Amicable Resolution Of Civil Litigation In Malaysia

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Abstract
Amicable resolution of litigation is regularly attempted by lawyers who are acutely aware of the limitations of the litigation process. They begin by issuing a Notice of Demand or Letter Before Action – by giving the other party an opportunity to make amends within a specified period. This will sometimes encourage the other party to negotiate for a settlement resulting in a compromise. Negotiations of this nature by lawyers on behalf of their clients require application of special skills resulting in a settlement satisfactory to both parties (a win-win solution). This is in fact amicable dispute resolution even if it does not fall within the strict definition of mediation. The value of this effort by lawyers is not fully appreciated, even by the client. If the negotiation fails, the claimant files an action in court as the first step on a journey of a thousand miles to obtain judgement. This journey may involve several voyages of discovery along the way. Each party will discover the strengths of his opponent's case and the weakness of his own case at almost every step along the journey to trial and judgment: these are opportunities for the solicitor to gently guide his client towards a settlement. The most common stages for consideration of settlement are: -

(a) after close of pleadings;
(b) before the first Case Management Meeting with the judge;
(c) during any case management meeting, on the advice of the judge;
(d) in the midst of the trial;
(e) at the completion of the evidence;
(f) after submissions (before delivery of judgment);
(g) after judgment and service of notice of appeal;
(h) after service of notice of cross-appeal;
(i) during the hearing of the appeal;
(j) after judgment on the appeal.

The process of settlement would be greatly facilitated if the parties agree on a common mediator or if the court appoints a mediator. A skilful mediator will be better able to bring about a win-win solution than the parties' own solicitors. The trial judge should avoid playing the role of a mediator because he may be motivated by a desire to avoid a trial. Some disputes are naturally unsuitable for mediation. The most obvious examples are public interest litigation and applications for judicial review of administrative decisions. These are areas of litigation which cry for ventilation and vindication in open court, as a matter of public policy.

I. Notice of Action

Litigation goes through several stages before judgment. The preliminary stage is the notice of action by the claimant and subsequent correspondence. Whenever a solicitor receives instructions from a client to make a claim, the standard practice is to send a Notice of Demand or a Notice of Action to the potential defendant. The client may specifically instruct the solicitor to issue a notice or the solicitor may advise the client that it would be wise to serve a notice before proceeding to file the writ. A seasoned solicitor will not, in practice, rush to file the writ although he may earn a higher fee for the writ than for the notice.

The length and style of the notice may vary from one solicitor to another. However, all such notices have a common purpose, that is, to inform and intimidate or to inform and induce the recipient to comply with the demand or to negotiate a settlement. The effect the notice has on the recipient will vary according to the style of the notice and the temperament of the recipient. Generally speaking, a detailed statement of the background of the facts giving rise to the claim (instead of a simple demand) will make an impression on the recipient that the claimant is serious and is armed with the evidence to support his claim. This may induce him (the recipient) to offer settlement or to negotiate for an amicable settlement. (Such settlements are not included in the statistics of ADR)

However, the notice will end with a standard threat that if the recipient does not respond favourably within the stipulated period of time, the solicitor will proceed to file the action in court. This may induce one recipient to negotiate out of fear and another to resist the claim out of anger, if he does not take legal advice. If he does take legal advice, the advice may take the following forms:

a) If the claim is without any legal foundation or is weak, "Dispute the claim and resist it" or "Ignore the claim. *Do not commit yourself with a reply.* Wait for the service of the writ and the statement of claim. Then, file a defence or make an application to strike it out as being frivolous". (Most clients will not follow this advice!)

b) If the claim appears to have a reasonable chance of succeeding based on the allegation of facts and the applicable laws:

"*Commence negotiations* on a 'without prejudice' basis". Negotiations will then be conducted with a condition that the claimant must not file proceedings in court until "negotiations break down".

If a settlement is not reached within a reasonable time the claimant will terminate the negotiations and file the writ.

II. Writ and Pleadings

If a party is served with a writ and statement of claim as the defendant in a writ, he will normally take advice from a solicitor. The solicitor will enter "appearance" to prevent judgment in default. He will then study the claim and take instructions on the pleading and advise the defendant on his prospects of defending.

If the claim is well founded, any self-respecting solicitor will *advise his client to negotiate for settlement*. If the client agrees, the solicitor will then write to the plaintiff's solicitor asking if he is agreeable or amenable to negotiations. The negotiations will proceed on the undertaking of the plaintiff's solicitor not to apply for judgment in default of defence and to agree to give time to the defendant's solicitor to file defence out of time if a settlement is not reached within a specified period of time.

