



Neutral Citation Number: [2022] EWHC 912 (QB)

Case No: QA-2021-000170

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2022

Before:

MR JUSTICE CHAMBERLAIN

Between:

(1) DR FATIMA JABBAR
(2) DRJ55 LTD

Appellants

- and -

(1) AVIVA INSURANCE UK LIMITED
(2) AVIVA INSURANCE LIMITED
(3) AVIVA PLC

Respondents

Aidan Reay (instructed by **The Wilkes Partnership**) for the **Appellants**
Adam Wolanski QC (instructed by **BLM**) for the **Respondents**

Hearing date: 5 April 2022

Approved Judgment

Mr Justice Chamberlain :

Introduction

- 1 This appeal relates to a claim by Dr Fatima Jabbar and DRJ55 Ltd (“the Company”). Dr Jabbar has a substantial practice providing medico-legal reports for personal injury claims arising from road traffic accidents (“RTAs”). The Company was incorporated by her to collect her fees and perform certain administrative tasks in connection with this practice. Since 2015, Dr Jabbar has provided reports through an entity called MedCo, which was established to facilitate the sourcing of such reports in claims under what is now called the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (“the RTA Protocol”).
- 2 The first and second defendants are subsidiaries of the third defendant, a multinational insurance company headquartered in the UK. They are often (in essence) the defendants to personal injury claims.
- 3 The claim arises from letters and emails sent by the defendants to solicitors acting for claimants about Dr Jabbar. The Amended Particulars of Claim plead four causes of action: (i) conspiracy to injure, (ii) unlawful means conspiracy, (iii) tortious interference with contract and (iv) defamation.
- 4 The defendants applied to strike out all four causes of action and for summary judgment on the defamation claim. The latter application was based on the contention (among others) that a defence of absolute privilege applied to answers to CPR Part 35 requests under a pre-action protocol.
- 5 The claimants applied to re-amend the Particulars of Claim to plead claims in malicious falsehood and under data protection legislation.
- 6 The hearing of the defendants’ strike-out and summary judgment applications, and of the claimants’ application for permission to amend, came before Deputy Master Toogood on 26 May 2021. She reserved judgment.
- 7 On 11 June 2021, she was about to circulate her draft judgment to the parties. However, at 07.01, she received an email from the claimants’ solicitors in these terms:

“Further to the hearing before you in the above matter on 26 May 2021, we write on behalf of the Claimants to confirm that this matter has now been settled by agreement between the parties.

We understand from the Defendants’ solicitors that they filed a copy of the signed consent order in the attached terms with the Court via CE file yesterday afternoon

In the circumstances, given that the claim has now settled, we respectfully request that judgment not be handed down in this matter.”

8 The draft consent order recorded the claims as dismissed and included provision that the claimants pay the defendants' costs. It did not say anything, one way or the other, about whether judgment would be handed down.

9 The Deputy Master responded as follows at 11.02:

“Thank you for your email.

It is unfortunate that it did not occur to the parties to notify me sooner as I spent many hours yesterday writing my draft judgment and was intending to send it to the parties this morning.

However I note the consent order and that this matter has now been concluded.”

10 In the light of that, the defendants' solicitor emailed at 14.07, explaining that the settlement had only been concluded late on the previous day. The email included this:

“...our clients take a rather different approach to the claimants to the question of the judgment. Whilst our understanding is that it is entirely a matter for you as to whether judgment is handed down, our clients consider that this would be very beneficial and in the public interest, especially as the application involved issues of law of general significance/wider public interest. In particular, the application of absolute privilege to communications such as those which were the subject of these proceedings is of importance to our clients and, we anticipate, to all insurers, especially given the role played by insurers in the pre action processes for personal injury claims.”

The defendants' solicitor referred to the decision of the Court of Appeal in *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826, [2012] Bus LR 542, before continuing:

“We would respectfully submit that the general significance of (and public interest in) the issues that you are considering in the judgment and the fact that the draft judgment is at an advanced stage weigh heavily in favour of judgment being handed down. Our clients would certainly, for example, consider any clarification of the law relating to the application of absolute privilege in this context to be of importance. In this respect we note that the claimants have provided no explanation as to why they consider that judgment should not be handed down.”

