

Embargos on draft judgments—how not to handle a suspected leak (Optis v Apple)

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Dispute Resolution analysis: Mr Justice Meade was notified about a suspected leak of his draft judgment by EIP, the solicitors acting for Optis. However, he was not fully informed and was misdirected as to the circumstances of the suspected leak; it was eventually ascertained that there was no leak at all. Further to the parties' and Meade J's investigations, it transpired that there had been a misunderstanding and that while the finger had been pointed at Meade J's 'office' by a non-lawyer, this was an erroneous assumption. Meade J ordered a hearing at which he expressed his criticism of the conduct of both Optis and EIP. He also criticised the use of so called 'email exploders' and warned about the pro-visibility of draft judgments to an excessive number of people. The fact of the date of the public hand-down (which had led in part to the misunderstanding) was not confidential. Written by Natalie Todd, partner at PCB Byrne.

Optis Cellular Technology Inc and another v Apple Retail UK Ltd and others [\[2021\] EWHC 2694 \(Pat\)](#)

What are the practical implications of this case?

Meade J referred to [CPR PD 40E](#), concerning reserved judgments (para [12]), and the fact that the reasons for the practice of giving judgments in draft are many including:

- it enables the correction of typos and more substantive errors (para [15])
- it enables the parties to prepare to deal with the consequences of the judgment when it is made public, because steps in the litigation have to be taken, permission to appeal has to be considered, and the presentation by the winning and losing litigants of the judgment to their investors and other stakeholders has to be considered (para [16])

When there is an accidental breach of confidentiality provisions relating to confidential disclosure, it is essential to find out what happened with care, urgency and rigour, and to address it, and to make clear and complete disclosure to the court and the opposing party (this does not extend to privileged information). It is the obligation of a party, as recipient of the confidential information, to do this if there is believed to have been a breach.

The date of hand-down is not confidential because it is the date of an intended public hearing. Although intended hand-downs get listed in the Rolls Building lists, those lists do not reach far enough into the future to catch judgments such as the present, where the hand-down was a week away from the date of the communication of the draft judgment. Thought needs to be given to this.

What was the background?

Meade J sent his draft judgment to the parties on 20 September 2021 with the standard form warning notice as to confidentiality. On 22 September 2021, EIP sent Meade J an email notifying him of a breach of the confidentiality directions contained in the draft judgment. EIP informed Meade J that Mr Friedman, managing director of Optis, had been contacted by a third party who had 'congratulated' him on the outcome of trial. It transpired that the third party was Mr Fogliacco, who is chief executive officer of Sisvel, a current litigant in patent infringement proceedings (represented by Bird & Bird) and who had an interest in the result of the Optis trial.

On 21 September 2021, one of the counsel for EIP told another barrister that hand-down would be on 27 September 2021. Bird & Bird were told by the second barrister the date of hand-down. That information was passed on to Mr Fogliacco who then emailed Mr Friedman saying 'I hear Monday will be a big day for you guys. Keeping my fingers crossed! Best, M.' Mr Friedman immediately called Mr Fogliacco and then notified EIP that there had been a breach of confidentiality regarding the draft judgment.

Meade J was not informed by Optis or EIP of Mr Fogliacco's email and was told that Mr Fogliacco had called Mr Friedman (rather than the other way round). The identity of Mr Fogliacco was withheld and he was not told until later of Mr Friedman's assertion that the leak had emanated from Meade J's office.

What did the court decide?

Meade J criticised Mr Friedman for calling Mr Fogliacco. If he thought Mr Fogliacco knew the result, then Mr Friedman's proper course was to contact Optis' lawyers. If he thought that Mr Fogliacco did not know the result, then he should not have contacted him as their conversation was bound to touch on the outcome of the case. The embargo on draft judgments does not prevent a party from speaking to other commercial partners, but to undertake voluntarily a communication which is bound to be focused on the result of a trial is unacceptable (paras [27]–[28]).

EIP had 'seriously mishandled' the situation (para [39]) and 'significant errors of judgment were made' (para [73]). EIP did not immediately seek to find out exactly what had happened and although they could have taken steps to contact Sisvel, and/or Bird & Bird, to prevent further dissemination, they did not.

The judge said it would have been disproportionate to escalate this to contempt proceedings. Meade J's public expression of his severe dissatisfaction in the course of his judgment was an adequate sanction. He ordered Optis to pay the costs of Sisvel and Apple on the indemnity basis.

The provision of draft judgments to an excessive number of people is not in the spirit of the Practice Direction or the Patents Court Guide. A way of disseminating a judgment only to those people who really need to give instructions has to be found, and the responsibility to a considerable extent must lie with the parties, who need to communicate with judges' clerks a more concise list of people who really need to receive draft judgments.

Case details:

- Court: High Court of Justice, B&CPs, Chancery Division (Intellectual Property List), Patents Court
- Judge: Mr Justice Meade
- Date of judgment: 5 October 2021

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