DCPI1429/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1429 OF 2008

BETWEEN

LAU PIK NGAI ADA	Plaintiff
and	
TO CHUN FUNG ALBERT	Defendant

Coram: H H District Judge Marlene Ng in Chambers (Open to the Public)

Date of Hearing: 4th August, 2009

Date of Handing Down Decision: 28th August, 2009

DECISION

I. Background

1. The Defendant was/is a registered medical practitioner whose clinic was on 10th Floor, Sino Cheer Plaza, 23 Jordan Road, Yau Ma Tei, Kowloon ("10/F"). On 3rd July 2008, the Plaintiff commenced the present proceedings ("PI Action") to claim for damages for personal injury and other loss and damages arising out of Defendant's negligence and/or negligent misstatement and/or breach of statutory duty in connection with (a) the Defendant's use of phosphatidycholine (an unregistered drug not allowed to be used in Hong Kong, "Drug") for mesotherapy injections to her lower abdomen at a room on 9th Floor, Sino Cheer Plaza ("9/F") and/or (b) the Defendant's subsequent assessment, management and treatment of her condition.

2. On 30th June 2009, the Defendant issued a Summons ("Stay Summons") to stay the PI Action pending the determination of judicial review proceedings in HCAL71/2008 ("JR Action"). On 30th June and 21st July 2009 the Defendant filed 2 affirmations in support of the Stay Summons ("1st and 2nd Affirmations"). The Plaintiff filed her affirmation in opposition on 9th July 2009. With no objection from Mr Khaw, counsel for the Plaintiff, I granted leave for the Defendant to rely on his 3rd affirmation filed on 31st July 2009 ("3rd Affirmation"). Ms Gwilt, counsel for the Defendant, agreed that the Defendant's affirmation filed on 30th June 2008 in the JR Action ("JR Affirmation") be used for the Stay Summons.

II. Plaintiff's case

3. The Plaintiff claimed that the Defendant was associated with MBH Beauty Institute ("MBH") which traded at the 9/F and 10/F, and that his clinic on the 10/F was within MBH's reception area and his name card was placed at MBH's reception on the 10/F.

4. It is the Plaintiff's case that at about 6pm on 8th July 2005 she attended MBH at the 10/F for mesotherapy treatment which used a series of injections to perfuse medication into the subcutaneous tissue (mesoderm) for body contouring purpose ("Treatment").

5. A Ms Ng of MBH ("Ms Ng") arranged for the Plaintiff to consult the Defendant at the 9/F for the Treatment, and the Defendant administered a series of injections (later known to have contained the unregistered Drug) into her lower abdomen. During the injection process, apart from the Defendant and Ms Ng, there were another unidentified lady and a man younger than the Defendant (who was a doctor present as an observer and assisting the Defendant). The Plaintiff could not remember the exact time of consultation but it was around 7pm to 8:30pm.

6. Shortly after the Treatment, the Plaintiff experienced severe pain, burning sensation and swelling in her abdomen. On 9th July 2005, the Plaintiff through arrangements by MBH consulted the Defendant at his clinic. The Defendant performed an ultrasound examination and reassured the Plaintiff that the symptoms were part of the normal process of "burning the fat away". He dispensed some unlabelled pain-relieving drugs and asked her to return for follow-up on 12th July 2005.

7. However, the pain in the Plaintiff's abdomen did not reduce after taking the pain-relieving drugs dispensed by the Defendant. In the morning of 10th July 2005, the Plaintiff sought treatment at Prince of Wales Hospital ("PWH") and was advised there was inflammation of the subcutaneous fat in her abdomen which was compatible with allergic reaction or abdominal wall infection. She was prescribed antibiotic, pain-relieving and anti-allergic drugs, and was told to stop taking the unlabelled drugs dispensed by the Defendant. There was some pain reduction after the Plaintiff took the drugs prescribed by PWH, but her abdomen was still red and swollen.

8. In the late afternoon of 12th July 2005, the Plaintiff attended a follow-up consultation with the Defendant at his clinic, and the Defendant assured her there was no inflammation and advised her to stop taking the drugs prescribed by PWH. The Defendant represented that the Treatment was successful, and for better result she should receive another session of injections in a few days' time.

9. On 25th July 2005, the Plaintiff telephoned MBH to strongly demand for a medical report and information as to the name of the relevant doctors and the dosage of the injected drug. She received a call from Ms Ng in the afternoon and was told that her attending doctor was the Defendant (a gynaecologist).

10. In the afternoon on 26th July 2005, Ms Ng telephoned the Plaintiff to arrange for her to collect the medical report at about 6pm. When the Plaintiff collected the 3-page medical report ("Report"), she spoke with Ms Ng and a person claiming to be the Defendant's nurse. The alleged nurse assured the Plaintiff the Report was compiled by the Defendant after attending her. The 1st page of the Report on its face bore the Defendant's letterhead and also his signature whilst the 2nd and 3rd pages contained medical references. The typeface on the 1st page was different from that on the following 2 pages.

11. On 4th August 2005, a Ms Yeung of MBH telephoned the Plaintiff and *inter alia* asked after her condition. By a letter dated 23rd August 2005 to the Plaintiff sent by registered post ("MBH Letter"), MBH referred to the telephone conversation in which the Plaintiff asked for the name of the doctor who carried out the Treatment and who dispensed the medication and stated that it was a Dr Chan (who was described as a registered Hong Kong doctor without any other particulars). MBH suggested that Ms Ng might have misinformed the Plaintiff of the identity of the treating doctor. It was further alleged that because Dr Chan was on leave the Report was written by another doctor, but the letter did not mention who actually prepared it.

12. Between July and November 2005, the Plaintiff consulted other specialists, and it was confirmed that she suffered inflammation and fat necrosis in the lower abdomen. The pain, swelling and redness subsided after treatment, but there were multiple irregular lumps and contour irregularity in her lower abdominal region. The Plaintiff claimed the above were side effects of using the Drug for the Treatment.

III. Defendant's case

13. The Defendant did not admit any association with MBH, and denied having seen, provided any treatment to or dispensed any medication to the Plaintiff on 8th, 9th and/or 12th July 2005 or having administered any unregistered Drug to the Plaintiff. On 8th July 2005, the Defendant stayed at his clinic on the 10/F and did not go to the 9/F. He insisted that the Plaintiff was not his patient, so he did not have her patient's records, and he further denied he authored/signed the Report.

14. The Defendant claimed that the Plaintiff failed to make clear the exact time she allegedly consulted him on 8th July 2005. He pointed out that at first she alleged in her letter dated 11th December 2007 to the Medical Council ("MC") that she consulted him at about 7pm to 8:30pm, but when she became aware from the JR Affirmation that he left his clinic early that day to have a party with family and friends to celebrate his 50th birthday, she pleaded in her Statement of Claim that she consulted the Defendant at about 6pm on 8th July 2005. I pause here to note that in fact the Plaintiff pleaded that she attended MBH on the 10/F at 6pm and consulted the Defendant at the 9/F afterwards.

IV. MC proceedings and JR Action

15. Unless otherwise stated, the facts set out under this Part are not disputed.

16. By a letter dated 27th July 2005 to the MC (together with other supporting documents including the Report), the Plaintiff lodged her complaint against the Defendant in relation to the Treatment. On 26th August 2005, the Plaintiff verified the truth of the contents of such letter by statutory declaration.

17. By letter dated 29th August 2005, the Plaintiff provided the MBH Letter to the MC and expressed puzzlement at the number of doctors involved.

