CITATION: MBL Administrative Agent II LLC et al. v. Trade X Group of Companies Inc. et al., 2024 ONSC 3734
COURT FILE NO.: CV-23-00710413-00CL
DATE: 20240628

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. c.43, AS AMENDED

BETWEEN:

MBL ADMINISTRATIVE AGENT II LLC, as agent for POST ROAD SPECIALTY LENDING FUND II LP (f/k/a MAN BRIDGE LANE SPECIALTY LENDING FUND II (US) LP), and POST ROAD SPECIALTY LENDING FUND (UMINN) LP (f/k/a MAN BRIDGE LANE SPECIALTY LENDING FUND (UMINN) LP)

Applicants

AND:

TRADE X GROUP OF COMPANIES INC., 12771888 CANADA INC., TVAS INC., TRADEEXPRESS AUTO CANADA INC., TRADE X FUND GP INC., TRADE X LP FUND I, TRADE X CONTINENTAL INC., TX CAPITAL CORP., TECHLANTIC LTD. AND TX OPS CANADA CORPORATION,

Respondents

BEFORE: Cavanagh J.

COUNSEL: *Frank Addario, Andrew Max, and Alexis Beale*, for the Van Essen Companies and Wouter Van Essen

Matthew Gottlieb and John Carlo Mastrangelo, for FTI Consulting Inc. in its capacity as court-appointed receiver

Matthew Milne Smith and Maya Churilov, for MBL Administrative Agent II LLC

HEARD: June 17, 2024

ENDORSEMENT

Introduction

[1] In this receivership proceeding, FTI Consulting Inc., the court-appointed receiver of assets of a group of debtor companies, has brought a motion for an order allowing it to recover funds received by companies owned and controlled by Wouter Van Essen (the "Van Essen Companies"). The Van Essen Companies oppose this motion and have brought a cross-motion seeking a declaration that the funds belong to them.

[2] The Van Essen Companies assert that the Receiver and the appointing creditor obtained unauthorized access to its privileged records.

[3] The Van Essen Companies bring this motion for:

a. An Order striking out all evidence submitted by FTI Consulting Inc. in the motion and cross-motion;

b. An Order granting judgment on the motion and cross-motion in favour of the Van Essen Companies;

c. An Order staying the rights and claims of the Receiver and the Applicant and any related parties, without prejudice to the rights of the Van Essen Companies and Wouter Van Essen.

[4] For the following reasons, this motion is dismissed.

Background Facts

[5] FTI Consulting Inc. is the court-appointed receiver and manager (the "Receiver"), without security, of some of the property of the Trade X Group of Companies Inc.[1], (collectively, the "Debtors") pursuant to an order dated December 22, 2023 (the "Receivership Order"). The Debtors were in the business of buying and selling vehicles for export to foreign markets. One of the Debtors is Techlantic Ltd. ("Techlantic"). The Debtors acquired Techlantic in 2021. Techlantic was founded by Wouter Van Essen ("Wouter").

[6] Under the Receivership Order, the Receiver was appointed receiver of the assets and undertakings of the Debtors acquired for, or used in relation to, a business carried on the Debtors including all proceeds thereof. The Receiver was authorized to take possession and control over this property.

[7] Certain of the Debtors had entered into a senior secured revolving credit agreement dated September 27, 2021 (the "Global Facility"). Techlantic joined the Global

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[1] These companies are 12771888 Canada Inc., TVAS Inc., Tradexpress Auto Canada Inc., Trade X Fund GP Inc., Trade X Fund LP Fund I, Trade X Continental Inc., TX Capital Corp., Techlantic Ltd., and TX OPS Canada Corporation.

Facility as a borrower on December 30, 2021. MBL Administrative Agent II LLC ("MBL") is the Administrative Agent for the Global Facility for a syndicate of lenders (the "Lenders"). MBL is the applicant that sought the Receivership Order.

[8] Wouter Van Essen ("Wouter") is the father of Eric Van Essen ("Eric"). Eric was an officer and director of Techlantic when the Receiver was appointed. Eric notified the Receiver of his resignation as a director and officer of Techlantic on January 2, 2024. Eric stayed on as a Techlantic employee until April 19, 2024.

[9] In 2023, Techlantic borrowed money from the Lenders to buy certain vehicles (the "2023 Vehicles"). Techlantic sold the 2023 Vehicles. The purchaser paid the purchase price, totaling $1,723,495 (the "Funds"), to the Van Essen Companies. The Van Essen Companies set off the Funds against debts said to be owed to them in respect of vehicles sold to Techlantic in 2022.

[10] The Receiver's position on the underlying motion is that the set off asserted by the Van Essen Companies breached the Order of Justice Penny dated December 11, 2023 and effected a preference contrary to s. 93 of the *Bankruptcy and Insolvency Act*.

[11] In February 2023, the Receiver brought a motion for an order directing that the Van Essen Companies transfer the Funds to the Receiver, and a declaration that those funds are property of the Debtors. The Van Essen Companies brought a cross-motion for an order that it is entitled to retain the Funds. These motions are scheduled to be heard in late July 2024.

[12] Following the Receiver's appointment, legal counsel for the Receiver ("Goodmans") and the Receiver identified potential issues that require further investigation. The Receiver and Goodmans engaged a team from FTI's Forensic and Litigation Consulting group ("FTI Forensic") to assist with the Receiver's investigation.

[13] In January and February 2024, the Receiver instructed FTI Forensic to collect certain documents held on the Techlantic Servers, including certain custodians' emails. The documents collected by FTI Forensic were loaded into a Relativity database (the "Database"). In total, the Database contains approximately one million documents.

[14] The review of documents in the Database was conducted by Goodmans and FTI Forensic.

[15] Goodmans began its document review on February 19, 2024. The Database did not initially include Wouter's email account because the Receiver did not know that he used Techlantic's email server. Wouter's email account was not added to the Database until February 28, 2024.

[16] FTI Forensic conducted its own review of the Database to answer specific questions posed by the Receiver. FTI Forensic was not involved in formulating the Receiver's

litigation strategy. It communicated its findings to the Receiver and Goodmans by way of periodic update presentations.

[17] On April 4, 2024, the Receiver delivered its First Supplemental Report dated April 3, 2024 (the "Supplemental Report") in support of its motion to recover the Funds. The Supplemental Report states that the Receiver reviewed emails sent or received by Wouter from his Techlantic email address during the period from 2021-2024.

