#### DCPI972/2005

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 972 OF 2005

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| BETWEEN | CHONG LAI CHU | Plaintiff |
|  | and |  |
|  | TOWN TRANSPORTATION LIMITED | 1st Defendant |
|  | NG MEI KUEN SANDRA trading as | 2nd Defendant |
|  | PACIFIC RESOURCES COMPANY |  |
|  | CHINA STATE CONSTRUCTION  ENGINEERING (HONG KONG) LIMITED | 3rd Defendant |

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##### Coram: H H Judge Marlene Ng in Chambers (open to the public)

Date of Hearing: 13th December 2006

Date of Handing Down Decision: 19th December 2006

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###### DECISION

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I. Introduction

1. On/about 19th August 2003, the then minor Plaintiff was riding her bicycle along a cycle track in Tin Shui Wai when she fell into an excavation hole being part of the road works carried out by the 1st Defendant (“Accident”) thereby sustaining personal injuries. The 1st Defendant was sub-contractor to the 2nd Defendant who in turn was sub-contractor to the 3rd Defendant.
2. On 21st July 2005, the Plaintiff by her mother and next friend (“Mother”) commenced the present action (“Action”) against the 1st to 3rd Defendants to claim for loss and damages as a result of the Accident. The Action was subsequently settled with approval by the court in light of the involvement of minor’s interest. The remaining unresolved issue was the question of *inter partes* costs.
3. Despite heated debate between the parties on the outstanding issue of costs, which was plainly evident from the solicitors’ correspondence and the filed affidavits/affirmations, I am grateful for the pragmatic and sensible approach adopted by Mr Cheung, counsel for the Plaintiff, and Mr Lam, counsel for the 1st to 3rd Defendants, at the hearing before me on 13th December 2006 (“Adjourned Hearing”) that resulted in substantial reduction of the contested issues. Ultimately, as seen below, there remained a single issue to be determined by this court. However, as it is necessary to give a ruling on costs that flowed from various issues that have been pursued or abandoned, it is necessary to briefly describe the history of the Action.

