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## Safeguarding Secrets: Strategies for Maintaining Confidentiality in Corporate Disputes

All companies possess confidential and sensitive proprietary information belonging to themselves, their affiliates, or their clients. During business operations, disputes may arise that could lead to litigation. The disclosure of sensitive documents into the public domain for the proper determination of a case can threaten a company's competitive advantage (e.g., *trade secrets*) and lead to unwanted disclosure of confidential and/or personal data. Consequently, companies may be reluctant to litigate disputes, despite having a strong case, due to the fear of unwarranted exposure of sensitive information to the public.

### Can the Confidentiality of Sensitive Information Be Protected During Litigation?

Courts operate under the general presumption that it is in the public interest to allow full and open access to all court proceedings. However, the court may exercise its inherent power in exceptional cases where the competing public interest in maintaining the confidentiality of certain information outweighs the general presumption.<sup>1</sup>

Protective Orders are judicial directives designed to safeguard confidential information from being disclosed during court proceedings. Subject to the specific requirements of each case, the Court has wide powers, including the authority to<sup>2</sup>: -

- (a) Seal court documents, so the information in the court file is inaccessible to the public.
- (b) Restrict the disclosure of information to only a limited number of individuals deemed necessary for the just disposal of the case.

<sup>1</sup> *Toso Co Ltd v Goodmeyer Curtain Accessories Supply Sdn Bhd* [2024] MLJU 1814 [10], *Sherman Estate v Donovan* [2021] SCC 25 [1] & [2]

<sup>2</sup> *Kingtime International Ltd & Anor v Petrofac E&C Sdn Bhd* [2020] 11 MLJ 141 [22]

- (c) Order that all court proceedings be heard in private.

Over the years, the courts have developed a general guide to determine whether a Protective Order should be granted in a particular case, as follows<sup>3</sup>:-

- (a) **Real and Substantial Risk:** There must be a real and substantial risk to a party's commercial interests, supported by evidence demonstrating a serious threat.
- (b) **Public Interest in Confidentiality:** The commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake, i.e., *whether the information has a principle commercial right in law to be protected.*
- (c) **Availability of Alternative Measures:** The Court will assess whether reasonable alternatives to a Protective Order are available that could adequately protect the information.
- (d) **Balancing Interests:** Finally, the positive effects of the Protective Order must outweigh any negative effects on the rights and interests of the parties involved and the public.

#### Instances Where Protective Orders Have Been Granted

1. ***Toso Co Ltd v Goodmeyer Curtain Accessories Supply Sdn Bhd* [2024] MLJU 1814**

In ***Toso***, the Court granted a Protective Order to seal sensitive business documents, including license agreements, annual royalty reports, and pricing information related to goods.

2. ***Kingtime International Ltd & Anor v Petrofac E&C Sdn Bhd* [2020] 11 MLJ 141**

In ***Kingtime***, the Court granted a Protective Order to seal sensitive business information, including the defendant's income statements and transfer pricing records, and contractual documents between the defendant and contractors, sub-contractors, suppliers and consultants, regarding the project.

3. ***BBW v BBX and Others* [2016] 5 SLR 755 (Singapore)**

In ***BBW***, the Court granted a Protective Order to seal documents related to a connected arbitration proceeding, as arbitrations are confidential in nature.

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<sup>3</sup> *Toso Co Ltd v Goodmeyer Curtain Accessories Supply Sdn Bhd* [2024] MLJU 1814 [14] – [15], *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 SCR 522 [53] – [57].

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#### 4. *Dow Chemical Canada ULC v. Nova Chemicals Corp.*, [2015] A.J. No. 1507 (Canada)

In *Dow*, the Court granted a Protective Order to seal the sales and purchase agreements and affidavits containing confidential information.

#### Conclusion

In summary, there is a high threshold to be satisfied before a Protective Order will be granted. However, the Courts will not hesitate to grant such an order where a party has satisfied the general guide set out above, and it is in the interest of justice to do so, in all circumstances of the case. By understanding these strategies and considerations, companies can better navigate the complexities of litigation while safeguarding their sensitive information.

For further assistance on the matters discussed above or any other legal related matters relating to your business, please do not hesitate to contact Associates **Poh Jonn Sen** ([pjs@lh-ag.com](mailto:pjs@lh-ag.com)) and **Bryson Chee** ([ckt@lh-ag.com](mailto:ckt@lh-ag.com)), or their team Partner, **G. Vijay Kumar** ([vkg@lh-ag.com](mailto:vkg@lh-ag.com))