Federal Court  Cour fédérale

Date: 20220420

Docket: T-683-20

Citation: 2022 FC 566

Ottawa, Ontario, April 20, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

DEL RIDGE HOMES INC.

Plaintiff
(Defendant by Counterclaim)

and

LEDGEMARK HOMES INC.

Defendant
(Plaintiff by Counterclaim)

JUDGMENT AND REASONS

[1] This is an appeal from an order of Prothonotary Milczynski, dated February 14, 2022, in which she dismissed a motion brought by Ledgemark Homes Inc. [Ledgemark] seeking a protective order containing "counsel's eyes only" provisions [Order]. The appeal is brought on motion by Ledgemark pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106.

Background

[2] The background facts to this appeal are largely not in dispute.

[3] The action underlying the motion that was before the Prothonotary concerns an alleged trademark infringement. Del Ridge Homes Inc. [Del Ridge], the plaintiff in that action, seeks to restrain Ledgemark from using Del Ridge's "GREENLIFE" marks and any other allegedly confusingly similar marks.

[4] Mr. George Le Donne and Mr. David De Sylva are both principals of Del Ridge. Through Del Ridge, they worked together in the condominium construction business and real property development business for almost 20 years.

[5] Mr. Le Donne is also the president of Ledgemark, which entity is also in the condominium construction business and real property development business. He is also the president of Stiver Lane Inc. [Stiver Lane], LivGreen Main Street Inc. [LivGreen] and, Gel-Don Investments Inc. [Gel-Don].

[6] Mr. De Sylva is a principal of Miori Investments Inc. [Miori].

[7] Mr. Le Donne and Mr. De Sylva's business relationship disintegrated.

[8] In 2019, Gel-Don brought an application before the Ontario Superior Court of Justice [OSCJ] (Court File No. CV-19-00632390-00CL) against Miori, Mr. De Sylva and others [Ontario Litigation] seeking various oppression remedies under the *Ontario Business Corporations Act*, RSO, 1990, c B16 [OBCA] and other relief. A decision in the Ontario Litigation was issued on June 9, 2021 [Ontario Decision], which orders that a trial is to follow and provides directions to accountants.

[9] On June 29, 2020, Del Ridge, without the consent of Mr. Le Donne, issued a Statement of Claim in this Court commencing the underlying trademark infringement action. Affidavits of documents have been exchanged and some discoveries have been conducted.

[10] The issue of a protective order was initially raised by counsel for Ledgemark on October 22, 2020. Counsel for Del Ridge responded on November 3, 2020 expressing Del Ridge's view that a protective order was not necessary given the implied undertaking rule. It appears that Ledgemark did not respond to that email and delivered its Affidavit of Documents and Amended Affidavit of Documents. On December 18, 2020, Ledgemark wrote to the Case Management Judge, Prothonotary Milczynski, advising that Ledgemark intended to bring a contested motion seeking a protection order. Subsequently, however, counsel for Ledgemark advised counsel for Del Ridge by email of January 5, 2021 that Ledgemark would not be seeking a protective order at that time. By letter of the same date, counsel for Ledgemark advised Prothonotary Milczynski that Ledgemark had decided not to pursue a protective order at that time. Counsel also confirmed that a Second Amended Affidavit of Documents had been served, which included unreacted financial production. By letter dated January 21, 2021, counsel for Del Ridge advised, on behalf

of both parties, that since Ledgemark was not pursuing a motion for a protective order at that time, the parties would not require the time that had been set aside for that motion.

[11] On August 18, 2021, Del Ridge brought a motion to compel Ledgemark to produce certain documents that Ledgemark had, to that point, produced in redacted form only. The motion was heard on September 15, 2021, and on January 13, 2022 the Prothonotary issued an order compelling Ledgemark to disclose and produce all documents relevant to the financial affairs of Ledgemark's residential developments that were advertised using any of the logos identified in the pleadings. This included financial documents of companies related to Ledgemark that were involved with those residential developments, and any contracts between Ledgemark and those companies.

[12] In response to Del Ridge's motion to compel and the resultant Order, counsel for Ledgemark advised counsel for Del Ridge that Ledgemark would like a protective order given the production of third party financials. Counsel for Ledgemark provided a draft order, based on the Model Protective Order found on the Federal Court's website. Counsel for Del Ridge advised by email of October 7, 2021, given Ledgemark's concerns related to the production of related party financials, that Del Ridge was prepared to consent to a protective order, permitting Ledgemark to designate financial production, including related third party financials, as confidential information, but not designated as "counsel's eyes only".

[13] By email of October 13, 2021, counsel for Ledgemark responded stating that he believed that he had mentioned at the hearing that Ledgemark would require a counsel's eyes only

designation and asked Del Ridge to reconsider the protective order to include such a designation. By return email of same date, counsel for Del Ridge advised that Del Ridge would not consent to the inclusion of a counsel's eyes only designation.

[14] It appears that during a case management conference held on November 3, 2021, Del Ridge advised that, to keep matters moving forward, it would accept on an interim basis the documents that Ledgemark proposed to designate as counsel's eyes only. Del Ridge asserts that this was pending the disposition of Ledgemark's motion seeking the protective order. Ledgemark asserts that the documents were provided with an undertaking/agreement that they would be treated as for counsel's eyes only pending final disposition of the issue of a protective order.

[15] Ledgemark's motion for a protective order was dismissed on February 14, 2022.

Decision appealed against

[16] The Prothonotary noted that Del Ridge was not adverse to the issuance of a protective order and was agreeable to most of the terms proposed by Ledgemark. However, Del Ridge did not agree to the proposed counsel's eyes only provision. The Prothonotary also noted that a prohibition on the disclosure of relevant documents to a litigant is an extraordinary measure. It interferes with the ability of a party to conduct the litigation. A party under such restriction would not be fully informed, and may only receive some information through the sieve of counsel, experts or consultants. It would affect their ability to receive advice from their counsel, review expert reports and give instructions. It would affect a party's ability to fully assess their and the opposing party's case and could affect settlement prospects.

[17] She also acknowledged that such restrictions, and the consequent impairment of the solicitor-client relationship and interference in the normal litigation process, may sometimes be necessary. However, the test for obtaining a counsel's eyes only order is high. The Prothonotary accepted the statement of the test and its application as set out in Ledgemark's written submissions.

[18] The Prothonotary noted that the motion before her was somewhat unusual for two reasons. First, because of the stage of the litigation, Ledgemark knew precisely what documents it wanted to keep from Del Ridge. Second, and flowing from this, the motion in effect combined the issue of whether the exceptional imposition of a counsel's eyes only restriction was necessary as a provision in a protective order; and, in the face of Del Ridge's challenge to the actual documents to be designated, whether what Ledgemark sought to protect in that manner was appropriate.