*II. History*

1. On the day the Plaintiff commenced the Action (ie 21st July 2005), the Plaintiff’s solicitors (“Plaintiff’s Solicitors”) filed the Statement of Claim, Statement of Damages, two medical reports from the Tuen Mun Hospital (“Initial Reports”) and various documents obtained from the police (“Police Documents”) pursuant to Order 18 of the Rules of the District Court (“RDC”) and Practice Direction PD18 (“PD18”).
2. Particulars of the Plaintiff’s injuries and treatment were set out in both the Statement of Claim and Statement of Damages. The Initial Reports showed that the Plaintiff attended Tuen Mun Hospital on the day of the Accident with laceration of her chin and superficial abrasions over her body. There was tenderness over both temporal-mandibular joints and x-ray studies showed suspected fracture of neck of left mandible. The Plaintiff was admitted to the surgical ward where suturing of the laceration was done. X-ray revealed no fracture and she was discharged on 21st August 2003. When she attended follow-up on 3rd September 2003, the chin wound had healed and she was well. No further follow up was arranged.
3. As regards the Plaintiff’s permanent disabilities, the Statement of Damages pleaded *inter alia* that she had an ugly scar on her chin, scars on both of her hands, limited movement as well as pain, numbness and soreness of the jaw with aggravation on chewing, pain on the chin even on light touch, on and off headache causing lack of concentration at studies and poor sleep, on and off dizziness with aggravation when standing up after squatting, and psychological distress causing fear of darkness, falling into holes and riding the bicycle. The Statement of Damages went on to say Dr Wong See Hoi (“Dr Wong”), an orthopaedist, had been appointed to examine the Plaintiff on 2nd August 2005. It was further pleaded that the Plaintiff’s loss and damages were about HK$260,000.00 with interest thereon.
4. The Police Documents included statements from the Plaintiff, the Mother and an employee of the 2nd Defendant, some photographs and certain documents relating to the magistracy summonses and convictions against the 1st Defendant’s employee for failing to erect/maintain prescribed road signs at road works and lanterns during hours of darkness, and to sufficiently fence the excavation.
5. Notice of Checklist Review filed on 21st July 2005 showed that the Checklist Review hearing would take place on 24th November 2005.
6. The 1st Defendant, acting in person, gave notice of intention to defend on 16th August 2005. On 2nd and 16th August 2005 respectively, the 2nd and 3rd Defendants gave notice of intention to defend through their respective solicitors.
7. On 19th August 2005, the 3rd Defendant paid a sum of HK$80,000.00 into court in respect of the Plaintiff’s claim and the Plaintiff’s Solicitors acknowledged receipt on 2nd September 2005.
8. The 2nd Defendant’s Defence was filed on 1st September 2005. She admitted she was a sub-contractor to the 3rd Defendant, but denied the Plaintiff’s claim. She alleged the Accident was caused or contributed by the Plaintiff’s negligence. On 5th September 2005, the Plaintiff’s Solicitors filed a Reply denying or not admitting the 2nd Defendant’s averments.
9. The 3rd Defendant’s Defence was filed on 8th September 2005. It denied (a) the Plaintiff’s claim, (b) the relevance of the aforesaid magistracy summonses and (c) any liability for the excavation works carried out by the 1st and/or 2nd Defendants as independent contractors, and claimed that the Plaintiff and/or Mother were contributorily negligent or had voluntarily assumed risk of the Accident. The Defence further averred that the 3rd Defendant’s solicitors had asked for photographs of the Plaintiff’s alleged scars in vain. On 21st September 2005, the Plaintiff’s Solicitors filed a Reply denying or not admitting the 3rd Defendant’s averments.
10. The 1st Defendant filed its Defence on 22nd September 2005. It admitted it was sub-contractor to the 2nd Defendant, but denied the Plaintiff’s claim or the relevance of the aforesaid magistracy summonses. The 1st Defendant claimed it was the principal contractor that was responsible for all safety measures and road signs. On 26th September 2005, the Plaintiff filed a Reply denying or not admitting the 1st Defendant’s averments.
11. On 8th November 2005, the 3rd Defendant’s solicitors filed Notice to Act and Notice of Change of Solicitors for the 1st and 2nd Defendants respectively. From that time onwards the 1st to 3rd Defendants were represented by the same solicitors (“Defendants’ Solicitors”).
12. On the same day, the 1st to 3rd Defendants jointly paid a further sum of HK$80,000.00 into court which increased the total sum paid into court in respect of the Plaintiff’s claim to HK$160,000.00. On 15th November 2005, the Plaintiff’s Solicitors acknowledged receipt of the additional payment into court.
13. On 15th November 2005, the Plaintiff’s Solicitors filed the Plaintiff’s List of Documents which listed *inter alia* four medical reports from the Tuen Mun Hospital (neurosurgery department), Tin Shui Wai Health Centre (department of family medicine), Yuen Long Jockey Club Health Centre and Tuen Mun Hospital (oral maxillofacial surgery and dental unit) respectively of *divers* dates between 20th and 26th September 2005 (“Later Reports”) and Dr Wong’s expert orthopaedic report dated 22nd September 2005 (“Dr Wong’s Report”). I note that some of the Plaintiff’s pleaded injuries were reflected in the Later Reports.
14. On the same day, the Plaintiff’s Solicitors filed the Checklist with a draft order proposing directions to be sought at the Checklist Review hearing for discovery, exchanging witness statements and orthopaedic expert reports, filing/serving the Revised Statement of Damages and Answer thereto, and setting down the Action for trial in the running list.
15. On 22nd November 2005, the Defendants’ Solicitors filed the Checklist admitting liability in respect of the Action. The Defendants’ Solicitors complained of late service of Dr Wong’s Report that amounted to a deliberate ambush and caused prejudice to the 1st to 3rd Defendants who had conducted their defence on the basis of the Initial Reports and the coloured photographs of the Plaintiff’s scars provided by the Plaintiff’s Solicitors at the request of the Defendants’ Solicitors. The 1st to 3rd Defendants also intimated that they would oppose the Plaintiff’s proposal to adduce Dr Wong’s Report.
16. On the same day, the Plaintiff’s Solicitors filed a Notice of Acceptance of Payment into Court stating that, subject to the court’s approval, the Plaintiff would accept the sum of HK$160,000.00 in satisfaction of her claim in the Action.
17. On 23rd November 2005, the Defendants’ Solicitors wrote to the Plaintiff’s Solicitors complaining of the manner in which the Action was brought/prosecuted on behalf of the Plaintiff that “(a) was prejudicial to the interests of the 1st-3rd Defendants and (b) resulted in unnecessary costs”. The 1st to 3rd Defendants also did not consider they should bear the full amount of the Plaintiff’s legal costs on a party and party basis, still less on common fund basis. They indicated willingness “to bear 50% of the Plaintiff’s costs of and occasioned by this Action, after such costs have been taxed on the party-and-party basis”.
18. Since minor’s interest was involved, the Plaintiff’s Solicitors issued a summons for court approval of the settlement (“Summons”) on the same day and asked *inter alia* for the following reliefs (“Cost Relief”) :
19. the 1st to 3rd Defendants do pay the Plaintiff’s costs of the Action on a common fund basis to be taxed with waiver of any claim for further costs (if any) over and above those payable by the 1st to 3rd Defendants on a common fund basis;
20. there be liberty to apply for an order that taxation of the Plaintiff’s own costs be dispensed with on the court being informed of the sums to be received by way of costs, disbursements and expenses by the Plaintiff’s solicitors;
