

Neutral Citation Number: [2022] EWHC 2723 (Admin)

Case No: CO/3328/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

28th October 2022

Before:

MR JUSTICE FORDHAM

Between:

**THE KING (on the application of HELEN
KINSEY)**

Claimant

- and -

LONDON BOROUGH OF LEWISHAM

Defendant

-and-

**CITY OF LONDON CORPORATION
(No.3)**

Interested Party

Richard Harwood KC (instructed by Hodge Jones & Allen LLP) for the **Claimant**
Saira Kabir Sheikh KC (instructed by Womble Bond Dickinson (UK) LLP) for the **Defendant**
The **Interested Party** did not make submissions

Written submissions: 14-15, 20 July 2022, 7 October 2022

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This judgment describes what is accepted to have been a breach of the embargo under which my judgment [2022] EWHC 1774 (Admin) was pre-released to the parties as a confidential embargoed draft judgment (the “CEDJ”). The key point is about not issuing an ‘embargoed press release’ (“EPR”). So far as the law is concerned, the key recent cases are Attorney General v Crosland [2021] UKSC 58 [2022] 1 WLR 367 (20.12.21) and R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWCA Civ 181 [2022] 1 WLR 1915 (16.2.22), key principles from which are gathered together in the Administrative Court Judicial Review Guide 2022 (“JR Guide 2022”) at §§11.6.2-11.6.8. Procedurally, what happened was this. The CEDJ was circulated by my clerk on the morning of 5 July 2022, to all Counsel and solicitors. The scheduled virtual hand-down date for the finalised judgment was identified as 10am on 11 July 2022. The finalised judgment was duly handed down. Mr Harwood KC alerted the Court by an email on 14 July 2022 (“the Submissions”) to concerns that the Defendant had issued an EPR. Those concerns arose out of an email at 09:15 on 11 July 2022, which the Claimant had seen on 13 July 2022. Ms Kabir Sheikh KC responded substantively on behalf of the Defendant on 15 July 2022 (“the Response”), accompanied by a witness statement by the Director of Planning (Emma Talbot), setting out the Defendant’s position. Mr Harwood KC replied on 20 July 2022 (“the Reply”). Mr White KC communicated the Interested Party’s position (neutrality) on 19 July 2022. On 1 August 2022 I took steps to confirm that no party was seeking expeditious consideration, or an oral hearing. On 6 October 2022, I communicated my provisional understanding of what I was being told, having read all the papers, and posed some questions of the Defendant, in light of what had been raised in the Reply. Mr Harwood KC responded on 6 October 2022. Ms Kabir Sheikh KC responded on 7 October 2022 (“the Further Response”). Mr Harwood KC confirmed on 17 October 2022 (“the Further Reply”) that the Claimant’s position was maintained. This is my determination on the papers. I agree with the parties that no hearing is necessary. I am satisfied that it is necessary, but also sufficient, to give a ruling in the form of a judgment. I am satisfied, on the evidence before me, of the correctness of the factual aspects described in the rest of this judgment.

Internal Distribution

2. I start with the Defendant’s internal distribution of the CEDJ itself. What happened was this. The Defendant’s Lead Solicitor (Stephen Dagg) and Lead Counsel (Ms Kabir Sheikh KC) emailed the CEDJ on receipt (5.7.22) to the Defendant’s: (i) Director of Planning (Ms Talbot), (ii) Major and Strategic Projects Manager (Interim) and Planning Case Officer (David Robinson), (iii) Head of Development Management (Michael Forrester). Mr Dagg’s email stated:

PLEASE NOTE THAT NEITHER THE DRAFT JUDGMENT NOR ITS SUBSTANCE (INCLUDING THE RESULT) MAY BE DISCLOSED TO ANY OTHER PERSON UNTIL IT HAS BEEN HANDED DOWN. TO DO SO WOULD BE CONTEMPT OF COURT.