[18] By email sent on April 5, 2024, Alexis Beale, outside counsel to Wouter and the Van Essen Companies, informed Mark Dunn of Goodmans, counsel to the Receiver, that the Van Essen Companies used Techlantic's email server for the purposes of receiving legal advice, engaging in settlement discussions, and discussing litigation strategy. Ms. Beale raised concerns about the Receiver's potential unauthorized access to privileged documents.

[19] No one accessed the Database after Ms. Beale sent her email. The Receiver cut off access to the Database on April 11, 2024.

[20] On April 16, 2024, the Van Essen Companies brought this motion.

Analysis

[21] Where a party's privileged information is received by an opposing party or its counsel and a remedy is sought, the focus of the analysis is on trial fairness and the integrity of the adjudicative process: *Continental Currency Exchange Canada Inc. v. Sprott*, 2023 ONCA 61, at para. 31.

[22] There are three stages to the analysis.

[23] At the first stage, the moving party must prove that the responding party obtained access to their privileged materials.

[24] At the second stage, once the moving party has established that the responding party obtained access to privileged materials, there is a rebuttable presumption of prejudice. The moving party need not prove the risk of significant prejudice or the nature of the confidential information that was disclosed beyond the requirement to prove access by the opposing party. Instead, the responding party bears the onus to rebut the presumed prejudice flowing from receipt of the privileged information. See *Continental Currency*, at paragraph 34.

[25] The third stage of the analysis is to fashion an appropriate remedy. The question at the remedy stage is not whether there is prejudice but how to rectify it to ensure fairness. Before imposing a stay, remedies that are less serious must first be considered as a stay is an extraordinary remedy that should be reserved for the clearest of cases. It is a remedy of last resort to be imposed only to prevent ongoing prejudice, unfairness to a party, or harm to the administration of justice. See *Continental Currency*, at paragraphs 40-43.

Did the Receiver and MBL obtain access to privileged materials of the Van Essen Companies?

[26] At the first stage of the analysis, the moving party must prove that the responding party obtained access to their privileged materials.

[27] In order to decide the issue at this stage of the analysis, I first address how the Receiver took possession of electronic records said to include privileged records of the Van Essen Companies.

[28] Under the Receivership Order, the Receiver was appointed as receiver of all of the assets, undertakings and properties of the Debtors (other than Trade X Group of Companies Inc. and TX OPS Canada Corporation), including Techlantic, acquired for, or used in relation to a business carried on by the Debtors including all proceeds thereof. The Receiver was authorized to take possession of and exercise control over the Debtors' property.

[29] The Receivership Order provides in paragraph 5:

> **THIS COURT ORDERS** that all persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media or cloud-based storage containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

[30] The Receivership Order provides in paragraph 6:

> **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic or cloud-based system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or

> such other manner of retrieving and copying the information as the Receiver and its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

[31] In connection with its business, Techlantic operated an e-mail server (the "Techlantic Server") that Techlantic's employees and consultants used to send and receive emails relating to Techlantic's business (the "Techlantic Emails"). After the Receiver was appointed, it paid the fees required to operate the Techlantic Server and use and access the Techlantic Emails. The Receiver did so in order to ensure that Techlantic's remaining employees could operate Techlantic's business and assist with the Receiver's realization efforts, and to preserve the Techlantic Server and Techlantic Emails.

[32] The Receivership Order gives the Receiver unfettered access to the Techlantic Server for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein, provided that the Receivership Order does not require the delivery of records or the granting of access to records which may not be disclosed or provided to the Receiver due to privilege attaching to solicitor-client communications.

[33] By February 2024, the Receiver had identified a number of potential issues that required further investigation. The Receiver determined that it was appropriate to conduct a more detailed review of the Debtors' electronic records, including the Techlantic Emails and documents stored on the Techlantic Server. The Receiver, in consultation with MBL, decided to engage FTI's Forensic and Litigation Consulting group ("FTI Forensic") to assist with the Receiver's investigation. FTI Forensic operates a separate business line from the Receiver, although both businesses are owned by FTI Consulting Canada Inc.

[34] The Receiver took steps to preserve the Techlantic Server, including the Techlantic Emails. The Receiver never reviewed the Techlantic Server or the Techlantic Emails. All review was conducted by either Goodmans, the Receiver's legal counsel, or FTI Forensic, at the Receiver's request. To the extent that the Receiver obtained information about documents on the Techlantic Server or Techlantic Emails, this information was provided to it by either FTI Forensic or Goodmans.

[35] The Techlantic Server and the Techlantic Emails were hosted by a third party provider, MMO Techno. FTI Forensic asked MMO Techno to provide the contents of the mailboxes for a group of custodians which were uploaded into a document

management software called Relativity. In order to review the Techlantic Emails, reviewers from either Goodmans or FTI Forensic had to login to the Relativity database (the "Database"). In total, the Database contained approximately one million documents.

[36] On or around February 16, 2024, Goodmans and FTI Forensic began to review documents in the database. Shortly thereafter, Goodmans informed the Receiver that it had discovered through its preliminary review that Wouter had an email account on the Techlantic Server. FTI Forensic then tried to collect Wouter's emails and add them to the Database.

[37] The Database did not initially include Wouter's email account because the Receiver did not know that Wouter used Techlantic's email server. Wouter's email account was not added to the Database until February 28, 2024.

[38] On February 23, 2024, Mr. Dunn, a partner at Goodmans, told Alexis Beale, outside litigation counsel for Wouter and the Van Essen Companies, that Goodmans was reviewing the Techlantic Emails including emails sent and received by Wouter and Eric. By email sent February 27, 2024, Mr. Dunn informed Ms. Beale that the Receiver intended to serve a supplemental report in support of the underlying motion that would be primarily based on emails sent and received by the Van Essen Companies and located in Techlantic's records.

[39] The Receiver, by accessing the Techlantic Server, obtained access to the entirety of Wouter's mailbox with the address wouter@techlantic.com. Wouter's emails were available for review on February 28, 2024. The items collected included emails Wouter sent or received as recently as 2024, a folder named "legal" (which contained 1950 documents), and 326 emails exchanged between Wouter and his counsel in this proceeding.

