Neutral Citation Number: [2021] EWHC 1729 (QB)

Case No: QB-2019-004609

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2021

Before :

Deputy Master Toogood

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Between :

(1) DR FATIMA JABBAR **Claimants**

(2) DRJ55 LTD

- and –

(1) AVIVA INSURANCE UK LIMITED **Defendants**

(2) AVIVA INSURANCE LIMITED

(3) AVIVA PLC

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Ian Silcock (instructed by **Samuels Solicitors**) for the **Claimants**
Adam Wolanski QC (instructed by **BLM Law**) for the **Defendants**

Hearing dates: 26 May 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DEPUTY MASTER TOOGOOD

Deputy Master Toogood :

1. The hearing of the Defendants' application dated 2 November 2020 for an order striking out the Claimants' claims for conspiracy to injure, unlawful means conspiracy and tortious interference with contract pursuant to CPR Part 3.4(2)(a) on the ground that the Particulars of Claim disclose no reasonable grounds for bringing these claims, and for summary judgment on the defamation claim pursuant to CPR Part 24 took place on 26 May 2021. I had received written submissions from both parties and heard oral submissions for the full day, following which I reserved my judgment.

2. On 11 June 2020 at 07.00, I was informed by the Claimants' solicitors that the matter had been settled by agreement between the parties and a consent order had been filed the previous day. They requested that judgment not be handed down. Later that morning, I informed the parties that I had written my draft judgment the previous day and had intended to circulate it that morning. I noted the consent order and the matter had been concluded, as the consent order is in the terms that the Claimants' claim is dismissed and the Claimants pay the Defendants' costs. The Defendants' solicitor then emailed me requesting that my judgment should be handed down.

3. I considered that it was proportionate to deal with the dispute between the parties by way of written submissions, which I duly received, and this is my decision on whether I should hand down my judgment in relation to the Defendants' application.

The Law

4. The parties do not agree on the relevant legal principles to be applied in these circumstances and it is therefore necessary to consider the authorities in some detail.

5. The Claimants argue that, in cases where a judgment has not been circulated in draft prior to settlement, a discretion to hand down the judgment only exists in exceptional circumstances. They rely on the decision of the Court of Appeal in ***Prudential Assurance v McBains Cooper*** [2000] 1 WLR 2000 (CA).

6. In ***Prudential Assurance***, a draft judgment had been circulated by the trial judge, following which the parties settled their dispute and requested that the judgment should not be handed down. The trial judge held that there were strong public interest grounds for delivering the judgment and his decision was upheld by the Court of Appeal. The Claimants rely on the judgment of Brooke LJ, with whom Robert Walker LJ and Peter Gibson LJ agreed, in which he stated that *"under the new practice the process of delivering judgment is initiated when the judge sends a copy of it to the parties' legal advisers. Provided there is a lis in being at that stage, it will be in the discretion of the judge to decide whether to continue that process by handing down the judgment in open court or to abort it at the parties' request."*

7. The Claimants argue that the effect of ***Prudential Assurance*** is that, prior to the circulation of a draft judgment, a judge only has the discretion to hand

down judgment in exceptional circumstances, analogous to those in which a hearing may take place even where the issue has been settled between the parties, such as a question of public law.

8. The Claimants also rely on ***Bruce v Worthing DC*** (1994) 26 HLR 223, which was mentioned in ***Prudential*** Assurance, in which Staughton LJ stated at 228 *"In our adversarial system a judge who is asked to make a consent order should do so, provided that the parties are of full age and understanding and that the order is not illegal, immoral or so equivocal as likely to give rise to further dispute."*

9. In this case, neither party is suggesting that I should not approve the consent order. The issue of whether my judgment should be handed down does not affect that order, not least because the outcome would be the same following my judgment as the parties have agreed in the consent order.