In an email exchange Mr Robinson asked Mr Dagg: “Can the draft be shared to a couple of other members of the planning service?” Mr Dagg replied: “Yes the Council

is a party, so it can be shared with other officers. My advice though is to make the circulation list very small and make it crystal clear that it is contempt of court to share it as I did below. The fewer people have the judgment the less likely anyone is to be sent down!!” The reference to “as I did below” is to Mr Dagg’s “PLEASE NOTE ...” statement. David Robinson replied: “Okay thanks for advising. I’ll maybe keep the draft judgement amongst Emma, Michael and I for now and let the other few know the outcome.” Mr Robinson forwarded the CEDJ to the Defendant’s (iv) South Area Planning Team Leader (James Hughes) and (v) Business Improvement Manager (managing the team dealing with the Defendant’s Planning email inbox) (Alison Bradshaw). The CEDJ was not shared beyond persons (i) to (v) above.

3. I turn to the Defendant’s internal communication of the outcome described in the CEDJ. Ms Talbot emailed “news of the outcome” to the Defendant’s: (vi) Cabinet Member for Housing, Development and Planning (Cllr Brenda Dacres); (vii) Deputy Head of the Mayor’s Office (Sophie Carroll); (viii) Head of Mayor’s Office (James Noble); (ix) Cabinet Executive Officer (Anisha Faruk); (x) Executive Director of Housing, Regeneration and Public Realm (Jennifer Daothong, the Director of Planning’s line manager and involved in the case); and (xi) former Cabinet Member for Housing and Planning (Cllr Paul Bell). Councillor Bell had been responsible for planning up until 25th May 2022 and had been closely involved in the Mais House case and in Lang J’s previous judgment of 18 May 2021 [2021] EWHC 1286 (Admin). All Officers and Members who received notification of the outcome of the judgment were advised that the draft judgment and the outcome of the case were subject to embargo until 10am on Monday 11th July and that disclosure would therefore be contempt of Court.
4. In the Reply the Claimant contended, and in the Further Reply has maintained, that the scope of this internal distribution constituted a breach of the embargo (without inviting any finding of contempt), because it was communication of the CEDJ or its substance “beyond those who needed to see it for the purposes for which it had been distributed in draft” (JR Guide 2022 §11.6.5; Counsel General §23). The “purposes” of circulating a CEDJ are to enable the parties to make suggestions for the correction of errors, prepare submissions on consequential matters and prepare themselves for the publication of the judgment (JR Guide 2022 §11.6.2; Counsel General §24). In particular, the communication of the outcome to (xi) Councillor Bell can only have been “for interest”, which is illegitimate and a breach of the embargo. That is the Claimant’s stance.
5. The Defendant’s position is set out in the Further Response. It is as follows. As a matter of judgment, it was considered that each of the individuals (iv) to (xi) did “need” to know in order to “prepare themselves for the publication of the judgment”, given their involvement with the case. More specifically, given the widespread public interest that had seen multiple and continued requests for statements and responses at Council Questions, there was a likelihood that these individuals would have been contacted or asked for comment immediately after the judgment went public. As such, the view taken was that there was a legitimate need for those people to be informed and prepared. Specifically: (iv) Mr Hughes, as the South Area Planning Team Leader, needed to know because the case fell within the area for which he is responsible; (v) Ms Bradshaw needed to know because she manages the Planning Inbox which formed an essential part of this case; (vi) Councillor Dacres is the Cabinet Member for

Housing, Development and Planning and therefore the Cabinet Member with responsibility for this case; (vii) Ms Carroll, (viii) Mr Noble and (ix) Ms Frank were cc'd to the email to Councillor Dacres because they provided support to the Cabinet Members and the Mayor and as such had a historic and ongoing involvement with this case. (x) Ms Daothong, Executive Director of Housing, Regeneration and Public Realm is Ms Talbot's own line manager and was involved in the case. (xi) Councillor Bell was the previous Cabinet Member for Housing, Development and Planning, the Cabinet Member when planning permission was granted, and had been closely involved with the Mais House case and previous judgment. Each of the individuals who were sent a copy of the draft judgment or outcome was done so on the basis of their historic and ongoing professional connection with the case. Each was a member of the planning service directly linked to the case (either at the time of the draft judgment or at the time permission was issued), namely officers, the relevant Cabinet Member and their direct support team. Reliance is placed on Counsel General for Wales at §24, which includes in the purposes for which "judgments are handed down in draft under embargo" that the "process is to enable the parties ... to prepare themselves for the publication of the judgment".

