

The penalty for overzealous redactions

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One of the key battlegrounds between parties attempting to agree the scope of disclosure is to what extent they are entitled to apply redactions to documents otherwise made available for inspection. There are two broad grounds on which redactions may be justified: where a document contains privileged material and where the document contains irrelevant and commercially sensitive information. What is irrelevant and commercially sensitive is a tricky – and often heavily disputed – question.

Recent developments

Redactions were considered by the High Court in a judgment by Snowden J last week in the context of a dispute between West Ham Football Club and the owners of the Olympic Stadium (the defendant). The stadium owner had applied redactions to nearly half of the eight odd thousand documents disclosed on grounds that the excluded material was both irrelevant to the pleaded claims and commercially sensitive.

West Ham disputed the redactions and, after unsuccessful attempts by the parties to resolve the complaints, Snowden J decided to take the perhaps unusual step of exercising his power to review the original versions of the redacted documents to decide whether they were appropriate or not. In doing so he provided a useful recap of the law on redactions for irrelevance. He also endorsed commentary by Charles Hollander QC (in the textbook *Documentary Evidence*) that greater vigilance by the court is justified where a high proportion of redactions are made.

Having reviewed a sample of the documents in issue, the judge decided that the redactions were, for the most part, legitimate. However, he noted that by the time he had reviewed the documents, the defendant had undertaken a substantial review of the documents in issue, resulting in the withdrawal of a material number of redactions. He therefore ordered the defendant to pay 50% of West Ham's application costs challenging the redactions, warning that whilst he understood the defendant's commercial reasons for applying redactions, "*parties who decide to adopt such an approach in disclosure must take enhanced care to ensure that such redactions are accurately made, and must be prepared to suffer costs consequences if they are not*".

Comment

Given the adversarial nature of litigation, attempts to restrict or hide material usually arise suspicion, exacerbated by the increasing tendency in substantial disputes to apply widespread redactions, often for reasons not easy to discern. As a result, formal applications challenging their application are increasingly prevalent.

Snowden J's decision is a useful reminder of the law in this area, as well as the high price this may bring for parties adopting an overzealous approach - and makes for mandatory reading for practitioners involved in large-scale disclosure exercises.

Worth noting is the new disclosure practice direction to be implemented as part of the disclosure pilot scheme kicking off next year - see [here](#) - which makes clear that any redaction must be accompanied by an explanation of the basis on which it has been made together with confirmation that it has been reviewed by the relevant legal representative controlling the disclosure process.

Tags: **disclosure, redactions**