Neutral Citation Number: [2022] EWCA Civ 181

Appeal No: C1/2021/0802

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
Lord Justice Lewis and Mrs Justice Steyn [2021] EWHC 950 (Admin)

Royal Courts of Justice, Strand
London WC2A 2LL

Date: 16/02/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE NICOLA DAVIES
And
LORD JUSTICE DINGEMANS

B E T W E E N

THE QUEEN
on the application of
THE COUNSEL GENERAL FOR WALES

Appellant/ Claimant

and

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Respondent/ Defendant

and

(1) THE LORD ADVOCATE
(2) THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Interested Parties

Helen Mountfield Q.C. and Mark Greaves (instructed by **Director of Legal Services, Welsh Government**) for the **claimant**

The defendant and interested parties did not appear and were not represented

Hearing date: 16 February 2022

JUDGMENT

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This judgment concerns the violation of an embargo on the publication or disclosure of the contents of an Approved Judgment provided in confidence to the parties and their counsel and solicitors.

2. The draft judgment in this case was sent by the clerk to Lady Justice Nicola Davies on the usual terms to counsel's clerks at 13.40 on 4 February 2022. Two of the three counsel representing the appellant were Ms Helen Mountfield QC and Mr Mark Greaves (the "Barristers"), who practice from Matrix Chambers ("Matrix"). The email attaching the draft judgment was sent to the clerking team at Matrix. It included the following:

> This draft is confidential to the parties and to their legal representatives. Neither the draft nor its substance may be disclosed to any other person or made public in any way. The parties must take all reasonable steps to ensure that it is kept confidential. No action is to be taken (other than internally) in response to the draft before judgment has been handed down in court. A breach of any of these obligations may be treated as a contempt of court.

The header to the draft judgment itself included a statement in a substantially similar form, save that it said expressly that "the Practice Direction supplementing CPR Part 40" applied to the draft judgment.

3. CPR PD40E, which establishes the procedure for circulating judgments to counsel for corrections, provides as follows:

> 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.
>
> 2.5 Where a copy of the draft judgment is supplied to a party's legal representatives in electronic form, they may supply a copy to that party in the same form.
>
> 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.

4. At 14.49 on 8 February 2022 (the day before the draft judgment was due to be handed down in court), Ms Elizabeth Bousher, senior practice manager in Matrix, (Ms Bousher) emailed a letter (the Letter) to the clerk to Lady Justice Nicola Davies with the following text:

> It has been brought to my attention that our Matrix press release in relation to the Judgment due to be handed down tomorrow on the matter of *R (Counsel General for Wales) v Attorney General* has been uploaded too early. This was due to a miscommunication within Chambers and we are very sorry for this vast administrative oversight. The text that was posted online is written below and was taken down immediately when this error was discovered.
>
> The Court of Appeal has dismissed the appeal of the Counsel General for Wales in his application for permission to seek a declaration as to the proper construction of the Government of Wales Act in the light of the UK Internal Markets Act. The Court of Appeal held that the application was premature and should be tied to a specific piece of Senedd legislation. The Counsel General is seeking permission to appeal to the Supreme Court. Helen Mountfield QC and Mark Greaves represented the Counsel General with Christian Howells." [sic]
>
> The draft judgment was not included and has not been released.
>
> We apologise profusely to the court for this mistake and will take steps internally to make sure this error is never repeated. Counsel will be available to make our apologies in person to the Court.

5. I responded to the Letter by writing to the Barristers personally on 11 February 2022. I said that the Letter had explained that the outcome of the case was made the subject of a press release from Matrix posted, as I thought, on Matrix's website, in violation of the Court's embargo on 8 February 2022. I said that the court found inadequate the explanation that this violation had been "due to a miscommunication within Chambers". I explained that the Court of Appeal, like other Courts, operated on the basis of a system of trust between judges and Counsel and that adherence to judges' directions was central to that trust: "[i]t was counsel's personal responsibility to ensure that the court's directions [were] adhered to". I referred to the strict provisions of CPR PD40E. I sought a written explanation as to (i) what precisely went wrong within Chambers and how such a serious error could have occurred, (ii) the names of each individual person within Chambers, whether barristers or staff, who had access to the embargoed judgment and for what purpose they had such access, (iii) who drafted the press release and posted it and where and for how long, and (iv) the precise steps that you propose to ensure that there is no repetition of the mistake. Finally, I indicated in my response that we intended to hold a hearing at the earliest opportunity to hear oral representations as to what occurred and what consequences should follow.

