IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *UMS Solutions, Inc., v. Cornell,*
2023 BCSC 214

Date: 20230213
Docket: S196349
Registry: Vancouver

Between:

UMS Solutions, Inc. doing business as Universal Imaging

Plaintiff

And:

Brad Cornell

Defendant

Before: The Honourable Madam Justice Morellato

Reasons for Judgment
In Chambers

Counsel for the Plaintiff:	Lana Tsang
Counsel for the Defendant:	David L. Cayley
Place and Dates of Hearing:	Vancouver, B.C. May 18, 2022 August 29, 2022 September 7, 2022
Place and Date of Judgment:	Vancouver, B.C. February 13, 2023

I. INTRODUCTION

[1] The defendant, Mr. Brad Cornell, seeks an order dismissing this action for want of prosecution and for costs.

[2] The plaintiff, UMS Solutions Inc., doing business as Universal Imaging ("UMS Solutions"), sells, installs and services digital radiography and ultrasound equipment. It is a corporation operating under the laws of the State of Delaware in the United States, with a place of business in Bedford Hills, New York. UMS Solutions alleged that Mr. Cornell breached an agreement as their sales representative and brought their dispute before an arbitrator in New York. The arbitrator found in favour of UMS Solutions in April 2017 and the arbitration award was later confirmed by a New York Court judgment on April 12, 2019 ("2019 New York Judgment").

[3] UMS Solutions filed its Notice of Civil Claim on June 3, 2019, in British Columbia ("2019 B.C. Action" or "this Action"), seeking to enforce the 2019 New York Judgment against Mr. Cornell. It is the 2019 B.C. Action that the defendant seeks to dismiss in this application.

[4] Following UMS Solutions' filing of this 2019 B.C. Action, further proceedings continued in New York. Mr. Cornell brought a motion on September 24, 2019, to set aside the 2019 New York Judgment. On August 24, 2021, Mr. Cornell's motion to set aside the 2019 New York Judgment was dismissed by a New York court. Mr. Cornell filed this application for want of prosecution in November 2021.

[5] UMS Solutions opposes Mr. Cornell's application to dismiss this Action. It submits that any alleged delay was not inordinate. Further, it submits that if there was any delay, it was excusable, did not cause serious prejudice to Mr. Cornell in presenting his defence and, on balance, justice does not require that this Action be dismissed.

II. BACKGROUND FACTS

[6] Mr. Cornell entered into an agreement with UMS Solutions as a sales representative on or about December 15, 2014 ("Agreement"). The Agreement

included a clause dealing with the governing law and choice of forum, which provided that disputes between the parties were to be addressed exclusively through the American Arbitration Association in New York City:

> This Agreement will be governed by, and construed in accordance with, the internal laws of the State of New York, without regard to its choice of law principles. The parties hereby irrevocably consent to the exclusive jurisdiction of, and venue in, the American Arbitration Association in New York City, the arbitration shall be governed by the then current rules of the AAA for Commercial Litigation for the purposes of adjudicating any matter or dispute arising from, related to or in connection with his Agreement or the Sales Rep's provision of service to the Company.

[7] On March 31, 2016, UMS Solutions filed a Demand for Arbitration with the American Arbitration Association. It alleged that Mr. Cornell had breached the terms of the Agreement by working for a competitor, misappropriating UMS Solutions' business opportunities, and not returning certain equipment.

[8] On April 22, 2016, Mr. Cornell acknowledged UMS Solutions' Demand for Arbitration and he indicated to the International Case Director of the American Arbitration Association that he intended to retain counsel for the arbitration.

[9] In a May 16, 2016 letter to the International Case Director of the American Arbitration Association, Mr. Cornell stated that he was "open to the thought of mediation but feels it would not be effective." He acknowledged that "arbitration would be the next likely step in resolving this matter," but he also advised he "will not be physically available to leave the Vancouver, B.C. area as [he is] the primary caregiver of both an un-well child and elderly parent."

[10] In this May 16, 2016 letter, Mr. Cornell also submitted that he was "hired to perform sales duties based on $120,000.00 USD [annual] wage plus expenses, car allowance and commissions". He submitted he was to perform the duty of General Manager of Sales, selling digital X-ray equipment in the "veterinary marketplace." He asserted that during his tenure with UMS Solutions, he was not given the tools to perform his duties and often was not compensated for the "sales [he] was involved in." He explained that his "base wage was reduced significantly by Mr. Brunelli

without just cause and [his] commission and expenses were not paid in many months." Mr. Brunelli was the Founder and Chief Executive Officer of UMS Solutions.

[11] Mr. Cornell's May 16, 2017 letter also stated:

> My employment was ended via constructive dismissal due to harassment, lack of payment for wages, commissions and expenses endured. I have since started an Employment Standards Act [proceeding] in the Province of British Columbia to claim for wages, commissions and expenses due as well as a claim for constructive dismissal.

[12] Mr. Cornell submitted in his letter of May 16, 2016, that UMS Solutions' "claims are unjust and contain no credibility" and he sought the following relief:

> I am seeking that all claims be dropped and all wages, commissions, expenses and all other costs be paid immediately per the Canadian Employment Standards Act…
>
> I further seek that Mr. Brunelli stop all slanderous activities including contacting multiple vendors, clients and colleagues with damaging statements about my credibility. A cease and desist order has been sent to UMS and Mr. Sledzik formally requesting this
>
> I feel an arbitrator should have experience in commission sales as well as international law, specifically Canadian employment law more specifically in the Province of British Columbia.

[13] Mr. Cornell acknowledged that he "received notice in December 2016 that an arbitration hearing was scheduled for a date in January 2017".

[14] On January 26, 2017, the arbitration hearing proceeded in New York City. Mr. Cornell did not attend this hearing.