11 The Deputy Master invited and received written submissions on the question whether, in these circumstances, she should hand down her judgment. She decided that she should, for reasons contained in a judgment dated 25 June 2021, which she did hand down: [2021] EWHC 1729 (QB) (“the hand-down decision”). She refused permission to appeal against the hand-down decision. However, she indicated that she would not in fact hand down her judgment on the strike-out, summary judgment and amendment applications, to allow time for the claimants to renew their application for permission to appeal against her hand-down decision.

- 12 Permission to appeal against the Deputy Master’s hand-down decision was granted by Tipples J on 24 November 2021.

The law

- 13 The key decision relied upon by the claimants is that of the Court of Appeal in *Prudential Assurance v McBains Cooper* [2000] 1 WLR 2000. That came shortly after the introduction of the present procedure for circulating draft judgments under embargo: see *Practice Statement (Supreme Court Judgments)* [1998] 1 WLR 825. The dispute, which related to an allegation of negligence on the part of surveyors, settled after circulation of the draft judgment. Brooke LJ, giving a judgment with which the other members of the court agreed, began by considering the principles that would have applied prior to the introduction of the new practice of circulating embargoed judgments.

- 14 As to that, Brooke LJ said at 2005F-G:

“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: see *Foskett, The Law and Practice of Compromise*, 4th ed. (1996), P-90, citing *Plumley v Horrells* (1869) 20 LT 473, per Lord Romilly MR and *Knowles v Roberts* (1888) 38 ChD 263, 272, per Bowen LJ.”

- 15 He then referred to a series of House of Lords authorities dealing with the question whether the House could or should hear appeals which were “academic” appeals.

- 16 Counsel for both parties argued that, in a private law case at least, the guiding principle was that, if at any time before judgment was entered the parties told the court that they had compromised the dispute, “that was the end of the matter, unless the parties wished the court to take steps to assist them to put their compromise into effect”. That being so, Brooke LJ said:

“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.” (2006E-G)

- 17 As Brooke LJ understood the position, the existing principles were common ground and the appeal turned on the effect of the new procedure for circulation of draft judgments. The question was whether circulation of the draft judgment was part and parcel of the process of handing down the judgment or was a separate and anterior step. Having considered the background to the introduction of the new practice, he gave the answer at 2008F-G:

“...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.”

- 18 One of Brooke LJ’s reasons for reaching that conclusion was that, if counsel 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”. Counsel had suggested that there might be

“one rule for first instance courts and a different rule for appellate courts. For the latter, 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.” (2009A-C)

- 19 Brooke LJ distinguished the case before him from that in *HFC Bank plc v HSBS Bank plc* [2000] CPLR 197, *The Times*, April 26, 2000. In that case, the parties had come to terms before the draft judgment was circulated. At 2010D-E, Brooke LJ said this about the *HFC Bank* case:

“The parties had... 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.”

- 20 In *Gurney Consulting Engineers v Gleeds Health and Safety Ltd* [2006] EWHC 536 (TCC), notice of the settlement was received just before circulation of the draft judgment. HHJ Peter Coulson QC summarised what he understood to be the principles established by the *Prudential* case at [5]:

“(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 (No. 3)* [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...”

- 21 In *Barclays Bank plc v Nylon Capital LLP*, the Court consisted of Lord Neuberger MR, Thomas and Etherton LJ. The parties settled the case after Thomas LJ had prepared a first draft of the judgment and sent it to the other two members of the Court, but before the draft judgment had been circulated to the parties. The *Prudential Assurance* case does not appear to have been cited. Lord Neuberger MR, giving the judgment of the Court said:

“74. Where a case has been fully argued, whether at first instance or on appeal, and it then 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 law of some 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 in most cases 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 was 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, that 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 an 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 to 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 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."

- 22 In *Greenwich Inc. Ltd v Dowling* [2014] EWHC 2451 (Ch), the parties settled the dispute after the judge had announced the decision but before he had given his reasons. Peter Smith J said this at [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."

