

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP75/2017

CATCHWORDS

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

APPLICANT	KE Wang Pty Ltd (ACN 161 400 540)
FIRST RESPONDENT	Lendlease Real Estate Investments Limited (ACN 063 427 896)
SECOND RESPONDENT	Lendlease Shopping Centre Development Pty Ltd (ACN 002 909 908)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Directions Hearing
DATE OF HEARING	31 January 2018
DATE OF ORDER	13 February 2018
CITATION	KE Wang Pty Ltd v Lendlease Real Estate Investments Limited (Building and Property) [2018] VCAT 199

ORDER

1. Adopting the document numbering set out in the affidavit of Jasmina Bradonjic dated 15 December 2017 and in Exhibit “JAB 4” to the affidavit of Jamie Arthur Bedelis dated 24 November 2017, the following parts of the documents set out hereunder may be redacted by the Respondents:
 - (a) Document 15:
 - (i) The text referring to the *Rent* and *Security Deposit* payable may be redacted.
 - (b) Document 19:

- (i) The text relating to the *Rent and Rent Review, Rent Review-Options Periods* and the *Security Deposit* may be redacted.
 - (c) Document 36:
 - (i) The text relating to the *Rent, Gross Rent, Operating Expenses, Marketing Levy, Lease Deposit, Tenancy Design Review Fee, Survey Fees, Opening Promotion Levy, Bank Guarantee Amount* and *Operating Expenses & Air-Conditioning Charges* may be redacted.
2. Documents 37:
- (i) In the *Lend Lease* document dated 30 July 2013, the text relating to the *Rent, Gross Rent, Operating Expenses, Marketing Levy, Lease Deposit, Tenancy Design Review Fee, Survey Fees, Opening Promotion Levy, Bank Guarantee Amount* and *Operating Expenses & Air-Conditioning Charges* may be redacted.
 - (ii) In the *Disclosure Statement*, Items 1, 3, 9.2, 10.1, 11.1, 12.1, 13.1, 14.1, 14.2, 14.3, 14.4, 14.5, 14.6, 14.7, 14.8, 14.9, 14.10, 14.11, 14.12, 14.13, 14.14, 14.16, 15.2 and 16.1 may be redacted.
- (b) Document 38:
- (i) The text relating to *Bank guarantee* may be redacted.
- (c) Document 39:
- (i) The text relating to *Rent, Review Date, Turnover Rent, Agreed Percentage for Turnover Rent, Marketing Levy* and *Tenancy design review fee* may be redacted.
3. As to the remaining documents discovered by the Respondents, the documents are to be produced without masking or redacting.
4. Liberty to apply.
5. Cost reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant

Ms L Papaelia of counsel

For the Respondents

Mr R Peters of counsel

REASONS

INTRODUCTION

1. The Applicant is the tenant of retail premises located within a shopping centre known as *Craigieburn Central*. The Respondents developed and now operate that shopping centre. In this proceeding, the Applicant claims against the Respondents for loss and damage allegedly suffered by reason of certain representations said to have been made by the Respondents. Those representations concern the timing of certain building works relating to a cinema, playground area, and other matters connected with the shopping centre.
2. Pursuant to orders made by the Tribunal on 30 May 2017, the parties filed and served *Lists of Documents*, listing all documents in their possession, custody or control relevant to the issues raised in the proceeding. A number of documents were discovered and copies of those documents exchanged. Some of the documents produced by the Respondents have certain sections redacted. The Applicant contends that there is no basis upon which to redact sections of those documents and seeks an order that un-redacted copies of those documents be produced. By contrast, the Respondents contend that they are entitled to redact certain sections of those documents on the ground that the sections are irrelevant to any issue raised in the proceeding and/or commercially sensitive.

SUBMISSIONS

3. It is common ground that the Respondents bear the onus of establishing an appropriate basis for redacting a section of discoverable documents. Mr Peters of counsel, who appeared on behalf of the Respondents, submitted that the Respondent was justified in masking sections of its discoverable documents because those sections contained information that was either irrelevant to any issue raised in the proceeding or otherwise commercially sensitive. He relied upon the affidavit of Jasmina Bradonjic, sworn on 15 December 2017, in support of that submission.
4. In her affidavit, Ms Bradonjic refers to each of the documents in question and sets out the basis upon which the Respondents contend that they are entitled to mask the section of that document which has been redacted.
5. Mr Peters also relied on the judgment of Ierodiaconour AsJ in *Orora Ltd v Asahi Holdings (Australia) Pty Ltd*,¹ where her Honour heard an application for pre-trial discovery of certain documents. In considering

¹ [2015] VSC 749.

questions of confidentiality and redaction, her Honour set out the following principles as being applicable:²

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 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’.

