IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 152 of 2013 (IMJ)

BETWEEN

TOBY

Plaintiff

AND

ALLIANZ GLOBAL RISKS US INSURANCE COMPANY

Defendant

IN CHAMBERS

Application dealt with at the request of the parties, by way of Written Submissions dated 23 August 2018 filed by Harney, Westwood & Reigels, Attorneys for the Plaintiff, and supported by Stuarts, Walker, Hersant & Humphries, Attorneys for the Defendant.

Before: **Hon. Justice Ingrid Mangatal**

Date of Ruling: **28 August 2018**

Ruling as amended
Distributed: **30 August 2018**

HEADNOTE

Judgments - draft judgment sent to parties' lawyers - Practice Direction No.1/2004 – Parties' lawyers participating in process of suggesting minor corrections – Parties subsequently indicating they have reached settlement before finalised judgment handed down - Discretion of Judge to decide whether to hand down judgment notwithstanding settlement agreement.

RULING

1. This is my ruling in respect of an application by the Plaintiff, which is supported by the Defendant. The parties seek to have the finalised judgment in this matter, not be handed down or published. The judgment was circulated to the parties in draft on 1st August 2018.

2. It is useful to set out a bit of background to this application.

Background

3. The Writ and Statement of Claim were filed in 2013.

4. This matter involved a complex civil aviation insurance claim. The trial took place over 10 days in September/October 2017 and involved a significant number of witnesses, including witnesses from Brazil. Expert evidence was given as to the law of Brazil and as to civil aviation insurance practice. The claim relates to a Cessna C680 aircraft. The aircraft was leased by the Plaintiff, Toby, and insured by the Defendant Allianz Global Risks US Insurance Company, and was subsequently confiscated by the Brazilian authorities.

5. Extensive work was done before, during and at the trial, and in completing the draft judgment. The draft judgment, which is over 200 pages long, was sent out to the parties' attorneys on 1st August 2018. The draft was sent out pursuant to Practice Direction No. 1 of 2004. It contains an index, as well as a summary of my findings of fact and law.

6. As the judgment was relatively long, and my Personal Assistant and I were both going to be on leave for two weeks, the parties were given longer than 72 hours (the period discussed in the Practice Direction - unless the Judge otherwise directs). They were given until 5 pm on Thursday 16th August 2018, to review the unapproved draft judgment and provide any comments in respect of any factual and/or typographical errors.

7. The parties requested additional time in order to provide an agreed list of suggested changes, and they helpfully also provided a marked-up version of the draft judgment, and a list of seven questions regarding wording in the draft judgment. This was provided on Friday 17th August 2018.

8. On return to office on Monday 20th August 2018, I thanked the parties for their assistance, confirmed that all of the suggested changes (the vast majority of which were described by the Defendant's Attorneys as "*very minor*") were acceptable, and answered the seven uncomplicated questions about the wording. I also accepted the Defendant's Attorneys' offer to send a clean version of the draft judgment incorporating all the changes. This was expected to be received by the Court on Tuesday 21st August 2018.

9. On the morning of Tuesday 21st August 2018, the Court received an email from the Plaintiff's Attorneys, indicating for the first time that "*the parties had reached an advanced point in settlement negotiations and the principal terms of settlement have been agreed this morning.*" That email also stated as follows:-

> "*In the circumstances, the parties respectfully and jointly request that the Honourable Judge exercise her discretion and refrain from formally handing down judgment. We thank the Honourable Judge for her careful and considered judgment and for the considerable time clearly invested in both the Hearing and in preparation of the Judgment. However, in our respectful submission, publication in these circumstances may well hamper the parties' ability to compromise proceedings. We would respectfully submit that it is therefore in the interests of justice for judgment not to be published as that will facilitate concluding the proceedings by way of settlement and a saving of time, expense and further Court resources in any argument over costs and any potential appeal.*"

10. The Defendant's Attorneys joined in the request for no formal hand-down or publication.

11. In a later email, the Plaintiff's Attorneys requested time to file written submissions, and this was granted.

12. Brief submissions, along with a bundle of authorities have been filed. The Defendant's Attorneys support the submissions made by the Plaintiff's Attorneys.

The Submissions

13. The Plaintiff's Attorneys submit that the Court retains a discretion whether or not to hand down the judgment in public, notwithstanding that the parties settle the case after receiving a draft judgment. The submissions indicate that meaningful settlement discussions began after the delivery of the draft judgment and progressed very rapidly.

