

PROMONTORIA (OAK) LTD v EMANUEL

Court of Appeal [2021] EWCA Civ 1682, 18 Nov 2021 (Henderson, Phillips and Nugee LJ)

Jamie Riley QC and James McWilliams have been successful in [a case](#) before the Court of Appeal which gave important guidance on how trial judges should approach the interpretation of documents of title that have been redacted. The judgment provides helpful and important guidance, generally but especially to investment funds operating in the competitive market of acquiring bank loan and security portfolios, on how to balance commercial confidentiality with the evidential requirements of proving title.

In four conjoined appeals, the court was required to determine a common issue of principle concerning the use of redacted documents to establish a claimant's title to sue as an assignee. The appeals arose from the acquisition by investment fund entities of large portfolios of loan assets and securities from a bank. In each case, the companies had sought to enforce payment of the loans and related security as assignee of the bank's rights. In each case the relevant company acquired the debts pursuant to a structure involving a sale and purchase agreement ("SPA") between the bank and a Dutch registered company; a novation of the SPA to an Irish subsidiary; and a deed of assignment transferring title from the bank to the Irish company.

The terms of the transaction documents were commercially sensitive. Therefore, in each case the claimant company relied on redacted versions of the assignments to establish their title which the defendants required the company to prove. In each case the trial judge found title established on the basis of the redacted assignments and written notices of assignment which had been sent by the bank and of behalf of the company. The lead appeal, Emanuel, was a second appeal. On the first appeal the High Court overturned the trial judge's decision; it found that while the trial judge was entitled to find that the redacted documents established title, the trial judge should have excluded the redacted deed from the evidence because of evidence that was not before the court that might have led to an interpretation that there was no effective assignment.

The appeals raised the issue of how a judge should deal with documents on which a claimant needed to rely to prove its title to sue, but which were redacted on asserted grounds of irrelevance and confidentiality. A further issue was whether the Law of Property Act 1925 s. 136 offered adequate protection to the debtors.

On the first point of principle - reliance on redacted documents – the court held that the starting point was the guidance in the related case of *Hancock v Promontoria (Chestnut)* [2020] EWCA Civ 907, [2020] 4 W. L. R. 100, [2020] 7 WLUK 182. *Hancock* indicated that where the court had to interpret a contractual document, it normally had to see the entire document. If, exceptionally, any redactions were made, they had to be fully explained and justified with sufficient particularity for the court to be able to rule on the need for redaction in the event of a challenge. In general, irrelevance would not of itself justify redaction; there had to be some additional feature such as privacy or confidentiality. However, there was no absolute rule that the whole, unredacted document should always be disclosed. The question was whether the court could, on the material before it, safely reach a conclusion as to the effect of the document. In the instant cases, the court was not being asked to interpret an ambiguous provision or choose between competing interpretations. It simply had to determine whether the redacted documents had effected assignments of the debts. To do so it would have to consider the meaning and effect of the provisions relied on, and other parts of the document were likely to be irrelevant. On a procedural note, it was generally unsatisfactory for questions about the extent of redactions to be first raised at trial. Such questions should be raised either at a case management conference or by way of interlocutory application (see paras 43-48 of judgment).

With regard to section 136 of the Law of Property Act 1925, this establishes that where there had been an absolute assignment of which notice had been given, the assignee could give a good discharge to the debtor without joining the assignor. The court held that although the section allows the debtor to pay the debt into court or interplead if it is on notice of a dispute between assignor and assignee, where there was no dispute the debtor was entitled to satisfy itself that there has been an assignment; *Van Lynn Developments v Pelias Construction Co* [1969] 1 Q. B. 607, [1968] 10 WLUK 24 followed. However, that was of little if any relevance where the obvious practical solution would be to ask the assignor for confirmation of the assignment; the debtor would only have to inspect the assignment if the assignor failed to respond, or responded in equivocal terms. Even then, they would not be entitled to see any more of the document than was sufficient to demonstrate that there had been a valid and absolute assignment (paras 49-53, 56).

In *Emanuel* the company's appeal was allowed. The trial judge's decision to admit and give weight to the redacted assignment was an exercise of judicial discretion. The company had given reasons for the redactions and explained that the redacted passages were not only confidential but also irrelevant. While its case would have been bolstered by a witness statement from a solicitor justifying the redactions, the absence of such a statement was not fatal. There was enough material before the trial judge to enable him safely to resolve the issue of the company's title and his decision to admit the redacted assignment could not be impugned (paras 85-89).

In the other cases the debtors' appeals were dismissed. There was no suggestion that the trial judge should not have admitted the redacted documents into evidence and the findings that they established a valid transfer of title could not be criticised. Indeed, in the *Simpson* case there could be no criticism of the trial judge's approach because the claimant company had limited its redactions and provided a detailed explanation of them in line with the guidance in *Hancock* (paras 105-108 and 126).