[40] The FTI Forensic Relativity user logs show that reviewers accessed (a) 25 pieces of correspondence between Ms. Beale and the Van Essen Companies from at least February 2, 2024 onwards, (b) 27 pieces of correspondence between Wouter and Andrea Brinston, corporate counsel for the Van Essen Companies from October 2023 onwards, and (c) 26 documents from a filing folder in the email account for Wouter's Techlantic email address marked "legal". The Relativity logs show that 8 reviewers had documents in these three categories displayed on their screen. The Receiver cannot identify the date each privileged document was displayed on a reviewer's screen and reports that it is not possible to determine how long a document was open.

[41] In *Solosky v. The Queen*, 1979 CanLII 9, [1980] 1 S.C.R. 821, Dickson J. (as he then was), writing for the Court, at pp. 835-836, citing *Wigmore* [8 Wigmore, Evidence (McNaughton rev 1962) para. 2292], confirmed that "[w]here legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance protected from disclosure by himself or by the legal advisor,

except the protection be waived". Dickson J. held that the protection does not apply to communications in which legal advice is neither sought nor offered. Dickson J. confirmed that where the communication is not intended to be confidential, privilege will not attach.

[42] The first question is whether Wouter and the Van Essen Companies have shown that the Receiver obtained access to communications from or to them where legal advice was sought or received from a professional legal advisor in her capacity as such.

[43] Wouter and the Van Essen Companies submit that the Receiver obtained access to privileged material including:

a. solicitor-client privileged correspondence with counsel for Wouter and the Van Essen Companies (Alexis Beale of Rosemount Law) in this litigation matter, including correspondence on the subject matter which forms the foundation for the Receiver's motion to obtain the Funds;

b. solicitor-client privilege documents between Wouter and corporate counsel for the Van Essen Companies, Andrea Brinston, from October 2023 onwards;

c. documents in the mailbox folder filing folder used by Wouter marked "legal"; and

d. various documents from October 2023 onwards over which litigation privilege is asserted, including documents between Wouter and others related to the legal strategy for the steps taken in respect of the Funds by the Van Essen Companies which are the subject of the Receiver's motion.

[44] In support of this submission, the Van Essen Companies rely on the affidavit of Wouter sworn April 16, 2024, his supplemental affidavit sworn May 10, 2024, and his reply affidavit sworn May 21, 2024.

[45] Wouter Van Essen deposes that the emails collected by the Receiver were collected from a folder that includes all his correspondence with counsel and other privileged and confidential correspondence with counsel in relation to the litigation herein which was stored in other folders. Wouter deposes that he made efforts to identify documents in the Database over which privilege is claimed and he identified four categories of documents (which, he states, are not comprehensive):

a. communications between him and his lawyer in relation to this litigation;

b. communications between Andrea Brinston (the Van Essen Companies' corporate counsel) and him and from October 23 onwards;

c. documents he stored in a folder marked "legal"; and

d. Communications among Eric, others, and him that may be subject to litigation privilege.

[46] Wouter deposes that by letter dated May 10, 2024, the Receiver's counsel identified 40 unique emails between the Van Essen Companies and their counsel, viewed by FTI Forensic and Goodmans. He deposes that these emails are all confidential and sensitive and relate to legal advice about the litigation herein. He deposes that he is advised by his counsel that these emails are solicitor-client privileged.

[47] The Van Essen Companies submit that through this evidence, they have discharged their onus at the first stage of the analysis by showing that the Receiver obtained access to their privileged material.

[48] The Receiver submits that the Van Essen Companies have failed to show that the Database includes relevant documents that that are subject to solicitor and client privilege or litigation privilege held by the Van Essen Companies.

[49] In support of this submission, the Receiver relies on the Van Essen Companies' refusal to produce the emails over which they claim privilege to special counsel for the Receiver (who had offered to give an undertaking not to disclose the information in the emails to others) so that special counsel could make informed submissions about whether any emails are privileged and the Court could decide this question on an informed basis, having seen the emails in question.

[50] I do not accept that the decision by Wouter and the Van Essen Companies not to tender into evidence the emails over which privilege is claimed (not having agreed on an acceptable protocol with special counsel for the Receiver) properly leads to the conclusion that they have failed to show that the Receiver obtained access to privileged records. They provided evidence that the emails include communications involving legal advice with counsel in relation to the underlying motion.

[51] The moving party need not specifically identify all documents over which they claim privilege. Once it is shown that an opposing party or its lawyers have had access to relevant confidential information that is protected by privilege, prejudice is presumed and the onus rests on the recipient of the information to rebut the presumption of prejudice. See *Continental Bank of Canada v. Continental Currency Exchange Canada Inc.*, 2022 ONSC 647, at paras. 116-118.

[52] It was not necessary for the Van Essen Companies to tender into evidence all records over which privilege is asserted in order to satisfy their obligation at the first stage of the analysis.

[53] I am satisfied that the Wouter and the Van Essen Companies have satisfied their onus of showing that records of communications between Wouter and legal counsel representing him and the Van Essen Companies where legal advice with respect to matters relevant to the underlying motion was sought and received are in the Database to which the Receiver obtained access.

[54] This is not the end of the analysis at the first stage. A prerequisite for the creation of privilege is that the communication be made or received in confidence. The next question is whether Wouter and the Van Essen Companies have shown that these records of communications between Wouter and legal counsel representing him and the Van Essen Companies were made or received in circumstances where they were intended to be kept in confidence.

[55] In Sidney N. Lederman, Michelle K. Fuerst and Hamish C. Stewart, *The Law of Evidence in Canada, Sixth Edition* (LexisNexis Canada Inc. 2022), at ¶14.54, the authors write:

> The presence of unnecessary third parties when the communication was made may serve to vitiate the privilege. When a client or his solicitor admits into the privacy of their relationship an individual whose presence is not essential or of assistance to the consultation, then it may be presumed that the communication was not intended to be made in confidence.

[56] Under the Receivership Order, the Receiver obtained access to the records in question from the Techlantic Server where emails sent and received by Wouter using his Techlantic email account were stored. Techlantic had access to emails in this account which were hosted for Techlantic by a third party provider, MMO Techno, and stored on the Techlantic Server.

[57] In order to decide whether Wouter and the Van Essen Companies have satisfied their onus of showing that email records of their communications with counsel, when they were sent or received, were intended to be kept confidential, I review the evidentiary record of the circumstances of the relationship between Wouter and Techlantic.