[19] The Prothonotary stated that, in the circumstances, it would have been of assistance to the Court, since both counsel were privy to the documents in issue, to have also been provided with them. The Prothonotary accepted Del Ridge's evidence that:

- the breakdown of the business relationship between Mr. De Sylva and Mr. Le Donne has led to acrimonious litigation;
- there is a breakdown in trust and confidence "to the point of paralysis";
- Mr. Le Donne has concerns that Mr. De Sylva will misuse the Stiver Lane and LivGreen information; and that

- the OSJC made findings regarding Mr. De Sylva's lack of good faith and oppressive conduct (within the meaning of the OBCA), with incidents noted such as email server access disruption, making unilateral changes to agreements, failing to attend management committee meetings and failing to provide banking records.

[20] The Prothonotary also set out the evidence of the claimed risk to commercial interests as found in the affidavit of Mr. Le Donne. She found that the evidence of the threat of risk to Ledgemark and to Mr. Le Donne's other ventures was almost entirely grounded in the circumstances surrounding Del Ridge, the litigation surrounding its dissolution and, how Mr. Le Donne feels about Mr. De Sylva.

[21] She noted that in the within trademark infringement action in this Court, which had been ongoing for 18 months, there was no misuse of Del Ridge's confidential information that had already been produced and the parties had governed themselves being mindful of their obligations under the implied undertaking rule. Accordingly, and it was difficult to conclude that the new document production by Ledgemark would be treated any differently. Even in the course of the Ontario litigation, which was not parallel litigation, but involved the same individuals, there was no evidence of the misuse of confidential information.

[22] The Prothonotary held:

> That the Del Ridge Homes proceedings are acrimonious and involve former business associates and competitors is not in and of itself a reason to impose counsel's eyes only restrictions on one of the parties in other litigations. Ledgemark must submit something more than allegations and bare assertions that Mr. De Sylva could or would violate the implied undertaking. There is no evidence in the record from the Defendant setting out what the information is (beyond that described above) or how that information to be

> disclosed could be used by the Plaintiff to harm the commercial interests of the Defendant. As noted, the documents themselves were not provided to the Court, despite being available and being provided to counsel for the Plaintiff for this motion.

[23] The Prothonotary also noted some over reach on Ledgemark's part in its proposed designation of those counsel's eyes only information/documentation.

[24] The Prothonotary concluded that there was no basis upon which to impose such an extraordinary restriction on Del Ridge. She was not satisfied that disclosure to Del Ridge posed a serious threat or risk of harm to Ledgemark's commercial interests. And, while it might be understandable that a former business associate would not want to disclose information about their new ventures, concern or belief is not enough. Nor had Ledgemark established that the information over which it sought counsel's eyes only protection was "of such extremely sensitive character that its disclosure will be highly prejudicial" (*Glaxo Group Ltd. Novopharm Ltd.* 1998 Can LII 7667 FCA).

[25] As to the need for a protective order at all (without counsel's eyes only terms), the Prothonotary stated that the parties may benefit from a protective order to focus them on their obligations that exist, in any event, under the implied undertaking. However, as they had been conducting the litigation for 18 months without such an order, she would not impose one. The parties were, however, free to negotiate the terms of a protective order in accordance with her reasons and to submit it to the Court for review.

Standard of review

[26] The standard of review applicable to the appeal of a discretionary decision of a prothonotary is the appellate standard of "palpable and overriding error", as identified in *Housen v Nikolaisen*, 2002 SCC 33 for questions of fact, or mixed fact and law. Questions of law, and mixed questions where there is an extricable question of law, are to be reviewed on the standard of correctness (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 79; *Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48; *Canada (Attorney General) v Iris Technologies Inc.*, 2021 FCA 244 at para 33).

[27] Legal questions are questions about what the correct legal test is; factual questions are questions about what actually took place between the parties; and, mixed questions are questions about whether the facts satisfy the legal tests, or, put otherwise, whether they involve applying a legal standard to a set of facts (*Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 [*Teal Cedar*] at para 43). The application of a legal test to a set of facts is a mixed question. However, if in the course of that application the underlying legal test may have been altered – for example by failing to consider a required element of the test – then a legal question arises. This is an extricable question of law (*Teal Cedar* at para 44). However, "[c]ourts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question)" (*Teal Cedar* at para 45).

[28] The palpable and overriding error standard of review is highly deferential. “Palpable” means an obvious error. However even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding. An overriding error is one that goes to the very core of the outcome of the case (*South Yukon Forest Corp v R*, 2012 FCA 165 at para 46; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [Mahjoub] at paras 61-64; *Imperial Manufacturing Group Inc. v Décor Grates Inc*, 2015 FCA 100 at paras 40-41; see also *NCS Multistage Inc. v Kobold Corporation*, 2021 FC 1395 at paras 32-33).

[29] Ledgemark frames the basis of its appeal solely as whether the Prothonotary applied the wrong test. More specifically, that the Prothonotary erred in law by applying the wrong standard for the grant of a counsel’s eyes only provision. This narrow question is reviewable on the correctness standard.

[30] However, as will be discussed below, I agree with Del Ridge that some of Ledgemark’s submissions are actually aimed at the Prothonotary’s application of the legal test. That aspect of the Prothonotary’s decision, had it been challenged as such by Ledgemark, would be reviewable on a standard of palpable and overriding error.

[31] Ledgemark also asserts that, as a part of this motion appealing the Prothonotary’s decision, this Court should determine whether the parties are required to maintain the confidentiality of documents pending a final disposition on the issue of a Protective Order. Del Ridge frames this issue as whether Ledgemark can unilaterally impose a counsel’s eyes only restriction. In my view, what Ledgemark asks is whether the Court should issue an interim order

requiring the parties to maintain the confidentiality of documents pending a “final disposition” of the issue of a protective order. As will be discussed below, this is not properly at issue in the appeal before me.

Did the Prothonotary err in law by applying the wrong test?

[32] Ledgemark submits that while the Prothonotary cited the correct test in her Order, she erred by failing “to make all of the considerations” required by the test as set out in *Paid Search Engine Tools, LLC v Google Canada Corporation*, 2019 FC 559 [*Paid Search Engine*] at paras 28-29, and the principles set out in *Richards Packaging Inc v Distrimedic Inc*, 2020 FC 116 [*Richards Packaging*] at para 10. Further, that the Prothonotary considered other factors that have no basis in law, or were appropriately addressed in Ledgemark’s submissions.