18. By letter dated 20th September 2005, the Plaintiff provided further information in support of her complaint and stated *inter alia* that :

> (a) 1 of the doctors who treated her was about 40-50 years old but did not say who he was although she subsequently came to know he was the Defendant;

(b) on 25th July 2005 Ms Ng informed her by telephone that the doctor who treated her was the Defendant;

(c) on 26th July 2005 when she attended MBH to collect the Report, she asked the person claiming to be the Defendant's nurse whether it was compiled by the Defendant, and the Defendant's nurse said "yes".

On 15th October 2005, the Plaintiff verified the truth of the contents of such letter by statutory declaration.

19. On 28th October 2005, the chairman of the MC's Preliminary Investigation Committee ("PIC") referred the case to the PIC for consideration. After seeking legal advice, he directed that the Plaintiff be asked to provide more information and evidence in support of her complaint. By letter dated 17th January 2005 (which should be 2006), the MC requested further clarification from the Plaintiff. On 3rd February 2006, the MC received an undated reply from the Plaintiff responding to the request and providing further documents.

20. By letter dated 26th April 2006, the Plaintiff through her solicitors complained that the Defendant failed to provide copies of his consultation and treatment medical notes/records concerning the Plaintiff. On 16th June 2006, the PIC chairman directed that the further matters be referred to the PIC. Between 16th November 2006 and 23rd January 2007, the MC made unsuccessful attempts to serve the PIC Notice on the Defendant. Eventually, the Defendant collected the PIC Notice from the MC on 26th January 2007.

21. By the PIC Notice dated 24th January 2007, the MC notified the Defendant that the Plaintiff's complaint alleging professional misconduct on his part would be considered by the PIC in meeting on 12th March 2007, and invited him to submit a written explanation before 28th February 2007 ("PIC Submission"). The PIC Notice also enclosed documents provided by the Plaintiff and correspondence between the Plaintiff and the MC.

22. In the JR Affirmation, the Defendant claimed that the letterhead of the Report omitted one of his professional qualifications and also his contact details, and was different from the one he normally adopted. On 29th January 2007, he wrote to the MC to request for inspection of *inter alia* the original Report. Between February and April 2007, the Plaintiff's former solicitors Messrs Johnson Stokes & Master (later known as Messrs Mayer Brown JSM, "JSM") corresponded with the MC on the subject, but at that time JSM did not state whether the Report was made or signed by the Defendant or not.

23. By letter dated 21st February 2007, JSM asked for extension of time until 30th April 2007 for the PIC Submission. By letter dated 27th February 2007 to JSM, the MC acceded to such request and the PIC meeting was rescheduled to 14th May 2007.

24. On 19th April 2007, the Defendant inspected the Report but found it was a photocopied document. He then instructed JSM to insist on inspection of *inter alia* the original Report and to ask for extension of time for the PIC Submission (see JSM's letter to the Defendant dated 20th April 2007). Consequently, JSM wrote to the MC on 25th April 2007 to request for provision of the original Report by the Plaintiff, and to ask for further extension of time for the PIC Submission.

25. On 26th April and 21st May 2007, the Department of Health informed the Plaintiff's solicitors by letter that there was no registered pharmaceutical product containing the Drug, and that they had no record of any application by the Defendant to import such Drug or any pharmaceutical product containing such Drug for any patient. By letter dated 27th April 2007, the Plaintiff' solicitors informed the MC that the Drug prescribed/dispensed by the Defendant was an unregistered drug, and asked the MC to refer the matter to the police.

26. By letter dated 2nd May 2007, the MC informed JSM the PIC chairman directed that the PIC Submission be submitted within 1 month after provision of the requested original documents. On 10th May 2007, the Plaintiff at the request of the MC provided *inter alia* the original Report.

27. On 23rd July 2007, the PIC chairman decided to defer consideration of the Defendant's case pending police investigation into suspected use of the unregistered Drug. On 25th July 2007, the MC referred such complaint to the police.

28. By letter dated 16th August 2007, the MC reminded the Defendant that the deadline for the PIC Submission was 16th September 2007. On the same day, the Defendant inspected the Report provided by the Plaintiff through the MC and noticed a manuscript notation "p.2" on the 2nd page not found in the photocopied Report previously provided. On 23rd August 2007, JSM wrote to the MC *inter alia* to request the Plaintiff to give an explanation. By letter dated 31st August 2007, the MC asked the Plaintiff to give clarification in respect of the Defendant's queries.

29. By letter dated 6th September 2007, the Plaintiff explained that the printed notation "1" and the manuscript notation "p.3" respectively on the 1st and 3rd pages of the Report were already on the Report when it was given to her. She wrote the notation "p.2" on the 2nd page when the MC requested her to submit the original Report in order to show to the MC there were altogether 3 pages and to avoid any missing page. On 12th September 2007, the MC sent such written explanation by the Plaintiff to JSM.

30. On 14th September 2007, JSM asked for further extension of time for the PIC Submission. By letter dated 20th September 2007, the MC informed JSM that the PIC chairman directed a final postponement to 31st October 2007, and stated that the Defendant's case would be discussed at the PIC meeting scheduled on 12th November 2007.

31. On 15th October 2007, JSM wrote to the MC to obtain *inter alia* the original Report to enable a qualified forensic and handwriting expert ("Expert") to analyse the document. JSM enclosed a letter from the Defendant giving his reasons for forensic examination of the Report on the basis that he did not author or sign the Report.

32. On 18th October 2007, the MC replied that the PIC would meet as arranged irrespective of whether the Defendant provided the PIC Submission or not.

33. On 29th October 2007, JSM wrote to the MC reiterating that the Defendant wished to obtain forensic evidence for the PIC Submission, and that the process would take no more than a few months. JSM enclosed a letter from the Defendant complaining against *inter alia* the PIC's refusal of his request in JSM's letter dated 15th October 2007, and his further request for more time to collect evidence for the PIC Submission.

34. Due to the aforesaid developments, the MC sought legal advice. On 31st October 2007, the MC wrote to inform JSM that the PIC chairman agreed to extend time for the PIC Submission until 30th November 2007 pending legal advice.

35. On 19th November 2007, the MC urged the police to advise the progress of their investigation. On 20th November 2007 JSM wrote to the MC for further extension of time for the PIC Submission, and on 27th November 2007 the MC replied that the PIC refused the Defendant's request for the original Report for forensic examination, but gave him a month to submit the PIC Submission.

36. On 19th December 2007, upon the Plaintiff clarifying a number of matters unrelated to the Report, the MC wrote to JSM for extension of the deadline for the PIC Submission to 18th January 2008.

37. On 15th January 2008, the Defendant through JSM repeated his request to the MC for release of the original Report for forensic examination in order to verify its authenticity, and to extend time for the PIC Submission until 2 weeks after he obtained such forensic examination report. After seeking legal advice, the MC replied on 28th January 2008 that the PIC chairman declined the Defendant's request and that the Defendant was to submit the PIC Submission on or before 1st February 2008.

38. On 22nd January 2008, the Defendant was interviewed by the police in their investigation into his alleged use of an unregistered drug on the Plaintiff. He understood from the investigating officers that the complaint was referred by the MC.

39. On 28th January 2008, the MC chased the police for progress of their investigation. On the same day, the MC wrote to JSM asking for the PIC Submission by 1st February 2008. On 30th January 2008, the Defendant wrote to the MC complaining that the PIC's position which prevented him from preparing and furnishing a full explanation amounted to breach of natural justice. He could not understand why the PIC still pressed for the PIC Submission pending police investigation, and warned that he would ask for judicial review if the PIC proceeded with the matter.