14. The Plaintiff's Attorneys say that it is appreciated that a significant amount of time, consideration and energy has been expended in preparing the draft judgment and in considering complex and contested issues. However, they submit that this is not a case where publication is necessary to clarify a novel point of law, expose a conflicting position taken by two appellate courts, or to avoid perpetuation of an error by the courts of first instance. Moreover, it was submitted that this is not one of those cases in which it would be necessary to publish the judgment in order to expose or exonerate wrong-doing (these scenarios emerge from some of the cases cited). They therefore submit that the wishes of the parties for the Court not to make its findings of law and fact public, and the interests of encouraging settlement in future matters, outweighs the public interest in making those findings public.

15. The Plaintiff's Attorneys go on to say however, that if the Court is minded to publish the judgment, they respectfully suggest a form of words to be noted at the commencement of the judgment.

Discussion

16. It may be useful to set out a portion of the Practice Direction No.1/2004: The Practice Direction "*Corrections to Judgment*", at paragraphs 1 and 2 states as follows:

> "*1. Unless the judge otherwise sees fit, copies of written judgments will now be made available before being released as finally approved to facilitate the following:*
>
> *1.1 To enable the attorneys of the parties to consider the judgment and decide what consequential orders they should seek. In appropriate cases the judge may impose conditions of confidentiality until the judgment is finally released or until the formal order is finally issued.*
>
> *1.2 To enable the attorneys of the parties to submit any written suggestions to the judge about typing errors, wrong references of fact or citation of authority or other minor corrections of that kind in good time, so that, if the judge thinks fit, the judgment can be corrected before it is finally handed down in open Court or Chambers."*

17. One of the cases referred to by the Plaintiff's Attorneys was ***Barclays Bank Plc v Nylon Capital LLP*** [2011] EWCA Civ 826. In that case, the Court of Appeal of England and Wales had not yet handed down a draft judgment to the parties, although the draft judgment of Thomas LJ, (which was the main judgment), had been circulated to Neuberger LJ (as he then was) and to Etherton LJ, when the parties indicated to the Court that they had reached agreement and requested that the Court not give judgment. In deciding that the judgment of the Court should be handed down, Neuberger LJ provided some useful guidance at paragraphs [74]-[78], as follows:

> "*[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.

[75] ***It will also be relevant 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 is 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, the 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 any 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 that desire.***

[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 had 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 different 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 is not already in the public domain, thanks to the judgment below. ***Finally, so far as the parties' interests are otherwise concerned, no good reason has been advanced for us not giving judgment.***" (My emphasis)

18. It is to be noted that in ***Barclays***, Lord Neuberger took into account as a factor, the circulation of a draft judgment even amongst members of the Court, and where the draft judgment had not yet been sent to the parties.

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.

20. In ***Prudential***, the trial concerned a surveyor's negligence action which took place over a five day period. Some months after the trial, the Judge sent out the draft judgment to the parties, in accordance with the procedure used in England as prescribed by the ***Practice Statement (Supreme Court: Judgments)*** [1998] 1 WLR 825 (This Practice Statement, although containing some terms that differ from the Cayman Practice Direction contain the same basic underlying principles). Just before the Judge was to hand down the finalised judgment, the parties asked that he adjourn doing so with a view to his making a Tomlin Order on a paper application which they would be making in due course. The Judge agreed to do so. However, it seemed to the Judge on reflection that there were grounds which would justify him handing down the judgment formally in open court. He gave Counsel the opportunity for submissions to be made on this issue. The Judge gave a short ruling in which he concluded that there were strong public interest grounds for formally delivering the judgment in open court. In that case permission to appeal was

granted, and the effect of the Judge's ruling was stayed until the conclusion of the appeal from his decision.

21. In dismissing the appeal from the Judge's decision, the Court of Appeal indicated that the Judge had a discretion whether to hand down the judgment formally, and that there were no grounds upon which the Court would interfere with the way in which he exercised his discretion.