[33] Del Ridge submits that there was no error in law. The Prothonotary cited and adopted the correct legal test, referencing Ledgemark’s own submissions in that regard. Nor is there an error on an extricable question of law as the Prothonotary did not alter the legal test. Rather, Ledgemark simply seeks to have the test applied differently. Del Ridge also submits that there is nothing in the Order to suggest that the Prothonotary failed to consider the elements of the relevant test. In any event, the considerations under the test are non-exhaustive and non-determinative and it cannot be an error of law to consider additional factors.

Analysis

[34] In her reasons, the Prothonotary found that the test for obtaining a counsel's eyes only protective order, and its application, were well summarized in Ledgemark's written representations which she reproduced as follows:

> 34. "Counsel's eyes only" [CEO] designations are a more Restrictive type of protective order that have been ordered by this Court even on contested motions.
>
> 35. This Court has recently laid out the principles governing a CEO designation36: A. C-CEO serves "to prevent the disclosure of highly sensitive and confidential information to officers, executives, employees or anyone else involved in the receiving party's day-to-day operations from consciously or unconsciously grounding their business decisions on the confidential information to the competitive disadvantage of the producing party" (*Angelcare Development Inc. v Munchkin, Inc*., 2018 FC 447 at para 20 (*Angelcare*)). The disclosure of C-CEO information must present a "serious threat" that is "real, substantial and grounded in the evidence" (*Bard Peripheral Vascular Inc. v W.L. Gore & Associates, Inc*., 2017 FC 585 at paras 15, 16; *Pliteq, Inc. v Wilrep Ltd*., 2019 FC 158 at paras 6, 9 (*Pliteq*)). B. The party asserting confidentiality must establish objectively on a balance of probabilities that (1) it has treated the information as confidential at all times; and (2) its proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information (*AB Hassle v Canada (Minister of National Health and Welfare)*, 1998 CanLII 8942 (FC) at paras 29-30 (AB *Hassle*)). C. A C-CEO designation will not be made lightly and will not be ordered on the basis of bald allegations (*Glaxo Group Limited v Novopharm Ltd*., 1998 CanLII 7667 (FCA) at paras 2-3; *Rivard Instruments, Inc. v Ideal Instruments Inc*., 2006 FC 1338 at para 2 (*Rivard*)). D. A C-CEO designation may be justified if, for example (a) the parties are direct competitors and the information in issue would allow the receiving party to injure the producing party's interests whether intentionally or unintentionally (*Lundbeck Canada Inc. v Canada (Health*), 2007 FC 412 at paras 16, 19 (*Lundbeck*)); and/or (b) the receiving party has a single representative who may use the information in issue consciously or unconsciously to further their business interests (*Arkipelago Architecture Inc. v Enghouse Systems Limited*, 2018 FC 37 at paras

> 7, 20, affirmed 2018 FCA 192 at para 16 (*Arkipelago Architecture)*).
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> 36. In determining whether a CEO designation is warranted, the Court has had regard to the following test37: 1. The terms reflected the terms of a similar order in parallel litigation. 2. The terms of the order allowed for the other party to object to the classification of information as confidential, which allows for the Court to ultimately control the classification and disclosure between the parties. 3. The Court's practice was to issue protective orders where a party believed in good faith that its commercial, business or scientific interests may be seriously harmed by disclosure to the public, especially at the pre-trial stage.

[35] I note that in *Paid Search Engine*, Justice Phalen considered an opposed motion seeking a protective order. In the course of his reasons, he discussed the significant distinctions between, and considerations that apply to, protective orders and confidentiality orders as well as the evolution of protective orders:

> [28] Particularly in *Apotex Inc v Wellcome Foundation Ltd* (1993), 51 CPR (3d) 305 at 311, [1993] FCJ No 1119 (FCTD) [*Apotex*], the Court recognized that at the pre-trial stage it was sufficient to demonstrate a belief that a party's proprietary, commercial and scientific interest would be seriously harmed by producing information upon which those interests would be based. The Court went on to recognize that when matters went before the Court, the open court principles might alter the confidentiality regime.
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> [29] The Court favoured the issuance of an order based on three considerations also existing in the present motion:
>
> > 1. The terms reflected the terms of a similar order in parallel litigation.
> >
> > 2. The terms of the order allowed for the other party to object to the classification of information as confidential, which allows for the Court to ultimately control the classification and disclosure between the parties.
> >
> > 3. The Court's practice was to issue protective orders where a party believed in good faith that its commercial, business

> or scientific interests may be seriously harmed by disclosure to the public, especially at the pre-trial stage.
>
> [30] These three factors have been subsequently adopted by the Court when considering the granting of counsel's eyes only orders (see e.g. *Merck & Co v Apotex Inc*, 2004 FC 567 at para 8, 130 ACWS (3d) 487; *Lundbeck Canada Inc v Canada (Health)*, 2007 FC 412 at paras 14-16, 157 ACWS (3d) 161).
>
> [31] The *Apotex* decision was followed by *AB Hassle v Canada (Minister of National Health & Welfare)* (1998), 83 CPR (3d) 428. 1998 CarswellNat 2520 (FCTD), aff'd [2000] 3 FC 360 (CA) [*AB Hassle*], where the Court was dealing with a challenge to the designation of confidential information under a hybrid order. **The Court established a two-part test. The first part incorporated the good faith subjective belief discussed in *Apotex* and a second part where, on a challenge to the classification, the party claiming confidentiality must show confidentiality on an objective basis – a harms test.**
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> (emphasis added)

[36] Justice Phalen noted that *Levi Strauss & Co v Era Clothing Inc / Vêtements Era Inc*, (1999), 1 CPR (4th) 513 at paras 17, 26-28, 172 FTR 248, (FCTD), confirmed two different processes, one for protective orders and one for confidentiality orders, with the former being based on good faith belief in the harm from pre-trial outside Court disclosure. Justice Phelan went on to discuss *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*]. There:

> [38] The Supreme Court recognized that there was a difference between protective orders and confidentiality orders. It accepted that the test in *AB Hassle* could be used for both protective orders and confidentiality orders for determining whether there was a risk to important commercial interests. However, for confidentiality orders, a party must also show that there are no reasonable alternative measures and the confidentiality order is not disproportionately harmful to the public interest in open and accessible court proceedings.

[39] In *Sierra Club* at para 60, the Supreme Court addressed the test for protective orders:

> 60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. **Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information:** *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).Justice Phalen stated that while *Sierra Club* gives guidance on the test for protective orders, it established a test in paragraph 53 meant solely for confidentiality orders and that:

[43] The test for protective orders can be summarized as follows:

> - that the information at issue has been treated at the relevant times as confidential;
>
> - that the information is confidential in nature; and
>
> - that there is a reasonable probability that disclosure of the information could cause harm to proprietary, commercial and scientific interests.

