Neutral Citation Number: [2021] EWHC 1641 (QB)

Case No: QB-2018-003939

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2021

Before:

MARGARET OBI (SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between:

Kingsley Napley LLP	**Claimant**
- and -	
1. Stephen Harris	**Defendants**
2. Danriss Group Holdings Limited	

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David Halpern QC and William Harman (instructed by **Mayfair Rise Solicitors**) for the **Defendants**
Scott Allen and Melody Ihuoma (instructed by **RPC**) for the **Claimant**

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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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MARGARET OBI (SITTING AS A DEPUTY HIGH COURT JUDGE)

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 10:30am on 18 June 2021.

Ms Margaret Obi:

Introduction

1. This judgment follows the public and private judgments handed down on 14 April 2021 (see: [2021] EWHC 901) and solely relates to the assessment of the basis of costs.

2. Kingsley Napley (KN) issued a claim against Mr Harris for non-payment of professional fees. Mr Harris counterclaimed. He raised allegations of professional negligence in relation to three of KN's retainers known as the 'Matrimonial Matter', the 'Possession Matter' and the 'IWG Matter' respectively. The trial took place in January 2021. All three counterclaims were dismissed.

3. The IWG Matter was the only matter heard in public. In summary, the IWG Matter related to a standstill agreement drafted by KN which lacked clarity with regard to the parties to that agreement. Mr Harris alleged that this meant that he was obliged to accept a less beneficial settlement from IWG (his former firm of solicitors) than he would otherwise have achieved. In accordance with my judgment on privacy and confidentiality (see: [2021] EWHC 137) the Matrimonial Matter and the Possession Matter were heard in private.

4. Three post-judgment issues (save for an application in relation to the costs budget) arose, namely: (i) whether some of KN's costs should be assessed on the indemnity basis; (ii) the sum Mr Harris should be ordered to pay by way of payment on account of costs; and (iii) whether Mr Harris should be granted permission to appeal any part of the order made by this Court. Having determined that the post-judgment issues should be determined without a hearing, I received written submissions, on behalf of KN, dated 19 April 2021, written submissions, on behalf of Mr Harris, dated 11 May 2021 and KN's reply dated 14 May 2021. I was also provided with the relevant 'without prejudice save as to costs' correspondence between the parties. Two of the outstanding issues were resolved by the time KN's reply, dated 14 May 2021, was received. As there has been no application for permission to appeal and the parties had reached agreement in respect of payment on account of costs, the only remaining issue to be determined was whether some of those costs should be awarded on the indemnity basis.

5. My draft judgment on the issue of indemnity costs was sent to the parties, on the morning of Monday 7 June 2021, with the usual request for typing errors or obvious errors by 9 June 2021. Following receipt of the draft judgment, Mayfair Rise informed me via email on 7 June 2021 that the parties had reached an agreement. I subsequently received an email from Mr Allen (7 June 2021), on behalf of KN, in which he confirmed that it had been brought to his attention that an agreement had been reached after business hours on Friday 4 June 2021. I had not previously been notified that the parties were in negotiations with a view to settlement.

6. Mr Allen submitted in his email sent on 7 June 2021 that notwithstanding the agreement my judgment should be published in the usual way because: (i) it was based on detailed submissions by the parties; (ii) it had taken a significant amount of judicial effort (and therefore public money) to draft; and (iii) it covers important matters in the arena of indemnity costs generally, which will assist other litigants. He

invited me to conclude that publishing the judgment is in the public interest. On 8 June 2021, I received submissions from Mr Halpern QC via email. He made a request for the judgment not to be handed down. He submitted that: (i) the fact that a significant amount of work was involved in drafting the judgment is a strong factor but cannot be decisive – see *Beriwala v Woodstone Properties (Birmingham) Ltd* [2021] EWHC 609 (Ch) per Robin Vos (sitting as a Judge of the Chancery Division) at [23.1-23.2]; (ii) the judgment is unlikely to be of general interest; (iii) there is no other public interest reason for handing down the judgment; (iv) the main judgment to which the decision on consequential matters relates is not publicly available. Mr Allen responded by email on 9 June 2021. He distinguished the *Beriwala* case from the circumstances of this case. In *Beriwala* the parties had agreed a settlement which was contingent upon the draft judgment not being handed down, there were further issues between the parties which might require yet further litigation, and both parties were asking the court not to hand down the judgment. He further submitted that if the judgment is not published there is a real risk that a practise will develop where parties use draft judgments as a '*stepping stone*' to settlement.

Should my judgment be published?

7. It is well-established that where a draft judgment is sent to the parties, and the issues that were in dispute are then settled, the court 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. 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 observe that in the *Prudential* case 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.

8. The recent judgment in *Beriwala* sets out the key legal principles and makes reference to the Court of Appeal judgment in *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826 where a number of factors were identified which might justify handing down a judgment even though settlement had been reached. These factors include: (i) whether a point which is in the public interest has been raised; (ii) the stage reached in the preparation of the judgment; (iii) the views of the parties.

9. It is clear from the authorities that, in deciding whether to publish a judgment, it is necessary to weigh up the private interests of the parties and any public interest in handing down the judgment.

10. In this case, the draft judgment was complete (subject to corrections) before the court was made aware that an agreement had been reached and KN has expressed the view that the judgment should be published. These are relevant factors which weigh in favour of publication. Furthermore, as acknowledged by both parties a significant amount of work was involved in drafting the judgment which was circulated on 7

June 2021, and as a consequence precious time and resources have been wasted. However, settlement (even very late settlement) is to be encouraged. I am satisfied that in the circumstances of this case the fact that a great deal of work was undertaken, which turned out to be unnecessary, is unfortunate but of limited significance when balanced against the other interrelated factors as set out below:

i) The parties reached an agreement before they were made aware of the content of the draft judgment. This is not a case where the parties entered into a settlement in the light of the draft judgment that had been sent to them in confidence. In such cases, there are overriding public interest considerations in favour of handing down the judgment in open court which do not apply in this case. In my view, there is no real risk of a trend emerging (as a result of this case) whereby parties seek to suppress judgments based on the content of the circulated draft. Practice Direction 40E makes it clear that the purpose of supplying the draft judgment is to enable the parties to consider consequential orders and to suggest any proposed corrections to the draft judgment; it is not to facilitate settlement discussions. The courts are alive to the public interest issues raised by the suppression of judgments and each case will turn on its own facts.

ii) Two general submissions on the question of indemnity costs, were made on behalf of Mr Harris, in respect of '*drop hands*' offers (i.e. where each party agrees to bear its own costs) and cases where no strike out/summary judgment application has been made. Both of these submissions were rejected in my draft judgment on the basis of common sense and a fair reading of the rules and relevant authorities. I am not persuaded that my draft judgment provides important guidance that will assist future litigants. Furthermore, the exercise of the court's discretion to award indemnity costs is highly fact-sensitive and in my view the draft judgment is unlikely to be of general interest.

iii) There are no other public interest reasons for the draft judgment to be published. The parties are private individuals. There is no dominant or powerful party seeking to buy off the other party as part of a settlement in order to suppress the judgment.

iv) Much of the draft judgment will only be of interest to the parties. The substantive judgment to which the decision on consequential matters relates is a private judgment. As the context on the issue of indemnity costs is not publicly available it is likely to be of less interest to third parties and members of the public.

11. The public interest factors in favour of publication are significantly outweighed by the public interest factors against publication.

12. Having weighed up all of the circumstances, I have come to the conclusion that, in this case, it is appropriate not to hand down my judgment on indemnity costs. I will approve the Consent Order provided by the parties on 8 June 2021.