Kluwer Patent Blog

Embargoed judgments: lessons learnt from the recent decisions of the Court

Brian Cordery, Rebekka Thomas (Bristows) · Wednesday, February 22nd, 2023

A number of recent decisions have highlighted the risks that can arise from the practice of supplying draft judgments to litigants and their advisers under an embargo. The courts have made it clear that a breach of embargo is to be treated seriously, and failure to comply with an embargo may result in proceedings for contempt of court. Whilst these examples demonstrate the considerable time, expense and stress associated with a suspected breach of embargo, they also provide a valuable lesson in best practice for dealing with a draft judgment and managing a suspected breach.

Why are draft judgments supplied in advance of hand-down?

Practice Direction 40E, paragraph 2.4 permits the supply of a copy of the draft judgment to the parties so long as (i) neither the draft judgment or its substance is disclosed to any other person or used in the public domain; and (ii) no action is taken (other than internally) in response to the draft before it is officially handed down. Additional copies may be distributed within a company, provided that all reasonable steps are taken to preserve the confidentiality of the document, and the requirements of paragraph 2.4 are adhered to.

In *Optis v Apple (Trial F)* [2021] EWHC 2694 (Pat), Meade J explained the justifications for the practice of supplying draft judgments. One reason is to assist the Court by giving parties the opportunity to correct typos and more substantive errors. However, the supply of draft judgments is also for the benefit of the parties, enabling them to prepare to deal with the consequences of the judgment before it is made public, allowing instructing client contacts to make decisions on the next steps in litigation, including considering any application for permission to appeal, and giving the parties time to consider how to present the outcome of the ruling to investors and other stakeholders.

Consequences of breaching an embargo

Where there is a suspected breach of an embargoed draft judgment, the same principles apply as would to a breach of confidential information. It is essential to establish what happened "*with care, urgency and rigour",* and to address the breach whilst clearly disclosing all relevant facts and information to the court and opposing party (with the exception of privileged information).

The importance of dealing with a suspected breach properly and ensuring that the correct steps are

taken to minimise any risk of a breach is made clear by the comments of Sir Geoffrey Vos MR in *R v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181. In this ruling, the Master of the Rolls stated that counsel and solicitors are personally responsible to the court for ensuring that the mandatory requirements of the embargo are complied with, and for explaining these obligations to clients. Further, the Judge explained that the ruling in *R v Secretary of State* was intended to send a clear message that judgment embargoes must be respected, and "*those who break embargoes can expect to find themselves subject to contempt proceedings*".

Investigating a breach

Given the serious consequences of breaching an embargo, the recent case law provides important guidance on best practice to avoid a breach and the steps to take in the event that a breach may have occurred.

In *Optis v Apple*, Meade J explained that if a breach is suspected, the only appropriate action is to contact the party's lawyers as soon as possible. Urgency is crucial and the court is unlikely to be sympathetic to delays in launching an investigation. Further, a breach must be brought to the attention of the court as soon as it is identified.

Once notified, the party's lawyers should hold "*long and detailed*" discussions with those who may have been involved to work out whether a breach has occurred, and if so, establish the impact of the breach. Once the relevant details have been gathered, the case law highlights the importance of providing all relevant information to the court. The information should be contained in a witness statement and, if necessary, privileged information may be redacted.

Has the embargo been breached?

As noted above, there are a number of purposes for which parties will be permitted to use a draft judgment in accordance with the terms of the embargo. Understanding the boundaries of these "permitted uses" is crucial to establishing whether an embargo has been breached.

In *Optis v Apple*, Meade J explained that the date of hand-down itself is not necessarily confidential. However, parties in receipt of a draft judgment must be cautious as the result of the trial is confidential and can be revealed by a single word or even the mood of the winning or losing party or representative. For this reason, it may also be prudent to refrain from communicating the date of hand-down, even if not subject to the embargo.

In *Match Group v Muzmatch* [2022] EWHC 1023 (IPEC), Nicholas Caddick KC (sitting as a Deputy High Court Judge) expanded upon the limits of the permitted activities under the embargo in relation to the press. The sharing of a draft judgment internally for the purpose of preparing a press release in anticipation of hand-down will likely be permissible under the terms of the court embargo. However, circulating a release which reveals the outcome of the case and/or details of the judgment to external press prior to hand-down will be considered a clear breach, even if provided under a "press embargo".

