## DCPI 745/2004

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 745 OF 2004

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##### BETWEEN

YIP KOON YAN Plaintiff

and

DR. HO CHUNG YIN ANDREW Defendant

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Coram: Deputy District Judge J. Ko in Chambers

Date of Hearing: 23rd November 2005

Date of Handing Down Decision: 12th December 2005

D E C I S I O N

1. There are two summons before me, both taken out by the Defendant.

2. By the first summons (“the Stay Summons”), the Defendant applies for an order that all further proceedings in this action be stayed under the inherent jurisdiction of the court on the ground that the parties have concluded an agreement for the compromise or settlement of the Plaintiff’s claim herein.

3. By the second summons (“the Cross-examination Summons”), the Defendant applies for an order that the Plaintiff be cross-examined, through the Defence counsel, on her affirmation filed herein on 15th August 2005.

4. Both summons are opposed by the Plaintiff.

## Background

5. The Plaintiff has only issued the writ in this action and parties have yet to file their pleadings. Be that as it may, the following undisputed facts, which represent the bare minimum for the purpose of these applications, can be gleaned from the affidavit/affirmation(s) filed by both parties:

* 1. The Defendant, Dr. Chan Yuk-sau (“Dr. Chan”) and Dr. Siu Chi-lan (“Dr. Siu”) are all registered medical practitioners in Hong Kong.
  2. On 23rd and 27th July 2001, the Plaintiff consulted Dr. Chan. Dr. Chan referred her to the Defendant for a termination of pregnancy operation (“the TOP Operation”).
  3. On 4th August 2001, the Defendant performed the TOP Operation on the Defendant.
  4. On 13th August 2001, the Plaintiff returned to Dr. Chan for follow-up treatment. Dr. Chan referred her to Dr. Siu. The Plaintiff consulted Dr. Siu on the same day and a second operation was arranged for 16th August 2001 (“the Second Operation”).
  5. On 16th August 2001, Dr. Siu performed the Second Operation on the Defendant.

6. It is the Plaintiff’s case that the Defendant had been negligent in performing the TOP Operation on her on 4th August 2001, which necessitated the Second Operation which was remedial in nature. By this action, the Plaintiff claims for damages for personal injury as well as loss and damage suffered.

7. On 21st July 2005, the Defendant took out the Stay Summons.

8. On affidavit, the Defendant on the one hand does not admit any fault in performing the TOP Operation and on the other hand alleges that in any event there is a settlement agreement made with the Plaintiff to fully and finally settle the matter (“the Alleged Settlement Agreement”). The circumstances of the making of the Alleged Settlement Agreement are deposed to in the affidavit/affirmation(s) of the Defendant, Dr. Chan and Dr. Siu.

9. In order to appreciate the Defendant’s case on the Alleged Settlement Agreement for the present purpose, it may be helpful to refer to the evidence of Dr. Siu as follows:

“I explained to the Plaintiff that she would need to undergo a repeated dilatation and curettage operation to ensure complete evacuation of the uterus as soon as possible. The Plaintiff told me that the Defendant was out of Hong Kong at that time. With the Plaintiff’s consent, I made a long distance call to the Defendant and informed him of the Plaintiff’s situation. The Defendant asked me to offer to perform a repeated dilatation and curettage operation on the Plaintiff at the Defendant’s own expense, subject to the Plaintiff’s agreement not to make any complaint or claim against the Defendant upon satisfactory completion of the operation. I relayed the Defendant’s offer to the Plaintiff who confirmed to me that the offer was agreeable. I therefore made the necessary arrangements for the Plaintiff’s admission to the Hospital for the operation.”

10. In her affirmation filed herein on 15th August 2005, the Plaintiff sets out the factual background of her case and denies the Alleged Settlement Agreement.

11. Argument on the Stay Summons was scheduled to be heard on 23rd November 2005. A few days before the scheduled hearing, the Defendant took out the Cross-examination Summons returnable on the same date.

12. At the hearing, Mr. Fung (counsel for the Defendant) invited me to deal with the Cross-examination Summons first because the Defendant may obviously wish to use the fruit of the cross-examination (if any) to support his application under the Stay Summons. Mr. Leung (counsel for the Plaintiff) confirmed that he was ready to proceed with the Cross-examination Summons. He, however, indicated that he would necessarily touch upon the Stay Summons in opposing the Cross-examination Summons.

13. With the agreement of counsel, I have decided to hear argument on the Cross-examination Summons first and to adjourn the Stay Summons *sine die* with liberty to restore.

### Discussion on the Cross-examination Summons

14. It is common ground that the relevant legal principles on the exercise of the discretion in permitting cross-examination on an affidavit can be found in Fuad JA’s judgment in ***Wendy Wenta Seng Yuen v Philip Pak-yiu Yuen*** [1984] HKLR 431. These have recent been summarized in *Waters v. Malahon Credit Co Ltd* [2004] 2 HKC 94 as follows:

“1. The court has an unfettered discretion to permit cross-examination but an applicant is not entitled to this right as of course.

