

HONG KONG / JUDGMENT

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Court of First Instance

DECIDED

14 March 2007

CASE / FILE NUMBER

HCMP15/2002

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bjbj HCMP 15/2002 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 15 OF 2002

IN THE MATTER OF Re: (hereinafter referred to as the Patient) and IN THE MATTER OF the
Mental Health Ordinance, Cap.136 Laws of Hong Kong

Before: Hon. Lam J in Chambers (Not open to public) Date of Judgment: 14 March 2007 Date of
Hearing: 14 March 2007

J U D G M E N T

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1. This matter came before me by way of an application under Order 80, rules 11 and 12 of the Rules of the High Court in the context of a settlement of a personal injuries claim by a person under disability in HCMP 991 of 2006. The matter had, first come before Suffiad J who made an order on 1 June 2006. By that order, the settlement agreed between the plaintiff and the defendant in the personal injuries claim was approved.
 2. However, there is some problem with regard to the use of the money in terms of the repayment of certain debts incurred by the next friend and the committee. Therefore, the matter was not fully dealt with at the hearing before Suffiad J and some further evidence was filed subsequent thereto.
 3. By way of background, perhaps I should say something about the patient and the accident. The plaintiff, whom I shall call "the patient" because he has been in a vegetative state since the accident and, according to the medical opinion, it is unlikely that he would recover from that state. The patient was an engineer. He was educated in and acquired his qualification from the City Polytechnic. In 1999, he was gainfully employed by Star TV as an engineer

earning about \$20,000 per month with housing allowance. He had a steady girlfriend and they were living together. The girlfriend was, I believe, a teacher at that time. Subsequently, she has turned to another career as an interior designer. The patient was about to be promoted in 1999. On the fateful date, he had a buffet and got some viral infection and went to the hospital for treatment. He had suffered brain damage, as a result of which he is now in the sorrowful state of being in a vegetative state.

4. The close relatives of the patient, apart from the girlfriend, was his father and also an elder brother. The elder brother has his own family. The father, before the accident, was working as a manager of a factory in Bangladesh earning about \$20,000 per month. The father was 64 years old at the time of the accident and he is now 71.
5. The patient was in his 30s. I was told that the patient was have normal life expectancy.
6. In HCMP No. 15 of 2002, Pang J made an order on 24 January 2002, appointing the father to be the committee to manage the affairs of the patient. Paragraph 3 of the order of Pang J directed the committee to file account to the court and the first of such accounts was to be filed within one month from 24 January 2003.
7. Unfortunately, no such account has been filed. This morning, I was told that this was due to oversight on the part of the committee and the committee gave this court an undertaking to file an account within one month.
8. Since the accident, the father came back to Hong Kong to attend to the patient and he has not been working. Due to lack of means, he has to live on borrowings from friends and relatives as well as banks and credit cards. As a result of that, he incurred quite a substantial amount of debts. According to the figures provided by him, the high-water mark of his indebtedness is in the tune of \$1.68-odd million. He is looking forward to having this indebtedness repaid through the money paid by the defendant in the settlement.
9. As far as the indebtedness towards the banks and credit cards are concerned, the order of Suffiad J had already catered for that in paragraph 4(c). I was told this morning that that indebtedness has been discharged out of the lump sum of \$500,000 released to the plaintiff's solicitors for that purpose. The balance had been repaid into court.
10. But apart from that, there is still an outstanding liability or indebtedness in the sum of \$1,193,000-odd. These are said to be borrowings from friends and relatives. The major issue before me this morning is whether I should permit this to be repaid out of the money paid into court for settlement.