40. After seeking further legal advice, the PIC chairman rejected the Defendant's request for forensic examination of the original Report. He took the view that if its authenticity was disputed, the Defendant would make the point and state the grounds in the PIC Submission, and the PIC would take them into consideration when deciding whether to refer the case to the MC for disciplinary inquiry ("Inquiry"). He claimed the Report was not the only evidence showing that the Defendant administered the Treatment to the Plaintiff (see the Plaintiff's complaint letters in paragraphs 18-19 above), so its authenticity was not a crucial factor on the issue of the Defendant's involvement. In any event, the proper time for the Defendant to challenge the authenticity of the Report or the veracity of the Plaintiff's evidence would be at the Inquiry if the case were referred to the MC for Inquiry, and then the MC would make a determination having regard to all the evidence.

41. On 13th February 2008, the MC informed JSM that the PIC Submission should be submitted on or before noon on 18th February 2008 at the latest, and reminded that there had been extensions of time for the PIC Submission since the PIC Notice was served on the Defendant on 26th February 2007. It was said that in fairness to both the Plaintiff (as complainant) and the Defendant and for the avoidance of any further delay the PIC chairman declined the request for further extension of time.

42. However, the Defendant considered that the delay was in fact caused by the PIC's failure to procure the release of the original Report for forensic examination by the Expert, which prevented him from preparing any comprehensive and fair PIC Submission.

43. On 18th February 2008, JSM wrote to inform the MC that the Defendant would not be able to give a reply by noon that day. JSM also asked whether the MC referred any matter to the police. On 19th February 2008, the MC informed JSM the PIC would defer consideration of the case to 10th March 2008 in order to give a final opportunity for the Defendant to make the PIC Submission, but it would proceed to consider the case even if he did not make use of such opportunity. On 25th February 2008, the MC declined to comment on the police investigation, and reminded the Defendant to submit the PIC Submission by 29th February 2008.

44. On 27th February 2008, the Defendant wrote to the MC for extension of time for submitting the PIC Submission and for deferral of consideration of his case until the results of the police investigation were known.

45. The PIC chairman in his affirmation filed on 11th November 2008 in the JR Action claimed that at the meeting held on 10th March 2008, the PIC after considering the available information and materials, including the information and complaints from JSM, the Defendant's attacks on the Plaintiff's case, and all legal advice previously obtained, took the view that whether the Report was signed/issued by the Defendant was not determinative of the identity of the Plaintiff's attending doctor, and there was other evidence which was *prima facie* sufficient to show the Defendant had administered the Treatment to the Plaintiff (such as the Plaintiff's letters in paragraphs 18-19 above). The PIC was satisfied that there was *prima facie* evidence for the case to be referred to the MC for Inquiry ("PIC Decision").

46. On 13th March 2008, the police informed the Defendant by letter there was insufficient evidence empowering the police to take any action against him, and the police would take no further action against him in the case. On 19th March 2008, the police also informed the MC of the same.

47. By letter dated 2nd April 2008, the MC informed the Defendant of the PIC Decision on 10th March 2008.

48. On 18th April 2008, the MC sent the Notice of Inquiry to the Defendant which gave particulars of the charges that would be considered at the Inquiry and of the meeting scheduled on 22nd January 2009 for the MC to consider such charges and to determine whether or not the MC should take action against the Defendant under section 21(1) of the Medical Registration Ordinance. The Defendant was invited to provide written answer to those charges.

49. On 30th June 2008, the Defendant made an *ex parte* application for leave to apply for judicial review to seek *inter alia* a *certiorari* to quash the PIC Decision and an order to prohibit/restrain the MC from adjudicating upon the complaint.

50. In the *ex parte* application, it was alleged that the Report supplied by MBH was the only evidence implicating the Defendant as the Plaintiff's treating doctor, yet (a) the MBH Letter stated that her treating doctor was a Dr Chan and that the Report was written by another doctor whilst Dr Chan was on leave, (b) the Report did not contain the contact details, medical specialty and one of the medical qualifications of the Defendant, (c) the signature on the Report did not resemble the Defendant's usual signature, (d) the typeface on the 1st page of the Report was different from that in the following pages, and (e) the 1st page of the Report bore a typewritten page number whilst the page numbers on the following pages were marked in manuscript.

51. It was said that the authenticity of the Report deserved preliminary investigation, especially when (a) MBH had closed down and the whereabouts of its responsible persons unknown, (b) any identification of the Defendant by the Plaintiff would be unreliable in all the circumstances, and (c) the matter could be simply resolved by forensic investigation of the Report within a few weeks.

52. The Defendant claimed that it was unclear what preliminary investigations were conducted by the PIC since receipt of the Plaintiff's compliant in July 2005 apart from seeking the clarifications in the letter in paragraph 18 above, and why there was a delay of 1½ years before notifying the Defendant of such complaint. The Defendant further claimed it was *Wednesbury* unreasonable for the MC to reject his requests for forensic examination of the original Report and for the PIC not to conduct proper preliminary investigations.

53. In the JR Affirmation in support of such application, the Defendant claimed the Report was not signed by him. He reiterated that there was unexplained delay between the MC's receipt of the complaint by the Plaintiff in July 2005 and the PIC Notice sent to the Defendant in January 2007, and that the MC acted unreasonably in refusing the Defendant's request for forensic examination of the original Report which would only take a few weeks. The Defendant claimed that such minor delay was necessary for him to provide a strong denial/defence to the complaint, and in declining his request the PIC failed to conduct proper preliminary inquiry.

54. On 3rd July 2008, the Plaintiff commenced the present proceedings.

55. At the hearing of the application for leave to apply for judicial review on 24th July 2008, Hartmann J granted leave and gave directions for an expedited hearing. But he refused to prohibit or restrain the MC from proceeding with the Inquiry since the MC might well proceed if it was of the view there was other convincing evidence.

56. On 5th August 2008, Notice of Motion was taken out by the Defendant in the JR Action. On 29th October 2008, the MC applied by summons to set aside leave granted by Hartmann J and to strike out the Notice of Motion in the JR Action. On 11th November 2008, the MC filed the affirmation of the PIC chairman in support of the application. The PIC chairman claimed that the PIC had properly fulfilled its duties, and the PIC Decision could not be challenged. He further disagreed that the Report was the only evidence against the Defendant, and that there was in fact other evidence (such as the Plaintiff's letters in paragraphs 18-19 above).

57. On 31st December 2008, the Defendant filed his affirmation in opposition. He denied being associated with MBH or having written/signed the Report. He claimed that the Plaintiff's version of the events in July and August 2005 highlighted her uncertainty over the identities of her treating doctors, and her letters in paragraphs 18-19 above verified by her statutory declarations failed to buttress her flimsy evidence of identification of her treating doctor. The Defendant understood that the PIC made no attempt to locate Ms Ng and the person claiming to be the Defendant's nurse to verify the Plaintiff's hearsay statements. Further, the Defendant claimed that his clinic was located at the other end of the corridor on the 10/F and not next to MBH, which fact the police verified in the course of their investigations. In any event, any identification of the Defendant by the Plaintiff now must be tainted by the Defendant's media exposure between 2005 and 2008.

58. The Defendant in his affirmation went on to say that since the Report would implicate him in terms of identification and was the only evidence in respect of his alleged use of the Drug, and given the matters in the above paragraph, forensic examination of the original Report would be essential to his case, and he believed the refusal was due to concern as to what might be discovered by such examination. Even though the police found no evidence implicating him (possibly due to the Plaintiff's inability or unwillingness to identify him), the PIC apparently still wanted to proceed.

59. The Defendant was of the view that the PIC/MC should not attach any weight to the Report or infer from such Report that he administered the Treatment to the Plaintiff in the absence of corroborative evidence. So in all fairness, the question of authenticity of the Report and veracity of the Plaintiff's evidence should be clarified as soon as possible and not deferred to the Inquiry. The Defendant claimed it was unfair to deprive him of the chance to gather evidence for formulation of the PIC Submission before the PIC hastily referred the case to the MC.

