SETTLEMENT WITHOUT TEARS: PRACTICAL ADVICE FOR NEGOTIATING SETTLEMENTS OF CIVIL CLAIMS

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Introduction

The vast majority of civil claims are concluded without trial. Settlement or compromise of claims is the primary means of concluding most types of civil actions. Hence, negotiation for the settlement of claims is a central feature of the litigation lawyer’s life. Negotiation is a complex process, and requires one to engage in complex forms of interaction with other people. It is case-sensitive, party-sensitive, lawyer-sensitive and time-sensitive. Different styles, strategies and methods may need to be adopted in different cases or in different stages of a case.

In order to be an effective negotiator, one should acquire five “skills or mentalities”, namely, analytical skills, communication skills, influencing skills, flexibility and creativity. Moreover, one needs to bear in mind five “knows”, namely, know the problems and issues involved; know the strength and weakness of one’s case; know one’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. Particularly 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. The purpose of this article is to focus solely on certain practical procedural aspects of settlement negotiation.
Some Practical Advice on Procedural Safeguards

Negotiation in the Absence of Lawyers

If a client wishes to conduct settlement negotiations with the other party in the absence of lawyers, a lawyer may explain and discuss with the client the desirability of the presence of lawyers. However, one must accept that in some cases the presence of lawyers may be counter-productive. In any event, lawyers cannot insist on their presence (and charge their client for it). In such cases, the lawyer needs to at least explain to his or her client the risk of the other party making use of the admissions or other contents of the negotiations in the proceedings, unless the negotiation is conducted on a without prejudice basis. However, explanation is not enough. The lawyer should also write a letter captioned “without prejudice” to the other party’s solicitors putting on record that all negotiations between the parties on the subject matter are on a without prejudice basis. One cannot expect a lay client to effectively explain to the other lay party at their meeting the legal concept of without prejudice negotiations.

But that may still be insufficient. In law, a party who is sui juris may itself compromise an action without the knowledge or intervention of its solicitor on record.¹ A recognised exception to the admissibility of “without prejudice” communication is that the content of the communication may be referred to in court to ascertain whether an agreement has been reached.

Hence, if the lay client does not wish to conclude any settlement without first seeking his or her lawyer’s advice on the terms thereof, the lawyer should put on record to the other side that all such negotiations are “subject to contract”. In particular, if one’s client has a strong case, even if there may not yet be any planned negotiations, one should, subject to one’s client’s consent, write a standard letter to the other side at the outset making it clear that any future discussions for settlement between the parties on the subject matter of the proceedings are to be on a “without prejudice” and “subject to contract” basis. This may avoid one’s

¹ The Hope (1883) 8 PD 144, CA.
client facing a trumped up defence by an unscrupulous defendant who
may allege that somehow, for example, when they met the parties dis-
cussed and eventually reached an agreement to settle the action. In Kwan
Siu Man Joshua v Yaacov Ozer, an agreement alleged to have been orally
made by the parties at a 10-minute chance meeting outside the lift lobby
to settle the proceedings was accepted by the trial judge and confirmed
by the Court of Appeal. The appellant (defendant) in that case was
only vindicated when the Court of Final Appeal eventually allowed his
appeal. One obviously does not wish to see one’s client going to such
expense to obtain justice!

**Negotiation Through Lawyers**
The advice mentioned above should apply even if the negotiation is to
be concluded by and through lawyers, in particular if one is dealing with
an unscrupulous lawyer on the other side.

In case lawyers are given instructions to negotiate settlement on be-
half of their lay client, they should first obtain clear instructions as to
whether they are authorised to conclude the settlement. One should be
especially aware that a solicitor’s ostensible authority to settle proceed-
ings can be wider than his or her express or implied authority to settle
(see Waugh v HB Clifford & Son Ltd). Lawyers should therefore avoid
getting into a situation where their opponent may bind their client to a
settlement agreement made by them by relying on the lawyer’s osten-
sible authority, while their client may sue them for acting outside their
actual authority. For safety’s sake, one should therefore always obtain
clear written instructions from one’s client and caption all negotiation
communications “without prejudice and subject to contract” (unless one
really wishes to conclude a settlement by simply exchanging terms
through correspondence or through oral communication).