6. I accept the Defendant's reasoned explanation. I find no breach on this aspect. I agree with Mr Harwood KC that neither a CEDJ nor the outcome arising from it can legitimately be communicated purely "for interest" or "for information". There must be a "need", based on the identified purposes of the distribution of the CEDJ. It must, moreover, be a "need" which cannot be satisfied through the benign communication of the date and timing envisaged for the hand-down. There is a need for care and a conscientious exercise of judgment. There is a need for diligence. On the other hand, the Court ought not routinely be drawn into supervising a distribution list. I accept that persons within an authority or entity which is a party to the proceedings may, in preparing themselves for publication of the judgment, need to be aware of the substance of a CEDJ, may need to be prepared, and may need to be assisted by co-workers in how they are prepared, so as to be able to 'hit the ground running' when the judgment is handed down. I also accept that it may not always suffice, or be practicable, to schedule each such person to be told of the timing of the proposed hand-down and then have the outcome communicated at that moment. That is not to encourage large numbers for circulation. In terms of takeaway points, it seems to me that a party should liaise closely with their legal representatives in identifying those individuals to whom, in terms of strict confidentiality reflecting the Court's embargo: (a) the CEDJ is proposed to be circulated or (b) the outcome is proposed to be communicated. A clear basis as to why that circulation or communication is 'needed for the purposes for which the CEDJ has been distributed by the Court' should be identified, prior to circulation, and it should contemporaneously be recorded. The question should be asked: why does it not suffice for the person to be made aware of the timing of the proposed hand-down and receive the communication promptly when it takes place? If there is doubt, the Court's permission should be sought. The other parties' observations can, as appropriate, be invited. In the present case, I do not find a breach. I add this. If permission had been sought in the present case for this internal distribution on the reasoned basis put forward, I would have granted it.

The Embargoed Press Release (EPR)

7. I turn to address the issue which was the subject of the Submissions (14.7.22), arising out of the 0915 email on 11 July 2022. The key point is this. The Court's embargo in relation to a CEDJ does not allow a party to issue an EPR: a pre-'hand-down' press release, issued to the press, but carrying its own 'embargo'. To do so is a breach of the Court's embargo. It must not happen. But it happened in this case.
8. I return to the factual narrative. Ms Talbot had separately emailed the Defendant's: (xii) Media and Campaigns Officer for Planning (Edward Parker Humphreys) at 13:50 on 5 July 2022, advising Mr Parker Humphreys of the outcome, and making clear that the news must not be shared more widely. The purpose of communicating the outcome with Mr Parker Humphreys was so that he could prepare a draft press release ahead of the judgment being handed down on Monday 11th July 2022 at 10am. The email which Ms Talbot sent to Mr Parker Humphreys on 5th July 2022 stated: "News embargoed until Monday 11th at 10am so this cannot be shared yet". I accept that "cannot be shared yet" was a reference to disclosure to, rather than by, the press. Ms Talbot did not share this news with the Council's "general media relations" email address given the need to maintain confidentiality. Mr Parker Humphreys responded to Ms Talbot with a draft press release on Friday 8 July 2022 for comment. He also sent the draft press release to Councillor Dacres for her comment and approval. The draft press release included, in red highlighted text: "EMBARGOED UNTIL 10AM MONDAY 11 JULY". As Ms Talbot tells, in his email to her Mr Parker Humphreys "stated that he would circulate the press release to the local press/trade press at 10am on Monday 11th July (when the judgment was due to be handed down)". Mr Parker Humphreys was due to be on annual leave on Monday 11 July. He therefore asked his colleague, the Council's: (xiii) Senior Media and Campaigns Officer (Emma Wynne) to send the press release to various media outlets "first thing" on Monday morning. This request was initially by an MS Teams call (in which Mr Parker Humphreys made it clear the press release had to be sent with a 10am embargo) and reiterated in his handover email to Ms Wynne and other communications colleagues. Ms Wynne did as she had been asked. It was in those circumstances that the email timed at 0915 on Monday 11 July 2022 from the Defendant's "media relationships" email address was an EPR which was sent to 17 press and media email addresses (supplied to the Court).
9. The EPR was as follows:

From: Media Relations Date: Mon, 11 Jul 2022 at 09:15

Subject: Planning permission upheld for 100% social housing development

To: Media Relations

EMBARGOED UNTIL 10AM MONDAY 11 JULY

Planning permission upheld for 100% social housing development

Lewisham Council's decision to grant planning permission for a 100% social housing development at Mais House has been upheld by the High Court, following a judicial review.

