In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 298

BETWEEN:

FIREMINDS OPERATIONS LIMITED

Plaintiff

- and -

BERMUDA INVESTMENT ADVISORY SERVICES LIMITED

Defendant

JUDGMENT

Arbitration Act 1986; Application for termination of arbitration proceedings pursuant to section 39; intentional and vexatious delay; inordinate and inexcusable delay; prejudice and risk to a fair arbitration; application for extension of time to appoint arbitrator pursuant to section 38

Date of Hearing: **30 November 2022**
Date of Ruling: **16 December 2022**

Appearances: **Richard Horseman, Wakefield Quin, for Plaintiff**

Keith Robinson and Kyle Masters, Carey Olsen Bermuda Limited, for Defendant

Judgment of Mussenden J

Introduction

1. This matter appears before me on two applications:
    a. The Plaintiff's ("**Fireminds**") application under section 39 of the Arbitration Act 1986 (the "**Act**") seeking an order terminating an arbitration commenced by the Defendant ("**BIAS**") against Fireminds and prohibiting BIAS from commencing further arbitration proceedings in respect of any matter which is the subject of the terminated arbitration (the "**Termination Application**".)
    b. BIAS's application under section 38 of the Act seeking an order extending the time for appointing an arbitrator and for the commencement of arbitration proceedings ("**Extension Application**").

Background

2. Fireminds caused an Originating Summons to be issued on 23 September 2021 for the Termination Application to terminate arbitration proceedings that had been commenced by BIAS on or about 27 September 2019 (the "**Arbitration Proceedings**") pursuant to section 39(2) of the Act.

3. On 8 October 2021, I granted Fireminds' application for an order to restrain the Arbitration Proceedings pending the determination of the Termination Application

The Evidence

Fireminds' Evidence

Michael Branco - Evidence in Chief

4. Mr. Michael Branco, Fireminds' Chief Executive Officer, swore an affidavit dated 21 September 2021. He stated that by way of a Master Services Agreement (the "**MSA**") and

a Statement of Works (the "**SOW**") both effective as of 12 December 2018, Fireminds was engaged by BIAS to provide it with managed IT services. A dispute arose and subsequently on 27 September 2019, BIAS commenced the Arbitration Proceedings pursuant to Clause 12 of the MSA which provided for arbitration for dispute resolution (the "**Arbitration Agreement**"). BIAS then terminated the contracts effective 27 September 2019.

5. Clause 12 of the MSA provided the procedure and timelines for any arbitration proceedings. Clause 12(c) set out a limitation period "*Either party may commence arbitration by giving Written Notice to the other party demanding arbitration and providing full particulars of the dispute. A Written Notice must in all cases be given within thirty (30) days of the cause of action or dispute arising. Such 30-day period shall be considered a limitation period with the effect that any claim or notice brought after the expiry of such period shall give the other party an absolute limitation defense.*" Clause 12(f) stated "*Notwithstanding the foregoing, the parties agree that the arbitration shall be heard no later than 120 days after the service of the Written Notice.*"

6. Thereafter, starting in October 2019, there were attempts to appoint an arbitrator without success. Marshall Diel & Myers ("**MDM**") acted for BIAS at that stage whilst Wakefield Quin ("**WQ**") always acted for Fireminds in this matter. On 5 November 2019, a without prejudice meeting took place when Fireminds stated that the parties reached an agreement to settle the matter (the "**Settlement Agreement**"). The terms included Fireminds providing BIAS with a $36,000 credit against sums owed to Fireminds, the provision of 100 hours of Fireminds' time (at no cost to BIAS) to effect the migration of the IT services to a new IT supplier (the "**Migration**") and further discussions if additional hours were needed for the Migration. Two days later, on 7 November 2021, BIAS indicated that it had to reconsider matters and alleged that no agreement had been reached as the points were "*subject to contract*".

7. On 5 December 2019, Fireminds issued the credit to BIAS's account in accordance with the purported Settlement Agreement. The amount of the $36,000 credit was more than the $32,842.50 that BIAS claimed in its Points of Claim.