22. At paragraphs 28 - 30, 31, and 33 - 34, Brooke LJ, after analyzing the UK Practice Statement, discussed some relevant considerations as follows:

> *"28. **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 settle their dispute.** Its purpose is to introduce an orderly procedure for the delivery of reserve 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.*
>
> *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 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.*

30. ***Counsel accepted that the logical consequence of the arguments they were urging on the court was that the parties could prevent the judge from delivering judgment even if it contained findings of serious fraud or serious negligence, if the defendant was willing to pay the claimants large sums of money to suppress them.*** *They also accepted that unless there was anything in the procedures of the House of Lords (which they had not researched) to the contrary it would be open on their arguments to the parties to private litigation, on reading the copies of their lordships' opinions made available to them shortly before they were delivered in the House, to settle their dispute there and then and require that the speeches not be delivered.*
31. *The longer we tested their thesis, the more fragile it appeared.........*

33. *In my judgment the judge was correct in the way he gave his ruling in this matter, for the reasons he gave.* ***He did possess a discretion to decide whether or not to hand down his judgment, and there are no grounds on which this court could interfere with the way in which he in fact decided to exercise his discretion. As I have said, although much of his judgment was of interest only to the immediate parties to the dispute, there were three rulings on points of law which were potentially of wider interest, and a judge sitting in a specialist jurisdiction like the Technology and Construction Court is uniquely well placed to judge whether it would be of value if his judgment was a matter of public record.***
34. *......* ***The wishes of the parties are just one factor, but not an overriding factor, which a judge should take into account."***

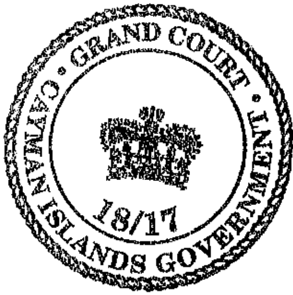
(My emphasis)

23. Thus, whilst the wishes of the parties are to be taken into account by the Judge, they are not an overriding factor.

24. The stage at which the application is made is important. After four and a half years of not settling this matter, it is only after the draft judgment was sent, and indeed, after the parties' attorneys had provided their input into minor corrections to the draft, that these parties announced to the Court that they were at an advanced stage of settlement.

25. In ***Prudential***, Brooke L.J. at paragraphs 35 and 36, discussed the somewhat different situations that may obtain before or after draft judgments have been made available. He stated:-

> *"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. At the beginning of the third week after the end of the hearing of the appeal counsel's clerks were told that judgment would be given on the Thursday of that week and 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 dispute, and this, in my judgment, makes all the difference.** In the circumstances of that case Nourse LJ said at paragraph 9 that the court wished to make it clear that it would always encourage the parties to settle their differences even at a late stage and nothing the court said was intended to detract from this principle. He went on to express the view of the court that it had been the duty of the parties themselves to*



inform the court of the possibility of a settlement at any rate on the Thursday of the previous week when arrangements were made for a meeting in the United States in four days' time between representatives of the parties' holding companies with a view to seeing whether the dispute could be compromised even at this very late stage. It was no part of the compromise agreement that the judgments of the Court of Appeal should be suppressed, since neither party had seen the draft judgments at the time they settled their differences."

(My emphasis)

26. As the cases show, a draft judgment is not a settlement tool. It is also not in the nature of a dress rehearsal. Its purpose is not to simply provide more materials to the parties on which they can decide to settle their dispute.

27. In ***F&C Alternative Investments (Holdings) Ltd. v Barthelemy and another*** [2011] EWHC 1851, after sending out a draft judgment, and the parties indicated that they had now reached a settlement, Sales J, sitting in the Chancery Division, expressed his clear view that the application should be dismissed and the judgment handed down. Having examined the parties wishes, at paragraph [8] he stated as follows:

> *"[8] On the other hand, I also have in mind that it is not the function of the practice of providing judgments to the parties in draft before hand down to allow them "to have more material available to them to help them to settle their dispute" (see* ***Prudential Assurance*** *at [2000] 1 WLR at 2008 E). The parties here had a long time to settle their dispute. It appears from the timing when Mr. Thompson informed me, as part of his professional obligation (see* ***HFC Bank Plc v HSB Bank Plc****, Court of Appeal, unrep, 10 February 2000), of the existence of active settlement negotiations that this round of negotiations were entered into on the basis of knowledge of the terms of the draft judgment..."*

28. There is in the instant case plainly a public interest in many of the issues in this case; indeed both as to the law and facts. In relation to the law and construction issues, there are a plethora of issues that have been determined and which would be of interest to the profession, the civil aviation insurance industry, as well as the insurance industry generally. In terms of the findings of fact, there is also a public interest in these, because this Court was asked to determine and examine Brazilian Law, including a number of decisions made by the Courts in Brazil in relation to the Plaintiff, and others, and the Customs Temporary Admissions Regime in Brazil. Further, the Court was asked to consider the important question of whether the Plaintiff's use of the Temporary Admissions Regime was lawful or unlawful. Findings have been made on this issue.

