Neutral Citation Number: [2023] EWCA Civ 57

Case No: CA-2021-003431

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST
PATENTS COURT
HHJ Hacon (sitting as a High Court Judge)
[2021] EWHC 2152 (Pat)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 January 2023

Before :

LORD JUSTICE BIRSS
LORD JUSTICE WARBY
and
LADY JUSTICE FALK

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Between :

InterDigital Technology Corporation & Ors	**Claimants/ Respondents**
- and –	
Lenovo Group Ltd & Ors	**Defendants/ Appellants**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 30 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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LORD JUSTICE WARBY :

1. In this case there has been a breach of the embargo on disclosure of draft judgments. We have to decide what if any action to take.

2. This was an appeal from the judgment of HHJ Hacon after a trial at which the appellant ("Lenovo") challenged the validity and essentiality of the patent EP (UK) 2 485 558, belonging to the respondent ("InterDigital"). This was the first of a series of technical trials and was known as "Trial A". The judge held the patent to be valid and essential. Lenovo appealed. We heard the appeal on 14 and 15 December 2022. On Friday 13 January 2023 our judgments were circulated in draft following the practice set out in PD40E.

3. As the standard rubric at the top of the draft explained, the purpose of doing this is "to enable the parties to make suggestions for the correction of errors, prepare submissions on consequential matters and draft orders and to prepare themselves for the publication of the judgment". The terms of the embargo are also set out in the standard rubric. This states that the draft is "confidential to the parties and their legal representatives", that "neither the draft itself nor its substance may be disclosed to any other person or made public in any way", and that "a breach of any of these obligations may be treated as a contempt of court."

4. What happened here is this. The draft judgment was sent out in the early afternoon of Friday 13th. It went in the first instance to the parties' Counsel, Counsel's clerks, and one representative of each of the solicitors' firms involved. Counsel's clerks then passed the draft on to two other solicitors at InterDigital's solicitors, Gowling WLG, Alexandra Brodie and Matt Hervey. They called three of their four key client contacts at InterDigital with a view to informing them of the outcome, noting the draft, embargoed nature of both the outcome and the substance of the judgment, and to say that they would be providing the draft embargoed judgment shortly by way of email. They spoke directly to two of the three (InterDigital's Chief Legal Officer and its Chief Licensing Officer). A voicemail was left for the third, Steve Akerley, who is Deputy General Counsel and Head of Intellectual Property and Litigation.

5. Shortly after 5pm UK time Mr Hervey circulated an email to these three, and to the fourth key contact, who was InterDigital's CEO. The email was titled "EMBARGOED Judgment – Trial A Judgment from the Court of Appeal". It was marked privileged and confidential to the four addressees. The body of the email drew attention to the terms of the embargo, emphasising that the recipients must not share the judgment, the outcome, or any details about it with any other person who was not directly involved in one of the three legitimate activities specified in the embargo wording. The email added that the recipients should not share any hint of the outcome by their demeanour. The copy of the draft embargoed judgment that was attached to the email was password encrypted. The password was provided to the four addressees by separate email from Mr Hervey.

6. Thus far everything was done entirely properly.

7. The problem arose at the InterDigital end. Mr Akerley was taking a vacation day that Friday. When he received Mr Hervey's emails, shortly after midday EST, he was out of the office. He used his mobile device to read the emails. He had some experience

of previous proceedings before the courts in this country and knew that the judgment was embargoed. But, as he explains it, "In my haste to see the outcome of the judgment, I did not review the substance of Mr Hervey's emails". He therefore did not see the detail of what Mr Hervey had said. After quickly reading the judgment and seeing the outcome, Mr Akerley disclosed the outcome by email to InterDigital's external counsel, Mr Mike Levin of Wilson Sonsini Goodrich & Rosati ("Wilson Sonsini"). Mr Akerley's email was headed "Confidential – Trial A appeal decision". It advised Mr Levin that he could tell the core team at Wilson Sonsini but the information was confidential and must not be shared publicly.

8. Mr Akerley did not pass on the draft judgment and did not appreciate that in disclosing the outcome to Mr Levin and his team in this way he was violating the embargo. He puts it this way: "Due to the close, cooperative nature of Gowling and Wilson Sonsini, and having not read Mr Hervey's covering email, I incorrectly had in mind that providing the outcome of the judgment to Mr Levin and his core team was not prohibited." The reference to co-operation relates to the involvement of Wilson Sonsini in the global dispute with Lenovo and the fact that Mr Akerley views them as "co-counsel" with Gowling WLG.

9. Mr Levin forwarded Mr Akerley's email to five members of his "senior, core team" at Wilson Sonsini, repeating Mr Akerley's warning that the information was strictly confidential to the senior people working on InterDigital matters. All of this took place on the Friday.

