COMBAR, ChBA & TECBAR PROPOSAL RE FOREWARNING OF RESERVED JUDGMENTS TO BE CIRCULATED UNDER EMBARGO IN THE BUSINESS AND PROPERTY COURTS

1. This proposal is made by the Commercial Bar Association ("**COMBAR**"), the Chancery Bar Association ("**ChBA**") and the Technology & Construction Bar Association ("**TECBAR**") for the consideration of the Judges of the Business and Property Courts in relation to the possibility of giving forewarning of the delivery of reserved written judgments under embargo ("**Embargoed Judgments**") in the light of the urgent professional obligations which fall to counsel upon the delivery to them of Embargoed Judgments.

2. The proposal asks for consideration of the feasibility of a system of (unless inappropriate) a minimum of a week's advanced notice to legal representatives of *when* an Embargoed Judgment will be, or is likely to be, circulated under embargo.

Applicable CPR Framework

3. Relevant provision is made under CPR PD 40E (Reserved Judgments) on the process for the finalisation and handing down of reserved judgments.

   3.1. Paragraph 1.1 applies the PD to, "*all reserved judgments which the court intends to hand down in writing*."

   3.2. Paragraph 2.1 provides a general power to a Judge, "*at the conclusion of the hearing,* [to] *invite the views of the parties' legal representatives as to the arrangements made for the handing down of the judgment*."

   3.3. Without prejudice to the generality of paragraph 2.1, paragraph 2.2 provides that the following provisions of paragraph 2 will apply (unless the Court directs otherwise), "*where the judge or Presiding Judge is satisfied that the judgment will attract no special degree of confidentiality or sensitivity*".

   3.4. Those default arrangements include the following features:

3.4.1. By paragraph 2.3, "*The court will provide a copy of the draft judgment to the parties' legal representatives by 4pm on the second working day before handing down, or at such other time as the court may direct.*"

3.4.2. By paragraph 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 judgment is handed down.*"

3.4.3. By paragraph 2.6, "*If a party to whom a copy of the draft judgment is supplied under paragraph 2.4 is a partnership, company, government department, local authority or other organisation of a similar nature, additional copies may be distributed within the organisation, provided that all reasonable steps are taken to preserve its confidential nature and the requirements of paragraph 2.4 are adhered to.*"

3.4.4. By paragraph 2.7, "*If the parties or their legal representatives are in any doubt about the persons to whom copies of the draft judgment may be distributed they should enquire of the judge or Presiding Judge.*"

3.4.5. By paragraph 2.8, "*Any breach of the obligations or restrictions under paragraph 2.4 or a failure to take all reasonable steps under paragraph 2.6 may be treated as contempt of court.*"

3.5. Additionally, paragraph 4 on "*Orders consequential on judgment*" provides in material part:

3.5.1. By paragraphs 4.1 and 4.2, that the legal representatives must seek to agree orders consequential on judgment and file these in the relevant court office by 12 noon on the working day before handing down together with lists of proposed corrections or amendments to the draft judgment.

3.5.2. By paragraph 4.4, that a party who wishes to apply for an order consequential on the judgment must make an application by filing

written submissions with the clerk to the Judge or Presiding Judge by 12 noon on the working day before hand down.

4. Accordingly, by reference to the default arrangements under PD40E, in respect of a judgment to be handed down (by way of example) on Friday 7 November 2025, the following deadlines would apply:

   4.1. The parties' legal representatives would by 4pm on Wednesday 5 November (40EPD2.3) receive the Embargoed Judgment from the Court and could thereafter share it with their clients, subject to any need to clarify with the Court the scope of permitted recipients (under 40EPD2.6 and 2.7).

   4.2. The parties would be required to seek to agree orders and file these with the Court by 12 noon on Thursday 6 November (40EPD4.2).

   4.3. The parties would be required to file lists of suggested corrections and amendments to the draft judgment by 12 noon on Thursday 6 November (40EPD4.2).

   4.4. Any party seeking consequential orders would be required to file written submissions by 12 noon on Thursday 6 November (40EPD4.4).

5. The Chancery Guide refers to the provisions at paragraphs 12.86 to 12.92; the Commercial Court Guide at paragraph J.12; the TCC Guide at paragraph 15.9.4.

Practice Note [2022] 1 WLR 1915

6. Additional guidance on Embargoed Judgments was given by the Master of the Rolls, giving the judgment of the Court of Appeal (Sir Geoffrey Vos MR, Nicola Davies, Dingemans LJJ) in the Practice Note in the matter of ***R (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy*** [2022] EWCA Civ 181, in relation to an incident of an inadvertent breach of the embargo within a set of Chambers. The Practice Note provides the following relevant guidance:

   6.1. At [20], "*The events I have described should not have happened. The court understands that mistakes are bound to occur and that is why, if the strict rules contained in CPR PD 40E are to be adhered to, far stricter measures need to be put in place by anyone who is*

given the privilege of seeing an embargoed draft judgment before it is handed down and thereby put into the public domain."

6.2. At [21], "*The purpose of this judgment is not to castigate those whose inadvertent oversights gave rise to the breaches in this case, but to send a clear message to all those who receive embargoed judgments in advance of hand-down that the embargo must be respected. In future, those who break embargoes can expect to find themselves the subject of contempt proceedings as para 2.8 of CPR PD 40E envisages.*"

6.3. At [22], "*I want also to draw attention to the terms of para 2.4 of CPR PD 40E which provides that 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."*"

6.4. At [23], "*The persons to whom the judgment is normally (unless specific protections are provided for) supplied are counsel, the solicitors working on the case, and the parties themselves (whether individuals or corporate). Para 2.5 of CPR PD 40E envisages that a party's legal representatives may supply a copy to the party to the claim in electronic form, not that it can be circulated elsewhere. If the party is a partnership, company, government department, local authority or other organisation of a similar nature, para 2.6 of CPR PD 40E provides expressly that "additional copies may be distributed in confidence within the organisation, provided that all reasonable steps are taken to preserve its confidential nature and the requirements of paragraph 2.4 are adhered to". That is not a licence to circulate the draft judgment beyond those who need to see it for the purposes for which it has been distributed in draft.*"

6.5. At [24], "*It is important, therefore, to understand why judgments are handed down in draft under embargo in the first place. Some insight is gained from the passage cited above from* Crosland. *That suggests that the process is to enable the parties to make suggestions for the correction of errors, prepare submissions and 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 beyond those that I have specifically mentioned is forbidden (unless the court expressly gives consent). For a*

fuller explanation of the history and rationale of the court's practice, see Thomas S Woods "Paragraph 168: A Cautionary Tale Concerning the Circulation of Draft Judgments to Counsel" (2017) Oxford University Comparative Law Forum I."

6.6. At [27], "*It should be sufficient for one named clerk to provide the link between the court and the barrister or barristers. Nobody else in the chambers' administrative machine should have access to the draft judgment or any of the documents created in relation to it without there being a good reason, connected to one of the permitted purposes I have mentioned, for them to do so.*"

6.7. At [29] – [31], in conclusion:

> *"29. As I have tried shortly to explain, the provisions of CPR PD 40E are mandatory. It is the personal responsibility of counsel and solicitors instructed in a case in which an embargoed draft judgment is provided to ensure that they are complied with. The purpose of the process is to enable the parties to make suggestions for the correction of errors, prepare submissions and agree orders on consequential matters and to prepare themselves for the publication of the judgment.*
>
> *30. CPR PD 40E 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.*
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> *31. My conclusions are as follows: (i) it is not appropriate for persons in the clerks' rooms or offices of chambers to see the draft judgment or to be given a summary of its contents, (ii) drafting press releases to publicise chambers is not a legitimate activity to undertake within the embargo, (iii) it should be sufficient for one named clerk to provide the link between the court and the barrister or barristers, (iv) proper precautions and double-checks need to be in place in*

barristers' chambers and solicitors' offices to ensure that errors come to attention before the embargo is breached, and (v) in future, those who break embargoes can expect to find themselves the subject of contempt proceedings as envisaged in para 2.8 of CPR PD 40E."

Difficulties for counsel in discharging their non-delegable professional obligations in respect of Embargoed Judgments

7. It can be seen from the provisions of PD40E and the guidance in the Court of Appeal's 2022 practice note that the obligations placed on counsel following receipt of Embargoed Judgments are serious, may be heavy and are tightly time-constrained.

8. When a judgment has been reserved, the parties (including legal representatives) will not normally have any idea when judgment is likely to be circulated in draft as an Embargoed Judgment. A reserved judgment could be handed down anything from a number of days after the end of the hearing to a number of months later. It would not be unusual, for example, for a judgment reserved in July to be handed down in November. That means that the circulation of the Embargoed Judgment usually comes somewhat out of the blue, and that counsel may need to refresh their memory of pertinent details of the case in order to be able effectively to discharge their obligations upon the circulation of the Embargoed Judgment.

9. When an Embargoed Judgment is circulated to counsel, the following tasks immediately arise:

    9.1. Determining to whom the Embargoed Judgment should be circulated.

    9.2. Reading the Embargoed Judgment to understand the outcome and the Court's reasoning.

    9.3. Carefully reviewing the Embargoed Judgment for typographical and other such errors (this may include checking against hearing bundles to ensure that acronyms, definitions and references have been correctly given) and producing a list of suggested corrections for the Court's consideration.

9.4. If counsel acts for an unsuccessful party, considering prospects of appeal in order to be able to advise the solicitor and lay clients on appeal options and prospects[1].

9.5. If counsel acts for a successful party, considering prospects of the unsuccessful party obtaining leave to appeal, to be able to advise the solicitor and lay clients on the same.

9.6. Considering the form of order to be agreed and producing a draft, obtaining instructions on the draft order and seeking to agree the same with counsel for the other party or parties, including costs disposition (including the principle of costs orders).

9.7. Considering whether to seek any consequential orders (including stays) and drafting and finalising written submissions in support of any consequential orders.

9.8. Considering with the client any immediate steps to be taken, such as press releases the client may consider it needs or wishes to release upon the Judgment being publicly handed down, and any steps the client needs urgently to take to comply with the terms of the Embargoed Judgment (for example, where the final relief granted includes injunctive relief).

10. In many cases, the default time periods outlined in PD40E are departed from, but only at the discretion/initiative of individual Judges. A party's legal representatives cannot have any expectation that any different time period will apply from that provided for under the default position in PD40E.

11. In the estimation of COMBAR, ChBA and TECBAR, and at least in larger cases, the arrival of an Embargoed Judgment often involves a full day of counsel's time to deal with the immediate tasks arising identified in paragraph 9 above. That is a large,

[1] Note that paragraph J.12.3 of the Commercial Court Guide provides that if at the time judgment is given any party wishes to apply for permission to appeal to the Court of Appeal, that application should be supported by written draft grounds of appeal. Paragraph 12.91 of the Chancery Guide reminds parties that if permission to appeal is to be sought from the trial judge, such an application must be made when judgment is handed down unless the parties have obtained an extension of time for doing so.

unexpected and non-delegable amount of work to be accommodated in a default time period of only two working days (or some slightly longer period directed by the Court). In some cases, an Embargoed Judgment will be received in a week when counsel has ample capacity to deal with the Embargoed Judgment, including by deprioritising less time critical tasks. In other cases, the Embargoed Judgment may be received when counsel is (a) in trial or a hearing, (b) already fully engaged with other scheduled and/or urgent deadlines, hearing or trial preparation or (c) is away from Chambers.

12. The impact upon counsel of the receipt of the Embargoed Judgment without forewarning can vary broadly depending upon the following professional factors (non-exhaustively stated):

    12.1. The length and complexity of the Embargoed Judgment.

    12.2. Whether sole counsel is instructed for a party, or the party is represented by a counsel team made up of two or more barristers.

    12.3. The availability of the solicitors with relevant conduct of the case at the time when the Embargoed Judgment is circulated.

    12.4. The complexity of appeal prospects and any consequential issues.

Equality considerations

13. The impact on counsel of the receipt of the Embargoed Judgment without forewarning can also vary broadly depending upon the following personal factors (non-exhaustively stated) all of which are likely to limit the ability to work extended hours at short notice:

    13.1. Childcare responsibilities:

        13.1.1. This is likely disproportionately to impact female counsel. We draw attention to:

            13.1.1.1. Chapter 6, paragraph 1 of the Equal Treatment Bench Book (May 2025 update) (the "**ETBB**") which provides, "*Judges should be aware that women may face particular challenges when participating in the justice system (eg, because of childcare or eldercare issues, or if*

they are pregnant/have recently given birth), and courts may need to consider adjustments to enable women to fairly participate."

13.1.1.2. Chapter 6, paragraphs 12-13 of the ETBB which provides, "*Women are still the primary carers of children, either as single parents (nine out of 10 single parents are women), or as a couple. Working mothers are still twice as likely to be the first port of call when childcare breaks down and are twice as likely to do domestic work as soon as they get home.*"

13.2. Caring responsibilities.

13.2.1. We note chapter 6, paragraph 14 of the ETBB which provides, "*Many women provide unpaid care by looking after an ill, older or disabled family member, friend or partner. Drawing from the last census in 2021, Carers UK estimates that five million people in England and Wales are unpaid carers. Although this is an overall decrease from the 2011 census, explained by fewer people providing lower levels of care, Carers UK reports a significant increase in the numbers providing higher levels of care, between 20 and 50 hours per week. Of those, 59% are female… Caring tends to affect men and women at different times. Women are much more likely to care in their 30s, 40s and 50s, and are more likely to be "sandwich carers" (combining eldercare and childcare), which makes the reconciliation of work and family life twice as difficult.*"

13.2.2. We also note chapter 6, paragraph 19 of the ETBB: "*Carers may have difficulty finding someone else to take over the caring role. It helps if they can be given set times for the beginning and end of the hearing and, where childcare is an issue, holding the hearing during school term time may be preferable, if this is possible.*"

13.3. Health issues.

13.4. Disability.

14. Short notice risks a disproportionately negative impact on counsel with childcare and caring responsibilities (predominantly women), disabled counsel and counsel with

health issues which may limit their ability to work longer hours to accommodate the unexpected demands of an Embargoed Judgment, and this heightens the seriousness of the concerns about giving of short notice.

Proposals

15. Of course, sometimes short notice is unavoidable. However, given the equally unavoidable strong personal and non-delegable professional obligations on counsel in respect of Embargoed Judgments, steps to avoid unnecessary or unreasonable pressure on counsel would be desirable, including in light of the equality considerations outlined above.

16. One way of addressing this issue would be for the default periods between circulation of Embargoed Judgments and hand down of final judgments to be extended. As for this:

    16.1. There may be policy reasons why it is considered desirable for an embargo period to be constrained, including risk of inadvertent disclosure of information which could, for example, be market sensitive.

    16.2. However, the default position under PD40E only applies to cases of "*no special degree of confidentiality or sensitivity*".

    16.3. There is reason to doubt that in the case of the majority of cases heard in the Business and Property Courts, the default timings in PD40E are fair, reasonable or workable (for example, consequential submissions being due by noon one working day before the hand down, in circumstances where the Embargoed Judgment need only be provided by 4pm two working days before the hand down).

    16.4. Anecdotal experience suggests that in many cases, and particularly in heavy cases with lengthy written judgments, Judges already recognise that the default period between circulation of an Embargoed Judgment and the hand down of the final judgment in PD40E is not realistic and are exercising their discretion to direct longer periods when circulating Embargoed Judgments to the parties' legal representatives. Additionally, Judges not infrequently recognise that

consequential matters cannot fairly be dealt with in the default period and give directions for consequential matters and applications to be dealt with following hand down.

