In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 298

BETWEEN:

FIREMINDS OPERATIONS LIMITED

Plaintiff

- and -

BERMUDA INVESTMENT ADVISORY SERVICES LIMITED

Defendant

RULING

Date of Hearing: **28 September 2021**
Date of Ruling: **8 October 2021**

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

Keith Robinson, Carey Olsen, for Defendant

RULING of Mussenden J

Introduction

1. The Plaintiff caused an Originating Summons to be issued on 23 September 2021 (the "**Termination Application**") seeking an order to terminate arbitration proceedings that had been commenced by the Defendant on or about 27 September 2019 (the "**Arbitration**

Proceedings") pursuant to Section 39(2) of the Arbitration Act 1986 (the "**Act**") and to restrain the Defendant from proceeding to appoint an arbitrator until the Termination Application had been determined.

2. By a Summons dated 23 September 2021 the Plaintiff now seeks an order that the Defendant be restrained from pursuing the Arbitration Proceedings until the determination of the Termination Application.

Background

Affidavit of Michael Branco, Chief Executive Officer of the Plaintiff

3. Mr. Michael Branco, the Plaintiff's Chief Executive Officer, in an affidavit sworn on 21 September 2021, provided the background of the matter. By way of a Master Services Agreement (the "**MSA**") and a Statement of Works (the "**SOW**") both effective as of 12 December 2018, the Plaintiff was engaged by the Defendant to provide it with managed IT Services. A dispute arose and subsequently on 27 September 2019 the Defendant commenced the Arbitration Proceedings pursuant to Clause 12 of the MSA which provided for arbitration for dispute resolution (the "**Arbitration Agreement**"). The Defendant then terminated the contracts effective 27 September 2019.

4. 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*." The Plaintiff contends that the Defendant's claims are time barred.

5. Thereafter, starting in October 2019 there were attempts to appoint an arbitrator without success. Marshall Diel & Myers ("**MDM**") acted for the Defendant at that stage whilst Wakefield Quin always acted for the Plaintiff in this matter. On 5 November 2019 a without prejudice meeting took place when the Plaintiff states that the parties reached an agreement to settle the matter (the "**Settlement Agreement**"). The terms included the Plaintiff providing the Defendant with a $36,000 credit against sums owed to the Plaintiff, the provision of 100 hours of the Plaintiff's time (at no cost to the Defendant) 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 the Defendant indicated that it had to reconsider matters and alleged that no agreement had been reached as the points were "*subject to contract*".

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

7. The Migration started which required the Plaintiff, at the Defendant's request, to maintain and not disconnect the IT servers holding the Defendant'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 the Plaintiff received notification from the Defendant that the Migration was complete. The last communication from MDM to Wakefield Quin was on 4 March 2020. The Plaintiff had recorded 97 hours of work on the Migration over approximately 15 months.

8. On 11 August 2021 Wakefield Quin received a letter from Carey Olsen indicating that Carey Olsen had been instructed to take over the matter, that the Defendant 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. Wakefield Quin replied that the binding Settlement Agreement had been agreed but that even if one had not been reached, any further claims would be time barred.

Updated Background since the Branco Affidavit sworn 21 September 2021

9. The Defendant informed the Court that since the date of the Branco affidavit it had asked the Bermuda Bar Association to immediately appoint an arbitrator. It had also proposed to the Plaintiff that it make a stay application to the arbitrator once appointed, which it would not oppose (the "**Undertaking**"). However, the Plaintiff wrote to the Bermuda Bar Association requesting it not appoint an arbitrator.

10. The Plaintiff also wrote to the Defendant suggesting a specific arbitrator if the Termination Application was unsuccessful. The Defendant replied that the Court does not have jurisdiction to grant a stay of the Arbitration Proceedings and reiterated its Undertaking to not oppose any application for a stay made to an appointed arbitrator.

