Neutral Citation Number: [2006] EWHC 536 (TCC)

Case No: HT-04-267

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

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Royal Courts of Justice
Strand, London, WC2A 2LL

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Date: 15 March 2006

Before :

HIS HONOUR JUDGE PETER COULSON Q.C.

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Between :

GURNEY CONSULTING ENGINEERS (A FIRM)	**Part 20 Claimant**
- and -	-
GLEEDS HEALTH & SAFETY LIMITED **GLEEDS MANAGEMENT SERVICES LIMITED**	**Part 20 Defendants**

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NO. 2

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MR.PAUL SUTHERLAND (instructed by **Reynolds Porter Chamberlain EC3**) for the **Defendant/Part 20 Claimant**
MR. PAUL REED (instructed by **Plexus Law EC3**) for the **Part 20 Defendants**

Hearing date: 15 March 2006

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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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Transcript of the Court's recording by:
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JUDGE PETER COULSON QC :

1. The trial of the remaining claims in this action, namely those by Gurney against GHS and GMS, occupied nine hearing days in January and February 2006, with final submissions being heard on 6th February. At the conclusion of those submissions I indicated that I hoped

that the draft judgment would be circulated to the parties in three to four weeks' time. On 20 February, my clerk informed the parties in writing that the final draft judgment would be available on 9th March 2006.

2. The final draft judgment took in total about 10 working days to prepare. Its preparation time was longer than it might otherwise have been as a result of my sitting in a trial in another matter from 13th February to 2nd March 2006. When the final draft judgment was completed on the morning of Wednesday 8th March 2006, it ran to 298 paragraphs and 130 pages.

3. As my clerk prepared to send out the draft judgment on 8th March, he received, without any prior warning, a fax informing him that the action had been settled. The principal term of the draft consent order, which was sent at the same time, was the dismissal of Gurney's claims against GHS and GMS.

4. An issue now arises as to the status of the draft judgment. Gurney are anxious to ensure that the draft judgment is not published. GHS and GMS were originally neutral but, in a short note with which I was provided yesterday, they have subsequently indicated that they, too, do not wish the judgment to be published.

5. On the basis of the authorities it seems to me that the following principles apply:

a) Where a draft judgment is sent to the parties, and the action is compromised thereafter, the Judge has a discretion whether or not to publish the draft judgment: see the decision of the Court of Appeal in ***Prudential Assurance Company Limited v McBains Cooper & Ors*** [2000] EWCA Civ 172; [2000] WLR 2000, applied by Evans-Lombe J in ***Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No3)*** [2001] 1 WLR 2337.

b) In his judgment in ***Prudential Assurance***, Brooke LJ confirmed that this discretion arose as a matter of public policy, because without it, "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." He went on to note that the judge at first instance had exercised his discretion in favour of publication because the judgment contained rulings on points of law which were potentially of wide interest, and he made it plain that there were no grounds on which the Court of Appeal could interfere with such an exercise of discretion. Similarly, Evans-Lombe J in ***Liverpool Trustees*** chose to make public one aspect of his draft judgment on the grounds that it was "a procedural question of some general importance".

c) If parties to an appeal compromise their dispute after the hearing or argument, but before the judgment is provided, even in draft, it seems that there may be circumstances in which the Appellate Court might in any event hand down its judgment. At paragraph 31 of his judgment in ***Prudential Assurance***, Brooke LJ said:

> "It appeared to be conceded during the course of argument that this court might have a residual discretion to hand down its judgment notwithstanding the fact that the parties had compromised their dispute, if only to correct errors in the reported judgment in the Court below, or to reconcile conflicting lines of authority."

Similarly, in ***Grovit v Doctor*** [1997] 1WLR 640, the Appellate Committee of the House of Lords refused the appellant permission to withdraw its appeal after it had been argued, and proceeded to give judgment on the appeal in any event.

d) Generally, however, the position appears to be that, if the draft judgment has not been sent to the parties by the time they compromise the action, the court will not publish that draft judgment. Indeed, it is very doubtful whether a first instance court, such as this one, even has the discretion to do otherwise. At paragraphs 35 and 36 of his judgment in ***Prudential Assurance***, Brooke LJ said:

> "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.
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> 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."

6. In accordance with these principles, I have reached the clear conclusion that I should not publish the final draft judgment that I have prepared in this case. The case had been settled, albeit only for a very short time, when the parties received the draft. The compromise means that I am no longer seized of any dispute in respect of which that judgment is required. Thus, unlike the situation in ***Prudential***

Assurance or ***Liverpool Trustees***, where the draft judgment had been provided prior to the compromise, I do not consider that I have any discretion to publish the draft. Even if I was wrong about that, and there was some residual discretion, the fact that neither party in this case wants the draft judgment to be published would, I think, be bound to lead me to exercise my discretion against publication. In accordance with these principles, therefore, I have concluded that the draft judgment must remain unpublished.

