal Jet International* Limited [2005] 2 HKLRD 795, at 799A-F:

“(1) The purpose of pleadings is fairly and precisely to inform the other side of the stance of the pleading party so that proper preparation is made possible, and time and effort are not expended unnecessarily on other issues. The passage at paragraph 18/12/1 of Hong Kong Civil Procedure 2004 Volume I sets out the rationale for proper pleadings.

(2) In a trial, particularly where evidence is given by witnesses, it becomes extremely important that each side knows exactly what are the live issues. …”

1. The defendant’s conduct in the extensive discovery exercise is in complete disregard of the underlying objectives set out in Order 1A rule 1 and against trite principles of discovery. Any further unwarranted application for discovery must be viewed with caution and sanctioned.

*Order*

1. There be variation of para 1(o) the Discovery Order by inserting towards the end “(not including bank statements of 3 bank accounts jointly held by the plaintiff and her husband)”; and
2. The defendant’s amended summons for unless order be dismissed.

*Costs*

1. Costs should follow the event. I however should take into account the fact that there was non-compliance of para 1(o) of the Discovery Order on the part of the plaintiff, and that the defendant was entitled to come to court to enforce it.
2. I therefore ordered that the plaintiff shall have 50% of her costs against the defendant in respect of the defendant’s amended summons dated 3 April 2014, with certificate for counsel, to be taxed if not agreed.

( Phillis Loh )

Deputy District Judge

Mr Wayne Hariman instructed by Robertsons, for the plaintiff

Mr Jackson Poon instructed by Or & Partners, for the defendant