- 23 In *Beriwala v Woodstone Properties* [2021] EWHC 609 (Ch), the parties settled the dispute after the draft judgment had been circulated. Robin Vos (sitting as a Deputy High Court Judge) referred to *Prudential* and *Barclays Bank* and said at [19] that "[i]n my view the test is no different whether the settlement is reached before or after the draft of the judgment is provided to the parties".

- 24 In *Kingsley Napley v Harris* [2021] EWHC 1641 (QB), the case settled after circulation of the draft judgment. Margaret Obi (sitting as a Deputy High Court Judge) applied *Prudential Assurance*, holding at [7] that “[i]t 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”.

The Deputy Master’s reasons

- 25 The Deputy Master considered all the authorities I have mentioned. She thought the decision in *Barclays Bank* “highly relevant” because that was a case where the draft judgment had not yet been circulated. She indicated her agreement with the reasoning of Peter Smith J and Robin Vos in the passages I have quoted at paras 22 and 23 above. She concluded that exceptional circumstances were not necessary for the discretion to hand down judgment to arise. However, even if they were, the fact that her judgment decided a hitherto undetermined point of law was sufficiently exceptional to trigger the discretion to hand down the judgment.

- 26 The Deputy Master identified the factors relevant to the exercise of the discretion at [18]:

“(i) Whether the case involves a point of law of some potential general interest (*Barclays Bank v Nylon* at [74])

(ii) Whether there are issues of dishonesty or credibility (*Barclays Bank v Nylon* at [74], *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1851 (Ch) at [9(iii)])

(iii) How far the preparation of the judgment had got at the time of settlement (*Barclays Bank v Nylon* at [75]) and the public interest in avoiding further expenditure of court time and resources (*F&C Alternative Investments* at [7])

(iv) The wishes of the parties (*Barclays Bank v Nylon* at [76])

(v) Whether it was a condition of settlement that judgment would not be handed down (for example, *Liverpool Roman Catholic Archdiocesan Trust v David Goldberg QC* [2001] 1 WLR 2337 (Ch) and *Beriwala*) in the context of the desirability of encouraging settlement and finality in litigation (*Prudential Assurance*).”

- 27 At [19], the Deputy Master said that there was a clear public interest in publishing a judgment that addresses a previously undecided point of law which has been the subject of detailed argument and consideration by the court. It was also in the public interest that judgment should be given “where, as here, allegations have been made of malice, dishonesty and conspiracy and the judgment considers whether there are reasonable grounds for bringing those claims”: [20]. Since the judgment had already been drafted, there would be no significant additional waste of judicial resources: [21]. The claimants’ argument that the judgment would give publicity to damaging statements had “little merit” in circumstances where they had agreed an order dismissing their claim; and it was of some (albeit “subsidiary”) relevance that the claimants had chosen to bring the action in the first place: [23]. The judgment could not sensibly be published in part; and in any event it was in the public interest that the parts dealing with the claimants’

allegations of malice, conspiracy and tortious interference with contract be published, since these involved issues of alleged dishonesty: [25]. Finally, it was not a condition of the settlement that the judgment would not be handed down, so there was no risk that handing the judgment down would prevent finality in litigation: [26].

- 28 For these reasons, the Deputy Master concluded that the public interest in publishing the judgment outweighed the claimants' reasons for contending that it should not be handed down: [27].

The claimants' submissions

- 29 For the claimants, Aidan Reay submitted that *Prudential Assurance* establishes that, until such time as judgment is handed down, the complete settlement of the action by the parties will, in the absence of exceptional circumstances, remove the matter from the court. Only if exceptional circumstances obtain can the court hand the judgment down after settlement of the action. *Prudential Assurance* establishes that the circulation of the draft judgment to the parties' legal representatives begins the process of handing down the judgment. Once that act has taken place, but only then, the court retains a well-established discretion to continue the process of handing down the judgment regardless of whether exceptional circumstances apply.
- 30 *Barclays Bank* deals with the criteria upon which the discretion to hand down a judgment may be exercised. It establishes that the considerations are the same whether settlement occurs before or after the process of handing down the judgment begins. It does not, however, alter the rule established by *Prudential* that, in cases where a settlement occurs before the process of handing down begins, exceptional circumstances must apply before any discretion can arise. Insofar as it purports to alter that rule, it was decided *per incuriam*.
- 31 Given that there were no exceptional circumstances of the kind identified in *Prudential Assurance*, the Deputy Master had no discretion to begin the process of handing down the judgment: the factors she identified were not such as to make the case exceptional, given that she was sitting at first instance (so her decision on a point of law would not be binding) and she was not making any findings of fact. The settlement assumed that judgment would not be handed down (even though this was not among its terms) and by handing down judgment the Deputy Master denied the claimants the opportunity they would otherwise have had to appeal. Therefore, she should simply have made the order in the terms of the draft consent order provided by the parties.