[44] **This test is essentially the test set out in *AB Hassle,* although the subjective and objective elements of the test are both required for the issuance of the protective order**. This is both how the Supreme Court in *SierraClub* described the test as well as how the test was applied in *Rivard Instruments v Ideal Instruments Inc*, 2006 FC 1338 at para 26, 153 ACWS (3d) 818.

……

> [67] The "counsel's eyes only" [CEO] category in the protective order is a more restrictive type of protective order and therefore requires that Google establish the existence of "unusual circumstances" that would warrant it: *Bard Peripheral Vascular Inc v WL Gore & Associates, Inc*, 2017 FC 585 at para 15, 280 ACWS (3d) 524 [*Gore*]; *Arkipelago* at para 11. This requires that the disclosure of CEO-designated confidential information presents a "serious threat" that is "real, substantial and grounded in the evidence" (*Gore* at para 16). Although the consideration of "unusual circumstances" is a contextual and flexible analysis, the Court has often considered the three Apotex factors in determining whether to grant a CEO order (*Gore* at para 15).
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> (emphasis added)

[37] In *Bard v Gore,* 2017 FC 585, Justice Manson considered the appeal of a prothonotary's order granting Bard's motion to amend the provisions of an existing protective order to add the designation of counsel's eyes only, the underlying action being a patent infringement. There Justice Manson held that:

> [15] **CEO orders are a more restrictive form of confidentiality order, which the Court has held should only be granted in "unusual circumstances" (*Lundbeck Canada Inc v Canada (Health)*, 2007 FC 412 at para 14 [*Lundbeck]*). What constitutes an "unusual circumstance" is not defined; however, the Court generally considers three factors which may favour granting a CEO order** (*Apotex Inc v Wellcome Foundation Ltd*, [1993] FCJ No 1117 at paras 14 to 16 [*Wellcome*]): 1) the terms reflect the terms of protective orders granted upon consent in parallel litigation in the US, in which the parties are directly or indirectly involved; 2) the terms of the order provide opportunity to a receiving party to object to the classification of certain documents as confidential; and 3) the party requesting the CEO order believes in good faith that its commercial business or scientific interests may be seriously harmed by disclosure.
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> [16] **These three Wellcome-factors form a non-exhaustive list of criteria, and the Court may see fit to consider and apply**

> **other relevant factors (*Lundbeck*, at para 16). However, the harm caused by the disclosure of the CEO information must be a serious threat to the interest in question and must be real, substantial, and grounded in the evidence (*Sierra Club* at para 54).**
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> (emphasis added)

[38] Subsequently, in *Arkipelago Architecture Inc. v Enghouse Systems Limited*, 2018 FCA 192 [*Arkipelago*], the Federal Court of Appeal considered an appeal from an order of this Court dismissing Arkipelago's appeal from a counsel's and expert's eyes only protective order granted by the prothonotary acting as the case management judge.

[39] The request for the order came in response to a motion by Arkipelago requesting access to certain confidential information, including computer source code, client information and agreements, and financial information. The case management judge had found that this information was highly sensitive in nature and warranted protection by way of a counsel's and experts' eyes only [CEEO] order. The Federal Court of Appeal noted that the case management judge was satisfied that the prospect of Arkipelago's president subconsciously or inadvertently using the confidential information obtained in the proceeding in future business activities represented a real and substantial risk that was grounded in the evidence.

[40] The Federal Court of Appeal noted that, on appeal of the Prothonotary's order to this Court, this Court found that the case management judge had articulated the correct legal principles governing the issuance of CEEO orders and applied them properly. This Court had been satisfied that the order and reasons reflected a proper balancing of Arkipelago's ability to

conduct its case and the need to protect the respondent's highly confidential information. This Court had seen no palpable and overriding error that warranted intervention.

[41] Before the Court of Appeal, Arkipelago argued that the Federal Court had adopted the incorrect standard in granting the CEEO order and that it had erred in its treatment of the evidence when concluding that the CEEO order should stand. With respect to the first issue, the Federal Court of Appeal held that:

> [8] The question whether the Federal Court Judge articulated the correct standard in granting a CEEO Order is an extricable question of law reviewable for correctness. The second question whether the evidence satisfies that standard is clearly a question of mixed fact and law reviewable for palpable and overriding error.
>
> [9] Turning to the first question, Arkipelago argues that the Federal Court, in accepting that subconscious or inadvertent misuse is sufficient to justify a CEEO order, adopted a lower standard of risk than is required or alone is insufficient to justify such an order. Rather, the evidence must establish the existence of "unusual circumstances" that would warrant the extraordinary order of disclosure on a "counsel's eyes only" basis: *Bard Peripheral Vascular Inc. v. WL Gore & Associates, Inc.*, 2017 FC 585 at para. 15 [*Bard*].
>
> [10] The respondents, for their part, argue that mere risk can be sufficient provided the evidence establishes that the risk is real and substantial and does not simply amount to generalized concern: *Rivard Instruments Inc. v. Ideal Instruments Inc.*, 2006 FC 1338 at paras. 1-2 [*Rivard*]; *Lundbeck Canada Inc. v. Canada*, 2007 FC 412 at para. 19 [*Lundbeck*].
>
> [11] **The case law is clear that such orders should only be granted in unusual circumstances: *Bard* at para 15; *Lundbeck* at para 14; *Rivard* at para 37; *Angelcare Development Inc. v. Munchkin, Inc.*, 2018 FC 447 at 21-22. However, there is no comprehensive definition of what constitutes "unusual circumstances" and each case must be decided on its own merits. In the context of harm to a commercial business interest, a CEEO order is warranted where the disclosure of the confidential information at issue presents a "serious threat" that is "real, substantial, and**

> **grounded in the evidence": *Bard* at para. 16; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [2002] S.C.R. 522 at para. 54 [*Sierra Club*]).**
>
> [12] Based on the foregoing authorities, we are not persuaded that the decision of the Federal Court Judge can be construed as a departure from earlier case law and as setting a different standard of proof. On the contrary, both the Federal Court and the Case Management Judge independently articulated the correct legal standard applicable to the issuance of a CEEO order.
>
> [13] Furthermore, we also agree with the respondents that the appellant's reliance on *Pharmascience* is misplaced. The appellant submits that this decision stands for the proposition that a "risk of or potential for misuse" is not sufficient. However, the decision stated that a CEEO order should not be granted "simply on the basis of a concern for the risk of or potential for misuse" (*Pharmascience* at para. 1). When read in its proper context, this decision accords with the respondents' position, and with the above authorities, **that mere concern is not enough – the risk must be real and substantial and grounded in the evidence.**
>
> (emphasis added)

[42] Based on this jurisprudence I understand the test for obtaining a protective order to be as set out by the Supreme Court of Canada in *Sierra Club* at paragraph 60, as summarized in by Justice Phelan in *Paid Search Engine* at para 43. That is:

i. that the information at issue has been treated at the relevant times as confidential;

ii. that the information is confidential in nature; and

iii. that there is a reasonable probability that disclosure of the information could cause harm to proprietary, commercial and scientific interests.