The Plaintiff's Application

11. The Plaintiff submitted that its Termination Application was based on sections 39(2) and (3) of the Arbitration Act 1986 (the "**Act**") which empowered the Court to terminate an arbitration and prohibit further arbitration proceedings if there had been delay.

> *"39(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.*
>
> *39(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."

12. The Plaintiff submitted that having filed the Originating Summons on 21 September 2021 it was hoped there would be no need for any interim relief. However, Carey Olsen had written to the Bermuda Bar Association inviting the President of the Bar to appoint an arbitrator. Carey Olsen had explained that it would be an efficient use of time in the event the Termination Application was unsuccessful and that the appointed arbitrator would have the jurisdiction pursuant to Section 20(3) of the Act to order an interim stay of the arbitral proceedings pending the disposal of the Termination Proceedings. Section 20(3) states:

"An arbitrator or umpire shall, unless a contrary intention is expressed in the arbitration agreement, have power to administer oaths to, or take the affirmations of, the parties to and witnesses on a reference under the agreement and shall also have power to adjourn the arbitration proceedings to such place as he thinks fit."

13. Mr. Horseman submitted that there would be significant prejudice to the Plaintiff by agreeing with the course proposed by Carey Olsen for several reasons including that the Plaintiff would be taking steps in the Arbitration Proceedings which it says should be terminated, an arbitrator would want to be retained on accepting the appointment, the Plaintiff would have to make an application to the arbitrator incurring cost and the arbitrator would have to consider whether the termination Application had any merit. Thus there would be parallel proceedings in both the Court and the Arbitration Proceedings at considerable expense to the parties with a risk of different decisions being made. Also, although the Defendant gave its Undertaking, there is no guarantee that the arbitrator would

stay the proceedings. Further, Mr. Horseman questioned whether an arbitrator has the power to grant a stay noting that Section 20(3) of the Act grants the arbitrator a power to adjourn arbitration proceedings to such place as he thinks fit. In light of the facts of the matter, the Plaintiff was seeking an interim injunction to stay the matter pending the determination of the Termination Application.

14. Mr. Horseman submitted that the Court has the power to restrain an arbitration from proceeding in breach of contract. He contended that the Defendant is attempting to pursue the arbitration in a clear breach of the contractual provision where the parties agreed that the arbitration will be heard within 120 days but where the Plaintiff had asserted that there was a Settlement Agreement, accepted the financial credit and 97 hours of free work from the Plaintiff in respect of the Migration. Also, he submitted that the Defendant was in breach of Section 39(1) of the Act that imported into the contract an implied term that mandated that it was "… *the duty of the claimant to exercise due diligence in the prosecution of his claim*."

15. Mr. Horseman relied on a number of cases to support his application that the Defendant is in breach of the implied term in addition to the express terms of the contract and that it has failed miserably to exercise due diligence in the prosecution of the claim.

16. 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.*" In light of these authorities, the Plaintiff submitted that it had a strong case for termination.

17. Mr. Horseman submitted that damages would not be an adequate remedy in this case where the Plaintiff had to expend effort and resources in parallel proceedings stating it would be a colossal waste of time, effort and money for the parties to have to proceed to arbitration. Further, he submitted that the Plaintiff could be at a disadvantage if he acceded to the Defendant's request to appoint an arbitrator and then make an application to the arbitrator, thus failing to take steps to stay the arbitration having submitted to the jurisdiction of the arbitrator. He argued against what he called the Defendant's "*Trojan Horse*" tactic to bait the Plaintiff into the Arbitration Proceedings. He relied on *Bermuda Cablevision v Greene* [2004] Bda LR 18 where, the plaintiff having nominated an arbitrator, Kawaley J stated "*They did not, as they could have done, challenge the right of the Minister to establish a Tribunal on the grounds that there was no applicable dispute capable of engaging the provisions of the 1992 Act. The objection to the Tribunal's jurisdiction was not seemingly raised until May 2004, when the Originating Summons herein was filed.*" Further he relied on findings by Kawaley J as follows: "*The time for challenging the validity of the reference, in my view, was when the Plaintiff was asked to nominate its tribunal member…*".