21. upon payment by the 1st to 3rd Defendants of the settlement sum and the abovementioned costs of the Action, they be discharged from any further liability in respect of the Plaintiff’s claim against them in the Action.
22. On 26th November 2005, the Defendants’ Solicitors wrote to the Plaintiff’s Solicitors and analysed the chronology of events from which they drew the inference that the Action “have not simply been financed through [the Plaintiff and Mother]”. Consequently, they claimed that the ordinary reason for an award of costs on a common fund basis had disappeared, and the 1st to 3rd Defendants ought not be asked to pay a significant portion of the Plaintiff’s costs, not least in relation to various matters itemised in such letter.
23. On 2nd December 2005, the 1st to 3rd Defendants filed the 1st affidavit of their solicitor, Ms Christine Amanda Mak, in support of the settlement and to contest the Cost Relief. Ms Mak mentioned that the 1st to 3rd Defendants were seriously concerned as to the veracity of the Plaintiff’s allegations of multiple injuries and psychological problems without the support of any medical report. She referred to the “fundamental divergence” between the Plaintiff’s pleaded complaints and the Initial Reports that effectively gave the Plaintiff “a clean bill of health, and mentioned nothing about the said symptoms”. Ms Mak claimed that the Plaintiff’s assertions, which transpired to be dubious and speculative after the Plaintiff accepted the payment into court, were made to inflate quantum. She further claimed the manner in which the Action was pursued by the Plaintiff’s Solicitors (which was described in detail in her 1st affidavit) amounted to an abuse of procedure, which together with the impecuniosity of the Plaintiff/Mother supported a strong suspicion the Action (a) was not financed by the Plaintiff/Mother but funded/directed by a third party which had a pure financial interest in the amount which might be awarded, and (b) was brought to extract money from the 1st to 3rd Defendants on dubious grounds.
24. Thus, the 1st to 3rd Defendants contended by way of Ms Mak’s 1st affidavit that there was no basis to award costs on a common fund basis and “a significant discount (say, at least 50%) ought to be applied to the Plaintiff’s costs on the standard party-and-party basis”.
25. On the return day of the Summons on 8th December 2005 (“Return Hearing”), I granted approval for the Plaintiff to accept the sum of HK$160,000.00 (“Settlement Sum”) paid into court by the 1st to 3rd Defendants in satisfaction of her claim in the Action and made *inter alia* the following directions in relation to the Cost Relief (“Directions”) :
26. the Plaintiff do file and serve affirmation in support of the Cost Relief within 28 days;
27. the 1st to 3rd Defendants do file and serve affirmation in opposition within 28 days thereafter if so desired;
28. the Plaintiff do file and serve affirmation in reply within 14 days thereafter if so desired;
29. leave be granted to the Plaintiff to seal privileged material in her affirmations and exhibits to be marked for sight by the court only;
30. the Cost Relief be adjourned for argument before a District Judge in chambers (not open to the public) on the following preliminary issues (“Preliminary Issues”), namely, (i) whether any material submitted by the Plaintiff and claimed to be privileged should be disclosed (“Disclosure Issue”), and (ii) whether there was sufficient basis for the 1st to 3rd Defendants’ assertions (ie the Action was not financed by the Plaintiff/Mother and was brought to extract money from the 1st to 3rd Defendants) to be left for argument (“Indemnity Principle Issue”);
31. costs of the Return Hearing in relation to the Cost Relief be reserved;
32. costs in relation to the Cost Relief would not be borne by the Plaintiff.
33. On 16th March 2006, the Plaintiff’s Solicitors filed the 2nd affirmation of the Mother in support of the Cost Relief and to oppose the allegations in Ms Mak’s 1st affidavit. The Mother asserted that the Plaintiff was entitled to (a) costs of the Action as of right upon payment into court pursuant to Order 62 rule 10(2) of the RDC, (b) such costs to be taxed on a common fund basis pursuant to paragraph 17.5 of PD18, and (c) assessment of the quantum of such costs by taxation.
34. The Mother denied that the Plaintiff’s acceptance of the Settlement Sum meant her claim was dubious and speculative or that there was any fundamental divergence between the Plaintiff’s pleaded complaints and the Initial Reports that essentially dealt with the Plaintiff’s physical injuries. She claimed that the pleaded particulars of the Plaintiff’s injuries were supported by the Initial Reports as well as Dr Wong’s Report, and the pleaded psychological problems were based on the Plaintiff’s instructions. Indeed, although Dr Wong being an orthopaedist would not make any expert psychiatric assessment, in his report he expressed belief that the scar on the Plaintiff’s chin would lead to psychological impact on her.
35. The Mother noted the Initial Reports were the only medical reports available at the time of the service of the Statement of Claim. She was advised that Order 18 of the RDC did not require service of expert medical reports with the Statement of Claim. Further, the Plaintiff’s Solicitors in their pre-action letters dated 4th April 2005 invited the 1st to 3rd Defendants to participate in a joint orthopaedic examination with Dr Wong, but the 1st to 3rd Defendants did not respond or make any request for examination by their own expert(s).
36. The Mother explained that the Plaintiff’s Solicitors advised the Plaintiff to (and the Plaintiff did) apply for legal aid twice, but her applications were refused. The Mother accepted she had limited means, but the Plaintiff’s Solicitors agreed to let her defer payment of legal fees until the conclusion of the case. The Plaintiff/Mother and the Plaintiff’s Solicitors entered into a retainer agreement (“Retainer Agreement”) a day before the commencement of the Action. The Retainer Agreement was exhibited to the Mother’s 2nd affirmation, but was sealed and marked for sight by the court only.
37. On 28th March 2006, the Defendants’ Solicitors responded in detail to the Mother’s 2nd affirmation by letter and reiterated their complaints. However, “in the interests of economy on further costs”, the 1st to 3rd Defendants offered to pay HK$85,000.00 in full and final settlement of the Cost Relief “against themselves arising out of, and/or in connection with [the Action], inclusive of all disbursements and interest”.
38. On 7th April 2006, the Plaintiff’s Solicitors issued a reply to the offer marked “without prejudice save as to costs” (“Without Prejudice Letter”). As seen below, it is unnecessary for present purposes to refer to the contents of such letter. However, it is plain the Plaintiff did not accept the above offer by the 1st to 3rd Defendants.
39. The Defendants’ Solicitors filed the 2nd and 3rd affidavits of Ms Mak on 13th April and 8th September 2006 respectively and exhibited various solicitors’ correspondence.
40. At the hearing of the Preliminary Issues before H H Judge Yuen on 13th September 2006, the learned judge adjourned such issues to be heard before me at the Adjourned Hearing.
41. At the time when the Action was settled, the Plaintiff was still a minor. Since then, she has attained the age of majority. On 17th October 2006, the Plaintiff made an *ex parte* application for payment out of the Settlement Sum to her. At the hearing on 30th November 2006, I granted leave for the Settlement Sum to be paid out to the Plaintiff through her solicitors upon confirmation that the full Settlement Sum would be for the use and benefit of the Plaintiff and not for costs of the Action.
42. The Defendants’ Solicitors filed and served the 4th affidavit of Ms Mak on 1st December 2006 again exhibiting various solicitors’ correspondence.