The defendants' submissions

- 32 For the defendants, Adam Wolanski QC submitted that *Prudential Assurance* addresses the situation where the case settles after the draft judgment has been circulated. Anything said about the situation where settlement occurs before the process of handing down the judgment begins is therefore *obiter*. Nothing in that case, or in the previous case of *HFC Bank*, shows that exceptional circumstances are required to trigger the jurisdiction to hand down judgment in this situation.
- 33 *Barclays Bank*, by contrast, deals with precisely the present situation, where the case settles before circulation of the draft judgment. The decision shows that there is a

discretion to hand down judgment and there is no trace of any requirement to show that exceptional circumstances.

- 34 Insofar as *Gurney* doubted that a first-instance court even had jurisdiction to hand down judgment where the case settles before the process of handing down begins, it pre-dated *Barclays Bank*, where the Court of Appeal confirmed the existence of the jurisdiction. *Beriwala* and *Harris* provide support for the Deputy Master's conclusions.
- 35 If, contrary to the defendants' submissions, it is necessary to identify exceptional circumstances to trigger the jurisdiction to hand down judgment, the fact that the judgment decided a previous undecided point of law was sufficient. The point is novel, and of real significance to those who operate in the field of RTA claims and more generally. The fact that the judgment contained the Deputy Master's response to serious allegations of malice and dishonesty was also relevant to the balance of public interests.

Discussion

Does the jurisdiction to begin the process of handing down a judgment after settlement depend on identifying "exceptional circumstances"?

- 36 Mr Reay's argument for the claimants depends on reading the Court of Appeal's decision in the *Prudential Assurance* case as deciding that, in a private law case which is settled before the process of handing down the judgment begins, the court lacks jurisdiction to hand down judgment save in exceptional circumstances. Mr Reay conceded that he could not establish that proposition from any of the previous cases referred to in *Prudential Assurance*.
- 37 To my mind, it is possible that this is what both the parties in the *Prudential Assurance* case and the court thought. The way in which Brooke LJ distinguished the decision in *HFS Bank* might be thought to support this view. But the decisions of appellate courts are only binding authority for the points they actually decide or upon which the disposition of the case depends. The court did not have to decide under what circumstances a first instance or appellate court could give judgment in a case which settles before the process of handing down the judgment begins. That is, presumably, why the court was content simply to record a concession (made by counsel for both parties before it) that a "residual discretion" to hand down judgment applied, at least in appellate courts, without saying whether it accepted this concession or explaining whether the discretion was limited to appellate courts or when it could be exercised: see the extract quoted at para. 18 above.
- 38 Insofar as Mr Reay sought to rely on the passage at the start of Brooke LJ's analysis quoted at para. 14 above, it does not assist him. What the court considered "elementary" was 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". As a general proposition, that is no doubt true. But the passage from *Foskett* and the authorities on which it is based are dealing with a different consequence of an "unimpeached compromise": that the compromised issues of fact and law are not to be raised again in a new action. These authorities do not touch the question whether, and if so in what circumstances, the court may hand down a judgment in the action which has been compromised.

