

JERSEY / JUDGMENT

FG Hemisphere Associates [2010] JRC 178C (04 October 2010)

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judgment

the commissioner: 1. On 10 th September, following trial of this matter in June this year, the Court's judgment (running to 197 paragraphs and some 66 pages) was made available to the Advocates for parties and their clients in draft form in accordance with Practice Direction RC10/01. Thursday 30 th September, 2010, was fixed for formal handing down of the judgment and the making of consequential orders. 2. On the afternoon of Tuesday 28 th September the Court was informed by e-mail that settlement discussions between Hemisphere, Gecamines and the DRC were currently in progress in the US and enquiry was made whether the Court would be prepared to adjourn handing down of the judgment for seven days in order to see whether those discussion came to fruition, and whether, in the event of a settlement being reached, the Court would be willing permanently to withhold the judgment that it would otherwise have delivered (to "withhold publication", as the enquiry was expressed). It was suggested that an indication from the Court that it was willing to proceed in this way would be likely to facilitate settlement and, conversely, that without such an indication the prospects of a settlement would be likely to be impaired. 3. The Court directed that it would hear formal submissions on the matter, before deciding how to proceed, and this accordingly took place before us at 2.00pm on Thursday last week. 4. The parties have only been able to make this application because the modern practice in this Court of allowing Advocates and their clients sight of a reserved judgments in draft before it is formally "handed down" (or "delivered") has inevitably opened up, in practice, a window of opportunity to do this. The application raises questions of the propriety of such an application, the Court's jurisdiction to grant or refuse it, and how this Court should respond in this particular case. 5. Counsel were unable to direct us to any Jersey case in which this particular situation has previously been the subject of consideration. But the Court's own inquiries reveal that there are certainly English authorities directly in point, the practice of supplying reserved judgments in draft in advance of formal delivery being very similar to that of this Court. The essence of those authorities, so far as jurisdiction goes (in courts of first instance, at least), is (i) that up until the point when the court starts to deliver judgment, parties to civil litigation are at liberty to settle their dispute and that if they do so there ceases to be any lis in respect of the court has any jurisdiction to adjudicate; but (ii) the issue in draft of the text of a reserved judgment is regarded as the start of the process of delivery of judgment and from that point onwards the parties are no

longer in a position, of their own volition, to prevent the court from completing that process by formally handing down judgment; and (iii) in situations of the latter kind - such as the present case - whether to withhold judgment or to proceed to formal delivery, in whole or in part, becomes a matter of discretion for the trial judge. The leading authority is *Prudential Assurance Co Ltd-v-McBains Cooper*

[2000] 1 WLR 2000 a decision of the Court of Appeal (Peter Gibson and Brooke L. JJ. and Robert Walker L. J. now Lord Walker of Gestingthorpe), since applied in at least two other reported cases, *Liverpool Roman Catholic Archdiocesan Trustees Inc-v-Goldberg* (No.3)

[2001] 1 WLR and, most recently, *Gurney Consulting Engineers-v-Gleeds Health & Safety Limited & Anor* (No.2)

[2006] EWHC 536 (TCC) . 6. As regards the exercise of such discretion , factors which were evidently regarded by the courts as material or potentially material in those cases included (i) the purpose of the practice of supplying reserved judgments in draft, (ii) whether the judgment deals with points of law of general interest, (iii) the parties' wishes, (iv) the saving of time and expense likely to result from a settlement and (iv) whether one or more of party might be taking advantage of the practice to try prevent publication of an adverse otherwise unwelcome judgment. 7. Thus Lord Justice Brooke, giving the leading judgment in *Prudential Assurance* , expressed the relevant principles as follows:- "It is elementary that parties to private litigation are at liberty to resolve their differences by a compromise, and that an unimpeached compromise represents the end of the dispute or disputes from which it arose....." (2005-F). "It is clear to me that the resolution of this appeal turns on the nature of the exercise that is being performed from the moment the draft judgment is delivered to the parties in accordance with the new practice. Counsel argued that this new practice did not make any difference at all. They both submitted that once the parties knew what the judge intended to say in his or her judgment, they were at liberty to compromise their dispute and to make it a term of their compromise that the judge would not publish the judgment whose terms they had read. They accepted that one party might be so anxious to prevent publication that it might be willing to pay the other party far more than the total amount of its claim plus indemnity costs, but they submitted that such a compromise would be binding and enforceable and that a condition to the effect that the judge would not publish the judgment he or she had prepared did not offend against public policy in any way. In order to consider the merits of this somewhat surprising submission it is necessary first to set out the relevant terms of the current Practice Statement (Supreme Court: Judgment)