10. The Court of Appeal in ***Prudential Assurance*** also referred to ***HFC Bank plc v HSBC Bank plc,*** unreported, 10 February 2000 (CA) (now reported by Westlaw as: 2000 WL 281405) and noted that the parties in that case had not been shown the judgment when they settled which Brooke LJ considered *"made all the difference"*. However on reading the judgment in ***HFC Bank***, it is plain that neither party had requested that the judgment be handed down and the Court was not considering the issue of whether they should do so. Nourse LJ made it plain to the parties that they should have communicated with the court when there was a possibility of settlement in accordance with their duty to further the overriding objective, which includes the requirement that a case be allotted an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

11. In ***Gurney Consulting Engineers v Gleeds Health and Safety Ltd*** [2006] EWHC 536 (TCC), HHJ Peter Coulson QC decided not to hand down judgment in a case where the parties had settled the claim prior to the draft being circulated. He noted that it was *"doubtful"* whether a first instance judge has discretion to publish a draft judgment which has not been seen by the parties at the time of settlement. In that case, both parties had requested that the judgment should not be published.

12. However the Court of Appeal considered the matter again in ***Barclays Bank PLC v Nylon Capital LLP*** [2010] EWHC 1139 (Ch), in which the parties reached settlement after the judgment had been drafted by Thomas LJ and circulated to Etherton LJ and Lord Neuberger but before it had been sent to the parties. Both parties had requested the court not to give judgment.

13. Lord Neuberger stated at paragraphs 74 to 77:

"74. Where a case has been fully argued, whether at first instance or on appeal, and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment. Where the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment despite the matter having been disposed of between the parties.

Obvious examples of such cases are where the case raises a point of law of some potential general interest, where an appellate court is differing from the court below, where some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest.

75. It will also be relevant in most cases to consider how far the preparation of any judgment had got by the time of the request. In the absence of good reason to the contrary, it would be a highly questionable use of judicial time to prepare a judgment on an issue which was no longer live between the parties to the case. On the other hand, where the judgment is complete, it could be said (perhaps with rather less force) that it would be a retrospective waste of judicial time and effort if the judgment was not given.

76. The concerns of the parties to the litigation are obviously also relevant and sometimes very important. If, for their own legitimate interests, they do not wish (or one of them does not wish) a judgment to be given, that request should certainly be given weight by the court. (Of course, in some cases, the parties may request a judgment notwithstanding the fact that there is no longer an issue between them).

77. Where there are competing arguments each way, the court will have to weigh up those arguments: in that connection, the reasons for any desire to avoid a judgment will be highly relevant when deciding what weight to give to that desire."

14. I consider that ***Barclays Bank v Nylon*** is highly relevant because the Court of Appeal considered the position where, as in this case, settlement had been reached after the hearing but before the judgment had been handed down. In the ***Prudential Assurance*** case, the Court of Appeal was considering the case where settlement had been reached after judgment had been handed down. I agree with the reasoning of Peter Smith J in ***Greenwich Inc Ltd v Dowling*** [2014] EWHC 2451 (Ch) at paragraph 131:

"The clearest decision, in my view, is that of Lord Neuberger in the ***Barclays Bank*** *case. It is to my mind artificial to have a situation that a judgment can in effect be stopped by the parties by an agreement made before they see the draft judgment but not afterwards. I can see no logical reason for that. It is true to say that the early authorities were not cited to the Court of Appeal in Barclays Bank, but as a matter of policy it seems to me that the reasoning in Lord Neuberger's judgment must plainly be correct in the modern environment. The court must retain a general discretion whether before or after the parties have seen a draft judgment to continue to deliver a judgment where it is appropriate so to do."*

15. I consider that this was also the approach adopted by Robin Vos, sitting as a judge of the Chancery Division, in ***Beriwala v Woodstone Properties*** [2021] EWHC 609 (Ch). The judge reviewed the relevant authorities and concluded at paragraph 18 *"the test is no different whether the settlement is reached before or after the draft of the judgment is provided to the parties. However, the fact that a draft judgment has been provided to the parties is clearly a relevant factor to take into account."*

16. I also note the recent decision of Margaret Obi (sitting as a Deputy High Court Judge) in ***Kingsley Napley LLP v Harris*** [2021] EWHC 1641 in which the issue had been settled prior to the circulation of the judge's draft judgment, without the judge having been informed. The judge considered ***Prudential Assurance***, ***Barclays Bank v Nylon***, and ***Beriwala v Woodstone Properties***. There was no suggestion that she did not have jurisdiction to decide whether or not to hand down judgment save in exceptional circumstances, as the Claimants contend in this case. The judge held that she had to weigh up the private interests of the parties and any public interest in handing down the judgment and exercised her discretion in accordance with the authorities.

