IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CASE NO. FSD 103 OF 2015 (RMJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW, 2014

AND IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND THE MATTER OF TORCHLIGHT FUND L.P.

IN COURT 4

Appearances:	**Mr. Tom Lowe Q.C. instructed by Ms. Jessica Williams of Harneys for the Petitioners** **Mr. John Wardell Q.C. and Mr. Andrew Mold instructed by Mr. Ben Hobden and Mr. Erik Bodden of Conyers Dill & Pearman for the Respondent**
Before:	**The Hon. Mr. Justice Robin McMillan**
Heard:	**10 September 2018**
Judgment Delivered:	**13 September 2018**

HEADNOTE

The jurisdiction of the Court to deliver Judgment notwithstanding settlement by the parties- The principles governing exercise of the Court's discretion- The paramount interest in public access to justice.

Judgment

Introduction

1. On 16 July 2018 the Court issued the following directions in this matter:

> *"1. This is a case where the Court carefully reminds itself that it has an independent discretion to decide whether to deliver its Judgment or not.*
>
> *2. The Court is aware that neither the Petitioners nor the Respondent had seen the draft Judgment at the time they settled their differences but that they were already aware of the Court's expression of interest in disclosing its findings of law and fact in any event. The draft Judgment was essentially completed prior to the settlement.*
>
> *3. The Court has considered the letter submissions of both the Petitioners and the Respondent, for which as always the Court is most grateful, together with the relevant authorities also upon which reliance has been placed.*
>
> *4. The Court has had particular regard to the dicta of Lord Neuberger MR in Barclays Bank v. Nylon Capital LLP [2012] ALL ER (comm) 912 at paragraphs 74-78:*
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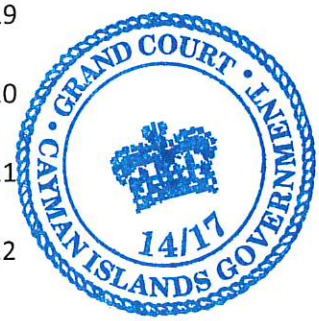
> > *"78 In this case, I consider that the argument for handing down our judgments is compelling. First, by the time we were informed that the parties has settled their differences, the main judgment, representing the views of all members of the Court, had been prepared by Thomas LJ, in the form of a full draft which has been circulated to Etherton LJ and me. Secondly, a number of the issues dealt with in that judgment are of some general significance. Thirdly, although we are upholding the judgment below, we*



are doing so on a rather difference basis, so it is right to clarify the law for that reason as well. Fourthly, so far as the parties' understandable desire for commercial privacy is concerned, we have not said anything in our judgments which are not already in the public domain, thanks to the judgment below. Finally, so far as the parties' interests otherwise are concerned, no good reason has been advanced for us not giving judgment."

5. *It is to be noted that the factors which the learned Judge has identified are very similar to the factors which have arisen in the instant case.*

6. *Notwithstanding these factors the Petitioners submit as follows:*

"We invite the Court not to make public its findings of law and fact in these proceedings for the following reasons:

1. *In the case before this Honourable Court, the parties informed the Learned Judge's assistant in a timely fashion on 1 June 2018 that settlement negotiations were underway. Those negotiations resulted in a settlement between the parties without knowing any of the findings made by the Court.*
2. *A decision to hand down the judgment in the circumstances of this case would tend to deter parties to litigation generally from settling their differences at a late stage.*

3. *The publication of any factual findings in these proceedings could seriously and adversely affect the commercial interests and reputation of any of the parties concerned.*

4. *Further, if those findings were to be published, neither party would be able to challenge any findings adversely reflecting on them. The parties would not, therefore, have a remedy against any such findings which could in and of themselves be potentially damaging to their commercial interests or their reputations."*

7. *It is indeed important that parties to litigation generally should not be deterred from settling their differences even at a late stage, and the Court welcomes the development in this case as indeed in other cases.*

8. *However, in the circumstances of this case two specific areas for concern arise.*

9. *Mr. George Kerr and Mr. Russell Naylor have been heavily criticised in the course of these proceedings and their professional standing has been consistently impugned. Not only are Mr. Kerr and Mr. Naylor entitled to know that they have been exonerated but the public is entitled to know it as well. This is a matter of human rights as much as it is a matter of commercial law, and in this context public access to justice is paramount.*

10. *In addition, there has arisen a number of issues of law which in the opinion of the Court are of general significance both to the legal profession and to the public at*

large. Accordingly, there is a strong public interest that these rulings of the Court be made public.