60. On 6th January 2009, A Cheung J adjourned the application by the MC to set aside leave granted by Hartmann J *sine die* with liberty restore. He also granted the following directions :

(a) In the event that the Plaintiff was agreeable to release the Report to the Expert to conduct forensic examination, certain undertakings would be given (i) by the Defendant's solicitors, Expert and other persons who shall have possession of the Report concerning the preservation of the Report and (ii) by the MC not to hold any Inquiry pending preparation of the expert report within 1 month of receipt of the Report and submission of further explanation by the Defendant together with the expert report to the MC within 7 working days thereafter ("1st Direction").

(b) For the avoidance of doubt, in the event that the Plaintiff was not agreeable to release the Report to the Expert for forensic examination, the MC "shall be at liberty to proceed with the [Inquiry] as scheduled, it having been accepted by the Secretary of the [MC] that in such event, the Secretary of the [MC] shall not contest that the [Report] was not signed by the [Defendant]" ("2nd Direction").

61. On 9th February 2009, the MC provided to the Defendant's present solicitors, Messrs Lawrence K Y Lo & Co ("LKYL"), the Report together with a cross-undertaking signed by the Plaintiff ("Cross-undertaking"). By the Cross-undertaking, the Plaintiff cross-undertook and guaranteed that the original Report received by her from Ms Ng on 26th July 2005 with "p.2" subsequently marked by her on the 2nd page thereof were the original pages so received without any changes, and the Report she passed to the MC was the original so described and which would be forwarded to the Defendant's solicitors or his Expert for the purpose of forensic document examination.

62. On 17th February 2009, LKYL wrote to the MC to say that in order for their Expert to examine the Report, it was essential for the Plaintiff to sign the attached confirmation ("Confirmation") by the following day.

63. On 11th February 2009, the Defendant instructed Mr Cheung Yau-Sang Patrick ("Mr Cheung"), who according to his resume was a forensic handwriting and document examiner, to render an expert report on "whether the entry "p.2" at the bottom right hand corner of page 2 of [the Report] is original or a photocopy". The Defendant did not instruct Mr Cheung to forensically examine the 1st page of the Report which bore the only signature on the document even though the Defendant denied having signed the Report.

64. By letter dated 19th February 2009, the MC stated it failed to see why the Plaintiff was required to give the Confirmation when she had already signed the Cross-undertaking. The MC informed LKYL that the Plaintiff wished to know why the Confirmation was necessary in addition to the Cross-undertaking.

65. On 20th February 2009, LKYL replied that the Confirmation was to "double confirm the facts contained in the [Cross-undertaking] which is necessary before we can precisely instruct our expert to carry on the document examination process". But in fact on that very day, Mr Cheung completed his expert report in which he opined that the manuscript notations "p.2" and "p.3" respectively on the 2nd and 3rd pages of the Report were not originals, and that the entire 2nd and 3rd pages including such notations were photocopies. There is no dispute that the 1st page of the Report was an original page.

66. Again on the same day, the MC informed LKYL by letter that since they failed to give the rationale or explanation for the necessity of obtaining "double confirmation", it would be up to the Plaintiff to consider the request on available information. On 21st February 2009, LKYL replied that the Confirmation was to supplement and strengthen the Cross-undertaking by confirming that the Report was complete, intact and not a single page was altered, swapped, misplaced or lost save for the notation of "p.2" on the 2nd page (even though LKYL had no doubt over the efficacy of the Cross-undertaking). On 25th February 2009, the MC wrote to LKYL to confirm that its position remained the same as stated in their letter of 20th February 2009, and to advise that the Plaintiff declined to sign the additional Confirmation.

67. On the same day, LKYL wrote to the MC to advise that their Expert had confirmed that the Report was not a complete original set, and the 2nd page was replaced by a photocopy "which rendered forensic examination of the document impossible". LKYL claimed that the Plaintiff by the Cross-undertaking misled them into believing that the 2nd page with her notation of "p.2" thereon was an original, and such unacceptable conduct cast serious doubt on the genuineness of the 1st and 3rd pages of the Report. LKYL demanded that the Plaintiff should provide the original 2nd page of the Report.

68. By letter dated 4th March 2009, LKYL complained to the MC that the Plaintiff failed to follow the roadmap in the 1st Directionby not producing the original Report, and they would take issue over her credibility in the JR Action and in the Inquiry. In view of the Plaintiff's failure to provide the original 2nd page of the Report, LKYL returned the Report and the MBH Letter to the MC, and claimed that time should not run until the full original Report was released to them.

69. On 9th March 2009, the MC wrote to LKYL to put on record the state of the Report, the MBH Letter and the envelop containing these documents when they were released to and returned from LKYL in order to dispel possible future challenge on authenticity as a result of the handling such documents by the MC. On 11th March 2009, LKYL replied by letter setting out their version of the handling of the Report and the MBH Letter.

70. By letter dated 23rd April 2009 to the MC, the Plaintiff explained she might have mixed up the original 2nd page of the Report on which she marked "p.2" with photocopies of such page during the process of handling the Report in her liaison with various entities, such as the Consumer Council, other treating doctors, the Director of Legal Aid, and the police. The Plaintiff said she would write to the relevant entities to retrieve copies of the Report given to them, and would provide the same to the MC upon receipt.

71. In her above letter dated 23rd April 2009, the Plaintiff expressed concern and could not understand why the Defendant chose to forensically examine the 2nd and 3rd pages of the Report and not the more important 1st page which contained the signature. She was unable to discern any legal or scientific hurdle that would prevent forensic examination of the 1st page before having access to the original 2nd page. The Plaintiff suspected that in failing to do so and in returning the Report the Defendant was merely seizing upon an excuse to avoid forensic examination of the 1st page.

72. The Report was disclosed as item 8 of Schedule 1 Part 1 of the Plaintiff's List of Documents filed on 30th April 2009.

73. On 1st June 2009, the MC wrote to LKYL enclosing the Plaintiff's letter dated 23rd April 2009. The MC further advised that on 19th May 2009 it received from the Plaintiff what she claimed to be all the medical reports which she had retrieved from various entities ("Retrieved Reports") in order to allow the Expert to examine them all if the Defendant wished. It appeared to the MC from the Retrieved Reports that the Plaintiff should have lost the original of the page on which she had written "p.2" thereon. "It is now up to [the Defendant] whether he wishes to have further forensic examination to be considered on these reports. These reports are always available for [his] collection at [the MC's] office by prior arrangement for specific purpose of the forensic examination." The MC further advised that the Inquiry was fixed for 30th September 2009.

74. On 3rd June 2009, LKYL wrote to the MC complaining of "breach of the undertaking to Court" and failure to comply with the 1st Direction, and insisting that time would not run unless and until the complete original Report was released to the Defendant. It was asserted that "our expert could not carry on with the forensic examination with an incomplete Report".

75. On 4th June 2009, the MC replied that once the PIC decided to refer the case to the MC for inquiry on 10th March 2008, it was necessary for the MC to follow the relevant statutory procedure. The MC denied there was any breach of undertaking to the court since it had acted on A Cheung J's order, which did not disturb Hartmann J's refusal to prohibit the MC from progressing the case to Inquiry. Further, the Plaintiff had already stated her position in her letter dated 23rd April 2009.

76. On 10th June 2009, LKYL wrote to the MC saying that since the Plaintiff had chosen to release the purported Report and given the Cross-undertaking, it was apparent that the MC/Plaintiff had chosen to adopt the roadmap under the 1st Direction and were therefore obliged to follow through by providing the original Report instead of asking the Defendant to identify and examine the Retrieved Reports. It was said that a departure from such roadmap was a breach of MC's undertaking to the court under the 1st Direction. LKYL complained that the Defendant kept changing her stance and covering up her tampering with the Report as evidenced by her late explanation about the Report so many months after her Cross-undertaking. Forensic examination of the original Report was essential and to fix a date for the Inquiry before the Defendant's forensic examination and written explanation amounted to a violation of the aforesaid roadmap. "Having said that, it is, of course, always the wish of [the Defendant] to have all the [Retrieved Reports] examined by our [Expert]", but the Defendant would only do so against various confirmations by the Plaintiff/MCas to the chain of custody of the Retrieved Reports, cancellation of the Inquiry on 30th September 2009 and time to run "after the complete intact original [Report] is found".