[43] With respect to the far more restrictive counsel's eyes only protective order, the jurisprudence is clear that such orders should only be granted in "unusual circumstances"

(*Arkipelago* at para 11; *Bard* at para 15; *Lundbeck* at para 14; *Rivard* at para 37; *Angelcare Development In. v Munchkin Inc,* 2018 FC 447 at paras 21-22 [*Angelcare*]). What constitutes unusual circumstances must be decided in each case on its own merits (*Arkipelago* at para 11). Further, in the context of harm to a commercial business interest, such an order is warranted only where the disclosure of the confidential information at issue presents a "serious threat" that is "real, substantial, and grounded in the evidence" (*Arkipelago* at para 11; see also *Bard* at para 16; *Seirra Club* at para 60).

[44] Ledgemark concedes that the Prothonotary cited the correct test. It argues, however, that she failed to make all of the considerations as required by the test. In that regard, Ledgemark refers to the factors as described in *Bard*: 1) the terms reflect the terms of protective orders granted upon consent in parallel litigation in the US, in which the parties are directly or indirectly involved; 2) the terms of the order provide opportunity to a receiving party to object to the classification of certain documents as confidential; and 3) the party requesting the counsel's eyes only order believes in good faith that its commercial business or scientific interests may be seriously harmed by disclosure.

[45] I would first remark that I do not understand *Bard* to indicate that these factors – viewed in isolation – are the test to be met. Rather, they form a non-exhaustive list of criteria which are often considered when assessing whether unusual circumstances exist which would support the issuance of a counsel's eyes only protective order. However, the consideration of "unusual circumstances" is a contextual and flexible analysis. And, while the Court has often considered the above three factors in determining whether to grant a counsel's eyes only order (*Gore* at para

15; *Paid Search Engine* at para 67), they have been held not to be a series of criteria to be examined in every instance (*Angelcare* at para 29; *Lundbeck* at para 16). This is demonstrated, for example, by the fact that many of the cases concerning counsel's eyes only orders pertain to patent infringements where litigation of the corresponding patent may be ongoing in the United States. That, of course, is not the situation in this matter.

[46] In any event, as to the first factor, whether the proposed the terms of the protection order reflect the terms of protective orders granted upon consent in parallel litigation, the Prothonotary found that the Ontario Litigation was not strictly speaking "parallel litigation". Ledgemark agrees that this is so given that: Ledgemark is not a party to the Ontario Litigation and, as such, its confidential information has not been disclosed in that litigation; the Ontario Litigation pertains to oppression remedies of various Del Ridge entities; and, Mr. Le Donne and Mr. De Sylva are both principals of Del Ridge and, as such, would have access to the same confidential information in the Ontario Litigation.

[47] As to the second factor, whether the terms of the order provide an opportunity to a receiving party to object to the classification of certain documents as confidential, Ledgemark asserts that the Prothonotary did not address this factor, which amounts to an error of law.

[48] However, the Prothonotary noted that the documents at issue were described in Ledgemark's supplementary affidavit of documents delivered on November 19, 2021. Production numbers 177-195 are the documents that Ledgemark sought to designate as for counsel's eyes only. Production numbers 117 and 178 are Ledgemark's 2020 financial

statements and 2021 profit and loss statement. Production numbers 179-192 are Stiver Lane and LivGreen's financial and profit and loss statements for 2018-2021. Production numbers 194-195 are LivGreen and Hart Haus (Stiver Lane) agreements of purchase and sale with customer information redacted. Production number 193 is a Master Agreement between Ledgemark and Stiver Lane.

[49] The Prothonotary found that the motion before her was somewhat unusual for two reasons. First, because of the stage of the litigation. The general/generic language of the "standard" protective order is usually issued when the parties cannot yet identify specific documents, but only broader categories of information. In the matter before her, Ledgemark knew precisely what documents it wanted to keep from Del Ridge and, more precisely, from Mr. Le Donne. Second, and flowing from this, the motion combined, in effect, (a) the issue of whether the exceptional imposition of a counsel's eyes only restriction is necessary as a provision in a protective order; and (b) in the face of Del Ridge's challenge to the actual documents to be designated, whether what Ledgemark seeks to protect in that manner is appropriate.

[50] The Prothonotary stated that, in these circumstances, it would have been of assistance to the Court, since both counsel were privy to the documents in issue, to have also been provided with them. As they were not, the Court could only review what was made an exhibit on Mr. Le Donne's cross-examination (Production #177) and assess what could be gleaned from the notice of motion and the record, cross examination transcript and counsel's representations.

[51] She also found, based on the cross-examination of Mr. Le Donne, that it appeared that there had been some overreach on the part of Ledgemark in its proposed designation of counsel's eyes only information/documents. This was because the cross examination established that the documents in issue:

- were of a similar nature to those already produced for other years without any proposed counsel's eyes only designations (summary financial and profit and loss statements for other years); or

- were form agreements (Production #193) and other, non-confidential customer purchase and sale agreements that could be assigned without confidentiality or non-disclosure restrictions (production numbers 194-195).

[52] Given this, I do not agree with Ledgemark that the Prothonotary erred in law by failing to consider whether the terms of the proposed protective order provided an opportunity for Del Ridge to object to the classification of certain documents as confidential. The Prothonotary acknowledged this factor and considered Del Ridge's challenge to the actual documents sought to be designated by Ledgemark as counsel's eyes only to have been subsumed within the motion before her.

[53] As to the third factor, whether a party believed in good faith that its commercial, business or scientific interests may be seriously harmed by disclosure to the public, Ledgemark submits that the Prothonotary erred in law by requiring more than a good faith belief of harm.