8. The Migration started which required Fireminds, at BIAS's request, to maintain and not disconnect the IT servers holding BIAS's information until the Migration was complete. There was a series of correspondence between the parties about the process and progress of the Migration and sometimes this necessitated correspondence between counsel. On 1 December 2020, Fireminds received notification from BIAS that the Migration was complete. The last communication from MDM to WQ was on 4 March 2020. Fireminds had recorded 97 hours of work on the Migration over approximately 15 months.

9. On 11 August 2021, WQ received a letter from Carey Olsen Bermuda Limited ("CO") indicating that CO had been instructed to take over the matter, that BIAS wanted to proceed to arbitration, its claims now amounting to $107,069.84 remained unresolved and failing an admission of liability, it would write to the Bermuda Bar Association to appoint an arbitrator. WQ replied that a binding Settlement Agreement had been agreed but that even if one had not been reached, any further claims would be time barred.

10. At the hearing of this matter, Mr. Branco gave evidence that he had resigned from Fireminds effective 31 December 2021 and was currently on garden leave with a clause to participate in any litigation whilst on garden leave. He would be released from Fireminds and any obligations effective 31 December 2022.

Michael Branco – Cross-Examination

11. Mr. Branco was cross-examined by Mr. Robinson. He stated that he was seeking opportunities overseas. However, he was prepared to answer to a subpoena to participate in these proceedings or the Arbitration Proceedings.

12. The thrust of his evidence was as follows:
    a. Fireminds did not have a business relationship with the Trott & Duncan law firm ("**T&D**"). However, One Communication, a connected but legally separate company, had sought legal advice from T&D on a company matter.
    b. Fireminds considered Ms. Kiernan Bell to have a conflict as she was a director of a client company.

c. After the meeting of 5 November 2019 between Fireminds and BIAS, he left thinking that they had resolved the matter. When presented with the email dated 7 November 2019 from MDM to WQ about the meeting and challenged that as a result of the wording of paragraphs (d) and (e) about the 100 hours to be provided by Fireminds, Mr. Branco stated that he took the paragraphs to mean that there was disagreement about the number of hours, whether 100 or another amount. He denied that after the 5 November 2019 there were still 'ongoing settlement discussions' noting his use of those words in his affidavit evidence was a reference to whether the hours committed by Fireminds was going to be 100 hours or some other amount of hours, for example 500 hours. He stated that as of 7 November 2019 Fireminds was surprised that there was a reconsideration of the purported Settlement Agreement.

d. The Migration was completed at the end of November 2020. Fireminds had continued to invoice BIAS monthly for service until that time and BIAS had paid those invoices.

e. Mr. Branco stated that at the 5 November 2019 meeting in MDM boardroom, he knew that Tim Marshall was a lawyer there, he thought in semi-retirement but he and his attorneys did not raise any issue of conflict as they did not think that Mr. Marshall was involved in the matter. Later on, in February 2020, he saw an email thread which had copied in Mr. Marshall. He asserted that although Mr. Marshall was not a director of Fireminds, the Fireminds group of companies were all the same business.

f. Mr. Branco conceded that a letter from WQ to MDM dated 20 March 2020 requested the parties to focus on the Migration first and after it was completed they could revisit other issues including conflict of interest and any additional claims. He explained that he was focused on making the customer happy with Fireminds' services.

BIAS's Evidence

Robert Pires – Evidence in Chief

13. Mr. Pires, the Chief Executive Officer and Chief Investment Officer of BIAS, swore an affidavit 26 November 2021. He stated that BIAS is an investment manager licensed to conduct investment business pursuant to the Investment Business Act 2003 and regulated by the Bermuda Monetary Authority ("**BMA**"). Its primary business is managing the assets of individuals and institutions which requires a high level of trust. Its business requires data and information to be managed well and securely. Thus, its information technology ("**IT**") systems are an important part of its business. Mr. Pires stated that the BMA had issued guidance notices in respect of which required BIAS to seek approval prior to outsourcing services, in particular cloud services. Part of the process was for BIAS to carry out a risk evaluation and due diligence on the service provider.

14. Mr. Pires stated that BIAS had not delayed the prosecution of the Arbitration Proceedings in a manner that could be described as intentional, vexatious, inordinate or inexcusable. Rather it was Fireminds that had repeatedly thrown up roadblocks designed to avoid the due prosecution of the matter in a timely manner.