² Paragraphs dealing with pre-trial discovery have omitted.

- (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...³
6. In her affidavit, Ms Bradonjic states that the subject headings to each of the sections of redacted text indicates that the masked text could not be relevant to any issue in dispute between the parties, because the subject matter does not touch upon any issue in dispute and/or relates to commercial terms as between the Respondents and unrelated entities, unconnected with the alleged misrepresentations.
7. The thrust of Mr Peters’ submission rests on the contention that it is open for the Respondents to redact certain sections of the discovered documents if it is clear that the text has no relevance to any issue raised in the proceeding or is commercially sensitive.
8. Ms Papaelia of counsel, who appeared on behalf of the Applicant, submitted that the affidavit of Ms Bradonjic does not go far enough to establish a basis upon which to mask sections of discoverable documents. In particular, she submitted that mere irrelevance is not a basis upon which to redact portions of a document, which is otherwise discoverable. She drew my attention to the judgment of Dixon J in *Octagon Inc v Hewitt & Anor (No 2)*,⁴ where his Honour 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.⁵

FINDINGS

9. In my view, mere relevance, 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

³ [2015] VSC 749, 10-11 (footnotes omitted).

⁴ [2011] VSC 373.

⁵ *Ibid*, [53].

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.

10. In the present case, a number of the documents have been redacted simply on the basis that the information is purportedly irrelevant to any issue in dispute. There is no other basis relied upon. The documents falling within that category are documents numbered 5, 12, 30 and 34 and exhibited as a bundle of documents forming part of Exhibit JAB 4 to the affidavit of Jamie Arthur Bedilis dated 24 November 2017. The remaining documents numbered 15, 19, 35, 36, 37, 38, and 39 referred to in the affidavit of Ms Bradonjic are said to contain, or by implication contain, commercial terms between the Respondents and unrelated entities.⁶ Significantly, however, nothing is said in the affidavit to the effect that the Respondents will suffer prejudice if those commercial terms were made known to the Applicant.
11. Nevertheless, Mr Peters submitted that it is implicit, having regard to the nature of the information that has been masked, that prejudice would be suffered if there was full disclosure. He submitted, by way of example, that the *Offer of Lease* and *Lease* documents between the Respondents and unrelated entities described the rent payable and other ‘commercial’ terms agreed between the Respondents and lessees or potential lessees, who have no connection to the issues raised in the proceeding. Mr Peters submitted that the disclosure of those ‘commercial terms’ might prejudice the Respondents in its negotiations with the Applicant or other potential lessees if that information was disclosed. He argued that it was open for the Tribunal to reasonably infer that such prejudice would be suffered by the Respondent when one considered other terms expressly set out in those documents, which required the parties to those documents to keep the terms of those documents confidential. In particular, Document 15, which is headed *Offer of Lease* states under Item 19:

Confidentiality

The terms and conditions of this letter are strictly confidential (“Confidential Information”). The parties must not disclose any Confidential Information to any other person, firm or body corporate, or to directly or indirectly use produce or deal with the Confidential Information for any purpose without the prior written consent of the other party except on a confidential basis to professional consultants.

⁶ Documents 54 and 58, referred to in the affidavit of Ms Bradonjic dated 15 December 2017, have been partially redacted on the ground that legal professional privilege is claimed. The Applicant does not contest or seek production of un-redacted copies of those documents.

12. The difficulty in accepting that submission is that most of the *Confidential Information* has already been discovered and produced. In particular, apart from those sections of the document which have been redacted, the remaining terms and conditions are not masked. Further, the affidavit of Ms Bradonjic makes no reference to that clause, nor does it give any indication that the Respondents would be prejudiced if the information or the terms of the *Offer of Lease* were disclosed to the Applicant during the course of this litigation. Moreover, the actual *Lease* between the Respondents and the ‘unrelated entity’, which is Document 39 in Exhibit ‘JAB 4’ to the affidavit of Mr Bedelis, does not contain that confidentiality clause.
13. Nevertheless, I accept that the disclosure of how much rent has been negotiated by one tenant within the same shopping centre complex may adversely impact on negotiations between the Respondents and the Applicant or other tenants or potential tenants. I also accept the disclosure of how much rent other tenants pay has no relevance to any issue in this proceeding. In those circumstances, I find that it would be unjust to require the Respondents to disclose that type of information.
14. In *Gunns Limited & Ors v Marr & Ors*,⁷ Kaye J considered whether there was a basis to redact parts of documents, said to be commercially sensitive. He 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*

⁷ [2008] VSC 464.