11. Although the matter came before me by way of the application under Order 80, it seems to me to be more appropriate to deal with the application under HCMP No. 15 of 2002. In other words, this court will be exercising jurisdiction under Part II of the Mental Health Ordinance in deciding what is to be done with regard to the monies in court which, in law, belongs to the patient. The powers of the court under Part II of the Mental Health Ordinance is greater than the power of the court under Order 80.
12. Whilst Order 80 rule 12 gives the court power to deal with money recovered by a person under disability, Order 80 rule 12(3) suggests that such power is confined to payment in respect of monies paid or expenses incurred for or on behalf of, or for the benefit of, the person under disability or for his maintenance, or otherwise for his benefit, or to the plaintiff's solicitors in respect of costs. In other words, if payment out is not for these purposes, for example, if it is for the maintenance of a family member, it would not be covered under Order 80, rule 12.
13. On the other hand, the power of the court under Part II of the Mental Health Ordinance is much wider. Under section 10A of the Mental Health Ordinance, the court, in the exercise its power under Part II of the Mental Health Ordinance, can do or secure the doing of all such things as appear necessary or expedient:
 - (a) for the maintenance or other benefit of the patient;
 - (b) for the maintenance or other benefit of members of that patient's family;
 - (c) for making provision for any other person or purposes for whom or for which the patient might be expected to provide if he were not mentally incapacitated; and
 - (d) otherwise for administering the mentally incapacitated person's properties and affairs.
14. Hence, in the present context, I think it would be more appropriate for me to proceed under the jurisdiction under Part II of the Mental Health Ordinance rather than Order 80. I believe there is no objection from Mr Li for this court to proceed on that basis.
15. As I mentioned earlier, it is unfortunate that the duty to file account has not been observed. The father has been appointed as the committee and, if he has complied with the order to file account, the problem with regards to this indebtedness would have come to the attention of the court and perhaps those advising him as well at an earlier stage.
16. A committee has to bear in mind that he is appointed as a statutory agent in terms of the management of the affairs of the patient. If he has any major decisions to make which might affect the financial well-being of the estate, it would be wise for him to seek the court's sanction before taking any steps. In the present context, if a committee were minded to borrow sums of money for certain purposes and if that loan is expected to be repaid out of the estate of the patient, I think in general a committee should obtain the approval of the court before he actually borrows that money. Any loans or borrowings made without the prior sanction of the court are at the committee's own risk. In other words, a committee may

find that he is personally liable for the repayment of that loan and the court may not sanction the use of the estate's money to repay the loan.

17. This issue is particularly acute in the present case because, ever since the accident, the patient has all along been in a vegetative state and hospitalised. Apart from a modest sum of \$39,000 spent on foot reflexology on the patient between 2002 and 2003 and some consumables purchased for the patient's benefit at about \$670 per month, my understanding is that the rest of the indebtedness was spent basically on the personal maintenance of the father. Of course, I should point out, as Mr Li helpfully submits, out of the total indebtedness of about \$1.8-odd million, quite a substantial part were in fact payment of bank charges or interest. Based on the records produced by the father throughout these years bank charges or interest in the sum of about \$9,000-odd per month were incurred on average. In other words, out of an average monthly sum of \$25,000-odd, a sum of \$9,000-odd were paid in each month by the father to the bank or credit card company. The balance of about \$16,000-odd were spent basically on the father's own maintenance.
18. I must not be critical of the father because he found himself in a very difficult situation. He had to quit his job and come back to Hong Kong to look after the son who was rendered into a vegetative state. I am sure with the best of hope, the father tried to look after him as good as he can hoping that one day he might recover. Bearing in mind the age of the father at that time, it is understandable that he cannot find another job in the market, not to mention that he has to spend a lot of time in terms of looking after the son.
19. I have a lot of sympathy for the father and I accept Mr Li's submissions that there is no evidence that the father has actually squandered off with the monies he had borrowed from others. However, what remains is still a situation where, out of the sum paid by the defendant by way of settlement, a large part of those monies has gone to the bank by way of bank charges and interest and I am asked to approve a not insubstantial part of that money for repayment of the debts due to the friends and relatives. Of course, as mentioned above, most of that indebtedness was spent, apart from bank charges, on the maintenance of the father himself rather than the patient.
20. It appears that the father had not applied for public assistance in terms of maintenance for his own living. He has been living on borrowings basically, and he has no means of repaying those borrowings by himself. Of course, at the moment, all I have is information from the father because Mr Li can only act on instructions and instructions in this case only come from the father. There has not been any investigation into the father's financial position. For example, there has been no investigation in terms of the assets that the father might have been holding. Based on what I have been told, he seems to have been gainfully employed before the accident and he has a net income of \$20,000 per month. On the other hand, there are some indications that he was already in debt at the time of the accident. Amongst those indebtedness which he now asks this court to approve for repayment are a debt in the sum of \$60,000 owed to one Mr Kam and a sum of \$50,000 owed to one Mr Pun that were said to be borrowings by him prior to the accident.