Even if the defence has been served, there is *room for negotiation*. Even if steps have been taken to prepare for trial, the parties are not precluded from settling the case. So here again, in practice, some solicitors will review the progress of the case towards trial and at each stage assess the strength and weaknesses of their case, especially after discovery of documents and before case management with the judge.

III. Case Management (Role of judge)

When a writ action reaches the stage of judicial case management, the solicitors must be prepared to tell the judge that they are ready for trial or ready to settle the case. The judge will ask if they have taken steps towards settlement. If they have not attempted settlement and are not prepared for trial, the judge might be justified in striking out the action in the interests of the administration of justice under the extensive powers given to him under Order 34 of the Rules of High Court. The powers listed are not exhaustive but only illustrative of what the judge can do under "case management".

Some judges may "twist the arm" of the solicitors to achieve a settlement even if they (the solicitors) are ready to try the case. This is the undesirable aspect of "judicial mediation".

However, there is a positive side to case management even without a full settlement. The judge will require the solicitors to prepare a statement of agreed facts and a statement of issues. He is given the power to "settle the issues" without the consent of the solicitors. He is only required to "confer" with them. If the issue is narrowed, it may have the effect of inducing one party or the other to commence negotiations for settlement. If such a power is honestly applied, it may bring about a desirable settlement. If it is exercised for the sole purpose of achieving settlement, that would be an abuse of judicial power.

The ostensible purpose of case management is to compel the solicitors to get ready for trial or face striking off (of the claim or the defence). However, the process of preparing the case under the scrutiny of the judge, knowing that the trial is imminent often has the effect of bringing stubborn solicitors and their clients to their senses. When they face the prospect losing the case and incurring costs some of them will look for a compromise. This is the magic of case management.

IV. Partial Settlement

The rules of procedure provide for partial settlement in court where consent judgment may be entered either on liability or on quantum of damages. This is fairly common in "running down" litigation.

The quantum of damages can usually be assessed on the basis of previous awards in reported cases for similar injuries. It would usually fall within a bracket. If there are sufficient precedents for reference, it is possible to arrive at a figure which may then be agreed as the value of the claim. This figure will be recorded in court as "the agreed damages subject to proof of liability". Sometimes liability is not in issue where the facts are not disputed and are clearly in favour of the plaintiff but damages may be disputed. In such a situation consent judgment maybe recorded on liability and the trial is confined to assessment of damages.

I had the good fortune to represent a plaintiff whose lorry was severely damaged in a collision with a Mercedes Benz driven by an engineer. The repair bill amounted to RM60, 000. The writ was filed in the High Court at Kuantan. The defendant's solicitor promptly served a defence at my office. It consisted of a single paragraph which admitted liability but disputed the amount of damages claimed. I was stunned by the admission of liability. (Apparently the defendant engineer had told his insurers or his solicitors that he was totally at fault.)

I commenced negotiations at once with the consent of my client. We reached settlement within a few weeks at RM 40, 000. Consent judgment was recorded in court with the help of a solicitor in Kuantan. Payment was received within a few weeks from the consent judgment. The client was willing to accept a reduced sum because he did not have to wait for years for the outcome of litigation and possible appeal causing further delay. He did not have to waste precious time in attending court over several days. He avoided the frustration of coming to court with his witnesses only to be told that the case could not proceed because a court interpreter in a particular dialect was not available or the judge had gone on leave.

V. Role of Advocate and Solicitor in Avoiding Trial.

A lawyer representing a client in litigation in his capacity as a solicitor has a legitimate role to play in resolving his client's dispute without a trial or with the minimum use of the adversarial process.

The law relating to practice and procedure and the common law relating to solicitors supports this role. "Once legal proceedings have been commenced, a solicitor instructed by a party to conduct them on her behalf has, in the absence of instructions to the contrary, an *implied authority* from the client *to compromise* them". This is the position taken by the Singapore court in *Bank of China v Maria Chia Sook Lan* [1976] 1 MLJ 41 at 48, upheld on appeal by its Court of Appeal in *Maria Chia Sook Lan v Bank of China* [1976] 1 MLJ 49. In an action and a counterclaim to set aside two consent judgments, the client alleged that she did not consent to orders being made in respect of two of her properties to be sold by a bank to enforce guarantees given by her. She denied giving any such instructions. The solicitor, Mr. Selvadurai gave evidence that the client personally instructed him, pursuant to which he entered into correspondence with the bank and concluded an agreement of compromise. The correspondence which was produced in evidence did not contain any reference to a "consent judgment". Yet the trial judge accepted the evidence of the solicitor and upheld the consent judgment because there was

no evidence of "instructions to the contrary". He made a finding that the client was not a credible witness.
A solicitor's implied authority may be countermanded by express instructions from the client. Otherwise his implied authority to compromise will continue. In Malaysian litigation practice, the solicitor will usually give the client a standard document called "Warrant to Act" to sign. By the terms of this document, the client appoints the solicitor to represent him in a specific case of litigation and authorizes him to act for him generally in the conduct of the case and also agrees to *ratify* whatever the solicitor does on his behalf lawfully. It gives *implied power to negotiate and settle the claim.*

