



Neutral Citation Number: [2022] EWCA Civ 368

Case No: CA-2021-000446
(formerly A4/2021/0302)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
MR JUSTICE HENSHAW
[2020] EWHC 2979 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 March 2022

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE SIMLER
and
LADY JUSTICE CARR

Between :

**THE PUBLIC INSTITUTION FOR SOCIAL
SECURITY**

**Appellant/
Claimant**

- and -

BANQUE PICTET & CIE SA & OTHERS

**Respondents/
Defendants**

Approved Judgment

Lady Justice Carr :

1. This judgment concerns breaches of an embargo on the disclosure of the contents of a judgment provided in confidence to the parties and their lawyers. It raises issues considered very recently by Sir Geoffrey Vos, the Master of the Rolls, in *R (on the application of the Counsel General for Wales) v The Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181 (“CGW”).
2. The judgment in question ([2022] EWCA Civ 29) dismissed an appeal by the Claimant Appellant (“PIFSS”) against the judgment of Henshaw J dated 6 November 2020 (“the appeal”). Henshaw J had determined that the court did not have jurisdiction to try claims against eight Defendant Respondents and would decline to exercise its jurisdiction over two further Defendant Respondents.

The history of events

3. The judgment in draft form was sent to counsel on the usual terms on Tuesday 18 January 2022. The covering email stated that the draft was to be “treated in confidence”. The Approved Judgment was headed:

IN CONFIDENCE
This is a judgment to which the Practice Direction supplementing CPR Part 40 applies. It will be handed down remotely by circulation to the parties or their representatives by email, and release to BAILII and the National Archives. The date and time for hand-down will be deemed to be 10.30am on Tuesday 25 January 2022.
This draft is confidential to the parties and their legal representatives and accordingly neither the draft itself nor its substance may be disclosed to any other person or used in the public domain. The parties must take all reasonable steps to ensure that its confidentiality is preserved. No action is to be taken (other than internally) in response to the draft before judgment has been formally pronounced. A breach of any of these obligations may be treated as a contempt of court. A copy of the judgment in final form as handed down will be available on BAILII shortly thereafter but can otherwise be obtained on request by email to the Judicial Office (press.enquiries@judiciary.uk)...

(“the Embargo”)

4. On 18 January 2022 PIFSS and all but two of the Defendant Respondents requested permission to circulate the draft further to identified Swiss legal representatives, subject always to the adherence by those individuals to the restrictions of CPD 40E. That permission was granted on 19 January 2022.
5. As set out, the date and time for hand-down was initially indicated as 10.30am on Tuesday 25 January 2022. By email on Friday 21 January 2022 the parties’ solicitors were informed that the date and time for hand-down would be delayed to 10.30am on Wednesday 26 January 2022 and tasked with informing all parties and relevant individuals accordingly (including the Swiss lawyers). There is no suggestion that the revision in timing was not communicated as necessary. Hand-down duly took place at 10.30am on Wednesday 26 January 2022.
6. On 7 February 2022 Greenberg Traurig LLP (“GT”), solicitors for Mr Al-Rajaan, the main defendant in the proceedings but who was not a party to the appeal, wrote to Stewarts Law LLP (“Stewarts”), solicitors for PIFSS, copied to all parties to the main action. GT referred to and appended screenshots of material posted on the social media website Twitter from around 7.30am UK time on 26 January 2022. The tweets came

from various Kuwaiti news outlets, and revealed the broad outcome of the appeal, namely that the court had confirmed that it did not have jurisdiction over PIFSS' claims against the Swiss banks/bank accounts involving Mr Al-Rajaan. GT contended that, in light of the fact that i) PIFSS and those instructing Stewarts were emanations of the Kuwaiti state and ii) PIFSS and those instructing Stewarts were the only parties based in Kuwait to have received the draft judgment, there was a "very strong inference" that the tweets were written as a result of a breach of the Embargo by PIFSS and/or those instructing Stewarts. The motivation was said to be "to head off the obvious bad press that would ensue from the Kuwaiti public being made aware that the Court of Appeal had ruled against PIFSS..."

7. Stewarts wrote to the court on 17 February 2022, enclosing GT's letter of 7 February 2022 and attachments, together with further related material identified by Stewarts through internet searches conducted after receipt of GT's letter. Stewarts identified the enquiries that it had made into the tweets (with counsel, within Stewarts, with PIFSS' Swiss lawyers and within PIFSS, including the Department of Legal Advice and Legislation ("DLAL")). Stewarts stated that, on the basis of those enquiries, it had identified no basis for GT's allegation that the tweets were written as a result of a breach of the Embargo on PIFSS' side.
8. On the same day, the court emailed Stewarts, copied to GT, as follows:

"...It is clear that there has been a breach of the court embargo, which is a serious matter.

It is noted that counsel, the relevant lawyers at Stewarts, the named Swiss legal representatives and all individuals at PIFSS, including the lawyers within the DLAL, who were made aware of the outcome of the appeal prior to hand down have individually confirmed:

- i) That they were aware that the draft judgment was subject to embargo;
- ii) 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;
- iii) That they have no other information regarding how the material might have come into the public domain prior to the hand down.

The court requires Stewarts to write to all of the Respondents to the appeal, and all defendants in the main action, inviting each Respondent/Defendant and their counsel and solicitors to provide the court with confirmation in like terms by 4pm on Friday 4 March 2022..."

9. All parties (save for the 6th, 19th and 32nd Defendants) responded to the court as directed. No party admitted responsibility, either directly or indirectly, for the tweets and all denied any knowledge of how the information leading to the tweets came to be leaked.

