IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO: 177 of 2014

BETWEEN

AUTOCLEAR LLC	**RESPONDENT/CLAIMANT**

AND

G. TODD CONWAY	**1st APPLICANT/DEFENDANT**
FRED FARKOUH	**2nd APPLICANT/DEFENDANT**
DAVE BONDY	**3rd APPLICANT/DEFENDANT**
MARY ELLEN MATTHEWS	**4th APPLICANT/DEFENDANT**
BARBARA BAILEY	**5th APPLICANT/DEFENDANT**
CHRIS REGAN	**6th APPLICANT/DEFENDANT**
CHARLES FABRIKANT	**7th APPLICANT/DEFENDANT**

Keywords: Practice: Application to stay proceedings for forum non conveniens;

International Limited Liability Companies Act (LLC); Domicile; Transfer (Re-Domiciliation) of an LLC; Operating Agreement: Foreign LLCs;

The Arbitration Act of Belize; New York Convention; Recognition and Enforcement of Foreign Arbitral Awards; Foreign (US) Arbitration; Jurisdiction of Arbitrator.

Before the Honourable Mr. Justice Courtney A Abel

Hearing Dates: 28th November 2014;
5th March 2015.

Appearances:

Mr. Godfrey Smith S.C. and Ms. Leslie Mendez for the Applicants/Defendants

Mr. Rodwell Williams S.C and Mrs. Julie-Ann Ellis Bradley for the Respondent/Claimant.

DETAILED DECISION
(Of an Oral Decision given on the 28th November 2014)
Delivered on the 5th March 2015

Introduction

[1] This is an application filed on the 11th July 2014 by the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th Applicants/Defendants ("the Applicants") against the Respondent/Claimant ("the Respondent") essentially to stay the claim herein on the ground of *forum non conveniens.* The Applicants are led by G. Todd Conway, the 1st Applicant and the Respondent is led by Bradley Conway.

[2] The application has been brought on the basis that there is an ongoing arbitral proceeding in New Jersey USA and that the USA, and not Belize, is the most natural and appropriate forum for the present dispute between the parties. The Applicants, more specifically, allege that the present claim was brought in Belize to eviscerate the jurisdiction of the Arbitrator who has made orders adverse to the Applicant.

[3] Another ground was relied on in the application, that the Claim should be struck out as an abuse of process, but in their oral submissions the Applicants have confined themselves to '*forum non conveniens'* and it is on this basis that I have decided the application.

[4] The Respondent has vigorously contested the application.

[5] On the 22nd December 2014 I heard the application and ordered a stay on the ground of *forum non conveniens* with costs of the application to be paid by the Respondent to be agreed or assessed. Although I then gave some oral reasons for my decision I indicated that more detailed reasons would follow.

[6] These are my more detailed reasons.

Background

[7] The Respondent was originally formed in New Jersey under the name Control Screening LLC on the 29th February 1995 and being a limited liability company was organized pursuant to the laws of the State of New Jersey, with a principal place of business and registered office located at 234 Industrial Parkway, Northvale, New Jersey 07647, United States of America.

[8] The Respondent's managers and sufficient members signed the Operating Agreement which governed the Respondent's affairs on the 1st April 1995. The Operating Agreement at Paragraph 13 contains the following clause:

> *"ARBITRATION: ANY MATERIAL DISPUTE HEREUNDER SHALL BE DECIDED IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION WHICH AWARD SHALL BE FINAL."*

[9] The Respondent is engaged in the business of designing, building, distributing and servicing security screening systems worldwide, and in acquisitions that facilitate that and other company purposes.

[10] The Applicants are all investors or equity holders in the Respondent.

[11] A dispute arose in relation to the management control of the Respondent from about October 2010 led by 2 groups of investors or equity. One group was led by G Todd Conway and the other group by Bradley Conway .As will be seen this dispute is still continuing.

[12] In 2011, Belize passed the International Limited Liability Companies Act ("ILLCA") into law and the Superior Court of the State of New Jersey ordered, pursuant to an undoubted arbitration agreement in the Operating Agreement, that the issues regarding the management and control of the Respondent should be submitted to arbitration.

