

PROMONTORIA (OAK) LIMITED V EMANUEL: REDACTIONS - THE LATEST WORD FROM THE COURT OF APPEAL



The Court of Appeal has handed down judgment in combined appeals representing the latest round of litigation concerning redacted documents of title in claims brought in reliance on assigned rights.

In the case of *Promontoria (Oak) Limited v Emanuel and other appeals*[2021] EWCA Civ 1682, the Court of Appeal addressed a number of appeals identified by Nugee LJ at the permission stage as raising the question of the approach to redaction of a document required to prove title to sue but which is redacted on claimed relevance and confidentiality grounds.

This represented further consideration at the Court of Appeal level of the broad question recently before the same Court in *Hancock v Promontoria (Chestnut) Limited*[2020] EWCA Civ 907.

Giving judgment, and before considering the specific issues arising on each individual appeal, Lords Justices Henderson, Phillips and Nugee sought to address the general principle, and in doing so summarised and approved (at [44]) the guidance given by Henderson LJ in *Hancock*, to the effect that, where a question of construction is before a court, the entire document should ordinarily be put before the court, with the use of redactions being exceptional, and requiring provision of a clear explanation with appropriate particularity, and, most likely, a justification of *both* irrelevance *and* confidentiality.

In adding some additional comments, the court noted that the requirements for construction of a document are heavily context-dependent, and concluded (at [46]) that “*there is no absolute rule that the whole document should always be disclosed in unredacted form if asked for*” and that “*The ultimate question is always whether it is possible for the Court to reach a safe conclusion on the effect of the document: if it cannot, it would be unfair to the other party for the Court to proceed on the basis that the document had a particular effect, but if it can, there is no reason why it should not do so, and it would be unfair on the party relying on the document to refuse to do so.*”

The court also expressed the view that it is undesirable for questions of the appropriateness of redaction first to be raised at trial, and that a defendant taking issue with the claimant’s approach to redactions ought to raise the issue with the court on a prior occasion.

Some of those interested in these assignment cases will recollect that Marcus Smith J gave two substantial written judgments in the High Court in *Emanuel*, each of which gave rise to an appeal.

In the first ([2020] EWHC 104 (Ch)), Marcus Smith J determined that the defendants’ appeal against the decision at first instance to admit a redacted deed of assignment into evidence ought to be allowed. The claimant’s appeal against this decision has now itself been allowed by the Court of Appeal, which considered that the recorder’s decision ought not to have been disturbed on appeal.

The effect of Marcus Smith J’s second decision ([2020] EWHC 563 (Ch)) was to leave the actual outcome at first instance unaltered, on the basis that registration of the charge in the name of the claimant provided an alternative route not only to proving title to the charge, but also to recovery of the debt with which it was associated. That decision had itself been appealed by the defendants, in an appeal raising grounds of both substance and procedure. However, in the light of its decision to allow the claimant’s appeal, the Court of Appeal did not go further into this question, meaning that the effect of registration of title to a security, considered in Marcus Smith J’s second judgment, has gone unconsidered by the Court of Appeal on this occasion.

Hugh Sims QC appeared for the *Emanuel* defendants at trial and on appeal in the High Court and Court of Appeal, leading *Oliver Mitchell* on the appeals.