[54] In support of this, Ledgemark refers to the affidavit of Mr. LeDonne. This indicates that:

- there has been a breakdown in the business relationship between Mr. La Donne and Mr. De Sylva;

- Paragraph 17 of the affidavit which states:

> 17. In the Ontario Decision, the Court made several findings that demonstrate the conduct of Mr. De Sylva when dealing with me and my companies, including:
>
> > [5] Unanimous decision making between Miori and Gel-Don is no longer possible. The relationship between De Sylva and LeDonne is marked by a lack of trust and confidence. Both claim to have endured oppressive conduct in their business relationship.
> >
> > …
> >
> > [24] In mid- to late-December, LeDonne was denied access to the Del-Ridge email servers for some time. LeDonne was not advised that the email servers would be taken down and they were only restored after LeDonne's counsel intervened. However, the email servers that had been restored were later taken down again, which was disruptive to LeDonne and Gel-Don's ability to conduct business.
> >
> > …
> >
> > [32] I find that Miori, as the majority shareholder in the Co-Tenancies, has acted in a manner that is unfairly prejudicial and that unfairly disregards the interests of the minority shareholder Gel-Don.
> >
> > [33] Examples of this conduct include gaining control over decision making in respect of eight of the Co-Tenancies by instructing the solicitor who drafted those agreements to change the voting structure from one in which unanimous decision making was required between the co-tenants to one in which Miori could control decision making. Though De Sylva submits that there is no evidence to support the conclusion that he instructed John Morrison to make this change to the Co-Tenancy

Agreements, I find that it is more likely than not that he did. Mr. Morrison says that he cannot recall how the change came about, but LeDonne did not instruct Mr. Morrison on the Co-Tenancy Agreements, De Sylva did. Gel-Don had a reasonable expectation that the Co-Tenancy Agreements would not be changed in a material way without notice to him.

[34] Further examples of conduct that was prejudicial to Gel-Don and disregarded its interests include denying access to the email server without notice when Gel-Don was dependent on it to conduct its business, Miori's failure to attend a Management Committee meeting scheduled with a view to resolving a number of the issues that arise in this application and counter-application, and its failure to provide all of relevant financial information, including banking records relating to the Co-Tenancies and in support of the "state of the union" reporting by Miori, as requested by Gel-Don.

[35] Based on the evidentiary record, I do not find that the Co-Tenancies or Gel-Don have acted in a manner that is oppressive, unfairly prejudicial or that unfairly disregards the interests of Miori/De Sylva/Dagin. It may be that Miori/De Sylva/Dagin are creditors of the Co-Tenancies, just as Gel-Don and LeDonne may be creditors of the Co-Tenancies, but whether this is so, and if so, the extent of the indebtedness, has yet to be determined.

…

[46] De Sylva disputes LeDonne's claim but has offered no evidence of another agreement. De Sylva has given inconsistent testimony on this point. Contrary to his affidavit evidence and his evidence on cross-examination, De Sylva now submits that the contracts were "time and materials" contracts, that Con-Struct was overpaid on these contracts, and that therefore Con-Struct owes money to the Co-Tenancies.

…

[87] Based on the record, I am not satisfied that De Sylva discharged his duty of good faith or acted in the best interests of LeDonne in determining whether the capital calls were required. He has shown no evidence of having

> satisfied himself that the needed funds were not available from a lender other than one of his own companies.
>
> …
>
> [98] Given the lack of effort by De Sylva to find a lender so that the Co-Tenants would not have to make capital calls themselves, the lack of notice with respect to certain capital payments, and the lack of notice of Miori's intention to charge interest, or any attempt by Miori to recover interest on a distribution of cash surplus from a Co-Tenancy, I find that De Sylva has not met his onus to show that LeDonne was in default of his obligations under the Co-Tenancy Agreement, such that the interest provisions of the Agreement apply, or that interest should otherwise be payable. Prior to this litigation, neither De Sylva nor Miori made any formal demand, nor produced any document requesting payment for any alleged amount owing by Gel-Don in respect of the loans and interest.

- Mr. Le Donne states that the OSCJ held that certain properties were to be sold on consent of the parties but to date Mr. De Sylva has acted unreasonably in effecting this;

- Mr. Le Donne states that Ledgemark and Howland Greens regularly do business with the same third parties, such as consultants and trades and are direct competitors in the real estate market in the Greater Toronto Area;

- Given the breakdown in trust and confidence between Mr. Le Donne and Mr. De Sylva, Mr. Le Donne states that he believes that if Mr. De Sylva obtained access to Ledgemark's confidential information that it would consciously or unconsciously affect his business decisions to the competitive disadvantage of Ledgemark; and

- Mr. Le Donne states his belief that Mr. De Sylva would use the information to further his business interest with Howland Greens entities and his litigation interests on behalf of the Del Ridge entities in the Ontario Litigation.

[55] In my view, there is no doubt that one of the "unusual circumstances" factors that will often have to be established to obtain a counsel's eyes only designation within a protective order is whether the party requesting the counsel's eyes only order believes in good faith that its commercial or business interests may be seriously harmed by disclosure. However, establishing this factor alone will not meet the test for a protective order containing that designation. Rather, the harm caused by the disclosure must also be a real threat to the interest in question and must be real, substantial and grounded in the evidence (*Bard* at para 16; *Lundbeck* at para 16; *Sierra Club* at para 54; *Archipelago* at para 11; *Paid Search Engine* at paras 31, 67). The test requires not only a good faith subjective belief that harm will result, but also "confidentiality on an objective basis – a harms test" (*Paid Search Engine* at paras 31, 44; *AB Hassle* at para 9).

[56] Accordingly, while Ledgemark submits that the Prothonotary erred in law by requiring more than a good faith belief of harm, based on her reasons as discussed below, it is apparent that the Prothonotary found that a good faith belief was alone not enough. Ledgemark also had to establish a real and substantial threat of harm, grounded in the evidence. In my view, the Prothonotary did not err in law in her statement and understanding of this factor.

[57] Further, while Ledgemark submits that the evidence set out above was sufficient to meet the "test" of a good faith belief of harm, this is not a question of law. It is a question of applying the facts to the law.

[58] Here the Prothonotary set out and accepted Ledgemark's evidence that: the breakdown of the business relationship between Mr. De Sylva and Mr. Le Donne has led to acrimonious

litigation; there is a breakdown in trust and confidence “to the point of paralysis”; Mr. Le Donne has concerns that Mr. De Sylva will misuse the Stiver Lane and LivGreen information; and that the OSCJ made findings regarding Mr. De Sylva’s lack of good faith and oppressive conduct (within the meaning of the OBCA), with incidents noted such as email server access disruption, making unilateral changes to agreements, failing to attend management committee meetings and failing to provide banking records. She also quoted paragraphs 26, 28, 29 and 30 of Mr. Ledonne’s affidavit in which he sets out his belief that if a protective order with counsel’s eyes only designation is not issued that Mr. De Sylva would use the information to harm Ledgemark’s commercial interests.

[59] However, the Prothonotary found that the evidence of the threat or risk to Ledgemark and Mr. Le Donne’s other ventures was almost entirely grounded in circumstances surrounding Del Ridge, the Ontario Litigation relating to its dissolution and, how Mr. Le Donne feels about Mr. De Sylva. She found that there was much assertion and speculation that Ledgemark and related company information would affect Mr. De Sylva consciously or unconsciously in making business decisions to the competitive disadvantage of Ledgemark and that he would use this information to further his own business interests with the Howland Green entities and in the Ontario Litigation. The Prothonotary found that the men clearly did not like each other, they are direct competitors in business and will likely be engaged in protracted and acrimonious litigation to dissolve their prior dealings. However, the issue before her was whether Ledgemark had established sufficient grounds to warrant an order of this Court prohibiting Del Ridge from reviewing the subject documents.

