Preface to this Fourth Edition

Four editions of this book in just nine years may appear excessive, but in reality it reflects the speed at which the courts are moving to reform the civil process. The number of judgments affecting civil procedure is, indeed, quite breathtaking.

The civil justice system underwent a significant reform early in 2009 and, after a brief honeymoon period, its full effects are now being felt. At a conference organised jointly by The University of Hong Kong and University College London to celebrate the first anniversary of the Reform and the hundredth anniversary of The University of Hong Kong, many insightful but provisional views were expressed as to whether the Reform was achieving its aims. A small book 'Civil Justice Reform – What Has It Achieved?' published in 2010 and edited by one of our contributors Gary Meggitt, reproduces the papers delivered at the Conference. In the Preface to that book the then Chief Justice Andrew Li said:

> 'It is now just over a year since the reforms were implemented on 2 April 2009 … As has been anticipated, it will take some time for the reforms to fully settle in. The key to the success of the reforms is a change in culture in the conduct of dispute resolution both on the part of judges and the profession. The necessary change is that contemplated and directed by the underlying objectives in the Rules; increasing cost effectiveness, ensuring expedition, promoting a sense of reasonable proportion and procedural economy, ensuring fairness, facilitation of settlements and ensuring the fair distribution of limited court resources. The change in culture would make the process less adversarial and more co-operative. It must, however, be remembered that the rules expressly provide, in giving effect to the underlying objectives, the court shall always recognise that the primary aim in exercising its powers is to secure the just resolution of disputes in accordance with the substantive rights of the parties … Since the reforms were implemented, progress has been made in achieving the necessary change in culture but we have some distance to go.'

A year has passed since this was written and we now have a new Chief Justice, Mr Justice Geoffrey Ma, a new Chief Judge of the High Court, Mr Justice Andrew Cheung and a new Registrar of the High Court, Mr Lung Kim Wan. There is an air of determined optimism amongst judicial officers that much can be achieved and there can be no doubt that the reforms are having notable effect. In particular the Registrar and Masters

The Civil Justice Reform 2009

In response to the perceived need for a significant overhaul of the civil litigation system in Hong Kong, in 2000, the Chief Justice set up a Working Party on Reform of the Civil Rules and Procedures of the High Court. The purpose of the Working Party was to consider and make recommendations as to what changes should be made to the civil justice system in Hong Kong with a view to ensuring and improving access to justice at reasonable cost and speed. The Working Party published its final report in March 2004 and its recommendations were accepted by the Chief Justice. New Rules have now been enacted (with some underpinning by necessary changes to the High Court and District Court Ordinances) to give effect to those recommendations. At the same time, significant amendments (of an almost identical nature) have been made to the District Court Rules. These amendments came into effect as from 2 April 2009.

Selective amendment rather than enactment of entire set of new rules

In reaching its recommendations, the Working Party paid close attention to the English Civil Procedure Rules enacted in 1998 to implement the 'Woolf Reforms', analysing their perceived achievements and deficiencies. The new English Rules formed an entirely new code, but the Hong Kong Working Party concluded that, in the light of local circumstances, it would be preferable to adopt a series of selective reforms by amendment to our existing Rules rather than by introducing an entirely new code. This would provide for future flexibility and cause less disruption. In deciding which changes to recommend, the Working Party was guided by the objectives of improving the cost-effectiveness of the civil justice system, reducing the complexity and reducing the delays encountered in litigation. Any changes were, however, subject to the fundamental requirements of procedural and substantive justice.