7. In view of other submissions which were made this morning, I should also deal with the way in which the parties reached a settlement, seemingly out of the blue, at the very moment that the court was sending out its draft judgment. Was that just an unfortunate coincidence, or had something, somewhere, gone rather wrong?

8. It is a well-known rule of practice that if, following the conclusion of a hearing at which judgment has been reserved, there are meaningful settlement discussions between the parties, the court should be informed immediately of the fact of such discussions. Indeed in ***HFC Bank***, an authority on which Mr Sutherland relied, Nourse LJ criticised the parties because, despite their clear obligation to inform the court as to the possibility of a settlement (in that case no later than the date when arrangements were made for a "without prejudice" meeting to take place in the United States) they had failed to do so.

9. Nourse LJ made clear the point of principle and its applicability to all courts, including this one. He said:

> "The parties and their legal advisers have apologised to the court through counsel. Their apologies having been accepted we propose to take no further action in this case beyond stating, with the concurrence of the Master of the Rolls, that, in a case where judgment has been reserved, it is the duty of the parties and their professional advisers to inform the court immediately they become aware of any development which may make it unnecessary for judgment to be delivered. 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."

10. I respectfully agree with and adopt those remarks.

11. In the present case, it was apparent from the documents with which I was provided before this morning's hearing that detailed negotiations had been going on between the parties since the date of the final submissions on the 6th February. In his fax to my clerk of 8th March, Gurney's solicitor said:

> "We have, however, been trying for some weeks to conclude a negotiated settlement and it has only just been possible to reach agreement."

12. In his written submissions Mr Sutherland, on behalf of Gurney, referred to "difficult negotiations (which continued over many weeks)".

13. In their oral submissions, at my prompting, counsel elaborated on these general indications, although they did not entirely agree as to the sequence of events. Mr Sutherland told me that there were discussions after 6th February, which reached an impasse on about 10th February, which impasse was not overcome until 1st March; and that, as from 1st March, there was then a real possibility that the case would settle. Mr Reed, who understandably had less information about the relevant events, said that he had understood that there were no meaningful discussions until relatively recently, and he said he was happy to accept that these discussions commenced on about 1st March. I should make it clear that neither counsel had any involvement in the negotiations themselves.

14. In contravention of the rule of practice outlined by Nourse LJ in ***HFC Bank***, the parties did not inform the court on or after 1st March that meaningful negotiations were taking place: they stayed completely silent. I was struck by the fact that, before I expressly raised the point this morning, there had been no hint of an apology to the court for this. I originally thought that the reason appeared to be because the parties had deliberately decided not to keep the court informed of the settlement negotiations and considered that they were entitled so to do. The impression I formed from the documents was that the parties had relied upon the 9th March date as a cut-off point for their negotiations, a long-stop date by which they had to reach agreement if they wanted to avoid the judgment being published. This initial view was apparently confirmed by these passages from Mr Sutherland's written submissions provided yesterday:

> "Moreover the parties were given a date on which judgment would be provided in draft (see above 9th March 2006). The parties had that date in mind as a final deadline after which a settlement, where the judgment would not be published, would not be possible...When, as here, the parties are given a date on which judgment will be provided in draft, the parties should be free to attempt to settle the case at any time before that date"

15. This submission appeared to suggest that the parties could have meaningful settlement discussions right up to the date that the draft judgment was provided, without taking any steps to inform the court. As I made clear during argument, I consider that, to this extent, the submission was misconceived. What it ignores is the simple point that if the parties had complied with their obligation to inform the court, on or immediately after 1st March, about the fact of the detailed negotiations that were then taking place, work on the draft judgment would have stopped altogether, at least until such time as the court was informed about the outcome of those negotiations. There would, therefore, have been no operative date for the draft judgment on which the parties could have relied.

16. In their oral submissions today, once the point had been expressly raised with them, both counsel made it plain that the parties had not deliberately kept the court in the dark about the negotiations, and Mr Sutherland apologised if a different impression had been created by his written submissions. I was told that the parties were frankly unaware of their obligation to inform the court, and had acted inadvertently in failing to do so. The parties, through counsel, apologised for this and the difficulties caused thereby.

17. For the avoidance of doubt, I accept that, contrary to the impression created by the documents referred to above, the parties did act inadvertently in failing, after 1st March, to keep the court informed of developments in the settlement process, and that they did not deliberately keep those developments secret from the court.

18. 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. There are, however, rules which govern the parties' conduct in such cases, which are designed to prevent, as far as possible, the waste of judicial resources and, just as importantly, to avoid detriment to other court users. In the present case, the parties did not comply with the rules, certainly from 1st March 2006, and, as a result, there has been both wasted judicial time and an adverse effect on other TCC users. However, I accept the apologies of the parties, and their assurances that this was inadvertent, and not deliberate. I consider that that is therefore an end to the matter. But I hope that other parties to civil litigation (whether in the TCC or elsewhere) will understand that there are very good reasons why they must keep the court informed of any developments which may affect the settlement position during the period when a judgment has been reserved.