[60] In that regard, she noted that within the Federal Court action, which had been ongoing for 18 months, there was no evidence of misuse of Del Ridge's confidential documents that had already been produced without a protective order and the parties had governed themselves being mindful of their obligations under the implied undertaking rule. Given this, she found that it was difficult to conclude that the new productions of Ledgemark and its related company information (Stiver Lane, LivGreen) would be treated any differently.

[61] Nor was there evidence of misuse of confidential information in the Ontario Litigation. The Prothonotary found that "The suggestion by counsel for the Defendant that the risk Mr. De Sylva would do this is not supported by the evidence of Mr. Le Donne beyond his statement of what he believes Mr. De Sylva could do". Further, that Ledgemark must submit something more than allegations and bare assertions that Mr. De Sylva could or would violate the implied undertaking. She noted that there was nothing in the record from Ledgemark setting out what the information at issue is (beyond as described in the Prothonotary's reasons) or *how* that information could be used by Del Ridge to harm the commercial interests of Ledgemark.

[62] The Prothonotary also noted, based on the cross-examination of Mr. Le Donne on his affidavit, that it also appeared that there had been some overreach by Ledgemark in its proposed designation of the for counsel's eyes only information and documents. This was because on cross-examination it was established that the documents provided to Del Ridge's counsel for the purposes of the motion were of a similar nature to those already provided for other years without any proposed counsel's eyes only designations (summary financial and profit and loss statements for other years). Or, the documents were form agreements (production #193) and other, non-

confidential customer purchase and sale agreements that could be assigned without confidentiality or non-disclosure restrictions (production numbers 194-195).

[63] The Prothonotary was not satisfied that disclosure to Del Ridge posed a serious threat or risk of harm to Ledgemark's commercial interests. She acknowledged that they are direct competitors, are involved in acrimonious litigation, and have experienced a loss of trust and confidence. Further, that Mr. De Sylva was found to be acting in bad faith in the business of winding up Del Ridge in the ongoing Ontario Litigation. However, the Prothonotary considered that she must also take into account the nature of that conduct and the conduct of Del Ridge in the litigation in this matter. In this action, there had been no misuse of Ledgemark's information or evidence of actions to harm Mr. Le Donne's new business ventures.

[64] The Prothonotary stated that while it may be understandable on some level that a former business associate would not want to disclose information about how their new ventures are doing, "concern or belief is not enough". Nor had Ledgemark established that the subject information is of such an extremely sensitive character that its disclosure will be highly prejudicial.

[65] Given the Prothonotary's above reasons, I am not persuaded that she erred in law by requiring more than a good faith belief of harm. Rather, the Prothonotary found that a good faith belief was alone not enough; Ledgemark also had to establish a real and substantial threat of harm, grounded in the evidence, but had failed to do so.

[66] In sum, for the reasons above, I do not agree with Ledgemark that the Prothonotary erred in law by applying the wrong test when assessing its request for a counsel's eyes only protective order.

[67] However, Ledgemark also asserts that the Prothonotary erred in law by considering other factors that have no basis in law or "were appropriately addressed in Ledgemark's submissions".

[68] First, as discussed above, while the three identified unusual circumstances factors are often considered in determining whether to grant a counsel's eyes only order, they form a non-exhaustive list of criteria (*Bard* at para 16; *Lundbeck* at para 16; *Paid Search Engine* at para 67). There is no comprehensive definition of what constitutes "unusual circumstances". Rather, each case must be decided on its own merits utilizing a contextual and flexible analysis (*Arkipelago* at para 11; *Paid Search Engine* at para 67). The Court may see fit to consider and apply other relevant factors (*Bard* at para 16; *Lundbeck,* at para 16). Accordingly, no error of law arises by considering other relevant factors.

[69] Second, while Ledgemark may be of the view that it appropriately addressed such factors in its submissions, what it is really submitting is that it disagrees with the Prothonotary's application of the facts to the law and her resultant decision. This does not give rise to an error of law.

[70] In any event, Ledgemark states that the Prothonotary noted that it was unusual for a protective order to be sought 18 months into litigation. Ledgemark submits that there was no

legal requirement that the protective order be sought at the initiation of the litigation and sets out reasons why it sought the protective order at a later stage. In my view, this submission does not amount to an error of law. The Prothonotary did not suggest that it was a requirement at law to seek a protective order at the commencement of the proceeding. Further, the reasons Ledgemark now offers to explain why the order was only sought 18 months after the action was commenced are not relevant to the alleged error of law. Ledgemark does not assert any error of mixed fact and law in this regard.

[71] Similarly, Ledgemark asserts that the Prothonotary erred in putting weight on the lack of evidence of misuse of confidential information in the Ontario Litigation. Ledgemark asserts that this is not a "relevant consideration in law". Ledgemark also submits that the Court cannot hold that a party must wait for evidence of misuse of confidential information before seeking a protective order. While I agree with the latter proposition, that is not what the Prothonotary did in this case. Rather, she weighed the evidence before concluding that Ledgemark had not demonstrated that the disclosure poses a serious threat or risk of harm to Ledgemark's commercial interests. Ledgemark also asserts that it put forward strong evidence as to Mr. De Sylva's conduct, including bad faith and prejudicial conduct in the Ontario Litigation, and submits that the potential misuse of confidential information in this action "is in the same vein". Again, what Ledgemark is challenging is the weighing of the evidence by the Prothonotary; this is not an error of law. Nor does Ledgemark make any argument that the Prothonotary made a palpable and overriding error – of any sort. Ledgemark does not argue that the Prothonotary misapprehended the evidence or erred in fact.

[72] Finally, Ledgemark submits that the Prothonotary took issue with the fact that the documents over which counsel's eyes only designation were being sought were not provided to the Court and made overreach findings. Ledgemark submits that there is no requirement in law to file the proposed confidential documents with the Court, rather, the moving party only needs to show that the category of documents are confidential. Ledgemark submits that the appropriate approach for the Prothonotary would have been to grant the order over the category of documents, following which the parties could address any overreach between counsel or utilize the challenge mechanisms within the protective order.