[15] On April 19, 2017, Arbitrator Bianchi found in favour of UMS Solutions and issued an award of damages as follows:

> i) lost profits of $178,520.07 for breach of the Agreement because Mr. Cornell was working for Horizon, contrary to section 14.3 of the parties' Agreement;
>
> ii) lost profits of $30,000.00 for breach of the Agreement because Mr. Cornell attempted to undersell UMS Solutions with respect to Drs. King and Kennedy, and causing Dr. Hagerman to buy a product

from someone other than UMS Solutions, contrary to section 14.3 of the parties' Agreement;

iii) lost value of $6,075.00 for failure to return UMS Solutions' equipment upon termination of the parties' Agreement, "contrary to paragraph 30 thereof";

iv) compensation of $13,783.00, constituting the value of lost services to UMS Solution as a result of Mr. Cornell "hiring and/or soliciting Garcia", contrary to section 14.2 of the Agreement;

v) $30,923.10 for unjust enrichment, representing the base draw and car allowance between the time when Mr. Cornell started working with Horizon, and the date of his termination, "since during this time, Mr. Cornell was working for the benefit of Horizon and not the Claimant" [UMS Solutions];

vi) Reasonable attorney's fees and costs incurred in connection with the arbitration proceedings, pursuant to section 13.4 of the Agreement.

[16] Arbitrator Bianchi also noted that under section 13.3 of the Agreement, interest was payable at 15% interest per annum and he awarded interest at that rate from September 1, 2016, until payment, reasoning as follows:

> … This date (September 1, 2016) appears to be the latest possible date on which the most recent breach (the hiring/soliciting of Garcia), for which damages are awarded hereunder, was committed, and, given the high rate of interest, I award interest from the date of the most recent breach, not from the earlier date. I do not award interest on attorneys' fees and costs.

[17] Considering the evidence before him, Arbitrator Bianchi also awarded "attorney fees of $45,945.97, and its legal costs". He summarized his arbitration award as follows and issued the following terms of payment:

1) Within thirty (30) days from the transmittal of this Final Award to the parties, Respondent [Mr. Cornell] shall pay Claimant [UMS Solutions] the sum of $259,301.17 for damages, and $45,945.97 for attorneys' fees.

2) The administrative fees and expenses of the ICDR, totaling $7,500.00, and the compensation and expenses of the arbitrator, totaling $12,368.00, shall be borne by Respondent. Therefore, Respondent shall reimburse Claimant the sum of $19,868.00, representing said fees and expenses, which have been paid by Claimant.

3) Respondent shall pay interest to Claimant on the amount of $259,301.17, from September 1, 2016, on the amount from time to time outstanding, at a rate of 15% per annum, until payment is made.

4) This award is in full settlement of all claims submitted to this arbitration.

("Arbitration Award")

[18] Subject to the outcome of these proceedings, under the Arbitration Award, interest has continued to accrue to date at 15% per annum.

[19] On April 28, 2017, approximately a week after the Arbitration Award was issued, UMS Solutions filed a petition in a New York District Court to confirm Arbitrator Bianchi's decision ("New York Petition").

[20] In May 2017, Mr. Cornell acknowledged he received notice that an Arbitration Award had been entered against him. He sought the advice of a "well-regarded Canadian attorney" to discuss its implication. Mr. Cornell explained the advice he received in a sworn statement, that was later filed before the New York Court:

> … I was advised there was no reason to be concerned about the award, as my presence outside of the United States made its enforcement against me exceedingly difficult. Further I was advised that from a procedural standpoint, the proper time to challenge UMS' allegations would arise when and if UMS attempted to enforce the award in Canada.
>
> While I firmly disputed the frivolous allegations contained in the Demand for Arbitration (and had claims of my own against UMS), I was ultimately convinced by my legal counsel that there was nothing to be gained by challenging UMS's Arbitration Award in the United States or by participating in subsequent American court proceedings.
>
> Accordingly, I decided not to spend copious sums of money and upend my life to travel to New York to participate in meritless proceedings that I was advised would have not impact on me.

[21] On or about August 2, 2017, Mr. Cornell was personally served with UMS Solutions' New York Petition to confirm the Arbitration Award.

[22] Mr. Cornell did not respond to the Petition and on October 5, 2017, Judge Vernon Broderick, a United States District Judge, issued an order to show cause why default judgment should not be issued against Mr. Cornell. On December 29, 2017, Mr. Cornell was served with an Amended Order to Show Cause why a default judgment should not be entered against him in the New York Petition proceedings.

[23] On February 26, 2018, apparently as a matter of court process and procedure in New York state, Judge Broderick referred UMS Solutions' New York Petition to

Judge Henry Pitman, requesting that Judge Pitman provide a report and recommendation regarding this petition.

[24] On or about March 2, 2018, Mr. Cornell received a a letter from counsel for UMS Solutions notifying him of their request that Judge Pitman treat its previous Petition filings in support of a default judgment, as a motion for summary judgment. In the same letter, UMS Solutions sought Judge Pitman's permission to effect future service on Mr. Cornell "by mail only". The request to effect service by mail was apparently made on the grounds that service, pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, would result in lengthy delays and was unnecessary in light of the personal service Mr. Cornell had already received.

[25] Upon his receipt of this March 2, 2018 letter, Mr. Cornell once again sought the advice of the same Canadian lawyer whose advice he had previously relied upon. Mr. Cornell explained that this lawyer reiterated the enforcement of an arbitration award or judgment in Canada was unlikely and that the proper time to challenge UMS Solutions' claims was if and when they attempted to enforce an arbitration award in Canada.

