

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP28/2018

CATCHWORDS

LANDLORD AND TENANT – Discovery of documents – Inspection of documents – redaction – Whether justified – Relevance and commercial sensitivity considered.

APPLICANT	DJP Scoria Pty Ltd (ACN 162 753 399)
RESPONDENT	Mount Road Nominees Pty Ltd (ACN 005 902 796)
FIRST RESPONDENT BY COUNTERCLAIM	William Robert Wilson
SECOND RESPONDENT BY COUNTERCLAIM	David Robert Wilson
THIRD RESPONDENT BY COUNTERCLAIM	Peter John Wilson
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Directions Hearing
DATE OF HEARING	13 April 2018
DATE OF ORDER	17 April 2018
CITATION	DJP Scoria Pty Ltd v Mount Road Nominees Pty Ltd (Building and Property) [2018] VCAT 601

ORDER

1. **By 20 April 2018**, the Applicant must produce to the Respondent copies of the documents numbered 108 to 188 inclusive, listed in the affidavit of documents sworn by Peter Wilson on 11 April 2018, without redaction or masking.
2. By consent, leave is given to the Respondent to file and serve *Amended Points of Amended Defence and Counterclaim* dated 13 April 2018, *nun pro tunc*.

3. **By 27 April 2018**, the Applicant and Respondents by Counterclaim must file and serve any *Amended Points of Defence to Counterclaim*.
4. The date by which the Respondent must file and serve any further expert reports is extended **4 May 2018**.
5. **By 4 May 2018**, the parties must file and serve an *Outline of Evidence* of each lay witness to be called to give evidence at the hearing of this proceeding. Each *Outline of Evidence* must consist of a summary of the evidence to be given by each lay witness and must be relevant to the issues raised in the proceeding.
6. A party will not be allowed to call a lay witness if an *Outline of Evidence* of that witness's proposed evidence has not been filed and served in accordance with these orders, without justifying the need to do so to the Tribunal. A party wanting to call such additional evidence may be ordered to pay costs if a hearing is delayed.
7. Unless otherwise advised, all witnesses must attend the hearing for cross-examination. If a party does not wish to cross-examine another party's witness, written notice must be given to the party concerned at least seven (7) days before the hearing date.
8. Liberty to apply, including liberty to request that a compulsory conference be convened.
9. Cost reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr A K Panna QC with Mr H Forrester of counsel
For the Respondent	Mr L Magowan of counsel
For the Respondents by Counterclaim	Mr A K Panna QC with Mr H Forrester of counsel

REASONS

INTRODUCTION

1. On 2 April 2013, the Applicant and the Respondent entered into an agreement (**‘the Agreement’**) under which the Applicant was to licence or lease a large parcel of land owned by the Respondent in Parwan (**‘the Land’**). The Land is (or was) known as *Sir Jack Brabham Park* and comprises (or comprised) a motor racing track with various facilities. Under the Agreement, the Applicant was required to construct a 35 acre car park facility. The Agreement further provided that the Applicant was to pay the Respondent rent or a fee, being the higher of either \$100,000 per annum; or 15% of the gross sales of stone or scoria; or \$2 per tonne of stone or scoria extracted from the Land. Subject to payment of the rent or fee (and other outgoings), the Applicant was entitled to retain what other profit it recovered from sales of the extracted material, comprising stone or scoria.
2. On 2 January 2018, the Respondent re-entered the Land. By order dated 8 January 2018, an interlocutory injunction was granted in favour of the Applicant, allowing the Applicant to reoccupy the Land.
3. The Applicant’s right to occupy the Land lies at the heart of the issues for determination in this proceeding. Essentially, the Respondent alleges that the Applicant’s occupation of the Land was pursuant to a licence agreement. On the other hand, the Applicant alleges that it holds a leasehold interest in the Land. Further, the Respondent alleges that the Applicant has failed to construct the car park and has, in lieu thereof, simply and illegally conducted an extractive industry by operating a quarry, rather than extracting material for the purpose of constructing the car park.
4. By order made 17 January 2018, the parties were required to provide discovery of all relevant documents in their custody, possession or control. Order 10 was expressed as follows:
 10. By 4 pm on 9 March 2018 the parties must:
 - (a) serve a list of all documents in their possession or control, or in the possession or control of an agent, relevant to the proceedings including those documents which may harm the discovering party’s case and any relevant document or class of documents which the other party may reasonably request the discovering party to discover;

...
5. On 6 April 2018, further orders were made by the Tribunal requiring the parties to file affidavits of documents.