17. Having considered all the matters relied on by the Claimants, I do not agree with the Claimants' submission that there must be exceptional circumstances in order for a court of first instance to possess the jurisdiction to hand down judgment where the action has settled after the hearing but before the draft judgment has been circulated. I consider that I have a discretion whether or not to hand down my judgment but I must exercise that discretion in accordance with the established principles. However even if the Claimants are correct, I consider that the fact that I have heard full argument on a point of law which has not been previously decided is a ground for finding that the matter is sufficiently exceptional that I have a residual discretion whether or not to hand down judgment.

18. In relation to the exercise of my discretion, the authorities indicate that the general principle is whether it is in the public interest to hand down judgment but in making that decision, the following factors are relevant:

    i) Whether the case involves a point of law of some potential general interest (***Barclays Bank v Nylon*** at [74])

    ii) Whether there are issues of dishonesty or credibility (***Barclays Bank v Nylon*** at [74], ***F&C Alternative Investments (Holdings) Ltd v Barthelemy*** [2011] EWHC 1851 (Ch) at [9(iii)])

    iii) How far the preparation of the judgment had got at the time of settlement (***Barclays Bank v Nylon*** at [75]) and the public interest in avoiding further expenditure of court time and resources (***F&C Alternative Investments*** at [7])

    iv) The wishes of the parties (***Barclays Bank v Nylon*** at [76])

    v) Whether it was a condition of settlement that judgment would not be handed down (for example, ***Liverpool Roman Catholic Archdiocesan Trust v David Goldberg QC*** [2001] 1 WLR 2337 (Ch) and ***Beriwala***) in the context of the desirability of encouraging settlement and finality in litigation (***Prudential Assurance***).

Applying the law to this case

19. There is a clear public interest in publishing a judgment that addresses a point of law which has been previously undecided and which has been the subject of

detailed argument and consideration by the court. The issue of whether absolute privilege should apply to communications made by an insurer pursuant to a Pre-Action Protocol is of particular importance when so many claims are dealt with under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and do not reach the stage of issuing proceedings. This is the main basis on which I consider that my judgment should be published.

20. It is also in the public interest for a judgment to be published where, as here, allegations have been made of malice, dishonesty and conspiracy and the judgment considers whether there are reasonable grounds for bringing those claims.

21. The draft judgment had been completed and was ready for circulation to the parties when I was notified of the consent order. There will therefore be no significant additional waste of judicial resources or disproportionate allocation of court time to this case if the judgment is handed down.

22. With regard to the parties' wishes, the Defendants seek publication of the judgment principally on the grounds that the case raises a novel point of law which is of public interest and there is no factual dispute which the judgment would determine.

23. The Claimants argue that the judgment should not be handed down on the basis that the judgment would give publicity to the statements which allegedly damaged the Claimants. I consider that this argument is of little merit in the circumstances where the Claimants have agreed an order that their claim is dismissed and they will pay the Defendants' costs, thereby effectively conceding that their claim would fail. As a subsidiary point, it is of some relevance that the Claimants chose to bring the action in the first place.

24. The Claimants repeat the argument made at the substantive hearing that a point of law should not be determined on a summary judgment application, however I have considered this argument as part of my substantive judgment and do not consider that it is relevant to the question of whether that judgment should be handed down or not.

25. The Claimants further submit that, if judgment is handed down due to the public interest in the point of law concerning absolute privilege, the judgment should be confined to that point only. The Claimants do not give a reason for resisting the handing down of the remainder of the judgment, but in any event I consider that it is also in the public interest for the judgment concerning the issues of malice, conspiracy and tortious interference with contract to be published as these involve issues of alleged dishonesty, and I do not consider that the judgment can sensibly be redacted further.

26. It was not a condition of the settlement that the judgment would not be handed down. Given the terms of the consent order, there is no risk that the judgment will prevent finality in the litigation.

27. For all these reasons, I consider that the public interest in publishing the judgment outweighs the Claimants' request that the judgment is not handed down.