A solicitor may commence acting even on verbal instructions but it would be prudent to obtain confirmation or ratification in writing. "It is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, to approve all that has been done in the past and to instruct the solicitor to continue the action". - *Danish Mercantile Co. Ltd v. Beaumont* [1951] Ch 680 at 687; [1951] 1 All ER 925 at 930.

Circumstances may give rise to a retainer and an implied authority to compromise. This depends on the logic of the situation. However, it would be a very bold solicitor who will negotiate and conclude a compromise without the written consent of his client. His premium for professional indemnity insurance is likely to rise!

- **Extent of Solicitor's Athority to Compromise**

The Malaysian solicitor's position is substantially similar to the solicitor in England. He has authority to represent his client before action, during action and after judgment. His implied authority extends to acts necessary for the proper conduct of the litigation, including making formal admission in the course of proceedings - *Elton v Larkins* (1832) 1 M & Rob 196. However, if the solicitor's conduct is not in the best interest of the client, he would be liable in damages for breach of contract.

In *Groome v Crocker [1939] 1 KB 194,* a motorist was sued for negligence. Since he was insured, he referred the suit to his insurer who then appointed solicitors to represent him (as they were entitled to under the terms of the policy and the Road Transport Act). The motorist was not negligent. This fact was known to the insurer and the solicitors. However, the solicitors admitted negligence in the defence they filed on behalf of the motorist on the instruction of the insurer, without the consent of the motorist. The motorist sued the solicitor and the court held that the solicitor had committed a breach of duty by acting in the interest of the insurer and against the interest of the insured. Nevertheless the consent judgment on admission did bind the motorist client because the solicitor had *ostensible authority* but not implied authority *to compromise*.

Under the provisions of the English and the Malaysian Road and Transport Acts, the insurers are liable to satisfy the judgment against the insured. So, the insured motorist is indemnified by the insurers in respect of monetary liability as long as the insurers are solvent. However, if a motorist with a clean driving record is adjudged to be negligent on an "admission" made by his solicitor he will be prejudiced. Upholding a compromise

reached by solicitor on behalf of their clients has been encouraged as a matter of public policy. "As a general rule, it is against public policy to allow a settlement concluded on behalf of their respective clients to be challenged with impunity. To do so would open the flood gates of endless litigation initiated by parties who become wise after the event. It will also discourage the practice of the out of court settlements", per Harun J. in *Yap Chee Meng v Ajinomoto (M) Bhd* [1978] 2 MLJ 249.

In running down litigation in Malaysia, it is common practice for negotiation to be conducted by the solicitors for the parties. The defendant's solicitor (appointed by the insurer) usually offers a sum in full settlement of the plaintiff's claim "without admission of liability". Negotiation will usually commence from the time the plaintiff's solicitor serves a notice of demand on the defendant with a copy to his insurer. A few cases will be settled at this stage. In other cases a writ will be filed (by solicitors) followed by pleadings. Negotiations will extend until pleadings have closed and documents have been exchanged. In yet other cases the defendant's solicitor will only offer settlement a day before the date fixed for trial.

Offers and counter-offers are made "on instructions" of their respective clients. The defendant's solicitor usually receives his instructions from the Claims Manager of the insurer, who is usually legally qualified and has specialized knowledge in the area of motor negligence. However, the plaintiff being a layman relies on the advice of his solicitor as to what is a reasonable offer for his claim in the light of the law and the time likely to be taken for the litigation and possible appeals. Most plaintiffs will follow the advice of their solicitor. Some however, will be adamant and instruct the solicitor to ask for an unreasonable amount. The solicitor will then have to make a choice – discharge himself or proceed to trial. If he discharges himself, he may have to sue for his fees-something most solicitors prefer to avoid. If he proceeds to trial, he will be under instructions to ask for an amount as 'instructed' by his client but which is not supported by authorities of decided cases. It is embarrassing for counsel to ask the court to make an award knowing that the sum asked is not justified by the evidence and the authorities. Counsel must maintain his credibility and discharge his duty to the court honourably. Can he disregard client's instructions?

