Settling litigation in the Cayman Islands

THE thought of settling in the Cayman Islands almost always evokes images of white sand beaches, calm blue seas and maybe even a cold piña colada. Although settling litigation in the Cayman Islands may get you one step closer to retirement in the Caribbean, two recent judgments of the Grand Court of the Cayman Islands highlight that a settlement which occurs after a trial will not necessarily mark the end of the matter.

Both judgments make clear that after a trial has concluded the judge has discretion to issue judgment, notwithstanding that the parties in the dispute may have reached settlement before the judgment is published.

In complex matters judges will often reserve their decisions for days, weeks or even months. This may give parties further time to settle disputes after the hearing has concluded, but before judgment is given.

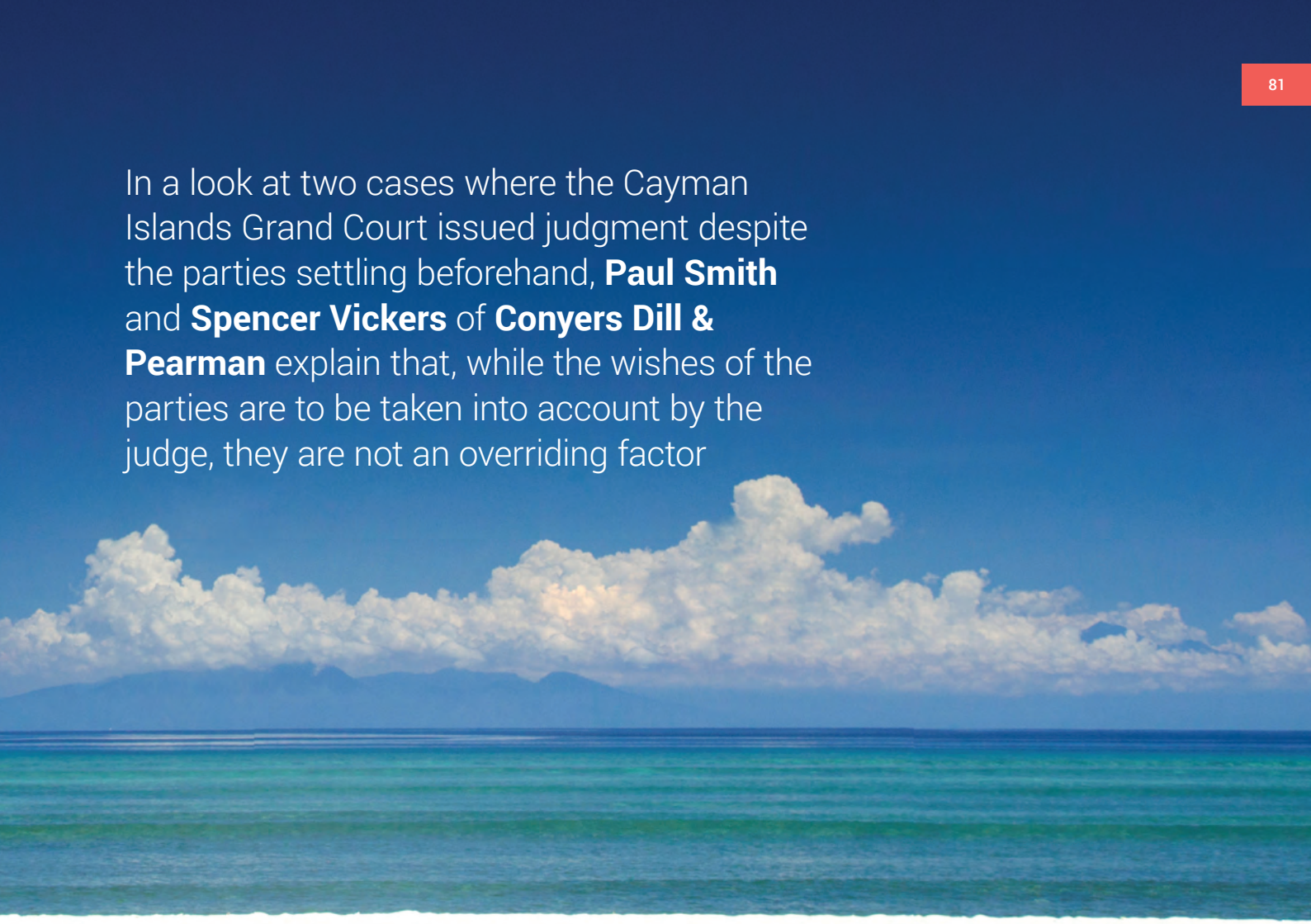
The advantages of parties settling their disputes between themselves are well-known; settlement can save time, reduce costs, ensure confidentiality and avoid the uncertainty of handing over the determination of the dispute to the court (or other third-party decision-maker).