*III. Issues at the Adjourned Hearing*

1. As indicated above, the outstanding issue is the question of *inter partes* costs. As at the commencement of the Adjourned Hearing, the Preliminary Issues were still live issues between the parties. In respect of the Indemnity Principle Issue, the 1st to 3rd Defendants argued there was a “genuine issue” that the Plaintiff was in breach of the indemnity principle which disentitled her to claim for costs of the Action. In respect of the Disclosure Issue, the 1st to 3rd Defendants argued they were *prima facie* entitled to see the Retainer Agreement, which they claimed was not privileged, pursuant to Order 24 rule 10 of the RDC and because the Plaintiff chose to put it in evidence and to rely on it.
2. I referred both counsel to (and gave them opportunity to consider) three recent English authorities. Mr Lam then informed me that upon consideration of the said authorities and on further reflection the 1st to 3rd Defendants decided not to pursue the Preliminary Issues.
3. In the circumstances, the parties were ready to proceed with argument on the substantive issue of *inter partes* costs. Having abandoned arguments on the Preliminary Issues, Mr Lam confirmed that the 1st to 3rd Defendants were prepared to pay costs of the Action (apart from costs in relation to the Cost Relief) to the Plaintiff subject to two outstanding matters. First, the 1st to 3rd Defendants argued that the basis of taxation of those costs should be on a party and party and not common fund basis (“Basis of Taxation Issue”). Secondly, they contended that assessment of the quantum of those costs should be by way of gross sum assessment instead of by taxation (“Assessment Method Issue”).
4. In relation to the Assessment Method Issue, it was not disputed that gross sum assessment of costs should be carried out on broad principles and that it should not be an exercise similar to taxation. In my view, courts are ready in appropriate circumstances to order gross sum assessment, eg for a short interlocutory application or where the nature of the case is straightforward.
5. However, as apparent from the filed affidavits/affirmations and counsel’s written/oral submissions, the manner in which the Plaintiff and/or the Plaintiff’s Solicitors conducted the litigation was being hotly debated almost every inch of the way. The 1st to 3rd Defendants challenged the Plaintiff’s “unreasonable and unsatisfactory approach” that allegedly added significantly to the time and costs involved in the Action. In the course of his oral submissions, Mr Lam on further reflection conceded that the above protests would be better ventilated and determined with the benefit of a full taxation bill from and papers/vouchers lodged by the Plaintiff as well as a list of objections from the 1st to 3rd Defendants.
6. In the circumstances, the 1st to 3rd Defendants abandoned their stance on the Assessment Method Issue and agreed with the Plaintiff’s contention that the Plaintiff’s costs of the Action should be assessed by way of taxation. So the sole remaining issue in relation to the Cost Relief was the Basis of Taxation Issue.