The most significant changes to the Rules

The most significant changes to the Rules include:

(a) introducing underlying objectives;

(b) introducing 'cost-only proceedings' to enable parties; who had reached a settlement on the substantive issues as well as the liability for costs but could not agree on the amount of costs, to have the relevant costs taxed;

(c) reducing the modes of commencement of actions to two: writs and originating summonses save where provided otherwise by statute;

(d) introducing a scheme for making admissions in claims for the payment of money;

(e) requiring defendants to plead substantive defences rather than plead mere denials;

(f) requiring that pleadings, witness statements and experts' reports be verified on oath;

(g) introducing sanctioned offers and sanctioned payments both in respect of liability, quantum and costs;

(h) rendering more effective the system of case management by introducing court determined timetables for the hearing of civil cases, including the submission of questionnaires and the holding of case management conferences and pre-trial reviews and the setting of milestone and non-milestone dates; further, case management summonses have replaced summonses for directions;

(i) empowering the court to make orders of its own motion;

(j) extending the scope of pre-action and pre-trial discovery from personal injuries cases to all cases;

(k) reducing the number of interlocutory applications and providing for paper resolution of many such applications;

(l) extending the court's wasted costs jurisdiction to barristers;

(m) requiring leave for many interlocutory appeals from the decision of a judge of the Court of First Instance to the Court of Appeal;

(n) providing for many interlocutory appeals to be dealt with as 'paper appeals'; and

(o) improving the system of taxation of costs.

The underlying objectives

The English Civil Procedure Rules introduced 'overriding objectives' to which the courts were directed to give effect when exercising their procedural powers and discretions. The Hong Kong Working Party, however, concluded that since the Rules would be revised by selective amendment rather than by way of introducing an entirely new code, it would not be appropriate to introduce overriding objectives but rather to identify 'underlying objectives'. These objectives are applicable to proceedings in both the High Court and District Court. Accordingly, the Rules now provide that their underlying objectives are:

(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the court;

(b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;

CHAPTER 13

Settlement

Introduction

The vast majority of civil claims are concluded without a trial. Settlement or compromise of claims is the primary means of concluding most civil actions. If a dispute is to be resolved by the court, there will inevitably be a loser. But settlement allows the parties to conclude the dispute on terms to which they all agree, thereby resulting in a win-win outcome for both parties. In adjudicating the claim, the court focuses on the rights, obligations and remedies, and can only grant judgment within the confines of issues raised in the pleadings. But in settlement, the parties may focus on their broader interests and can agree on terms which fall outside the bounds of their dispute (for example, agreeing to continue to do business together on particular terms). Court hearings and judgments are generally open to the public, but the parties can agree to keep the settlement terms confidential. Other advantages of settlement in lieu of a trial include the saving of huge legal costs and valuable time of the parties and of the court, and avoidance of emotional stress associated with the litigation. Hence, settlement is seen as an object worthy of promotion, and one of the important underlying objectives introduced under the Civil Justice Reform is to 'facilitate the settlement of disputes'.[1] Negotiation for settlement of claims is, therefore, a central feature of a litigation lawyer's life.

Negotiation for settlement may be conducted by the parties or their legal representatives with or without the assistance of a third party (such as a mediator or conciliator). It is a complex process, and it requires one to engage in complex forms of interaction with another person. It is case-sensitive, party-sensitive, lawyer-sensitive and stage-sensitive. Different styles, strategies and methods may need to be adopted in different cases or in difference stages of a case.

In order to be an effective negotiator, one should acquire five 'Skills or Mentalities', namely, analytical skill, communication skill, influencing skill, flexibility and creativity. Moreover, one needs to bear in mind five 'Knows', namely, know the problems and issues involved; know the

1 RHC and RDC O 1A r 1(e).

strength and weakness of one's case; know the client's needs, interests and constraints; know the other party's needs, interests and constraints; and know the law and procedure governing negotiation or settlement. On top of that, one must not overlook the preparation required. In particular, before the settlement negotiation one must first explore different plausible options available; establish goals and set targets; formulate plans and strategies; and in the course of settlement negotiation, one must constantly review and, if necessary, revise the same.

This chapter will focus on the procedural aspects of settlement.

Procedural Safeguards

Ostensible authority to compromise

If the negotiations are conducted through lawyers, in general one need not enquire whether the opponent's lawyer is authorised to settle on behalf of his client. This is because the solicitor (or the counsel) retained in an action has ostensible authority to compromise the suit so long as the compromise does not involve matters collateral to the suit.[2] However, the implied authority of the lawyer as between himself and his client is not necessarily as extensive as the ostensible authority of the lawyer vis-a-vis the opposing litigant.[3] The lawyer should, therefore, in general avoid compromising an action on behalf of his client without the latter's express consent.