6. The Barristers responded as directed by my letter at Noon on 14 February 2022 providing the court with a summary of their responses to my questions and witness statements from each of the Barristers and Ms Boucher. I shall deal with the contents of those statements in a moment. Yesterday, a further witness statement from Rachel Southern, Head of Marketing and Strategic Development at Matrix, was filed.

7. We held the hearing that I had directed in my letter today on 16 February 2022. It was attended by Ms Mountfield QC and Mr Greaves in person. Notwithstanding that we gave the other counsel in the case, the solicitors and the parties the opportunity to attend, only Diane Dunning, the solicitor within the Welsh Government Legal Services attended.

8. I am, therefore, delivering this judgment having received written and oral representations as to what occurred and what consequences should follow.

The Barristers' explanation for what happened

9. The Barristers' witness statements explain that, once their clerks had received the password-protected copy of the draft embargoed judgment, they were sent it and the password (by separate email) on the same day (Friday 4 February 2022). Ms Venetia Tate, a Marketing Assistant at Matrix emailed the Barristers at 10.09 on Monday 7 February 2022 headed "News Item" in the following terms: "I understand you are in Court tomorrow for the case of Wales v AG. Would you like a news item to be uploaded onto the website? If so would you be able to draft some text or shall we write something and send to you for approval?"

10. After that email, Ms Mountfield drafted the text recorded above and sent it to Ms Tate at 11.03 on Monday 7 February 2022. On the following day, Tuesday 8 February 2022 at 10.09 (which was still almost 24 hours before the hand-down fixed for 10.00 on Wednesday 9 February 2022), Ms Tate emailed the Barristers again saying: "Would you prefer I did not post about it on social media?" Ms Mountfield responded one minute later saying: "I'm easy either way", and Mr Greaves responded two minutes after that saying: "I think it is probably worth posting on social media, just due to the importance". At 10.30 the same day, Ms Tate responded to the Barristers saying: "Thanks for confirming. I'll post on social media this morning".

11. It can be seen immediately from this email exchange that the Barristers each had two opportunities to realise that Ms Tate, the Marketing Assistant in their office, was under a misapprehension as to the date of hand-down. On Monday, she had emailed saying that she understood they were "in court tomorrow", and on Tuesday, she had emailed saying she would post on social media that morning. The Barristers were fully aware, and do not suggest otherwise, of the date and time of hand-down, which was, I repeat, Wednesday at 10.00.

12. To be fair to the Barristers, however, I should record that Ms Mountfield explains in her statement that she did not pick up, as she should have done, that Ms Tate's understanding was that the date of hand-down was a day earlier than it actually was because she was "[w]orking under pressure of time to get submissions to the court" and she "read and responded to Ms Tate's email too fast". Mr Greaves explains that he was engaged in urgent work and did not see Ms Tate's original email referring to his being "in Court tomorrow". He replied to an email later in the chain without

scrolling down to the email that had started the chain off. Neither of the Barristers actually saw the email sent at 10.30 on Tuesday about posting on social media that morning until after the violation had come to light.

13. The fact that busy barristers missed each of the four opportunities to avert a violation of the embargo highlights the need for Chambers to operate far tighter systems if further such breaches are to be avoided in future. I shall return to this issue in a moment.

14. It turns out that the press release that Ms Mountfield had drafted was actually posted on Matrix's website and on Matrix's Twitter and LinkedIn accounts at 10.29 on Tuesday 8 February 2022 and taken down, some 5 hours later when Matrix was seemingly informed both by the Counsel General's solicitor and by Mr Christian Howells (the third counsel in the appellant's team) that no such releases should have appeared. Nonetheless, Matrix have some 14,000 followers on Twitter and more than 7,000 followers on LinkedIn, who would have had access to the information. Because the tweet was deleted, there is no information about re-tweets.

