#### DCPI1632/2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1632 OF 2008

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| BETWEEN | SO LONG HIM (a minor by SO CHI KWONG his father and next friend) | Plaintiff |
|  | and |  |
|  | HO KAI LUN RICKY  FULLUCK CONSTRUCTION ENGINEERING LIMITED | 1st Defendant  2nd Defendant |

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##### Coram: H H District Judge Marlene Ng in Chambers (Not Open to the Public)

Date of Hearing: 4th February, 2009

Date of Decision: 4th February, 2009

Date of Handing Down Reasons for Directions: 10th February, 2009

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REASONS FOR DIRECTIONS

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###### I. Background

1. The Plaintiff is a minor. On 16th July 2008, the Plaintiff by his father and next friend commenced the present proceedings to claim against the 1st and 2nd Defendants for personal injury, loss and damages arising out of a traffic accident on 11th August 2006.
2. On 29th July 2008, the solicitors for the 1st and 2nd Defendants filed an acknowledgment of service stating that the 1st and 2nd Defendants would not contest the Plaintiff’s claim save as to quantum.
3. On 3rd December 2008, the Plaintiff’s solicitors wrote to inform the court that the parties have compromised the claim, and they would apply for approval of the proposed settlement.
4. On 29th December 2008, the Plaintiff’s solicitors issued a summons (“Summons”) seeking court approval of the settlement and consequential directions for (a) payment of the balance of the settlement sum into court after taking into account various payments into court, (b) payment out from the court for TAVA reimbursement, (c) periodical payments from the court for the Plaintiff’s future medical treatment, (d) investment and eventual payment out of the balance of the settlement sum upon the Plaintiff attaining the age of majority or further order, and (e) provision of costs of the action and of the application for approval of the settlement.
5. The Summons was supported by 2 affirmations and a Memorandum of Settlement (“Memorandum”) all *filed* on 19th December 2008.
6. The affirmation of the father and next friend dated 17th December 2008 (a) exhibited copies of the birth certificate of the Plaintiff, the identity card of his father and next friend, the Memorandum *filed* on the same day in support of the Summons, and receipts for medical expenses, (b) confirmed the receipt of and need for reimbursement of the TAVA sum, (c) confirmed the incurrence of medical expenses and tonic food for the Plaintiff, and (d) explained the Plaintiff’s need for future medical treatment.
7. The affirmation of the Plaintiff’s solicitor dated 29th December 2008 exhibited copies of counsel’s advice on settlement and various medical reports in respect of the Plaintiff’s condition.
8. The Memorandum dated 17th December 2008 gave (a) the age and date of birth of the Plaintiff, and (b) the terms of the order sought by the Plaintiff.
9. At the hearing of the Summons (which was not open to the public), I approved the settlement and granted the order in terms as sought with some amendments. In addition, I directed that the affirmation of the Plaintiff’s solicitor and the memorandum both filed on 29th December 2008 be removed from the court file to be kept separately and treated as lodged on the same date, and shall not be open to search by any party other than the Plaintiff or his solicitors without leave of the court (“Direction”).
10. At the hearing, I informed both parties that I would openly hand down reasons for the Direction. Since I will not be touching upon the terms of the settlement or any other confidential information, but will be dealing with the practice and procedure of Order 80 approval for disability settlement, these are perhaps more in the nature of a practice note rather than reasons for directions made.

*II. Order 80 approval*

1. Order 80 rules 10 and 11 of the Rules of the District Court (“RDC”) provide *inter alia* as follows :

“10. Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court.

11.(1) Where, before proceedings in which a claim for money is made by or on behalf of a person under disability (whether alone or in conjunction with any other person) are begun, an agreement is reached for the settlement of the claim, and it is desired to obtain the Court's approval to the settlement, then, notwithstanding anything in Order 5, rule 2, the claim may be made in proceedings begun by originating summons, and in the summons an application may also be made for-

1. the approval of the Court to the settlement and such orders or directions as may be necessary to give effect to it or as may be necessary or expedient under rule 12; or
2. alternatively, directions as to the further prosecution of the claim.

(2) Where in proceedings under this rule a claim is made under the Fatal Accidents Ordinance (Cap 22), the originating summons must include the particulars mentioned in section 5(4) of that Ordinance. ……”

1. To start with, the court is always ready to protect persons under disability from any disadvantage they may suffer as a result of the disability, and look after those who because of their disability cannot look after themselves. In case of minors, the court acts as *parens patriae*, and in case of mentally incapacitated persons, the court acts as a court of protection. This is one of the most important functions which the court is jealous to ensure is discharged properly.
2. According to *Hong Kong Civil Procedure 2009* para.80/11/1 at pp.1173-1174, Order 80 rule 10 and 11 provide a comprehensive code the objects of which are :

“(a) to protect minors and mentally incapacitated persons from any lack of skill or experience of their legal advisers which might lead to a settlement of a money claim …….