*IV. Basis of Taxation Issue*

*(a) Synopsis of the parties’ stance*

1. The Plaintiff claimed that the appropriate basis of taxation was common fund basis. But the 1st to 3rd Defendants argued that due to the particular circumstances of the Action, costs of the Action should be taxed on a party and party basis.
2. Although it was suggested otherwise in Ms Mak’s 1st affidavit and in correspondence by the Defendants’ Solicitors, Mr Lam confirmed that the 1st to 3rd Defendants would not seek any order for 50% global deduction of the Plaintiff’s costs of the Action to be taxed on a party and party basis. Plainly a global deduction is inappropriate for item by item taxation.

*(b) Defendants’ grounds*

1. Mr Lam in his written submissions relied on two grounds, namely, that (a) the rationale for awarding common fund costs was absent in the present proceedings and (b) the Plaintiff was guilty of unreasonable conduct which added substantially to the costs of the Action.
2. The Without Prejudice Letter was exhibited to Ms Mak’s 3rd affidavit in support of (b) above. Mr Cheung protested against the disclosure of such letter on the basis that it was protected by “without prejudice” privilege. But in the course of Mr Lam’s oral submissions at the Adjourned Hearing, he abandoned reliance on (b) above for the Basis of Taxation Issue although he expressly reserved the right of the 1st to 3rd Defendants to rely on such contention in future taxation proceedings. Mr Lam’s concession was made after Mr Cheung addressed the court on the Basis of Taxation Issue, so unfortunately some hearing time was spent on submissions in relation to (b) above.

*(c) Cost Relief*

1. At the Adjourned Hearing, I granted leave to the Plaintiff to amend paragraph 4 of the Summons (see paragraph 21(a) above) to seek an order *inter alia* that the 1st to 3rd Defendants do pay to the Plaintiff costs of the Action on a common fund basis to be taxed “if not agreed” with waiver by “the Plaintiff’s Solicitors” (and not the Plaintiff) of any claim for further costs (if any) over and above those costs payable by the 1st to 3rd Defendants on a common fund basis.
2. On the basis of such amendment and without objection from the 1st to 3rd Defendants, Mr Cheung submitted that the Plaintiff would not seek an order in respect of paragraph 5 of the Summons (see paragraph 21(b) above). Mr Lam conceded that an order should be made in terms of paragraph 6 of the Summons (see paragraph 21(c) above).

*(d) Confirmation by the Plaintiff’s Solicitors*

1. As apparent from paragraphs 21(a) and 47 above, the Plaintiff’s Solicitors waived any claim for costs over and above common fund costs of the Action. Since the 1st to 3rd Defendants agreed to pay costs of the Action on a party and party basis, the real issue is on whom liability for the difference between party and party and common fund costs should fall.
2. However, it is common ground that such difference would not be paid from the Settlement Sum. As apparent from the transcript of the proceedings, the Plaintiff’s Solicitors gave such confirmation to this court at the Return Hearing. Further, pursuant to the Directions, costs in relation to the Cost Relief would not be borne by the Plaintiff, ie such costs would not be paid from the Settlement Sum.