[1998] 1 WLR 825 " (2006 - F to H). Having set out the terms of the Practice Statement, which was headed "Availability of handed down judgments in advance of the hearing:-new arrangements" and which provided for supply of the draft to legal advisers 48 hours in advance with liberty to pass it to their clients a mere one or two hours before formal delivery), the learned Lord Justice continued:- "The extract makes it clear that the subject of the this practice statement is the "handed down judgment" of which copies are to be

made available in advance of the hearing 24 hours earlier than was allowed for in the previous practice. The express purpose of these arrangements was to enable the parties' legal advisers to consider "the judgment" and decide what consequential orders they should seek.....[and] to enable minor corrections to be pointed out to the judge in time for them to be put right before the judgment is "handed down formally in court" (2007-H to 2008-B). "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 to read the judgment orally in court. 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. Counsel accepted that the logical consequence of the arguments they were both 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 should not be delivered. The longer we tested their thesis, the more fragile it appeared. When we put to counsel the point made by the judge to the effect that if they were right, powerful defendants like insurance companies could pick and choose which judgments they were happy to see published and which judgments they were willing to pay money to suppress, we were told that it has always been a characteristic of the common law that it has developed haphazardly" (2008- E to 2009-B). 8. In that case the trial judge, Judge Richard Harvey Q. C. sitting in the Technology and Construction Court, having circulated a draft written judgment, had been requested by the parties - very shortly before the time fixed for formal handing down of the judgment, as in the present case - to adjourn formal delivery pending confirmation that an anticipated settlement of the action in fact been concluded. Having initially agreed to this request the judge evidently had second thoughts. By that time, the parties had finalised terms of settlement and lodged a draft order with the court seeking a permanent stay of all proceedings. Notwithstanding this, having heard submissions from counsel, the judge decided that there were strong public interest grounds for formally

delivering his judgment in open court and so ruled. On appeal the Court of Appeal declined to interfere with his decision. Lord Justice Brooke again:- "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 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 were a matter of public record. Of course the courts are always anxious to assist parties to resolve their disputes, and I realise that one consequence of this judgment is that the parties to the present action may now face ancillary litigation on the question whether their compromise is binding, or may face the expense and inconvenience of an appeal if it is accepted or held that it is not. They have, however, placed themselves in this position by making a compromise agreement on the mutual understanding that, as a consequence of their compromise, the judgment would not be handed down. This mutual understanding is unenforceable, in that public policy dictates that the judge should not have an independent discretion to decide whether to deliver his judgment or not. The wishes of the parties are just one factor, but not an overriding factor, which a judge should take into account" (2009-G to 2010-B). 9. By contrast, in *Liverpool Trustees*, where the application to withhold formal delivery of judgment also only arose after a draft had been distributed, Evans-Lombe J, exercising his discretion, decided that he would not hand down the entirety of his judgment but only that part of it which dealt with "a procedural point of some importance" which did not concern the merits of the parties' cases. He commented:- "I was informed that a condition of the settlement between the parties was that judgment would not be given. The course which I have chosen therefore means that the settlement will take effect saving the time and expense involved in appeals, by either party, for which I would have been minded to give permission." (Paragraph 4). 10. *Gurney* was a case in which the judge received notice that the parties had reached a settlement while his clerk was preparing to send the draft judgment to counsel but had not actually done so. Following the principles propounded in *Prudential Assurance* he accordingly held that he was no longer seized of the dispute and had no discretion to publish the judgment. The case is not therefore of materiality to the present one. 11. It is, however, of interest to note that in *Grovit-v-Doctor*