- 39 Nor do the House of Lords authorities referred to take the matter any further forward. In the first place, they are dealing with the question whether and if so when the House can hear “academic” appeals, not whether it can give judgment in appeals which have been compromised shortly before judgment. In any event, in one of the authorities referred to later in the judgment, *Grovit v Doctor* [1997] 1 WLR 640, the House of Lords refused to give leave for an appeal to be withdrawn during the course of a hearing, which suggests that there is no absolute rule requiring a *lis pendens* even at the hearing, never mind at some later point.
- 40 The closest the Court came to establishing the proposition on which Mr Reay relies is the sentence beginning “Provided there is a *lis* in being at that stage...” in the passage quoted at para. 17 above. But that proviso was not the subject of argument. The court did not have to consider, and did not consider, the circumstances in which a court could begin the process of handing down judgment after settlement; and the disposition of the appeal was not inconsistent with the existence of a general discretion to do so.
- 41 In *Gurney*, HHJ Coulson QC (as he then was) regarded the question of jurisdiction as “doubtful”. That is understandable. It had not been decided as part of the ratio of the *Prudential Assurance* case, but – as I have said – certain observations in that case might have suggested a negative answer.
- 42 The question did, however, arise for decision in *Barclays Bank*. There, as here, the case settled before circulation of the draft judgment. (The fact that a draft of the judgment had been sent from one judge to the other two is irrelevant: it could not sensibly be suggested that an act internal to the court could begin the process of handing down the judgment.) The terms of Lord Neuberger’s judgment are, in my judgment, fatal to the submission that the discretion to hand down the judgment applies only in exceptional circumstances. Not only did the court not say so, but its reasoning clearly shows that what was required was a balancing of the public interest considerations in favour of giving judgment against any arguments for not doing so. I would endorse the conclusion of Robin Vos in *Beriwala* that the *Barclays Bank* case shows that the test is no different whether the case settles before or after the process of handing down the judgment has begun – and the same test applies whether at first instance or on appeal. There is no need to show exceptional circumstances to trigger the jurisdiction to begin the process of handing down a judgment after a case has settled.
- 43 Approaching the matter from first principles yields the same result. As Lord Neuberger said in *Barclays Bank* at [74], the cases where the public interest favours handing down a judgment after a case has settled include those raising a point of law of some potential general interest, but also those where “some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest”.
- 44 Mr Reay argued that the public interest in publication of a ruling on a point of law was much less strong if the decision was that of a first-instance court. I would accept that the public interest will be greater where the court in question is an appellate court whose decisions are binding on other courts, other things being equal. But even a first instance judgment on a novel point of law can provide useful guidance to litigants and can make a significant contribution to the development of the law. The more one posits examples, the more obvious it becomes that the strength of the public interest in any given case will

be fact-specific. The issue is not susceptible to a threshold condition of the kind contended for by Mr Reay.

- 45 In similar vein, Mr Reay conceded that a judge could hand down judgment after settlement if the judgment contained findings of dishonesty or criminal wrongdoing. But there is no support in the authorities, and no reason of principle, for limiting the discretion to cases where the judgment contains such findings. There will be many circumstances in which a judgment contains observations falling short of findings of dishonesty or criminal conduct, but where publication remains in the public interest. It is not uncommon, for example, for a judge to remark on some aspect of the evidence on which he or she is unable to make findings of fact, but which should nonetheless be drawn to the attention of another public body (such as a regulator or prosecuting authority).
- 46 Cases where the judgment exposes wrongdoing or potential wrongdoing are as likely to arise at first instance as on appeal. (Indeed, the justification for publication may be more powerful at first instance, since the wrongdoing or potential wrongdoing will not yet have been the subject of any public judgment.) Again, the public interest in publication will vary, but the existence of that public interest cannot depend in a binary way on whether the case settled before or after circulation of the draft judgment.
- 47 These considerations seem to me to undermine the justification for any threshold condition of exceptionality in the case where the process of handing down the judgment begins after settlement. They support the approach in *Barclays Bank*, that the discretion should be exercised in the same way irrespective of whether settlement takes place before or after the hand-down process has begun, though of course the factors favouring hand-down may often be more powerful in the latter case.

Did the Deputy Master err in balancing the factors for and against handing down judgment?