- **Authority of Counsel to Compromise**

"The conduct and control of the cause are necessarily left to the counsel", per Pollock CB in *Matthews v Munster* (1887) 20 QBD 141. "The client cannot direct counsel on how to conduct the suit. *A barrister in England has the power to act without asking his client what he shall do*. He has no master, but he is the conductor and regulator of the whole thing" per Brett MR in *R v Registrar of Greenwhich. County* Court (1885) 15 QBD 54 at 58. The general effect of cases in this area appears to be that the client cannot control his counsel from agreeing to a compromise. It will be valid and binding on the client unless he protests openly - *Rumsey v King* (1876) 33 LT. This can be difficult for the client. In *Rumsey*, counsel recommended compromise to the solicitor and the solicitor agreed relying on counsel's advice. The client who was in court stated his objection first to his solicitor and later to his counsel. Counsel told him to be silent and announced the compromise to the court. The client did not protest to the court. He subsequently

explained his conduct: "I did not protest against it to the court personally, as I thought that I had no right to address the court personally, and that if I did so I should have been treated as creating a disturbance, and have been silenced or removed". His subsequent application to set aside the compromise was refused. On appeal Cockburn, C.J. said: "The plaintiff was present and heard the announcement of his counsel in open court that the two causes were compromised. Then was his time to protest and protest openly". (p729).

The rationale for recognizing the authority of counsel to compromise his client's case has been lucidly explained by Lord Atkin delivering the judgment of the Privy Council in *S.N. Mitra v. S. T. Dasi* (1930) 46 T.L.R. 191 where they considered the position of the advocate in India to bind his client to compromise reached: "Their Lordships regard the *power to compromise* a suit as *inherent in the position of an advocate in India*. The considerations which have led to this implied power being established in the advocates of England, Scotland and Ireland apply in equal measure to India. It is a *power deemed to exist* because its existence is necessary to effectuate the relations between advocate and client, to make possible the duties imposed upon the advocate by his acceptance of the cause of his client. The advocate is to conduct the cause of his client to the utmost of his skill and understanding. He must in the interest of his client be in position, hour by hour, almost minute by minute, to advance this argument, to withdraw that; he must make the final decision whether evidence is to be given or not on any question of fact; skill in advocacy is largely the result of discrimination. These powers in themselves almost amount to powers of compromise: one point is given up that another may prevail. But, in addition to these duties, there is from time to time *thrown upon the advocate the responsible task of deciding whether in the course of a case he shall accept an offer made to him, or on his part shall make an offer on his client's behalf*, to receive or pay something less than the full possible liability. *Often the decision must be made at once.* If further evidence is called or the advocate has to address the Court the occasion for settlement will vanish. In such circumstances, if the advocate has no authority unless he consults his client, valuable opportunities are lost to the client.

On such grounds as these advocates in England, Scotland and Ireland have long been considered to have an implied power to settle a suit in which they have received a brief. In England authority is abundant. Their Lordships will only refer to *Shepherd v. Robinson* (35 The Times L.R., 220; [1919] 1 K.B., 474, at p. 477) in the Court of Appeal, where Lord Justice Bankes says: "It is clear that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it". The apparent authority is derived from the known existence of the implied authority. In Scotland the rule is no less clear, and, indeed, has been expressed on great authority to go so far as to entitle the advocate acting *bona fide* to disregard the wishes of his client in the compromise of a suit. See further Lord President Inglis in *Batchelor v. Pattison* (3 R., 914, at p. 918), and Bell's Commentaries, s. 219. 10th Ed., p. 92. In Ireland the law is the same as in England.

Two observations may be added. First, the implied authority of counsel is not an appendage of office, a dignity added by the Courts to the status of barrister or advocate at

laws. It is implied in the interest of employment of advocate. Secondly, the implied authority can always be countermanded by the express directions of the client. No advocate has actual authority to settle a case against the express instructions of his client. If he considers such express instructions contrary to the interests of his client, his remedy is to return his brief.