[58] In his first affidavit, Wouter deposes that he founded Techlantic in 2001 as a company engaged in the international trade of luxury automobiles. He deposes that in 2018 he sold his shares in Techlantic to his son, Eric. He remained involved in a consulting capacity with a view to lessening his role with time. Wouter deposes that Techlantic was sold to Trade X in August 2021 and he continued to be involved in its operations, primarily offering consultancy and being listed as a finance team member on Techlantic's website.

[59] In Wouter's second affidavit, he addresses the Receiver's position that he and the Van Essen Companies knew that the Receiver had unfettered access to the Techlantic emails and the Techlantic Server as of the date of the Receivership Order. Wouter deposes that he did not have such knowledge, and he assumed that access to the Van Essen Companies' documents, including his own documents, was the subject of ongoing discussions between the Receiver and his counsel. He deposes that he did not know that the Receiver might be reviewing his privileged correspondence or, more generally, that the Receiver had collected the entirety of his Techlantic email accounts.

[60] In his second affidavit, Wouter deposes that he has used two main Techlantic email accounts for his business operations. He deposed that the first email address, wouter@techlantic.com, has been his primary email account since 2001, both for his business and private emails. He deposes that in late 2023, he created a new email account, wouter@techlanticconsulting.com, and began using it regularly in order to compartmentalize the business conducted on behalf of the Van Essen Companies. He deposes that both email accounts contain privileged information. Wouter deposes that he understands that his filing practice using a folder system in Outlook leads to intermingling between the two accounts because emails from the @techlanticconsulting.com account end up filed with emails from the @techlantic.com account, a circumstance he did not appreciate at the time.

[61] FTI Forensic did not collect any emails from the domain "techlanticconsulting.com".

[62] In Wouter's third (reply) affidavit, he addresses his efforts to identify privileged emails in different categories including emails with legal counsel that relate to legal advice about the litigation in this proceeding. He deposes that he is advised by his counsel that some of the privileged emails appear to have been collected from Eric's email account. He states that he is advised and believes that Eric sent and received these emails in his capacity as a shareholder of the Van Essen Companies, acting on their behalf. Wouter gives evidence concerning the Receiver's assertion that Eric tried to delete Wouter's emails from the Techlantic Server and explains, based on information from Eric, that Eric was not seeking to do so and, in any event, his emails were already backed up elsewhere at the time.

[63] Mr. Dunn, a partner at Goodmans, the Receiver's counsel, gave evidence that when they began to review documents in the Database, neither Goodmans, FTI Forensic, nor the Receiver knew that the Database might contain privileged documents – or any documents that belonged to the Van Essen Companies. Mr. Dunn's evidence is that Goodmans and the Receiver assumed that the Van Essen Companies operated using their own infrastructure because they said they dealt with Techlantic at arm's length.

[64] The Receiver relies on an email sent by Wouter's counsel, Ms. Beale, to Mr. Dunn dated January 30, 2024 in which she advises that the transactions from December 7 to 19, 2023 (at issue on the underlying motion) "were legal set-offs between companies operating at arm's length". The Van Essen Companies state in their Notice of Cross-Motion for the Funds motion that "[a]ll dealings between Techlantic and the Van Essen Companies ... were endorsed by Trade X and at arm's length". On his cross-examination, Wouter testified that the Van Essen Companies' response to the Receiver's motion has always been that the Van Essen Companies dealt at arm's length with Techlantic and he confirmed that this was his understanding before and after the receivership.

[65] Wouter and the Van Essen Companies submit that their use of the Techlantic Server to send and receive emails using Wouter's Techlantic email account does not vitiate

the privilege that would otherwise attach to their communications with counsel. In support of this submission, these parties rely on *Dente et al. v. Delta Plus Group et al.*, 2023 ONSC 3376 and authorities cited in that decision.

[66] In *Dente*, the plaintiffs sold their shares in two companies to a purchaser. The plaintiffs continued to work with the companies' businesses after the transaction closed to assist with the transition of the new ownership. Two years after the sale, the plaintiffs sued the purchaser and the companies whose shares were sold. These defendants counterclaimed. The plaintiffs sought a declaration that certain electronic communications that the defendants identified during electronic document review for the litigation were subject to solicitor and client privilege. The subject documents were comprised primarily of emails, attachments, and calendar invitations and were found on the email servers of the defendant companies whose shares were sold.

[67] The motion judge held that the defendant purchaser (which, after closing, became the owner of the books and records of the two companies) was not the successor to solicitor and client privilege over communications between the plaintiffs' lawyer and them with respect to the share purchase agreement because the lawyer did not represent the two companies for this agreement and there was no joint privilege. The motion judge then addressed whether the plaintiffs had solicitor and client privilege over these communications.

[68] There were two categories of documents at issue. One category was privileged documents left behind on one of the defendant companies' server after closing. The motion judge referred to evidence that after the sale transaction closed, one of the plaintiffs took steps to delete and remove all privileged and confidential communications from the electronic systems of the two companies whose shares were sold. The motion judge accepted this evidence and held that any privileged documents on the server of one of the companies were left due to inadvertence. This category is not relevant to the issues on this motion because the relevant communications over which Wouter and the Van Essen Companies assert privilege were created after Wouter sold the shares of Techlantic in 2018 and after Techlantic was sold to Trade X in 2021. The relevant records were created after Wouter and the Van Essen Companies were, according to Wouter's evidence, dealing at arm's length with Techlantic.

[69] The second category of documents in *Dente* was electronic documents created by the plaintiffs after closing when they worked as consultants and continued to use the email system of one of the companies whose shares were sold. The defendants argued that the plaintiffs impliedly waived privilege by using these email addresses after closing. The plaintiffs provided evidence that they believed that they deleted all confidential emails from the server before they left (as consultants). The motion judge, at para. 72, cited settled jurisprudence standing for the principle that solicitor-client privilege should not be lightly interfered with and should be deemed waived only in the clearest of cases in order to maintain public confidence in a client's right to communicate with his lawyer. The motion judge, citing *Mizzi v.*

Cavanagh, 2021 ONSC 1594, at paras. 32-33, held that inadvertent disclosure to a third party does not necessarily waive privilege and the court may exercise discretion in favour of maintaining privilege notwithstanding the disclosure.