77. By letter dated 29th June 2009, ie a day before the Stay Summons was issued, the MC informed LKYL that the Inquiry scheduled for 30th September 2009 would not be postponed but added as follows :

> "Incidentally, the Secretary [of the MC] concedes the [Plaintiff's] explanation in her letter dated 23rd April 2009 that she might have mixed up (i) the exact [Report] she collected from MBH and (ii) the second page of the [Report], or the copy of it, on which she marked "P.2" thereon herself. To take the concession one step further, the Secretary confirms that she shall not contest in the Inquiry that the [Report] was not signed by [the Defendant]. For the avoidance of doubt, such position of the Secretary is not made on the basis that the [Plaintiff] is not agreeable to the release of the subject report, but is instead made after taking into account the said paramount public interest and all the circumstances of this case." ("Concession")

78. On 30th June 2009, LKYL wrote to inform the Plaintiff's solicitors that the Defendant would challenge the authenticity and admissibility of the purported Report. On the same day, the Plaintiff issued the Stay Summons. However, the 1st Affirmation did not exhibit the letter dated 29th June 2009 from the MC.

79. On 14th July 2009, LKYL replied to the MC's letter dated 29th June 2009 by complaining against the MC's change of stance in refusing to allow forensic examination of the Retrieved Reports and against the Plaintiff for changing her story all the time, and by demanding the release of the Retrieved Reports to them for their Expert's examination.

80. On 22nd July 2009, the MC replied to say that it had not at any time withdrawn its invitation to LKYL by letters dated 1st and 4th June 2009 to collect the Retrieved Reports, but LKYL did not approach the MC for such purpose. The MC refused to enter into any debate over the Plaintiff's credibility, and maintained that it was for the MC to decide at the Inquiry in which the Defendant would be given an opportunity to advance his case.

81. By letter dated 27th July 2009, LKYL required the MC/Plaintiff to give the various confirmations set out in their letter of 10th June 2009 (see paragraph 76 above) before collecting the Retrieved Reports. They warned that failure to respond to such request for provision of the confirmations would delay the whole process, and time would not run until they "have found out the full set of original [Report] after forensic examination".

82. In the 3rd Affirmation filed on 31st July 2009, the Defendant disclosed for the first time that he would file a summons in the JR Action to seek leave to apply for additional reliefs as follows :

(a) leave be granted to the Defendant to add the PIC as the 2nd respondent in the JR Action;

(b) a declaration that the MC was in breach of the 1st Direction;

(c) a declaration that it would be unreasonable for the MC and the PIC to rely on the incomplete Report, and that time was not to run until after full compliance with the 1st Direction;

(d) a declaration that due to breach of the Plaintiff's Cross-undertaking in providing the full original Report for the Defendant to conduct forensic examination, it would be unreasonable for the MC/Plaintiff to rely on the Report as evidence at the MC Inquiry "and other civil action (if any)";

(e) an order that the MC's application to set aside leave granted by Hartmann J be dismissed with costs.

V. Legal principles

83. Section 48(5) of the District Court Ordinance Cap.336 provides that the District Court may stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings.

84. In *Clinton Engineering Limited v B-tech (Holdings) Limited (formerly known as Dong-Jun (Holdings) Limited)* HCA3608/1998 (unreported, 28th September 2001), which dealt with removal of stay of proceedings, Recorder Liao SC held that the principles for staying proceedings applied equally to the lifting of a stay. "Where a temporary stay is sought, I think the correct approach should be …… to consider the balance of convenience and fairness as between the parties" (para.9). In that case, the stay was granted to avoid inconsistent results between arbitration and court proceedings. But when the result was known through the arbitral award, it was held that on balance of convenience and considering the fairness between the parties the stay ought to be lifted.

85. In *SWE Limited v Chong Lai Fun* HCA1064/2004, Reyes J (unreported, 28th October 2004), the plaintiff registered owner wanted the defendant to vacate the subject property, but the defendant argued that the action should be stayed pending the outcome of her claims for ancillary relief in divorce proceedings against her husband. The defendant sought an injunction in the divorce proceedings restraining her husband from *inter alia* causing a sale of the property, and her husband gave an undertaking to the court *inter alia* not to cause a sale of the property or to instruct the plaintiff to evict the defendant.

86. Reyes J followed *Clinton Engineering Limited* and held that "[where] the Court thinks appropriate, it may as a matter of discretion grant a temporary stay to ensure that its procedures are used in a logical, fair and cost-efficient manner" (para.27). He granted a stay of the proceedings (subject to suitable undertakings) pending determination of the issues in the divorce proceedings as to whether the defendant was actually in control of the property through 2 companies or whether the defendant had an interest in the property on the basis that it was not for him to pre-empt deliberation of the factors pertinent to the defendant's application for a transfer order in the divorce proceedings, and he could not take for granted that the defendant's transfer claim would be equally satisfied by a cash payment instead.

87. In *Tan Man Kou and Cheung Yat Ming in their capacity as the Joint Administrators Pendente Lite of the Estate of Wang Teh Huei v Chime Corporation Limited & ors* HCMP4146/2001, HCA2415/2002, HCCW1050/2004, HCCL73/2002, HCCL63/2004, HCCL64/2004, HCA3626/2003 and HCA2492/2004, Kwan J (unreported, 11th March 2005), a temporary stay of all these proceedings pending the related probate appeal scheduled to be heard in 4 months' time was sought. The purpose of the stay was to enable the probate appeal to resolve the entitlement to the estate of the deceased before further prosecution of these 8 actions. Kwan J followed the above authorities, took into account the whole situation, and on the basis that "[the] question at hand is not a question of deprivation of the right of a litigant to proceed altogether, but a question of case management" (para.14) granted the stay sought.

88. With these principles in mind, I now turn to the Stay Summons.

VI. Discussion

89. Whether this court should grant a stay of the PI Action depends on an exercise of discretion and case management. The crucial question is whether on balance of convenience and fairness between the parties and on logical, fair and cost-efficient use of court procedures the matters arising in the JR Action justify putting the PI Action on hold.

(a) Ms Gwilt's submissions

90. Ms Gwilt in her written submissions argued that in view of the ongoing JR Action and the dispute over the identity of the maker of the Report and the identity of the Plaintiff's treating doctor, which brought into question the authenticity and admissibility of the Report, it would be appropriate to stay the PI Action until the final determination of the JR Action on the grounds that (a) the aforesaid dispute was already *sub-judice* in the JR Action, (b) the Defendant would proceed with the JR Action and apply for leave to claimthe additional reliefs set out in paragraph 82 above, and (c) any parallel progress of the PI Action would waste costs and prejudice the JR Action.

91. Ms Gwilt pointed out that the Defendant had yet to carry out thorough forensic examination of the original Report, the results of which would have a bearing on the authenticity and admissibility of the Report for the MC Inquiry and/or the PI Action, so if the PI Action was not temporarily stayed, the Defendant in such action would have to seek specific discovery and production of the original Report for forensic examination, and to apply for determination of preliminary issues relating to the identity of the Plaintiff's treating doctor, the alleged use of the unregistered Drug, and the authenticity and admissibility of the Report, which would lead to duplicated work and extra/unnecessary costs.