18. Mr. Horseman also relied on the same case *Bermuda Cablevision v Greene* where Kawaley J referred to the principles in ordering a stay of arbitration proceedings stating:

> *"The statutory basis of this Court's jurisdiction is contained in the following provisions of Section 19 of the Supreme Court Act 1905*:
>
> > *"(c) an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just; and if any injunction is asked for either before, at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim the right to do the act*

sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable;"

"...Another example is where the parties have contracted to resolve a dispute in a particular way, such as by arbitration, and an injunction is sought to either restrain Court proceedings taken in breach of an arbitration agreement or, alternatively, to restrain a party to a pending arbitration from pursuing those arbitral proceedings either (a) on the grounds that the tribunal substantively lacks jurisdiction or (b) on the grounds that the respondent to the injunction is pursuing the arbitration in a manner inconsistent with the contractually agreed procedure. As regards the latter case, I described the relevant principles at pages 17-18 of my judgment in Professional Services Insurance Company Limited v Gerlin-Konzern Allegemeine Versicherungs as follows:

"I accept Mr. Hargun's submission that this Court may restrain the pursuit of arbitration proceedings being conducted in breach of contract, but that brings into play the basis on which injunctive relief can properly be granted. .... However, the most relevant case cited by the Plaintiff's Counsel establishes that an injunction may be granted when a party is being compelled to arbitrate otherwise than in accordance with the contractually agreed arbitral rules. In such a case, 'the question for the Court to consider is whether the Plaintiff is seeking to restrain a breach of the arbitration contract: Compagnie Europeene v Tradax [1986] 2 Llyoyds Rep 301 at 306, per Hobhouse, J. ..."

19. Mr. Horseman argued that although the present case was not strictly a jurisdiction matter, it is concerned with a breach of contract in respect of the arbitration being conducted within 120 days and the implied term as well as the requirement of the arbitrator being appointed within 14 days of the commencement of the arbitration and if not so appointed, the matter referred to the President of the Bermuda Bar Association for such an appointment. He relied on the case of *Bermuda Cablevision v Greene* where Kawaley J stated "*The Court will consider the wider implications for the administration of justice for a tribunal which*

this Court is charged with supervising to be allowed to pursue proceedings in cases where the tribunal very arguably lacks jurisdiction."

20. In respect of an arbitration proceeding while the Termination Application was pending in Court, Mr. Horseman again relied on *Bermuda Cablevision v Greene* where Kawaley J stated "*I accept this submission as being fundamentally sound. In my view, in this factual context, the need to prove loss which damages cannot compensate does not as such arise, and the first stage of the American Cynamid does not apply.*" and *"… it would be bordering on abuse of the process of this Court for the BIU to be permitted to pursue this matter on the 1st Defendant's behalf while it is simultaneously being considered by this Court.*" Mr. Horseman also relied on the Overriding Objective in that it makes no sense to have ongoing parallel proceedings when the Termination Application should be adjudicated first.

21. Mr. Horseman submitted that whereas in England the power to terminate arbitration proceedings is vested in the arbitrator, in Hong Kong and Bermuda, the legislation was similar in that the power to terminate arbitration proceedings for want of prosecution was granted to the Court and not the arbitrator. Therefore, once the Court was seized of the matter, the Court had the power to restrain the Arbitration Proceedings from proceeding any further until the Termination Application before it was determined, otherwise it would be ludicrous for an arbitrator to barrel ahead while a Termination Application was pending and the Court had no power to restrain the arbitrator. Mr. Horseman relied on the case of *Professional Services Insurance Company Limited v Gerlin-Konzern Allegemeine Versicherungs* [2003] L.R. 55 where a defendant applied to set aside an ex parte injunction restraining the defendant from pursuing or taking any further steps in the arbitration commenced by the defendant on the basis that the Court had no jurisdiction to order a stay. Mr. Horseman submitted that Kawaley J made it clear that the Court has a jurisdiction to order a stay of arbitration proceedings. He cited a number of findings of Kawaley J as follows:

> *"This does not mean, however, that this Court should determine such legal issues where there is no basis for properly concluding that its intervention is genuinely*

required because the agreed arbitration procedure is not being followed. [page 17 at line 20]

While it is true that the Bermuda Court may have some supervisory role to play should the arbitral process demonstrably go astray, I would be permitting a coach and horses to ride through the contractually agreed dispute resolution procedure for this Court to grant injunctive relief on these facts. As to this crucial issue, I find that there is no serious issue to be tried. I accept Mr. Woloiecki's submission that there is no serious issue to be tried, but not on his primary jurisdictional ground. [page 18 line 22]

"In the special context of injunctions to restrain proceedings in breach of an arbitration agreement or, as here, to restrain arbitration proceedings allegedly being pursued in breach of the arbitration agreement, the Plaintiff must in my view demonstrate an arguable case of contractual breach. As Hobhouse, J., observed in the Compagnie Europeene case at page 307: "The final point I have to consider is whether the remedy of injunction is appropriate. If it is the only way of ensuring that the arbitration contract is not broken then convenience and principle both suggest that it is the appropriate remedy". In my view this is an inappropriate case for injunction relief because the Plaintiff has failed to establish an arguable case that the arbitration agreement is being breached and/or that an injunction is the only effective remedy for any potential breach that might occur." [page 18 line 30]

22. Finally, Mr. Horseman submitted that as the Plaintiff had agreed the choice of an arbitrator in the event that the Termination Application was unsuccessful, the Defendant could have simply stood down from appointing an arbitrator pending the determination of the Termination Application. However, the Defendant was attempting the "*Trojan Horse*" bait tactic to get the Plaintiff to take steps in the Arbitration Proceedings whilst proposing the Undertaking.

The Defendant's Reply

23. The Defendant opposed the application for a stay for several reasons. First, the Defendant submitted that the Court had no jurisdiction to grant a stay as the law was clear that there is no statutory power under Section 19 of the Supreme Court Act 1905 or inherent jurisdiction to grant an order restraining arbitration where there is an enforceable and binding arbitration agreement and where an appointed arbitrator is capable of ordering a stay.

24. Mr. Robinson argued that the start point was that the Court had no power to issue an injunction restraining a party from proceeding beyond the agreement to refer, even where the arbitration proceeding may be futile and vexatious. He relied on the case of *The North London Railway Company v The Great Northern Railway Company* (1883) 11 Q.B.D. 30 where the Court of appeal decided that no injunction could be granted to restrain a purported arbitration on the grounds that the dispute fell outside the terms of the arbitration agreement, and the tribunal had no jurisdiction.

25. He also relied on the case of *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*. [1981] A.C. 909 (1981) which held that (i) the High Court (and by analogy the Supreme Court) has no inherent jurisdiction to supervise the conduct of arbitrations analogous to its power to control inferior tribunals, and (ii) its power to grant injunctions restraining arbitrations are limited to cases where it can be shown that proceeding with the arbitration would be a breach of a legal or equitable right of the Plaintiff. Lord Diplock considered that there had to be a legal right which was infringed or threatened to justify granting of an injunction, and said that injunctions had been granted when the arbitration agreement relied upon was void or voidable ab initio (e.g. for fraud, mistake, ultra vires, or want of authority), and when the arbitrator becomes disqualified by bias.

26. Mr. Robinson submitted that an arbitrator would be competent to rule on all matters between the parties including the limitation issues and contractual exclusions of liability alleged by the Plaintiff.