The City of London Corporation, who own the Sydenham Hill estate, plan to build 110 new social homes on the estate, replacing a set of garages and an empty block of flats. The empty block was previously used as supported living accommodation for elderly residents, but is no longer fit for purpose. The new social homes will be used to house families on

Lewisham and the City of London’s housing waiting lists, helping to tackle the housing crisis facing London.

The plans for the Mais House development were approved by Lewisham Council’s Strategic Planning Committee in June 2021. An application was subsequently made to the High Court for a judicial review of the decision. A judicial review was carried out by Justice Fordham and found that there were no grounds to overturn the Council’s original decision to grant planning permission.

Cllr Brenda Dacres, Cabinet Member for Housing Development and Planning, said:

“I am pleased that the High Court has upheld our original decision to grant planning permission for this important 100% social housing development at Mais House.

“With 10,000 families on our housing waiting list, building new social homes is a key priority for Lewisham. The development at Mais House will see an empty building and garages replaced with 110 much-needed social homes, helping families on our housing waiting list. It will also see more trees planted and the creation of a new play space for residents, while retaining current green space on the estate.”

-ENDS-

10. I accept that it was proper for a press release to be prepared, by the Defendant as party to the proceedings, so that it could be sent promptly when the finalised judgment had been handed down. The drafting of press releases by a barristers Chambers to publicise Chambers is not a legitimate activity to undertake within the embargo (JR Guide 2022 §11.6.4; Counsel General for Wales §26). But it is “different” and permissible “if a corporate party wishe[s] to issue a press release immediately on hand down to explain to the public what had occurred in the judgment” (Counsel General for Wales §26). Ms Talbot legitimately considered that it was appropriate to communicate the outcome to Mr Parker Humphreys, as the Defendant’s internal press officer, so that the Defendant would be in a position expeditiously to update the public and inform the community as to the outcome. None of that was a breach, as is common ground.
11. It was however a breach of the Court’s embargo to send an EPR to the press, communicating substantive content from the CEDJ. This was a breach, notwithstanding that the publication at 09:15 on 11 July 2022 was not to the public at large but to a portion of the press; that it was premature by 45 minutes; that it bore an ‘embargo’ of its own, as to reporting to the public; and that there was no press reporting until after 10am – indeed not until 13:06 – on 11 July 2022. Mr Parker Humphreys mistakenly thought that a press release could be sent out prior to hand-down, with an ‘embargo on reporting’ prior to 10am. This sort of ‘media embargo’ is standard practice for other announcements in the course of the Defendant’s general business, where Mr Parker Humphreys would usually liaise with journalists to issue press releases. His approach was a “media embargo” rather than a “court embargo”. This misunderstanding of the Court embargo was a genuine human error. In light of this correspondence, and a course of dealing with other judicial review decisions, Miss Talbot had understood Mr Parker Humphreys to be aware of the court embargo process and the seriousness of it. In the context of the First Judgment (Lang J), in communications on 11 May 2021 between Ms Talbot, Helen Clarke (Head of Communications) and Mr Parker Humphreys, Ms Talbot had stated: “this news can’t be shared outside the Council at this stage as it would be contempt of court”; and “Cannot be shared outside the Council otherwise CONTEMPT OF COURT”. That

email itself further noted “this news is currently confidential and cannot be shared otherwise we’ll be in contempt”. Mr Parker Humphreys has communicated his deep regret at not taking the opportunity to clarify the nature of the embargo with Ms Talbot. Had he have done so, Ms Talbot would have been clear that it could not be shared with the press. The Defendant promptly acknowledged the breach and has apologised for it. Ms Talbot’s witness statement described it as an “error” and a “mistake”. She told the Court: “I entirely accept that this should not have happened and apologise unreservedly for this error”; “I accept that this error should not have happened at all”; “I understand the seriousness of this error and again offer my sincere apologies”; “This should not have happened”. She also tells the Court: “I want to assure the Court that we will be taking action to ensure that this does not happen again, including agreeing a written protocol with the Council’s Monitoring Officer”. It is, rightly, agreed that this was a breach of the embargo and that this Court should find and record the breach. I hereby do so. No finding of contempt is invited and none is made. No Order is necessary. This judgment is sufficient to address the concerns which have arisen.