15. Ms Mountfield also described the normal practice at Matrix as being: "that when the practice team learns of a hand-down, they flag the fact (though not the content) of the judgment to the marketing team, and a member of the marketing team emails the barrister concerned to ask if it should go onto the website/new feed at the point of hand-down. If so, the barrister is usually asked to draft some wording to be published on the website and social media following the handing down of the judgment". A revised practice has been initiated since this incident, but I do not need to record its details here.

16. I should also record that both Barristers have properly accepted personal responsibility for what occurred and apologised unreservedly to the court. Ms Bowsher also filed a witness statement explaining what happened in the office and how Ms Tate made the error about the date of hand-down inadvertently and despite the fact that the date was correctly recorded in the Chambers' hand-down log.

<u>The law</u>

17. I have only been able to find two cases in which violations of an embargo on publication of a draft judgment have been in issue. In *Baigent v. Random House Group Ltd* [2006] EWHC 1131 (Ch), the Lawyer magazine had published the result of a judgment on its website shortly before it was handed down. The posting was removed as soon as the error was discovered. Peter Smith J pointed out at [7] that the journalists in question were in ignorance of the law. At [12], he said that any future breach of CPR PD 40E might have quite severe consequences.

18. More recently and perhaps more significantly in *HM Attorney General v. Crosland* [2021] UKSC 58 (*Crosland*) (on appeal from [2021] UKSC 15), the Appeal Panel of the Supreme Court upheld the First Instance Panel's observations on the limited period of the embargo that had prevented the disclosure of a draft judgment. The majority of the Appeal Panel (Lords Briggs Kitchin and Burrows and Lady Rose) held at [63] and [77] that the restriction engaged Article 10 of the European Convention on Human Rights, but was necessary and proportionate:

> "Furthermore, it [the embargo] was for the specific purposes of enabling the parties to make suggestions for the correction of errors, prepare submissions on consequential matters and to prepare themselves for the publication of the judgment. It is important that the published text of a judgment of the court should be accurate, complete and in its final form. This restriction was clearly necessary in order to achieve the legitimate objective of maintaining the authority of the judiciary and judicial decisions and was a proportionate means of achieving that result".

19. Those comments apply as much to that case as to this one, and to draft judgments handed down in the Court of Appeal under CPR PD40E as to the equivalent process in the Supreme Court.

Discussion

20. The events I have described should not have happened. The court understands that mistakes are bound to occur and that is why, if the strict rules contained in CPR PD40E are to be adhered to, far stricter measures need to be put in place by anyone who is given the privilege of seeing an embargoed draft judgment before it is handed down and thereby put into the public domain.

21. I should say that I have called this case into court because, amongst other reasons, the breaches that occurred here are not alone. I have become aware formally and informally of other breaches in other cases. It seems, anecdotally at least, that violations of the embargo on publicising either the content or the substance of draft judgments are becoming more frequent. The purpose of this judgment is not to castigate those whose inadvertent oversights gave rise to the breaches in this case, but to send a clear message to all those who receive embargoed judgments in advance of hand-down that the embargo must be respected. In future, those who break embargoes can expect to find themselves the subject of contempt proceedings as paragraph 2.8 of CPR PD40E envisages.

22. I want also to draw attention to the terms of paragraph 2.4 of CPR PD40E which provides that 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".

23. The persons to whom the judgment is normally (unless specific protections are provided for) supplied are counsel, the solicitors working on the case, and the parties themselves (whether individuals or corporate). Paragraph 2.5 of CPR PD40E envisages that a party's legal representatives may supply a copy to the party to the claim in electronic form, not that it can be circulated elsewhere. If the party is a partnership, company, government department, local authority or other organisation of a similar nature, paragraph 2.6 of CPR PD40E provides expressly that "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". That is not a licence to circulate the draft judgment beyond those who need to see it for the purposes for which it has been distributed in draft.

