IN BRIEF

- Latest caselaw on implications where lawyers breach embargo on circulating draft judgments.
- Covers 2022 cases of *Banque Pictet* and *Match Group*.
- Updates readers on developments since *Counsel General for Wales*, providing a part two to the previous article in *NLJ* in March.

For your eyes only… (Pt 2)

Neil Parpworth revisits his article about breaching embargoes on circulating draft judgments, with some important updates

Recently, this author reported on the Court of Appeal decision in *R (on the application of the Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy and others* [2022] EWCA Civ 181, All ER (D) 79 (Feb) in which the Master of the Rolls, Sir Geoffrey Vos, issued a clear warning that those who break embargoes on the publication of draft judgments can in the future 'expect to find themselves the subject of contempt proceedings' as envisaged by para 2.8 of Practice Direction 40E of the Civil Procedure Rules (see 'For your eyes only' *NLJ*, 18 March 2022, pp9-10). While there had at that time only been two other decisions on the issue (see *Baigent v Random House Group Ltd* [2006] EWHC 719 (Ch), [2006] All ER (D) 113 (Apr) and *HM Attorney General v Crosland* [2021] UKSC 15, [2021] All ER (D) 84 (May)), Sir Geoffrey noted how anecdotal evidence suggested that 'violations of the embargo on publicising either the content or the substance of draft judgments are becoming more frequent' (at [21]). Confirmation of the accuracy of this observation has occurred in the past few months with two further cases having been decided by the courts: see *The Public Institution for Social Security v Banque Pictet & CIE SA and others* [2022] EWCA Civ 368, [2022] All ER (D) 85 (Mar) and *Match Group LLC and others v Muzmatch Ltd and another* [2022] EWHC 941 (IPEC). In the discussion which follows, both will be considered in order to assess the impact of the Counsel General for Wales decision.

The Banque Pictet case

The draft judgment in question had been sent to counsel on what Carr LJ referred to as 'the usual terms', along with a covering email which made it clear that it was to be 'treated in confidence' pending it being handed-down. Originally, formal hand-down was to occur at an appointed date and time. However, this was put back by a day, the delay having been notified to the parties' solicitors. Publication duly took place in accordance with the revised date and time. However, it became apparent that material had been posted on Twitter some three hours before the formal hand-down was due to occur. It came from various Kuwaiti news outlets and confirmed the broad outcome of the appeal, ie that the court did not have jurisdiction over the Public Institution for Social Security's (PIFSS) claims against the Swiss banks/bank accounts of the main defendant to the proceedings. The breach of the embargo caused the main defendant's lawyers to write to the solicitors for PIFSS. After having made various enquiries, they duly wrote to the court, informing it that they had found no basis for the suggestion that the breach of the embargo had been on PIFSS' side. In its reply, which was copied to the lawyers for the main defendant, the court noted that while the breach of an embargo was a 'serious matter', both sides had initially confirmed 'that they were not directly or indirectly responsible for publishing any of the tweets or providing any information to any of the sources who tweeted'. It later emerged, however, that a senior lawyer acting on behalf of one of the defendants had sent a WhatsApp message to what he believed to be five senior equity partners at the same firm as himself indicating that the case had been won. In fact, the message had been mistakenly sent to a quite different group of 41 international lawyers.

The senior lawyer was quickly made aware of his error by one of the unintended recipients, the message was deleted and a further message was sent to the senior equity partner group, as originally intended. Since he had concluded that there was no connection between the tweets and his misdirected WhatsApp message, he had not informed the court about it. However, as Carr LJ explained, he subsequently 'offered his unreserved apologies to the court and expressed deep regret for the situation that had arisen'.

In delivering the lead judgment, Carr LJ noted that the breach or breaches of the embargo had been 'very serious in what is a high profile and high value case involving allegations of fraud on the part of multiple individuals and organisations'. Nevertheless, it was unclear as to who had committed the breach or breaches. She noted that lawyers for the main defendant had not pursued an application for contempt against PIFSS and/or its lawyers, and that despite the gravity of the breach(es), it would be inappropriate for 'the court itself to instigate what would be complex, expensive and probably ultimately fruitless enquiries into precisely who committed the breach(es), when and how'.

With regard to the WhatsApp communication, Carr LJ noted how the error had been identified and corrected 'before any damage was done'.

Significantly, the communication to the senior equity partners was deemed to be a breach of the embargo since it 'did not fall within the narrow purposes for which the draft judgment had been released'. Carr LJ also noted how the judgment in the *Counsel General for Wales* had not been available at the time, and that further steps were therefore unnecessary. Nevertheless, the judgment in the present case concluded with two important observations which ought to influence future behaviour. In the first, it was stressed that informing lawyers within the same organisation of the outcome of litigation prior to the hand-down of the relevant judgment will be a breach of the embargo on publication, unless it is for the legitimate purposes of checking for errors, agreeing orders on consequential matters and preparing for the judgment's publication. The second observation related to the use of technology. Thus, Carr LJ observed that 'in the digital age', there is a need for the 'utmost care in communicating the content or substance of a draft judgment', such that sending electronic messages 'requires greater, not lesser, attention to detail so as to ensure that errors of the type that occurred in this instance are not repeated'.