[1997] 1 WLR 640, H. L.(E.), their Lordships gave short shrift to counsel who sought, on instructions, to withdraw his client's appeal following a break in proceedings after counsel had concluded his submissions. 12. The parallels between the practice of the Royal Court and that of the English courts are sufficiently close for it to be appropriate for this Court to adopt for the most part at least the principles and approach discussed these cases. Practice Direction RC10/01, headed "Handing down of Judgments", provides that reserved judgments, instead of being read aloud in court, may be "distributed in advance to the

parties' advocates at such time as the Court may direct" (paragraph 1); and that where this is done "The judgment remains a draft judgment until formally handed down..... The draft is confidential. It may be shown, in confidence, to the parties but only for the purpose of obtaining instructions and on the strict understanding that the judgment, or its effect, is not to be disclosed to any other person..... Because the judgment is a draft, the parties may not rely upon it for any purpose until it is formally handed down." (Paragraph 2). The Direction then proceeds to set out, very clearly, the limited purposes of this procedure:- "3. The primary purpose is to enable the advocates to consider the judgment and decide what consequential orders they should seek. Efforts should be made to agree these if possible.

4. A secondary purpose is to enable the advocates to submit suggestions to the Court about typing errors, factual errors, wrong references and other minor corrections of that kind.....
 5. A third purpose in the case of Family Division cases is to enable the parties to offer observations on the degree of anonymity (if any) in the draft judgment....." 13. How then are we to exercise our discretion in the present case? There are, on any view, similarities with the situation in *Prudential Assurance*, in that while much of the judgment here is concerned with issues of fact, a very substantial portion of it deals with potentially important questions of law. The Representor ("Hemisphere") is the assignee of the benefit of two very substantial arbitration awards against the First Respondent ("the DRC") which it seeks leave to enforce as judgments in Jersey and to execute against certain assets of Gecamines which, Hemisphere contends, are sited here and susceptible of execution in part satisfaction of the otherwise wholly unrecovered awards. The principal issues at trial were, first, whether the relationship between the Second Respondent ("Gecamines") and the DRC is such that the former is to be regarded as an organ of state of the latter and, secondly, whether Gecamines' shareholding in the Party Cited ("GTL"), a Jersey registered company, and certain very substantial trading debts owed by GTL and still accruing to Gecamines ("the Payments") can be taken by Hemisphere in execution of the awards. The first of these was largely an issue of fact between Hemisphere and Gecamines; the second an issue which was hotly contested by GTL (the DRC itself was not represented and played no part in the proceedings). The latter involved discussion of questions of the situs of debts, residence (of corporate bodies), and the nature and effect of the process of execution against third parties known in this jurisdiction as *arrêt entre mains*
- a process which has many of the same features as, but a more far-reaching effect than, English garnishee proceedings (now known as Third Party Debt Orders). All of these subjects are, we venture to suggest, of substantial general interest, particularly in a jurisdiction such as this with a major financial services industry, and when they appear, in significant respects, not to have been the subject of previous consideration in the courts of Jersey. Advocate Lawrence, appearing for Hemisphere recognised in her original e-mail enquiry "that there is a material public interest argument weighing in favour of publication".