- 48 It follows that, in my view, Deputy Master's analysis of the law was correct. Her identification of the relevant factors, by reference to the case law, cannot be faulted. Her application of those factors to the circumstances of this case was cogently reasoned and balanced.
- 49 The draft judgment on the strike-out, summary judgment and amendment applications records conclusions reached after full argument on a point of law that was both novel and important: whether the defence of absolute privilege in defamation proceedings applies to statements made in answering Part 35 requests under a pre-action protocol. By the time the Deputy Master was informed of the settlement, she had spent some time marshalling the arguments and reducing her conclusions to writing. Her analysis of the law is likely to be of benefit not only to RTA insurers but also to litigants more generally. It is also likely to assist the appellate courts if and when (as seems eminently possible) the point falls for decision there.
- 50 The Deputy Master was correct to note that the claimants alleged malice and dishonesty against the defendant insurers. She was also right to regard it as relevant that the claimants chose to bring this claim, making these allegations in a public forum. Where such allegations have been made publicly, and the court has reached conclusions on them and reduced those conclusions to writing, there is a public interest in the court publishing those conclusions, even in a case where the parties have agreed terms.

- 51 Mr Reay submitted that the public interest in handing down judgment was diminished because the allegations were struck out (largely on the basis that the pleadings were inadequate), as opposed to being disposed of on the merits. I reject that submission. There were several opportunities for the claimants to amend their pleadings. The Deputy Master's conclusion that, despite those opportunities, the claims fell to be struck out was every bit as much a vindication of the defendants as a determination on the merits would have been. The Deputy Master was entitled to conclude that it was in the public interest for that vindication to be published.
- 52 The Deputy Master might have added that, while her draft judgment makes no findings of fact about the conduct of Dr Jabbar, it does contain observations at paras 11-12 and 25-30 which may set in train enquiries or investigations by others and may, in any event, be matters of legitimate interest to those considering instructing her to produce medico-legal reports in the future and to those involved as defendants in litigation in which her reports feature. This seems to me to be an important public interest factor in favour of publication of the judgment.
- 53 I have considered carefully whether, as Mr Reay submitted, these observations were extraneous to the issues the Deputy Master had to determine and so should not have been included. I reject that submission. The observations were part of the factual background to the strike-out applications. They were largely based on evidence the claimants had chosen to give. The relevance of the observations to the issues of malice and serious harm are obvious. In any event, at para. 80 of her judgment, when dealing with the amendment application, the Deputy Master expressly referred back to the observations at paras 25-28.
- 54 Like the Deputy Master, I consider it relevant that one of the parties had submitted that the judgment should be handed down. It was also of some significance that the consent order did not proceed on the basis that the judgment would not be handed down. The publication of the judgment did not, therefore, carry the risk of undermining the finality of the settlement.
- 55 Other than the claimants' strongly expressed opposition (which has to be viewed against the background of the matters in para. 52 above), the only reason not to hand down the judgment was that, having settled the claim, the claimants could not now challenge any prejudicial observations on appeal. The Deputy Master did not expressly deal with this point. But this did not matter, because – as I have said – those observations were based on the claimants' own evidence. In any event, the point was plainly outweighed by the considerations in favour of publication.
- 56 In my judgment, the Deputy Master's decision to hand the judgment down involved no error of law or approach and was squarely within the ambit of her discretion. Although it is not necessary to say so to dismiss the appeal, I record that I would have reached the same decision.

If it were necessary to identify exceptional circumstances, was it open to the Deputy Master to hold that such circumstances were present?

57 If it were necessary to identify exceptional circumstances to trigger the jurisdiction to hand down the judgment after settlement, I can see no basis for confining such circumstances to those contended for by Mr Reay (findings of fact of dishonesty or criminal conduct). In my judgment, it was sufficient to trigger the jurisdiction that her judgment contained a ruling on a point of law and vindicated defendants against whom the claimants had chosen to make serious allegations of malice and dishonesty. She could also have relied on the matters to which I have referred at para. 52 above.

Part-publication

58 I can see no basis for criticising the Deputy Master's decision that it would not be feasible or appropriate to publish only that part of her judgment containing her ruling on the absolute privilege point. That would have served only part of the public interest justification for publication. The need to vindicate the defendants was a further reason for publishing the judgment. As I have said, the observations at paras 11-12 and 25-30 were a material part of the background to her decision to strike out the claims. In any event, there was a separate public interest justification for publication of those observations. The decision to hand down the judgment in its entirety, without redactions, was open to the Deputy Master. Again, I would have reached the same decision.

Conclusion

59 For these reasons, the appeal is dismissed.