(b) to provide a means by which a defendant may obtain a valid discharge from a minor’s or mentally incapacitated person’s claim ……

(c) to ensure that solicitors acting for a minor or mentally incapacitated person are paid their proper costs and no more ……

(d) to make sure that money is recovered by and on behalf of a minor or mentally incapacitated person is properly looked after and wisely applied ……

(e) to ensure that the interests of all dependents entitled to a possible share in the settlement are properly protected ……”

1. In discharging its duty for Order 80 approval of disability settlement, the key or perhaps even sole question for the court is whether the proposed compromise is fair and for the benefit of the person under disability. It is therefore necessary for the legal representatives acting for the minor or mentally incapacitated person to explain how the proposed settlement is arrived at and why the court should approve it.
2. In the present case, the compromise was reached after proceedings were commenced. According to *Hong Kong Civil Procedure 2009* para.80/11/8 at p.1175, the application for Order 80 approval “…… must be supported by a memorandum prepared by the solicitor having prime responsibility for the action setting out full details of the position on liability and on damages so as to enable the master or judge to have all the necessary information to enable him or her to consider the matter fully. The latest medical reports should be annexed to the memorandum unless they are already before the court in the form of a checklist review bundle, pre-trial review bundle or trial bundle. Counsel’s advice on the proposed settlement must also be annexed (assuming counsel has been instructed) ……”
3. Such memorandum must be lodged and not filed, and the hearing of the application for approval of disability settlement is not open to the public (see Practice Direction 25.1). The reason for this is straightforward. The court requires a frank and realistic assessment as to the prospects of success of the claim in order decide whether the settlement is fair and of benefit to the person under disability. The next friend and the legal representatives acting for the person under disability must not be inhibited about giving a candid assessment, and confidential information concerning the minor or the mentally incapacitated person should not be unnecessarily disclosed, especially when there is always the possibility that the settlement may not be approved and the case proceeds to trial.
4. Hence, the memorandum for approval of settlement, which requires annexure of counsel’s opinion (if there is one) and/or an assessment of the merits of the claim and the fairness of the settlement, should always be *lodged* with the judge or master hearing the Order 80 application and not filed. Protection of the interests of the person under disability is not sufficiently secured by not serving the memorandum on the other party because if it were filed the other party may have access to the same by search of the court file. I am not saying that the other party or his solicitors, well knowing the spirit and intent of the provisions in Order 80 of the RDC, will deliberately search the court file for such purpose. But if the memorandum is filed, they may have access to it innocently in the usual course of legal proceedings. For example, where the defendant compromises the minor co-plaintiff’s claim but continues to contest the claim of the adult co-plaintiff, there may be a need in the course of conduct of the continuing litigation for the defendant or his solicitors (especially upon a change of solicitors) to search the court file.
5. For this very reason, counsel’s advice and/or the assessment of the merits of the claim and the fairness of the settlement by the next friend and/or legal representatives are not annexed to or set out in affirmations/affidavits which by their nature should be filed. If it becomes necessary to place non-confidential and/or non-privileged facts and information which are considered to be more suitable to be set out in an affirmation/affidavit rather than in a memorandum before the judge or master hearing the Order 80 application, solicitors acting for the person under disability should be astute to ensure that the legal opinion as to the merits of the claim and the assessment of the fairness of the settlement be withheld from the defendant by incorporating them separately in a memorandum to be lodged.
6. Here, the settlement was reached in the course of legal proceedings and unfortunately the practice set out in *Hong Kong Civil Procedure 2009* referred to in paragraph 15 above was not followed. In fact, a proper Memorandum should have been prepared without the need for the affirmation of the Plaintiff’s solicitor. In light of the above, to protect the minor Plaintiff’s interests in this case, I made the Direction at the hearing.
7. Given the aforesaid, even in respect of a compromise reached prior to proceedings being commenced so that the application for Order 80 approval is dealt with pursuant to an originating summons, I agree with the comments in *Hong Kong Civil Procedure 2009* para.80/11/08 at p.1174 insofar that the application must be supported by an affirmation/affidavit by the solicitor having the prime responsibility for the claim setting out the details of the position on liability and on damages so as to enable the master or judge to have all necessary information to enable him or her to consider the matter fully, and that the latest medical reports, the birth certificate of the minor and/or the evidence supporting the contention that the plaintiff is a mentally incapacitated person must be annexed to the affidavit/affirmation.
8. But as a result of the fundamental reasons explained above, I do not agree with the suggested practice in the same passage in *Hong Kong Civil Procedure 2009* that the “advice on the proposed settlement by counsel (assuming counsel has been instructed) must be annexed to the affirmation/affidavit”. I also do not see why there should be a distinction in approach between applications for Order 80 approval prior to proceedings being commenced (ie annexing counsel’s opinion to an affirmation/affidavit which is to be filed) and in the course of legal proceedings (ie annexing counsel’s opinion to a memorandum which is to be lodged) in the Hong Kong context. In my view, the same practice should be adopted for both situations, but more likely than not a supporting affidavit/affirmation setting out all relevant and necessary factual information and details will be required in an application for Order 80 approval under an originating summons for compromises reached prior to proceedings being commenced.
9. Whilst it is fair to say that there are many practitioners who diligently adhere to the good practice outlined above, it is still a not infrequent experience to have applications for Order 80 approval come before this court with counsel’s opinion or assessment by the responsible solicitor annexed to affirmations/affidavits, and in some cases such affirmations/affidavits have regrettably been served whereupon this court has given directions for their return with undertakings from solicitors not to disclose the information therein to the defendant or use them in any way. I am happy to say that such undertakings have been readily given.
10. Turning to the contents of the memorandum for settlement, it should in every case show that the solicitor having prime responsibility for the matter to have considered the correct question, namely, whether the proposed settlement is of benefit to the minor or the mentally incapacitated person upon a comprehensive assessment of the primary information and material. It is not enough (as sometimes occurs in the Order 80 applications that have come before this court) for the legal representatives to tender an opinion that the proposed settlement is reasonable or that the proposed settlement is agreed to by the next friend.
11. There have also been occasions, which I must say are less frequent, that the memorandum provided to this court has been inadequate for proper assessment of the benefit of the proposed settlement to the person under disability. This would entail an adjournment for a supplemental memorandum to be prepared with consequent delay and wastage of costs of the initial hearing.
12. As explained above, minors and mentally incapacitated persons are persons who need protection by the court, and solicitors as well as counsel (if instructed) should assist the court in discharging its function in looking after such persons under disability. Although the following observations of Megarry J in *Re Barbour’s Settlement, National Westminster Bank Ltd v Barbour* [1974] 1 All ER 1188, 1191 and 1193 were made in the context of the practice in the United Kingdom, I find them of revelance to the situation in Hong Kong :