(b) Mr Khaw's submissions

92. Mr Khaw on the other hand submitted there were no overlapping issues or sufficient nexus/commonality between the JR and PI Actions that would support the Stay Summons.

(c) MC Inquiry and PI Action

93. To put the above arguments in proper perspective, it should be remembered that it is not the Defendant's case that the PI Action should be stayed pending the MC Inquiry, which is yet to be held on 30th September 2009. So whether there are or are not any overlapping issues of, say, authenticity and admissibility of the Report and credibility of the Plaintiff between the PI Action and the MC Inquiry isneither here nor there. It is therefore unnecessary to consider Mr Khaw's submissions that even if the Defendant intends to allege there are such overlapping issues, the parties are always at liberty (either by consent or otherwise) to seek an order that expert evidence (if any) on the issue of authenticity of the Report adduced in one set of proceedings will apply to or bind another set of proceedings.

(d) Plaintiff not party to JR Action

94. It should be further remembered that the Plaintiff is not a party to the JR Action. Even now, the Defendant only intends to join the PIC and not the Plaintiff as an additional respondent in the JR Action. In short, unless the Plaintiff consents otherwise, it is arguable that any determination by the court in the JR Action ("JR Court") may not necessarily bind the Plaintiff.

(e) Scope of JR Action

95. Turning to counsel's arguments, to ascertain whether there are any overlapping issues or other commonality between the JR and PI Actions, it is necessary to first consider the scope of the JR Action.

96. The Defendant's case in the JR Action is focused on the refusal by the MC to provide him with the original Report for conducting forensic examination, namely, that :

> (a) the purpose of the forensic examination is two-fold, ie (i) to cast doubt on the authenticity and admissibility of the Report, and (ii) to undermine the Plaintiff's credibility;
>
> (b) the MC/Plaintiff by disclosing the incomplete Report have chosen the roadmap under the 1st Direction and are therefore bound to follow through such roadmap by producing the original Report for the Defendant to conduct forensic examination;

(c) in breach of the 1st Direction and the Cross-undertaking, the MC and the Plaintiff have respectively failed to release the original Report, so the Defendant is unable to conduct thorough forensic examination of the Report in order to properly prepare the PIC Submission;

(d) consequently, the PIC Decision should be quashed, the MC should be restrained from carrying out the Inquiry, the time for submitting the PIC Submission should be extended until after full compliance with the 1st Direction, and the MC's application to set aside the leave granted by Hartmann J should be dismissed.

(f) Authenticity of the Report

97. Having studied the scope of the JR Action outlined above, I am not persuaded that the authenticity of the Report is a common issue crucial to the MC Inquiry and the JR and PI Actions.I agree with Mr Khaw that it isnot correct to say that the authenticity of the Report is *sub judice* and will be determined in the JR Action.

98. The question in the JR Action is a limited one, ie whether the PIC has acted fairly in making the PIC Decision. According to the Defendant, such question turns on whether the MC has produced or will produce the original Report for forensic examination by the Defendant'sExpert for proper preparation of the PIC Submission, and if the answer is in the negative, the PIC Decision should be quashed. So even on the Defendant's case, it is therefore unnecessary for the JR Courtto make any ruling on the authenticity of the Report.

99. Rather, since the Report is disclosed as part of the Plaintiff's discovered documents in the PI Action, it is open to the Defendant to challenge the authenticity of the Report in the PI Action. Indeed, the Defendant solicitors flagged this by their letter dated 30th June 2009 (see paragraph 78 above).

100. Ms Gwilt at first submitted that the decision by the JR Court would be persuasive on the issues of authenticity and admissibility of the Report as evidence in the PI Action, but eventually conceded such issues should be decided bythe court in the PI Action("PI Court") and not by the JR Court. In such circumstances, there is no overlapping issue between the JR and PI Actions, and the argument that there will be duplication of work and costs falls away.

101. Mr Khaw submitted that even if the issue of authenticity of the Report were pertinent, it was impossible to understand why the Defendant chose not ask his Expert to examine the 1st page of the Report and comment whether the signature thereon was his.

102. It was suggested in the 1st Affirmation that without the full original Report it was impossible for the Expert to complete the forensic examination, and further suggested in the 2nd Affirmation that the Expert could not carry out the examination without the original 2nd and 3rd pages of the Report "as he need to examine the imprint and other tests on the paper of the alleged [Report]".

103. Whilst I am of the view that it is unnecessary to deal with such arguments in light of Ms Gwilt's concession that the issue of authenticity of the Report is a matter for the PI Court and not the JR Court, I can see the cogency of Mr Khaw's submissions. There is no dispute that the 1st page of the Report is an original document, and Mr Cheung in his report has not alluded to any difficulty that may hinder forensic examination of the 1st page. What is clear is that Mr Cheung has not been instructed to carry out forensic examination of the 1st page at all even though ironically (a) such page contains the body of the Report and the signature whilst the 2nd and 3rd pages merely contain medical references, and (b) an important aspect of the Defendant's position is that he did not sign the Report. Indeed, ever since the Report (which the Defendant claims to be incomplete) was given to him in February 2009, the Defendant has not applied to restore the JR Action even by the time of the issuance of the Stay Summons, and in March 2009 he even returned the Report released to him through the MC.

(g) Admissibility of the Report

104. It is also suggested there is an overlapping issue of admissibility of the Report in the PI and JR Actions. In the 1st Affirmation, the Defendant claimed that "[the] production by the Plaintiff of the copy Report in [the PI Action] is repetition of her previous attempt to introduce this piece of inadmissible evidence in [the JR Action]". I disagree that *the Plaintiff*, who is not a party to the JR Action, has ever attempted to adduce the allegedly defective Report as evidence in the JR Action. The question in the JR Action has always been whether the PIC Decision is procedurally fair, and the alleged failure of *the MC* in releasing the original Report goes to this question rather than to any issue of admissibility of evidence for the purpose of the PI Action.

105. Ms Gwilt in her written submissions gave a slight twist to the above argument by saying that "[what] the Plaintiff is attempting to do is to adduce an incomplete [Report] to [the PI Court] when there exist an issue whether a defective compliance of the order [in the JR Action] has yet to be determined".

106. At the hearing before me, it has been conceded that the issue of admissibility of the Report goes hand in hand with the issue of authenticity. It is also accepted by both counsel that if the Report is found to be authentic in the sense that it is authored/signed by the Defendant, then it must be admissible in the PI Action since its relevancy cannot be doubted. Even if the Report is not a complete original set or authored/signed by the Defendant, it is possible that such document may still be admissible in the PI Action for the purpose of showing to the PI Court the document that was handed over to the Plaintiff by MBH.

107. Given Ms Gwilt's concession that the issue of authenticity of the Report is for adjudication by the PI Court and not by the JR Court, it naturally follows from the discussions in above paragraph that the issue of admissibility of the Report is a matter for the PI Court at an appropriate stage in the proceedings and not for the JR Court, which position Ms Gwilt eventually conceded and acknowledged in her oral submissions. In my view, it is highly doubtful whether the JR Court has any jurisdiction to rule on admissibility of evidence in other civil proceedings.

108. Mr Khaw went even further in his submissions by arguing that even if the Defendant succeeded in quashing the PIC Decision, the issue of admissibility of the Report is ultimately a matter for the MC at the Inquiry after proper referral of the case to the MC by the PIC (if any) rather than a matter for determination by the JR Court. I agree, but it is unnecessary to rest my conclusion on this because the Stay Summons is not premised on developments in proceedings by the MC/PIC.