[73] As discussed above, the Prothonotary recognized that this was an unusual situation as the protective order, with the disputed counsel's eyes only designation, was sought 18 months after the litigation was initiated and because this was, therefore, not the more typical situation where only a category of documents could be identified for protection as counsel's eyes only. Here, the specific documents were identified and had also been provided to Del Ridge's counsel for review in advance of the protective order motion being heard and decided. The Prothonotary found that, in effect, the challenge to the protection of those specific documents was part of the contested motion. In that circumstance, she noted that it would have been helpful had Ledgemark also provided the disputed documents to the Court. Ultimately, however, based on the evidence that was before her she found that there was overreach and that Ledgemark had not established that the disclosure posed a serious threat or risk of harm to its commercial interests.

[74] The Prothonotary did not err at law by requiring the disputed documents to be filed with the Court. She merely pointed out that, in the unusual circumstances before her, that it would have been helpful had they been.

[75] Ultimately, whether or not to issue a protective order with counsel's eyes only designation is a discretionary decision based on the applicable law and the surrounding facts. Ledgemark does not submit that the Prothonotary made any palpable and overriding error in reaching her decision.

Conclusion

[76] In conclusion, the Prothonotary did not err in law. She identified the correct legal test to be applied when determining if a protective order, with counsel's eyes only designation, should be granted. She considered the three "unusual circumstances" factors frequently employed in this regard. These are non-exhaustive and she did not err in law by considering other relevant factors. I also agree with Del Ridge that there was no error on an extricable question of law in this case because Ledgemark has not established that the legal test was altered by the Prothonotary in the course of the application of the test.

[77] Although Ledgemark framed and grounded its appeal exclusively on alleged errors of law, some of its submissions, in effect, speak to the application of the test by the Prothonotary and seek a different outcome. However, Ledgemark made no submissions in its appeal asserting that the Applicant made any palpable and overriding error in reaching her decision.

[78] For these reasons, I am dismissing Ledgemark's motion appealing the Prothonotary's Order.

Further relief sought by Ledgemark

Ledgemark's position

[79] Ledgemark notes that the Prothonotary, in her reasons, acknowledged that to facilitate the motion before her "counsel for the Defendant provided and the Plaintiff agreed to receive the documents on an interim or provisional counsel's eyes only basis".

[80] Del Ridge has indicated its understanding that the interim agreement did not extend past the disposition of the motion.

[81] Ledgemark asserts that the agreement should be interpreted as encompassing the final disposition of the matter, including all appeals, not just the disposition of its motion. Further, that this Court should order that the parties are required to treat the documents as provided on a counsel's eyes only basis pending the final disposition of the issue of the protective order by way of any and all appeals. And, while this request may function like a stay of the Order, it is not a stay. Ledgemark submits that this is because there are no obligations flowing from the Order that require a stay. There was no protective order in place before the Order and there is no protective order now in place after the Order. There is only the agreement between counsel that Ledgemark submits should be maintained pending the final deposition of the issue.

Del Ridge's position

[82] Del Ridge points out that Ledgemark's Notice of Motion does not request a stay of the Order, pursuant to Rule 398, nor does it include the necessary details that would permit this Court to impose a stay under that Rule. Further, that the interim agreement between counsel is reflected in the parties joint correspondence to the Court prior to the determination. Del Ridge refers to correspondence dated January 20 and 24, 2022, which indicates that Del Ridge would accept the documents that Ledgemark proposed to designate as counsel's eyes only "on an interim counsel's eyes only basis pending the disposition of the Defendant's motion" and that Mr. Le Donne was "cross-examined on documents accepted on an interim confidential basis subject to the disposition of this motion".

[83] Del Ridge submits that the Order dismissing the motion found that the documents were not confidential. Accordingly, the interim agreement came to an end and no interim counsel's eyes only restriction remains.

[84] Although Ledgemark now adopts a new interpretation of the interim agreement and alleges professional misconduct in order to unilaterally impose a counsel's eyes only restriction until it has exhausted all appeals, this is unfounded. Nor has Ledgemark, based on its new interpretation, sought injunctive relief pursuant to Rule 373 within its Notice of Motion.

Analysis

[85] I first note that there is no evidence to suggest that the issue of the extension of the interim agreement between counsel pending any appeal was raised before the Prothonotary. Her reasons suggest that it was her understanding that the agreement was in place pending the disposition of the motion before her. Further, the joint correspondence before the Prothonotary, as the case management judge, clearly contemplates that the agreement was in play pending the disposition of Ledgemark's motion. Accordingly, to the extent that Ledgemark now asserts that the agreement was intended to survive the motion and extend to the exhaustion of all appeals, the evidence does not support this.

[86] Moreover, what Ledgemark takes issue with is the scope of the agreement by Del Ridge as to the treatment of the disputed documents. That is, whether the agreement to treat them as subject to interim or provisional counsel's eyes only extended beyond the determination of Ledgemark's motion. However, that question was not at issue before the Prothonotary. It is not the role of this Court, on appeal of the Prothonotary's Order, to address this new issue, absent a motion seeking this discrete relief.

[87] In that regard, Ledgemark did not seek a stay in its Notice of Motion. That said, I take its point that as its request was dismissed, there is noting to stay. However, it would seem that in these circumstances Ledgemark's remedy would have been to bring a motion seeking injunctive relief. That is, precluding Del Ridge from treating the documents as anything other than subject

to counsel's eyes confidentiality until the appeal of the Prothonotary's Order, as well any other appeals, are exhausted. Ledgemark did not take that course of action.

[88] In my view, in these circumstances, by asking this Court to require Del Ridge to continue to treat the documents as subject to counsel's eyes only confidentiality until the disposition of any and all appeals, Ledgemark ignores that it did not seek this protection prior to the disposition of the motion. It also circumvents the seeking of relief that was potentially available to it and thereby avoids the need to establish that it meets the test to be afforded injunctive relief. For these reasons, I am not prepared to order Del Ridge to treat the documents initially provided by Ledgemark on a counsel's eyes only basis pending disposition of the motion before the Prothonotary, to continue to be treated as such pending the outcome of any and all appeals of that issue.

[89] Needless to say, the usual implied undertaking remains. That is, any documents or information received in the course of pre-trial discovery may only be used for the purposes of this litigation (*Seedlings Life Science Ventures LLC v Pfizer Canada Inc.*, 2018 FC 443 at para 3). Further, the parties are free to negotiate the terms of a protective order that is in accordance with the Prothonotary's reasons (that is, absent counsel's eyes only provisions) and to submit it to her for consideration.

Costs

[90] When appearing before me, the parties agreed that costs in the all-inclusive amount of $2500, to be paid forthwith, were appropriate. I agree.

JUDGMENT IN T-683-20

THIS COURT'S JUDGMENT is that

1. The appeal is dismissed; and
2. Costs in favour of Del Ridge Homes Inc., in the all-inclusive amount of $2500, are to be paid forthwith by Ledgemark Homes Inc.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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