[70] In *Mizzi*, documents that were solicitor and client email communications between a defendant (a dismissed former employee of one of the plaintiff's businesses) and his lawyer were found in the former employee's office and, in respect of one document, by accessing the computer used by the former employee with his former employer. The lawyer (also a defendant) moved pursuant to s. 137.1 of the *Courts of Justice Act* to have the action dismissed against him. He claimed that the documents were privileged and the privilege was not waived by his client. The motion judge was called on to decide whether the emails should be excluded from the evidentiary record because they were privileged and, at paras. 32-33, held:

> First, subject to certain exceptions and unless common interest privilege applies, the disclosure of a privileged communication to a third party waives the privilege. The older authorities of this principle establish that privilege is waived even if the disclosure was inadvertent or unintended. However, recent case law establishes that inadvertent disclosure does not waive the privilege and that the court has the authority to remedy the disclosure.
>
> In exercising its discretion about the privilege associated with an inadvertently disclosed privileged document, the court will consider such factors as the manner and extent of the disclosure, the content of the privileged material and the degree to which it is prejudicial, the response to the disclosure, the extent of the review of the privileged material, the stage of the litigation, the actual or perceived unfairness to the opposing party, the potential effectiveness of an information firewall or other precautionary steps to mitigate the disclosure, and the impact on the due process and fairness of the proceedings. In the circumstances of the immediate case for the purposes of this motion that could see the dismissal of the Mizzi family's action, I shall not exercise the court's discretion to exclude this important evidence.

[71] In *Dente*, the motion judge cited *Chan v. Dynasty Executive Suites Ltd*., 2006 CanLII 23950 (ON SC), at para. 31 (which cited *The Law of Evidence in Canada* 2nd ed., 1999, at ¶14.122), where the court identified the following factors a court will consider in determining whether inadvertent disclosure amounts to waiver of privilege, whether: (i) the disclosure was actually inadvertent and excusable; (ii) an immediate attempt was made to retrieve the document; and (iii) preserving privilege would cause unfairness to the receiving party.

[72] The motion judge in *Dente*, at para. 75, accepted as a general principle that an employee's use of an employer's computer system to send emails does not create

an implied waiver. The motion judge cited three authorities for this conclusion. I address each of these authorities.

[73] In *Leroux v. Proex Inc.*, 2022 ONSC 319, the plaintiff continued to act as CEO for his company after it was sold. He used the company's email system to communicate with his lawyer. The company's representative to whom the plaintiff reported (after he ceased being CEO) agreed on cross-examination that while the plaintiff was CEO, no one within the company would have had the authority to access and read the plaintiff's emails without his consent. The only other person who had access to the plaintiff's email account was a third-party IT provider who reported to the plaintiff. The company's representative agreed on cross-examination that plaintiff would have a reasonable expectation of privacy with respect to his company email address. The court held that the plaintiff reasonably expected that these emails would be confidential.

[74] In *Milicevic v. T. Smith Engineering*, 2016 ONSC 2166, two persons were employees of a company (TSEI). They later terminated their employment relationships with TSEI. They sued TSEI for non-payment of salaries and bonuses and other relief. TSEI counterclaimed. The former employees moved for an order requiring another party to expunge from the record and destroy communications retrieved from the TSEI server between them and a lawyer they consulted for legal advice. These communications were emails sent by or received from the former employees using their computers at their then employer, TSEI, which communications flowed through the TSEI server and were discovered and retrieved by TSEI and provided to a party who included them in his affidavit of documents. The motion judge held that in the absence of evidence of a policy at TSEI that it could access employees' personal communications or that use of TSEI computers would result in loss of confidentiality/privilege in the communications, there was no evidence that the two former employees did not intend the communications to be privileged. The motion judge, at para. 205, held that it was reasonable to expect that employees could or would use their personal computers to send and receive confidential or privileged communications and, without more, the employer's retrieval of an electronic copy of the emails on the company's server without the employees' consent would not, by itself, amount to an implied waiver of privilege. The motion judge held that there was no evidence that the former employees knew or ought to know that TSEI could or would access their confidential communications and no other evidence of implied waiver of privilege.

[75] In *Martin & Profile Legal Services v. Cordiano*, 2011 ONSC 5724, the parties were shareholders in a company. They decided to sever their relationship and entered into a Share Purchase Agreement. Prior to completion of the transaction, the defendant retained a third party to wipe his company laptop clean, which he had previously used for business and for some personal use. He then returned the laptop. The plaintiff discovered two emails between the defendant and his lawyer respecting plans to set up a competing enterprise. The court held that the emails were privileged, and that privilege was not lost or waived by the defendant. The court held that mere loss of possession of privileged solicitor client communications

due to inadvertent or negligent disclosure does not automatically waive or terminate the privilege: at paras. 36-44.

[76] After reviewing these three authorities, the motion judge in *Dente* found that the plaintiffs subjectively believed that they deleted all personal and confidential emails from the server before they left (as consultants) and held that these precautions were reasonable and demonstrated that the plaintiffs intended to retain exclusive rights to privilege concerning these communications. The motion judge pointed to evidence of the plaintiffs' immediate attempts to retrieve the documents once they learned of the inadvertent disclosure. The motion judge, at para. 78, concluded that the emails are protected by solicitor-client privilege and there was no explicit or implicit waiver of privilege because the communications were sent through the server of the company where they worked as consultants.

[77] An employee would, of course, be expected to use his employer's email account for emails in connection with the employee's services for his or her employer. As the cases show, in many circumstances, it may not be unreasonable or unexpected for an employee to sometimes use his or her work email account to send or receive personal or confidential emails to third parties, sometimes even to his or her personal legal counsel. The fact that an employee uses his or her employer's email account, where emails would be stored and accessible on the employer's email server, to send and receive otherwise privileged communications does not necessarily vitiate the privilege that otherwise attaches to such communications.

[78] Wouter does not provide evidence that his emails with legal counsel over which he and the Van Essen Companies assert privilege were made accessible to Techlantic through inadvertence. His evidence is to the contrary, that he chose to use Techlantic email accounts for his business and private emails, where emails would be stored on the Techlantic Server. This use was not limited to emails for Wouter's consulting services to Techlantic, after his Techlantic shares were sold to Eric in 2018, or after Techlantic was sold to Trade X in 2021. Wouter does not explain why he used Techlantic email addresses for the business of the Van Essen Companies, and for his personal emails, where his emails, including with legal counsel, would be stored on the Techlantic Server where they would be accessible by Techlantic, an entity that Wouter considered to be at arm's length.