2. The applicant has to establish that in all the circumstances there is ‘good and sufficient’ reason for the application.

3. Where the evidence on the affidavits will result in a ‘final order’, it may not be difficult to establish ‘good and sufficient’ reason for the application; where the evidence is for use in an interlocutory matter, it may be more difficult, in view of the expense and delay involved, for the court to be satisfied that the discretion should be exercised in favour of permitting cross-examination.

4. What is essential is for the applicant to establish that the proposed cross-examination might be productive of a ‘useful result’ at the stage that the application is made.”

15. Mr. Fung submits that there are good and sufficient reasons for cross-examining the Plaintiff at this stage of the proceeding because:

* + 1. The evidence of the Plaintiff, after cross-examination, may result in a “final order” under the Stay Summons.
    2. There is no advantage in deferring to hear the evidence on Alleged Settlement Agreement until trial. The evidence to be dealt with at trial on the issue of the alleged medical negligence must be totally independent and irrelevant to the issue of whether the Alleged Settlement Agreement was in fact made by the parties.
    3. To allow the Plaintiff to be cross-examined at this stage will save time and a large amount of costs on all parties.

16. Given that parties have yet to formulate their case fully on pleadings, the less I say in this decision the better.

Whether the evidence, after cross-examination, may result in a “final order” under the Stay Summons?

17. In my view, the Cross-examination Summons must be looked at in the context of a pending Stay Summons. The thrust of Mr. Fung’s argument is that if the Defendant succeeds in discrediting the Plaintiff, the court is left with only the evidence from the Defendant and his witnesses on the existence of the Alleged Settlement Agreement.

18. It must be remembered that the Plaintiff’s evidence in her affirmation on the Alleged Settlement Agreement is merely a denial. Even if the Defendant succeeds in discrediting the Plaintiff, it does not mean that the court would then accept the Defendant’s case on the Alleged Settlement Agreement. It will still be open to the Plaintiff to challenge the evidence filed by the Defendant during argument on the Stay Summons with a view to invite the court not to find for the existence of the Alleged Settlement Agreement.

19. Mr. Leung has demonstrated at the hearing how he would challenge the evidence filed by the Defendant on the existence of the Alleged Settlement Agreement. He starts with the general premises that the court should be hesitant to decide on the existence or otherwise of an alleged settlement agreement without a trial and without hearing all relevant evidence (see *Wong Tak Shing v. Amertex International Limited*, CACV 110/1987). This is all the more so as the Alleged Settlement Agreement is oral in nature and the terms not recorded or evidenced in writing. Secondly, Mr. Leung has observed the close working relationship between the doctors and submits that neither Dr. Chan nor Dr. Siu can be regarded as independent witnesses. Thirdly, Mr. Leung has also cast doubt on the affidavit/affirmation(s) evidence of the doctors. For example, he submits that it is extraordinary that Dr. Siu has failed to record the Alleged Settlement Agreement in her contemporaneous clinical records.

20. Mr. Leung further submits that the Alleged Settlement Agreement, even if factually established, is not enforceable in law for want of consideration and on the ground of undue influence.

21. First, he observes that the Plaintiff has already paid for the TOP Operation. He submits that the Defendant failed to perform the TOP Operation properly but then procured the Second Operation to be carried out by Dr. Siu. In the circumstances, the Second Operation was merely a vicarious performance of the Defendant’s existing obligation to the Plaintiff and no additional consideration moved from the Defendant to support the Alleged Settlement Agreement. In reply, Mr. Fung submits that the expenses in relation to the Second Operation other than Dr. Siu’s fee (such as hospital charges), which was settled by the Defendant, may constitute good consideration.

22. No doubt this issue of want of consideration will be fully canvassed when the Stay Summons is argued or at the trial of this action. In deference to the judge hearing the summons or presiding the trial, I need not reach any conclusion at this stage. Suffice it for me to observe that cross-examining the Plaintiff on her affirmation at this stage is unlikely to be helpful in resolving this issue.

23. Secondly, Mr. Leung notes the “medical advisor and patient” relationship between Dr. Siu (through whom the Defendant concluded the Alleged Settlement Agreement with the Plaintiff) and the Plaintiff. Adopting the terminology in *Bank of China (Hong Kong) Limited v. Wong King Sing* [2002] 1 HKC 83, he submits that there is a Class 2(A) situation and a presumption is raised as a matter of law that undue influence has been exercised. The onus is then shifted to the influencer (i.e. Dr. Siu) to demonstrate that the relevant transaction was not one in which undue influence could have existed. The Defendant, being the principal of Dr. Siu insofar as the Alleged Settlement Agreement is concerned, was fixed with the undue influence presumed against Dr. Siu and the Alleged Settlement Agreement is therefore not enforceable against the Plaintiff. In reply, Mr. Fung submits that there cannot be any question of undue influence based on what is deposed to in paragraph 11 of the Plaintiff’s affirmation.