R v Secretary of State further clarified that, whilst it is permissible for parties to circulate the judgment to specific individuals internally for the purpose of preparing a press release, this use is reserved only for the actual parties to the litigation. Circulation of the judgment for the purpose of preparing a press release on behalf of an entity which is not a party to the litigation, for example a set of chambers or law firm, would be a breach of the terms of the embargo.

Finally, *Match Group v Muzmatch* confirmed that sharing a draft judgment internally for the purpose of identifying any technical and design implications that might be relevant to the parties in preparing submissions on the judgment, agreeing orders on consequential matters and preparing for publication of the judgment is permitted. This would include discussions with the relevant individuals relating to technical changes or non-infringing design-arounds to be implemented.

Outside of the IP world, in *Wright v McCormack* [2022] EWHC 3343 (KB), the High Court went as far as to issue contempt proceedings, on its own initiative, where posts on the Slack messaging platform and an email that had been forwarded where deemed to have disclosed the substance of a draft judgment in libel proceedings. Wright had suggested that the Slack messages were posted to encourage debate amongst those on the channel, however the Court disagreed holding that by posting those messages, Wright was disclosing, and intending to disclose, the substance of the judgment contrary to the terms of the embargo, which had been explained to him.

Best practice ahead of hand-down

Although breaches of the embargo were identified in *Interdigital v Lenovo* [2023] EWCA Civ 57 and *Match Group v Muzmatch*, these cases provide important guidance on what may be considered 'best practice' for practitioners sharing a draft judgment ahead of hand-down.

1. Before providing a draft judgment, lawyers should speak to key client contacts directly in order to explain the terms of the embargo and the consequences if the terms are breached.
2. A draft judgment should be sent to a limited number of key contacts only, and emails should be marked as confidential, drawing attention to the wording of the embargo, the obligations of recipients under the embargo and the permitted purposes for which the draft judgment may be shared.
3. Parties, solicitors and barristers should consider carefully the use of email "exploders", even if commonly used in the course of the litigation. Emails containing the draft judgment or revealing its contents should be sent only to the addresses of specific individuals who require access to the decision for the purposes permitted by Practice Direction 40E. The case law makes clear that members of the press, clerks' rooms, chambers' offices, and foreign counsel are very unlikely to fall within the class of persons permitted to receive the draft judgment or any of its contents. As per the guidance in *R v Secretary of State*, chambers should identify one named clerk responsible for communicating the draft judgment from the court to the relevant barristers.
4. When circulating a draft judgment, the attachment should be password protected and the body of the email should not reveal the result or content of the judgment. Passwords should be sent in a separate email. This will ensure that even if an email is inadvertently forwarded in breach of the terms of the embargo, the confidentiality of the judgment itself may be maintained.

Is there a need for draft judgments to be released under embargo?

Earlier in this article, we set out the provision of the Court Rules pursuant to which judgments may be handed down under embargo and the purpose of so doing. However looking at the problems that have been caused through this practice in recent years, it worth considering whether the practice should be discontinued or modified. One of the problems with the practice is that, for better or worse, all of us live in an age of instant communication. News can travel fast and to many people at once. Who among us has not sent a message to the wrong WhatsApp group when on the move or in a hurry? The answer to that potential issue is of course very simple – don't use WhatsApp groups for transmitting important or sensitive information such as the confidential result

of a trial. But in the euphoria of a victory or the agony of a loss, it is difficult for the lawyers to remember to adhere to protocols let alone their clients. WhatsApp groups or group emails may have people on them – such as trainees or paralegals or representatives of the client – who have moved on and therefore may not appreciate the significance of the embargo and once the genie is out of the bottle, there is no putting it back.

Would it help if judgments were released under embargo to the external legal teams only? Possibly, but then the external lawyers would be faced with an excruciating period of time when they cannot advise their clients with full transparency. The second author of this article is long enough in the tooth to remember when this was the practice and the difficult phone calls with clients who knew their lawyers had the result of a trial but were unable to say what it was. Questions from anxious clients such as "is it sunny or rainy in London today?" were not uncommon and hard to answer via telephone. They would be impossible to deal with via video conference unless the external lawyers happened to have exceptional poker-faces as well as being gifted legal advisers. Furthermore, ethically, should a lawyer know the outcome of a case and not be able tell their client, especially in high profile actions or cases where it could be devastating for a company's business?