[79] Wouter offers no evidence that there was any special relationship between him (or the Van Essen Companies) and Techlantic such that sharing access with Techlantic of all business emails of the Van Essen Companies, including emails between Wouter and his counsel, was essential to, or reasonably necessary for, the business of the Van Essen Companies or for consultations with legal counsel. Indeed, given Wouter's evidence that Techlantic was an arm's length entity, it is difficult to conceive of a reason why, if the emails with counsel and other records over which privilege is now claimed were intended to be kept confidential, Wouter would allow such emails and records to be created and received in circumstances where they would be accessible by Techlantic or, later, by a Receiver appointed by the Court

and authorized to take possession of Techlantic's assets and to read documents stored on the Techlantic Server.

[80] Wouter does not provide evidence that Techlantic agreed that his business and personal emails sent and received using his Techlantic email account and stored on the Techlantic Server were to be kept confidential from Techlantic, which had access to these emails on the Techlantic Server, or that his permission was required before Techlantic would have access to these emails.

[81] The decision in *Dente* and the decisions cited by the motion judge in *Dente* are readily distinguishable. In *Dente*, the motion judge cited evidence that the plaintiffs had inadvertently left privileged emails on the company's server after diligently trying to remove them when they ceased acting as consultants. There was evidence that the plaintiffs in *Dente* immediately attempted to retrieve the documents once they learned of the inadvertent disclosure. In *Mizzi*, there was evidence that the communications in question were disclosed inadvertently, and motion judge, after considering relevant factors, declined to exercise his discretion to exclude the evidence. In *Leroux*, the person asserting privilege acted as CEO and used the company's email system in this capacity. The company admitted that the documents would only be accessible with his consent. In *Milicevic*, the persons asserting privilege were former employees who inadvertently used their work email accounts to send and receive communications with their legal counsel. They reasonably expected their private communications to be kept confidential. In *Martin*, the party asserting privilege tried to remove privileged information from the company's laptop and that information was left on the laptop inadvertently.

[82] The Receiver obtained access to the records in question on this motion because Wouter chose to use a Techlantic email account (where the emails would be stored on the Techlantic Server and accessible to Techlantic) to send and receive communications concerning his businesses including those with his counsel concerning the subject matter of the underlying motion and other relevant communications over which he claims privilege.

[83] The Receiver also relies on evidence that Wouter's emails over which privilege is claimed were copied to Eric, who was the most senior officer of Techlantic, which Wouter regarded as an arm's length company. Although Eric may have been a shareholder of the Van Essen Companies, he was also the most senior officer of Techlantic when Wouter's emails were copied to him, and it is not possible to limit his access to these emails to a capacity that excludes his role with, according to Wouter's evidence, an arm's length third party, Techlantic.

[84] The fact that the Receiver takes the position on the underlying motion that the Van Essen Companies and Techlantic did not deal at arm's length in respect of the transactions at issue on that motion does not assist the Van Essen Companies. They dispute the Receiver's opposition in this regard, and they have the onus at this stage of the analysis to show that the records in question were confidential. Whether the

Van Essen Companies and Techlantic were, in fact, arm's length parties is an issue to be determined on the Funds motions.

[85] In *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, the Supreme Court of Canada, at p. 875, confirmed that solicitor and client privilege is not a rule of evidence but a substantive rule by which the confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent. The Court stated that part of the rule provides that "[u]nless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality".

[86] On this motion, Wouter and the Van Essen Companies seek a permanent stay of the Receiver's motion to recover the Funds as a result of the Receiver obtaining access to their privileged materials. This is a remedy of last resort that is reserved for the clearest of cases. For Wouter and the Van Essen Companies to obtain this remedy, they must satisfy their onus at the first stage of the analysis.

[87] To discharge this onus, the Van Essen Companies must show that the materials in question were made or received in circumstances where they were intended to be kept in confidence and not shared with a third party whose presence was not essential or of assistance to the consultation. Wouter and the Van Essen Companies have not offered evidence to show that the records in question were kept confidential from, or were intended to be kept confidential from, Techlantic, a third party with which, according to Wouter's evidence, he and the Van Essen Companies dealt at arm's length. There is no conflict in the evidence in this respect that needs to be resolved.

[88] In the absence of such evidence, the Van Essen Companies have not satisfied their onus at the first stage of the analysis.

[89] As a result, the motion by the Van Essen Companies must be dismissed.

Has there been a waiver of privilege by the moving parties?

[90] Wouter and the Van Essen Companies submit that the Receiver is reversing the onus on this motion, and that the Receiver has the onus of proving that privilege was waived, and it has failed to do so.

[91] The Receiver submits that if the records in question were subject to privilege when they were sent and received, Wouter and the Van Essen Companies waived the privilege by placing the emails on the Techlantic Server, copying Eric, an officer of Techlantic, not advising the Receiver that there were potentially privileged materials under its control, and then referring to them in an affidavit.

[92] Wouter and the Van Essen Companies submit that in the circumstances of this motion, the Receiver and its legal counsel would not know whether privileged

emails of Wouter and the Van Essen Companies were stored on the Techlantic Server. They submit that, therefore, the Receiver and its legal counsel were required to take steps to avoid collecting or reviewing privileged information. They submit that the Receiver could have done so by, among other things, screening for terms such as the name of legal counsel for third parties and terms such as "legal" or "litigation", instructing reviewers to avoid privileged information in their review, asking Ms. Beale for names of lawyers consulted by Wouter to establish a screen, asking Ms. Beale if there were privileged emails in Wouter's account, or sending a questionnaire to custodians, including Wouter, to ascertain whether there might be privileged documents in the Database. Wouter and the Van Essen Companies submit that the Receiver failed to take such steps and is responsible for the consequences of accessing privileged materials.

[93] There is no evidence on this motion that taking these steps is the usual practice of insolvency professionals in court-appointed receiverships. The Receiver reports that it is not its practice or, to its knowledge, common practice among insolvency professionals, to screen a debtor's electronic records to determine whether privileged or confidential documents held by third parties might be stored there. Wouter confirmed that neither he nor his legal counsel, Ms. Beale, or, to his knowledge, anyone else, told the Receiver that he had done business for the Van Essen Companies using emails sent from Techlantic email accounts. No one told the Receiver that the Database included records over which Wouter and the Van Essen Companies claim privilege.

[94] The Receiver reports that if it had known that there were (or might be) privileged documents on the Techlantic Server, then it would have taken appropriate steps to ensure that those documents were not included in the Database or reviewed by anyone. However, the Receiver reports, the Receiver was not aware of any reason to implement these procedures when Goodmans and FTI Forensic began reviewing documents. I accept the Receiver's report in this regard, which is supported by Mr. Dunn's evidence.

[95] In *Chan*, at para. 31, the motion judge held that whether or not privilege has been waived through inadvertent disclosure requires the court to consider three factors: (a) whether the error was in fact inadvertent and thus excusable; (b) whether an immediate attempt was made to retrieve the document; and (c) whether preservation of the privilege in the circumstances would cause unfairness to the receiving party.

[96] I have concluded that the Van Essen Companies have failed to show that the records in question were made accessible to Techlantic through inadvertence. Wouter knowingly used a Techlantic email account for his business and personal emails where the emails would be accessible to Techlantic by being stored on the Techlantic Server. If the onus was on the Receiver to show that privilege was waived, I would conclude that the Receiver has shown that the Van Essen Companies did not make the records in question accessible to Techlantic through inadvertence.

[97] When the Receiver was appointed, Wouter reviewed the Receivership Order. Wouter testified on his cross-examination that as February 27, 2024 (one day before his email account was added to the Relativity Database) he was aware that Techlantic emails were being reviewed by the Receiver. Wouter was aware that he sent emails from his Techlantic email address until around November of 2023 and he knew that the Receiver had access to those emails. Wouter also knew that the Receiver was reviewing what was in Eric's Techlantic email account. After the Receiver was appointed, Wouter did not notify the Receiver that he claimed privilege over any emails on the Techlantic Server until April 5, 2024, when his counsel so notified counsel for the Receiver.

[98] The Receiver has shown that Wouter and the Van Essen Companies did not make an immediate attempt to retrieve records over which they claim privilege from the Receiver once they know that the Receiver was in possession of such records. The failure of the Van Essen Companies to promptly act to notify the Receiver that the Techlantic Server stored records over which they claimed privilege supports the Receiver's position that there was an implied waiver of privilege by the Van Essen Companies. See *Benoit v. Federation of Newfoundland Indians Inc.*, 2019 NLSC 116, at paras. 90-92; aff'd 2020 NLCA 16.

[99] If Wouter and the Van Essen Companies had notified the Receiver before February 28, 2024 that they claim privilege over certain of the emails sent and received by Wouter using his Techlantic email account, the Receiver could have taken steps to ensure that his emails were not viewed, at least until any issues of privilege had been determined. In these circumstances, where this was not done and the Van Essen Companies now seek an order permanently staying the Receiver's motion to recover the Funds, the preservation of privilege would result in unfairness to the Receiver.

[100] If I had held that Wouter and the Van Essen Companies had shown that the records in question were subject to privilege when they were sent and received, I would have concluded that these parties waived any privilege attaching to the records by using an email account of a third party, Techlantic, to send and receive otherwise privileged communications, where such emails would be stored on the Techlantic Server and accessible to Techlantic, and by sharing the emails with Eric, the most senior officer of Techlantic at the relevant times.

If the Van Essen Companies had met their onus at the first stage of the analysis, have the responding parties rebutted the presumption of prejudice?

[101] Once the moving party has established that the responding party obtained access to privileged materials, there is a rebuttable presumption of prejudice. The responding party bears the onus to rebut the presumption of prejudice flowing from receipt of the privileged information.

[102] The presumption of prejudice can be rebutted by identifying to the court with some precision that: (i) the responding party did not review any of the privileged

documents in their possession; or (ii) they reviewed some documents, but the documents reviewed were not privileged; or (iii) the privileged documents reviewed were nevertheless not likely to be capable of creating prejudice. See *Continental Currency*, at paragraph 35.

[103] The evidence adduced must be clear and convincing such that a reasonably informed person would be satisfied that no use of the confidential information would occur.

[104] Mr. Dunn provides affidavit evidence about the review by Goodmans and FTI Forensic. This evidence does not show that Goodmans or FTI Forensic did not review any documents which the Van Essen Companies claim are privileged. The Receiver submits that the privileged documents that were viewed by Goodmans and FTI Forensics were not likely to be capable of creating privilege.

[105] Mr. Dunn's evidence is that of the four categories of advice that Wouter received in the records over which privilege is claimed, he and his colleagues at Goodmans, and FTI Forensic, did not read the documents and they formed no part of the Receiver's conclusions.

[106] Mr. Dunn's evidence is that the conclusions of the Receiver as stated in its First Supplemental Report were primarily drafted by him and reflects the Receiver's conclusions based on information and documents provided to the Receiver by Goodmans and limited information from FTI Forensic. Mr. Dunn deposes that they did not refer to or rely on any of the records over which privilege is claimed in the course of drafting the First Supplemental Report, and that the documents that the Receiver relied on are clearly identified in, and appended to, this report. Mr. Dunn explains in his affidavits how the Receiver reached its conclusions with respect to the underlying motion to recover the Funds, and states that none of the records in the categories over which privilege is claimed informed the Receiver's decision-making whatsoever. Mr. Dunn's evidence is that the FTI presentations to the Receiver and MBL do not reference any privileged documents.

[107] The Van Essen Companies submit that the evidence upon which the Receiver relies to rebut the presumed prejudice is insufficient because (i) the responding parties cannot show that they did not review the documents to which they had access over which privilege is claimed, (ii) they have failed to show that that there is no risk that privileged information will be used to prejudice the Van Essen Companies because the evidence upon which they rely consists of conclusory statements which, without more, would not satisfy the public that confidential information will not be used, and (iii) there is other evidence that, they say, calls into question and undermines the evidence that confidential information was not read, including the listing of one document by Mr. Dunn as "responsive" and the downloading and circulation of another document by FTI Forensic to the Receiver and its counsel.

[108] The burden of the responding party at this stage of the analysis can be difficult to satisfy. Mr. Dunn's evidence shows the information which, he says, informed the

Receiver's position with respect to the underlying motion. However, his evidence that no records over which privilege is claimed informed the Receiver's decision-making is based on declaratory assertions which are difficult to verify.

[109] In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at para. 52, the Supreme Court of Canada held:

> *A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica*, *supra*, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.

[110] If I had concluded that the Van Essen Companies had satisfied their onus at the first stage of the analysis, I would conclude that the Receiver has not shown that no information over which privilege is claimed was imparted which could be relevant, such that the presumption of prejudice is rebutted.