14. Each of the represented parties invited the Court to adopt the course suggested in their respective e-mails, but when it came to hearing oral submissions on Thursday afternoon there was a marked reluctance to take the lead on the matter. Advocate Lawrence insisted that it was Gecamines' application, while Advocate Harvey-Hills said that Gecamines was only on the periphery of the settlement talks and only with reluctance agreed to speak first; Advocate Robinson explained that his clients, GTL, were not involved in the talks although they had for some time been encouraging the other parties to reach a settlement. According to Mr. Harvey-Hills the principal participants in the talks were the Hemisphere, the DRC and Société Nationale D'Electricité ("SNEL") (which together with the DRC is liable on the arbitration awards but was not a party to the litigation in this Court). The somewhat bizarre result was that the party most pressingly anxious to prevent the judgment being handed down, the DRC, was not represented (accepting for present purposes, Mr. Harvey-Hills' own stance that he did not represent the DRC). 15. All three advocates present in court invoked the significant saving in time and costs that would result from a settlement and the avoidance of an appeal from this Court's judgment - given that Gecamines and GTL have both made it clear that they intend to appeal

- and, with varying degrees of emphasis, the enhanced risk of such settlement failing were the Court to decline to accede to the application. Mr. Harvey-Hills also suggested that the public interest was best served by allowing third-world countries to sort out their "debt-burden" by negotiation rather than litigation; and Mr. Robinson submitted that, absent early settlement there is a risk that GTL, and its non-Congolese shareholders, as well as Gecamines, would sustain substantial commercial and financial damage. 16. We readily recognise that, all other things being equal, it is far better for parties to settle their disputes than to litigate them and that the courts will ordinarily encourage and facilitate settlement. But once a draft judgment is made available to the parties other public interest factors are engaged which inevitably require a different view of things. If the parties' desire to compromise their disputes, however last-minute, even if only hours or minutes before the time of formal handing down of judgment, were the dominant factor that ought to guide a court in the exercise of its discretion in situations such as the present, the Court of Appeal in *Prudential Assurance* would no doubt have said so. As it is, Lord Justice Brooke spoke of the parties' wishes as being "just one factor, but not an overriding factor:" not even "the principal" factor. Moreover, were it otherwise, one would expect the relevant practice directions to be differently structured and worded so as to make provision in every case for parties to have sight of judgments in draft sufficiently far in advance to allow them an opportunity to consider whether it might not be sensible to compromise their dispute before the court's conclusion was published. But the Practice Direction in this Court, as in the High Court in England, makes it abundantly clear that the procedure is intended to serve three and only three limited purposes (paragraph 11 above). To borrow Lord Justice Brooke's words "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". It is, no doubt, just and convenient that the court should always retain a discretion to withhold the

judgment that it would otherwise have handed down in the event of the parties reaching a settlement following sight of the draft judgment, but it seems to us that the whole structure and stated purpose of the procedure is such that the normal expectation will and should be that, once the stage of distributing a draft judgment has been reached, the matter will proceed to formal delivery, and that the discretion to withhold judgment is one that should not lightly be invoked or exercised. 17. It is in the nature of litigation that the resulting judgment of the court is usually unwelcome to one or other of the parties, either as a source of embarrassment, awkward precedent or financial or commercial detriment, and will not infrequently lead to the parties settling their dispute rather than allowing the matter to proceed to appeal. But it is evident from *Prudential Assurance* that the Court of Appeal there was uneasy about parties taking undue advantage of the opportunity afforded them (of having sight of an impending judgment for the limited purposes described) to adjust their attitude to settlement, particularly if motivated by a desire to prevent the judgment seeing the light of day, and was concerned that the opportunity thus afforded could be abused. The particular example given in that case of a powerful insurance company picking and choosing which judgments it was happy to see published and which it was willing to pay money to suppress was, it appears to us, no more than one illustration of a more general concern. In the present case no secret is made of the fact that the DRC and Gecamines are unhappy with the Court's judgment and are concerned that it may create difficulties for them "in other areas". And, if Miss Lawrence were right that, at the time of previous settlement discussions in early August this year, those representing the DRC had refused to join Hemisphere in writing to the Court to inform it of those discussions (a point to which we return below), it would suggest that at that stage it suited the DRC's interests to allow the machinery of justice to continue to take its course. For the DRC, having seen the Court's judgment in draft, now to adopt a very different stance, would be profoundly unsatisfactory. 18. It should not be thought from these latter observations that we have not given full weight to the parties' preferred course and to their stated reasons for making the application that they do. But, irrespective of the concern expressed in the previous paragraph, in our view the public interest in publication of the substantial sections of the judgment dealing with points of law outweighs the parties' wishes. Miss Lawrence tentatively suggested that there might be some way in which the published version of the judgment could be "anonymised", but recognised that this would involve a considerable exercise of editing and that it was by no means clear that this could be done satisfactorily. Nor does the judgment lend itself to the extraction of one discrete point such as the point of procedure that Evans-Lombe J. felt able to publish in *Liverpool Trustees*. We are, accordingly in no doubt that the correct course is for the judgment to be handed down formally and published in the usual way. 19. It remains to say something concerning settlement discussions which take place during the interval between the end of a trial and formal handing down of judgment. It became evident during the course of last Thursday's hearing that the possibility of a settlement is not something that suddenly arose last week. The precise course of events was far from clear and the information that emerged, piecemeal. In other circumstances the Court might have insisted on a full account on affidavit, but time did not permit. It appeared that active discussions