[13] On the 23rd May 2011, the Respondent (led by Bradley Conway acting as Chairman and Manager of the Respondent) instituted arbitration proceedings against several persons including the Applicants, as a result of a dispute relating to the management and control of the Respondent ("Arbitration of the pre 2013 issues" or "the Arbitration") and pursuant to the Arbitration agreement in the Operating

Agreement. This Arbitration was conducted under the auspices of the American Arbitration Association before Robert C. Garofalo as the Arbitrator ("Arbitrator").

[14] The Arbitration of the pre 2013 issues has not been resolved and the Arbitration continues.

[15] On the 15th May 2013, while the dispute was continuing before the Arbitrator, the domicile of the Respondent was transferred to Belize pursuant to ILLCA. At the time of re-domiciliation the Respondent's headquarters and principal place of business was 2 Gardner Road, Fairfield, New Jersey 07004, United States of America, although the Respondent carries on business worldwide (apparently in over 150 countries) through numerous subsidiaries for tax benefits.

[16] The Applicants allege, which I accept, that this transfer was done surreptitiously and without notice to them. This dispute is obviously a matter for determination but clearly the legal procedure to effect the re-domiciliation was complied with as the Respondent is now registered (until set-aside) in Belize and has the appropriate registration documents as an LLC under the ILLCA.

[17] By virtue of the above dispute as to the bona fides of the re-domiciliation, it is clear that this issue is a central question for determination and cannot be resolved at this interlocutory stage of the proceedings. The question remains which forum and tribunal will hear and resolve the issue.

[18] On the 7th January 2014 the Applicants, and others, purported to convene a meeting of the Respondent off premises at which resolutions were purportedly passed as follows:

(a) Removing Brad Conway as CEO of the Respondent (the Applicants had already purported to pass resolutions on the 16th November 2013 removing Brad Conway as Manager and Chair of the Respondent).

(b) Acting as a new replacement Board of Managers; and

(c) Appointing G. Todd Conway as interim CEO of the Respondent.

[19] The Respondent's Operating Agreement was subsequently amended by a Consolidating Amendment dated June 2013, which purports to replace all prior

amendments, and an amendment by Members' Resolution dated 22nd January 2014. Included in the amendments of the Operating Agreement is the removal of the arbitration agreement with the effect of avoiding the jurisdiction of the arbitration and the Arbitrator and to require arbitration in Belize under Belize law.

[20] In January 2014 the Applicants authorized G. Todd Conway to contact senior employees, and to inform all employees that he was the "real" CEO, and that Bradley Conway, the long standing CEO since 1989, and Chair since 2004, should be "locked out" of the business.

[21] The Applicants also authorised their attorneys to write to and call the Respondent's three main banks, including its mortgage banker, representing that their "Board" and "CEO" were in control, and that they should disregard Bradley Conway and the current signatories.

[22] The expulsion of the aforesaid persons as members was also considered at a meeting of members held on the 21st March 2014, and by majority vote of the remaining members' interests, it was determined that they have been expelled as members of the Respondent, but not as economic interest holders.

[23] On the 14th April 2014 the Respondent commenced the present claim against the Applicants.

[24] There have been some interim decisions by the Arbitrator concerning the interpretation of the Operating Agreement. The Arbitrator is seised of and dealing with the dispute on an on-going basis.

[25] In particular , the Applicants claim, most of which is disputed by the Respondent, that the Arbitrator ruled and made the following orders:

(a) In an Order dated 2nd January, 2014 that the Members of Respondent may elect or remove Managers only by a majority vote of the Member interest;

(b) The Respondent's managers were not entitled to elect or remove the company's management.

(c) Brad Conway's purported November 2010 "amendments" to the Operating Agreement were ultra vires, null and void because they were beyond the power of the Managers to enact.

(d) By Order dated 17th January, 2014 the Respondent and Bradley Conway were restrained from transferring any asset of the Respondent to a foreign jurisdiction without the written approval of the Arbitrator, except in the ordinary course of business.