10. However, the response dated 2 March 2022 from Peters & Peters Solicitors LLP (“Peters & Peters”), solicitors for Mr Bertherat, revealed further relevant matters. It was written by Mr Keith Oliver, Head of International and head of the team at Peters & Peters with conduct of the litigation on behalf of Mr Bertherat. In summary, Mr Oliver stated:

- i) He received and read the embargoed judgment in the late evening of 18 January 2022. He was working in Dubai at the time;
- ii) Just after 10.15pm he sent (so he then thought) a WhatsApp message to five senior equity partners at Peters & Peters, a group used for confidential messages between senior partners:

“In other news we just won in the CA on the Pictet case. Huge jurisdictional victory. [F] dealt. So he is good on [redacted] to become fully involved.”

Mr Oliver stated that the main purpose of the message was to communicate F’s availability to work on another case;

- iii) It did not occur to him that this might have involved a breach of the Embargo although, having now read *CGW*, he recognised that it “may have been inappropriate” for him to communicate anything about the embargoed judgment to other senior partners not involved in the case;
- iv) However, in fact Mr Oliver did not send a message to his fellow partners as he had intended. Instead, by error, he sent the message to a quite different group of 41 international lawyers in a group sharing interests and created for social reasons;
- v) A member of the group (in fact F) received the message and recognised Mr Oliver’s mistake immediately. A minute or so after the message had been sent, he contacted Mr Oliver who then immediately sent a further message to the group asking recipients to ignore the message and delete it as soon as possible. A few minutes later, with the assistance of F, Mr Oliver deleted the message completely so that recipients could not access it. Mr Oliver then sent the message as originally intended to the partner group;
- vi) Mr Oliver now appreciated that he should have brought the incident to the court’s attention at this stage but did not recognise this at the time;
- vii) When he received the court’s email of 17 February 2022, he concluded that there was no connection between the tweets and his misdirected WhatsApp message;
- viii) He had spoken to all of the partners who received the message and each had confirmed that they disclosed nothing about the judgment to any other person;
- ix) He had also spoken to all recipients of the first WhatsApp message each of whom (apart from F of course) confirmed that they did not read the message before its deletion.

Mr Oliver offered his unreserved apologies to the court and expressed deep regret for the situation that had arisen.

11. On 8 March 2022 the court directed all parties to the appeal and the main action:
 - i) to share their responses to the court (and those of their lawyers) with all other parties by 4pm on 11 March 2022;
 - ii) to lodge any submissions or applications arising out of the responses by 4pm on Friday 18 March 2022;

The court would then consider what, if any, further steps were appropriate.

12. No application has been made, and only GT made any further submissions – to the effect that, having reviewed the parties’ collective responses, there was no evidence of a link between Mr Oliver’s breach and publication in Kuwait via Kuwaiti/Arabic sources and media. Thus, there must have been further breach.

Breaches of the Embargo

13. As the Master of the Rolls identified in *CGW* at [24], the reason for handing down judgments in draft under embargo is to enable the parties to make suggestions for the correction of errors, prepare submissions, 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” for purposes beyond these is forbidden (unless the court expressly gives consent).

The tweets

14. It is clear on the information before the court that there was a breach (or breaches) of the Embargo. Those breach(es) were very serious in what is a high profile and high value case involving allegations of fraud on the part of multiple individuals and organisations. However, on the information before the court, it is not clear who committed the breach (or breaches).
15. GT has not pursued any application for contempt against PIFSS (and/or its lawyers). Nor, despite the gravity of the breach(es), would it be appropriate 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.

Mr Oliver

16. Mr Oliver committed a breach of the Embargo through his (inadvertent) error in messaging the group of 41 international lawyers. His error was identified in time for the message to be deleted, fortunately before any damage was done. In addition, Mr Oliver committed a breach of the Embargo in communicating the result of the appeal to fellow partners uninvolved in the conduct of the litigation on behalf of Mr Bertherat. That communication was undoubtedly a breach of the Embargo. Communication with such partners did not fall within the narrow purposes for which the draft judgment had been released. These breaches should have been self-reported at the time.

17. As set out above, Mr Oliver has expressed deep regret for his actions and provided a full apology to the court. It is not suggested that there is any connection between his messages and the tweets. In all the circumstances, and recognising that the judgment in *CGW* was not available at the time, it is unnecessary for any further steps – apart from publication of this judgment – to be taken.
18. The facts of this matter confirm the anecdotal information to which the Master of the Rolls referred in *CGW* at [21], namely that violations of court embargoes on publicising either the content or the substance of draft judgments have been becoming more frequent. All recipients need to understand clearly:
 - i) The importance and breadth of such embargoes. They are orders of the court which prohibit communication for any purpose other than the legitimate exercise of making suggestions for the correction of errors, preparing submissions, agreeing orders on consequential matters and preparation for the publication of the judgment. Informing other lawyers within the same organisation who are not involved in the conduct of the litigation and whose input is not necessary for the purpose of carrying out these legitimate exercises will be a breach of the court's order;
 - ii) The need for utmost care in communicating the content or substance of a draft judgment in the digital age. The use of electronic messaging requires greater, not lesser, attention to detail so as to ensure that errors of the type that occurred in this instance are not repeated;
 - iii) Any breach of an embargo must be drawn to the court's attention as soon as it is identified.

Lady Justice Simler :

19. I agree.

Lord Justice Peter Jackson :

20. I also agree.