**Use of Open Correspondence**
During without prejudice negotiations, one may wish to state certain
facts or versions of events to advance one’s case. If one wishes to rely on

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3 [1982] Ch 374 CA.
those facts or versions at trial when settlement fails, one may be prohibited from doing so as the privilege attached to without prejudice communications cannot be waived by one party alone. One may of course try to argue that some parts of a letter, though captioned “without prejudice”, are not in reality directed to settlement and are therefore not privileged (see Unilever Plc v Procter & Gamble\(^4\) for a useful summary of the principles involved). But if one wishes to avoid any trouble or uncertainty, the most sensible course is for one to set out those facts at the outset in open letters while stating one’s settlement proposal in the accompanying or ensuing “without prejudice” correspondence.

Some Practical Advice on Creating Climate or Exerting Pressure for Settlement

**Maximise the Prospect of Settlement by Exerting the Right Pressure**

In general, one may achieve a better settlement at the time when one has the upper hand in the proceedings. Hence, one may maximise the prospect of settlement by exerting the right pressure, for example, by taking some interlocutory applications for Further and Better Particulars or for Interrogatories in appropriate cases. However, one must not exert too much pressure as this may be counter-productive.

**Payment Into Court**

An effective method to force a settlement, if one is acting for a defendant,\(^5\) is to make a payment into court. One must remember to include the likely interest that may be ordered by the court on the principal sum up to the date of payment in when one advises one’s client on the appropriate sum to pay in.\(^6\) If the case concerns different causes of action or one’s client has already made an interim payment, one should follow the rules in Order 22, rule 1(4) and Order 29, rule 16 and make clear in the Notice of Payment Into Court what is being covered by the payment in.

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\(^4\) [2000] 1 WLR 2436, CA.

\(^5\) This includes a plaintiff facing a counterclaim.

\(^6\) See O 22, r 1(8), Rules of the High Court.
One obviously does not wish to rely on arguments that though the Notice of Payment Into Court is defective, it is not fatal, so that the court should still take into account the defective payment in when deciding who should bear the legal costs. This happened in *The Prudential Mall Ltd v P H Shek Ltd*\(^7\) where the defendant who filed a Notice of Payment Into Court not in compliance of Order 29, rule 16 eventually obtained justice only when the case went all the way to the Privy Council.

*Calderbank Offer*

If defendants can protect themselves on costs by a payment into court, any purported Calderbank offer will be ineffective.\(^8\) Hence, in general, one must not rely on a Calderbank offer if one is faced with a monetary claim. However there can be exceptions. If a defendant, for example, has been adjudged liable but the assessment of damages is postponed to another occasion, in case that defendant wishes to preserve his or her right of appeal on liability, he or she may make an effective Calderbank offer on quantum.\(^9\)

**Some Practical Advice on Choosing Settlement Methods**

*Useful Discussions on Various Settlement Methods*

Slade J’s decision in *Green v Rozen*\(^10\) contains very useful discussions on the legal effect and suitability of different settlement methods. One should always remember that the appropriateness of a particular settlement method to a particular case depends largely on the nature of the proposed settlement terms. One practical tip is to ask oneself: “What may be done if there is default in the course of carrying out the settlement terms?” Careful consideration should then be given to the steps which can be taken under each of the settlement methods for enforcing the compromise in case default occurs.

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7 [1993] 1 HKLR 195 PC.
8 O 22, r 14.
9 See the recent English Court of Appeal decision in *Hobin v Douglas (No 2)*, *The Times*, 29 December 1998; [2000] PIQR Q1.
10 [1955] 1 WLR 741.
Settlement by Contract Without a Court Order

If the parties settle by way of contract without a court order, the settlement may have the effect of discharging the original cause of action and the court may have no jurisdiction in the pending proceedings either to enforce the settlement or to revive the original cause of action. One may be left only with a remedy of suing on the settlement contract by way of fresh proceedings, as in *Green v Rozen* and *McCallum v Country Residences Ltd.* One may, however, note that the Australian and Canadian courts have refused to follow the Rozen / McCallum approach but allowed the court in the original proceedings, in suitable cases, to enforce the compromise summarily to avoid delay and multiplicity of actions. They say the matter is not one of jurisdiction but rather one of discretion.