2 *Waugh v HB Clifford & Son Ltd* [1982] Ch 374, [1982] 1 All ER 1095, [1982] 2 WLR 679, CA (Eng). A compromise does not involve 'collateral matter' merely because it contains terms which the court could not have ordered by way of judgment in the action. The matter is not collateral to the action unless it involves extraneous subject matter.

3 Brightman LJ gave the following example in *Waugh v HB Clifford & Son Ltd* (above): 'Suppose that a defamation action is on foot; that terms of compromise are discussed; and that the defendant's solicitor writes to the plaintiff's solicitor offering to compromise at a figure of £100,000, which the plaintiff desires to accept. It would in my view be officious on the part of the plaintiff's solicitor to demand to be satisfied as to the authority of the defendant's solicitor to make the offer. It is perfectly clear that the defendant's solicitor has ostensible authority to compromise on behalf of his client, notwithstanding the large sum involved. It is not incumbent on the plaintiff to seek the signature of the defendant, if an individual, or the seal of the defendant if a corporation, or the signature of a director. But it does not follow that the defendant's solicitor would have implied authority to agree damages on that scale without the agreement of his client. In the light of the solicitor's knowledge of his client's cash position it might be quite unreasonable and indeed grossly negligent for the solicitor to commit his client to such a burden without first inquiring if it were acceptable. But that does not affect the ostensible authority of the solicitor to compromise, so as to place the plaintiff at risk if he fails to satisfy himself that the defendant's solicitor has

Without prejudice rule

There is a recognised public policy of encouraging litigants to settle their differences rather than litigate them to a finish. To facilitate settlement, the litigants are encouraged fully and frankly to put their cards on the table during negotiations, without fear that anything that is said[4] in the course of such negotiations may be used to their prejudice in the future. The 'without prejudice' rule has, therefore, been developed by the court to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. The application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.[5] However, a competent solicitor should always caption

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sought the agreement of his client. Such a limitation on the ostensible authority of the solicitor would be unworkable.'

4 Including the failure to reply to an offer or an assertion made by the other party.

5 For an authoritative modern statement of the principles, see Lord Griffiths' speech in *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280, [1988] 3 All ER 737, [1988] 3 WLR 939. In that case, the House of Lords held that in general the 'without prejudice' rule made inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement; and that admissions made to reach settlement with a different party within the same litigation were also inadmissible whether or not settlement was reached with that party. The rule was also held to apply to protect those negotiations from being disclosed to third parties. The general rule as stated above is, however, subject to well-recognised exceptions. In *Unilever plc v The Procter and Gamble Company* [2001] 1 All ER 783, [2000] 1 WLR 2436, CA (Eng), Robert Walker LJ took the opportunity to set out some of the more important exceptions to the general rule in which it would be permissible to refer to without prejudice correspondence. For example, without prejudice communications may be admissible for deciding whether a compromise was concluded; whether to set aside a concluded compromise on the ground of fraud or misrepresentation; whether there is an estoppel by a clear statement made in the negotiation; whether the delay was excusable in an application to stay the action for want of prosecution; whether there is any abuse in the use of without prejudice negotiation as a cloak for perjury, blackmail or other 'unambiguous impropriety'. As explained in *Family Housing Association v Michael Hyde & Partners* [1993] 1 WLR 354, CA (Eng), the willingness of parties to discuss the merits of their case with a view to settlement, without fear of any concessions made being used later as admission of liability, which underlay the policy excluding the use of without prejudice correspondence at trial or during post-trial proceedings, would not be inhibited by the disclosure of such evidence on an application to strike out for want of prosecution, since the correspondence would not be available at any subsequent trial and that the prevailing need on applications to strike out is for evidence relevant to the question of delay and the conduct of the parties to be available. In *Wu Wei v Liu Yi Ping* [2009] HKCU 126 (HCA 1452/2004, 30 January 2009, unreported) (Deputy