Although these advantages do not carry as much weight when a trial has already concluded, there are good reasons that many disputes are only resolved at this late stage. Understandably, it is sometimes only after each party has had an opportunity to review and consider each other's evidence and arguments (and perhaps witness the judge's approach to the dispute) that they have enough information to reach a compromise.

On two recent occasions the Cayman Islands Grand Court has been asked to consider whether it should release judgments in circumstances where the parties had reached settlement after the trial had concluded. In the first case, a draft judgment had been circulated to the parties before the court was notified of settlement and in the second case a draft judgment had not been circulated:

- In the 30 August 2018 unreported judgment of **Justice Mangatal** in *Toby v Allianz Global Risks US Insurance Company*, the parties announced to the court that they were at an advanced stage of settlement only after over four years of litigation and after a 200-page draft judgment had been circulated to the parties. The parties then asked

In a look at two cases where the Cayman Islands Grand Court issued judgment despite the parties settling beforehand, **Paul Smith** and **Spencer Vickers** of **Conyers Dill & Pearman** explain that, while the wishes of the parties are to be taken into account by the judge, they are not an overriding factor



the court not to publish the judgment.

- In the 13 September 2018 unreported judgment of **Justice McMillan** in *In re Torchlight Fund LP*, the Court was asked to consider whether it could deliver judgment notwithstanding that the parties reached settlement after the hearing had been completed, but before the parties had received a copy of the judgment (draft or otherwise).

The Cayman Islands courts are always eager to assist parties to resolve disputes between themselves, even at a late stage. Accordingly, in both matters the court was mindful that a consequence of publishing the judgments after settlement may be to deter other parties from attempting to settle disputes in future. However, as discussed below, this is not the court's only consideration.

Both McMillan and Mangatal JJ took into account the comments of **Lord Neuberger MR** in *Barclays Bank v Nylon Capital* (2012), where at paragraph 74 Lord Neuberger states:

"Where a case has been fully argued, whether at first instance or on appeal, and then it settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment. Where the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment despite the matter having been disposed of between the parties. Obvious examples of such cases are where the case raises a point of potential general interest, where an appellate court is differing from the court below, where some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest."

In addition, Lord Neuberger commented that relevant considerations also include the status of the judgment and the concerns of the parties. In relation to the status of the judgment, Lord Neuberger notes that it would be a questionable use of judicial time to prepare a judgment on an issue which is no longer live between the parties. In relation to the concerns of the parties, his Lordship observed that if, for their own legitimate interests, parties do not wish (or one of them does not wish) for a judgment to be given, this should be given weight by the court.

In *Toby,* Mangatal J also took guidance from the English Court of Appeal's decision in *Prudential Assurance Company v McBains Cooper* (2000). That decision was particularly helpful as in that case a draft judgment had also been circulated to the parties in advance of the parties notifying the court

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of settlement. After considering **Lord Justice Brooke**'s 1999 judgment in *Prudential Assurance v Eden Restaurants,* Mangatal J states at paragraph 26:

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

In *In re Torchlight Fund*, in addition to the authorities noted above, McMillan J also refers to the English High Court's decision in *Greenwich Inc Ltd (in administration) v Dowling* (2014). In that case **Mr Justice Peter Smith** noted that it would be artificial to have a situation where a judgment can in effect be stopped by the parties by an agreement made before they see the draft judgment but not afterwards. Accordingly, the court must retain a general discretion to issue judgement (whether before or after the parties have seen a draft judgment) where it is appropriate to do so.

Mangatal and McMillan JJ both reached the same conclusion that the judgment in each case should be released. In exercising the court's discretion to release the judgment, McMillan J noted his concern "in this day and age with the paramount aspect of public access to justice". Mangatal J's decision to publish also highlights the importance of judgments to the wider public. While the wishes of the parties are to be taken into account by the judge, they are not an overriding factor. Suppressing judgments prevents the court from providing useful guidance to the public and the legal profession.

Both judgments serve as clear notice that if parties to Grand Court proceedings are unable to reach settlement until after a hearing is concluded, whether or not a draft judgment has been provided, they may be too late to prevent release of a judgment.

Importantly, lawyers should ensure that their clients are aware that agreeing to settle a matter at a late stage will not guarantee the prevention of a judgment being published, even where both parties agree to ask the court to supress judgment. As touched on in *Prudential*, it also follows that post-hearing settlement agreements should be drafted carefully to ensure that they contemplate the possibility of a judgment being published. If lawyers fail to include appropriate terms and ancillary litigation is required to enforce the settlement agreement, the sand, seas and piña coladas may be much further away than imagined.

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