15. Mr. Pires stated that almost from the outset Fireminds failed to meet its obligations under the SOW and the MSA which was dated 13 December 2018 and effective 12 December 2018 for a period of two years. On 30 July 2019 BIAS set out its complaints in a letter before action dated 30 July 2019 ("**LBA**") which called for Fireminds to cure the breaches of contract within 30 days and to pay BIAS the damages for losses it had suffered. Fireminds did neither. Therefore, on 27 September 2019, BIAS instructed its then attorneys, MDM, to give notice of immediate termination of the contract. It also issued a Notice of Arbitration ("**Arbitration Notice**").

16. Mr. Pires stated that after the Arbitration Notice was served, Fireminds took repeated steps to delay the Arbitration Proceedings. Fireminds objected to BIAS's proposed arbitrators on spurious grounds and proposed alternative arbitrators without any proposed terms of appointment. Fireminds failed to engage constructively with the process of finalizing the

appointment of the final proposed arbitrator. After many months, Fireminds argued that BIAS's then legal counsel was conflicted, causing BIAS to seek new counsel which delayed the Arbitration Proceedings and coincided with the Covid-19 shelter-in-place restrictions.

17. Mr. Pires set out the correspondence between the parties. He also referred to the 5 November 2019 meeting and denied that the parties had agreed the Settlement Agreement as the proposed terms were always subject to contract. In respect of the Migration, Mr. Pires stated that the Migration was stifled by Fireminds and the state and age of the IT servers noting failures in implementing security updates. This caused new IT service providers to be delayed in taking on BIAS until the updates were resolved. Mr. Pires stated that he engaged the services of Wayne Nelson to help get the issues resolved. Mr. Nelson was required to perform a number of duties including discovering how the systems and servers worked, replicating processes, testing the processes and decommissioning the old servers. This work had to be done prior to BIAS approaching a replacement IT service provider to engage them in the Migration. He stated that during this period, disruption of business had to be avoided at all costs.

18. Mr. Pires stated that during Mr. Nelson's work, Covid-19 restrictions started which caused people to require technology to work from home. This led to a scarcity of available IT service providers who were working with their own clients to ensure remote working for teams of people and which led to delay of the Migration. Eventually he was able to secure an IT service provider and obtain permission from the BMA on 26 September 2020. Shortly thereafter, the IT provider met with BIAS when they made a plan and the Migration to the new provider started in November 2020. Mr. Pires stated that BIAS was focused purely on the Migration.

19. In respect of further conflicts, Mr. Pires stated that WQ objected to MDM representing BIAS as Mr. Marshall (a former partner of MDM) was previously a director of Fireminds. However, he decided to seek new counsel, a process which took some time as each prospective attorney had to ensure that they had no conflicts with Mr. Branco, Fireminds or One Communications (which owned a significant stake in Fireminds) and all the other

entities connected to Fireminds. Peter Sanderson of Benedek Lewin ("**BL**") was identified and he started to review the file, however he was set to leave BL in or about the fall of 2020. Mr. Pires stated that Mr. Sanderson's concern was that BIAS got control of its data and that Fireminds would not obstruct the Migration.

20. Mr. Pires stated that Fireminds eventually retained CO. He delivered the papers to CO just prior to another Covid-19 work from home guidance issued in early April 2021. Later that summer Mr. Robinson was able to complete a document review of the file and provide BIAS with the advice to progress the arbitration.

21. Mr. Pires stated that Fireminds was invoicing BIAS for services during the period February 2020 to November 2020. BIAS made payments for those invoices.

Robert Pires – Cross-Examination

22. Mr. Pires was cross-examined by Mr. Horseman. The thrust of his evidence was as follows:
    a. He stated that he had received the email proposal to appoint Kiernan Bell but that Fireminds never provided agreement to appoint Ms. Bell. Instead, they had suggested appointing attorney Nathaniel Turner but BIAS did not agree his appointment. He conceded that BIAS did not take any further steps to appoint Ms. Bell and did not ask the President of the Bermuda Bar Association (the "**Bar President**") to appoint Ms. Bell.
    b. In respect of BIAS's duty to proceed with the Arbitration Proceedings he stated that his first duty was to protect the data of his firm and his clients. He also had a duty to the BMA to ensure the data was secure. He stated that his focus was on securing BIAS's data as he was informed by IT service providers that Fireminds servers were out of date. Also, Fireminds were not providing him with requested information. He denied that he intentionally decided not to proceed with the Arbitration Proceedings stating that he had agreed with Fireminds to complete the Migration and then deal with other matters. He agreed that BIAS made no steps to advance the Arbitration Proceedings between November 2019 and June 2020.