[26] On March 9, 2019, Judge Pitman issued his reasons, recommendations and procedural directions in regard to the New York Petition, framing the proceedings, in part, as follows:

> This is an action to confirm an arbitration award and to reduce the award to a judgment. Defendant [Mr. Cornell] has defaulted in both the arbitration proceedings and in this action.
>
> In light of defendant's default, plaintiff has moved for a default judgment.

[27] After a review of the applicable law, Judge Pitman concluded he would treat UMS Solutions "pending motion for default judgment as a motion for summary judgment." In his reasons, Judge Pitman expressly notified the defendant that the case before the New York court would be decided without a trial based on written materials, including affidavits. He underscored that "judgment may be entered

against you [Mr. Cornell] without a trial if you do not respond to this motion on time by filing sworn affidavits and/or other documents" and he added:

> …If you have proof of your defences, now is the time to submit it. Any witness statements must be in the form of affidavits…
>
> If you do not respond to the motion for summary judgment on time with affidavits and/ or documents contradicting the material facts asserted by the plaintiff, the Court may accept plaintiff's facts as true…

[28] Judge Pitman also stated that Mr. Cornell's response materials were to be filed no later than April 9, 2018, and "After that date, I shall consider the matter fully submitted and ripe for decision."

[29] Mr. Cornell did not receive the March 9, 2018 reasons of Judge Pitman or the related motion materials for summary judgment until June 2018, well past the April 9, 2018 deadline Judge Pitman had set for Mr. Cornell to provide his response affidavit materials opposing UMS Solutions' motion for summary judgment. Accordingly, Mr. Cornell was unaware of the April 9, 2018 deadline until after it had passed.

[30] Later that year, Judge Pitman issued his report and recommendations to Judge Broderick on November 6, 2018 ("Report"). In the Report, Judge Pitman reasoned that the court may vacate or modify the Arbitration Award if:

1) the award was procured by corruption, fraud or undue means;
2) there was partiality or corruption on the part of the arbitrators;
3) the arbitrators were guilty of misconduct;
4) the arbitrators exceeded their powers;
5) there were evident material miscalculations or mistakes made in the calculations of the award;
6) the arbitrators issued an award on a matter that was not submitted to them; or
7) the award was imperfect as a matter of form.

[31] He concluded: "Because I find that none of the above listed factors are present here, I respectfully recommend that the arbitration award be confirmed." Judge Pitman also reviewed the award for attorney fees and recommended the

attorney fees should be reduced. In the result, Judge Pitman made the following recommendations:

> 1) Judgment be entered in favor of UMS Solutions in the amount of $325,115,14;
> 2) Interest at the rate of 15% per annum on the sum of $259,301.17 from September 1,2016 until full payment is made pursuant to Arbitrator Bianchi's instructions;
> 3) UMS Solutions be awarded attorneys' fees in the amount of $10,077.50; and
> 4) UMS Solutions be awarded costs in the amount of $400.

[32] In his Report, Judge Pitman noted that pursuant to the applicable rules of court, "the parties shall have fourteen days from receipt of this Report to file written objections." No Written objections were filed.

[33] On April 11, 2019, Judge Broderick accepted the Judge Pitman's Report and the four recommendations of Judge Pitman, itemized above. Judge Broderick expressly granted UMS Solutions' Petition to confirm the Arbitration Award and directed that judgment be entered in their Petition as recommended by Judge Pitman. On April 12, 2019, judgment was entered setting out the four terms recommended by Judge Pitman ("New York Judgment").

[34] On May 14, 2019, a clerk of the United States District Court certified the New York Judgment and confirmed that the time for appeal had expired with no appeal having been filed.

A. Mr. Cornell's New York Motion

[35] On September 24, 2019, Mr. Cornell filed a motion in New York to set aside the New York Judgment, which was supported by a memorandum of argument and an affidavit sworn by Mr. Cornell.

[36] Mr. Cornell points out that he brought this motion for relief on two bases:

> 1) Federal Rule of Civil Procedure 60(b)(1), which empowers the New York Court to set aside judgments (including but not limited to judgments obtained by default) where an applicant can establish:

i) "excusable neglect," which includes consideration of a) prejudice to the responding party; b) the length of the delay; c) the potential impact on judicial proceedings; and d) the reason for the delay; and

ii) a meritorious defence; and

2) in the alternative, a meritorious defence Federal Rule of Civil Procedure 55 (c), which concerns the setting aside of relief granted on default.

[37] Mr. Cornell advanced various submissions and tendered sworn evidence regarding the merits of his arguments to the effect that he did not breach the Agreement with UMS Solutions at all but, rather, UMS Solutions was in breach. He asserted, for example, that UMS Solutions besmirched his name, did not pay him as required under the Agreement, and intentionally misrepresenting the facts to Arbitrator Bianchi. Mr. Cornell advanced various additional arguments concerning the unfairness of the hearing and adjudicative processes underlying the previous decisions. He also submitted the Arbitration Award should be vacated on the basis that it had been procured by fraud.

[38] On October 8, 2019, UMS Solutions filed a Memorandum of Law in opposition of the Mr. Cornell's New York Motion, including its own supporting affidavit.

[39] On October 10, 2019, Judge Broderick considered Mr. Cornell's request to proceed by way of an oral hearing of his motion. Judge Broderick declined this request and determined the motion would proceed by way of written submissions from both parties.

[40] On October 14, 2019, Mr. Cornell filed a Reply to UMS Solutions' materials in opposition to his motion. In those submissions, Mr. Cornell raised as a further consideration, pursuant to Federal Rule of Civil Procedure 60(b)(6), that the legal advice he received constituted "gross negligence."

[41] On May 16, 2020, Mr. Brunelli passed away, after contracting COVID-19.