If one is anxious to resolve this interesting point of law as to whether the Hong Kong court would depart from the English approach and follow the Australian or Canadian approach, one could do no better than to settle by way of contract and then try to enforce the settlement contract in the original action without issuing any fresh proceedings. Otherwise, one should try another settlement method.

One may also note that if the settlement agreement is drafted on terms that the agreement to compromise the action is given in return for the performance (instead of the promise *per se*) of the settlement terms, then the cause of action will not be discharged until the terms are performed. The non-defaulting party therefore has an option of either suing on the settlement agreement or continuing with the action. But as explained by Godfrey J (as he then was) in *Lam Fung Ying v Ho Tung Sing*, the non-defaulting party may have a practical dilemma in case the existence or validity of the agreement is in dispute. If it sues on the settlement agreement in a fresh action, the other side may defend the

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11 [1965] 1 WLR 657 CA.
12 See, eg *Roberts v Gippsland Agricultural and Earth Moving Contracting Co Pty Ltd* [1956] VLR 555 (Full Court of the Supreme Court of Victoria); *Darling Downs Investments Pty Ltd v Ellwood* (1988) 80 ALR 203 (Federal Court of Australia); *Childs v Childs Estate* (1987) 45 DLR (4th) 282 (Saskatchewan Court of Appeal).
13 [1993] 2 HKC 28 CA.
claim by challenging the existence or validity of the agreement. If it
continues with the original cause of action, as held in that case, this may
amount to an estoppel barring it from suing on the settlement agree-
ment later.

Given the above-mentioned difficulties, one should think twice as
to whether to advise clients to settle by way of contract without a court
order.

Tomlin Order
A settlement may take the form of a consent order along the following
lines: "It is ordered that all further proceedings in this action be stayed
upon the terms of settlement agreed between the parties set out in the
schedule hereto except for the purpose of carrying this Order and the
said terms into effect for which purpose the parties are to be at liberty to
apply". This is known as a Tomlin Order. The name derives from Tomlin J
who prescribed the practice in an early English *Practice Note* to give
effect to compromises in actions. Statutory recognition is now given
under Order 42, rule 5A(2)(b)(iii). One notable advantage of a Tomlin
Order is that unlike settlement by agreement, the action is still "pend-
ing" and alive so that upon default of the party, the other party does not
need to start a fresh action but may apply to the court to enforce the
agreed terms.

A Tomlin Order is most appropriate if the settlement involves terms
other than monetary payment and terms going beyond the ambit of the
original dispute. As the agreed terms set out in the schedule of the Tomlin
Order do not technically form part of the court's order, one may include
unusual or complicated terms of settlement which will not generally be
ordered by the court. Moreover, the parties need not exhibit or set out
all the settlement terms in the schedule. Hence, the parties may also
keep certain settlement terms secret even from the court merely by stat-
ing in the Tomlin Order that the settlement terms are set out in, say, a
letter signed by the parties on a certain date.

14 [1927] WN 290.
15 See *EF Philips v Clarke* [1970] Ch D 322 (Goff J).
16 See *Horizon Technologies International Ltd v Lucky Wealth Consultants Ltd* [1992] 1 WLR 24, PC.
One should, however, note that although one need not start a fresh action to enforce a compromise embodied in a Tomlin Order, one still needs to apply to the court in the original action for an order for enforcement. In exceptional cases, the court may refuse to enforce any terms set out in the schedule (eg as being unconscionable).