(e) By Order dated 3rd March, 2014 that Brad Conway and the Respondent have consented to the jurisdiction of the Arbitration proceedings and the State of New Jersey for and in connection with all matters pertaining to the Respondent's Operating Agreement.

(f) By Order dated 1st April, 2014 that:

I. Bradley Conway and the Respondent without notice to the Members as required by the Operating Agreement and unbeknownst to their attorneys, transferred the domicile of the respondent to Belize;

II. Neither the Respondent nor anyone acting on its behalf (including Brad Conway) shall commence any action or proceeding involving the issues in this Arbitration in Belize or any other jurisdiction than the State of New Jersey, under and pursuant to the Rules of the American Arbitration Association and the State of New Jersey; and

III. In the event the Respondent, or anyone on its behalf, file any such action, the Company shall be responsible for and pay all reasonable and necessary legal fees and expenses incurred by Defendants in opposing such action.

(g) By Order dated 15th May, 2014 the Arbitrator ruled that the purported "*amendments to the Operating Agreement are extensive and dramatically impact the governance of the Company*." As such, it is claimed by the Applicants that the Arbitrator found it disturbing that no notice had been given to him or the Members of Respondent that the purported

"amendments" to the Operating Agreement had been made over eleven months earlier while the arbitration proceeded under the original 1995 Operating Agreement.

(h) By Order dated 2nd June, 2014, the Arbitrator ruled that the 2010 Membership List of the Respondent is fixed and determined in a stated Certification of 6th June, 2011 and that the Respondent's 2010 Membership List shall be utilized by the Respondent in connection with any activity undertaken by the Respondent pursuant to its Operating Agreement of 1995 and the Orders and Decisions entered in this Arbitration.

[26] It has been claimed by the persons who appear to be in management control of the Respondent, led by Bradley Conway, that these decision are not final and it has been stressed that such decisions can either be confirmed or departed from at the time the Arbitrator issues his final award. Also, that in relation to decisions of the Superior Court of New Jersey there has been an appeal lodged

[27] The Respondent alleges that the effect of this re-domiciliation is that the ILLCA (and presumably the laws of Belize) is now the governing law of the Operating Agreement and, from the date of re-domiciliation, the Supreme Court of Belize is the forum in respect of disputes arising in relation to the Operating Agreement. The Applicants allege that this re-domiciliation is null and void and was done to forum shop and to eviscerate the jurisdiction of the Arbitrator by litigating the very issues before the Arbitrator (which the Respondents have been losing); and that the very issues before this court are the same issues which are before the Arbitrator and should continue before the Arbitrator.

[28] There was apparently a ruling by the Arbitrator on the 1st April 2014 making clear that the Applicants are not the new Managers of the Respondent.

[29] In April 2014, despite the ruling above, the Applicants, G. Todd Conway and Fred Farkouh, with authority from the Applicants and/or their attorneys wrote the threatening e-mails to two Senior Employees. G. Todd Conway repeatedly signed his letters as "Interim CEO".

[30] On the 22nd April 2014, the Respondent filed a Motion before the Superior Court of New Jersey for an order that the stay of 11th August 2011, which it had originally demanded to allow the Arbitration, be lifted and that the Arbitration proceedings be stayed on the grounds that the issues are now subject to the jurisdiction of the Court in Belize.

[31] The Superior Court of New Jersey delivered a decision, which this court accepts, in the Applicant's favour on the 25th of September 2014 refusing to lift the stay apparently on the grounds that:-

(a) The post-May 2013 issues are the same issues that Judge Klein sent to Arbitration and as such the matter is properly before Arbitrator Garofalo.

(b) The manner in which the domicile was transferred and the Consolidated Amendments issued indicate not a sound business decision but a clear attempt to avoid arbitration; and

(c) The Respondent acted inequitably in moving the company at this stage without notifying the Applicants and then asserting that Belize law governs.

[32] On the 17th of October 2014, shortly after the Court Order was perfected, the Respondent filed an "*Application For Permission To File Emergent Motion*" to appeal the September 25th decision of the Superior Court of New Jersey. This Application was denied by the Superior Court-Appellate Division of New Jersey.

[33] The Applicants allege, which this court accepts, that as a consequence of the Court Order of 17th October 2014, the arbitration is proceeding and that the Superior Court of New Jersey not only affirmed the jurisdiction of the Arbitrator to deal with the issues, it also condemned the actions taken by the Respondent, characterising them as clear attempts to evade the jurisdiction of the Arbitrator.

[34] Despite the Court Orders and Rulings (which are disputed by the Respondent) of the Arbitrator the Applicants continue to dispute who the true managers of the Respondent are and the Respondent does not accept the legality of any amendment to the Operating Agreement.

[35] The Respondent alleges that the Applicants breached the provisions of the Operating Agreement as amended in June 2013 and 22nd January 2014, as a result of which, apart from the 3rd and 6th all other Applicants have been expelled as members of the Respondent, but not as economic interest holders.

The Court Proceedings

[36] The Claim herein was filed by the Respondent on the 14th April 2014 along with a Statement of Claim. In the Claim the following reliefs were sought:

(1) A Declaration that the Operating Agreement of the Respondent has been validly amended by the Manager's Decision and members resolutions dated June 2013 and the 22nd of January 2014;

(2) A Declaration that the members meeting purportedly held on the 16th of November 2013 was not validly convened;

(3) A Declaration that the resolutions purportedly passed at the meeting of the members of the Respondent purportedly held on the 16th November 2013 did not have the affirmative vote of 50% of the actual outstanding members interests of the Respondent and in consequence on the 7th January 2014:-

a. Bradley Conway was not removed as the Manager and CEO of the Respondent;

b. No new Board of Manager was validly appointed; and

c. G. Todd Conway was not appointed as interim CEO of the Respondent.

(4) A Declaration that the Applicants G. Todd Conway, Fred Farkouh, Mary Ellen Matthews, Barbara Bailey and Charles Fabirkant were validly expelled as members of the Respondent pursuant to the Minutes of the Meeting of 50% Quorum of Members of the Respondent signed on 21st of March 2014 and/or pursuant to Manager's Decisions made on 11th and 21st March 2014

(5) Damages against the Applicants for breach of the Operating Agreement.

(6) Further or other relief.

(7) Costs

[37] The Applicants filed Acknowledgments of Service on the 30th June 2014.

[38] The Applicants filed the Notice of Application herein, the subject of the present application, on the 11th July 2014, supported by the Affidavit of the 1st Applicant, in which it sought the following Orders:

1. The Claim be stayed on the ground of forum non conveniens;
2. Further, or in the alternative, the Claim be struck as an abuse of process;
3. Costs of this Application be paid by the Respondent/Claimant; and
4. Such further and other relief as to this Honourable Court seems just.

[39] A Case Management Conference was then held on the 27th October 2014 at which certain directions were given for the future conduct of the application including a hearing date on the 4th November 2014.

[40] Pursuant to the directions given:

(a) The Applicants' Notice of Application was then supplemented by a 2nd Affidavit of the 1st Applicant filed on the 27th October 2014.

(b) The Applicants then filed Written Submission in Support of its application on the 29th October 2014.

(c) The Respondents, in opposition to the application, filed on the 21st November 2014, the 1st Affidavit of Bradley Conway and the 1st Affidavit of Patrick Tobia (the US Attorney for the Respondent).

(d) The Respondents then filed Written Submission in Response to the application on the 24th November 2014.

(e) The Applicants filed Reply and Written Submissions on the 27th November 2014.

Recognition and Enforcement of Arbitration Agreements and Awards

[41] The Arbitration Act[1], ("the Arbitration Act") made a fairly comprehensive provision for arbitrations (both local and foreign) and for irrevocability and validity of and the Protocols and procedures and practice associated with such submissions to arbitration under written agreements of parties.

[42] In a recent decision of the Caribbean Court of Justice[2] after a challenge to its validity, it was held that the Arbitration Act was indeed valid and constitutional.

[43] In particular, provision in the Arbitration Act was made for the staying of legal proceedings, where such proceedings were commenced in any court against any party to the submission and for the enforcement of foreign awards in Belize which was by the Arbitration Act made binding under the laws of Belize.

[44] The Arbitration Act also contained provisions which adopted into its statutory laws certain Conventions, including the New York Convention[3]. The New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards – albeit primarily aimed at an award at the end of the process of arbitral proceedings.

[45] Under the New York Convention Belize undertook to "…*recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject- matter capable of settlement by arbitration*[4]."

The International Limited Liability Companies Act

[46] ILLCA was assented to 29th December 2011 applies to Respondent.

[1] Chapter 125, revised Edition, 2000 Laws of Belize
[2] BCB Holdings Ltd and Belize Bank Ltd v Attorney General [2013] CCJ 5 (AJ), [2014] 2 LRC 81
[3] Convention On the Recognition and enforcement of Foreign Arbitral Awards, signed at New York, United States, June 10, 1958 and of which the United States is a signatory and thereby ratified on 30th September 1970. The whole of the Convention was set out the Fourth Schedule of the Arbitration Act.
[4] See Article II. 1 of the New York Convention.

[47] The object of ILLCA is: "*to provide for the establishment and administration of international limited liability companies; and to provide matters connected therewith or incidental thereto*".

[48] A Limited Liability Company (LLC) is a well-known and internationally recognized business entity[5] which operates under an "operating agreement" being a valid agreement of all the members as to its affairs and the conduct of its business.

[49] For the first time special provision was made under the laws of Belize, in the ILLCA, for LLCs which "*applied to LLCs formed under, subject to, or continued under this Act*[6]".

[50] ILLCA also made provision for limited liability companies of similar nature to those formed under the laws of any jurisdiction other that Belize (a "foreign limited liability company[7]")

[51] Under ILLCA "members" of an LLC, was defined as a "*person with an ownership interest in a limited liability company with the rights and obligations specified under this Act*".

[52] A "manager" was defined as the person or persons entitled (whether by appointment, designation or election) to manage it pursuant to the articles of organization, the operation agreement or under the ILLCA[8] and who may not be a member and may hold office under a management agreement.

[53] It is to be noted that by Section 12 of ILLCA:

> ***"Any dispute between or among parties to an operating agreement or between or among the members or managers of any limited liability company operating under this Act shall be resolved by the Supreme Court and any appellate court having jurisdiction over Belize.***

[5] Defined under Section 1 of the ILLC as "a body corporate or unincorporated".
[6] See Section 3 of the ILLCA.
[7] Ibid.
[8] See section 1, and 63 of the ILLCA.

(2) A court of competent jurisdiction shall resolve any dispute between the member or manager or the limited liability company and a third person or person other than those provided in section 36 dealing with charging orders and judgment creditors."

[54] Of particular interest to the present case is Part XI of ILLCA which provides for the transfer of domicile to Belize of foreign LLC and contains provision and procedures (including which documents should be filed etc.), the compliance with which would effect that purpose.

[55] Included under Part XI is Section 87 as follows:

"87. Upon the filing of the application to transfer domicile and the documents referred to in sections 85 and 86, together with the fees prescribed, if the Registrar finds that such documents are in proper form and satisfy the requirements of this Part, and if the name of the limited liability company meets the requirements of section 17, then the Registrar shall deliver to the limited liability company a certificate of transfer of domicile and the limited liability company shall become domiciled and registered in Belize as a limited liability company of Belize and shall thereafter be subject to all the provisions of this Act, and the limited liability company shall be deemed to have commenced its existence on the date the limited liability company was first formed, registered, organized, created or otherwise came into existence and shall be deemed to have continued its existence in Belize. The limited liability company shall promptly modify or amend its operating agreement, its registration, management and records to comply with the laws of Belize including this Act."

[56] Section 88 provides that a foreign LLC that has been re-domiciled pursuant to this Part is for all purposes the same entity that existed before the re-domiciliation and that all property owned by the re-domiciliating foreign LLC is vested in the Belize LLC as well as other related matters. The other related matters include matters

relating to all debts, liabilities and other obligations of the re-domiciliating foreign LLC which would continue as obligations of the Belize LLC, pending actions or proceeding against the re-domiciliating foreign LLC, all the rights, privileges, immunities, powers and purposes of the re-domiciliating foreign LLC which are vested in the Belize limited liability company; and relating to the members of the re-domiciliating foreign LLC, continues as members of the Belize LLC.