6. The Applicant has filed an affidavit of documents dated 11 April 2018. There are a number of documents discovered, which bear the note *Redacted*. Those documents essentially fall within the broad category of documents evidencing the expenditure of the Applicant. The redacted sections of those documents have masked the quantum of the expenditure, rather than the nature of the expenditure.
7. The Respondent objects to any of the discovered documents being redacted. By this application, it seeks an order compelling the Applicant to produce un-redacted copies of its discovered documents.

APPLICANT'S SUBMISSIONS

8. Mr Panna QC, together with Mr Forrester of counsel, appeared on behalf of the Applicant. They argued that the masked sections of the discoverable documents contained commercially sensitive or private information that had no relevance to any issue in the proceeding. They relied on three affidavits from the Applicant's solicitor, Mr Joseph Di Mauro, dated 6, 11, and 13 April 2018.
9. In Mr Di Mauro's affidavit dated 11 April 2018, he deposes to the documents bearing numbers 11, 62, 63, 64, 79, 99 to 105 inclusive and 108 to 154 inclusive listed in the Applicant's affidavit of documents as being the documents which have been partially masked. He describes those documents as follows:
 6. As to document 11, the redacted component relates to the email by Peter Wilson to our firm attaching the balance of the email.
 7. As to documents 62, 63 and 64, which contain the trading accounts for the Metro Constructions Unit Trust, the redaction relates to the deletion of commercially sensitive material relating to our client's operations that in no way relate to the lease of the premises or the calculation of the rent and/or royalties provided for by said lease.
 8. As to document 79, which discovered the trust tax returns for the Metro Constructions Unit Trust, the redaction component relates to the deletion of commercially sensitive material relating to our client's operations that in no way relate to the lease of the premises or the calculation of the rent and/or royalties provided for by said lease.
 9. As to documents 99 to 105 inclusive, which discover PAYG Payment Summaries for the employees of the Applicant, the redaction is necessary in order to preserve the privacy of the individual is referred to in the PAYG Payment Summary as the documents disclose the income of the said individuals.

10. As to documents 108 to 118 inclusive, which discover the documents relating to the purchase, hire purchase or lease of various pieces of equipment, the redaction component relates to the deletion of commercially sensitive material relating to our client's operations that in no way relate to the lease of the premises or the calculation of the rent and/or royalties provided for by said lease. The redacted components disclose the monthly payments associated with the said equipment leases.
 11. As to documents 119 to 153 inclusive, the discovered documents relate to the monthly invoices for interest paid by the Applicant on loans it has obtained, the redaction component relates to the deletion of commercially sensitive material relating to our client's operations that in no way relate to the lease of the premises or the calculation of the rent and/or royalties provided for by said lease.
 12. As to documents 154 [sic], the discovered documents relate to the bank account of the Applicant, the redaction component relates to the deletion of commercially sensitive material relating to our client's operations that in no way relate to the lease of the premises or the calculation of the rent and/or royalties provided for by said lease.
10. Mr Di Mauro further deposes to the commercial sensitivity of the information contained in the documents referred to above. He states:
14. Further, Peter Wilson informed me that the Respondent is fishing for the commercially sensitive information contained in the documents, and that the Respondent would be gaining an unfair commercial advantage as this dispute about termination may be used against him in any subsequent lease negotiations including without derogating from the foregoing, rent or royalty negotiations. Further the information may be used by the Respondent in any negotiations with third parties seeking to lease the Property.
11. Mr Panna submitted that the quantum of expenses incurred by the Applicant has no relevance to any issue raised in the proceeding. Although he conceded that the declared amount of gross sales was an issue in dispute, the calculation of those gross sales was unrelated to how much the Applicant spent in achieving those gross sales.
12. Mr Panna referred me to the judgment of Kaye J in *Gunns Limited & Ors v Marr & Ors*,¹ where his Honour considered whether there was a basis

¹ [2008] VSC 464.

to redact parts of documents, said to be commercially sensitive. His Honour stated:

[33] Ultimately, the onus lies on the party resisting production of the whole of the document to establish an appropriate basis for doing so. No doubt, in a number of cases, the nature and description of the document may be sufficient to entitle a Court to be guided solely by the oath of the party, making discovery, that the redacted parts are irrelevant and confidential. On the other hand, there may be other cases where either the nature of the document, or other material, may be sufficient to put in doubt the claim by the deponent that the redacted portion of a document is irrelevant and confidential. As I stated, it is recognised, and not uncommon, for a Court, in an appropriate case, to inspect some or all of the redacted documents.