Example
Sometimes one needs to be creative and apply practical common sense in devising a suitable settlement method. For example, if A sues its former general manager B for misappropriating HK$5 million of funds and eventually they agree to settle on terms that B agrees to pay HK$3 million by 10 monthly instalments, plus an undertaking by B not to conduct business with 10 named customers of A. The lawyer acting for A may be tempted to use a Tomlin Order as the settlement terms include an undertaking by B which is extraneous to the original dispute. However, one must not forget that the fact underlying the original claim reveals that B may probably be an unscrupulous character who may have no intention of honouring the terms of the settlement. Hence, a Tomlin Order may not provide sufficient deterrent for B to comply with the settlement terms, and the remedy of an injunction to enforce the undertaking may not be effective in practice (eg B may use an off-shore company to deal with the 10 named customers, rendering it difficult, if not impossible, for A to gather sufficient evidence to enforce the injunction). The lawyer acting for A may therefore consider negotiating a settlement on the basis of A obtaining judgment by consent for the full sum of HK$5 million with an agreement to stay the execution of the judgment so long as B complies with all the settlement terms.

Stay of Proceedings vs Dismissal or Discontinuance
If one's intention is to put an end to the proceedings, one should avoid using words in the consent order such as “proceedings are stayed”. A stayed proceeding is still alive technically and the stay may be lifted by the court in exceptional cases. A third party may also seek leave to join

17 See Green v Rozen and Tsang Iu Hung v Tsang Tak Wah [1993] 2 HKC 471 (Godfrey J).
as a co-defendant even if the plaintiff and the defendant have already fully settled the action on terms that all the proceedings and causes of actions are “stayed”. One should instead have the action “dismissed” or “discontinued”.

Some Practical Advice on Agreeing Settlement Terms

Consider Consequences in the Event of Default

One should always consider and discuss thoroughly with one’s client the question as to whether the client can comply fully with the proposed settlement terms. If there is any possibility that one’s client may not be able to fulfil his or her obligation under a particular proposed term (as a result of, say, oversight or a plausible change in circumstances), one should either not agree to such a term or ensure that one’s client can accept the consequence of any default on that term. In particular, one should avoid, if possible, agreeing to a settlement whereby the other party is to pay one’s client the agreed settlement sum upon full compliance of such a proposed settlement term by one’s client on or before a particular date.

For example, in *Kai Fung Engineering Co v Plasteel Hong Kong Ltd*, the parties agreed to settle by way of a consent order that judgment be entered for the plaintiff in the sum of HK$40,000, to be paid forthwith upon the plaintiff complying his undertaking to return to the defendant 5,000 lengths of steel rods as per sample kept by the plaintiff’s solicitors within 14 days of the consent order. The sample rod was in a shiny and clean condition while the steel rods being returned were of a “rough surface” as a result of dust accumulating on the greasy surface of the rods. The defendant refused to accept the greasy rods tendered by the plaintiff and refused to pay the judgment sum. The plaintiff’s application for leave to enforce the judgment by levying execution on the defendant was dismissed by Rhind J with costs on the ground that the plaintiff had not complied with his undertaking in the first place.

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18 See *ROFA Sport Management AG v DHL International (UK) Ltd* [1989] 1 WLR 902, CA.
Similarly, in Ng Yiu Ming v Leung Yee, the proceedings involved a dispute over the use of a trade mark name. The parties eventually agreed to settle by way of a consent order where the plaintiffs undertook, inter alia, to add distinguishing words within one month to their signs, advertising materials, etc bearing the disputed trade mark name with the distinguishing words being roughly the same size as the disputed trade mark name; and upon the plaintiffs' full compliance of this undertaking (plus another term), the defendants “shall simultaneously pay the sum of HK$6.5m” to the plaintiffs. The plaintiffs then took steps to add the distinguishing words and received advice from their solicitors that the alterations were in order in complying with their undertaking. The defendants disputed and the plaintiffs sought declarations that they had fully complied with their undertaking and an order requiring the defendants to pay the HK$6.5 million. Deputy Judge Wesley Wong decided that the plaintiffs were not entitled to have the payment of HK$6.5 million and refused the plaintiffs’ applications with costs on the ground that the distinguishing words added to some of the signboards were not roughly of the same size as the disputed trade mark name.