24. It is important, therefore, to understand why judgments are handed down in draft under embargo in the first place. Some insight is gained from the passage cited above from *Crosland*. That suggests that the process is 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 and dissemination of the judgment itself or its substance beyond those that I have specifically mentioned is forbidden (unless the court expressly gives consent). For a fuller explanation of the history and rationale of the court's practice, see Woods: *Paragraph 168: A Cautionary Tale Concerning the Circulation of Draft Judgments to Counsel*, 2017, Oxford University Comparative Law Forum.

25. In this case, a number of specific errors were made. First, it was not appropriate for persons in the clerks' rooms or offices of Chambers to be given a summary of its contents. That was not necessary for any of the purposes I have mentioned. The clerk to the barrister in question is sent the draft judgment for onward transmission to the barrister. Whilst I accept nobody in Matrix's office actually read the draft judgment, they were sent a press release explaining its contents, which should not have happened as I shall explain in a moment. There would be nothing objectionable about a clerk transmitting corrections, submissions or draft orders to the court, but that again is not what happened in this case.

26. Secondly, drafting press releases to publicise Chambers is not a legitimate activity to undertake within the embargo. It would be different if a corporate party wished to issue a press release immediately on hand down to explain to the public what had occurred in the judgment. But barristers (and solicitors) are not parties to the proceedings; they are legal representatives, who are provided with the draft judgment to make suggestions for the correction of errors and to prepare submissions and agree orders on consequential matters. They have no need to prepare themselves for the publication of the judgment, as an individual or other party might need to do. Of course, counsel and solicitors can properly assist and advise their client to make such preparations but that was not what happened in this case.

27. Thirdly, too many people in Matrix seem to have had access to the summary contained in the press release. It should be sufficient for one named clerk to provide the link between the court and the barrister or barristers. Nobody else in the Chambers' administrative machine should have access to the draft judgment or any of the documents created in relation to it without there being a good reason, connected to one of the permitted purposes I have mentioned, for them to do so.

28. Finally, the measures taken by Matrix to protect the confidentiality of the draft judgment and its contents were lax. The Barristers either did not read or did not properly read emails they were sent in relation to the draft judgment, and no proper precautions or double-checks were in place to ensure that one employee's error came to attention. I do not wish in this judgment to suggest what level of security is needed, but whatever is done must be effective. Each of paragraph 2.4 of CPR PD40E, the standard rubric on draft judgments and the standard form email sent out with judgments are in mandatory form. The latter two documents say that "[t]he parties **must** take all reasonable steps to ensure that it is kept confidential" (emphasis added). As I have already said, paragraph 2.4 of CPR PD40E provides that "neither the draft judgment nor its substance is [to be] disclosed to any other person or used in the public

domain", and "no action is [to be] taken (other than internally) in response to the draft judgment, before the judgment is handed down". Counsel and solicitors are personally responsible to the court for ensuring that these mandatory requirements are adhered to. It is their duty to explain those same obligations on the parties to their clients.

Conclusions and summary

29. As I have tried shortly to explain, the provisions of CPR PD40E are mandatory. It is the personal responsibility of counsel and solicitors instructed in a case in which an embargoed draft judgment is provided to ensure that they are complied with. The purpose of the process is 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.

30. CPR PD40E exists for good reasons. 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, for example, from dealing with highly personal information in some cases to price-sensitive information in others. The court is rightly concerned to ensure that its judgments are only released into the public domain at an appropriate juncture and in an appropriate manner.

31. My conclusions are as follows: (i) it is not appropriate for persons in the clerks' rooms or offices of Chambers to see the draft judgment or to be given a summary of its contents, (ii) drafting press releases to publicise Chambers is not a legitimate activity to undertake within the embargo, (iii) it should be sufficient for one named clerk to provide the link between the court and the barrister or barristers, (iv) proper precautions and double-checks need to be in place in barristers' Chambers and solicitors offices to ensure that errors come to attention before the embargo is breached, and (v) in future, those who break embargoes can expect to find themselves the subject of contempt proceedings as envisaged in paragraph 2.8 of CPR PD40E.

Lady Justice Nicola Davies:

32. I agree.

Lord Justice Dingemans:

33. I also agree.