21. On the whole, I am not satisfied at the moment that it is appropriate to use the monies in court for repayment of these outstanding indebtedness. I am not saying that the money should not be used in that way under all circumstances. But it seems to me that the father must take up some of the responsibility in that regard. I note that under the order of Suffiad J, a sum of \$100,000 would be paid to the father as damages for loss of society and services. It may be a little bit harsh to say to the father that he has to resort to that for repayment of this indebtedness. On the other hand, the debts were incurred by him. In particular, some were incurred by him prior to the accident.
22. I think I need more information about the background of these creditors as well as the father's finance before I can properly exercise my power under Part II of the Mental Health Ordinance as regards the repayment of these borrowings from friends and relatives. I should mention the father's livelihood in the future is secured by a monthly payment out in the tune of \$20,000. That is not a small amount of money. According to the affirmation of the father, his monthly average expenses is about \$13,000-odd. So perhaps he can find some means to repay his indebtedness out of the \$20,000 he would receive each month. But if he still wishes to pursue with the application for repayment of those indebtedness to friends and relatives out of these monies in court, I think further investigation is called for and this is a case where I would invite the Official Solicitor to intervene.
23. It also seems to me there is a conflict of interest at this point in time between the father and the estate and I doubt if it is appropriate to have the father to remain as the committee of the estate of the patient. But I do not see any urgency in the matter to be sorted out because the monies are paid into court.
24. I will therefore direct the case be referred to the Official Solicitor and ask the Official Solicitor to report to this court on the background of the father and also make recommendation to the court as regards the outstanding indebtedness.
25. As regards the further therapies and medical equipment for the patient, I know they are recommended by an occupational therapist but sometimes items recommended by therapists for the purpose of a PI claim are not really that necessary. I will ask the Official Solicitor to look into that as well and defer any decision on the purchase of those until I have a report from the Official Solicitor.
26. As regards the payment on account of expenses incurred and rendered by the brother, by the aunt and by the girlfriend, I think they are reasonable and I will approve them at this stage. So I would make an order as suggested in the affidavit but in the context of the Part II jurisdiction. I understand the solicitors will prepare a draft order for the court's approval in that regard.
27. As I said, I do not want to be critical of the father and I have every sympathy with him, but there are lessons to be learned from this case and, hopefully, the same mistakes will not be made in the future. I think it is time for the legal profession to realise, especially for those who handle personal injuries claims, whether solicitors or counsel, to come to the

understanding that when they act for a person under disability, be he a minor or a person with mental incapacity, it is perhaps advisable for them to look at the matter with the broader picture in mind. Although in general, the approach in Re CK, HCMP 1150 of 2006, 4 Aug 2006, should be adopted, there are cases, (and the present one is a good example) an application should be made to the court under Part II of the Mental Health Ordinance at an early stage in order to ensure that the affairs of the patient and the conduct of the committee will be under the supervision of the court at an early stage. This has been done in the present case but, unfortunately, there has not been any follow-up in terms of the compliance with the order, particularly the order for the filing of account by the committee.

28. I believe it is the duty of the legal advisers to explain to the committee or even in the context where no committee is appointed, a next friend who conduct the legal proceedings on behalf of a person under disability, that they are under a fiduciary duty towards the person under disability.
29. That means the court will look to them for an account of what has happened to the estate whilst they were acting as the committee or as next friend. In the handling of the affairs of a person under disability, whether in the terms of the conduct of proceedings or in the administration of the finance of the person under disability, in case of major decisions it is advisable for them to seek guidance from the court. In any event, they must always act with the best interests of the person under disability in mind.
30. It is easy to be wise with the benefit of hindsight but I think it is necessary to pass the message across that the court depends on the legal profession in guiding their clients through these difficult circumstances. Of course, faced with an accident, the next friend or the committee will be under a lot of stress, not only in terms of dealing with matters relating to litigation but also in everyday life such as the father in the present case. He has to quit his job. He has to take care of his son and, at the same time, he must be under quite a lot of emotional strain so sometimes it is easy to make mistakes. It would be doing the law a lot of service if lawyers can provide good advice and also guide the relatives with proper directions in these times of difficulties. (Discussion re sensitive information contained in judgment) (Discussion re costs)
31. For the avoidance of doubt, I make an order that the defendant will pay the plaintiff's costs of today, to be taxed if not agreed.
32. I have edited the sensitive part of this judgment to render it suitable for circulation. I grant leave for publication of this judgment. (M H Lam) Justice of the High Court Mr Andrew S Y Li, instructed by Messrs Cheung & Yip, assigned by the Director of Legal Aid, for the Plaintiff
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