

Embargoed judgments: A professional word of caution

16 February 2023  Makhala Kirwan

To receive a judgment under embargo is to be given a draft judgment on highly confidential terms. Put simply, parties and their legal representatives are given a ‘sneak peek’ of the trial’s outcome before the decision is handed down publicly. The substance of an embargoed judgment cannot be disclosed to another person or used in the public domain.

In most cases, the confidentiality attaching to embargoed judgments is honoured – but in some cases, it is breached. The consequences of breaching an embargoed judgment can find those responsible in contempt of court.

This article considers how legal professionals and their clients should treat judgments of this nature and avoid the dangers of breach.

The purpose of circulating embargoed judgments

Mr Justice Meade, in *Optis Cellular Technology Inc v Apple Retail UK Limited*, explained that the purpose of circulating judgments in draft is twofold:

1. “From the Court’s point of view, it enables the correction of typos and it also enables corrections of more substantive errors”
2. “For the parties, there are a number of benefits, a major one of which is to prepare to deal with the consequences of the judgment when it is made public, because steps in the litigation have to be taken, permission to appeal has to be considered, and the presentation by the winning and losing litigants of the judgment to their investors and other stakeholders has to be considered”

The key takeaway from the decision confirms the common practice of circulating draft judgments in a limited and controlled way, particularly in cases where parties will be required to make a prompt public announcement once the judgment has been handed down.

What are the rules?

The terms of an embargoed judgment are set out in Practice Direction 40E which specifies that:

2.4. A copy of the draft judgment may be supplied, in confidence, to the parties provided that:

- a. neither the draft judgment nor its substance is disclosed to any other person or used in the public domain; and
- b. no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down

2.6 If a party to whom a copy of the draft judgment is supplied under paragraph 2.4 is a partnership, company, government department, local authority or other organisation of a similar nature, additional copies may be distributed in confidence within the organisation, provided that all reasonable steps are taken to preserve its confidential nature and the requirements of paragraph 2.4 are adhered to.

2.7 If the parties or their legal representatives are in any doubt about the persons to whom copies of the draft judgment may be distributed they should enquire of the judge or Presiding Judge.

2.8 Any breach of the obligations or restrictions under paragraph 2.4 or failure to take all reasonable steps under paragraph 2.6 may be treated as contempt of court.

In accordance with the Practice Direction, draft judgments are commonly accompanied by a warning as to the consequences of breaching the embargo.

Recent case

The Patents Court's decision in *Optis* was recently considered by the Court of Appeal in *InterDigital Technology Corporation v Lenovo Group* which held that a mobile patent held by the US-based company InterDigital had been infringed by the Chinese company, Lenovo. On the afternoon of Friday 13 January 2023, an embargoed judgment was received by InterDigital's UK solicitors. While clearly noting the embargoed nature of the judgment, InterDigital's UK solicitors went on to advise their clients of the outcome.

When the embargoed judgment was passed on to Mr Mike Levin, external counsel at InterDigital's US law firm, by email under the heading: "Confidential – Trial A appeal decision", the outcome (but not the judgment itself) was then shared by Mr Levin with a number of others within his firm. A recipient of that email congratulated one of the UK solicitors on the outcome, who replied: "*Thank you but unfortunately that is a breach of the embargo. Who else did he tell?*"

In the circumstances, it was decided that there was no intention to defy the embargoed judgment and that the disclosures were limited. Accepting the apologies of those in breach, the Court of Appeal (Lord Justice Warby, Lord Justice Birss and Lady Justice Falk) ruled that no further exploration or investigation was necessary, and that "further proceedings would be disproportionate to any need to uphold the court's authority".

It might be said that this was a fortunate outcome given the fact that there had been a technical breach of the embargo. In any event, the case serves as a timely reminder to practitioners of the importance of respecting the confidentiality attaching to, and abiding by the restrictions for the circulation of, embargoed judgments.

Key legal takeaways and practical steps

- The provisions found in Practice Direction 40E are compulsory.
- The draft judgment are to be shared only with the parties and their legal representatives for the specific purpose of correcting errors, agreeing subsequent orders and preparing for publication of the outcome.
- It should be made clear when circulating the draft judgment that the contents are confidential and not for circulation beyond the permitted purposes.
- Where a draft judgment is provided, the legal representatives involved are personally responsible for ensuring compliance.
- An accurate list of recipients should be maintained by the parties' legal representatives.
- In the event of breaching an embargoed judgment, immediate steps should be taken to inform the Court and other parties, and to investigate the breach.

Key contact



Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000