

Proceed with caution: High Court reinforces the risks of embargo breaches

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In this article, Audrey Serrano and Ellie Sowden of Kennedys consider how to circulate an embargoed judgment and set out the practical steps to take when a breach of an embargoed judgment occurs, following the High Court's decision in *World Uyghur Congress v Secretary of State for the Home Department and others* [2022] EWHC 912 (Admin).

Serious consequences can await those who breach the terms of an embargoed judgment. In the latest in a succession of cases addressing the importance of complying with the terms of an embargo, *World Uyghur Congress v Secretary of State for the Home Department and others* [2023] EWHC 912 (Admin) is a cautionary reminder that mishandling an embargoed judgment can lead to proceedings in contempt of court.

As is common practice, the draft of the first judgment in this case was circulated to counsel and solicitors for the purposes of making editorial changes and for the parties to prepare a draft order to give effect to the terms of the judgment. The draft judgment was subject to an embargo.

The Government Legal Department (GLD), acting for the defendant, circulated the draft judgment to a limited number of individuals at the Home Office, HMRC and the National Crime Agency. The email made clear that neither the judgment, nor its contents, could be shared with anyone outside the recipients of the email or those not a party to the litigation.

Unfortunately, a senior policy officer at HMRC to whom the draft judgment had been sent, proceeded to write to individuals in other departments, telling them that the embargoed draft judgment had been received and that it was favourable to the defendant.

The GLD became aware that the result of the case had been shared more widely than permitted and promptly notified the court.

The Practice Direction to CPR Part 40, PD 40E, provides 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.

The judge in the case, Mr Justice Dove, found that the GLD email attaching the embargoed draft judgment had clearly set out the terms of the embargo and the consequences of non-compliance. A witness statement of the individual at HMRC, explained that they had not recognised or understood the full effect of the embargo, and had not taken the time to properly read the instructions accompanying it.

There was no doubt that this was a significant breach of the requirements of confidentiality specified in the embargo under which the judgment was provided to the parties, and that a breach of this nature could lead to the prosecution of proceedings for contempt of court.

Mr Justice Dove decided, however, against taking further action on the basis that the GLD "took all the reasonable steps to ensure that the embargo was properly and accurately communicated and the importance of abiding by it fully explained together with the consequence of failing to do so" (*paragraph 13, judgment*). Mr Justice Dove was also satisfied that the GLD had acted promptly and efficiently in rapidly closing down the breach and notifying the court.

The court took the opportunity in its judgment to set out some crucial, practical points for practitioners when dealing with embargos and potential breaches, highlighting the key actions taken by the GLD that ultimately saved it from more serious consequences.

How to circulate an embargoed judgment

Clearly and accurately communicate the embargo and state its requirements to all those receiving the draft judgment

The court found that the email circulating the draft judgment could not have been clearer as to the strict confidentiality under which it was being received and the need for the embargoed decision not to be shared. The terms of the embargo must therefore be relayed in the clearest of terms, and recipients need to read and digest these carefully. The identity of the recipients themselves should also be considered; who needs to know the outcome prior to the final judgment being handed down?

Make clear that failure to adhere to the embargo could lead to proceedings for contempt of court

The email circulating the draft judgment had explicitly set out the potential for breach of the embargo, namely, to give rise to proceedings for contempt of court against either departments or individuals. Again, the consequences and their seriousness both in terms of ramifications for individuals as well as firms, need to be relayed in the clearest of terms for the recipients.

Provide comprehensive, sensible and robust advice and guidance about embargoed judgments

The email circulating the draft judgment was accompanied by a leaflet from the GLD about embargoed judgments, clearly setting out the importance of adhering to the strict confidentiality pertaining to the draft judgment and potential consequences of not doing so.

Practical steps to take when a breach occurs

Detect and close down the breach of the embargo as soon as possible

The court commented that the GLD had operated with efficiency in rapidly closing down the breach. The legal team were notified of the breach at 11.28 am and by 11.44 am had reinforced the terms of the embargo to all relevant parties. When it came to light that a group of unauthorised individuals had become aware of the judgment outcome as a result of the breach, an urgent request was made for details of those to whom the draft judgment or its substance had been shared. These individuals were notified of the breach and its seriousness.

Notify the court promptly with a full explanation of how the breach occurred

In this case, the court was notified the following day with a thorough explanation and timeline of events and the steps taken to close down the breach. Notification to the court should detail the steps taken to communicate to the relevant parties the requirements of the embargo, details of the breach, and the steps taken to rectify the breach. Notifications must be transparent, detailed and treated with the necessary urgency.

Provide to the court a full and frank apology

In this case, the individual who breached the embargo apologised to the court and accepted full responsibility for the breach. The apology was one of the factors that contributed to the court's decision not to take further action. It would therefore be prudent for the individual and the team responsible for the breach to provide, along with their notification to the court, an apology and understanding and acceptance of responsibility of the breach.

The requirements surrounding an embargoed judgment, should therefore be strictly adhered to, to avoid being in contempt of court.

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