29. I will just mention a few of the important law points considered: Avoidance; non-disclosure and misrepresentation. The Court had to construe a number of important provisions of the insurance policy, including "*The Law Compliance Condition*", the "*Any Other Financial Cause*" clause, the "*Illegal Purpose Exclusion*", the "*Claims Procedure Condition*", and the law on illegality generally. Indeed, during the hearing, the Court had pointed out to the parties that if decision on some points went a certain way, that would be determinative of the outcome and therefore it may not be necessary to make determinations on all the issues raised. Both eminent Queen's Counsel who appeared at the trial were agreed that, although they could see how much work that would involve for the Court, the parties would need resolution on all the points because of their importance.

30. As a Judge sitting in the Financial Services Division, it is obvious to me that there are rulings I have made in this matter that would be of wider interest than to just the parties. It would plainly be of value if the judgment in this case were to be a matter of public record.

31. Additionally, it is unlikely that such a unique set of circumstances will present themselves together in quite the same way in any one case in the future. If the judgment is "*suppressed*", or the judgment process "*aborted*" (see ***Prudential***), this would mean a truly wasted opportunity for the Financial Services Division of the Grand Court of the

Cayman Islands to provide guidance on a wide range of difficult topics for the public, the insurance industry, and the profession. It is plain that the public may have an interest in the complex composite of issues ventilated, and hence in the judgment being available for publication.

32. Clearly, the examples which the Plaintiff's Attorneys refer to that I have described at paragraph 14 (above) are obviously only examples lifted from some of the cases. As can also be seen from the cases, these are not the only types of circumstances in which there is a public interest in the handing down and publication of a judgment.

33. The parties here have not said in any great detail why publication of the judgment would stop them from settling issues of costs, compromising an appeal, or reaching compromise or settlement generally. Nevertheless, I take into account the parties' expressed desire to settle the dispute on terms favourable to them, and I appreciate that there is also a public, as well as their respective private interests, in the saving of costs and further court time and resources to bring the dispute to an end. However, the parties have not in my view advanced strong reasons for me not to give judgment (see ***Barclays***).

34. Additionally, in my view what happened in this case is not a good practice to encourage. Whilst of course courts are pleased when parties can resolve their matters, if what happened in this case were to happen more frequently it could result in a colossal waste of scarce judicial resources. This is particularly true of a jurisdiction such as the Cayman Islands, where there is a relatively small number of Judges. A case like this took months of concentration and focus, and spending time on it has had an opportunity cost for other matters; there were other outstanding cases and judgments that this Court could not work on while attending to the instant case and completing the judgment.

35. Indeed, the Practice Direction leaves it open to a Judge to decide that a draft not be provided in advance if the Judge sees fit. In my view it may be appropriate in the future to consider more deeply whether it may be preferable, to issue a judgment in final form even if there may be some typographical errors (which can be corrected after delivery by

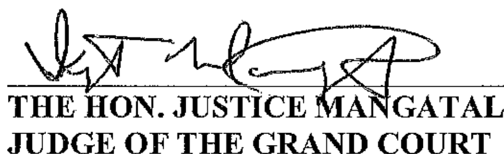
way of errata anyway, albeit an inconvenient process), rather than to have such a potential for waste of judicial resources.

36. When weighed in the balance, and having considered carefully the submissions of the parties, for many powerful and compelling reasons, I exercise my discretion in favour of dismissing the parties' joint application, and will formally hand down and publish the judgment.

37. The words suggested by the Plaintiff's Attorneys to be added at the commencement of the judgment, are not, in my view appropriate. At any rate, I have not seen these words or anything similar, in any of the judgments to which the attorneys have referred me. But at the end of the finalised judgment, I will add the following words as a new paragraph:

> "***Joint Application of the Parties after receipt of draft Judgment***
> *In accordance with Practice Direction 1/2004, the draft judgment was circulated to the parties on 1 August 2018, and the parties were given time to make, and did make, suggestions for changes. On 21 August 2018, the parties indicated that they had entered into advance settlement negotiations and sought that the Court not hand down or publish the judgment. After considering submissions, the Court exercised its discretion to dismiss the application and decided that it was in the public interest to hand down and publish the judgment. The Court's Ruling is dated 28 August 2018.*"

38. I rule accordingly.



THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT