

HUGH SIMS QC AND OLIVER MITCHELL SUCCESSFUL IN HIGH COURT APPEAL ON 'BEST EVIDENCE' RULE AND REDACTION

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The High Court has handed down judgment in an appellate decision, *Promontoria (Oak) Limited v Emanuel* [2020] EWHC 104 (Ch), concerning both the 'best evidence' rule and the permissibility of reliance on redacted documents as secondary evidence.

Mr Justice Marcus Smith was required to consider whether or not a claimant had been properly permitted to rely upon a redacted copy of a deed of assignment in establishing its claim, in a context in which the validity of the assignment had been in issue.

Marcus Smith J reviewed the so-called 'best evidence' rule, concluding that it was in fact guidance as to the exercise of a judicial discretion to admit and give weight to secondary evidence. His Lordship went on to consider a number of factors relevant to the exercise of that discretion: the probative difference between primary and secondary evidence in an individual case, the nature of the point in issue, the reason for non-production of the primary evidence and the procedural history of the case.

Marcus Smith J concluded that the decision of the recorder at first instance to permit the claimant's reliance on the redacted copy deed was sufficiently flawed as to require setting aside. The judge noted the additional probative weight of the original documents relating to the claimed assignment which had not been before the court, concluded that the unredacted documents were relevant, and considered that asserted confidentiality was not, without more, a sufficient basis for withholding unredacted evidence if the unredacted form of the evidence would be relevant.

Whatever view the recorder had gone on to form on the material actually before him, it had therefore, in the view of Marcus Smith J, been wrong to permit reliance on the redacted deed and to proceed on that basis. The defendants' appeal was accordingly allowed.

Hugh Sims QC (who also appeared at first instance) led Oliver Mitchell for the defendants on appeal in the High Court.

The judgment can be found on the BAILII website at <http://www.bailii.org/ew/cases/EWHC/Ch/2020/104.html>.