

Legal Briefing

Challenging the redaction of documents

WH Holding Ltd & Anor v E20 Stadium LLP [2018] EWHC 2578
(Ch)

Before Mr Justice Snowden

In the High Court of Justice, Business and Property Courts of England and Wales, Business List

Judgement delivered October 2018

The facts

Under an agreement dated 22 March 2013 E20 granted WH concessionary rights to use the London Olympic stadium during the football season. Numerous disputes subsequently arose between E20 and WH including in relation to the maximum number of seats to be made available on matchdays. WH commenced proceedings contending that contrary to its obligations to act in good faith and as a reasonable and prudent operator, E20 had declined to seek the necessary consents to increase seating capacity.

Disclosure took place in January 2018 and E20's list identified 7,501 relevant documents. Of these, 413 documents included redactions for privilege and 3,720 documents included redactions stated to be for irrelevance and/or commercial sensitivity.

WH was concerned by the level of redactions and on 3 July 2018 issued an application seeking further information as to the basis upon which some 323 documents had been redacted. In response, E20's lawyers conducted a further review and removed the redactions from 95 documents. At a hearing in August 2018 the judge provided some non-binding guidance and the parties agreed that WH should identify on a sample basis some 21 documents with the aim of exploring whether the redactions had been properly made. These 21 documents were reviewed by E20's counsel and on 31 August 2018 E20 provided full copies of the documents that counsel considered had been redacted unnecessarily together with an explanatory schedule.

WH was still not satisfied and issued a further application contending that E20's approach to redacting documents for irrelevance had been too heavy handed and was founded

upon too narrow a view on what material might potentially be relevant to the increased seating capacity issue. WH contended that the only fair way in which the redactions could be tested was for the original documents to be reviewed by the court. E20 responded that the redactions had been properly made and that WH's approach to relevance was far too wide where the review process undertaken by E20's lawyers had been fully explained to the court and did not suggest that the redactions were unjustified.

The issue

Were the redactions applied by E20 properly made?

The judgment

By reference to the limited number of authorities the judge set out the main principles: (i) if the court is not satisfied that the right to withhold inspection of part of a document is established, for example because the evidence provided does not indicate a legal right to withhold, inspection of the complete documents will be ordered; (ii) if sufficient grounds are shown for challenging the correctness of the redactions then the court may order further evidence to be produced on oath; or, (iii) if there is no other appropriate method of deciding whether the redactions were properly made, the court may decide to inspect the original documents.

The judge concluded that there were sufficient grounds to challenge the correctness of the redactions and that it was just in all the circumstances to exercise his discretion to personally inspect the original documents. This was because the extensive redaction of a very large number of documents by E20 justified the court in adopting greater vigilance to ensure that the right to redact was not being abused or too liberally interpreted. The judge also noted there was evidence that too narrow an approach had been taken by E20's lawyers during the review process. Finally, there was no viable alternative: WH's lawyers would be involved in the other disputes over the concession agreement and therefore it was not appropriate to allow WH's representatives sight of the disputed documents in an un-redacted form.

Having reviewed the sample documents and applied the test for standard disclosure in CPR Rule 31.6 the judge concluded that for the most part, E20's redactions had been properly made.

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Commentary

The judge made it clear that the court's inspection of the documents is very much a last resort, primarily because it offends Article 6 of the ECHR and the overriding objective in CPR Rule 1.1(2)(a) both of which require that the parties in civil proceedings are placed on an equal footing. However, here there was no reasonable alternative.

Where WH's application had ultimately lead to a material change in the overall scale of redactions, the judge ordered E20 to pay 50% of WH's costs of the application. He concluded that any party making extensive redactions must take extra care to ensure that redactions are appropriate and justified and be prepared to suffer the costs consequences if the court thinks otherwise.

Ted Lowery
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