c. In respect of the 5 November 2019 meeting, he stated that he did not accept the offer but would consider a proposal in writing.

d. In respect of the WQ letters dated 20 March 2020, 6 April 2020 and 8 May 2020 inquiring about the status of the Migration, he stated that the 20 March 2020 letter was not worthy of a response, that BIAS did not want Fireminds to know what BIAS was doing about the Migration. Further, BIAS did not need Fireminds for the Migration as they would be obstructive.

e. In respect of the $36,000 credit, he stated that he never received any funds and the credit never appeared on an invoice or statement.

f. He stated that Mr. Sanderson had conduct of the file for the period February 2020 – September 2020 but he could not explain why Mr. Sanderson did not keep conduct of the file when he left BL. Further, he agreed that Mr. Sanderson never made any contact with WQ about the matter. During that time BIAS was getting control of its data and not advancing the Arbitration Proceedings.

g. He stated that the Migration was completed in November 2020 but he did not know why he did not advance the Arbitration Proceedings at that point.

h. He agreed BIAS engaged CO in April 2021 and that CO wrote its first letter to WQ in August 2021 with the new claim of $107,069.84. He agreed that the details of the new claim were not provided but he thought that they had been provided. In any event the new claims did not arise from the Migration but pre-dated September 2019. He thought that they might be for legal fees.

The Plaintiff's Case

23. Fireminds' case is that the Court should terminate the Arbitration Proceedings and prohibit further proceedings on the basis that there has been intentional and vexatious delay by BIAS, the delay was inordinate and excusable and that there is a serious prejudice in that it is no longer possible to have a hearing of the matter as Mr. Branco has ended his employment with Fireminds and will finish with them as of 31 December 2022.

24. Fireminds set out the key time periods as follows:

a. September 2019 – December 2019 – Fireminds submitted that the notion that Fireminds was delaying the Arbitration Proceedings during this period should be rejected. The simple solution was that BIAS could have asked the Bar President to appoint an arbitrator pursuant to the MSA. However, BIAS did nothing. Further, it engaged in settlement discussions and reached the Settlement Agreement which was the true reason why it did not proceed with the Arbitration Proceedings.

b. 19 December 2019 – June 2020 – Fireminds submitted that BIAS claims it had engaged Mr. Nelson during this period and who then was resolving various IT matters before moving on to the Migration. Fireminds referred to unanswered March, April and May 2020 letters wherein they were requesting BIAS to have their new IT provider get in touch with them so they could implement the Migration. Fireminds submitted that there was nothing preventing BIAS from getting the Arbitration Proceedings on track while Mr. Nelson carried out his duties.

c. June 2020 – November 2020 – Fireminds referred to this period where BIAS said that it took this period of time to get the Migration underway. Also, BIAS complained during this time that Fireminds had raised a conflict about Mr. Marshall's affiliation with MDM. Fireminds submitted that again there was nothing preventing BIAS from writing to the Bar President to appoint an arbitrator.

d. The time period taken for the search for a lawyer – Fireminds submitted that the explanation about the time taken to secure a lawyer should be rejected as the arbitration pleadings were already drafted and it was a small claim for $32,842.50. Fireminds argued that BIAS had failed to explain why it took so long to find Mr. Sanderson or why he could not continue with the matter when he moved to Beesmont law firm.

e. The time when Mr. Sanderson had conduct of the BIAS matter – Fireminds submitted that Mr. Sanderson did not take any action when he held the matter. BIAS's arguments that at that time they were concerned that Fireminds would obstruct the Migration, should be rejected.

f. April 2021 – 11 August 2021 - The time when CO had conduct of the BIAS matter – Fireminds submitted that it took BIAS eight months to locate new attorneys,

namely CO. It then took Mr. Robinson four months to review the file and provide advice to BIAS to progress the Arbitration Proceedings.

25. Mr. Horseman argued that it took over one year and a half for one of BIAS's attorneys to write formally to WQ to progress the Arbitration Proceedings.

