

Draft judgments: navigating the embargo

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Status: Published on March 9, 2022 | Jurisdiction: England, Wales

This article was first published by Practical Law on the Practical Law Dispute Resolution Blog, the predecessor to the Practical Law Dispute Resolution Column which can be found at: uk.practicallaw.thomsonreuters.com/w-038-8059
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Where the court is to hand down a [reserved judgment](#), the parties and their legal representatives ordinarily do not have to wait until the judgment is made public to find out the result. They are given a sneak preview, on confidential terms, usually a couple of days beforehand. This is usually referred to as receiving the judgment under [embargo](#).

In the great majority of cases, it all works smoothly – but sometimes it doesn't, and the consequences can be dramatic. A breach of the embargo may be treated as a [contempt of court](#). At the very least, as recent examples have shown, it is likely to draw judicial ire and public castigation.

This blog post considers how parties, and their lawyers, can make sure they don't end up in danger of such treatment.

Practice Direction (PD) 40E

The terms of the embargo are set out in [PD 40E](#) (Reserved Judgments). This provides that a copy of a 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.”

Where the party is a company (or other similar organisation) additional copies may be distributed in confidence within the organisation, provided that all reasonable steps are taken to preserve its confidential nature and the above requirements are adhered to. If there is any doubt about who can receive a copy, enquiries should be made of the judge.

Recent Court of Appeal guidance

The Court of Appeal has recently taken the opportunity to give guidance as to what should – and should not – be done under the embargo.

In *R (Counsel General for Wales v BEIS)*, counsel's chambers accidentally jumped the gun and published a press release on a case counsel was involved in the day before judgment was handed down. As soon as the error was picked up, the press release was deleted from its website and social media and the senior practice manager wrote to the court explaining that there had been a “miscommunication” in chambers and apologising for the incident.

The Master of the Rolls (MR) wrote to the barristers personally, emphasising the strict provisions of PD 40E and seeking a written explanation as to precisely what had happened, and also called them into court for an oral hearing. In his written judgment, the MR said it seemed, anecdotally at least, that violations of the embargo are becoming more frequent, and he wanted to send a clear message that the embargo must be respected. He added that, in future, those who break embargoes can expect to find themselves the subject of contempt proceedings as envisaged by PD 40E.

The purpose of handing down a judgment in draft, he explained, is to enable the parties to make suggestions for the correction of errors, prepare submissions and agree orders on consequential matters, and prepare themselves for the publication of the judgment – and not for any other purpose.

The MR highlighted a number of specific errors in this case, including that individuals in the clerks' room and chambers' offices were given a summary of the draft judgment's contents in the form of the press release. That was not necessary for any of the purposes listed above and should not have happened.

Indeed, the MR commented, drafting press releases to publicise chambers “is not a legitimate activity to undertake within the embargo” (*paragraph 26, judgment*). It is different where a party wishes to issue a press release immediately on hand down, and enlists the help of counsel or solicitors with such preparations. But, he said, barristers and solicitors are not parties to the proceedings and have no need to prepare themselves for publication in that way.

Another recent example

A High Court decision last October gives another example of court guidance on proper conduct relating to draft judgments under embargo: *Optis Cellular Technology Inc v Apple Retail UK Ltd*. That case involved an unusual set of facts where the claimant thought a draft judgment had been leaked when in reality it hadn't. An industry contact of the claimant's managing director (MD) had heard that the judgment was to be handed down on a particular date and sent an email essentially to wish him luck. That led to a conversation in which they were at cross-purposes and the MD thought the contact had learned the result when in fact that wasn't the case.

Meade J handed down a judgment in which he highlighted a number of important points around the handling of draft judgments and any suspected breach of confidentiality. The judge was particularly critical of the MD for initiating a phone call with his industry contact in a conversation that was bound to touch on the outcome of the case – whether or not he thought the result had already leaked out.

The judge was also critical of the claimant's failure to investigate the suspected breach of confidentiality with "care, urgency and rigour" and to make full disclosure to the court and the opposing party. Instead, the account of what happened had come out in piecemeal fashion and had initially been false in certain respects, and there had been an entirely unfounded suggestion that the (suspected) leak had come from the judge's "office".

Although it had not resulted in any breach of confidentiality in this case, the judge was also critical of the use of email "exploders", whereby an email sending the judgment to a central email address at the claimant's law firm had been automatically forwarded to a broader distribution list. This had led to the draft judgment being provided to an excessive number of individuals.

Practical steps

A number of important practical points can be distilled from these decisions:

- A draft judgment should be provided only to those who need to see it for a proper purpose, that is suggesting corrections, preparing submissions or agreeing orders on consequential matters, and preparing for publication.
- This might not be everyone who has been involved in the litigation, and automatic distribution lists should not be used to circulate a draft judgment as they may lead to wider dissemination than is appropriate.
- If there is any doubt as to who may receive a draft judgment under embargo, the position should be clarified with the judge.
- While parties to litigation may use the draft judgment to make legitimate preparations for publication, for example by getting ready to issue a press release immediately on hand-down, legal representatives should only undertake activities aimed at assisting the client with such preparations – not their own marketing activities for example.
- Proper steps must be taken to ensure confidentiality, for example by making sure anyone provided with the draft judgment or informed of its contents is aware of the confidentiality restrictions.
- There is nothing to prevent a party who has received a draft judgment from speaking to colleagues or commercial contacts, but any communication that is likely to be focused on the result should be avoided and care must be taken to avoid giving away the result with a word or a gesture.
- If a breach of confidentiality is suspected it must be investigated by a party's legal representatives fully, carefully and urgently. All relevant information should be reported to the judge and the opponent as soon as possible.

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