COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2022/CLE/gen/000456

BETWEEN

FABIA INVEST LTD.

1st Plaintiff

JEAN-CLAUDE FABIANI

2nd Plaintiff

AND

XAIBAS INC.

1st Defendant

JAN GERARD BOON

2nd Defendant

OHTLI INC.

3rd Defendant

PRICEWATERHOUSECOOPERS (BAHAMAS) LIMITED

In its capacity as registered agent of Ohtli Inc.

4th Defendant

Before: The Honourable Madam Justice Simone I Fitzcharles

Appearing: Mr Sean Moree KC with Mr Miguel Darling for the 1st and 2nd Plaintiffs

Ms Gabrielle Rahming with Mrs Yvette Rahming for the 1st and 2nd Defendants

Mr Audley Hanna with Ms Oluwafolakemi Swain for the 4th Defendant

02 December 2022; 1 March 2023; 27 June 2023; 6 July 2023.

RULING

FITZCHARLES, J.

Introduction

1. This is an application by Xaibas Inc ("Xaibas") and Mr Jan Gerard Boon, the 1st and 2nd defendants, to set aside the writ of summons in this action and all subsequent proceedings. Alternatively, Xaibas and Mr Boon seek to stay these proceedings and restrain the 1st and 2nd plaintiffs, Fabia Invest Ltd ("Fabia") and Mr Jean-Claude Fabiani from bringing any further actions against the 1st and 2nd defendants. These applicants also apply for an award of the costs of and occasioned by the application. They rely upon **Order 12 Rule 7** of the **Rules of the Supreme Court, 1978, section 9** of the **Arbitration Act** and/or the inherent jurisdiction of the Court. The application was brought by Summons filed on 21 October 2022 and is supported by the Affidavit of Christopher Rahming filed on 25 October 2022 (the "Rahming Affidavit").

2. On 19 June 2023 the Court granted Mr Jan Gerard Boon ("Mr Boon") leave to enter a conditional appearance pursuant to **RSC Order 12 rule 6** of the **Rules of the Supreme Court 1978**. The 1st defendant was granted such leave to a limited extent, that is, in relation to its foreshadowed challenge to the jurisdiction of the Court on the ground that the matter ought to be determined by arbitration.

Background

3. The first plaintiff, Fabia, is a company incorporated under the **International Business Companies Act** (the "IBC Act"). Mr Jean-Claude Fabiani ("Mr Fabiani") is a shareholder and director of Fabia. There are 3 additional shareholders of Fabia – Vanina Fabiani, Laetitia Fabiani and Jacques Fabiani – all members of the Fabiani family.

4. Xaibas is a company incorporated under the IBC Act. Mr Boon is one of two directors and the sole shareholder of Xaibas. The other director of Xaibas is Melissa Boon.

5. Ohtli Inc, the third defendant ("Ohtli"), is a company incorporated under the IBC Act the shares of which are 50% owned by Fabia and 50% owned by Xaibas. On 12 September 2007 Mr Fabiani was appointed a director and president of Ohtli and Mr Boon was

appointed a director and vice president of Ohtli. On that day, Melissa Boon and Vanina Fabiani were also appointed directors of Ohtli. Mr Boon resigned as a director of Ohtli by letter to PricewaterhouseCoopers (Bahamas Limited ("PWC") dated 26 March 2020.

6. The fourth defendant, PWC is the registered office and the registered agent of Xaibas, Fabia and Ohtli.

7. According to the Rahming Affidavit relied upon by Xaibas and Mr Boon, Mr Fabiani and Mr Boon commenced a business relationship around the late 1970s or early 1980s in which they pooled resources and made certain land acquisitions. Ohtli holds current accounts and a 27.5% interest in a Dominican company called Tenedora Las Terrenas SA ("Tenedora"), which in turn holds real property. The land owned by Tenedora is valued near USD120,000,000.

8. By the Rahming Affidavit, Mr Boon was the president of Tenedora carrying out that company's daily business affairs in the Dominican Republic until January 2020. Mr Boon brought an employment claim in the Dominican Republic against Tenedora. Xaibas and Mr Boon submit that Mr Boon had concerns with the Board of Directors of Tenedora and sought to get support and assistance from Mr Fabiani regarding those concerns. In this context, Xaibas purported on 29 February 2020 to have made an offer by written instrument to assign all of its shares in Ohtli Inc and current accounts to Mr Fabiani for the price of $1.00 (the "2020 agreement").

9. The plaintiffs, by the Affidavit of Erin M Hill filed on 8 June 2022, explain the reason for the 2020 agreement differently. They state that the 2020 agreement was a final settlement between Mr Fabiani and Mr Boon. It had been agreed at the start of their business relationship that each of them would contribute one half of the funds required to run their real estate business, but over time it was realized that Mr Fabiani had been making all of such contributions. The plaintiffs submit that both Mr Fabiani and Mr Boon accepted that Mr Fabiani's contribution of funding the business far outweighed Mr Boon's contribution of conducting the day-to-day business. Therefore, it was agreed that Mr Fabiani would receive, by way of compensation for the shortfall in Mr Boon's contribution to the business

venture, both the Ohtli shares and all current accounts held by Xaibas in Ohtli's books for a nominal price. These terms were embodied in writing as the 2020 agreement.

10. The 2020 agreement is at the heart of this dispute. In accordance with a certified translation of that agreement from the original French language document to English (as exhibited in the Second Affidavit of Kevin A C Moree filed on 28 October 2022), the 2020 agreement provides:

"***DEED OF ASSIGNMENT OF COMPANY SHARES***

"***BETWEEN THE UNDERSIGNED:***

a) *Mr **Jan Boon**, Passport no. BT88H7H92 valid until 10/04/28, residing in Santo Domingo (Dominican Republic) at Avenida Helios 17, born in Leyden (Netherlands) on the 27th October 1955, a Dutch national;*

b) *The company known as XAIBAS Inc, domiciled at Providence House, East Hill Street, Nassau, Bahamas, represented by the abovementioned **Mr Jan Boon**;*

(initials)

Jointly referred to hereinafter as 'the ASSIGNOR'

PARTY OF THE FIRST PART

(initials)

"***AND:***

a) *Mr. **Jean-Claude FABIANI**, a Company Director residing in UCCLE – 1180 BRUSSELS (Belgium) at 39 A Avenue Hamoir, born on the 28th January 1943 in PARIS (14th district), the husband under an arrangement of separately-owned property of Mrs. Kyoko KAMIMURA following their marriage in UCCLE (Belgium) on the 30th March 2016, a Belgian national.*

   a. *Mr Jean-Claude FABIANI has conferred full powers to Mr Jean-Luc Vanhoutte, passport no. EN601938 valid until 11/01/23 to sign in his name all documents relating to this agreement to assign shares and current accounts;*

b) *The company Fabia Invest Ltd., domiciled at Providence House, East Hill Street, Nassau, Bahamas, is represented by the aforementioned Mr. Jean-Claude Fabian;*

"Referred to hereinafter as 'the ASSIGNEE'

"***PARTY OF THE SECOND PART***

"***IT HAS BEEN AGREED AS FOLLOWS***:

"The Parties designated above have together incorporated a company named Ohtli Inc, domiciled at Providence House, East Hill Street, Nassau, Bahamas.

"The purpose of the company is:

- *Ownership of 27.5% of the shares of a company named Tenadora Las Terrenas sa, (domiciled at Celle Henriquez Urena No. 150, Edificio Diandy XIX, 4to. Piso, Santo Domingo, DN, Dominican Republic), itself the owner of a plot of land at Las Terrenas (Dominican Republic)*

"The share capital is divided as follows:

- *FABIA INVEST, certificate 3 for 2500 shares*
- *XAIBAS, certificate 4 – for 2500 shares*

"Being a total of 5000 shares in the company Ohtli inc.

"Xaibas is assigning to Jean-Claude Fabiani all of its shares in Ohtli Inc, together with all the current accounts held by Xaibas for the price of $1. As a consequence of this, Mr. Jan Boon, representing the Xaibas company, agrees to sign all future documents to be drawn up in order to implement this assignment operation.

"It is therefore agreed that the current accounts of the Ohtli Inc company in Tenedora Las Terrenas shall remain the property of Ohtli and shall therefore be entirely owned by the acquiring party, Mr. Jean-Claude Fabiani.