[42] It was not until August 24, 2021, that Judge Broderick issued his decision and "denied" Mr. Cornell's motion to set aside the New York Judgment.

[43] On October 6, 2021, following Judge Broderick's August 24, 2021 decision, a Clerk of the United States District Court provided a "Clerk's Certification of a Judgment to be Registered in Another District." The Certification stated:

> I certify that the attached judgment is a copy of a judgment entered by this court on 04/12/2019.
>
> I also certify that as appears from this court's records, no motion listed in Fed. R. App. P. 4(a)4(A) is pending before the court, the time of appeal has expired, and no appeal has been filed or, if one was filed, it is no longer pending.
>
> Dated: 10/6/2021

B. Steps in This Litigation: 2019 BC Action

[44] As noted earlier, UMS filed its 2019 B.C. Action on June 3, 2019, and Mr. Cornell filed his Response to Civil Claim on July 29, 2019. As such, proceedings in New York State and British Columbia were conducted simultaneously for a period of time after the UMS Solutions commenced this Action on June 3, 2019, in relation to Mr. Cornell's subsequent motion in September 2019 to set aside the New York Judgment.

[45] On September 9, 2019, UMS Solutions delivered its List of Documents to Mr. Cornell and advised it wished to proceed with the examination for discovery of Mr. Cornell.

[46] On September 19, 2019, UMS followed up with counsel for Mr. Cornell regarding the production of his list of documents and his available dates to examine Mr. Cornell for discovery.

[47] On September 24, 2019, after filing his motion to set aside the New York Judgment, counsel for Mr. Cornell wrote a letter to counsel for UMS Solutions enclosing a copy of the filed motion. He noted that "if Mr. Cornell is successful in his motion to set aside the New York judgment," the 2019 B.C. Action would be moot. Accordingly, counsel for Mr. Cornell proposed that their "respective clients await the outcome of the motion before embarking on the expense and effort of taking further steps in this proceeding."

[48] At that point in time, counsel for Mr. Cornell understood his motion was to be heard on October 16, 2019.

[49] On September 26, 2019, counsel for UMS Solutions responded, noting that there was no stay of the 2019 B.C. Action and, accordingly, Mr. Cornell was "required to comply with [his] production obligations under the *Rules of Court.*"

[50] On October 3, 2019, counsel for UMS Solutions wrote another letter to counsel for Mr. Cornell that noted they had "not received your client's List of Documents." Counsel for UMS Solutions further advised:

> Accordingly, we intend to bring an application to compel compliance and will seek costs payable forthwith in any event of the cause against your client
>
> Please provide us with the dates you are available between October 28-31, 2019 to attend the hearing of our application by no later that 12:00 pm. October 9, 2019. If we do not receive your response by that date, we will unilaterally set the application down for hearing on one of those dates.

[51] By letter dated October 9, 2019, counsel for Mr. Cornell responded, noting that while there was no stay of the New York Judgment, his proposal for a "brief delay" to await the outcome of Mr. Cornell's motion in the New York court was "made only in an effort to keep expenses down." Counsel for Mr. Cornell acknowledged UMS Solutions' position and wrote:

> I have your client's position that it is content to incur those costs, now, regardless of the fact that the proceeding could be rendered moot. At no time has my client sought to avoid his discovery obligations.

[52] Counsel for Mr. Cornell advised his colleague that an order to compel the production of a list of documents was not required, and that he aimed to provide the List of Document soon thereafter.

[53] On October 24, 2019, Mr. Cornell delivered his List of Documents to UMS Solutions.

[54] On November 4, November 6, and November 8, 2018, counsel for UMS Solutions wrote counsel for Mr. Cornell requesting dates for Mr. Cornell's examination for discovery between December 9 to 17, 2018.

[55] Mr. Cornell was examined for discovery on January 21, 2020.

[56] On February 4, 2020, counsel for UMS Solutions requested Mr. Cornell's response to eleven outstanding requests that arose from his examination for discovery.

[57] On February 20, 2020, counsel for UMS Solutions followed up with her request that Mr. Cornell answer the outstanding requests that arose from his examination for discovery. Counsel for UMS Solutions also stated in this letter:

> We intend to proceed with having this matter determined by summary trial. I estimate that it would take no more than 2 days. If you wish to examine a representative of my client, please advise soon as possible who you wish to examine and provide suggested dates. Otherwise, please provide us with your availability to attend a 2-day summary trial in June, July and August 2020.

[58] On March 12, 2020, counsel for Mr. Cornell advised counsel for UMS Solutions that his client "continue[s] to review his documents relating to the requests" and stated they would provide a response by March 23, 2020 or sooner. Counsel for Mr. Cornell also noted that the Arbitration Award refers to a transcript and demanded UMS Solutions produce a copy of the transcript along "with any other evidence put before the arbitrator that is not already included in its list of documents."

[59] Also on March 12, 2020, counsel for UMS Solutions followed up with her request for a response to the outstanding answers that arose during Mr. Cornell's examination for discovery, and added:

> If we do not receive a response by 5 p.m., March 23, 2020, we will bring an application to compel a response and seek costs of having to do so against your client.

[60] The letter sent by counsel for UMS Solutions also repeated the intention to proceed with having the matter heard by way of a summary trial, and added:

> The next call in dates to reserve lengthy chambers hearing is either April 14, 2000 for bookings in June or May 12, 2020 for bookings in July. Please provide us with dates you are not available in June and July to attend a two (2) day summary trial hearing on this matter. If we do not receive your

> response as to the dates you are not available in June or July to attend the summary trial hearing by 5 pm, April 10, 2020, we will unilaterally set down a date in June or July with trial scheduling.

[61] On April 20, 2020, counsel for UMS Solutions followed-up again to request the response to the outstanding requests from Mr. Cornell's examination for discovery.

[62] On April 22, 2022, counsel for Mr. Cornell advised that his client was working on his responses and expects to provide them to counsel for UMS Solutions "shortly".

[63] On April 24, 2020, counsel for UMS Solutions took issue with counsel for Mr. Cornell's characterization of certain requests for information arising from the discovery of Mr. Cornell as being particulars. Further, in response to counsel for Mr. Cornell's demand for documents, she states:

> …none of those documents are material, relevant, nor are they required for you client to respond to the outstanding requests from the examination for discovery. It is a fishing expedition.

[64] On April 24, 2020, counsel for Mr. Cornell reaffirmed that Mr. Cornell was working on his response to the outstanding requests arising from his examination of discovery. He also requested that UMS Solutions produce the transcript of the arbitration:

> My client has requested that your client produce all the evidence tendered at the arbitration. Much of that evidence is already contained in his list of documents. From the award, we know for a fact that there is a transcript. We don't know whether there was other evidence. The request is appropriately narrow. Clearly, it is not a fishing expedition.
>
> …
>
> I urge your client to reconsider its position on the requested documents. While my client does not wish to unduly delay matters, he will be required to apply for production of that transcript along with any other evidence placed before the arbitrator.

[65] On May 4, 2020, counsel for UMS Solutions responded by advising that Mr. Cornell has UMS Solutions' position on the demand for documents. She again requested the outstanding answers to questions arising from Mr. Cornell's discovery.

[66] No further steps are taken by UMS Solutions in this litigation until the fall of 2021, after Judge Broderick issued his decision dismissing Mr. Cornell's motion to set aside the New York Judgment.

[67] Counsel for Mr. Cornell underscores that UMS Solutions decided in the fall of 2019 not to wait for the outcome of his New York motion. Instead, UMS Solutions took steps to press its claim in British Columbia by demanding Mr. Cornell's documents and setting a date for his examination for discovery.

[68] Moreover, counsel for Mr. Cornell points out that when UMS Solutions delivered its materials opposing Mr. Cornell's motion, it referred the New York Court to the proceedings in British Columbia, submitting that discovery is commencing, "although Cornell has already failed to meet deadlines to comply with discovery obligations." Counsel for Mr. Cornell underscores that "not only did UMS reject Mr. Cornell's invitation to delay [until the New York court rendered its decision on his motion], but it relied on the speed of the litigation here in support of its position in the New York Action."

[69] On November 1, 2021, after counsel for Mr. Cornell received an unfiled Notice of Intention to proceed dated October 1, 2021 from UMS Solutions, Mr. Cornell filed this application to dismiss this 2019 B.C. Action. He delivered copies of the application materials by email to counsel for UMS Solutions but later learned that counsel does not accept service by mail.

[70] On November 10, 2021, counsel for Mr. Cornell followed-up with counsel for UMS Solutions, inquiring whether UMS Solutions would be filing response materials to his application to dismiss, and also queried whether UMS Solutions would be seeking an extension of time or an adjournment of the application. Counsel for Mr. Cornell also served hard copies of his materials regarding this application on November 10, 2021.

[71] On November 10, 2021, counsel for UMS Solutions served counsel for Mr. Cornell with a filed Notice of Intention to proceed, delivered an Amended List of

Documents, and once again inquired about Mr. Cornell's availability for a summary trial hearing.

[72] From November 10 to 16, 2021, the counsel exchanged emails regarding issues concerning proper service of court documents. UMS Solutions then sought, and Mr. Cornell consented to, an extension of time to deliver its response materials. Mr. Cornell also agreed to adjourn this application.

[73] The parties deferred resetting the hearing date for Mr. Cornell's application pending receipt of UMS Solutions' response materials.

[74] No date has been set for the trial of this Action.

III. LEGAL FRAMEWORK AND ANALYSIS

[75] In *Gemex Developments Corp. v. Sekora*, 2011 BCSC 318, Justice Lynn Smith reviews the authorities that guide the exercise of the court's discretion, pursuant to the Supreme Court Civil Rule 22-7(7), in applications to dismiss proceedings for want of prosecution. She begins her review of the case law, at para. 16, by affirming the overriding principle in such applications that dismissing an action "without permitting it to be heard on its merits is a drastic measure, to be taken only where it is clearly required in the interests of justice": see also *Mackenzie Delta Industrial Ltd. v. North American Enterprises Ltd.*, 2022 BCSC 16 at para. 40.

[76] In the course of her reasons in *Gemex*, and in confirming the appropriate legal test that guides the court's discretion in such applications, Justice Smith refers to our Court of Appeal's decisions in *Irving v. Irving* (1982), 140 D.L.R. (3d) 157, and *Tundra Helicopter et al. v. Allison Gas Turbine et al*., 2002 BCCA 145. She also cites *Allen v. Sir Alfred McAlpine & Sons Ltd.,* [1968] 2 Q.B. 229, wherein Lord Diplock states that the court must consider the risk that the passage of time may reduce the court's ability to both assess what really happened and assess whether a fair trial is possible. Furthermore, Lord Diplock observes that dismissing a case for want of prosecution is a draconian order that should not be made lightly. The

relevant portions of Lord Diplock's reasoning are instructive, and were reproduced in *Gemex* at para. 19, as follows:

> And where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. But there may come a time when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.
>
> […]
>
> It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.
>
> […]
>
> It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollection of witnesses of events which happened long ago.

[77] In a similar vein, after considering the guiding jurisprudence, our Court of Appeal in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535, set out the following legal test to guide the requisite analysis:

> [27] These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:
>
> (1) the length of the delay and whether it was inordinate;
>
> (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
>
> (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
>
> (4) whether, on balance, justice requires dismissal of the action.

[78] In *0690860 Manitoba Ltd.,* Low J.A. noted, at para. 28, that he "consider[s] the fourth question to encompass the other three and to be the most important and decisive question." Similarly, in *West Harbour Electric Ltd. v. NGC Constructors Ltd.*, 2019 BCSC 452, at para. 35, Justice Grauer, as he then was, reasoned that while all factors must be considered, the central issue is the interests of justice. He underscores that the core purpose of Rule 22-7 is to "put an end to litigation that has not been prosecuted for so long that it creates a substantial risk that a fair trial on the issues will no longer be possible."

[79] In applying this analytical framework, I am mindful that the delivery of a Notice of Intention to Proceed, and exchanges of correspondence or other communications between counsel that do not move the litigation forward, have not be not considered as steps in an action for purposes of assessing delay*: Kelly v. Dyno Nobel Canada Inc.*, 2016 BCSC 1601 at paras. 19-21. Furthermore, a defendant has no obligation to advance an action where there is no step required of that defendant: *Tri-City*

Contracting Ltd. v. Leko Precast Ltd., 2016 BCSC 623 at para. 31. In addition, tactical delay, such as delay caused by a plaintiff, is not generally excusable: *Sahyoun (Committee of) v. Ho*, 2015 BCSC 392 at paras. 22-23.

[80] In *Gemex,* the court reasons that the conduct of the defendant is also relevant in considering the issue of delay:

> [27] In assessing whether there has been inexcusable delay and whether there has been prejudice to the defendants, as well as in looking at the balance of justice, the extent to which the defendants themselves have contributed to the delay is relevant. (See, for example, *De Cotiis v. Viam Holdings Ltd.*, 2004 BCSC 1301, 3 C.P.C. (6th) 349 [*De Cotiis*], where the defendants had not filed a statement of defence despite having been contacted by the plaintiffs with a request that they do so. The application, after five years' delay, to dismiss for want of prosecution was dismissed.)

[81] In light of this guiding jurisprudence, I now address the four-part test established by our Court of Appeal in *0690860 Manitoba Ltd.*

A. Has there been inordinate delay in prosecuting the case?

[82] Mr. Cornell submits UMS Solutions took a circuitous procedural route to enforce the Arbitration Award in an attempt to, first, conceal that the Arbitration Award was obtained on evidence it knew was false; and, second, to cause delay so that interest continued to accrue at a rate well in excess of the prime rate. He notes that the interest rate claimed by UMS Solutions totalled over $100,000 as early as May 31, 2019, before this Action was even commenced.

[83] Mr. Cornell submits that when the Arbitration Award was issued by Arbitrator Bianchi on May 19, 2017, UMS Solutions could have simply proceeded to having their Arbitration Award recognized and enforced in British Columbia at that time, through s. 35 (1) of the *International Commercial Arbitration*, R.S.B.C. 1996, c. 233. Counsel notes that UMS Solutions was at all times aware that Mr. Cornell resided in British Columbia such that the logical choice would have been to apply to have the Arbitration Award recognized and enforced in British Columbia. Instead, it chose to commence proceedings in New York state, "where it knew Mr. Cornell had no presence."

[84] Counsel for Mr. Cornell underscores that since UMS Solutions has commenced these proceedings in June 2019, it has produced a "clearly deficient list of documents." Further, he submits that, after UMS Solutions conducted its examination for discovery in January 2020, it took no steps to advance this litigation, "without explanation". Counsel for Mr. Cornell also points out that during this period, Mr. Brunelli passed away.

[85] Counsel for Mr. Cornell submits that Mr. Brunelli was a primary witness who was the operating mind of UMS Solutions, such that his death has "irremediably prejudiced" his client's ability to explore his defence at discovery and prove his defences at trial. He submits that, in addition to the prejudice created by accruing interest and fading memories, a fair trial is now impossible.

[86] Counsel for Mr. Cornell also points out that one of the requests that arose out of his client's examination for discovery was for Mr. Cornell to provide "particulars" of what he alleged to be the false evidence given by UMS Solutions during the arbitration. Mr. Cornell submits that before he could provide particulars of this false evidence, he required a copy of the transcript of evidence given during the hearing before Arbitrator Bianchi. However, UMS Solutions declined to provide a copy of the transcripts characterizing the request for it as a "fishing expedition".

[87] Counsel for Mr. Cornell asserts that since conducting the examination for discovery of Mr. Cornell on January 21, 2020, UMS Solutions has taken no further steps in this proceeding.

[88] As regards any delay that may have been unavoidably caused by Mr. Brunelli's death on May 16, 2020, counsel for Mr. Cornell asserts that by August 8, 2020, and perhaps earlier, his passing had no discernable impact on UMS Solutions operations. Counsel relies on an August 8, 2020, posting on their website which mourns the loss of Mr. Brunelli and states "our dedication to your business through education, service and support has never been stronger – and the resources behind these never stronger".

[89] Counsel for Mr. Cornell asserts there has been delay and that it has been inordinate, submitting that UMS Solutions has not pursued its claim with dispatch or in the ordinary course.

[90] I note that while Mr. Cornell had no obligation to advance this case, he was required to answer the outstanding requests that arose from his examination for discovery; to date, he has not done so. While this application does not ultimately turn on this fact, in light of the whole of the evidence before me, generally speaking defendants who wish to rely on applications such as these ought to make best efforts to fulfill their outstanding discovery obligations under Supreme Court Civil Rules 7-2(23-25).