Their Lordships are unable to see why the above considerations should not apply to an advocate in India, whose duties to his client in the conduct of a suit in no wise differ from those of advocates in England, Scotland and Ireland. There are no local conditions which make it less desirable for the client to have the full benefit of an advocate's experience and judgment. One reason, indeed, for refusing to imply such a power would be a lack of confidence in the integrity or judgment of Indian advocates. No such considerations have been or indeed could be advanced, and their Lordships mention them but to dismiss them. It does not appear to be disputed that advocates practising in the Presidency towns have such authority. It was decided in Allahabad in 1890 by Sir John Edge and full Bench in *Jang Bahadur Singh v. Shanhar Rai* (I.L.R. 13 All., 272) that advocates of that Court have the implied authority. Sir Francis Maclean, in Calcutta in 1900, seems to have had no doubt as to the existence of the implied authority: *Nundo Lal Bose v. Nistarini Dassi* (I.L.R. 27 Cal., 428). The same view seems to have been taken in Patna in 1922 in *Nilmoni Chaudhuri v. Kedar Nath Daga* (I.L.R. 1 Patna, 489). No evil results have apparently ensued in India from the existence of this power in the instances mentioned".

If the client is absent, counsel may proceed to compromise as it happened in *Matthews.* He will not be liable to his client – *Rondel v Worsley* [1969] 1 AC 191. This will probably be followed in Malaysia as they have been followed in New Zealand, South Australia and Victoria where the profession is fused as in Malaysia.

The reason for the immunity given to the barrister and the advocate is based on the notion that he is not an agent of his client; that he is undertaking a duty in the administration of justice together with the judge- similar to that of the wakil in the Islamic law. The practice in Malaysia is for counsel to ask for a short adjournment to take instructions before consenting to a compromise although he is deemed to have implied authority unhampered by overriding concern for his client's interest – Lord Langdale MR *Re Hobler* (1844) 8 Beav. 101. Some Malaysian judges attempt to pressurize counsel saying "you should advise your client what to do".

The advocate in England has *"unlimited power to do what is best for his client"* subject to the power of the court to overrule him if he acts unjustly for example giving an unfair advantage to the other side- Lord Esher M.R. in *Matthews v Munster* (p.143). It is the *"duty of the counsel to do that which he considered best for his client*"-Fry LJ (p.145).

The client cannot give directions to his counsel to limit his authority over the conduct of the case but he can terminate it at any moment- Lord Esher M.R (p.143). The facts of *Matthews v Munster* graphically illustrate the position of the client and the advocate. The client was the defendant in an action for malicious prosecution. The case was part heard in London on Saturday afternoon and continued on the following Monday. The defendant

and his solicitor coming from another town telegraphed to their counsel that they would reach London at 11 o'clock. The case proceeded in the absence of the defendant. Before the defendant and his solicitor arrived*, the judge made a suggestion. Defendant's counsel acted on the suggestion and consented to judgment* in favour of the plaintiff for £350/= and costs and further agreed that all imputation against the plaintiffs be withdrawn. The managing clerk of the solicitor was in court. He begged counsel to wait until the defendant and his solicitor arrived at the court but counsel proceeded with the compromise. The defendant subsequently applied to set aside the compromise. He and his solicitor filed a joint affidavit repudiating the terms of the consent judgment on the ground that he had not authorized any terms of settlement. The court refused and he appealed. The appeal was dismissed. Lord Esher MR discussed the authority of counsel as follows:

> "One of the things that counsel may do, so long as the request of the client to act as advocate is in force, is to consent to a verdict for a particular amount and upon certain conditions and terms; and the *consent of the advocate to a verdict against his client and the withdrawing of imputations is a matter within the expression "conduct of the cause and all that is incidental to it"*. If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed. This case is a still stronger one, for the client was not present, and it is not pretended that he ever withdraw his authority to counsel, but he now comes forward and asks that because he does not like what has been done it should be aside as between himself and his opponent. This the Court will not do and this appeal must be dismissed". (p.144 & 145).

Bower LJ summarized the relationship: "Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party. What is to be done if the client is in court? Is it the duty of the counsel to consult him? I should say- yes, with regard to important matters in which the client has an interest. It does not follow that counsel will submit to carry out the view of the client if it appears that it would be injurious to the client's interest. He has the *alternative of returning his brief*. In the present case, the client was not present and cannot complain if his *counsel*, who *was in command* and had *authority to do the best for his client*, compromised the suit within the reasonable limits of his authority to compromise. In this particular case it was clear what was done was within the reasonable scope of the advocate's authority within the rule laid down by Pollock C.B". (p.144, 145)

VI. Conclusion

The judge and the advocates working together have a powerful role to play in bringing about an amicable settlement of litigation. A great deal depends on the leadership of the judge and the persuasive skills of the lawyers in convincing their clients of the value of a compromise. The judge must encourage compromise without bullying. The advocates must consider the best interest of their clients and negotiate on their behalf to obtain a reasonable settlement. This may involve a reduction in their fees. It may also mean a loss of opportunity to obtain costs where the client has agreed to let the advocate collect the

costs. When a compromise is reached one of the terms may be that each party is to bear its own costs.