had started not long after conclusion of the trial; that by early August they had reached a point where Miss Lawrence had received instructions to write to the Court to alert it to the fact that such negotiations were in hand but those representing the DRC had opposed this; that those negotiations had subsequently gone into abeyance, but at some point had been revived. In the absence of a clearer picture of the precise sequence of events and of who knew what and when, we make no criticism of any particular person. It is perhaps appropriate, however, to emphasise the importance of parties and their legal advisers informing the court immediately they become aware of any development that may make it unnecessary for judgment to be delivered, not just as a matter of courtesy but in the interests of the efficient administration of justice. Lord Justice Nourse, giving the judgment of the court in HFC Bank Plc-v-HSBC Bank Plc (CAT 10th February 2000) put it this way:- "The foundation of that duty is not the personal inconvenience caused to the members of the court, acute though that may be. It is the requirement, which should be obvious to all, that the court's resources should be properly and efficiently deployed. These observations apply just as much to cases where judgment is reserved at first instance as to cases in which judgment is reserved in this court." (Paragraph 11). 20. The learned Lord Justice was also at pains to emphasise that this duty applies not just to parties' legal advisers but also to the parties themselves. There may be no rule of court on this particular subject in this jurisdiction, as there is now in England; but these observations are, by analogy with the requirement of paragraph 9 of RC 07/01, of equal cogency here, particularly where, at first instance, the resources in question will frequently include devotion of substantial time and commitment by two Jurats of the Royal Court to the determination of substantial issues of fact. Depending on the circumstances it may be that the Court will decide to carry on with preparation of its judgment: but the point is that it should have the opportunity for itself to decide how to proceed. 21. Although the full circumstances are, again, not known, reference to the involvement of SNEL in the negotiations that have been taking place suggests the possibility at least that the effect of this Court's draft judgment may have been made known to representatives of that body in breach of the terms on which the draft was made available (here too, time did not permit the matter to be probed). But here again it is appropriate to remind legal advisers of the very strict terms as regards confidentiality contained in RC10/01. *Authorities Prudential Assurance Co Ltd-v-McBains Cooper*

[2000] 1 WLR 2000 . *Liverpool Roman Catholic Archdiocesan Trustees Inc-v-Goldberg* (No.3)
[2001] 1WLR. *Gurney Consulting Engineers-v-Gleeds Health & Safety Limited & Anor* (No.2)

[2006] EWHC 536 (TCC) . *Practice Statement* (Supreme Court: Judgment) [1998] 1 WLR 825.
Grovit-v-Doctor

[1997] 1 WLR 640 , H. L.(E.). *HFC Bank Plc-v-HSBC Bank Plc* (CAT 10th February 2000). Page Last
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