DCPI 2067 of 2009

# IN THE DISTRICT COURT OF THE

# HONG KONG SPECIAL ADMINISTRATIVE REGION

**PERSONAL INJURIES NO. 2067 OF 2009**

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BETWEEN

###### CHIANG KI CHUN IAN, a minor suing by Plaintiff

###### his mother and next friend,

###### CHOW YUEN MAN LOUISE

and

LI YIN SZE Defendant

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Coram: Deputy District Judge C. Lee in Chambers

Date of Hearing: 29th October 2010

Date of Reasons for Decision: 29th October 2010

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REASONS FOR DECISION

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**I. INTRODUCTION**

1. On 8th October 2010, after two days’ trial on both liability and quantum, judgment was given for the Plaintiff who is a minor suing by his next friend. In that judgment, costs order nisi was made that the Defendant do pay the Plaintiff costs of the action (with all costs reserved, if any) to be taxed if not agreed.
2. By a letter dated 11th October 2010 from the Plaintiff’s solicitors, they asked for costs to be awarded on common fund basis on the ground that the Plaintiff is an infant. As directed by me, they took out summons on 21st October 2010 asking for variation of the scale of costs to common fund basis.
3. Ms. Koon, solicitors for the Plaintiff advanced two points. Firstly, costs to be awarded after trial or settlement of an infant’s claim should normally be on a common fund basis: *Ma Ka Lai v Katafygiotis Lamrpos HCPI 982/2001 per Hon. Seagroatt J dated 21st January 2003; Aqsa Rama v Tsui Luk Pui DCPI 68/2007 per HH Judge Wong dated 24th September 2007.*  Secondly, special or unusual feature must exist before the Court would grant costs on common fund basis: *Lily Tse and others v Incorporated Owners of Albert House and others HCPI 828/1997 per Hon Suffiad J dated 24th February 2000; Jackson Ivan O’ Neil Amrol v Marisol Rivera DCPI 267/2007 per Deputy Judge Ko (as he then was) dated 27th May 2008.* She submitted that there are special and unusual features in this case such as the fact that the Plaintiff is not on legal aid and the defence raised are unsuccessful.

**II. THE LAW & DISCUSSION**

1. I now deal with her 1st limb of argument. A revisit of the authorities causes me to come to the view that two scenarios are to be distinguished. The 1st scenario is that the usual costs order in respect of an infant’s settlement or compromise is on common fund basis, so that the court can be reasonably sure of the adequacy of the settlement to the infant: *Tai Chau Yung & Anr v Ng & Anr [1999] 2 HKLRD 549*. The 2nd scenario is after trial or assessment of damages, the position remains the same that there must be special or unusual feature of the case before costs on common fund basis be granted: *Fung Wing Yee, a minor by Kam Siu Yung Sandy, her next friend: HCPI 657/2007 per Hon Suffiad J dated 30th April 2010.*
2. It is often submitted but it may not be entirely correct that whenever there are cases involving minor, the scale of costs should be on common fund basis. This is particularly so when there is settlement involving minor and hence it is believed that the position should be the same after trial or assessment of damages. In Ma Ka Lai cases, what has been said by Hon Seagroatt J is:

*“Although costs in such circumstances, after trial or settlement of an infant’s claim, would normally be on a common fund basis, in the circumstances of this relatively simple claim I decided that they should be on the party and party scale.”*

1. There was no full argument on what is the correct test for “common fund basis” in *Ma Ka Lai* cases, so as in *Aqsa Rama* case.

1. However, full contentions were made in *Fung Wing Yee* case in which Hon Suffiad J drew the distinction between 2 scenarios: (i) cases involving minor was settled or compromised and (ii) cases involving minor after trial or assessment of damages.
2. Hon. Suffiad J noted the inconsistency between Master Barnes’s passages (similar to the Plaintiff’s 1st limb of argument here) in *Wai Yin Wa by her next friend Choi Siu Yick v Laminate Enterprises Ltd HCPI 514/1997 per Master Barnes (as she then was)* and the legal commentary under para. 62/App/8 of the Hong Kong Civil Procedure.
3. In Order 62 of the Hong Kong Civil Procedure 2010 edition, under marginal note 62/App/8 there appears the following commentary :

“**When to Order common fund costs—**To justify an order for costs on the common fund basis, the case has to have some special or unusual feature (*Overseas Trust Bank Ltd v Coopers & Lybrand (a firm) & Ors* [1991] H.K.L.R.177). It has now become the general practice of the court in cases settled or compromised in favour of an infant or a patient plaintiff to award costs on common fund basis and not party and party basis as the courts needed to be sure of adequacy of settlement *(Tai Chau Yung & Anr v Ng & Anr* [1999] 2 H.K.L.R.D.549).”

1. Master Barnes’s relevant passage is as follows:-

“… After considering the authority of **Tai Chau Yung and Chu Yau v Ng Jim et al** (HCPI No. 753 of 1997), I am of the view that a court in exercising its discretion should award costs on a Common Fund basis to safeguard the interest of an aided Plaintiff who is under a disability. I am also of the view that the same approach should be adopted whether the case was compromised by settlement or concluded after a full assessment.”

1. What was said in *Tai Chau Yung’s* case was as follows :

“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. …”

1. Having summarised the passages, Hon Suffiad J made his concluding remarks as follows:-

*“From those words it can be seen that the rationale for that practice in ordering common fund costs when the case is settled or compromised when a person under disability is involved is such that the court can be reasonably sure of the adequacy of the settlement to the person under disability.*

*Seemingly therefore, between the two passages cited above, one from Master Barnes and the other from the commentary in the Hong Kong White Book, there would appear to be some inconsistency in that the view taken by Master Barnes that the approach contained in Tai Chau Yung’s cases should be adopted irrespective of whether it is a settlement or a full assessment differs with what is stated in the commentary in the Hong Kong White Book.*

*If there is such a difference, I prefer the commentary contained in the Hong Kong White Book as being a more accurate statement of that general practice which is adopted where there is a compromise or settlement involving a person under a disability.*

*However that does not mean that in an appropriate case, that discretion given to the court cannot be so exercised by the court.*

*I therefore read Master Barnes ruling in Wai Yin Wah’s case to be her exercise of discretion based on the special feature of that case, and not as of general application.”*

1. In short, after trial or assessment, it does not matter whether the case involves a minor or not because the correct test on common fund basis still remains on “special or unusual feature”.
2. This brings me to the 2nd limb of her argument. *Lily Tse* case does not avail the Plaintiff. That case shows Hon Suffiad J’s consistent views: “But where the action is tried and disposed of by judgment, the normal rule is that no special consideration is given to the fact that the plaintiff is under disability and the usual party-and party-costs are awarded”. Further, Hon Suffiad J did not agree that the fact that a plaintiff was not on legal aid or defences raised were rejected or a plaintiff was required to strict proof would bring a case within the category of “special or unusual feature.” The learned judge was unable to see the kind of special and unusual circumstances that merit costs be ordered on a common fund basis. He refused to order costs on a common fund basis accordingly.
3. In *Jackson Ivan* case, Deputy Judge Ko (as he then was) was satisfied that the special or unusual feature was established. My view is that each case depends on its own facts. In the present case, the discretionary factors that I take into account include, firstly the causes of the Plaintiff’s action on scienter or occupier’s liability were not pursued or abandoned only during the Plaintiff’s opening submissions. Secondly, save as the aspect of whether the Plaintiff has teased the dog, which is a narrow and a reasonable factual dispute, the Defendant’s litigating conduct seemed to be reasonable all along by having agreed as many matters as possible that expedite the trial hearings.
4. In a nutshell, I refuse to vary the scale of costs to common fund basis. The Plaintiff’s summons dated 21st October 2010 be dismissed with no order as to costs. I say no order as to costs because those represented the Defendant chose not to appear or assist the Court. By a letter dated 28th October 2010, they simply asked for the adjournment of hearing this simple summons on the ground of “unavailability of the handling solicitor”. This raises the

Court’s concern on the duty of an officer of the court.

(Clement Lee)

Deputy District Judge

Ms. J. Koon of Messrs Szwina Pang, Edward Li & Co for the Plaintiff.

Messrs Szeto Virginia & Co for the Defendant, was absent