[34] In determining the entitlement of a party to mask or redact a part of a discovered document, the courts have emphasised that the test is what is necessary to ensure the attainment of justice between the parties. The Rules of Court are designed to serve and enhance the ends of justice, and to facilitate the resolution and determination of disputes between the parties...

[35] The precise basis, upon which a party is entitled to mask or redact irrelevant parts of documents discovered by it, has not been defined in the authorities. In *Telstra Corp v Australis Media Holdings & Ors*, McLelland CJ (in equity) referred to the practice of permitting the exclusion of irrelevant parts of documents from inspection "... in order to avoid infringement, for no legitimate purpose, of interests of privacy and confidentiality, and thus to avoid injustice". Later in his judgment, his Honour identified the relevant question as "... whether it is apparent that there are, or may be, substantial privacy or confidentiality interests which ought to be given protection...".²

13. Mr Panna submitted given the commercial sensitivity of the documents or the likely infringement of privacy, coupled with the fact that the information had no relevance at all to any issue in the proceeding, lead to the conclusion that there was no legitimate purpose served by disclosing that information. He submitted that the attainment of justice weighed in favour of allowing the Applicant to redact those portions of the discovered documents.

RESPONDENT'S SUBMISSIONS

14. Mr Magowan of counsel appeared on behalf of the Respondent. He argued that it was incorrect to categorise the documents as not being relevant to any issue in the proceeding. He referred me to the affidavit of Adam Kerr dated 12 April 2018, the solicitor for the Respondent, in support of his

² Ibid, [33-35] (footnotes omitted).

submission that the amount of expenditure was relevant because it provided a comparative guide as to the likely gross sales. In other words, if the declared gross sales were out of proportion with what would ordinarily be spent to achieve those sales, then it was possible that Applicant had undeclared gross sales. He further submitted that the fact that the documents have been discovered, of itself, indicates that they must be relevant to the issues in dispute. Otherwise, the documents would not have been discovered in the first place.

15. Mr Magowan submitted that there was no question of commercial sensitivity, given that the Applicant and the Respondent were not commercial competitors. He argued that the Applicant was a single purpose business and that the Respondent was not in the business of constructing car parks or extracting material. He submitted that the Respondent would receive no commercial benefit through disclosure of the information. Moreover, he argued that the principle in *Home Office v Harman* would provide the Applicant with protection that the information would not be used for any collateral purpose.

FINDINGS

16. I accept the discovery of the documents essentially amounts to an admission on the part of the Applicant that the documents are relevant to an issue in dispute. However, that, of itself, does not prevent the legitimate redaction of a part of a document, if the attainment of justice warrants that course.
17. In *Orora Ltd v Asahi Holdings (Australia) Pty Ltd*,³ Ierodiaconour AsJ, when considering questions of confidentiality and redaction, helpfully set out the following principles as being applicable:⁴

32 The following principles are applicable in respect of confidentiality and redaction:

...

- (d) Where a party has a legitimate claim of confidentiality, a party is entitled to redact the irrelevant parts of a document discovered by it.
- (e) If there is a dispute about the right of a party to mask or redact part of the discovered document, the Court may inspect the document in its unmasked form in appropriate cases. The Court may then assess whether the redacted parts of the document are irrelevant to the issues in the case and 'are part which, by their nature, attract a valid basis for exclusion from the inspection processes. In assessing the claim

³ [2015] VSC 749.

⁴ Paragraphs dealing with pre-trial discovery have omitted.

of a party to be entitled to mask up part of a discovered document, it is important to ensure that the redaction of irrelevant parts of the document does not create gaps [which] affect the intelligibility or meaning of the remaining portions of the document which are produced on inspection’.