The Defendant's Case

26. BIAS's case is that there has not been intentional and vexatious delay on its part. Further, there had not been inordinate and inexcusable delay on its part which gives rise to substantial risk that it is not possible to have a fair trial or that the delay is such as is likely to cause serious prejudice to Fireminds in the Arbitration Proceedings.

27. BIAS set out key time periods as follows:

    a. The First Time Period (11 October 2019 – 11 November 2019) – BIAS submitted that the parties had until 14 days from the Arbitration Notice on 27 September 2019 until 11 October 2019 to agree the appointment of an arbitrator or to have one appointed by the Bar President. BIAS argued that this time period should be considered to have ended when Ms. Bell provided her terms of appointment on 11 November 2019.

    b. The Second Time Period (December 2019 – November 2020) – BIAS submitted that during this time period the parties worked on the Migration. Also during this time period (in January 2020) the 120-day period during which the Arbitration Proceedings ought to have been heard pursuant to Clause 12(f) of the MSA expired.

    c. The Third Time Period (March 2020 – April 2021) – BIAS submitted that this time period overlaps with the Second Time Period. BIAS was forced to seek new counsel as Fireminds claimed MDM was conflicted for the purposes of pursuing the Arbitration Proceedings.

    d. The Fourth Time Period (April 2021 – September 2021) – CO was instructed to act for BIAS in April 2021 and then in August 2021 wrote to Fireminds demanding

payment of damages, requesting the parties agree to the appointment of an Arbitrator and writing to the Bar President.

The Law

28. Section 39 of the Act provides as follows:

Delay in prosecuting claims

39(1) In every arbitration agreement, unless the contrary be expressly provided therein, there is an implied term that in the event of a difference arising which is capable of settlement by arbitration it shall be the duty of the claimant to exercise due diligence in the prosecution of his claim.

(2) Where there has been undue delay by a claimant in instituting or prosecuting his claim pursuant to an arbitration agreement, then, on the application of the arbitrator or umpire or of any party to the arbitration proceedings, the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further arbitration proceedings in respect of any matter which was the subject of the terminated proceedings.

(3) The Court shall not make an order under subsection (2) unless it is satisfied that—

(a) the delay has been intentional and vexatious; or

(b) there has been inordinate and inexcusable delay on the part of the claimant or his advisers; and that—

(i) the delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the arbitration proceedings, or

(ii) the delay is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings either as between themselves and the claimant or between each other or between them and a third party."

Limitation

29. In respect of the limitation period, noting that an arbitration would not be struck out before the limitation period expired as set out in *Birkett v James*, a short limitation period was relevant to an application under Section 39(2) as stated in *James Lazenby v McNicholas Construction Co. Ltd* [1995] 1 WLR 615 "*... if the parties to an arbitration agreement wish to emphasise the importance of speedy resolution of their disputes, then they must agree to curtail the statutory limitation period of six years for a contractual claim.*" and in *Dera Commercial Estate v Derya Inc; the Sur* [2019] EWHC 1673 where, when parties had contracted for a shorter time period than the six-year period of contractual claims, it stated in the headnote "*Whether or not delay was inordinate would always be a fact-sensitive exercise in each case.*"

30. In *Marshall Diel & Myers v Collingwood Robinson* [2016] SC (Bda) 78 Civ, Hellman J considered a clause in MDM's engagement letter which provided that the client had 30 days in which to dispute any billing. Hellman J ruled that the complaints were time barred by contract stating:

> *"I accept that the Defendant may from time to time have made generalised complaints about the levels of his fees, but I am satisfied that prior to his affidavit of 17th May 2013 he did not question any specific items for which he was billed or dispute that he was liable to pay any of his bills, which he received on a monthly basis. As I find that the Defendant did not question any of his bills within 30 days of receipt he is liable to pay them. That is sufficient to dispose of this case."*

Assessing Delay and Burden of Proof

31. The UK Arbitration Act 1996 ("**UKAA**") provides tribunals governed by that act with the power to dismiss claims on the grounds of inordinate and inexcusable delay. Section 41(3) has almost identical language to section 39(3)(b) of the Act. It provides as follows:

> *(3) If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—*

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent,

the tribunal may make an award dismissing the claim.