[57] Of particular interest is Section 89 of the ILLCA which provides as follows:

> *The filing of an application to transfer domicile shall not affect the choice of law applicable to prior obligations and rights of the limited liability company prior to its re-domiciliation, except that from the date of issuance of a certificate of transfer by the Registrar, the laws of Belize, including the provisions of this Act, shall apply to the limited liability company to the same extent as if the limited liability company had been originally organised as a limited liability company of Belize.*

The Law of 'Forum Non Conveniens'

[58] I had cause in the recent case of **Anthony Rath et al v Birdsall, Voss & Associates and Anthohony Rath et al v The Belize Tourism Board and Belize Hotel Association** [9], to set out the principles which can be distilled from the leading UK case **Spiliada Maritime Corporation v Cansulex Ltd** which the present parties appear to have accepted as encapsulating this area of the law. I will merely rely on those principles without repeating them here.

[59] Counsel for the Applicants have summarized the applicable guiding principles as follows:

i. The fundamental principle underlying the discretion of the court is that an action should be tried in the forum more suitable to the interest of all the parties and the ends of justice.

[9] Consolidated Claims Nos 456 of 2011 and 26 of 2013.

ii. The Applicants have the burden of showing not merely that the local forum is not the natural or appropriate forum for trial but that there is another available forum which was clearly or distinctly more appropriate that the local forum.

iii. In determining appropriateness, the court looks for the country with the most real and substantial connection to the action taking into account factors such as:

1. Convenience;
2. Expense;
3. Availability of witnesses;
4. Governing law of transactions;
5. Place where parties reside; and
6. Place where parties carry on business.

iv. Once the Applicants have discharged their burden, the onus shifts to the Respondent to prove special circumstances by reason of which justice requires that the court should refuse the application.

[60] Counsel for the Respondents has emphasized that the jurisdiction of the court to grant a stay is highly discretionary and to be "exercised with care, even extreme caution" and that the determination as to whether Belize is the appropriate forum for the resolution of the dispute must be done in the context and with due regard to the pleaded causes of action.

The Issues to be determined in relation to the application

[61] On the facts of the present case there does not appear to be a real question, given the nature of on-going dispute between the parties and the arbitrations which have been taking place in New Jersey in the USA, where the other available and more suitable and appropriate forum is having competent jurisdiction for the trial of the present claim.

[62] The Supreme Court of New Jersey and the Arbitrator in New Jersey and therefore New Jersey is the clearly, distinctly and generally the country with the most real

and substantial connection to the claim taking into account convenience, expense, the availability of witnesses, the Governing law of transactions, the Place where the parties reside; and the place where parties have been carrying on business.

[63] The Supreme Court of Belize does not, in my view, come close to New Jersey in these respects and I accept the extensive written submissions of Counsel for the Applicants in this regard.

[64] It seems to me that the central question for determination in this application is whether the provision of Section 12 of the ILLCA grants to the Respondent the right (whether ranging from an absolute or some lesser one) or some significant advantage such that on the facts and circumstances of the case, the court ought to be satisfied that there are circumstances, which may be special circumstances, by reason of which justice requires that a stay should be granted

[65] In this respect due regard must be given to the pleaded case, the fact that the burden is on the Applicant and the present position that, as an interlocutory proceeding, disputed facts cannot be resolved at this stage. This question has to be counterbalanced with the fundamental principle underlying the discretion of the court that the present claim should be tried in the forum more suitable to the interest of all the parties and the ends of justice.

Contentions of the Parties

[66] The Applicants contend:

(a) That the existence of lis alibi pendens is a factor on which this Court may decline jurisdiction in favour of the current parallel arbitration proceedings before the Arbitrator; and relies on the dicta of Lord Diplock in the House of Lords case of **The Abidin Daver**[10] that in aid of judicial comity he warned about the precarious position that parties would be in if two actions were allowed to proceed currently in two jurisdictions. Reliance was also placed on the UK High Court case of **Cleveland Museum of Art v**

[10] [1984] 1 ALL ER 470.