- (f) Redaction should not ‘create gaps affecting the intelligibility or meaning of the unredacted portions of the document’. Put another way, if ‘masking on the ground of irrelevance would detract from a proper understanding of the meaning and significance of the admittedly relevant parts of the document, then such masking is not justified’.
- (g) ‘In determining the entitlement of a party to mask or redact a part of a discovered document, the courts have emphasised that the test is what is necessary to ensure the attainment of justice between the parties. It has been recognised that the rules must not be permitted to become an instrument of oppression, or to cause unnecessary unfairness to one or other party in litigation.’
- (h) The question is ‘whether it is apparent that there are, or may be, substantial privacy or confidentiality interests which ought to be given protection’.
- (i) ‘The court will not permit the coercive nature of the discovery process to infringe the genuine interests of privacy and confidentiality for no legitimate purpose’. The retention of secrecy of commercially sensitive information is a legitimate concern...⁵

18. Further in *Octagon Inc v Hewitt & Anor (No 2)*,⁶ Dixon J stated:

[53] Redactions for relevance alone can offend the discovering party’s prima facie obligation to produce for inspection the whole of the document being discovered by it. The fact that parts of the document are irrelevant does not ordinarily prejudice the discovering party in ways regarded as unjust. They have the protection of s 27 of the Act or, to the extent that the Act does not apply, the protection of the principle in *Home Office v Harman*. There is no suggestion in the evidence before me of prejudice to the Octagon parties due to discovery of the irrelevant material, or that s 27 of the Act does not provide adequate protection in the circumstances.⁷

⁵ [2015] VSC 749, 10-11 (footnotes omitted).

⁶ [2011] VSC 373.

⁷ *Ibid*, [53].

19. In my view, mere irrelevance, of itself, is not a proper basis to redact or mask a part of document that is otherwise discoverable. As highlighted by Dixon J in *Octagon*, it is not appropriate or just for parts of documents to be redacted unless there is some just reason for doing so. For example, if parts of a discoverable document are commercially sensitive and would prejudice the party discovering the document if produced in whole, then that may be a basis upon which to redact that commercially sensitive information, subject to the information not otherwise being relevant to any issue in the proceeding.
20. In the present case, Mr Pana emphasised that disclosing the quantum of expenditure is commercially sensitive information. Again, reference is made to the evidence of Mr Di Mauro, deposed to in his affidavit dated 13 April 2018:
 30. As to paragraph 17 and 18 of the Kerr affidavit, I note that Mr Kerr does not allow for the fact that our client may prevail in this matter. If our client prevails the information that the Respondent is seeking may be used against our client when negotiating terms and payments under the extended lease terms, or in negotiations that may flow from the existence of the lease, for example, a request by the Applicant for an additional lease term at the expiration of the current lease term.
21. In my view, there is some merit in Mr Pana's submission. In particular, I accept that the disclosure of aggregate net profit may impact on the Applicant's ability to renegotiate favourable terms, if the Applicant ultimately succeeds with its claim in this proceeding. In that sense, I find that the disclosure of aggregate net profit is commercially sensitive information.
22. However, this finding must be balanced against the proposition that some of the expenditure information is directly relevant to the question whether the Land has been used purely for a material extraction business or for the purpose of constructing a car park.
23. In that sense, I find that the documents numbered 108 to 118 inclusive, which relate to the purchase, hire purchase or lease of various pieces of plant or equipment should be produced without masking. In my view, the amount spent on plant or equipment, together with the nature of the plant or equipment, is information directly relevant to questions concerning gross sales and what work has been done on the Land. For example, if expert evidence proffers an opinion that the reasonable construction of a car park would only require minimal use of a particular type of equipment, the disclosed expenses may show excessive use of that type of equipment. That inconsistency may lead to an inference that the hire of that equipment is inconsistent with merely constructing a car park.

24. In my view, disclosure of that expenditure, of itself, would not compromise the commercial sensitivity attached to information concerning the Applicant's aggregate net profit but would, however, allow the Respondent to measure 'relevant' expenditure against what it believes to be the reasonable cost of that expenditure, having regard to the declared gross sales.
25. Accordingly, I find that the attainment of justice is best served by disclosure of the amount spent by the Applicant on plant or equipment.
26. Consequently, I will order that there be full disclosure and production of the documents 108 to 118 inclusive, listed in the Applicant's affidavit of documents. As for the remaining documents that are partially redacted, the Respondent's application for full disclosure is dismissed.

SENIOR MEMBER E. RIEGLER