[91] Delay is to be measured from the date of the commencement of the action, rather than from the date at which the cause of action arose: *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2004 BCCA 40 at para. 36. In *Cal Coast Spas Inc. v. Coast Spas Inc.*, 2008 BCSC 846, after a careful review of the authorities on this point, Madam Justice Ballance stated at para. 64:

> In summary, the authorities establish the proposition that in determining whether delay is inordinate, the court ought to look at the period of time after the commencement of the action rather than when the cause of action arose. The inquiry is to focus on the delay in prosecuting the action once a plaintiff has enlisted the judicial process as a forum for adjudication.

[92] There clearly has been delay in this case, but I am unable to conclude, as Mr. Cornell submits, that UMS Solutions tactically engineered the delay, or that the delay was inordinate, or that the delay was caused or controlled *by* UMS Solutions. UMS Solutions advanced its case through the arbitration process, as expressly set out in the Agreement itself. Moreover, even if Mr. Cornell's decision to not participate in the proceedings in New York leading to the Arbitration Award and the New York Judgment was due to the negligent legal advice he says he received, his decision to not participate in the New York proceedings, until after this Action was commence in British Columbia in 2019, was clearly beyond the control of UMS Solutions. Similarly, UMS Solutions is not responsible for the delay occasioned by Mr. Cornell's motion to set aside the New York Judgment. Notably, Mr. Cornell filed

his motion before the New York Court on September 24, 2019, and the Court did not render its decision until August 24, 2021. I am unable to conclude that this sequence of events constitutes inordinate delay orchestrated by UMS Solutions.

[93] My conclusion that this first branch of the legal test has not been satisfied on the facts before me is reinforced by previous case authority which provide that "inordinate delay" means more than simple delay. Citing *Azeri v. Esmati-Seifabad,* 2009 BCCA 133 at para. 9, Justice Smith reasons, at para. 23 of *Gemex,* that "inordinate delay" has been described as "uncontrolled, immoderate or excessive". She also cites the following characterization of the term by Justice Tyrwhitt-Drake in *Osolin v. Aquila Holdings Ltd.,* [1982] B.C.J. No. 1225 (S.C.) at para. 4:

> Inordinate delay must mean more than simple delay. "Inordinate" is a strong adjective, importing a quality to the delay which goes beyond the normal or even, in some circumstances, the abnormal: an inordinate delay must be one which strikes at the root of justice, and makes a fair trial a virtual impossibility.
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> [Emphasis added]

[94] The delay in this case has not been significant. It was less than two years in length and was not inordinate. I am simply unable to conclude that the delay has been "uncontrolled, immoderate or excessive", in light of the particular facts before me.

[95] Furthermore, as I discuss further below, I am unable to conclude that the delay in this case is inordinate in the sense that it "strikes at the root of justice", particularly in light of the fact that Mr. Cornell's motion to set aside the New York Judgment caused a substantial delay in the final determination of the New York Judgment. Mr. Cornell's motion was brought in September 2019 and was not determined by Judge Broderick until August 24, 2021. An additional 30-day appeal period followed before this Action could reasonably proceed. There is no inordinate delay in these circumstances on the part of UMS Solutions, particularly when UMS Solutions provided an Amended List of Documents on November 10, 2021, and once again pressed for dates for a summary trial at that time. Clearly, Mr. Cornell's New York motion and this application had to be determined first.

B. Whether the inordinate delay is inexcusable

[96] In light of the outstanding, ongoing and related proceedings before the New York Court until August 24, 2021, not only have I concluded that the delay was not inordinate, I have also concluded that it was excusable.

[97] It is understandable that UMS Solutions ultimately choose not to pursue its litigation before this Court until shortly after Judge Broderick issued his decision to deny Mr. Cornell's motion to set aside the New York Judgment. While I am mindful that UMS Solutions initially declined counsel for Mr. Cornell's proposal in September 2019 to take no further steps in this litigation until the New York Court rendered its decision on Mr. Cornell's motion, the understanding at that time was that the New York court would be rendering it its decision on Mr. Cornell's motion in mid-October 2019. Counsel for Mr. Cornell wrote in his letter of September 24, 2019 to counsel for UMS Solutions:

> … As you can see from the enclosed, the motion is to be decided on October 16, 2019, which is not far away.

[98] Clearly, the UMS Solutions' decision to press on with the discovery portion of its litigation was made in the context of this expected timeline. In addition, it was not necessary for UMS Solutions to take any further substantive steps in this Action, other than to wait for Mr. Cornell's New York motion to be determined before setting down the summary trial it intended to pursue.

[99] At the hearing of this matter, counsel for UMS Solutions explained that when it became apparent the proceedings in New York would take some time to complete, she determined it was prudent to await the outcome. Counsel for UMS Solutions underscores that to enforce and confirm a New York judgment in this court, it is necessary to establish that the judgment in question was a final one. That fact was not established until Judge Broderick rendered his decision in August 2021, and the 30-day appeal period had expired. In fact, the Clerk of the United Stated District Court for the Southern District of New York certified the New York Judgment on

October 6, 2021; the Clerk also certified on that date that the time for appeal had expired and that no appeal had been filed.

[100] After the expiry of the appeal period and this certification, UMS Solutions proceeded promptly. It notified counsel for Mr. Cornell on October 1, 2021, that it intended to proceed with the B.C. Action. On November 10, 2021, UMS Solutions delivered an Amended List of Documents and requested Mr. Cornell's availability to set this matter down for summary trial. In this light, the delay was excusable. A final decision from the New York court was necessary to prosecute this Action.

C. Whether the delay has caused, or is likely to cause, serious prejudice to the defendant applicant.

[101] Counsel for Mr. Cornell submits that when the court finds that a delay in prosecuting a proceeding is both inordinate and inexcusable, a rebuttable presumption of prejudice arises: *Busse v. Robinson Morelli Chertkow*, 1999 BCCA 313 at para. 18. They further submit that the rebuttable presumption of prejudice applies in this case and that it is supported by three factors: the death of Mr. Brunelli, the passage of time, and the accruing 15% interest rate.