24. On this question of undue influence, I wish to make 2 simple observations. First, the best the Defendant can hope for in cross-examining the Plaintiff is to shatter her credibility. Once that is achieved, it is likely that the whole of the Plaintiff’s affirmation will be disbelieved, including paragraph 11 thereof. Secondly, even if the Defendant succeeds in discrediting the Plaintiff on her denial of the Alleged Settlement Agreement only and preserving the rest of her affirmation, there is other evidence in the Plaintiff’s affirmation pointing to the fact that she might be in a confused state on 13th August 2001 when the Alleged Settlement Agreement was allegedly concluded (see paragraph 9 of the Plaintiff’s affirmation). After all, the rationale for the defence of undue influence is to prevent the victimization of the complainant and to protect people from being forced, tricked or misled in any way by others into entering into a disadvantageous transaction (*per* Recorder Ma SC, as he then was, in *Bank of China (Hong Kong) Limited v. Wong King Sing* [2002] 1 HKC 83 at 92F). The state of mind of the Plaintiff may be relevant to this defence. In my view, this issue cannot be easily resolved on affidavit evidence, even with the benefit of the Plaintiff’s cross-examination.

25. All in all, I am not convinced that the evidence, after cross-examination of the Plaintiff, may result in a “final order” under the Stay Summons.

Whether the evidence on the issue of the Alleged Settlement Agreement is totally independent and irrelevant to the issue of the alleged medical negligence?

26. Mr. Fung submits that since the evidence on the issue of the Alleged Settlement Agreement is totally independent and irrelevant to the issue of the alleged medical negligence, it is appropriate to have the Plaintiff cross-examined at this stage of the proceedings in order to dispose of the former issue.

27. I note from the terms of the Cross-examination Summons that the Defendant is proposing to cross-examined the Plaintiff on the whole of her affirmation. Mr. Fung has indicated that his instruction is not to restrict the scope of the intended cross-examination to the issue of the Alleged Settlement Agreement although he reiterates that the Plaintiff is unlikely to be cross-examined on the issue of the alleged medical negligence. In my view, the reluctance of the Defendant in restricting the scope of the cross-examination highlights the difficulty in separating the issue of the Alleged Settlement Agreement from the issue of the alleged medical negligence. The scope of the application under the Cross-examination Summons is so wide having regard to the content of the Plaintiff’s affirmation that granting the application may have the effect of giving the Defendant a free hand in cross-examining the Plaintiff. In Mr. Leung’s words, that will tantamount to a fishing expedition with a view to cure a misconceived application under the Stay Summons based on defective affidavit evidence.

28. In any event, Mr. Leung has demonstrated in his submission that in fact the evidence of the doctors as to the existence of the Alleged Settlement Agreement is also bound up with the whole circumstances surrounding the TOP Operation and the Second Operation as well as other medical evidence.

29. In the premises, I am not satisfied that the evidence on the issue of the Alleged Settlement Agreement is independent and irrelevant to the issue of the alleged medical negligence.

Whether to allow P to be cross-examined at this stage will save time and a large amount of costs on all parties?

30. This action is still in a very early stage and parties have yet to file their pleadings. Mr. Leung has submitted that the lateness of the Cross-examination Summons has already prejudiced the Plaintiff in terms of delay and costs. I have already noted Mr. Fung’s reluctance to restrict his proposed cross-examination to the issue of the Alleged Settlement Agreement. Cross-examining the Plaintiff at this stage of the proceeding without the issue(s) in dispute clearly defined by pleadings is, in my view, highly undesirable. This may give rise to other satellite applications and appeals. Having regard to the expense and time necessarily involved in the proposed cross-examination, I am not convinced that the discretion should be exercised in favour of permitting it.

31. In fact Mr. Leung takes a more fundamental objection to the Cross-examination Summons. He contrasts the present application with the procedure for trial on preliminary issue and observes that the Plaintiff will be greatly prejudiced if the present application is granted. He laments on the lack of court directions under the Cross-examination Summons (such as those given in preparation for trial on preliminary matters) to ensure that all the relevant evidence on the Alleged Settlement Agreement will be before the court. In particular, he points out that the Plaintiff will be unable to call the person(s) handling her case in the Legal Aid Department to explain the late response to the Defendant’s solicitors’ letter dated 19th February 2002.

32. In the end, I am not convinced that to allow Plaintiff to be cross-examined at this stage will save time and costs on all parties.

## Conclusion

33. For the above reasons, I am not satisfied that there is “good and sufficient” reason for the application in all the circumstances of this case. The Defendant has failed to establish that the proposed cross-examination may be productive of a useful result at the present stage of the proceeding.

34. The Cross-examination Summons is therefore dismissed. I further make a costs order *nisi* that the costs of the Cross-examination Summons be to the Plaintiff to be taxed if not agreed with certificate for counsel. The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

(J. Ko)

Deputy District Judge

Mr. Raymond Leung instructed by M/s Cheng, Yeung & Co., assigned by D.L.A., for Plaintiff.

Mr. Alfred Fung instructed by M/s. Johnson, Stokes & Master for Defendant.