

August 2023

## Disclosure of mediation communications in litigation Lam Cheung Fong 林張豐 v 黃亞新 [2022] HKCFI 3802



### Summary

A dispute arose over the disclosure of mediation communication in the course of court proceedings. The Mediation Ordinance (Cap 620) ("**MO**") defines "mediation communication" as (a) anything said or done; (b) any document prepared; or (c) any information provided, for the purpose of or in the course of mediation. The defendant filed two affirmations opposing an interim injunction granted to the plaintiff. The plaintiff sought to strike out the paragraphs of the defendant's affirmations that revealed the parties' previous mediation communications, claiming that the defendant was in breach of the confidentiality requirement of the MO. The master allowed the plaintiff's application to strike out the relevant paragraphs. Subsequently, the defendant appealed.

The Hong Kong Court of First Instance (the "**HKCFI**") allowed the appeal in part:

1. The Court reaffirmed that the defendant should not disclose any "mediation communication" within the meaning of the MO unless they had consent from all parties involved in the mediation or permission from the court.
2. However the statutory definition of mediation communication does not include an agreement to mediate or a mediated settlement agreement.

3. The HKCFI therefore ruled that it is not inappropriate for the defendant to mention a "mediated settlement agreement", i.e., an agreement by the parties to mediation settling the dispute, in the affirmation.

## Practical Implications

This case highlights that the protection of confidentiality for mediation, is confined to the statutory definition of "mediation communication" under the ordinance. This may be narrower than expected and explicitly excludes any (i) agreement to submit a dispute to mediation or (ii) settlement agreement reached during mediation.

In this case, the HKCFI took a strict interpretation of the definition of "mediation communication" under the MO and concluded that information fell that falls outside the statutory definition and is disclosable, such as the attendees of the mediation meeting.

The HKCFI also noted that the existence of a confidentiality requirement set out in the provision of a mediated settlement agreement did not provide additional grounds to support the plaintiff's strike out application which was solely based on the confidentiality requirement of mediation communication under the MO. Parties arguing against disclosing mediation contents should carefully formulate their grounds before making the striking out application.

## Background

The plaintiff brought a defamation action against the defendant, and the parties later reached a settlement agreement in mediation. However, the agreement was not implemented as the defendant did not have a legal representative.

Subsequently, the plaintiff sued the defendant in the Court for harassment and intimidation and successfully obtained an interim injunction restraining the defendant from the said acts.

In response, the defendant filed two affirmations opposing the interim injunction granted and seeking compensation from the plaintiff. The plaintiff then sought to strike out the contested paragraphs in the affirmations, arguing that they disclosed the parties' previous mediation contents, thus violating confidentiality requirement of mediation communication under the MO. The master granted the plaintiff's application and struck out the relevant paragraphs in the affirmations.

The current proceeding is the defendant's appeal against the master's decision.

## Court's decision

### Appeal out of time

The defendant's application for leave to appeal was submitted 12 days after the deadline. The HKCFI allowed the out of time application of appeal as the delay was considered short and no prejudicial effect would be caused to the plaintiff.

### New Evidence submitted by the defendant

The Court refused to allow the defendant to rely on new evidence submitted as (i) it was irrelevant to the current case, and (ii) the defendant should have provided such evidence in the original proceeding.

### Whether the contested paragraphs of the affirmations should be struck out?

The court ruled that since the plaintiff had never consented to the disclosure of any mediation communication, and the defendant had never been granted any leave for the disclosure, the defendant should not disclose any "mediation communication" within the meaning under the MO in the affirmations.

The Court dismissed the appeal for Parts II and III of the contested paragraphs and allowed the appeal for Part I in part, with the following grounds:-

- the section of Part I, which involved the reason for a person attending the mediation on behalf of the plaintiff and what the mediator said, was considered a mediation communication and should be struck out;
- The other sections of Part I, which referred to the list of attendees at the mediation meeting and the settlement agreement reached in mediation, were not considered part of mediation communication and should not be struck out.
- Parts II and III were struck out as they clearly involved mediation communication.

The court also clarified that the existence of a confidentiality requirement set out in the provision of the mediated settlement agreement did not provide additional grounds to support the plaintiff's application to strike out the contested contents which was solely based on the confidentiality requirement of mediation communication under the MO.

### Case details

- Court: Hong Kong Court of First Instance
- Judge: DHCJ H Au-Yeung
- Date of Judgment: 15/12/2022.

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