*(e) Legal principles*

1. Paragraph 17.5 of PD18 provided *inter alia* that “*Save as is otherwise ordered by the Judge* the proper order for costs in respect of such compromised proceedings [ie actions by persons under disability] is on a common fund basis” (my emphasis). The italicised proviso reflected the full power given to the court under section 53 of the District Court Ordinance Cap.336 to determine to what extent costs are to be paid.
2. Mr Cheung submitted that unless there were extraordinary circumstances the court should not depart from the usual practice of awarding costs on a common fund basis in respect of compromised proceedings involving minor interest. Mr Cheung did not clarify what he called “extraordinary circumstances”. More importantly, he did not disagree with the rationale for awarding common fund costs as discussed below.
3. The rationale for generally awarding common fund costs in infant cases was set out in the judgment of Suffiad J in *Tai Chau Yung & Another (intended administratrices of the estate of Kiung Kar Woo, deceased) v Ng & Another* [1999] 2 HKLRD 549, 551-552 :

“The one matter in dispute between the parties relates to costs. The plaintiff asked that costs on a common fund basis be awarded against the defendants which was objected to by the defendants. In this respect, I was referred to *The Supreme Court Practice* (1985 ed.) (*The* White Book) at marginal note 80/12/16 (the 1985 ed. of the White Book was used because after 1986, the basis of taxation in England had changed, but not so in Hong Kong). The practice referred to there relates to costs between an infant or patient plaintiff and the defendant, and at para. (ii) it is stated thus :

If the claim is disposed of by compromise or settlement out of Court, the costs awarded to a successful infant or patient are almost invariably on a common fund basis. *The reason for this practice is that it is difficult for the court to judge on the adequacy of the settlement without knowing how much the plaintiff will receive net of costs.* This can practically be achieved only by awarding costs on a common fund basis rather than as between party and party. Defendants are almost always willing to follow this practice except, perhaps, where the plaintiff or his advisers have added greatly to the costs by unreasonable conduct. *In the last resort, the court has the right to decide on whether party and party or common fund costs should be awarded without the consent of the parties* (O.62, r.28(2)).

……

In coming to a decision on the question of costs, first of all, I note that the award of costs is always a matter left to the discretion of the Court. Secondly, it has been a long standing practice at least in England if not in Hong Kong for costs to be awarded on a common fund basis to a successful infant plaintiff where the matter is compromised or settled, *so that the Court can be reasonably sure of the adequacy of the settlement to the infant*. If this practice is not one which has been prevalent in Hong Kong hitherto, the time has come for those advising in such cases where infant interest or patients are involved to take note of this long adopted practice in England which, in the views of judges dealing with the PI List, should be applied with much more regularity in Hong Kong, where appropriate, than has been the case. Especially taking into account the fact that costs in Hong Kong greatly exceed that in England where litigation is concerned, such that a successful infant or patient, where a case is settled or compromised, is often left with much less than the amount upon which the case was compromised for. Thirdly, in the present case, there has not been the slightest suggestion of unreasonable conduct by the plaintiff which has greatly added to the costs of this action. Fourthly, in the present case, over 75% of the amount paid into court and accepted by the plaintiff, have been apportioned for the benefit of the two infant dependants. Lastly, the fact that the plaintiff was not asked for contribution at the outset when legal aid was granted her, *does not mean that she would not have to make contribution as to the difference between the costs incurred by the Director of Legal Aid and those that the Director can recover from the Defendants on a party and party basis*. …...

In all the circumstances of this case, and *exercising my discretion, primarily on the basis to ensure that the Plaintiff, particularly the two infants, are adequately compensated for*, I came to the view that costs should be awarded on a common fund basis. Furthermore, I take the view that the application before me today was inevitable, if for nothing else it would have been incumbent upon the plaintiff to make an application to the court for the court's approval of the acceptance of the money paid into court in view of the fact that infant interests were involved in this case.

Accordingly, I made the Order that the 1st and 2nd defendants do pay the plaintiff's costs of this action including the costs of the hearing before me, to be taxed if not agreed, on a common fund basis.

In making this order for costs, it was not intended in any way to be punitive but upon the reasons given above.” (my emphasis)

1. It is plain that the *primary* rationale for granting common fund costs in infant cases is to safeguard the infant’s interests, so that the court can be satisfied with the adequacy of any settlement sum in favour of the infant. Such primary rationale is also reflected in *Hong Kong Civil Procedure 2006* Vol.1 para.80/12/14 at p.1130 as follows :