32. In *Dera Commercial Estate v Derya Inc; The Sur* [2018] EWHC 1673 (Comm) the English High Court [at para 137] considered the issues applicable to the assessment of determining whether a delay is inexcusable, confirming that the legal burden on the balance of probabilities rests with the party making the application for dismissal. In *Dera* [at para 127] it was also stated that where there are periods of procedural activity and non-activity, it will normally be appropriate for the Court to assess individual periods of delay separately and distinctively, with a view to arriving at a cumulative picture of overall delay.

33. *Dera* [at para 63] also addressed the circumstances where the parties had contracted for a shorter limitation period in an agreement to arbitrate. It found that a claim could be struck out for inordinate delay in such circumstances. However, the Court also stated [at para 64] that while the time period referred to in an arbitration agreement is an important yardstick used for assessing delay, it is not the only one. It stated as follows:

"The length of the relevant limitation period sets the context in which the nature of the period or periods of delay will be assessed, specifically whether the delay overall is inordinate or not. Whether or not delay is inordinate will always be a fact-sensitive exercise in each case.

[65] This is consistent with the decision of Rix J (as he then was) in The Finrose [1994] 1 Lloyd's Rep 559 where he stated (at p. 564):

"... where parties agree or are otherwise subject to a limitation period such as one year, so much shorter than the period of six years which would otherwise apply, it is clearly contemplated that the parties will or ought to proceed with litigation with that dispatch and promptitude inherent in the relevant time scale.""

34. In *Minister of Tourism, Transport and Municipalities v The Allied Trust and Anr* [2017] Bda LR 144, Kawaley CJ (as he then was) [at paras 10 -11] confirmed that his conclusion that the respondents in that application had been guilty of intentional and vexatious delay was based on his findings of the facts.

Vexatious

35. In *Words and Phrases Legally Defined* reference was made to the case of *Lee v Information Comr* EA/2012/0015, 0049, 0085 (unreported) First Tier Tribunal it stated that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure".

36. In *Stroud's Judicial Dictionary 10th Ed*, it stated:

> *"As a matter of ordinary language, the term 'vexatious' is apt to characterize an action, claim, accusation, or complaint, which has been '... instituted or taken without sufficient grounds, purely to cause trouble or annoyance to the defendant (Oxford English Dictionary)' ... However, the term 'vexatious' has a different meaning when used in certain specific legal contexts, of which this case is an example. In such cases, it is unnecessary to consider the motive of the person making the complaint. Authoritative guidance has been given by the courts as to the proper approach in law to be adopted by a decision-maker when assessing whether or not an action, claim, accusation or complaint is 'vexatious'. In Bhamjee v Forsdick [2004] 1 WLR 88, the Court of Appeal explained in paragraph [7] 'The courts have traditionally described the bringing of hopeless actions and applications as 'vexatious', although the adjective no longer appear in the Civil Procedure Rules: compare RSC Ord. 18, r 19(r)(b) with CPR r.3.4(2). In Attorney General v Barker [2000] 1 FLR 759 Lord Bingham of Cornhill CJ, with whom Klevan J agreed, said, at p 7674, para 19, that "vexatious" was a familiar term in legal parlance. He added: "The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process*

of the court, meaning by that a use of the Court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

Analysis of the Plaintiff's Application

37. In my view, the Plaintiff's application to terminate the Arbitration Proceedings should be granted on the basis that the delay was intentional and vexatious pursuant to section 39(3)(a) of the Act.

38. First, I bear in mind that the Notice of Arbitration was served on 27 September 2019. Pursuant to the MSA, the parties had 14 days until 11 October 2019 to agree the appointment of an arbitrator or have one appointed by the Bar President. Further, I calculate that the 120-day period when the Arbitration Proceedings ought to have been heard pursuant to Clause 12(f) of the MSA ended on 25 January 2020.

39. Second, section 39(1) of the Act sets out an implied term that it is the duty of the claimant to exercise due diligence in the prosecution of his claim. Thus, BIAS had the duty to exercise due diligence in progressing the Arbitration Proceedings.