27. Second, the Defendant submits that even if there was jurisdiction to grant the injunction, then it should not be granted in any event. The Defendant argued that in England and Wales, the Supreme Court has jurisdiction to grant an anti-arbitration injunction in respect of a domestic arbitration pursuant to Section 37 of the Senior Courts Act 1981 without reference to any underlying breach of the legal rights of the Plaintiff. This was because the law had been modified following the enactment of the Arbitration Act 1996 (the "**UK Act**") and specifically section 72(1)(c). Mr. Robinson referred to *Gee on Commercial Injunctions 7th Ed*, which explained that Section 72(1)(c) of the UK Act allows the applicant to question "*what matters have been submitted to arbitration in accordance with the arbitration agreement*" and to do so *"…by proceedings in the Court for a declaration or injunction or other appropriate relief*" and the effect of that section is to reverse the actual decisions in *The North London Railway Company v The Great Northern Railway Company* and *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*. cases, both which remain applicable in Bermuda and restrict the ability to grant injunctions as set out above.

28. The Defendant submitted that, even if the jurisdiction to make the order existed, it should not be granted since Gee also explained as follows:

> *"There is jurisdiction under s.37 to restrain an English arbitration, but its exercise is constrained by s.1(c) of the Arbitration Act 1996, the policy of non-intervention by the court underlying the Act, and by the consideration that a court will not grant an injunction to restrain an arbitration when the applicant is bound by an arbitration agreement which applies. The jurisdiction includes where the grounds on which an injunction is sought are based on the defendant having acted vexatiously or oppressively or unfairly, or by an interim injunction where there is a pending challenge to an award under s.67 or s.68. Usually the arbitrators will have power to adjourn or stay arbitral proceedings and if the applicant has agreed to arbitration then these are matters which ought to be considered by them."*

29. Finally, Mr. Robinson submitted that the same principle of non-intervention in relation to arbitration is embodied in Section 7 of the Act as follows:

> ***"Staying court proceedings where there is submission to arbitration***
>
> *7 If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."*

Analysis of the Plaintiff's Application

30. In my view, the Plaintiff's application for a stay of the Arbitration Proceedings pending determination of the Termination Application should be granted for several reasons. First, I disagree with the Defendant's contention that the Supreme Court does not have jurisdiction to grant injunctive relief in arbitration proceedings. I rely on the findings of Kawaley J in *Bermuda Cablevision v Greene* where he stated the statutory basis for the Court's jurisdiction to grant injunctive relief is contained in Section 19(c) of the Supreme Court Act 1905 as set out above. Also, he stated that "*The Applicant for an interlocutory injunction must accordingly demonstrate that the injunction is required to prevent the invasion of some legal or equitable right possessed by the Applicant*." citing the general rules in the *American Cyanamid* case.

31. Second, in my view, the Court has the jurisdiction to restrain arbitration proceedings being conducted in breach of contract. 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.

32. Therefore, in my view the Plaintiff has several contractual rights which are arguably being breached: (a) the contractual right in the Arbitration Agreement to bring the Termination Application pursuant to section 39(2) and (3) of the Act which in my view implies having it determined by the Court without further steps being taken in the Arbitration Proceedings; (b) the contractual right in respect of the express term that the Arbitration Proceedings would be heard within 120 days; and (c) the contractual right of the imported implied term that the Defendant would exercise due diligence in the prosecution of his claim pursuant to section 39(1). In my view, this Court could and should intervene to protect those contractual rights. Although the Defendant argues that the express terms of 120 days to complete the Arbitration Hearings and the imported implied term are issues to be determined by an arbitrator and should not be considered as grounds for an injunction, in my view, even if that was the case, those contractual terms will still be the basis for the ground that the Plaintiff has a contractual right to have the Termination Application heard and determined by the Court without further steps being taken in the Arbitration Proceedings.