The Match Group LLC case

This case was decided after *Banque Pictet*, which was referred to in the judgment of the Deputy High Court Judge, along with the *Counsel General for Wales*. It concerned a draft judgment which had been made available to the parties prior to the formal hand-down in which the judge set out his reasons for finding in favour of the claimant in a trade mark infringement and passing off claim. The underlying purpose of publishing the draft was evident from an accompanying communication which stated, among other things, that counsel should 'submit any list of typing corrections and other obvious errors in writing as a separate Word document or by a separate email', and that nil returns were required. Shortly before the formal hand-down, the claimant informed the judge that it had been approached by journalists who were aware of the outcome of the case. The defendant's solicitors confirmed that the defendants had been the source of the journalists' information.

It is notable that the judge was of the view that no criticism attached to the conduct of the defendants' solicitors in the present matter. They had sought to make it clear on several occasions to one client in particular, via email and over the telephone, that he ought not to inform anyone or do anything with the draft judgment prior to it being handed down. Collectively, these amounted to 'robust steps' to ensure that the clients were cognisant of 'the obligations of confidentiality'. Nevertheless, the individual in question went ahead and informed four of the defendant's employees of the outcome of the case. While one was informed for the purpose of preparing a press release which, it was accepted, fell within the scope of CPR PD40E, the other three received the information 'so they could start thinking about the technical and design changes' that would need to be made. A week after the initial disclosures, two further employees were informed of the outcome so that they could assist in the preparation of a recorded video statement which was to be sent to customers following the handing-down of the judgment.

In the judgment of the Deputy High Court Judge, while these 'internal disclosures' did not breach the embargo, 'parties in receipt of a draft judgment should always give careful thought as to who really needs to know the result'. Moreover, in his opinion, 'the greater the number of persons who are informed, the greater the risk that the disclosure will stray beyond the permitted purposes or that one of the people informed will themselves make an unlawful disclosure'.

The present case was not confined, however, to the disclosures referred to above. Thus, the employee who had been informed of the outcome in order to assist with preparing a press release had emailed 10 journalists offering to provide them with a copy of it provided that they agreed to comply with the embargo. It was subsequently provided to those journalists who so agreed. The colleague who had enlisted the assistance of the four employees failed to inform the company's solicitors as to what was happening. He later informed the court of his deep remorse and issued a wholehearted apology. While he stated that he had 'honestly believed' that it was permissible to communicate with the journalists on a strictly confidential basis, the judge found this 'a little surprising' given the advice tendered by the company's solicitors. In his judgment, the breach of the embargo had been 'serious'. However, he was willing to accept an apology to resolve the matter given that the claimants had no desire to initiate contempt proceedings, and since this was not regarded as being a case where the court ought to act on its own initiative to punish an individual 'for his past actions or to educate other litigants'.

It will be recalled that in the Banque Pictet case, Carr LJ made several observations regarding conduct which may amount to the breach of an embargo, as well as to the need for the utmost caution in relation to the digital communication of draft judgments. To these the judge in the present case offered an observation of his own: that 'the courts are likely to look with a very critical eye at any case where a party's wish to manage the publicity surrounding litigation has led that party to breach the embargo imposed by CPR PD40E'.

Conclusion

The judgment of Sir Geoffrey Vos in *Counsel General for Wales* highlighted the rationale for imposing embargoes on the publication of draft judgments, the importance of maintaining them and the legal consequences which may flow from their breach. While these may involve proceedings for contempt, it is evident from the two cases reported above that whether or not this is so will very much depend upon the particular circumstances. It clearly assisted both sets of potential contemnors that neither of the parties against them had pursued an application for contempt. Moreover, contrition in relation to the breach of the relevant embargo appears to have weighed heavily with the courts. In *Match Group LLC*, the judge agreed with counsel for the defendants that 'this is not a case where it is necessary for the court to seek to lay down any guidance with regard to the approach to be taken by the press in relation to draft judgments'. Whether this will come to be regarded as a missed opportunity remains to be seen. In the absence of court guidance, the media would be well advised to be very cautious about the handling of press releases relating to legal proceedings which have been sent to them in advance of the hand-down of the judgment itself, since if it is a breach of an embargo to communicate the outcome of a case to partners within the same firm, the same must be true where the press are the recipients of the information. It is to be hoped that the collective effect of *Counsel General for Wales* and the two present decisions will be to nip in the bud the questionable practices which the facts of the cases illustrate since if they fail to do so, contempt of court proceedings are likely to follow. NLJ

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