"Issued in Las Terrenas, on 29/02/20

(signature) *(signature)*

THE ASSIGNOR ***THE ASSIGNEE***

(signature)

THE WITNESS

Lucie Sabine Houdayer Descotes"

11. On 3 March 2020, Mr Vanhoutte wrote to PWC to find out "the most efficient way to transfer shares between shareholders." He stated that Xaibas wanted to sell all its shares of Ohtli to Fabia "so that, as a result, Fabia…will be owning 100% of Ohtli Inc.". In the same email, Mr Vanhoutte indicated to PWC that wire transfers would be sent to restore Fabia and Ohtli to the Register of Companies, as they had apparently been struck off for non-payment of annual fees. On 23 March 2020, PWC delivered to the Registrar General the

outstanding annual and late fee penalty payments for Fabia and Ohtli. Further, on 18 June 2021, PWC delivered restoration fees for both companies to be restored to the Register of Companies.

12. On 23 April 2020, Jacques Fabiani, son of Mr Fabiani and a shareholder of Fabia, indicated to PWC that "we would like to proceed" with the reduction of capital of Ohtli Inc from USD5 million to USD5 thousand "before buying the 2500 shares in Ohtli Inc currently held by Xaibas…". The par value reduction per share was to be USD1,000.00 to USD1.00. Further, Jacques Fabiani instructed PWC to prepare a draft resolution to reduce the authorized share capital and par value of the shares. He also confirmed to PWC by 1 May 2020 that the purchase price was to be $2,500.

13. PWC rendered advice to Mr Fabiani on certain legal and procedural requirements connected with the proposed reduction of share capital, including that the directors of Ohtli should satisfy themselves that the capital reduction complied with section 34 of the IBC Act. A bank account was established for Xaibas to receive the purchase price and the $2,500 sum was tendered to Xaibas via that bank account, according to the plaintiffs. Mr Boon in an email dated 3 May 2020 to Jacques Fabiani acknowledged the opening of a bank account for Xaibas at Apollo Bank.

14. As a part of the evidence, the Court has seen a document entitled Special Directors Resolutions in relation to Ohtli dated 8 May 2020 (the "Special Resolutions"), which appear to be signed by 2 of the 4 directors of Ohtli – Mr Fabiani and Vanina Fabiani. The Special Resolutions also contained a space for Mr Boon's signature which appeared blank, but it is noted that Mr Boon had turned in his resignation as a director of Ohtli since 26 March 2020. Also, there is no evidence before the Court that Melissa Boon, as a director of Ohtli signed the Special Resolutions.

15. By the Special Resolutions of 8 May 2020, the directors of Ohtli declared a reduction of the capital of the company from US$5,000,000.00 to US$5,000.00 and a reduction of the par value of each share from US$1,000.00 to US$1.00. Additionally, by the Special Resolutions, the following was declared to be of full legal effect:

(1) a cancellation of the Share certificate by which Fabia held 2,500 shares in Ohtli,

(2) a cancellation of the share certificate by which Xaibas held 2,500 shares in Ohtli, and

(3) the issuance of a new share certificate for all 5,000 shares in Ohtli in the name of Fabia.

16. In this application Xaibas and Mr Boon highlight the difference(s) between the resolutions described in the Special Resolutions on the one hand and the terms of the earlier 2020 agreement on the other: in the 2020 agreement the shares were transferred to Mr Fabiani for $1.00, while in the Special Resolutions the shares were purchased by the company, Fabia, for $2,500.00. Fabia and Mr Fabiani assert that the purchase price of $2,500 for the transfer of Xaibas' 2,500 shares and bank accounts in Ohtli was agreed subsequent to the 2020 agreement. They assert that Mr Boon took steps to carry out the terms of the 2020 agreement by having a bank account established for Xaibas to receive the purchase price and by resigning as a director of Ohtli.

17. It is apparent that after the 2020 agreement, Mr Boon did not sign any additional documents to implement the transfer of the shares and bank accounts. Further, it appears Xaibas did not carry out the assignment to Mr Fabiani of all of its shareholding in Ohtli together with all current accounts held by Xaibas pursuant to the 2020 agreement.

Procedural Matters

18. The plaintiffs, taking the position that neither Xaibas nor Mr Boon lived up to the terms of the 2020 agreement, issued the Writ of Summons in this action on 22 March 2022, by which they seek the following relief:

(1) "An order for specific performance of the 2020 Agreement against Xaibas and Mr Boon, requiring them to take all necessary steps in The Bahamas to:

(i) Effect the transfer of the 2,500 Shares to Mr Fabiani and record Mr Fabiani as the holder thereof in the share register of Ohtli; and

(ii) Transfer to Mr Fabiani all the current accounts held by Xaibas in Ohtli's books.

(2) Should Xaibas and/or Mr Boon fail to take necessary steps to effect the relief sought in (1) above, an order that PWC, as the registered agent of Ohtli, make the necessary amendments

to the corporate documents of Ohtli to reflect the transfer to Mr Fabiani of the 2,500 Shares and of all the current accounts held by Xaibas in Ohtli's books.

(3) In the alternative, (i) damages for breach of contract against [Xaibas and Mr Boon] in an amount to be determined and assessed at trial; (ii) a declaration that [Xaibas] and [Mr Boon] are jointly and severally liable to the plaintiffs for those damages; and (iii) interest pursuant to the Civil Procedure (Award of Interest) Act, 1992 on any sum as may be found due to the plaintiffs at such rate and for such period as the Court shall think fit.

(4) A declaration that, since his resignation on 26th March 2020, Mr Boon is no longer a Director of Ohtli and an order that Ohtli's Register of Directors be amended to reflect Mr Boon's resignation.

(5) Costs.

(6) Such further and other relief as this Honourable Court may deem just and appropriate."

19. On 29 March 2022, this Writ was served on Xaibas, Ohtli and the 4th defendant, PricewaterhouseCoopers ("PWC") at PWC's office in New Providence, The Bahamas. PWC entered an appearance in the action on 29 September 2022. In order to serve Mr Boon, the 2nd defendant, who resides out of the jurisdiction, Fabia and Mr Fabiani sought leave to issue a Concurrent Writ of Summons and, pursuant to RSC Order 11 rule 1(1)(f)(iii) and/or Order 11 rule 1(1)(j), to serve a Notice of the Writ of Summons on Mr Boon. They obtained this leave by Order of Registrar Constance Delancy on 26 May 2022.

20. The plaintiffs served Mr Boon with Notice of the Writ and a document entitled '*Acto Notificacion de Demanda y Citacion*' on Friday 12 August 2022. By the terms of the Order of the Registrar, Mr Boon had a period of 21 days of service of the notice of the Writ (that is, until 2 September 2022) to enter an appearance in this action. The plaintiffs filed an application for inter alia specific performance on 7 June 2022 (summary judgment).

21. On 14 October 2022, Fabia and Mr Fabiani were to appear for a hearing before the Court on their application for summary judgment. The Court was, on 13 October 2022, made aware by Counsel for Xaibas and Mr Boon that they wished to be heard on 14 October 2022, which was permitted. There were at that time 3 extant applications: (1) a summons

filed on 8 June 2022 by the plaintiffs for inter alia specific performance, (2) a Notice filed on 3 May 2022 by the plaintiffs for referral to case management and (3) a summons filed on 5 April 2022 by Xaibas and Mr Boon for leave to enter a conditional appearance in this action.

22. At the hearing Xaibas and Mr Boon stated that they wished to move their application for leave to enter a conditional appearance (the "Conditional Appearance" application) and that they intended to apply to set aside the Writ and/or service of Notice of the Writ out of the jurisdiction (the "Setting Aside" application). Counsel for the plaintiffs suggested that both applications be heard together, and the defendants' Counsel did not object to the applications both being set down to be heard in the same hearing. The Court gave directions and set the Conditional Appearance application and the Setting Aside application to be heard on 01 November 2022, which was adjourned to 02 December 2022. Xaibas and Mr Boon filed the Setting Aside application on 21 October 2022.

23. At the hearing, Fabia and Mr Fabiani contested both the Conditional Appearance and Setting Aside applications. The Court granted the application for leave to enter a conditional appearance on 19 June 2023. In relation to Xaibas' application leave was granted on the basis of the challenge to the Court not being the appropriate forum in light of an arbitration clause in the Articles of Association of Ohtli. In relation to Mr Boon, leave was granted on the basis of several challenges launched by him inclusive of the challenge to forum by reason of the arbitration clause. At the request of the Court, Counsel proffered further written submissions on parts of the arguments for the Court's consideration.

24. In this Setting Aside application, the plaintiffs rely on the Second Affidavit of Kevin A C Moree filed on 28 October 2022. The plaintiffs also refer to affidavits sworn in support of the specific performance application, namely the Affidavit of Erin Hill filed on 8 June 2022, the Affidavit of Alexandria Russell filed on 27 September 2022 and 4 October 2022 and the Affidavit of Kevin Moree filed on 14 October 2022. The defendants rely on the Affidavit of Christopher Rahming sworn on 25 October 2022.

Service Out of the Jurisdiction (RSC Order 11)

25. The Order of the Registrar by which the plaintiffs obtained leave to issue a concurrent writ and to serve notice of the same out of the jurisdiction on Mr Boon was pursued on the basis of **Order 11 rule 1(1)(f)(iii)** and/or **Order 11 rule 1(1)(j)** of the **Rules of the Supreme Court 1978**. Those rules provide:

> **"(1) Subject to rule 3 and provided that the writ does not contain any such claim as is mentioned in Order 67 rule 2(1), service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say –**
>
> **...**
>
> **(f) if the action begun by the writ is brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –**
>
> **(iii) is by its terms, or by implication, governed by Bahamian law;**
>
> **...**
>
> **(j) if in the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;...".**

26. Pursuant to **Order 12 rule 7 of the Rules of the Supreme Court 1978** the Court may entertain an application by a defendant which challenges the issue or service of a writ, or notice of a writ or any order by which leave is granted to serve any of those documents outside of the jurisdiction. For ease of reference I will call this a "setting aside order". **Order 12 rule 7** provides:

> **"7. (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within fourteen days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction.**
>
> **(2) An application under this rule must be made by summons."**

27. The rubric in the **1976 UK Supreme Court Practice** (1976 White Book) explains the grounds upon which a party may apply for a setting aside order. Under O. 12 r. 7 the explanatory notes at paragraphs **12/7/1** state:

> **"Effect of this Rule. – This Rule is taken from RSC (Rev), 1962, O. 12 r. 7, which had been taken in part from the former O. 12 r. 30, and in part from the former practice. Its effect is to enable a defendant to prevent a judgment in default being entered against him while at the same time remaining entitled to object to any irregularity in the issue or service of the writ or to the jurisdiction of the Court.**
>
> **"The term 'conditional appearance' means an appearance in qualified terms, reserving to the appearing defendant the right to apply to the Court to set aside the writ, or service thereof, for an alleged informality or irregularity which renders either the writ or service invalid or for lack of jurisdiction…".** [Emphasis added].

28. The rubric under **12/7/4** provides:

> **"Effect of Conditional Appearance. – A conditional appearance or appearance under protest is a complete appearance to the action for all purposes, subject only to the right reserved by the defendant to apply to set aside the writ or the service thereof, on any ground which he can sustain. A defendant has the right to appear conditionally where he has a bona fide intention to dispute the jurisdiction of the Court…".** (Emphasis added).

Grounds of the Application

29. In this application Xaibas and Mr Boon seek to set aside the writ of summons and all subsequent proceedings or to have the action stayed on several grounds as follows:

(1) The court at this time has no jurisdiction to hear these proceedings as the Supreme Court of the Commonwealth of The Bahamas is not the proper forum for the resolution of this dispute;

(2) The plaintiff obtained leave to serve the Notice of Writ of Summons out of the jurisdiction on grounds which were not applicable;

(3) The writ of summons filed 22 March 2022 to commence proceedings, was not marked 'Not for Service Out of the Jurisdiction' as it should have been;

(4) The contract purported to have been made on 29 February 2020, which is the primary subject matter of these proceedings is void and/or impossible ab initio;

(5) The contract purported to have been made on 29 February 2020, which is the primary subject matter of these proceedings, had been repudiated and therefore treated as having been brought to an end;

(6) These proceedings are frivolous, vexatious and/or an abuse of the court's process;

(7) Fabia and Mr Fabiani failed to give full and frank disclosure to the court;

(8) Mr Boon is neither a necessary nor proper party to these proceedings and therefore should not be a party and should not have been served out of the jurisdiction.

Proper Forum for the Dispute

30. The argument that the Court lacks proper jurisdiction to hear this dispute relies upon an arbitration clause contained in the Articles of Association of Ohtli. Xaibas and Mr Boon contend that the arbitration clause applies to the dispute in relation to performance of the 2020 agreement, with the effect that the plaintiffs ought never to have filed this action to resolve the dispute. Article 117 of Ohtli's Articles of Association provides:

> "Whenever any difference arises between the Company on the one hand and any of the members or their executors, administrators or assigns on the other hand, touching the true intent and construction or the incidence or consequences of these Articles of the Act, touching anything done or executed, omitted or suffered in pursuance of the Act or touching any breach or alleged breach or otherwise relating to the premises or to these Articles, or to any Act affecting the Company or to any of the affairs of the Company such differences shall, unless the parties agree to refer the same to a single arbitrator, be referred to two (2) arbitrators one to be chosen by each of the parties to the difference and the arbitrators shall before entering on the reference appoint an umpire.
>
> (Emphasis added).

31. Xaibas and Mr Boon further contend that pursuant to section 9 of the Arbitration Act 2009 the court ought to grant a stay of these proceedings. Section 9 of the Arbitration Act 2009 provides:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> "(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
>
> "(4) On application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."
>
> (Emphasis added).

32. Mr Boon and Xaibas submit that, by the Articles of Association of Ohtli, the parties agreed that the Supreme Court is not the proper forum for this dispute. As such any dispute between the members of Ohtli who are parties to these proceedings, that is, Fabia and Xaibas, should be dealt with by way of the agreed mode of resolution, namely arbitration. They contend that the Court should adhere to the definition of "dispute" and "difference" as discussed in ***AMEC Civil Engineering Ltd v Secretary of State for Transport*** [2004] EWHC 2339 (TCC) and ***Tomolugen Holdings Ltd v Silica Investors Ltd*** [2016] 1 LRC 147. They further submit that the Court ought to follow the approach recommended in those cases as to how a court should assess the question whether an arbitration clause applies to the resolution of a given dispute. The 1st and 2nd defendants opine that the terms of Article 117 are sufficiently broad to encompass this matter.

33. The plaintiffs' disagree with all arguments put by the 1st and 2nd defendant for the application of the Article 117 arbitration clause. The plaintiffs assert that this is a dispute between two shareholders of Ohtli – Xaibas and Fabia. They argue that Mr Fabiani and Mr Boon are not shareholders of Ohtli so the arbitration clause cannot apply to them. In

answer to this last point Xaibas and Mr Boon have countered that Mr Fabiani, by the 2020 agreement, is a designated assignee of Xaibas and he is therefore subject to the arbitration clause. This argument is rebutted logically by the plaintiffs who say the 1st and 2nd defendants contradict themselves: they cannot contend that the 2020 agreement is void ab initio when at the same time they argue that Mr Fabiani took an interest from them under the 2020 agreement as an assignee.

34. The plaintiffs further contend that Ohtli is not a party to the 2020 agreement, and has not entered an appearance in this action. They contend that no relief is sought against Ohtli, which was joined only because the relief sought against Xaibas and Mr Boon will, if granted, require amendments to the corporate documents of Ohtli. It is argued, there is no dispute between Ohtli on the one hand and any of its members on the other hand. As such, this dispute is outside the scope of the arbitration clause found in Ohtli's Articles of Association and such clause is irrelevant. To support this point the plaintiffs have drawn analogies from authorities (which will be discussed below) in which courts have construed similarly-worded arbitration clauses. The plaintiffs submit that the Supreme Court is the proper forum for resolution of this dispute. They have also expressed a willingness to remove Ohtli from the writ to put beyond dispute Ohtli's lack of substantive involvement in this dispute.

35. Alternatively, if the Court finds that the Article 117 arbitration clause is applicable to the dispute and that the Supreme Court is not the proper forum for the dispute, the plaintiffs argue that Mr Boon and Xaibas cannot apply for a stay after entering a conditional appearance. Rather, they contend, the reliefs available to Mr Boon and Xaibas under RSC Order 12, rule 7 are limited to "the right to apply to the Court to set aside the writ, or service thereof, for an alleged informality or irregularity which renders either the writ or service thereof invalid or lacking in jurisdiction."

36. The starting question for the Court is whether this dispute falls within the scope of Article 117 of Ohtli's Articles of Association – the arbitration agreement. It is settled law that the Court is duty-bound to give effect to parties' agreements to arbitrate their disputes. Centuries ago in England a policy in favour of arbitration was introduced in legislation,

and was later developed by the courts in decisions based upon statutes and the common law.[1] Of the requirement that the court uphold arbitration agreements, Lord Campbell in the seminal decision of ***Scott v Avery*** (1856) 5 HL Cas 811, 10 ER 1121, stated:

> "[W]hat pretence can there be for saying there is anything contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract…I can see not the slightest ill consequence that can flow from such an agreement, and I see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract."

37. The principle that courts must hold parties to their arbitration agreements was reiterated in ***Lyford Holdings NV v Vernes Holding Ltd*** [2018] 1 BHS J. No. 183. There the Court opined that the reason for the limited jurisdiction of the Court to exercise its powers in support of arbitral proceedings is because "courts believe that those who make agreements to arbitrate should be compelled to do so." The court also referred to ***Channel Tunnel Group Ltd & Another v Balfour Beatty Construction Limited & Another*** [1993] AC 334 in which the English Court of Appeal affirmed a court's inherent jurisdiction to stay an action in favour of an agreement between the parties to resolve their dispute by an alternative method, whether or not that procedure fell within the arbitration statute.