33. Therefore, in respect of the questions to be considered by the Court as posed by Kawaley J in *Professional Services Insurance Company Limited v Gerlin-Konzern Allegemeine Versicherungs*, in my view, the Plaintiff is seeking to restrain several breaches of the Arbitration Agreement. Further, I consider that this is an arguable case of contractual breaches and there are serious issues to be tried because it will determine whether the Arbitration Proceedings will continue or be terminated.

34. Third, in my view, there is serious prejudice against the Plaintiff in having to incur time, effort and costs in taking further steps in the Arbitration Proceedings when there is a

possibility that they can be terminated. The objective of the Termination Application is to bring the matters to a halt, and hopefully as soon as the Court could hear and determine the matter. It follows, that implied in that objective is that there should be no further steps taken in the Arbitration Proceedings. If the contractual right to have the Termination Application determined without further steps being taken was not respected, then it seems to me that the Defendant would be able to continue at will to prosecute the Arbitration Proceedings in the face of the parallel Termination Application. In this case, the Defendant has given the Undertaking, however, that may not always be obtained in other arbitration cases where there was an application to terminate it. Therefore, it seems absurd that the Defendant could defeat the very objective of the Termination Application by advancing the Arbitration Proceedings. Practically speaking, it can be envisaged that a robust arbitrator with available time could very well hear and determine the Arbitration Proceedings, with all its associated time, effort and costs, before the Court, with a busy schedule, could determine the Termination Application. Can it be said that this Court cannot take steps to restrain such likely conduct? In my view, it would be proper for the Court to intervene on this basis to restrain the Arbitration Proceedings.

35. Fourth, in my view, an arbitrator does have the power under Section 20(3) to adjourn the arbitration proceedings as he thinks fit. It is likely that in this case, an application by the Plaintiff to a reasonable arbitrator to stay the matter pending the determination of the Termination Application along with the Undertaking, would be granted. However, I agree with the Plaintiff that there is no guarantee of a stay by an arbitrator and further that it should not have to be put to the cost of retaining an arbitrator, making an application for a stay and enduring the risk of the arbitrator declining a stay.

36. Fifth, I have considered the policy of non-intervention in relation to arbitration proceedings. In my view, the Gee extract on section s.1(c) of the UK Act and section 7 of the Act support my view that it is appropriate to grant a stay of the Arbitration Proceedings. The parties agreed to submit their dispute to the Arbitration Proceedings which includes the limitation period and other contractual issues. The Termination Application is for the Court to determine and as such cannot be for the arbitrator. On that basis, granting a stay

is not inconsistent with the policy of non-intervention. Further, by way of comment, it seems to me that a sense of reciprocity should have some bearing between the Court and arbitration proceedings in that whilst the Court will abide by the policy of non-intervention to allow arbitration to proceed without Court interference, when there is an application to terminate the arbitration before the Court, the arbitration should yield to the Court without further progress pending judgment.

37. Sixth, I have given consideration to the Overriding Objective of enabling the Court to deal with this case justly taking into account saving expense, the amount of money involved, and dealing with the case expeditiously and fairly. I have also borne in mind the Court's duty of active case management including encouraging the parties to cooperate and deciding the order in which issues are to be resolved. In my view, these factors generally support my views as set out above that I should grant the order to stay the Arbitration Proceedings pending the determination of the Termination Application. If the Termination Application is not successful then the Arbitration Proceedings can proceed.

38. Seventh, in light of my findings above, in my view, the remedy of injunction is appropriate because the Plaintiff has established an arguable case that the Arbitration Agreement is being breached in contract and that the injunction is the only effective remedy for any such potential breaches. I am not satisfied that the Defendant's Undertaking is an effective remedy as it entails a furtherance of the very Arbitration Proceedings that the Plaintiff desires to terminate.

Conclusion

39. For the reasons above, I grant the Plaintiff's application for an order to restrain the Arbitration Proceedings pending the determination of the Termination Application.

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

Dated 8 October 2021

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