The Court of Appeal Considers the Disclosure of Embargoed Judgments to Foreign Counsel

1 March 2023

KEY TAKEAWAYS

- The Court of Appeal decision offers a cautionary tale to practitioners and clients that an embargo imposed on judgments requires strict observance and that a breach, even inadvertent, may result in public and embarrassing judicial scrutiny.
- Contempt of court proceedings may be taken for disclosing information about an embargoed judgment to external or foreign counsel, and liability for contempt of this kind is arguably strict.
- Practitioners would be well advised to explain to clients that disclosing information about embargoed judgments to external or foreign counsel, regardless of their close or cooperative relationship with the parties' representatives, can amount to a breach of the terms of the embargo.
- If a breach of an embargo does occur, the court is less likely to impose sanctions in circumstances where, once a breach of an embargo is identified, steps were immediately taken to limit further disclosure and make a prompt and fulsome disclosure to the court.

BACKGROUND

In *InterDigital Technology Corp v Lenovo Group Ltd* [2023] EWCA Civ 57, the Court of Appeal was concerned with a breach of the embargo on disclosures of draft judgements and what sanctions, if any, should follow.

The underlying case concerned, among other things, the validity of a patent held by InterDigital Technology Corporation (the "Respondent"). The patent was held to be valid at first instance. Lenovo Group Limited (the "Appellant") appealed. The draft

judgment for the appeal was circulated to the parties with the standard terms of the embargo that *"neither the draft itself nor its substance may be disclosed to any other person or made public in any way"*.

The Respondent's solicitors shared the draft embargoed judgment with the Respondent, including its in-house counsel, Steve Akerley ("Mr. Akerley"). They highlighted the terms of the embargo and asked the Respondent not to share the judgement or the outcome with anyone who was not directly involved in one of the three activities specified in those terms.

Mr. Akerley shared the outcome, but not the draft embargoed judgement itself, with the Respondent's external counsel in the United States (the "US counsel"). He had not read the terms of the embargo and the accompanying warnings shared by the Respondent's solicitors in detail. The US counsel were not representing the Respondent in the appeal. However, on the basis of the close cooperation between the Respondent's solicitors and the US counsel over the course of the dispute with the Appellant, Mr. Akerley had formed the view that they were acting as *"co-counsel"*.

When the Respondent's solicitors became aware of the disclosure, they investigated how widely the information had been disseminated and secured confirmation that none of the people to whom the information had been disclosed had passed it on to anyone else. The Respondent promptly disclosed the breach to the court.

THE DECISION

Warby LJ found no fault with the conduct of the Respondent's solicitors and stressed that they had taken the necessary steps to bring the terms of the embargo to the attention of the Respondent. He observed that paragraph 2.8 of Practice Direction ("PD") 40E provides that the disclosure of an embargoed judgment *"may be treated as contempt of court"*.

Warby LJ relied on *R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy*,[1] where Sir Geoffrey Vos MR stated: *"The consequences of a breach of the embargo can be serious. It is not possible to generalise about the possible consequences as judgments will range… from dealing with highly personal information in some cases to price-sensitive information in others"*.

Warby LJ found that Mr. Akerley had not intended to breach the embargo, as he did not realise at the time that his actions would violate its terms. However, Warby LJ

[1] [2022] EWCA Civ 181 at [30].

considered that, arguably, *"liability for contempt of this kind is strict"* and applicable regardless of Mr. Akerley's intentions. He concluded that Mr. Akerley *"may"* have been in contempt of court.

On the facts of the case, Warby LJ held that it was not necessary to take matters any further. He highlighted that Mr. Akerley had disclosed a limited amount of information, and not the draft judgment itself, to a small number of people. Mr. Akerley had marked the information as confidential and asked that it not be shared publicly. Warby LJ also underlined the proactive and cooperative approach taken by the Respondent and its solicitors, concluding that *"[f]urther proceedings would be disproportionate to any need to uphold the court's authority"*.

COMMENT

The decision confirms that sharing the outcome or the draft of an embargoed judgment with external or foreign counsel, regardless of their close or cooperative relationship with the parties' representatives, can amount to a breach of the terms of the embargo.

Practitioners would be well advised to clarify to clients that information about embargoed judgments should not be shared with external or foreign counsel, who are not the legal representatives for that particular case.

While information could be shared with external or foreign counsel to achieve certain legitimate purposes, practitioners should carefully consider whether the potential recipients are involved in the conduct of litigation and whether their input is needed to achieve those purposes.

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Please do not hesitate to contact us with any questions.

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