38. Articles of Association are contractual in nature and are as prescribed by statute. According to paragraph 244 of Halsbury's Laws of England, Companies, Volume 14 (2016):

> "A company's articles of association constitute a contract between the company and a member in respect of his rights and liabilities as a shareholder; and a company may sue a member and a member may sue a company to enforce and restrain breaches of the regulations contained in the articles dealing with such matters…".

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[1] See Brekoulakis, S. The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration, Oxford Journal of Legal Studies (2019) 39 (1): 24.

39. In this case the contract (contained in Article 117) must be construed. In ***BCCI v Ali*** [2001] 1 AC 251, Lord Bingham of Cornhill summarized the principles by which courts interpret contracts as follows:

> "To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."

40. The parties to this dispute (including Ohtli, which has not entered an appearance or made any submission in this litigation) have not produced any information concerning their entry into the Articles of Association of Ohtli which would persuade the Court to attribute any different meaning to Article 117 than that which is derived from the natural and ordinary meaning of its words.

41. Described in Article 117 of Ohtli's Articles of Association is the type of dispute or difference which it covers. It includes:

    (1) any difference touching the true intent and construction of the Articles or touching any consequences thereof;
    (2) any breach or alleged breach relating to the Articles of Association of Ohtli;
    (3) any dispute relating to any Act affecting Ohtli; or
    (4) any difference relating to the affairs of Ohtli.

42. The description of the type of matter the Article covers is quite broad, but the scope of such coverage is qualified or narrowed by a requirement that the difference or dispute arise "between the Company on the one hand and any of the members or …assigns on the other hand…".

43. The Article goes on to require that, unless the parties have agreed to refer the matter to a single arbitrator, the difference shall be referred to 2 arbitrators – one chosen by each party to the difference. For Article 117 to apply, its provisions require that the Company be a party to the difference. The clause contemplates 2 sides or parties in the dispute – the Company and any of its members or assigns. In that event, it appears the Company would be required to choose an arbitrator where there is no agreement on a single arbitrator. The member (or assign) on the other side of the dispute would also select an arbitrator. This wording suggests that the "difference" which falls within the scope of the Article 117 arbitration clause would require Ohtli to be an active or substantive contender in the dispute. Clearly, it is not.

44. The approach of the Court of Appeal of Singapore in ***Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals*** [2016] 1 LRC 147 to the question whether a given dispute falls within the scope of an arbitration clause is helpful. There, the court stated:

> "A crucial step in the analysis was the methodological question – ie whether the matter should be characterised at a high level of abstraction or the court should adopt a more granular approach – because the characterization of a matter could be dispositive of whether it fell within the scope of the arbitration clause concerned. When considering whether any 'matter' was covered by an arbitration clause, the court should undertake a practical and commonsense inquiry in relation to any reasonably substantial issue that was not merely peripherally or tangentially connected to the dispute in the court proceedings. In particular the court should not characterize the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In most cases, the matter would encompass the claims made in the proceedings. However, that was not an absolute or inflexible rule. Turning to the construction of the arbitration clause, the principles were well-settled. The court did not adopt a technical approach, but construed the clause based on the presumed intentions of the parties as rational commercial parties. When ascertaining whether a given matter was covered by an arbitration clause, the court had to consider the underlying basis and true nature of the issue or claim, and was not limited solely to the manner in which it was pleaded." (Emphasis added).

45. The Court is urged to consider seven propositions set out by Jackson J in the English case of ***Amec Civil Engineering Ltd v Secretary of State for Transport*** [2004] EWC 2339 (TCC) [68] which seeks to pinpoint the definition of 'dispute' or 'difference'. In part, these propositions are:

> (1) "The word "dispute" which occurs in many arbitration clauses…should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers…
> (2) …[L]itigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.
> (3) The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
> (4) The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference…".
>
> (Emphasis added).

46. In the Court's view, a review of the relief the plaintiffs seek in the Writ reveals the true nature of the dispute and the connection of Ohtli to this action. The Writ illustrates that:

(1) the plaintiffs seek specific performance of the 2020 agreement against Xaibas and Mr Boon requiring them to take all necessary steps in the Bahamas to transfer the 2,500 shares to Mr Fabiani and record Mr Fabiani as the holder thereof in Ohtli's register;

(2) the plaintiffs seek an order against Xaibas and Mr Boon to transfer to Mr Fabiani all the current accounts held by Xaibas in Ohtli's books pursuant to the 2020 agreement;

(3) alternatively, the plaintiffs seek damages for breach of contract against Xaibas and Mr Boon and a declaration Xaibas and Mr Boon are liable to the plaintiffs for those damages and interest pursuant to the Civil Procedure (Award of Interest) Act 1992; or

(4) If Xaibas and Mr Boon do not transfer the 2,500 shares to Mr Fabiani, record Mr Fabiani as their holder in Ohtli's books and transfer the current accounts Xaibas holds in Ohtli's books to Mr Fabiani, the plaintiffs seek an order of the Court that PWC, the registered agent of Ohtli, give effect to the transactions by amending Ohtli's documents to reflect the transfers under the 2020 agreement.

47. From the facts the Court can glean at this interlocutory stage, and by accounts given by both of the actively disputing sides, it appears that the underlying basis of the 2020 agreement was the mutual desire of Mr Boon, Xaibas and Mr Fabiani that Mr Boon by way of Xaibas give compensation or financial incentive to Mr Fabiani in relation to issues which arose relating to their separate business venture in the Dominican Republic involving a company called Tenedora. Ohtli is not a party to the 2020 agreement. Some of its shares and accounts are assets held by Xaibas which, under the 2020 agreement, were meant to constitute the financial incentive or compensation assigned to Mr Fabiani.

48. The plaintiffs joined Ohtli as a party to the litigation. They submit that this was done because if the plaintiffs succeed in their action against Xaibas and Mr Boon, and if, in such event, Mr Boon and Xaibas fail to comply with any order of the Court to transfer the shares and accounts as agreed and mark Ohtli's books to reflect the same, then Ohtli's books will have to be so marked by PWC. The Court notes that the plaintiffs by their action seek no direct relief against Ohtli and have no disagreement, dispute or difference with Ohtli. That is so even if the terms 'dispute' and 'difference' are given a broad interpretation.

49. Xaibas and Mr Boon contend that in keeping with the wording of Article 117, the dispute concerns Ohtli's Articles and the International Business Companies Act. They say for example that "there is an alleged breach of share transfer, alleged failures/omissions of Ohtli to carry out administrative tasks to reflect the share transfer, there is a reduction in share value of Ohtli and [a claim for]… a change of ownership control in Ohtli by a 50% shareholder to a 100% beneficial ownership of Ohtli and its bank accounts. However, the Court observes that Ohtli has put up no defence, and, logically, none would be warranted

as there are no such claims against Ohtli in the Writ. This is not a case where silence of Ohtli gives rise to an inference that it rejects the claim of the plaintiffs. Nor can it be said that by Ohtli's silence, it does not admit the claim as described in ***Amec***. The position, as represented by Counsel for PWC, is simply that PWC (as Ohtli's registered agent) stands by to abide the outcome of this application.

50. In my judgment, all of the factors considered make Ohtli a neutral party. PWC may have to act on the occurrence of certain contingencies, namely if the plaintiffs are successful in their action and if there is any failure on the part of the 1st and 2nd defendants to comply with an order to transfer shares and accounts of Ohtli as sought by the plaintiffs. In such a case, at this time the involvement of Ohtli seems peripheral to the main dispute. In the circumstances, this action could have proceeded without the joinder of Ohtli, because the active disputants are Fabia and Mr Fabiani on the one hand and Xaibas and Mr Boon on the other. The subsequent enforcement of any order, if the plaintiffs are successful against Xaibas and Mr Boon, may then involve PWC and Ohtli.

51. Based on a reading of the Writ, the overriding aim of the claim brought by Fabia and Mr Fabiani is to get Xaibas and Mr Boon to honour the 2020 agreement. If the 1st and 2nd defendants do so, there will be no action. When considering whether this dispute falls to be determined under the arbitration clause the first port of call is to be satisfied that, substantively, the dispute is between Ohtli on the one hand and a member of Ohtli on the other, as required by Article 117. Based on the foregoing discussion as to the connection of Ohtli to this dispute and the true nature of this dispute, I am not persuaded that this is the case. As such, the arbitration clause - Article 117 – does not apply to this dispute. Since under Article 117 this dispute is not a matter which is required to be referred to arbitration, and as there is no arbitration clause in the 2020 agreement, the dispute does not activate section 9 of the Arbitration Act of 2009.