[102] In *Tundra Helicopters Ltd. v. Allison Gas Turbine*, 2002 BCCA 145, the Court of Appeal clarifies that a presumption of prejudice arises once inordinate inexcusable delay has been established. Mr. Justice Hall states at paras. 35-36:

> [35] I also regard it as error in principle to dispose of the issue of prejudice by asking whether the plaintiffs had rebutted 'the presumption of prejudice that arises in the circumstances' and by going on to answer that question in the negative. The "presumption of prejudice" is not a presumption of law. It can be termed a presumption of fact but only in the sense, as it is put in Sopinka and Lederman "The Law of Evidence in Civil Cases", 1974 at p. 378:
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> > The term "presumption of fact" is used in many instances in which it is desired merely to shift the secondary burden to a particular party. When used in this sense, it means that the facts are such that a certain inference should, but need not, be logically drawn.
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> [36] It is in that sense that the word "presumption" is employed *in Busse v. Robinson Morelli Chertkow,* supra. In considering whether the presumption of prejudice has any application in a particular case, the question properly to be asked, as stated by Goldie J.A. in para. 27 of *Busse*, is:

> ... has the plaintiff established on a balance of probabilities that the defendant has not suffered prejudice or that other circumstances would make it unjust to terminate the action?

[103] In this light, I am unable to conclude that a presumption of prejudice properly applies on the facts of this case. Not only have I concluded that there was no inordinate delay and that the delay was excusable, I am also not satisfied that Mr. Cornell is likely to be seriously prejudiced. That is, the prejudice must be such that the defendants' ability to have a fair trial is imperilled and I am not satisfied this is likely to be the case: see *Gemex* at para. 26; *Fraser Cedar Products Ltd. v. Oceanic Underwriters Ltd.,* [1997] B.C.J. No. 837 [Chambers] at paras. 21-22.

[104] Mr. Cornell argues he will be prejudiced because the death of Mr. Brunelli has compromised his ability to marshal his defence. He asserts the Arbitration Award was decided on evidence, including *viva voce* evidence from Mr. Brunelli, given at the Arbitration. Mr. Cornell reasons that, "because UMS has never produced a copy of the transcript put before the arbitrator, he will never have an opportunity to establish Mr. Brunelli's knowledge that the evidence led in the Arbitration was false."

[105] The difficulty with this argument is that Mr. Cornell had the opportunity to challenge Ms. Brunelli's evidence at the Arbitration through cross-examination and by providing his own evidence and version of events. The prejudice suffered in this respect arises from Mr. Cornell's decision not to appear at the Arbitration.

[106] Further, Mr. Cornell argues:

> It is not apparent that any other member of UMS was involved in the Arbitration in any way. As such, the knowledge of any representative of UMS that may attend discovery, or trial, will only be second hand and necessarily incomplete.

[107] While I appreciate that Mr. Brunelli may very well have been the preferred choice for purposes of examination for discovery, UMS Solutions nevertheless bears the burden of proving its case. I am also not able to reasonably conclude or infer that UMS Solutions is not able to tender any other witness to be examined for discovery or at trial to speak, as required, to the material facts underlying its claim.

[108] It is possible that Mr. Cornell would have wanted to discover and/or cross-examine Mr. Brunelli in support of his assertion that that New York Judgment was obtained by fraud. I am satisfied that Mr. Brunelli's death may have caused some prejudice to Mr. Cornell in this regard, although I note Mr. Cornell could have pursued Mr. Brunelli's discovery in the fall of 2019. In any event, I am nevertheless of the view that any such prejudice would not create a substantial risk that a fair trial is not possible.

[109] As regards Mr. Cornell's submission that he will be prejudiced by the fading memories or other witnesses, I note this application was brought in the context of an alleged delay for want of prosecution of less that two years. Furthermore, I am unable to conclude that this factor prejudices Mr. Cornell any more than it prejudices UMS Solutions who bears the onus of proof. As well, the existence of the transcript of the Arbitration proceedings may be of assistance to both parties in this regard; I leave it to the parties to sort out this particular disclosure issue.

[110] The issue raised by Mr. Cornell concerning the magnitude, conscionability and propriety of the interest that has continued to accrue since the initial Arbitration Award, is clearly an important matter. However, it is not one than can be properly determined in the context of this application. It is best left for consideration and determination at trial.

D. Whether, on balance, justice requires dismissal of the action.

[111] In light of the factual matrix before me, I do not think it would be in the interests of justice to put an end to this case in this application. Dismissal is a draconian measure and a remedy of dismissal should only be granted in very clear circumstances: see *Gemex* at paras. 123-124 and *Allen* at p. 255-259. This is not such a case.

[112] Unlike *Irving*, at para. 23, I do no see UMS Solutions' case as one that is "hopeless". To be clear, I recognize that I ought not pronounce in any definitive sense on the relative merits of the parties' respective positions or submissions in this litigation, and I do not do so. Nevertheless, in light of the material before me, I also

cannot conclude that UMS Solutions' case is entirely devoid of merit. This is also a consideration in assessing whether ultimate justice will be done in such applications, and it does not favour dismissal.

[113] I have also specifically considered whether the defendants can achieve a fair trial of the issues in the context of the evidentiary challenges caused by the death of Mr. Brunelli and the passage of time since the commencement of the action. In light of the entirety of the Application materials before me, and considering the specific concerns raised by the Mr. Cornell, I have nevertheless concluded that a fair trial is achievable.

[114] On balance, I am of the view that justice does not require an order dismissing UMS Solutions' claim.

[115] In light of the unique facts underlying this application, costs shall be in the cause.

"MORELLATO J."