40. Third, I have considered the circumstances of appointing an arbitrator. Fireminds rightly concedes that it is not relying on the period when attempts were made to appoint Mr. Turner or Mr. Duncan as arbitrator. By 11 November 2019, Ms. Bell had confirmed that she was not conflicted. BIAS argued that Fireminds did not reply to that proposal. However, in my view, the duty was always on BIAS to progress the Arbitration Proceedings and thus BIAS should have written to the Bar President to have Ms. Bell appointed. Thus, in not doing so, BIAS contributed to the delay in this matter which was intentional.

41. Fourth, I have considered the arguments that Fireminds were delaying the proceedings by objecting to MDM as counsel for BIAS. Mr. Pires' evidence was that rather than fight this issue he sought other counsel, a process which took considerable time. I note that at this stage the pleadings were already drafted and the claim was reasonably small in the amount

of $32,000. Also, by this time the 120-day time period for hearing the Arbitration Proceedings had passed.

42. In my view, there is no acceptable explanation why BIAS took so long to retain Mr. Sanderson. Further, there is no acceptable evidence why Mr. Sanderson, once retained, did not take steps to progress the Migration. In my view, Mr. Pires' evidence that Mr. Sanderson was concerned that BIAS get control of its data and that Fireminds would not obstruct the Migration was not a proper reason for BIAS to not progress the Arbitration Proceedings by writing to the Bar President to request the appointment of an arbitrator. Significantly, Mr. Pires made it clear on cross-examination that BIAS did not need Fireminds for the Migration and did not want it to know what it was doing in respect of the Migration. The question then begs why not get on with the Arbitration Proceedings? Thus, again BIAS was contributing to the delay in the Arbitration Proceedings which was intentional.

43. I have considered that CO were retained in April 2021 with Mr. Robinson writing a letter in August 2021 to restart the Arbitration Proceedings. I accept that Mr. Robinson was required to deal with a personal matter during part of that time. In my view, the circumstances of the Covid-19 shelter in place and work from home were mitigated by the use of technology to progress matters. Of course, by this time the 120-day time period for hearing the Arbitration Proceedings had long passed by more than a year. Thus, I consider this period when CO had conduct to be of *de minimus* impact.

44. Fifth, I have considered the arguments of BIAS that it was concerned with the Migration and that Fireminds had acquiesced to dealing with the Arbitration Proceedings once the Migration was complete. BIAS relies on the WQ letter dated 20 March 2020 wherein WQ states that the parties should solely focus on the migration. I do not agree with those arguments. It seems clear to me that upon close consideration of that letter, WQ was referring to extending the limitation period for "new claims" that arose after 5 November 2019.

45. Sixth, I have considered Mr. Pires evidence that he was focused on a number of issues, including the Migration, securing the data, addressing the state of the servers, securing an IT person and obtaining information from Fireminds. In my view, BIAS should have been equally concerned about the Arbitration Proceedings that it had started, particularly in light of the arbitration clause in the MSA and the implied duty that he had to progress the Arbitration Proceedings. However, the effect of Mr. Pires' decision was that he intentionally decided not to progress the Arbitration Proceedings. I do not accept this position as excusable. By doing nothing in respect of the Arbitration Proceedings, in particular there being no communication with Fireminds since March 2020, the inference is that BIAS was not pursuing them. Thus, over the passage of time, Fireminds was justified in assuming that the arbitration was at an end.

46. Seventh, I have considered the circumstances of the new claims as evidenced by the demand for the payment of damages of $107,069.84 dated 11 August 2021 as increased from the original claim of $32,842.50. In my view, in applying the principles stated in *Marshall Diel & Myers v Collingwood Robinson* the new claims are time barred as the MSA set out that written notice had to be given within 30 days of the cause of action or dispute arising. On 1 December 2020, BIAS informed Fireminds that the Migration was completed and thus any new claims arising out of the Migration would have had to have been communicated in writing to Fireminds by 31 December 2020. Mr. Horseman complained that there has been no explanation for the new claims. Mr. Pires on cross-examination stated that they were for legal fees which I note would actually be a matter for costs rather than damages. In any event, the new claims to date remain unidentified. In my view, it would serve no useful purpose for the Arbitration Proceedings to continue in respect of the new claims.