52. I found useful the case of **Rakunas v Scenic Associates Ltd and another** 2008 BCSC 444 which involved a similarly-worded arbitration clause and was an action which related to a separate relationship (a trustee-beneficiary relationship between the company and a shareholder) which did not activate use of the arbitration clause in the articles of

association. In that case, Miss Rakunas and Mr Murphy lived together and set up SAL, a company registered in the British Virgin Islands of which they were the sole shareholders and directors, to buy some land in Whistler. Mr Murphy made the initial capital down payment and Ms Rakunas made the mortgage payments. Subsequently, the parties separated and apparently had no contact for some years. Ms Rakunas sought orders from the court that SAL held the property in trust for the shareholders and that the property be sold and the proceeds divided between Mr Murphy and her. Mr Murphy filed an appearance arguing that the court had no jurisdiction as the dispute was between the shareholders of a BVI company and the company, or alternatively, that the court was forum non conveniens, and that there was no resulting trust. Russel J. found jurisdiction and ordered a trial. On the issue of the applicability of a mandatory arbitration clause found in SAL's articles of association Russel J. opined:

> "[44] The issue of a mandatory arbitration clause contained in SAL's articles was not pled by Murphy in his notice of claim dated 18 April 2006 or in Pt III of his outline dated 1 March 2008. As it appears, the first time this argument was raised was in Murphy's written submissions dated 7 March 2008. As it was not raised in the pleadings, Murphy cannot rely on this argument.
>
> "[45] However, I also note that even if the arbitration issue were raised in the pleadings, it would not have changed the outcome of Murphy's application. The relevant provision reads as follows:
>
> > '151. Whenever any difference arises between the Company on the one hand and any of the members or their executors, administrators or assigns on the other hand, touching the true intent and construction or the incidence or consequences of these Articles or of the Act, touching anything done or executed, omitted or suffered in pursuance of the Act or touching any breach or alleged breach or otherwise relating to the premises or to these Articles, or to any Act or Ordinance affecting the Company or to any of the affairs of the Company such difference shall, unless the parties agree to refer the same to a single arbitrator, be referred to 2 arbitrators one to be chosen by each of the parties to the difference and the arbitrators shall before entering on the reference appoint an umpire.'

> "[46] First, I question whether the claim brought by Rakunas against SAL qua trustee really concerns a difference between Rakunas and SAL 'touching the true intent and construction or the incidence or consequences of these Articles or of the Act, touching anything done or executed, omitted or suffered in pursuance of the Act or touching any breach or alleged breach or otherwise relating to the premises or to these Articles, or to any Act or Ordinance affecting the Company or to any of the affairs of the Company.' It is my view that since Rakunas is alleging the existence of a trust between her and SAL, her rights qua beneficiary to sue the company qua trustee are entirely separate from her rights and obligations qua shareholder, to which the above provision would apply."

53. For our purposes, ***Rakunas*** demonstrates that even where the company is a substantive defendant and the action relates to matters which affect the company, the arbitration clause in the articles may not apply. In that case, the capacity in which the shareholder sued the company, that is, as beneficiary against trustee, took the scenario outside of the operation of the arbitration clause in the articles. In the instant case, the applicability of Article 117 may be even more remote by comparison, because substantively there is no dispute between the plaintiffs or any shareholder and Ohtli at all. The payment of shares and accounts under the 2020 agreement, appears to be consideration in connection with a personal obligation Mr Boon had to perform for, or alternatively, an incentive Mr Boon wished to give to, Mr Fabiani. PWC and Ohtli are joined in case the Court orders Mr Boon and Xaibas to comply with obligations under the 2020 agreement, and they fail to do so.

Applicability of the 'Extended Fiona Trust' Principle

54. The 1st and 2nd defendants raise an alternative argument for the application of the Article 117 arbitration clause to this dispute. In their Supplemental and 2nd Supplemental Submissions to the Court, they contend that should the Court not agree that the dispute amongst the parties falls within the terms of the Article 117 arbitration clause, it is invited to hold that the parties' as rational business people, agreed to an arbitration clause at the onset of their relationship, as it was their intent to have all disputes which arise from their relationship resolved by means of arbitration. They contend this proposition is supported

by ***Fiona Trust & Holding Corporation and others v Privalov and others*** [2007] UKHL 40.

55. Xaibas and Mr Boon further rely upon what has come to be known as the 'Extended Fiona Trust Principle' – a term coined by Bryan J in ***Terre Neuve SARL (a company incorporated in France) and Others v Yewdale Ltd and Others*** [2020] EWHC 772 (Comm). They submit that "common law authority… demonstrates that where parties, particularly in subsequent business contracts, expressed their wishes to have some issues decided by one tribunal and other issues decided by another, they must expressly say so. Otherwise…the Court will accept that the parties have agreed on a single tribunal for the resolution of all such disputes." They explain that in the event a contract does not have a jurisdiction or forum provision for the resolution of disputes (such as the 2020 agreement), the court may apply another jurisdiction or forum agreement made by the parties by an extension of the Fiona Trust principle, as referred to in ***Terre Neuve***.

56. In answer to this alternative argument the plaintiffs submit that for several reasons the Extended Fiona Trust principle has no application to this case. The plaintiffs state that in accordance with the ordinary rules of contract law articles of association do not bind a shareholder save in his capacity as a member of the company. Since the 2020 agreement is a settlement agreement of Mr Fabiani's financial contribution to a separate real estate business enterprise between Mr Boon and himself, they contend it is executed for an external purpose, unrelated to Ohtli's Articles of Association. They refer to the English Court of Appeal case of ***In re City Equitable Fire Insurance Company, Limited*** [1925] Ch. 407 where the court refused to assume any implied terms from articles of association or other documents into a separate employment agreement which was drafted after the articles of association. The plaintiffs point out that the 2020 agreement was prepared some 12 years after Ohtili's Articles and with no reference thereto, or to any jurisdiction, forum or arbitration clause.

57. The plaintiffs also submit that in order to determine whether an arbitration agreement in one document extends to disputes arising under another agreement, one must examine the Extended Fiona Trust principle. They assert that in this regard the summary of the principle as provided by the English Commercial Court in ***Terre Neuvre*** is useful. The plaintiffs

contend that on an examination of the precepts which govern the applicability of the Extended Fiona Trust principle, one must conclude that in this case the principle does not apply.

58. I turn to consider the principle and its extension. In ***Fiona Trust & Holding Corporation and Others v Privalov and Others*** 114 ConLR 69, the UK House of Lords determined an appeal on the scope and effect of arbitration clauses in 8 charterparties which took the Shelltime 4 form. The 8 owners alleged that the charters arranged with the 8 charterers came about as a result of an associate of the charterers' bribery of senior officers who were employed in the Russian State-owned group of companies to which the owners belonged. The owners therefore purported to rescind the charters. Each charterparty contained a similar arbitration clause. While the owners sought a declaration from the court that they had validly rescinded the charters, the charterers sought a stay under s 9 of the Arbitration Act 1996. At first instance, the stay was refused. On the charterers' appeal, the stay was granted. The owners then appealed to the House of Lords.

59. The House of Lords framed the issues for the court, which were: (1) whether, the arbitration clause covered the question of whether the contract was obtained by bribery, and (2) whether it is possible for a party to be bound by the arbitration clauses if he argues that he would not have entered into the agreement except for the bribery. The eight owners contended inter alia that as a matter of construction, these questions were not disputes arising under the charter. The House of Lords found that the charterers were entitled to a stay and the owners' appeal was dismissed. Lord Hoffmann stated:

> "[5]…Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement…Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.
>
> "[6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or

> what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen…
>
> "[7] If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts…If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

60. The court decided that it should give effect, as far as the language used by the parties permitted, to the commercial purpose of the arbitration clause. Further, the court saw no reason to deprive the parties, who had agreed to submit the question of the validity of the charters to arbitration, from doing so. It found that by the severability provision – s 7 of the Arbitration Act 1996, the arbitration clause is a distinct agreement and is not affected by the invalidity or otherwise of any wider agreement in which it is set out. The court further opined:

> "[13] …the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction…
>
> "[15] If one adopts this approach the language of cl 41 of Shelltime 4 contains nothing to exclude disputes about the validity of the contract whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. In my opinion it therefore applies to the present dispute…".