Hence, if one does not wish to be caught in the impasse that the plaintiffs faced in the above-mentioned examples, one may perhaps try to negotiate a settlement on terms that the obligation to pay the full settlement sum not be made dependent on the full compliance of the plaintiffs’ undertaking (for example, on terms that in case of the plaintiffs’ default, the plaintiffs shall still be entitled to the settlement sum, but shall pay the defendants an agreed sum as liquidated damages). Alternatively, one may try to insert a clause to the effect that if the plaintiffs are in default of their obligations, the defendants shall give written notification to the plaintiffs specifying the non-compliance whereupon the plaintiffs shall be allowed to remedy the breach within a specified period.

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20 Unreported, HCMP 1730/99, 8 November 1999, Deputy Judge Wesley Wong.
21 For the avoidance of doubt, the author wishes to make it clear that no criticism on the plaintiffs' legal representatives is intended as the author was not privy to the advice given to the lay clients and the negotiation process underlying the eventual settlement in these two cases. The settlement terms might well have been the best that the plaintiffs could secure in the circumstances.
In case one is caught in the aforesaid impasse, that may not necessarily mean that the plaintiffs are left with no remedy against the defendants. One may explore the possibility of seeking an extension of time under Order 3, rule 5 for the compliance of the plaintiffs' obligations under the consent order. For example, in the second example, subsequent to Deputy Judge Wesley Wong's decision, the plaintiffs applied for and were granted an extension of time by Beeson J to comply with their undertaking, though the plaintiffs were ordered to pay the defendants' costs for the application. The Court of Appeal upheld Beeson J's decision to extend the time under Order 3, rule 5, though penalising the plaintiffs further on costs by changing Beeson J's original costs order from one on a party-and-party basis to one on an indemnity basis. The Court of Appeal, upon review of a number of English cases, explained that a consent order may evidence a real contract between the parties, in which case the court has no power to set it aside or vary its terms. On the other hand, a consent order may only mean that the parties to it do not object to the order being made, and the court can alter its terms. But even where a consent order is founded on a true contract, unless it is plain that time is intended to be of essence or that the jurisdiction of the court under Order 3, rule 5 to extend time is ousted by agreement, the court can exercise its discretion to grant extension of time. On the facts of that case, the Court of Appeal accepted that the consent order contained a true agreement but on a proper construction of the agreement (praying in aid the "liberty to apply" clause in the consent order), the court still retained its jurisdiction to extend the time for the plaintiffs to comply with the undertaking.

Potential Claims Between the Parties
One should consider and discuss with one's client the possibility of the existence of potential claims between the parties and whether the settlement is also intended to put an end to such claims. If a claim, though not raised in the proceedings, could legitimately have been raised in the same action, a settlement (with or without a court order) between the

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22 Leung Yee and Another v Ng Yiu Ming and Another [2001] 1 HKLRD 309, CA.
parties may result in any fresh action on such a claim being struck out on ground of abuse of process.23

Claims against other persons
In case a plaintiff may have a related claim against a third party, one may need to consider whether the settlement is also intended to discharge the liability of the third party, even though he or she is not a party to the settlement. For example, if A sues B alone in tort and subsequently compromises the action for a sum less than the amount of damages claimed in the proceedings “in full and final settlement and satisfaction of all claims by A against B in the proceedings”, can A subsequently sue C, a concurrent tortfeasor, in respect of the same damage?

In Jameson v Central Electricity Generating Board,24 the House of Lords held that, in general, such a settlement operates to discharge the liability of the concurrent tortfeasor, even though he or she is not a party to the original proceedings or the settlement. The basic principle is that damage is an essential part of the cause of action in tort and if that damage has already been satisfied by one of the alleged tortfeasors, the cause of action is destroyed. The question is not whether the plaintiff has received the full value of his or her claim, but whether the sum which the plaintiff has received in settlement of it was intended to be in full satisfaction of the tort. Hence, the critical question is whether the claim has in fact been satisfied by the compromise and the answer to it will be found by examining the terms of the settlement agreement and comparing it with what has been claimed. In the judgment, Lord Hope said:

"In the typical case the plaintiff agrees to accept the sum which the defendant is willing to pay in full and final settlement of his claim. ... the agreement brings to an end the plaintiff's cause of action against the defendant for the payment of damages. The agreed sum is a liquidated amount which replaces the claim for an illiquid sum. The effect of the compromise is to fix the amount of his claim in just the same