10. We know all of this because it was disclosed to us by Gowling WLG and InterDigital. On Tuesday 17 January 2023, before the judgment was due to be handed down, we received a letter from the firm accompanied by a witness statement of Ms Brodie and a letter from Mr Akerley. Ms Brodie's statement explained that on the evening of Sunday 15 January Mr Levin sent her a message in these terms, "By the way, Steve told me about the trial A appeal decision (noting the sensitivity). Congrats!". On reading this Ms Brodie replied immediately to say "Thank you but unfortunately that is a breach of the embargo. Who else did he tell?" They spoke soon after. Ms Brodie also spoke to Mr Akerley to make clear that he should not tell anyone else.

11. Over the following 24 hours Ms Brodie unearthed the facts we have set out above and secured confirmation that none of the six people at Wilson Sonsini to whom the information had been disclosed had passed it on to anyone else. This process took longer than it might have done because Monday 16 January 2023 was a public holiday in the USA. Mr Akerley's letter confirms his role. It ends with an admission that he improperly informed US counsel of the outcome of the embargoed judgment, an unreserved acceptance of responsibility, and an apology. On 23 January 2023, at our request, Mr Akerley confirmed all of this in a witness statement.

12. In the meantime, on 19 January 2023, our judgment dismissing the appeal was formally handed down: [2023] EWCA Civ 34.

13. Lenovo has been provided with all of the above material. It has not sought to make any representations on the issue. But this is a matter that concerns the court itself.

14. The legitimacy of the embargo and the importance of adhering to it were both re-emphasised in *R (Counsel General for Wales) v Secretary of State for Business,*

Energy and Industrial Strategy [2022] EWCA Civ 181 [2022] 1 WLR 1915 where Sir Geoffrey Vos MR said this (at [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."

15. The Master of the Rolls drew attention to paragraph 2.8 of PD40E which provides that "any breach of the obligations or restrictions" on disclosure of a draft judgment "may be treated as contempt of court."

16. Since judgment in the *Counsel General for Wales* case was handed down on 16 February 2022 it has been the standard practice of this court to conclude an appeal hearing by underlining these points. The court makes clear that when a draft judgment is circulated it is subject to an embargo the breach of which may have these serious consequences. That was done at the end of the hearing in this case on 15 December 2022.

17. Mr Akerley is right to concede that what he did was in breach of the embargo. Wilson Sonsini were not parties to the appeal nor were they the "legal representatives" of InterDigital for that purpose. Mr Akerley is also right to accept full responsibility. No criticism can be levelled at Gowling WLG, who were scrupulous in controlling the distribution of the draft judgment, and in drawing attention to the existence and terms of the embargo, and its practical effects.

18. Contempt proceedings for breach of the embargo can be brought by the Attorney General, as in *Attorney General v Crosland* [2021] UKSC 15 [2021] 4 WLR 103. The court can, as there, refer a case to the Attorney for consideration. Alternatively, the court can act of its own initiative pursuant to CPR 81.6(1). This provides that "If the court considers that a contempt of court … may have been committed, the court on its own initiative shall consider whether to proceed against the defendant in contempt proceedings". If it decides to proceed the court can issue a summons. That is what happened in *R (Finch) v Surrey County Council* [2021] EWHC 170 (QB) [2021] 4 WLR 37 when the BBC recorded and broadcast part of a remote hearing: see [51]-[52].

19. Either way, I think the first step is for the court to decide whether a contempt "may" have been committed. There is no question in this case of an intention to flout the embargo. Mr Akerley says he did not realise that is what he was doing, and there is no reason to doubt what he says. There is however an argument that liability for contempt of this kind is strict, regardless of whether there is an intention to breach the court's rules or orders as is the case when a party breaches a court order: see Arlidge, Eady & Smith on Contempt (5th ed) Chapter 12 Section II. Accordingly, I do consider that there "may" have been a contempt in this case even on Mr Akerley's account of things.

20. That said, I do not think there is good reason to explore the questions of law that might arise or to proceed any further in this case. The facts of the matter are clear enough. The illegitimate disclosures which Mr Akerley made and authorised or caused were relatively limited in content and in terms of the number and identity of recipients. They did not include the draft judgment itself. The disclosure was made to people with a close professional interest in the outcome on express terms as to confidentiality which were adhered to. There was no public disclosure. The facts of the disclosure were investigated and disclosed to the court by the wrongdoer itself without prompting. For my part I would accept the evidence that has been filed, including Mr Akerley's explanation and his apology. I am confident that he has now understood the position. Further proceedings would be disproportionate to any need to uphold the court's authority.

LADY JUSTICE FALK:

21. I agree.

LORD JUSTICE BIRSS:

22. I also agree.