11. *Accordingly, notwithstanding the submissions of the Petitioners upon the point the Court has concluded that no good reason has been advanced for not giving Judgment, as this Court now intends to do.*

12. *Equally for the reasons which the Court has identified the Judgment should not be anonymised.*

13. *The draft Judgment will shortly be circulated for appropriate review and comments.*

14. *Finally, taking into account the circumstances which have now arisen, the Court requests that the parties together prepare an additional introductory form of wording which reflects and confirms that the Judgment is being released following a settlement between the parties and that the Petition has nevertheless been withdrawn. It is important that the parties agree their own form of wording if that is at all possible."*

2. Notwithstanding these directions, the Petitioners have continued to contend that publication should not ensue.

3. Therefore following the receipt of extensive correspondence on behalf of both the Petitioners and the Respondent the Court resolved that a short additional hearing should take place upon this issue.

4. The subsequent hearing took place on 10 September 2018, and the oral and written submissions which were received concentrated upon the subject of the Court's jurisdiction to order full publication as distinct from the exercise of the Court's discretion itself.

5. In light of that position the Court therefore does not intend to address in the course of this Judgment the merits of publication *per se* other than to state that for the reasons provided by the Court on 16 July 2018 the Court considers the merits of publication to be overwhelming.

The Legal Arguments

6. The Petitioners' written Submissions are dated 7 September 2018. The written Submission of the Respondent, henceforth refers to as "the General Partner", are likewise dated 7 September 2018.

7. Although the Petitioners accept that where settlement is reached after the parties have seen a draft judgment the Court retains the discretion as to whether or not to publish a judgment, the Petitioners go on to state at paragraph 12 of their Submissions as follows:

> "*12 The position is very different where a draft judgment has not been circulated before settlement because the settlement means that there is no lis pendens. This distinction was recognised by the English Court of Appeal in Prudential Assurance with reference to the earlier English Court of Appeal decision of HFC Bank Plc v HSBC Bank Plc:*

"29. *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 at the discretion of the judge to decide whether to continue to that process by handing down the judgment in open court or to abort it at the parties' request….*

35. *I should make it clear that the situation I have been considering in this judgment is quite different from the situation which confronted another division of this court recently in HFC Bank Plc v HSBC Bank Plc (CAT 10th February 2000). In that case the court had granted an expedited hearing of an appeal at the request of the claimant, and the members of the court then gave priority to preparing their judgments over the preparation of judgments in earlier cases which were not of the same degree of urgency. … counsel's clerks were told … that copies of the draft judgments would be made available to counsel at midday on the Tuesday. Early on the Tuesday morning, however, the court was told that the parties had come to terms overnight and wished that the appeal should be dismissed. The draft judgments were therefore not made available.*

36. *The parties had therefore not been shown the judgments which were going to be delivered at the time they settled their disputed, and this, in my judgment, makes all the difference. In the circumstances of that case… the court wished to make it clear that it would always encourage the parties to*

settle their differences even at a later stage and nothing the court said was intended to detract from this principle…"

(Emphasis added)".

8. The cases cited are *Prudential Assurance Company Limited v. McBains Cooper & Ors [2001] 3 AER 1014 and HFC Bank plc v. HSBC plc* [2000] Lexis Citation 2645.

9. The Petitioners also rely upon *Toby v. Allianz Global Risks US Insurance Company,* Cause No FSD 152 of 2013, which is a Cayman Islands decision of Mangatal J.

10. Mangatal J cites the *Prudential* case at paragraph 19 of her Judgment, where the learned Judge states:

> *"19. Another useful case referred to by the Plaintiff's Attorneys is the English Court of Appeal's decision in Prudential Assurance Company v McBains Cooper and others [2000] All E.R. (D) 715. That case is particularly helpful because it concerned a case where the first instance Judge had sent out the draft of his judgment to the parties in advance of their settlement indication."*

11. However, the Court notes that Mangatal J also refers extensively to the *Nylons* case at paragraph 17, and in particular to some "*useful guidance*" provided by Lord Neuberger MR, at paragraph 74 of that authority:

> *"74 Where a case has been fully argued, whether at first instance or on appeal, and then it 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 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."

12. At no point did Mangatal J draw a contrast between the two authorities so as to state or even imply that the *Prudential* case dicta were in any way to be preferred to the *Nylon* case dicta, or indeed that the guiding principles on publication identified by Lord Neuberger MR were wrong in practice.

13. This is a critical observation for this Court to make, because Mr. Lowe Q.C. is in effect inviting the Court to rule that Lord Neuberger's principles should not be adopted. He claims that to do so would in some way amount to stating that the *Toby* ruling and the *Prudential* ruling were wrongly decided.

14. With great respect, this is an entirely false dichotomy.

15. Lord Neuberger as Master of the Rolls is stating a broad general principle that where a case has been disposed of, as indeed the instant case has been disposed of, nonetheless the Court not merely has the right to decide whether or not to proceed to give judgment, but actually "*retains*" that right after disposal.

16. In contrast, on a much narrower basis Brooke L.J. emphasises at paragraph 29 of the *Prudential* judgment that he is discussing the process initiated when the judge sends a copy of the judgment to the legal parties' legal advisers. In the present case on the other hand the parties had expressly requested that this Court should not circulate its draft Judgment before a settlement could take place and the Court entirely accommodated that request.

17. Mr. Lowe relies on the fact that a final Order was made withdrawing the Petition in this case before the Court's draft Judgment was circulated, arguing at paragraph 19 of his Submissions that at the time when the draft Judgment was circulated the Court was no longer seized of any dispute in respect on which a judgment was required. Therefore in the absence of a *lis pendens* "*the Court does not retain power to hand down judgment in these circumstances.*"

18. However, this broad and even sweeping conclusion is directly contradicted by the express words of Lord Neuberger themselves at paragraph 74 and I consider that the conclusion is wrong for that reason.

19. In my own directions ruling I was also particularly concerned in this day and age with the paramount aspect of public access to justice and I explained why this was so.

20. In addition to that most crucial consideration, the Court also bears in mind the practical logic adopted by Peter Smith J in *Greenwich Inc Ltd (in administration) v. Dowling and others* [2014] EWHC 2451. The learned judge states at paragraphs 131 - 132:

"131. *There is clearly an inconsistency in the various decisions. 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.*

132. *If I am wrong, then the authorities appear to suggest that when the court has told the parties of the result (see Glaxo above) the court has a duty to give the reasons, if it is in the public interest so to do. Equally, the Prudential case establishes that where the Judge has prepared a draft and released it, a subsequent compromise cannot prevent him if he so wishes from releasing that judgment."*

21. It is appropriate to reiterate that in the circumstances of the present case no logical inconsistency arises between the approach of Mangatal J and that of this Court. Mangatal J was dealing with circumstances where the Judge had produced a draft and delivered it.

whereas this Court was initially asked not to release and agreed not to release a draft at all pending settlement.

22. In addition to providing a very helpful chronology for the assistance of the Court, Mr. Wardell Q.C. summarises the General Partner's position at paragraph 29.4 of his Submissions as follows:

> "*29.4 There has already been extensive delay in these proceedings. The Court may recall that the General Partner has repeatedly complained about what it considered to be attempts by the Petitioners to delay and disrupt judgment. That is no justification for yet further delay and the judgment should be published forthwith. As the Court itself has noted, Messrs Kerr and Naylor deserve public exoneration and it is entirely unfair for unfounded allegations to be left hanging over them for any longer than absolutely necessary. Messrs Kerr and Naylor deserve the public (and in particular, the LPs of the Partnership and the market in which they do business) to be informed that the allegations against them were misconceived. They have been led to expect that the judgment will be published in full imminently and they have a legitimate expectation that that will indeed happen.*"

23. Although the Court recognises and accepts the force of these arguments, nonetheless for the reasons set out above the Court has found it necessary as well as desirable to address directly the particular substantive legal issues raised on belief of the Petitioners.

Conclusion

24. The Court affirms that it has the overarching discretion to proceed to give a full Judgment notwithstanding the prior disposal of a case. The Court also rules that it has jurisdiction to do so, and in the particular circumstances of these proceedings for the specific reasons identified it is in the interests of justice to give the Judgment.

25. Finally, in light of the clear governing legal principles the Court considers that there are no arguable grounds of appeal and no realistic prospects of an appeal against this decision succeeding. Nonetheless, the Court shall grant a stay of 14 days before publication as requested by the Petitioners.

Robin McMillan

The Hon. Mr. Justice Robin McMillan
Judge of the Grand Court

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