61. Therefore, under the Fiona Trust principle, there is a presumption that the parties to an arbitration agreement intended that the same tribunal should decide any dispute arising out of the parties' relationship. In other words, one tribunal will adjudicate their matters. In **Terre Neuve SARL (a company incorporated in France) and others v Yewdale Ltd and others** [2020] EWHC 772 (Comm), arguably, an extension of the Fiona Trust principle was considered by which an arbitration or jurisdiction clause in one contract may be considered applicable to a dispute arising in relation to another or other contracts between the parties. Mr Justice Bryan, in six points, summarized the basis and application of the 'Extended Fiona Trust' principle as follows:

> "(1) The principle is based on the construction of the relevant jurisdiction clause (…in 'Contract A'): it is not based on an implication or implied incorporation of the jurisdiction clause from Contract A into a related contract (…'Contract B').
>
> "(2) As a matter of contractual construction, the wording of the clause in Contract A must be fairly capable of applying to disputes in Contract B. For example, a clause which stated that 'any dispute under this contract shall be referred to arbitration' may not apply to disputes arising out of a (related) Contract B.
>
> "(3) It is not legally or commercially odd or improbable that an agreement should have no jurisdiction clause. Equally an agreement may have no jurisdiction clause and not be covered by a jurisdiction clause in a different agreement. This was confirmed in Am Trust Europe Ltd v Trust Risk Group at [46] (albeit in reference to competing jurisdiction agreements):
>
> 'There is no presumption that a jurisdiction (or arbitration) agreement in Contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction".
>
> However, the absence of any competing jurisdiction clauses in any agreements within a particular set of agreements concluded by the parties for the same purpose, at the same time, and with the same subject matter, can be a relevant consideration… [**Etihad Airways v Flother** [2019] EWHC 3107 (Comm) at 102(v)].

"(4) This principle normally applies where the parties to Contract A and Contract B are the same…Where the principle is applied to a situation in which the parties to Contract A and Contract B are different, then it is possible that the court may conclude that it was the Contract A parties' intention that third parties should be able to rely on Contract A (for example in a Himalaya clause situation), or the court might conclude that only the common parties between Contract A and Contract B are bound by the jurisdiction clause in Contract A. However the latter is an inherently unattractive prospect, as it involves the fragmentation of disputes pursuant to the same agreement (Contract B) – possibly even disputes concerning the very same obligations…The effect of Fiona Trust is that fragmentation of disputes under one agreement is unlikely to be what the parties intended. However, it is perfectly possible that there may be fragmentation of the resolution of disputes across several agreements (although whether this was the parties' intentions is to be considered when construing the contracts).

"(5) The Extended Fiona Trust Principle normally applies where contract A and Contract B are interdependent…or have been concluded at the same time as part of a single package or transaction…or (if concluded at different times) dealt with the same subject-matter…

"(6) A jurisdiction agreement in Contract A will generally apply to Contract B where that contract was entered into at the same or a similar time as Contract A. In this regard:

…

"(c) If Contract A was concluded prior to Contract B, and a jurisdiction clause in Contract A was intended to cover Contract B, one might expect Contract B to cross-refer back to Contract A (albeit that ultimately what one is construing for present purposes is Contract A and on normal principles of contractual construction it stands to be construed at the date on which it was entered into)…".

62. On the basis of the analogy given in ***Terre Neuve***, in the instant case I take Contract A as Article 117 of the Articles of Association (the arbitration agreement) and Contract B as the 2020 agreement. Is Article 117 fairly capable of being construed as applying to disputes of the 2020 agreement? I do not believe it is. For several reasons I am of the opinion that the Fiona Trust principle does not apply and cannot be extended to apply to the 2020 agreement in this case. In particular, while Article 117 governs disputes between Ohtli on the one

hand and any of its members on the other, Ohtli is not a party to the 2020 agreement, and it is clear the parties did not see the necessity of making it such. Further, it is a fact that the shares of Ohtli are agreed to be dealt with in Contract B, but only as currency or compensation to settle a private dispute between Mr Fabiani and Mr Boon (according to Mr Fabiani) or to give an incentive to Mr Fabiani (according to Mr Boon) in respect of their Tenedora-related dealings. I reiterate here the principle in **Am Trust Europe Ltd v Trust Risk Group SA** [2016] 1 All ER (Comm) 325, that there is no presumption that an arbitration agreement in one contract, even if couched in broad language, was meant to apply to disputes in another contract. Construction of the arbitration clause is key, and I have earlier found that Article 117 is not applicable to the dispute at hand.

63. The Court notes that there is no arbitration agreement in the 2020 agreement. Under the 3rd point in ***Terre Neuve*** it was stated that the absence of such a clause in Contract B would be a relevant consideration where a particular set of agreements are concluded by the parties for the same purpose, at the same time, and with the same subject matter. As asserted by the plaintiffs, there is a 12-year chasm of time between the implementation of the Articles of Association of Ohtli and the 2020 agreement. The two documents cannot be characterized as being in a set or package of agreements concluded for the same purpose at the same time or having the same parties. On a careful analysis of all factors, there is nothing which convinces the Court that the parties meant for Article 117 to apply to the 2020 agreement, or that it in fact has such applicability. I therefore find that the principle known as the Extended Fiona Trust principle does not operate to cause the arbitration clause (Article 117) to be applicable to the 2020 agreement. The Court is not satisfied that the prima facie standard in relation to the conditions for the grant of a stay in this matter have been met. The result is that the parties are free to have their dispute determined in the chosen forum – the Supreme Court of the Commonwealth of The Bahamas.

64. As the Court has found that the arbitration clause in Article 117 is not applicable to determine this dispute, and such argument founded the sole basis upon which Xaibas was cautiously given leave to enter a conditional appearance in the first decision in this matter, such conditional appearance for Xaibas must become unconditional.

65. Before considering additional arguments raised by the 1st and 2nd defendants, I must observe, with gratitude to Counsel, that on this issue of the applicability of the arbitration clause Ms Gabrielle Rahming, Counsel for the 1st and 2nd defendants and Mr Sean Moree KC, Counsel for the 1st and 2nd plaintiffs, argued valiantly and produced authority as requested by, and to significant assistance of, the Court. The time-honoured principle stated by Robert Goff LJ in **The Messianiki Tolmi** - that a defendant within the jurisdiction has no grounds for contesting the jurisdiction, in particular affects Xaibas. The Court considered carefully the argument put forward by both Xaibas and Mr Boon, having permitted full opportunities to the parties to respond. The 1st and 2nd defendants' argument that they could raise the arbitration point on a conditional appearance and apply for a stay at this stage was based in part on their assertion that it constitutes a challenge to the jurisdiction of the Court.

66. The plaintiffs, on the other hand, have maintained that a conditional appearance only allows for certain arguments to be made as contemplated by **Order 12 rule 7**, which did not include a stay pending arbitration (a relief only available upon entry of a regular appearance). Moreover, the plaintiffs pressed the point that the 1st and 2nd defendants' application to the Court to stay proceedings is wholly inconsistent with the 1st and 2nd defendants' accompanying argument that the Court lacks jurisdiction to hear the dispute. Setting aside an action for lack of jurisdiction (as contemplated in **Order 12, rule 7**) puts an end to the action on the basis it was not properly brought; but seeking to have the Court stay an action admits of the Court's jurisdiction to grant the relief and in effect preserves that action in the Court, so that a party may subsequently apply to have the stay lifted. The plaintiffs therefore contend that if Mr Boon and Xaibas wish to seek a stay of the proceedings in favour of arbitration, they would have to enter a regular (unconditional) appearance.

67. On careful reflection, I am persuaded that the correct view is that the Supreme Court never loses its jurisdiction, even in situations where an arbitration clause is in force and must be resorted to for the resolution of a dispute. In an arbitration agreement the parties simply agree to have their dispute aired in an alternative way, but not to give up their fundamental rights. (See Nori Holdings Ltd & others v Public Joint-Stock Company "Bank Otkritie

Financial Corporation" [2018] 2 All ER Comm 1009). The reality is that the Supreme Court maintains a supervisory jurisdiction in relation to arbitration proceedings even after a stay is granted. Certainly, in the absence of a prima facie case for granting a stay, the Court's jurisdiction to decide whether to grant a stay exists in that the Court must decide whether an arbitration agreement is null and void, inoperative, or incapable of being performed. Section 55 in Part IX of the Arbitration Act, 2009 lists some examples of powers which may be exercised by the Court in relation to arbitration.

68. Since it is clear the Court retains its jurisdiction before and after a stay pending arbitration, the challenge 'to the jurisdiction' which the 1st and 2nd defendants launched in relation to the argument for a stay pending arbitration does not appear to be one which forms a part of the category of challenges to the jurisdiction of the Court as contemplated by **RSC Order 12 rule 7**. However, having already found that Article 117 (that is, the arbitration clause) of the Articles of Association does not apply to this dispute, it follows that the Court will not set aside or stay this action on such ground. Equally, by reason that there is no applicable agreement by the parties to arbitrate differences over the 2020 agreement, even if a stay could be considered, the Court would not grant one. I now turn to consider the additional grounds upon which Mr Boon seeks to have the Writ and all subsequent proceedings set aside.

Applicability of Grounds for Service Out of the Jurisdiction (Order 11 r.1(1))

69. The plaintiffs obtained leave to issue a Concurrent Writ of Summons and to serve Notice of the Writ of Summons out of the jurisdiction on the 2nd Defendant. Mr Boon now argues that the Writ and all subsequent proceedings (inclusive of the Order of the Registrar of 26 May 2022) should be set aside on the basis that the plaintiff obtained leave to serve the Notice of Writ of Summons out of the jurisdiction on grounds which were not applicable. This argument is based primarily on the argument that no claims for breach of contract or performance of the 2020 agreement can be made personally against Mr Boon because he argues he was not a party to the 2020 agreement in his personal capacity, but rather as a representative or agent of Xaibas.

70. Further, Mr Boon contends that he is neither a necessary nor a proper party to these proceedings and therefore should not be a party and should not have been served out of the jurisdiction. He asserts that if the Court had before it all the details of the case, the Registrar would not have granted leave. Mr Boon argues that there is no legitimate nexus between him, Fabia and Mr Fabiani.

71. Mr Boon contends that it is trite that a company is a separate legal entity from its directors and shareholders. (See the watershed case of **Salomon v Salomon Co., Ltd** (1897). Further, the case of **Said v Butt** [1920] 3 KB 497 puts beyond doubt that a director of a company is not liable for inducing breach of contract by that company if the director is acting bona fide within the scope of his authority. A director may be held personally liable if he has not acted in good faith. (See **Antuzis and others v DJ Houghton Catching Services Ltd and others** [2019] EWHC 843 (QB).

72. The plaintiffs contend that they applied appropriately under **RSC Order 11, rule 1(1)(f)(iii)** to obtain leave to serve Mr Boon out of the jurisdiction. Such ground may be employed where the action begun by writ involves enforcement of a contract or recovery of damages or obtaining other relief in respect of breach of a contract, the terms of which expressly or impliedly are governed by Bahamian law. Further, they argue that their application based on the applicability of **RSC Order 11, rule 1(1)(j),** that Mr Boon was served as a necessary and/or proper party to the action, was correct. The plaintiffs say that Mr Boon is inextricably involved in the dispute as a director and sole shareholder of Xaibas, as a signatory to the 2020 agreement in his personal capacity and as a representative of Xaibas. It is reasoned that if Mr Boon had been in the jurisdiction, he would have been served along with the other defendants.

73. In the Court's view, the 2020 agreement is subject to interpretation based on the evidence at trial. On one possible interpretation, Mr Boon may have (apart from being a representative of Xaibas) signed the 2020 agreement in his personal capacity, promising all other parties to the agreement (including Xaibas) that he would perform certain acts. It appears he has not performed on that promise to Fabia, Mr Fabiani and Xaibas.

74. At this juncture, the participation of the 1st and 2nd defendants may be viewed from a number of angles. Xaibas was aware of Mr Boon's promise as it is also a party to the 2020 agreement. In fact, Xaibas acts via Mr Boon, for it requires a natural person – its director – to perform certain acts such as negotiating and signing the 2020 agreement. If Xaibas was not aware of Mr Boon's promise in the 2020 agreement, Mr Boon has purported to bind Xaibas by signing the 2020 agreement on its behalf. The Court accepts the principles as set out in ***Said*** and ***Antuzis***. Whether a director acted bona fide or was not acting in good faith determines whether he can be held personally liable, for his acts purported to be performed qua director. At the time the Registrar granted leave to the plaintiffs to serve process out of the jurisdiction, she had before her an agreement in which it appeared Mr Boon had bound or intended to involve himself both personally and as a director of Xaibas (on at least one possible interpretation of the 2020 agreement). A decision on the strength of the argument against such interpretation must be made upon the Court's consideration and testing of all evidence surrounding the 2020 agreement and the parties' relationship. For this exercise, Mr Boon is appropriately joined as a party.

75. In the case of **Multinational Gas and Petrochemical Company v Multinational Gas and Petrochemical Services Ltd** [1983] 3 WLR 492, the English Court of Appeal considered the requirements of **Order 11 rule 1(1)(j)** when a party seeks leave to serve a necessary and proper party out of the jurisdiction, having properly brought the action against a person within the jurisdiction. May LJ opined, in part, as follows:

> "I turn now to consider the terms of sub-paragraph (j) of R.S.C., Ord. 11, r. 1 (1)... This sub-paragraph thus requires the court to be satisfied of two matters before any question of the exercise of its discretion under R.S.C., Ord. 11, r. 4 arises. First, on the assumption that the action begun by that writ was 'properly brought' against that person so served. Secondly, that the person out of the jurisdiction sought to be served is 'a necessary or proper party' to the action already begun against the English defendant.
>
> "It is not, I think, disputed that there is ample authority in the speeches of the members of the House of Lords in The Brabo [1949] A.C. 326 that an action is not 'properly brought'

against an English defendant if that action is in any event bound to fail, either on the facts if these are ascertainable by the court hearing the application for leave to serve out of the jurisdiction, or on the law. Equally, I think that if it can be shown that the action would be bound to fail against the potential foreign defendant were he made a party to it, he could be described neither as a necessary nor proper party to it… If one can demonstrate that the action against the defendant within the jurisdiction is bound to fail and that it is on this ground alone that one can say that he was only joined to provide a peg for an application to serve others who are out of the jurisdiction, then of course the action cannot be said to be properly brought for the reason I have already mentioned…

"We were referred to a number of authorities on this point, but I think that it is only necessary for me to mention some of them. The first was *Massey v. Heynes & Co.*(1888) 2 Q.B.D. 330. In that case London shipbrokers were sued for breach of warranty of authority to enter into a charterparty on behalf of Austrian principals. They denied the want of authority with the result that the plaintiffs applied for leave to join the principals and to serve them out of the jurisdiction. This was granted. Of necessity, the action had to fail either against the English agents or the [Austrian principals in] such circumstances the latter could be said… to be proper parties to the action against the former. However, upholding the grant of leave in the Court of Appeal, Lord Esher M.R. said, at p. 338:

> 'The question, whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this, - supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction.'

"In agreeing Lindley L.J. said, at p. 338:

> 'When the liability of several persons depends upon one investigation, I think they [are] all 'proper parties' to the same action, and, if one of them is a foreigner residing out of the jurisdiction, rule 1(g) – now a(1)(j) – of R.S.C., Ord. 11 applies.'"

76. The question whether Mr Boon is personally liable or involved in the 2020 agreement is still a live one. I cannot confidently say at this stage, and without hearing the evidence at

trial, that the case against Mr Boon is bound to fail. It is not readily apparent, as well, that the case against Xaibas will fail.

77. The evidence produced on Mr Boon's behalf suggests that a personal obligation to, or agreement he had with, Mr Fabiani culminated in the 2020 agreement. The explanation implied in the Rahming Affidavit for the creation of the 2020 agreement was that Mr Boon personally "*sought to get support and assistance*" from Mr Fabiani in relation to concerns Mr Boon had over the Board of Directors of Tenedora and an employment claim Mr Boon had launched against Tenedora. Apparently in that context, Mr Boon then agreed to cause Xaibas to transfer its Ohtli shares and accounts to Mr Fabiani. On that version of events put forward for Mr Boon, it appears that the underlying reason for the 2020 agreement was personal to him, and that he intended to use Xaibas to assist in incentivizing Mr Fabiani's support. On Mr Fabiani's evidence, the reason for the 2020 agreement is different. It was a promise by Mr Boon to cause Xaibas to transfer shares and accounts, but again, because Mr Boon personally owed Mr Fabiani some measure of reimbursement for Mr Fabiani's superior financial outlay towards their real estate business. This issue requires exploration at trial, and at this stage I am of the view that the Registrar correctly granted leave under **Order 11, rule 1(1)(j)**, having regard to these considerations relevant to the apparent capacity or capacities in which Mr Boon entered the 2020 agreement.

78. Further, in relation to **RSC Order 11, rule 1(1)(f)(iii)**, I am also of the view that although the 2020 agreement has no governing law or jurisdiction clause, a respectable argument can be made that Bahamian law has the closest and most real connection to this dispute.

79. According to the learned authors of *The Conflict of Laws* (15th Edition) –

> "33-003. At common law a contract for the sale, pledge or hire of a movable was governed by its proper law, determined by applying the general choice of law rules concerning contracts in the particular context of these contracts. In the absence of an express or implied choice of law, therefore, the contract was governed by the system of law with which it had the closest and most real connection.
>
> "33-008. To the extent that the law applicable to the contract has not been chosen..., a contract for the sale of goods is governed by the law of the country where the seller has his

> habitual residence. ...[I]t would appear to be of limited significance here whether the concept of 'goods' is interpreted broadly (for example, as including electricity, gas, water and intangible movables, such as shares or receivables) or more narrowly. Even if the thing sold does not fall within the definition of goods, the residual rule...should equally point to the law of the country in which the seller, as the person effecting the characteristic performance of the contract, is habitually resident...
>
> "33-009. Thus the habitual residence of companies and other bodies, corporate or unincorporated, will be the place of central administration...".