16.5. One consequence of this is an unpredictable procedural landscape where particular Judges give very different directions as to the time between receipt of an Embargoed Judgment and hand down. This is particularly challenging for counsel with less flexibility in their professional and personal schedules.

16.6. As for the default position in PD40E, this is part of the current CPR and of application more broadly than merely to the Business & Property Courts, and any amendment to PD40E would be a matter for the Civil Procedure Rule Committee and leadership Judges more broadly.

17. An alternative, and our primary proposed solution to ameliorate the difficulties counsel may face dealing with an Embargoed Judgment, would be to institute guidance to Judges and legal representatives in the Business & Property Courts by which forewarning should ordinarily be given to the parties' legal representatives of when an Embargoed Judgment will be, or is likely to be, circulated under embargo. As for this:

17.1. Forewarning that an Embargoed Judgment is imminent does not raise the same policy concerns which a longer embargo period might, in some cases, do. It will already be in the public domain that judgment is pending and has been reserved to be handed down at a future date. The forewarning of the likely date for circulation of the Embargoed Judgment and date for hand down of the final judgment does not provide significant new information.

17.2. To the extent any residual concern remained, the forewarning could itself be given under the same embargoed terms as the later receipt of the Embargoed Judgment.

17.3. Some Business and Property Court judges *do* give an indication as to when an Embargoed Judgment is likely to be handed down, or as to when the hand-down of a judgment is likely to take place. The practice is thus not without precedent.

18. The benefits of forewarning to parties' legal representatives would be considerable:

    18.1. First, it would allow legal representatives to organise their professional and personal schedules prospectively to ensure that they have sufficient time available to discharge the important obligations upon them on receipt of an Embargoed Judgment. This could involve things such as reallocating work within existing professional teams, or making additional childcare or caring responsibilities cover arrangements.

    18.2. Second, it would allow counsel and solicitors to consider in advance who will deal with which elements of the obligations on a party's legal representatives upon receipt of an Embargoed Judgment. It would also assist in managing the risk that a sole counsel to whom an Embargoed Judgment is emailed does not promptly receive and act upon it because of being unavailable (which could be for any number of reasons, e.g. being on a long flight, or unwell).

    18.3. Third, it would allow the early identification of any particular issues which may impact the workability of the proposed timeline down to hand down of the final Judgment and for these to be raised with the Judge in an orderly and timely manner in advance of circulation of the Embargoed Judgment.

    18.4. Fourth, it would allow contingent conversations to occur between clients and their legal representatives about possible positions on consequential matters (costs, appeals etc). In some cases, those conversations will not meaningfully progress matters until the parties and their legal representatives have sight of the terms of the Embargoed Judgment, but in other cases progress might be made (for example, a client may have decided that they do not have the financial appetite to prosecute any appeal if they have lost or it may be apparent that particular consequential orders may be warranted on different outcomes depending on supervening events).

19. As to the length of the relevant period, we suggest a default of a minimum of 7 days' forewarning of the circulation of an Embargoed Judgment (together with the date of the anticipated hand down of the Final Judgment and date for returning draft orders and

lists of corrections to the Court). This would make a significant and highly material improvement to the challenges counsel face on the current practice. Appreciating that it may not be possible in all cases (for example, cases of urgency) for a Court to give such forewarning, the guidance could be framed in terms of the *ordinary* practice being that Judges should give parties' legal representatives at least 7 days' forewarning of the circulation of an Embargoed Judgment (stipulating at the same time when corrections and draft orders would be expected to be returned and when hand down would be anticipated to take place). Whilst the judiciary will have a better sense for the practicality of particular periods of forewarning, it would seem reasonable to assume that most Judges will be aware of an intended circulation date 7 days prior to the circulation under embargo. If unforeseen developments rendered it impossible for the Embargoed Judgment to be delivered until a later date than forewarned, the parties could simply be updated within the forewarning period.

20. We are grateful to the Courts for their attention to this matter and would welcome the opportunity to discuss the subject of this submission further with leadership Judges within the Business & Property Courts if that was felt to be helpful.

Commercial Bar Association

Chancery Bar Association

Technology & Construction Bar Association

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