Capricorn Art Institute S.A[11]**,** an application to stay proceedings for *forum non conveniens*; and the case from the Court of Appeal of Barbados **Cellate Caribbean Limited v Harlequin Property (SVG) Limited and others**[12]**.**

(b) That the Arbitration Clause in the Operating Agreement (prior to its amendment) ought to be enforced, as on the clear facts of the present case it would be inequitable, unfair and unreasonable for this court to allow the Respondent to succeed in its willful and covert efforts to evade the jurisdiction of the Arbitrator, who has power to determine the validity of the amendments to the Operating Agreement, and that this Court should not sanction forum shopping but should force the parties to abide by their agreement to litigate in foreign arbitration.

[66] The Respondent contends:

(a) That in offshore jurisdictions such as Belize the grant of a stay on the basis of *forum non conveniens* should be handled with great care, if not extreme caution, to ensure that the jurisdiction of this court is not lightly ceded to foreign jurisdictions such as the USA especially where a provision such as Section 12 of ILLCA provides that any disputes shall be resolved by the Belize.

(b) That the migration of domicile was not a transfer of assets and/or a ploy or contrivance but a lawful, legitimate and proper management decision for tax reasons to transfer domicile to Belize as a jurisdiction which permits such transfers to take place and that Belize and the transfer have been mischaracterized.

(c) That relying on the BVI case of **Cukurova Holdings As v Imanagement Services Ltd**[13] the interests of Belize as an off-shore jurisdiction, and that fairness and justice requires, that the Supreme Court of Belize accepts

[11] [1990] BCLC 546.
[12] Civil Appeal No. 3 of 2011.
[13] HCVAP 2007/025

jurisdiction of the present dispute and that the Respondent would be "robbed of any juridical advantage which it may otherwise enjoy" by not accepting jurisdiction.

(d) That the issues which are at present before this court are different to that which is before the Court and Arbitrator in New Jersey, that is in the present case is the Arbitrator exceeding his jurisdiction, which in the circumstances of the case are better tried in Belize and that Belize for the trial of which, is the most appropriate forum.

(e) That in all the circumstances of the case, particularly Section 12 of ILLCA, and there being little dispute on the facts of the case involving witnesses, Belize is the most appropriate and natural forum for the claim and the court should jealously guard its jurisdiction and allow entities subject to its jurisdiction to have an objective ventilation of its disputes.

Determination

[67] I have given serious consideration to the nature of the pleaded facts in the present case and in particular looked carefully at the issues which arise for consideration as against the issues which have been and are being considered by the Superior Court of New Jersey and the Arbitrator. I have concluded that the present case in large measure is seeking to litigate the very same on-going issues in dispute namely the management control questions which have arisen in relation to the Respondent company in its domicile in New Jersey and in Belize and are properly before the Arbitrator in New Jersey.

[68] I have also given serious consideration to the facts of the case and the extensive written and oral submissions of Counsel and considered that wherever there was any real doubt I tried to resolve such doubt in favour of the Respondent or looked at such facts from the Respondent's point of view.

[69] However, as a matter of comity, due recognition and credibility has been given to all decisions of the Superior Court of New Jersey and due recognition and enforcement has been given to the arbitration agreement which existed in the

Operating Agreement prior to the migration of domicile of the Respondent to Belize.

[70] Further, due recognition and enforcement has been given to the decisions and awards of the Arbitrator as foreign Awards.

[71] Thus, in all such cases of conflict between the testimony on behalf of the Respondent and the documentary evidence exhibited by the Applicants this court has tended to resolve such disputes in favour of the evidence of such documentary evidence – in particular the transcript of the proceedings and particularly in the judgment pronounced by the Superior Court of New Jersey exhibited in the Second Affidavit of F. Todd Conway filed herein on the 27th October 2014.

[72] It is clear to me that the Respondent operated under an operating agreement which included an arbitration agreement and in a situation where the laws of New Jersey applied.

[73] The evidence is also clear that there was a management dispute in respect of the Respondent and that this dispute became the subject to arbitration proceedings in New Jersey and also in legal proceedings in the Courts of New Jersey.