“*A compromise of a claim on behalf of a minor or an infant has to include an agreement in respect of costs. Without such agreement it is not a full compromise to put before a court for its approval.* The court is asked to approve a fixed sum of money as reflecting a proper settlement. *If there is any uncertainty as to whether the proposed settlement figure may be reduced by any liability for costs, it may not be approved. In any event, the solicitors representing the plaintiff will be required to explain such potential liability fully.* In normal circumstances, where the settlement provides for costs on a common fund basis, solicitors will be expected to waive any claim for further costs. This is because the basis of common fund costs is a reasonable amount in respect of all costs reasonably incurred. The corollary is that any costs not recoverable from the defendant on this basis are deemed to be not reasonable and not reasonably incurred. The court is then likely to take the view that they should not be payable out of a plaintiff’s damages ……” (my emphasis)

1. Here, given the confirmation by the Plaintiff’s Solicitors to this court that the Plaintiff would not be deprived of any part of the Settlement Sum for payment of (a) the difference between common fund and party and party costs of the Action or (b) any costs over and above common fund costs, the aforesaid *primary* rationale was not applicable. Indeed, this court rested on the comfort of the above confirmation by the Plaintiff’s Solicitors in concluding that the Settlement Sum was adequate compensation for the Plaintiff.
2. The Plaintiff’s Solicitors did not see fit to charge against the Settlement Sum legal costs potentially not recoverable from the 1st to 3rd Defendants. If they had done so, they would have had to follow the practice in paragraph 17.6 of PD18 and, depending on the circumstances, the court might or might not have approved the settlement :

“In the event of a Solicitor for a plaintiff seeking to charge against a plaintiff's damages, costs and disbursements which he considers he will not recover from the Defendants, he must produce at the hearing for approval a statement of the maximum amount of such costs and disbursements and will be required to justify them. The Plaintiff and/or the next friend must have been advised in writing of the estimate of the amount of costs and disbursement in question, and any consent thereto must be in writing and produced to the Court. The written advice must set out clearly why those costs and disbursements have been incurred and why it is considered that they are not recoverable from the Defendants. A general undertaking to be responsible for costs signed by the client will not be sufficient for these purposes.

The proposed direction set out by the Plaintiff's Solicitors pursuant to 17.4 should also set out how the balance of the amount of the said costs and disbursements after deduction of the taxed costs payable to them should be applied towards the Plaintiffs.

No approval will be given to any settlement unless the court can be told with reasonable accuracy, the maximum amount it is sought to be deducted from the Plaintiff's damages. If the court is not satisfied with the maximum amount as put forward by the Plaintiff's Solicitors as being necessary, the court may whilst granting an approval of the settlement figure, give such directions for dealing with the application for approval of the distribution of the award as it thinks fit, including a speedy taxation of all the costs and disbursements.”

1. In the circumstances, Mr Cheung in his oral submissions frankly conceded the second and fifth factors referred to by Suffiad J in *Tai Chau Yung*’s case were inapplicable in the present situation. However, he submitted that the third and fourth factors referred to by Suffiad J were still relevant. As regards the third factor, Mr Cheung noted that for the Basis of Taxation Issue the 1st to 3rd Defendants abandoned any suggestion of unreasonable conduct on the part of the Plaintiff that added to costs of the Action. In relation to the fourth factor, the present Action even went further than *Tai Chau Yung*’s case in that whole and not just 75% of the Settlement Sum was for the benefit of the then minor Plaintiff.
2. I have carefully considered Mr Cheung’s arguments, but do not consider that they establish a sufficient basis for exercising my discretion to award costs of the Action on a common fund basis. With the removal of the *primary* rationale described above, and having carefully considered all the circumstances, I consider the appropriate basis of taxation of the costs of the Action is on a party and party basis.
3. I therefore make the following orders :
4. the 1st to 3rd Defendants do pay the Plaintiff’s costs of this Action (excluding costs of the Cost Relief) on a party and party basis to be taxed if not agreed with the Plaintiff’s Solicitors waiving any claim to further costs (if any) over and above those payable on a common fund basis;
5. upon payment by the 1st to 3rd Defendants of the Settlement Sum, the abovementioned costs of the Action and any costs payable to the Plaintiff in relation to the Cost Relief (see below), the 1st to 3rd Defendants be discharged from any further liability in respect of the Plaintiff’s claim against them in this Action.

