A Lesson on Embargoed Judgments: Do Not Tell the Press!

24 May 2022

Introduction. In *Match Group LLC v Muzmatch Limited* [2022] EWHC 1023 (IPEC), the High Court was concerned with a breach of the embargo on disclosures relating to a draft judgment and held (on the papers) that the circulation of an "embargoed" press release by Shahzad Younas ("**Mr. Younas**"), an employee of Muzmatch Limited ("**Muzmatch**" and, together with Mr. Younas, the "**Defendants**"), to the press was a "serious breach of the embargo".

The Law. Under Practice Direction 40E ("**PD40E**") paragraph 2.4:

- "*A copy of the draft judgment may be supplied, in confidence, to the parties provided that—*
  - *neither the draft judgment nor its substance is disclosed to any other person or used in the public domain; and*
  - *no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down.*"

Further, under PD40E paragraph 2.8:

- "*Any breach of the obligations or restrictions under paragraph 2.4…may be treated as contempt of court.*"

Recently, in *R (on the application of the Counsel General for Wales) v The Secretary of State for Business, Energy and Industrial Strategy* ("**CGW**"), the Court of Appeal found that:[1]

- "*…judgments are handed down in draft under embargo…to enable the parties to make suggestions for the correction of errors, prepare submissions and agree orders on consequential matters and to prepare themselves for the publication of the judgment. The process is not for any other purpose…*"

[1] [2022] EWCA Civ 181 per Geoffrey Vos MR at [24] and [29].

- "*It is the personal responsibility of counsel and solicitors instructed in a case in which an embargoed draft judgment is provided to ensure that [the mandatory provisions of CPR PD40E] are complied with.*"

Further, in *The Public Institution for Social Security v Banque Pictet*,[2] the Court of Appeal noted that where there is an embargo on publicising either the content or substance of a draft judgment, all recipients of that draft judgment need to understand clearly:

- "*Informing other lawyers within the same organisation who are not involved in the conduct of the litigation and whose input is not necessary for [the purpose of carrying out any legitimate exercise] will be a breach of the court's order".*

- *"The need for utmost care in communicating the content or substance of a draft judgment in the digital age."*

- "*Any breach of an embargo must be drawn to the court's attention as soon as it is identified."*

Background. In the present case, issues arose in relation to a draft judgment that was sent to the parties by email subject to the embargo imposed by PD40E paragraph 2.4.

However, shortly before the formal handing down of the judgment, the Court was shown an email from Counsel for Match Group LLC and others (the "**Claimants**") stating that the Claimants had been approached by members of the press who were aware of the outcome of the case. Subsequently, the Defendants' solicitors sent an email confirming that the Defendants had been the source of the journalist's information.

The Judgment. Firstly, the Court held that "*no criticism attaches to [the Defendants' solicitors] conduct in this matter*". This was on the basis that the Defendants' solicitors had repeatedly, and clearly, warned the Defendants, both orally and in writing, that they must keep the embargoed draft judgment confidential until after formal hand down of the judgment.

Further, the Court considered that the following internal disclosures made by Mr. Younas were not in breach of the embargo:

- Disclosure to Muzmatch's head of marketing for the purposes of preparing a press release for publication after formal hand down.

[2] [2022] EWCA Civ 368 per Carr LJ at [18].

- Disclosure to three of Muzmatch's employees in order to contemplate possible technical and design changes that Muzmatch may be required to make following the adverse judgment (i.e., contemplating the registration of new trade marks).

- Disclosure to two of Muzmatch's employees to enable them to prepare a recorded video statement to be sent to customers after formal hand down of the judgment.

However, the Court held that the disclosure by Mr. Younas of a press release relating to the draft judgment to several journalists—itself marked "embargoed" and sent on terms that the journalists respect the embargo—was a serious breach of PD40E. Nonetheless, the Court found that Mr. Younas' actions were an honest mistake and accepted his apology as resolving the matter without the need for full contempt proceedings.[3]

Notably, the Court also stated that "*courts are likely to look with a very critical eye at any case where a party's wish to manage the publicity surrounding litigation has led that party to breach the embargo imposed by CPR PD40E*".

Commentary. The Court has affirmed that it is permissible for parties to share an embargoed judgment internally for the purposes of preparing a press release. However, distributing such a press release for the purposes of managing the publicity surrounding litigation will constitute a serious breach of the embargo, and may be treated as contempt of court.

Practitioners would be well advised to take robust steps to remind clients of the obligations of confidentiality surrounding embargoed judgments, and to only share draft judgments internally on a need-to-know basis.

As ever, it remains of utmost importance to ensure that: (1) any disclosure of a draft judgment is made in compliance with the law; and (2) any information derived from a draft judgment is disseminated only in limited circumstances, and always with the greatest care, so as to avoid any inadvertent unlawful disclosure.

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Please do not hesitate to contact us with any questions.

[3] The Court's approach is similar to that taken by Meade J in *Optis v Apple* [2021] EWHC 2694 (Pat) at [80].

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