One practical solution would be to reduce the time of the embargo. At present it is common for the embargoed decision to be released to the parties about a week before it is formally handed down. Shortening this to 24 or 48 hours would certainly reduce but not eliminate the chance of inadvertent disclosure. It should also be borne in mind that it is very much the exception for the Court to deal with matters consequential to the judgment at the time of handing down. Such matters including permission to appeal and costs are deal with a separate hearing arranged a few weeks later. So one of the justifications for releasing judgments under embargo does not really apply in reality.

Perhaps it is time to do away with the embargo practice altogether? As far as the authors are aware, the practice of the English Court is unique amongst the major European jurisdictions. If a judgment handed down publically and contains some typos, these can easily be corrected. And if there is an issue that the Court has inadvertently omitted to opine on, this can be dealt with in a short supplementary judgment.

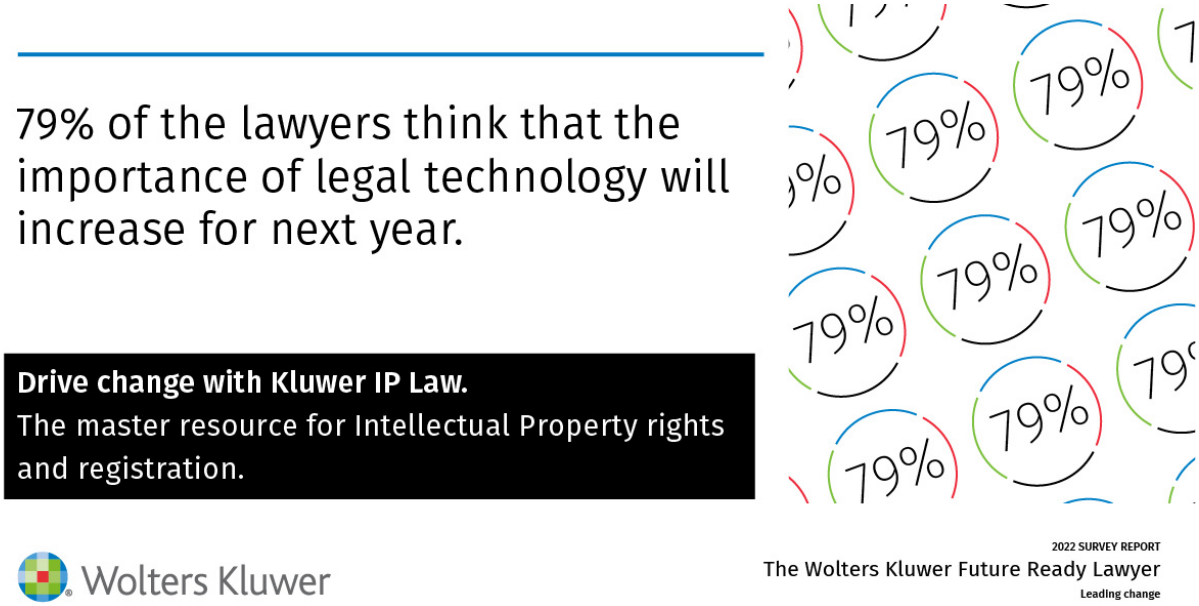
As a closing comment, the authors note that there is at present considerable variability in the time taken for handing down judgments in the English Patents Court following trial. The shortest time is typically 3-4 weeks (it can be quicker) but on the other hand, some judgments are currently taking over 8 months or more to be handed down. This can be a matter of frustration for the parties. Whilst accuracy must always trump speed, the authors wonder if, in appropriate circumstances, it would be better for the parties if the Court were to communicate the result either at the end of the trial or a few weeks later with the written reasons to follow? This is the practice in, among other places, the EPO and the German Federal Patents Court and whilst no system is ideal, it is clear that the parties appreciate knowing the result quickly. It may also promote settlement which may obviate the need for the Court to write a decision at all in appropriate circumstances. In an interim injunction case last year, Roth J communicated his decision to the parties several weeks before handing down his judgment. It might be worthwhile considering establishing this as normal practice.

To make sure you do not miss out on regular updates from the Kluwer Patent Blog, please subscribe here.

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



This entry was posted on Wednesday, February 22nd, 2023 at 1:47 pm and is filed under Case Law, Litigation, United Kingdom
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.