(h) Alleged breach of 1st Direction and Cross-undertaking

109. Further, whether there is any breach of the 1st Direction and the Cross-undertaking by the MC and the Plaintiff respectively does not raise any overlapping issue. Breach of the 1st Direction (if any) is a matter for the MC and not the Plaintiff. The Plaintiff's Cross-undertaking is not an undertaking to the court as alleged by the Defendant although some form of cross-undertaking by the Plaintiff is envisaged under the 1st Direction. But even assuming that the Plaintiff were in breach of the Cross-undertaking, and even on the basis of the Defendant's stance in the JR Action, such breach may support his application to quash the PIC Decision, but that only goes to the question of whether the PIC Decision is *Wednesbury* unreasonable (ie a matter between the MC and the Defendant) rather than to the question of authenticity and admissibility of the Report as evidence in the PI Action (ie a matter between the Plaintiff and the Defendant).

(i) Intended additional reliefs in JR Action

110. In my view, the proposed additional reliefs that the Defendant intends to seek in the JR Action (see paragraph 82 above) do not add anything further as they do not have material impact on the PI Action. Whether the PIC should be added as a party to the JR Action, whether the MC is in breach of the 1st Direction, and whether the MC/PIC can rely on the Report at the Inquiry do not concern the Plaintiff in the PI Action. I have dealt with the issue of the alleged breach of the Cross-undertaking in the above paragraph, but even if there were such breach, I cannot understand how the JR Court would have jurisdiction to adjudicate on the admissibility of evidence in any "civil action" such as the PI Action. Ms Gwilt promptly conceded there was no such jurisdiction.

(j) 2nd Direction and Concession

111. In this respect, I cannot ignore the Concession given by the MC a day before the issuance of the Stay Summons. But before I discuss this, I wish to disabuse a mistaken view taken by the defence in respect of the Concession.

112. Ms Gwilt in her written submissions argued that pursuant to the Concession "by the Plaintiff through the [MC] that she will not contest that the signature of the Report is not that of the Defendant", the Plaintiff was in fact "trying to adduce the Report in [the PI Action] knowing that the [Report] was not signed by [the Defendant]. Any unfavourable ruling as to the admissibility of this alleged [Report] would prejudice the Defendant's position in the [JR Action] to be restored".

113. In fact, a plain reading of the Concession (see paragraph 77 above) makes it abundantly clear that it is the MC and not the Plaintiff who made the Concession. The letter from the MC dated 29th June 2009 expressly states that for the avoidance of doubt the Concession was not made on the basis that the Plaintiff was not agreeable to the release of the Report, but was made by the MC after taking into account all the circumstances and the matter of public interest canvassed in the letter.

114. In my view, given the Concession made by the MC in respect of the Report for the purpose of the Inquiry, which may close the argument as to whether the Defendant should have access to the original Report for forensic examination to challenge his alleged signature thereon, I am not persuaded that the outcome of the JR Action will have any material impact on the live issues of authenticity and admissibility of the Report in the PI Action. In any event, the Concession shows there is even less reason for the JR Court to tackle the issues of authenticity and admissibility in respect of the Report.

115. In coming to the above view, I have not forgotten the 2nd Direction. It is, of course, for the JR Court to decide whether it will accept the Defendant's contention that once the MC has chosen to go down the route of the 1st Direction it is required to follow through by producing the original Report for forensic examination by his Expert otherwise the PIC Decision should be quashed. But in assessing the balance of convenience and fairness, this court cannot ignore the scenario contemplated by A Cheung J in the 2nd Direction, that if the Report is not made available to the Defendant for further forensic investigation, the MC will be able to proceed with the Inquiry (ie the PIC Decision will not be quashed) on the basis that the MC shall not contest that the Report was not signed by the Defendant. This echoes Hartmann J's decision not to prohibit or restrain the MC from proceeding with the Inquiry, and his observations that the MC might well proceed if it was of the view that there were other convincing evidence (see paragraph 55 above). It is evident from the affirmation of the PIC chairman dated 11th November 2008 in the JR Action (see paragraph 56 above) that the MC thinks there is such other convincing evidence. All this is pertinent to the present application insofar as it shows that the JR Court may not necessarily deal with the issues of authenticity and/or admissibility of the Report at all.

(k) Credibility of the Plaintiff

116. At first, Ms Gwilt also submitted that the issue of credibility of the Plaintiff was a relevant consideration for the exercise of discretion in respect of the Stay Summons. She pointed out *inter alia* that :

(a) the Plaintiff's evidence as to identification of her treating doctor and identification of the alleged use of the unregistered Drug were flimsy (such that the police did not hold any identification parade), especially as the Plaintiff relied on hearsay statements that were unreliable and unsupported by affidavit or witness evidence from the makers;

(b) the Plaintiff frequently changed her stance (eg her initial reluctance in releasing the original Report as informed to A Cheung J by the solicitors for the MC, her subsequent release of the incomplete Report in breach of the Cross-undertaking, and her written explanation dated 23rd April 2009 in paragraphs 70-71 above) with a view to prevent the Defendant from carrying out forensic examination of the Report and properly formulating the PIC Submission;

(c) the genuineness of the Plaintiff's compliant was suspect as she declined to release the original Report to the Defendant;

(d) in light of the Cross-undertaking and the MC's release of the Report with the photocopied 2nd and 3rd pages, there was reason for the Defendant to be concerned that the Plaintiff had tampered with the Report; and

(e) it was unreasonable for the MC/Plaintiff to rely on the defective Report having regard to the Concession and to the Plaintiff's changes of stance which made it difficult for him to cross-examine the Plaintiff.

117. Ms Gwilt initially argued that the Plaintiff and the MC/PIC placed heavy reliance on the Report which was the single most important piece of evidence pertinent to the issues of identification of the Plaintiff's treating doctor and identification of the alleged use of the unregistered Drug, but if such Report were inadmissible, it would be difficult if not impossible for the Plaintiff to prove her case or for the MC to establish the charges of professional misconduct. Whilst I am not concerned with whether the MC can or cannot prove the relevant charges of professional misconduct, I cannot see how the credibility of the Plaintiff is relevant to the exercise of discretion in respect of the Stay Summons. If the relevant evidence by the Plaintiff in the PI Action is weak, it may be a matter of weight to be assessed at the trial or it may attract interlocutory applications such as a striking out application, but it is insufficient justification for granting a stay of proceedings. Indeed, Ms Gwilt in her oral submissions eventually conceded that the credibility of the Plaintiff is not relevant for the present purpose.

118. I am also mindful of the fact that although the Defendant claims that the Report (and its authenticity) is the most important piece of evidence on the issues of mistaken identity and use of unregistered drug, the PI Court is bound to take into account all relevant evidence to adjudicate on the Plaintiff's claim and to assess the general credibility of the Plaintiff and/or other factual witnesses whether called or subpoenaed by the parties as well as the reliability of expert medical evidence on whether the Plaintiff's symptoms and condition are compatible with use of the Drug in the course of mesotherapy treatment. It is premature at the present stage of the PI Action to assume that the only evidence on mistaken identity and use of the Drug is the Report. So even if the issues of authenticity and admissibility of the Report are resolved in the JR Action (which I disagree), the PI Action will not necessarily come to an end.

(l) Retrieved Reports

119. Ms Gwilt next submitted that because the Defendant had yet to arrange for forensic examination of the Retrieved Reports, which investigation would reveal whether the full original Report was still available, it would be appropriate to stay the PI Action pending the result of the JR Action. However, I do not see how this justifies the proposed stay of proceedings when it is accepted that the issues of authenticity and admissibility of the Report and the credibility of the Plaintiff are to be determined by the PI Court and not by the JR Court.