Is a stay of proceedings the required remedy?

[111] At the third stage of the analysis, a party seeking a stay has the burden to show "special circumstances" to justify a stay which is only granted where there is (i) prejudice to the right to a fair trial or the integrity of the justice system, and (ii) no alternative remedy to cure the default. Before imposing a stay, remedies that are less serious must first be considered as a stay is an extraordinary remedy that should be reserved for the clearest of cases. It is a remedy of last resort to be imposed only to prevent ongoing prejudice, unfairness to a party or harm to the administration of justice. See *Continental Currency*, at paras. 42-43.

[112] The Van Essen Companies submit that the scope of the Receiver's use of communications over which they claim privilege is not known and, therefore, it is not possible to determine the degree of prejudice caused by the failure of the Receiver and MBL to take steps to identify records in the Database that are possibly subject to privilege before reviewing these records. The Van Essen Companies submit that the appropriate remedy is a stay of the underlying Funds motion against Wouter and the Van Essen Companies. They submit that a lesser remedy would bring the administration if justice into disrepute.

[113] In *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, at para. 59, the Supreme Court of Canada set out a number of non-exhaustive factors to be considered in determining the appropriate remedy. These factors include:

a. How the documents came into the possession of the opposing party or their counsel;

b. What the opposing party and their counsel did upon recognition that the documents were potentially subject to solicitor-client privilege;

c. the extent of review of the privileged material;

d. contents of the solicitor-client communications and the degree to which they are prejudicial;

e. the stage of the litigation; and

f. the potential effectiveness of a firewall or other precautionary steps to avoid mischief.

[114] The records in question came into the possession of the Receiver because it obtained access to the Techlantic Server through authority conferred by the Receivership Order. The Van Essen Companies had notice that the Receiver had access to email accounts and Wouter knew that he had been using Techlantic email accounts for his business and personal use, including to communicate with legal counsel. This factor does not support the extraordinary remedy of a stay of the Receiver's Funds motion as the only adequate remedy.

[115] Wouter and the Van Essen Companies did not notify the Receiver or Goodmans that they had been using the Techlantic Server for privileged communications until April 5, 2024. Upon being so notified, the Receiver promptly terminated access to the Database where the emails in question were stored to ensure that there was no inadvertent access to communications over which privilege was claimed.

[116] This evidence shows that the Receiver did not intentionally access communications between Wouter and his legal counsel. The Receiver acted promptly and responsibly to terminate access to the Database when it was informed of the position of the Van Essen Companies with respect to privileged documents.

[117] The Receiver has provided evidence, including from Mr. Dunn, that neither the Receiver nor Goodmans actually reviewed any allegedly privileged documents nor were any of these documents relied upon in crafting the Receiver's reports or informing litigation strategy. The Van Essen Companies say that this evidence consists of conclusory statements. Nevertheless, the Van Essen Companies have not shown that the Receiver relied on documents over which privilege is claimed to formulate its strategy with respect to the Funds motion.

[118] The Van Essen Companies submit that MBL is equally tainted by the Receiver's access to such communications. In support of this submission, the Van Essen Companies rely on evidence that MBL met with the Receiver and its counsel after the communications over which privilege is claimed were accessible to the Receiver. MBL has asserted common interest privilege over notes of those

meetings as a ground to refuse production of the notes. Wouter and the Van Essen Companies submit that MBL's evidence that it did not receive or review communications in the categories over which privilege is claimed is a conclusory statement which is insufficient to satisfy the public that the integrity of the justice system would be preserved if a stay of the Funds motion is not imposed on MBL, even if a new receiver were to be appointed.

[119] The evidence given on behalf of MBL by Westin Lovy, the Managing Director of Post Road Group ("PRG"), the parent company to MBL, is that he had limited communications with Mr. Dunn, counsel to the Receiver, and with Ms. Patel of FTI Forensics, and his communications were in order to understand the status of the affairs of the Debtors.

[120] Mr. Lovy deposes that none of the Receiver, FTI Forensic, or Goodmans has provided to him or anyone else at PRG any confidential or privileged information that belongs to Wouter. Mr. Lovy deposes that since the Receiver's appointment, he has not received any documents from the Receiver that relate to this motion other than what it has filed publicly. He deposes that he received only one document from FTI Forensic. On April 8, 2024, FTI Forensic presented to him an update of its findings with respect to the Debtors' business. The presentation excerpted certain emails sent to and received by the Debtors' officers and employees. None of the emails shown in the presentation involve legal counsel to any party. Mr. Lovy deposes that he has spoken to Mr. Dunn about the progress of the receivership on several occasions and, during those calls, Mr. Dunn did not reveal or describe to him any privileged information belonging to the Van Essen Companies nor did he indicate that he had reviewed or received any such privileged information.

[121] I have considered the factors identified in *Celanese*. The reason for the problem that has arisen is the decision taken by Wouter to use the email account of a third party, Techlantic, to send and receive business and personal emails, including those to and from his legal counsel. The Van Essen Parties have not shown that the Receiver or MDL have used information from communications over which privilege is claimed to formulate or support the litigation strategy in respect of the Receiver's Funds motion. The Van Essen Companies have not shown that MDL received and reviewed materials over which privilege is claimed and is thereby tainted.

[122] This is not a case where the responding parties acted improperly and knowingly reviewed the opposing side's privileged materials over a prolonged period of time. In these circumstances, the Van Essen Companies have not shown that a lesser remedy than a stay, such as one requiring that all documents over which privileged is claimed be removed from the Database and made unavailable to the Receiver or MBL for use on the Funds motion, or a remedy involving the appointment of a new receiver with new counsel, would not be adequate.

[123] The Van Essen Companies seek a stay of the Receiver's Funds motion as the only remedy. They do not seek, in the alternative, a lesser remedy. If they had satisfied

their onus at the first stage of the analysis, the Van Essen Companies have not shown that the extraordinary remedy of last resort, a stay of the Receiver's Funds motion, is necessary to prevent ongoing prejudice, unfairness to a party or harm to the administration of justice.

Disposition

[124] For these reasons, the motion by the Van Essen Parties is dismissed.

[125] If the parties are unable to resolve costs, they may make written submissions (three pages excluding costs outline; one page for reply) according to a timetable to be agreed upon by counsel and approved by me.

Cavanagh J.

Date: June 28, 2024