47. Eighth, in my view, in applying *Birkett v James* and *Lazenby v McNicholas Construction Co. Ltd.* the short limitation period is relevant to this application. The limitation periods had the purposes of expeditiously identifying any claims within 30 days and then getting them resolved within 120 days as the parties were commercial entities who in normal circumstances were in a continual contractual relationship with each other. It would be to no benefit to the parties to have unidentified or unresolved issues hanging about in limbo

as they proceeded in their commercial obligations to each other. I rely on the principles set out in *Dera* that the length of the limitation period is an important factor when assessing delay along with the fact-sensitive exercise in determining whether the delay is inordinate. I also rely on *The Finrose* where in a case where there is a 30-day limitation period and 120-day determination period to state that BIAS should have been acting with dispatch and promptitude inherent in the circumstances of the Arbitration Proceedings. Thus, I do not accept the focus on the Migration as a satisfactory excuse to not move ahead with the Arbitration Proceedings.

48. Ninth, I have considered the facts in the key time periods put forward in both cases. In applying the principles of *Dera* I have examined the periods of procedural inactivity and non-activity and have assessed the time periods separately and distinctly as set out above. In my view, the cumulative picture of overall delay lead me to the conclusion that there was procedural inactivity and thus inordinate delay from the period of 11 November 2019 (the First Time Period as described by CO) to April 2021 (the end of the Third Time Period). Also, in my view, the delay during this period was intentional and inexcusable.

49. Tenth, I have considered the circumstances of the delay being vexatious in this matter. The MSA set out several critically important provisions, namely (a) that there was a 30-day limitation period from the date of the cause of action which was an absolute limitation defence; and (b) the parties agreed that the arbitration would be heard no later than 120 days after the Arbitration Notice had been served. In my view, BIAS breached the provisions intentionally causing delay when they should have been acting with some promptitude in respect of the Arbitration Proceedings. Also, BIAS breached the provisions in an inappropriate and improper use of the arbitration procedures by focusing on all the issues associated with the Migration while intentionally ignoring the arbitration process thus causing delay. In my judgment, in following *Lee v Information Comr,* the delay was vexatious. Further, in applying the principles of *Attorney General v Barker*, in my view, the delay was vexatious in that its effect is to subject Fireminds to the inconvenience, harassment and expense of an arbitration which by all factors had gone to sleep and which is beyond the time period of 120 days for determination several times over.

50. Eleventh, in assessing all the circumstances in this case, whilst I have found the delay to be inordinate and inexcusable on the part of BIAS, I do not find that such inordinate and inexcusable delay gives rise to a substantial risk that it is not possible to have a fair trial or there is a serious prejudice to Fireminds of the issues in an arbitration proceeding. This is primarily for the reasons that this is a well-documented case and Mr. Branco can be available for an arbitration hearing.

Application to restrain any further proceedings arising out of the MSA.

51. Twelfth, I refer to my earlier Ruling in this matter when I held that the Court has the jurisdiction to restrain arbitration proceedings being conducted in breach of contract. Again I rely on *Bermuda Cablevision v Greene* where Kawaley J agreed with Mr. Duncan, counsel in that case, that the nature of the right the plaintiff was seeking to protect may result in different legal criteria applying from the general principles. He set out the example of arbitration proceedings and then referred to his judgment in *Professional Services Insurance Company Limited v Gerlin-Konzern Allegemeine Versicherungs* where he also accepted Mr. Hargun's submission that the Court may restrain the pursuit of arbitration proceedings being conducted in breach of contract.

52. In my view the Plaintiff has a contractual right which is being breached, namely (a) the contractual right that a written notice must in all cases be given within 30 days of the cause of action or dispute arising – where such 30-day period shall be considered a limitation period with the effect that any claim or notice brought after the expiry of the 30-day period shall give the other party an absolute limitation defence. In my view, in respect of the new claims, this Court could and should intervene to protect the contractual right of the absolute limitation defence. Therefore, I will grant the application to prohibit BIAS from commencing further arbitration proceedings in respect of any matter which is the subject of the Termination Application.

Conclusion

53. For the reasons above:

    a. I grant Fireminds' Termination Application on the grounds that the delay has been intentional and vexatious;

    b. I grant Fireminds' application for an order prohibiting BIAS from commencing further arbitration proceedings in respect of any matter which is the subject of the terminated Arbitration Proceedings; and

    c. I decline BIAS's Extension Application.

54. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of Fireminds against BIAS on a standard basis, to be taxed by the Registrar if not agreed.

Dated 16 December 2022

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT