Neutral Citation Number: [2021] EWHC 609 (Ch)

Claim No: BL-2019-001745

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (Ch)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 16 March 2021

Before:

ROBIN VOS
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between:

NEHA BERIWALA

Claimant

- and -

(1) WOODSTONE PROPERTIES (BIRMINGHAM) LIMITED
(2) JOGA KHANGURE

Defendants

- -
- -

SHAIL PATEL (instructed by **Grosvenor Law**) appeared for the **Claimant**
JOHN RANDALL QC and GAVIN McLEOD (instructed by **Aspect Law**) appeared for the **Defendants**
Hearing dates: 19-22 and 25 January 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.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 16 March 2021 at 10.30am.

DEPUTY JUDGE ROBIN VOS:

1. This claim relates to a commercial dispute between the parties. It concerns certain loans and the circumstances in which a transfer of shares between the parties was to take place.

2. The hearing lasted five days, concluding on 25 January 2021. My draft judgment was sent to Counsel for both parties on 19 February 2021 with the usual request for typing corrections or obvious errors by 23 February 2021.

3. Both parties provided their corrections on 23 February. However, the claimant also sought to raise a further issue which was consequential to the findings in the judgment but which was not part of the claimant's case nor part of the relief sought.

4. On 24 February, I invited submissions on this point and on the terms of a draft order. These submissions were provided on 2 March.

5. Having considered those submissions, on 4 March, I declined to make any findings in respect of the additional issue raised by the claimant and indicated that I would hand down the judgment the following day as well as arrange a separate hearing to deal with consequential matters including finalising the form of the order.

6. However, later that day, I received an email from Mr Randall, representing the defendants requesting, on behalf of both parties, that I should defer handing down my judgment until Tuesday 9 March 2021 in order to allow the parties to continue settlement discussions. It was said that the parties hoped that an agreement could be reached which would enable the court to approve a consent order without the judgment being handed down. Although I had not previously been notified that the parties were in negotiations with a view to settlement, I agreed to defer handing down the judgment.

7. On Monday 8 March 2021, I was informed by Mr Randall that the parties have reached agreement settling all outstanding disputes and was provided with a Tomlin order. The agreement however is conditional on me agreeing not to hand down my judgment.

8. Having weighed up all of the circumstances, I have decided that, in this case, it is appropriate not to hand down my judgment. However, as there are a number of authorities which make it clear that providing a draft judgment to the parties is not intended as an aid to any settlement discussions, I consider that it may be helpful for me to set out the reasons why I have reached that conclusion.

9. This point was considered by the Court of Appeal in *Prudential Assurance Company Ltd v McBains Cooper (a firm) and Others* [2000] 1 WLR 2000. Referring to the relevant practice direction in force at the time (which was relatively new), Brooke LJ observed at [2008E] that:-

> "There is no indication in the practice statement that its purpose is to allow the parties to have more material available to them to help them to settle their dispute. Its purpose is to introduce an orderly procedure for the delivery of reserved judgments, whereby the parties' lawyers can have time to consider and agree the terms of any consequential orders they may invite the court to make and the process of delivering judgment can be abbreviated by avoiding the need for the judge to read the judgment orally in court."

10. The relevant practice direction is now Practice Direction 40E. This confirms that one of the purposes of supplying the draft judgment is to enable the parties to consider consequential orders. A second purpose which is referred to in the Practice Direction is to enable the parties to suggest any proposed corrections to the draft judgment. This is of course understood to mean typographical corrections or the correction of obvious errors, as reflected by the wording typically found at the top of the draft judgment when it is circulated. As with the previous Practice Direction, the current Practice Direction contains no suggestion that the circulation of the draft judgment is intended to facilitate any settlement discussions.

11. This was the approach taken by Foskett J in *R (on the application of S) v The General Teaching Council for England* [2013] EWHC 2779 (Admin) who, having referred to the observations of Brooke LJ mentioned above, concluded at [2008F] that:-

> "The provision of a draft judgment is not to be seen simply as a staging post on the way to eventual settlement."

12. Having said that, it is clear that, even in circumstances where the draft judgment has been provided to the parties, the court retains discretion as to whether or not to hand down judgment. Brooke LJ confirmed this in *Prudential* at [29] saying:-

> "It follows 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. I agree with the judge that there may well be a public interest in continuing the process, notwithstanding the parties' wishes that he should not do so, and that there can be no question of a judge being deprived of the power to decide whether or not to do so simply because the parties have decided to settle their dispute after reading the judgment which has been sent to them in confidence."

13. Other than the reference to "public interest", the court in *Prudential* did not however provide specific guidance on the factors which a judge should consider in deciding whether to hand down judgment despite the fact that the parties had reached a settlement and did not want the judgment to be handed down. Instead, they approved the approach of the trial judge who had decided to hand down the judgment on the basis that the judgment dealt with a number of points of law which were potentially of wider interest.

14. Lord Neuberger MR (as he then was) made a similar point about public interest in *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826 but also referred at [74-75] to a number of factors which might justify handing down a judgment against the wishes of the parties:-

> "74. 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 would 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."

15. That was in fact a case where the draft judgment had not been supplied to the parties before they reached their agreement, but it seems to me that the same factors potentially apply whether or not the parties have seen the draft judgment. They are all relevant to the question as to whether there is a public interest in handing down the judgment notwithstanding the wishes of the parties.

16. In *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1851 (Ch), Sales J (as he then was) confirmed at [7] that:-

> "Considerable weight should be given to the wishes of the parties if they succeed in settling their dispute before judgment is finally handed down. There is also a public interest in avoiding the further expenditure of court time and resources to bring a dispute to an end."

17. However, in that case, he decided, nevertheless, to hand down judgment on the basis that there were important factors which meant that the public interest outweighed the private interests of the parties, including the fact that:-

    17.1 the dispute related to the conduct of various individuals and entities who were regulated by the FSA;

    17.2 the credibility and honesty of witnesses had been attacked but they had been vindicated in the judgment;

    17.3 there were a number of legal issues which would both develop the law and provide guidance to others.

18. It is clear from these authorities that, in deciding whether to hand down judgment, it is necessary to weigh up both the private interests of the parties and any public interest in handing down the judgment (see *F&C Alternative Investments* at [9] and *Barclays* at [74-77]). Whilst the points relied on in particular cases may be a helpful guide, it is necessary to take into account all of the relevant circumstances.

19. In my view, 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. This can be seen from the decision of the Court of Appeal in *Prudential* which approved the reasoning of the trial judge (Judge Havery QC) and reported him at [2004G] as concluding:-

> "Where a judgment has been finalised and notified to the parties and they enter into a settlement in the light of that judgment, there are overriding public interest considerations in favour of handing down the judgment in open court."

20. In contrast, referring to the decision of the Court of Appeal in *HFC Bank Plc v HSBC Bank Plc* (10 February 2000), Brooke LJ noted in *Prudential* at [2010D-E] that:-

> "The parties had therefore not been shown the judgments which were going to be delivered at the time they settled their dispute, and this, in my judgment, makes all the difference."

21. I do not understand the trial judge in *Prudential* to be saying that, where the judgment has been provided to the parties, there is a presumption that it should be handed down. In my view, the comments in that case simply make it clear that this is a relevant factor to consider in deciding whether to hand down the judgment.

22. Applying these principles to the present case, I am of the view that the factors in favour of not handing down the judgment significantly outweigh the factors which might suggest that the judgment should be handed down.

23. In this particular case, there are relatively few factors which would suggest that the judgment should be handed down:-

    23.1 The judgment has been prepared and provided in draft to the parties. This is a strong factor in favour of handing down the judgment but it cannot be decisive.

    23.2 Preparing the judgment has used court resources which will have been wasted, although as Lord Neuberger indicated in *Barclays* (see paragraph 14 above), not too much weight should perhaps be placed on this point. Indeed, Judge Peter Coulson Q.C. (as he then was) observed in *Gurney Consulting Engineers v Gleeds Health & Safety Limited (No 2)* [2006] EWHC 536 (TCC) at [18] that:-

> "Many, perhaps most, cases are better settled than fought all the way through to a final judgment. That principle holds good even after the conclusion of the trial itself, and if a late settlement means that a judge has done a good deal of work which thereby goes to waste, then that is simply an inevitable consequence of the process: judges just have to learn to live with that risk."

23.3 There is one point of law relating to Quistclose trusts which could be interesting. However, it is a point which, in my judgment, is unlikely to be relevant in many cases.

24. Against this, the factors in favour of not handing down the judgment are as follows:-

24.1 Both parties have requested that the judgment should not be handed down. Whilst not an overriding factor, this remains a relevant factor. In the absence of good public interest reasons to the contrary, I would agree with Sales J that such wishes should be given considerable weight (see paragraph 16 above).

24.2 The parties are private individuals (or in the case of the first defendant, a company with which one of them is associated) who have a dispute about commercial arrangements which do not affect third parties in any significant way. There is no dominant or powerful party seeking to suppress a judgment by buying off the other party as part of a settlement.

24.3 The judgment is based almost entirely on factual findings relating to the terms of the agreements reached between the parties and the application of conventional legal principles to those factual findings.

24.4 Whilst there are the normal issues relating to the credibility of the witnesses, there are no allegations of dishonesty or of the sort of behaviour which it might be in the public interest to be made public.

24.5 As a result of the way in which the claimant's claim was pleaded and the findings ultimately made by the court, there remains a significant (in financial terms) unresolved issue between the parties. There are two further issues which are also significant in financial terms and which, as a result of the court's findings, would need to be resolved between the parties and/or persons who are associated with the parties but who were not themselves parties to the

proceedings. Given the history of this claim, it is my view that, in the absence of any settlement, these unresolved issues are highly likely to lead to further litigation. As Sales J noted in *F&C Alternative Investments* at [7]:-

> "There is … a public interest in avoiding the further expenditure of court time and resources to bring a dispute to an end."

24.6 Similarly, the trial judge in *Prudential* is reported in the Court of Appeal decision at [2004G] as considering that:-

> "The risk of further costly litigation is certainly a weighty matter to hold in the balance."

24.7 In my view, this is an important point. Court resources are scarce and litigation is expensive. If parties are able to reach a settlement in circumstances where there is otherwise likely to be new or continued litigation, this is a strong reason not to proceed with handing down a judgment unless there are important countervailing public interest reasons why the judgment should be handed down.

24.8 It should be recognised that avoiding further litigation and therefore the use of court resources is itself a public interest consideration and not just a matter relating to the private interests of the parties. Whilst it has to be weighed up against all of the other relevant factors, it should be given appropriate weight.

25. In this case, the fact that I have spent time writing a judgment which deals with a point of law which could be of some limited interest but which is unlikely to be of more general interest and which has been provided to the parties is outweighed by the public interest in avoiding further use of court resources by continuing this litigation or spawning new claims and by the wishes of the parties. There are no significant reasons of public interest why the judgment should be handed down.

26. Given my conclusions, I will not hand down my original judgment and will approve the updated Tomlin order provided by the parties on 10 March 2021.