Costs of the Cost Relief

1. Mr Lam accepted that the 1st and 3rd Defendants would have to pay the costs in relation to all the issues/arguments that were abandoned or conceded, including the issue of the Plaintiff’s entitlement to costs of the Action, the Preliminary Issues and the Assessment Method Issue (“Abandoned Issues”).
2. Mr Cheung submitted that costs in relation to the Abandoned Issues should be payable on a common fund basis due to the unreasonable conduct of the Plaintiff in raising and pursuing such issues only to abandon them at the Adjourned Hearing. Mr Cheung made clear that he was not relying on minor interest in support of such contention. Mr Lam submitted that such costs should be taxed on a party and party basis.
3. Taxation of costs on a common fund basis is more generous than on a party and party basis since “there shall be allowed a reasonable amount in respect of all costs reasonably incurred” (see *Hong Kong Civil Procedure 2006* Vol.1 para.62/App/7 at p.960). Mr Cheung did not refer to any authority on when common fund costs should be ordered. However, I note that Godfrey J in *Overseas Trust Bank Ltd v Coopers & Lybrand (a firm) & ors* [1991] 1 HKLR 177, 182-183 said as follows :

“…… The usual practice of the court, in hostile litigation, is to order the costs be paid by the unsuccessful party to the successful party, and taxed as between party and party. That means that the successful party will be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending his rights : see O. 62, r.28(2). However, the court does have a discretion to order that the successful party's costs should be taxed, not as between party and party but on what is called (for historical reasons) the "common fund" basis : see O. 62, r.28(3). That is more generous and means that the successful party will be allowed a reasonable amount in respect of all costs he has reasonably incurred : see O. 68, rule 28(4). ……

 20. To justify an order for costs on the common fund basis, the case has to have some special or unusual feature : see **Preston v. Preston** [1982] Fam 17 and my own judgment in **Wharf Properties Limited v. Eric Cumine Associates**, HCA No.13431/1983 and CL No.48/1985, 24th February 1988, unreported. ……

 21. …… The court has a discretion to order that the costs of the successful party be taxed on the indemnity basis; but, in my judgment, in ordinary hostile litigation it should only exercise that discretion in that way, and so depart from the ordinary rule that the costs ought to be taxed as between party and party, when it feels a proper sense of indignation at the unsuccessful party's conduct, and that is not this case. For the same reasons, I do not think this is a suitable case for an award of costs on the common fund basis either. This is, in my judgment, ordinary hostile litigation; and I see nothing in it to justify a departure from the ordinary rule. ……”

1. In the present case, I am not persuaded that the behaviour of the 1st to 3rd Defendants went so far as to cause a proper sense of indignation at their conduct. There had been no suggestion that they took the Abandoned Issues for any ulterior or improper purpose. In fact, they have through open letters by the Defendants’ Solicitors dated 26th November 2005 and 28th March 2006 as well as Ms Mak’s 1st affidavit made proposals to pay certain costs to the Plaintiff to resolve the Cost Relief. Whilst the Plaintiff might well have considered that time was wasted by the 1st to 3rd Defendants by taking up points that were ultimately not pursued, I am not confident such conduct went beyond ordinary hostile litigation as to cause a sense of indignation. I also bear in mind that although the Abandoned Issues were not argued before me, it is not the case that they were obviously unarguable in their entirety. Mr Lam specifically reserved the right of the 1st to 3rd Defendants to contest the Plaintiff’s allegedly unreasonable and unsatisfactory approach to this litigation in the taxation proceedings.
2. In light of my conclusions on the Basis of Taxation Issue, I grant a costs order *nisi* that the Plaintiff do pay the 1st to 3rd Defendants costs in relation to the Basis of Taxation Issue to be taxed if not agreed. I note that at the hearing before H H Judge Yuen, one of the reasons for adjournment of argument on the Preliminary Issues to the Adjourned Hearing before me was because the Plaintiff or the Plaintiff’s Solicitors were unable to confirm the scope of the confirmation given to this court at the Return Hearing in relation to costs that might not be charged to the Settlement Sum. The Plaintiff’s Solicitors subsequently obtained the transcript of the relevant proceedings, which clarified the matter. This is part and parcel of the Basis of Taxation Issue and the Plaintiff should pay the costs in relation thereto to the 1st to 3rd Defendants.
3. To assist the taxing master, I apportion the time spent for the Basis of Taxation Issue and the Abandoned Issues at the Adjourned Hearing to be 20% and 80% respectively. In respect of the Return Hearing, I only apportion 5 minutes for the Basis of Taxation Issue. Apart from the usual directions for the filing of affidavits/affirmations in support of and opposition to the Cost Relief (which encompassed the Basis of Taxation Issue), the other discussions at the hearing related to the settlement of the Action (which should be part of the costs of the Action) and the Abandoned Issues.

# (Marlene Ng)

District Court Judge

Representation:

Mr Anthony Cheung instructed by Messrs Huen & Partners for the Plaintiff.

Mr Paul Lam instructed by Messrs J Chan, Yip, So & Partners for the 1st, 2nd and 3rd Defendants.