& 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...".⁸

CONCLUSION

15. Having regard to those authorities and the submissions made by both counsel, together with the affidavit material filed in this proceeding, I make the following findings in relation to each of the numbered documents under consideration.
16. Document 5:
 - (a) I find that the whole of the document is to be discovered and produced. I find there is no basis upon which to redact any portion of that document.
17. Document 12:
 - (a) I find that the whole of the document is to be discovered and produced. I find there is no basis upon which to redact any portion of that document.
18. Document 15:
 - (a) I find that the text referring to the *Rent* and *Security Deposit* payable is irrelevant to any issue raised in the proceeding and is commercially confidential as between the Respondents and United Cinemas Australia Pty Ltd. Accordingly, I find it just that the amount of rent set out under Item 8 remains redacted.
19. Document 19:
 - (a) I find that the text relating to the *Rent and Rent Review*, *Rent Review-Options Periods* and the *Security Deposit* are irrelevant to any issue raised in the proceeding and commercially confidential as between the Respondents and United Cinemas Australia Pty Ltd. Accordingly, I find it just that the text under Item 8, Item 9 and Item 10 remains redacted.
20. Document 30:
 - (a) I find that the whole of the document is to be discovered and produced. I find there is no basis upon which to redact any portion of that document.

⁸ Ibid, [33-35] (footnotes omitted).

21. Document 34:
- (a) I find that the whole of the document is to be discovered and produced. I find there is no basis upon which to redact any portion of that document.
22. Document 35:
- (a) I find that the whole of the document is to be discovered and produced. I find there is no basis upon which to redact any portion of that document.
23. Document 36:
- (a) I find that the text relating to the *Rent, Gross Rent, Operating Expenses, Marketing Levy, Lease Deposit, Tenancy Design Review Fee, Survey Fees, Opening Promotion Levy, Bank Guarantee Amount* and *Operating Expenses & Air-Conditioning Charges* are irrelevant to any issue raised in the proceeding and commercially confidential as between the Respondents and *Cheeky Chinos*. Accordingly, I find it just that the text under those sections remains redacted.
24. Document 37:
- (a) Document 37 comprises a number of documents, some of which contain irrelevant and commercially confidential information while others not. Consequently, the following documents are those documents that I have identified as containing irrelevant and commercially confidential information, justifying parts of those documents being redacted. The documents which are not referred to below under the group of documents within Document 37 are to be produced in whole and without masking or redaction, given that I find there is no basis upon which to redact any portion of those documents.
- (i) *Lend Lease* document dated 30 July 2013: I find that the text relating to the *Rent, Gross Rent, Operating Expenses, Marketing Levy, Lease Deposit, Tenancy Design Review Fee, Survey Fees, Opening Promotion Levy, Bank Guarantee Amount* and *Operating Expenses & Air-Conditioning Charges* are irrelevant to any issue raised in the proceeding and commercially confidential. Accordingly, I find it just that the text under those sections remains redacted.
- (ii) *Disclosure Statement*: I find that Items 1, 3, 9.2, 10.1, 11.1, 12.1, 13.1, 14.1, 14.2, 14.3, 14.4, 14.5, 14.6, 14.7, 14.8, 14.9, 14.10, 14.11, 14.12, 14.13, 14.14, 14.16, 15.2 and 16.1 are irrelevant to any issue raised in the

proceeding and commercially confidential. Accordingly, I find it just that the relevant text under those sections remains redacted.

25. Document 38:

- (a) I find that the text relating to *Bank guarantee* is irrelevant to any issue raised in the proceeding and confidential as between the Respondents and United Cinemas Australia Pty Ltd. Accordingly, I find it just that the text under that section remains redacted.

26. Document 39:

- (a) I find the text relating to *Rent, Review Date, Turnover Rent, Agreed Percentage for Turnover Rent, Marketing Levy* and *Tenancy design review fee* irrelevant to any issue raised in the proceeding and confidential as between the Respondents and United Cinemas Australia Pty Ltd. Accordingly, I find it just that the text under those sections remains redacted.

SENIOR MEMBER E. RIEGLER