“…… When the court is asked to give its approval on behalf of minors to a compromise of a dispute, the court has long been accustomed to rely heavily on those advising the minors for assistance in deciding whether the compromise is for the benefit of the minors. Counsel, solicitors, and guardians ad litem or next friends have opportunities which the court lacks for prolonged and detailed consideration of the proposals and possible variations of them in relation to the attitudes of the other parties and the apparent strength and weakness of their respective claims. When the matter comes before the court, the terms of settlement are in final from and the time for consideration is of necessity less ample. The court accordingly must rely to a considerable extent on the views of those whose opportunities of weighing the matter have been so much greater. Expressing a view on whether the terms of a proposed compromise are in the interests of a minor is a matter of great responsibility for all concerned. The solicitors must see that all the relevant matters are put before counsel, that the right questions are asked, and that the guardian ad litem or next friend of the minor fully understands and weighs counsel's advice when it is given. Counsel has to discharge what in my judgment is one of the most important and responsible functions of the Bar, that of helping those unable to help themselves; and the guardian ad litem or next friend must understand the advice given and carefully weigh the advantages of the proposed compromise to the minor against the disadvantages.

……

Let me make it clear that plain speaking and not obliquity is the characteristic that the court expects in both question and answer in these cases, and all the more so because the guardians ad litem or next friends who have to consider the problem are so often laymen who ought not to have to unravel lawyers' nods and becks and wreathed smiles.

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…… It may be that the great responsibilities of those who act on behalf of minors are today not so well known or fully understood as they once were. Yet they remain of high importance in the due administration of justice. They provide an important illustration of what all lawyers know, namely, that justice according to law is a co-operative process to which solicitors, counsel and judges all make their contributions. No judge can perform his duties adequately and efficiently without the great assistance from counsel and solicitors that is traditional. The gratitude for this assistance that is sometimes expressed from the Bench is genuine indeed; and correlative to that gratitude is the duty of the Bench to take whatever steps may be appropriate to see that the ancient standards are fully maintained. That reason alone, apart from anything else, suffices to show why I have adjourned this case into court for judgment.”

*III. Postscript*

1. I notice that para.80/11/8 at p.1174 in *Hong Kong Civil* on “practice on compromise or settlement” refers to “evidence supporting the contention that the plaintiff is a patient within the meaning of the Mental Health Ordinance”. However, Order 80 of the Rules of the High Court have been amended pursuant to the Mental Health (Amendment) Ordinance 1997 to define “mentally incapacitated person” to mean a mentally disordered person *or a mentally handicapped person (within the meaning of the Mental Health Ordinance Cap.136) who, by reason of mental disorder or mental handicap, as the case may be, is incapable of managing and administering his property and affairs*. Such definition removes “mental handicap” from inclusion in the category of “mental disorder” and is different from the definition of “patient” under the Mental Health Ordinance Cap.136, which refers to a person suffering or appearing to be suffering from mental disorder. Practitioners should read the guidance in the learned text in light of the current statutory definitions.

# (Marlene Ng)

District Court Judge

Representation:

Ms V Chih of Messrs Li, Chow & Co for the Plaintiff.

Ms H Sheung of Messrs Munros for the Defendant.