[74] What is also clear is that at some stage the managers of the Respondent, in my view, took the decision to re-domicile the Respondent to Belize. This they did quite properly under the technical formalities (in terms of the appropriate filings) of the laws of both New Jersey and Belize. The laws of Belize, under the International Limited Liability Companies Act (ILLC), are there to be used including for tax planning.

[75] Within ILLCA are contained certain provisions which allowed it to be used in the general circumstances of the present case and I do not question the legality of such provisions in the circumstance of the present case insofar as it was in compliance with the laws of Belize. I cannot speak to the laws of New Jersey as the nature of these interlocutory proceedings did not permit the examination of expert evidence on the laws of that State in the USA.

[76] The question arises whether this court should allow the Respondent to use such provisions in the facts and circumstances of the present case and in particular in the context of the rules and principles applicable to *forum non conveniens.* In relation to the facts and circumstances of the present case the question for decision is whether this court ought to stay the present proceedings.

[77] I should make it clear at the outset that this is not an attack on the ILLCA in any way including its use in appropriate circumstances. I understand that this may be the first time the relevant provision of the ILLCA has come before the Court for determination and I make no determination as to its general efficacy.

[78] I accept that the ILLCA certainly has legitimate uses however I am not satisfied, on the facts and circumstances of the present case, that the circumstances of this case is such a circumstance, or that it has been put to a legitimate use. I say so because of the decision to remove the arbitration agreement, which previously existed under the Operating Agreement, and that if there is a smoking gun in so far as the present case is concerned this fact points to misuse of the re-domiciliation provision in ILLCA for the purpose of eviscerating the jurisdiction of the Arbitrator.

[79] This Court, under the laws of Belize, is obliged to give recognition and enforcement to arbitration agreements and awards. In the circumstances of this case I am not satisfied that by allowing this claim to proceed in this Court as the Respondent has argued, this Court would give effect to such recognition and enforcement of arbitral proceedings. It would, in my view be contrary to such duty of the court with detrimental and unjust effect.

[80] I've arrived at the present conclusion using the **Spiliada** case and was quite satisfied that the burden had shifted to the Respondent to satisfy the court as to special circumstances that the proceedings should be stayed.

[81] On the contrary, to any such finding in the Respondent's favour, it seems to me that there are clear ulterior and improper motives behind the re-domiciliation and by the removal of the arbitration agreement. Both, in my view, are an attempt to unfairly and unjustly use the legal provisions of Belize as a weapon in its internal

management disputes or its fight in New Jersey and to prevent any further proceedings continuing on the basis of New Jersey law and on a basis on which it was losing.

[82] Also, both the re-domiciliation and the removal of the arbitration agreement (and thereby being subject to the arbitration proceedings that have commenced or could later be commenced in New Jersey) are attempts to give the Respondent what it perceives to be an advantage (what this court considers and unfair and unjust advantage) in the internal management disputes and fight.

[83] It seems to me that the appropriate forum for these proceedings and any prospective proceedings to do with the management of the Company is the Superior Court of New Jersey and in particular the Arbitrator in New Jersey.

[84] The Respondent has not satisfied me that Belize is an appropriate or convenient forum for these proceedings because there is such little or no connection, apart from the re-domiciliation (over which there is a huge question mark) and also with the result that the law of Belize might be considered the governing law.

[85] I am not satisfied that the laws of Belize are the appropriate laws or that the Supreme Court of Belize is the appropriate Court in this management fight, but rather, I am satisfied that the Superior Court of New Jersey and the Arbitrator in New Jersey is the appropriate place and convenient forum for such a fight.

Costs

[55] In the above circumstances, and based on the conclusions upon which I have arrived, and on the merits of the case and the conduct of the Respondent generally, I consider that justice will be served if costs of the application filed herein on the 11th July 2014 are awarded against the Applicants to be agreed or assessed.

Disposition

[56] For the reasons given above I order that:

(a) The Claim be stayed on the ground of *forum non conveniens*;

(b) Costs of this application be paid by the Respondent/Claimant to be agreed or assessed.

The Hon. Mr. Justice Courtney A. Abel