23 See the recent House of Lords decision in Johnson v Gore Wood & Co [2001] 2 WLR 72.
24 [2000] 1 AC 455, HL.
way as if the case had gone to trial and he had obtained judgment. Once the agreed sum has been paid, his claim against the defendant will have been satisfied ... I think that it follows that, if the claim was for the whole amount of the loss for which the defendant as one of the concurrent tortfeasors is liable to him in damages, satisfaction of the claim against him will have the effect of extinguishing the claim against the other concurrent tortfeasors." 25

However, His Lordship recognised that there might be cases where the terms of the settlement, or the extent of the claim made against the tortfeasor with whom the plaintiff has entered into the settlement, will show that the parties have not treated the settlement as satisfaction of the full amount of the claim for damages: "In the same way a judge, in awarding damages to the plaintiff in his action against one concurrent tortfeasor, may make it clear that he has restricted his award to part only of the full value of the claim:" 26.

If the settlement does not represent a full satisfaction of the plaintiff’s claim, and if A does continue to have a claim against C notwithstanding the compromise with B, then under s 3(3) of the Civil Liability (Contribution) Ordinance (Cap 377) C will be entitled to seek contribution against B notwithstanding that B is no longer liable to A by virtue of the compromise. In other words, if A is allowed to sue C, this will expose B to the risk that he or she will have to make a further payment – indirectly, as a result of a contribution claim brought against him by C – in respect of the same damage. The question is: would it be inconsistent with the "final" settlement which A has made with B for A to pursue a course of action (by suing C) which will result in B having to make a further payment by way of contribution? That was a point addressed in obiter by Lord Clyde in Jameson v Central Electricity Generating Board:

"In principle it seems to me that where settlement is sought with one alone, where the others are not involved in the proceedings, the intention of the parties should usually be taken to be that they are

25 Ibid., at 474.
26 Ibid., at 474H.
achieving a complete termination to any claims by the creditor and a complete freedom for the future for the debtor. On the one hand the creditor is being fully compensated for the value of his claim so as to exhaust any right to pursue it further in any direction. On the other hand the debtor is being discharged from any possible liability in contribution so that the creditor would be in breach of the agreement were he to sue a third party and create such a liability. Particular circumstances and particular terms in the agreement may obviate such consequences, but, where the matter has been left open and unclear, it seems to me that those are the consequences which should follow upon the settlement of one co-obligant in a joint and several obligation which has been carried out in the absence of any other co-obligant.\textsuperscript{27}

But that approach is not reflected in the speech of any other member of the House of Lords. In \textit{Heaton v AXA Equity \\& Law Life Assurance Society Plc}\textsuperscript{28}, the English Court of Appeal, in a case involving contractual claims, refused to follow Lord Clyde's aforesaid dicta. Chadwick LJ said:

"The question, in each case, is what did A and B intend should be the effect of the agreement which they made. And, given that, in any case where A settles for less than the full amount of his claim against B, A and B will have opposing interests in relation to the effect of the agreement on A's right to pursue C, it seems to me wrong in principle to approach that question on the basis that (in the absence of clear words to the contrary) they must be taken to have intended that the agreement would favour the interests of one rather than the interests of the other.\textsuperscript{29}\"

Having regard to the terms of the settlement and the nature of the plaintiff's claims, the English Court of Appeal held in the particular circumstances of that case that the plaintiff could still pursue its cons-

\textsuperscript{27} Ibid., pp 484–485.
\textsuperscript{28} [2001] 2 Ch 173.
\textsuperscript{29} Ibid., at paragraph 62.
tractual claim against the other parties in respect of consecutive breaches of contract notwithstanding that it had reached a full and final settlement with another contractual party.

The lesson to be learned from the above cases is that one needs to be particularly careful when agreeing on the exact settlement terms in cases where the plaintiff may have a related claim against a third party. If possible, the settlement agreement should expressly spell out the parties’ intention vis-à-vis the plaintiff’s right to pursue other parties in respect of the same loss, so as to avoid unnecessary future litigation.