120. Ms Gwilt feared that because the Retrieved Reports were still in the possession of the MC, there would be problems in having access to those documents for the purpose of any forensic investigation in the PI Action. I disagree. First of all, the MC has made it quite plain that the Defendant can at any time collect the Retrieved Reports for forensic examination (see paragraphs 73 and 80 above). Rather it is the Defendant who requires the MC/Plaintiff to give express confirmations before he will do so (see paragraphs 76 and 81 above). Secondly, if the Retrieved Reports have not been discovered by the Plaintiff as yet in the PI Action, there should be no problem in asking for a further and better list or specific discovery in respect of such documents which were/are in the custody possession and power of the Plaintiff. Indeed, discovery on the basis of implied undertaking may also obviate any potential dispute over any need for express confirmations. Thirdly, following proper discovery there should also be no difficulty in asking for inspection of the Retrieved Reports. At this stage, I cannot see how the Plaintiff can be barred from procuring the release of such documents being her documents from the MC, but even if there is any problem it can surely be overcome by appropriate application for third party discovery. I am not persuaded that the JR Action has any material impact on these matters.

(m) Result of JR Action unknown

121. In the end, Ms Gwilt's submissions boil down to the contentions that it is unclear what will happen in the JR Action and that forensic examination to be conducted for the purpose of the JR Action can arguably be used for the PI Action. Whilst expert evidence for one set of proceedings can be adopted and used in another set of proceedings, I cannot see how time and costs can be saved if the issues of authenticity and admissibility of the Report are only to be resolved by the PI Court instead of the JR Court.

122. Further, it is quite true that the Defendant has not taken any step in the JR Action since January 2009 when A Cheung J made the order, and it is only after a lapse of 7 months and just prior to the hearing of the Stay Summons that the Defendant now indicates that a summons will be issued to restore the substantive hearing of the JR Action for seeking additional reliefs. There has been no explanation for such last-minute attempt (especially when the Report released to the Defendant was returned to the MC in March 2009 and the Plaintiff's written explanation in respect of such Report was given to the Defendant in April 2009). Mr Khaw questioned whether the Defendant genuinely intended to further pursue the JR Action. Whilst I can see the force of Mr Khaw's submissions, I need not come to any concluded view because there is in any event insufficient commonality between the JR and PI Actions to support the stay sought even if the Defendant genuinely intends to further pursue to the JR Action.

(n) Undue delay

123. It was suggested in the 3rd Affirmation that there was undue delay on the part of the Plaintiff in commencing the PI Action, but there was no urgency for the Plaintiff to further progress the case pending resolution of her complaint to the MC which would have a bearing on the PI Action. However, in her oral submissions, Ms Gwilt conceded that the Plaintiff could not be criticised for issuing the PI Action before the expiry of the limitation period and for progressing the case thereafter especially in light of the Civil Justice Reform. I note that in any event the Stay Summons did not seek a stay pending the MC Inquiry.

124. In light of the above analysis, I am not persuaded there is sufficient commonality of issues between the PI and JR Actions for the outcome of the disputes in one set of proceedings to have material impact on the other set of proceedings such that a stay of proceedings is justified on the basis of balance of convenience and fairness between the parties. I further disagree that the issues of mistaken identity and of admissibility and authenticity of the Report are *sub judice* in the JR Action such that progressing the PI Action to deal with such issues whether by way of preliminary issues or at trial will prejudice the JR Action. In the circumstances, the Stay Summons is dismissed.

VII. Costs

125. There is no reason why costs should not follow event. I therefore grant a costs order *nisi* that costs of the Stay Summons (including all costs reserved if any) be paid by the Defendant to the Applicant with certificate for counsel and legal aid taxation of the Plaintiff's own costs.

126. Mr Khaw submitted that costs should be awarded on a higher basis because the Stay Summons was not only unmeritorious but taken out a day after the letter from the MC dated 29th June 2009 explaining their stance in relation to the Report for the MC Inquiry (see paragraph 77 above). Mr Khaw argued that such explanation plainly brought the JR Action into a different dimension in the sense that it would be highly unlikely that the JR Court would come to any conclusion on the issues of authenticity and admissibility of the Report. Mr Khaw suggested that the Defendant's conduct also showed it was only at the eleventh hour that he came up with the draft summons for seeking additional reliefs in the JR Action and there was no real genuine intention to progress the JR Action diligently (see paragraph 122 above).

127. Mr Khaw cited the case of *A v R* HCCT54/2008, Reyes J (unreported, 30th April 2009) which concerned the enforcement of a New York Convention arbitral award. In that case, the learned judge made absolute his order *nisi* making the award enforceable as a judgment of the court and found the respondent's opposition wholly unmeritorious. He took the view that a person who obtained an arbitral award in his favour had an expectation that the court would enforce it as a matter of course. Any opposition should be an exceptional event such that a party who made an unsuccessful opposition should in principle be expected to have to pay costs on a higher basis.

128. Whilst I agree with the learned judge's comments on the spirit of Civil Justice Reform and on the obligation under Order 1A rule 3 of the Rules of the District Court to further the underlying objectives, it appears that his decision to award costs against the respondent on indemnity basis was premised on the particular context of enforcement of arbitral awards, ie a party with an arbitral award in his favour should not have to contend with an unmeritorious challenge.

129. Costs are a matter of discretion. To justify an order for costs on common fund or indemnity basis, the case has to have some special or unusual feature (see *Overseas Trust Bank Ltd v Coopers & Lybrand (a firm) and* ors [1991] 1 HKLR 177 and *Town Planning Board v Society for Protection of the Harbour Limited* (2004) HKCFAR 114). I have carefully considered Mr Khaw's submissions. Whilst it is true that I do not accept the Defendant's contentions, I am unable to say that such contentions or the application by the Stay Summons are so outside the scope of ordinary hostile litigation as to amount to special or unusual features or an affront to the underlying objectives that justify a higher basis of costs. I make an order *nisi* that the costs awarded in paragraph 125 above be made on party and party basis.

130. That leaves the remaining issue of how the costs awarded on *nisi* basis are to be dealt with. At the hearing before me, Mr Khaw indicated that the Plaintiff was prepared to proceed with summary assessment of costs and that the Plaintiff's solicitors had in fact prepared a statement of costs, but such statement of costs was not lodged and served together with the skeleton argument for the substantive application (see paragraph 8 of Practice Direction 14.3). Ms Gwilt informed me that the Defendant's solicitors did not prepare any statement of costs at all.

131. Nevertheless, I consider this a fit matter for summary assessment of costs. I therefore grant the following directions :

> (a) unless an application is made to vary the above costs order *nisi* within 14 days from the date hereof, the Plaintiff do within 21 days from the date hereof (i) lodge and serve statement of costs pursuant to Practice Direction 14.3 and (ii) write to my clerk with copy to the Defendant's solicitors to seek an appointment for hearing before me for summary assessment of costs with half hour reserved;
>
> (b) the Defendant do within 7 days thereafter lodge and serve succinct summary of objections in bullet-point form of not more than half page in respect of the Plaintiff's statement of costs ("Objection Summary");
>
> (c) if application is made to vary the costs order *nisi* within 14 days from the date hereof but the Defendant does not challenge liability for costs, the Plaintiff do lodge and serve her statement of costs pursuant to Practice Direction 14.3 within 7 days before the hearing, and the Defendant do lodge and serve the Objection Summary within 3 days before the hearing;
>
> (d) if application is made to vary the costs order *nisi* within 14 days from the date hereof but the Defendant challenges liability for costs, the Plaintiff and the Defendant do respectively lodge and serve her/his statement of costs pursuant to Practice Direction 14.3 within 7 days before the hearing.

132. Finally, I would like to express my gratitude to counsel for the assistance they rendered to this court.

(Marlene Ng)
District Court Judge

Representation:

Mr Richard Khaw instructed by Messrs Boase Cohen & Collins for the Plaintiff.

Ms Angela Gwilt instructed by Messrs Lawrence K Y Lo & Co for the Defendant.