80. This case involves Bahamian companies and Bahamian shares, and in particular, the 2020 contract which purports to deal with those shares. Fabia and Xaibas are Bahamian International Business Companies ("IBCs") and so is Ohtli whose shares are dealt with in the 2020 agreement. The situs of the shares is The Bahamas and so is the place of central administration of the IBCs involved. On the basis of what was known to the Registrar at the time leave was granted to serve Mr Boon with process out of the jurisdiction, it is the Court's opinion that there were sufficient reasons to grant such leave in part by reason that there is a contract which appears to have been breached, the terms of which are impliedly governed by Bahamian law.

81. In the circumstances, the Court is of the view that both grounds upon which leave was granted under **RSC Order 11** by the Registrar were applicable on a reasonable consideration of the evidence presented to the Registrar at that time and application of the law. I therefore refuse to set aside the Writ or service thereof and all subsequent proceedings on this ground.

Non-Disclosure and Irregularities

82. Mr Boon applies to set aside the Writ and all subsequent proceedings in this action on the basis that the plaintiffs failed to give full and frank disclosure to the Court and/or there were irregularities in the plaintiffs' actions because they did not -

    (1) produce for the Registrar the original French language version of the 2020 agreement along with a certified translation into English of the same;

(2) produce for the Registrar a copy of the Special Resolutions dated 8 May 2020 by which a reduction of capital and terms contrary to the 2020 agreement were set out;

(3) disclose to the Registrar that both Fabia and Ohtli were struck off the Register of Companies at the time of entry into the 2020 agreement and only subsequently restored;

(4) produce for the Registrar a copy of the Articles of Association of Ohtli; and

(5) did not mark the Writ of Summons filed on 22 March 2022 '*not for service out of the jurisdiction.*'

83. It is trite that a foreign language document produced for use as evidence in the Supreme Court should be accompanied by a certified translation. In relation to the failure of the plaintiffs to produce the same to the Registrar, this was remedied in the Affidavit of Kevin A C Moree filed on 14 October 2022 and the Second Affidavit of Kevin A C Moree filed on 28 October 2022, by which the original French language version of the 2020 agreement and a certified translation into English were produced. Mr Boon complains that only an uncertified translation of the 2020 agreement was produced for the Registrar. The Court accepts that it is an irregularity that the original French version of the 2020 agreement and a certified translation were not produced for the Registrar's consideration at the time she made her decision to grant leave to the plaintiffs to serve the Notice of the Writ out of the jurisdiction on Mr Boon. However, I do not find this is a sufficient basis on which to set aside the Writ or service of the same and all subsequent proceedings in this action. The French language document and certified translation, albeit late, were produced to the Court so as effectively to cure the irregularity. Further, upon consideration of the certified translation the Court finds no material differences between it and the uncertified translation as produced for the Registrar. Therefore, had the certified translation and French language document been produced for the Registrar when she gave her ruling, there is nothing to indicate she would have refused leave.

84. The 1st and 2nd defendants accurately refer to the rubric at 11/4/1 of the 1979 UK Supreme Court Practice, setting out the practice of marking a writ "*not for service out of the jurisdiction*'. It reads:

> "*The writ.* – O. 6 r. 7 (1), provides that "No writ which, is to be served out of the jurisdiction shall be issued without the leave of the Court." Where, therefore, the defendant or all defendants are out of the jurisdiction, leave must be obtained to *issue* for service out of the jurisdiction and to *serve* abroad. If, however, one or more of the defendants are within the jurisdiction, issue without leave an ordinary writ with the names and addresses of all the defendants. It must be specially sealed iwht a notification that it is "not for service out of the jurisdiction…".

85. There is no note or provision which marks the failure to take the step of marking the writ '*not for service out of the jurisdiction*' as fatal to service of any concurrent writ issued or notice of the writ issued and served on a party abroad where there are also parties who have been served within the jurisdiction. This irregularity alone would not therefore, in my view, be a sufficient ground upon which the Court ought to exercise its jurisdiction to set aside a writ and all subsequent proceedings. Perhaps coupled with other more serious failures, for example, not getting the leave of the Court to issue a concurrent writ and serve notice of the writ out of the jurisdiction (such as occurred in the case of **Alexandra Henderson v Yamaha Motor Manufacturing Corporation of America & Anor**. SCCivApp No. 153 of 2021), a court might be persuaded that the mistakes are too egregious to put right. The Court agrees that it is important that parties comply with the rules. I consider whether Mr Boon or Xaibas suffered any prejudice as a result of the Writ not having been marked '*not for service out of the jurisdiction'*. None has been shown. I am not satisfied that this case is an exceptional one in which this Court ought not to exercise its discretion to cure the irregularities identified by the 1st and 2nd defendant.

86. The criticism is made of the plaintiffs also that they did not produce a copy of the Articles of Association of Ohtli for the Registrar, and did not inform her that Ohtli had been struck off the Register of Companies from January 2017 through 18 June 2021 when it was restored to the Register pursuant to section 166(3) of the International Business Companies

Act. The production of the Articles of Association would have been relevant if that document, and in particular Article 117 discussed above, was applicable. That point has been dealt with. The Court found the arbitration clause to be inapplicable. As such, there is no material non-disclosure found on the basis that the Articles of Association were not produced.

87. As for the disclosure of the striking off and restoration dates of Ohtli, I find this to be equally immaterial and no basis upon which to find that the plaintiffs did not live up to their obligation of disclosure. According to **section 166(3)** of the **International Business Companies Act**, after a company is restored to the Register of Companies it is deemed never to have been struck off the Register. This has long been settled. By the time the Registrar granted leave in this case, Ohtli had been restored and therefore deemed never to have been struck off in the first place. If deemed never to have been struck off, then any prohibition against carrying on business, commencing legal proceedings or dealing with assets which may have applied where Ohtli was struck off, no longer applied upon the company's restoration. The same is true for Fabia. (See **Beauchamp Pizza Ltd v Coventry City Council** [2010] EWHC 926 (Ch) which is instructive).

88. Now, Mr Boon also argues, relying on **Contract Facilities Limited v Rees and others** [2002] EWHC 2939 (QB), that while the restoration to the register resurrects the company and any legitimate contracts the company entered into during the period it was struck off, this does not revive a contract that has come to an end. The Court completely agrees with this principle as far as it goes. However, it does not accept that any actions taken by any of the parties is invalid, amounts to repudiation of the 2020 agreement, or otherwise. At this stage in the litigation, the assertions of each party have not been tested; necessarily, a fuller investigation of the facts surrounding the 2020 agreement and any subsequent actions taken by the parties (and the purport thereof) must be engaged in. A corollary of this is that the 1st and 2nd defendants do not lose the ability to argue any of these kinds of points at an appropriate stage in this case (i.e. points such as invalidity or repudiation of contract). Nonetheless, in the circumstances today, I find no material non-disclosure on the part of the plaintiffs in refraining from mentioning to the Registrar the fact, and time period during which, Ohtli was struck off the Register of Companies.

89. The 1st and 2nd Defendant accurately pointed out that the plaintiffs did not produce a copy of the Special Resolutions of the Directors of Ohtli dated 8 May 2020 for the Registrar. Rather, the document was produced in the evidence referred to in this application. I have studied both the Special Resolutions and the submissions made in connection with the same by the parties. The document is characterized as "partially signed" by the 1st and 2nd defendants. It appears to be at odds in some respects with the 2020 agreement, and I have outlined some of those differences in the recital of the background facts above. Mr Boon points out that the Special Resolutions were intended to bring about a reduction of capital before the purchase of the shares discussed therein. The tenor of the observation implies that this was some clandestine and/or questionable act by the plaintiffs, and that, had the Registrar been made aware of it, she would not have granted leave to serve Mr Boon out of the jurisdiction. The Court observes that based upon the evidence currently before it, while Mr Boon and/or Xaibas was willing in the 2020 agreement to accept $1 for disposal of all shares and current accounts in Ohtli, there was an increase in the purchase price to Mr Boon and/or Xaibas after the purported reduction of capital, which appears to have amounted to some $2,500 (possibly, $1 for each share transferred).

90. There are various reasons why a company may reduce its share capital, such as to facilitate redemption of shares or a share buyback or to enable dividends to be paid to shareholders by increasing reserves that can be distributed, to name a few examples. At this stage, the Court has not heard full evidence so as to ascertain the reason for the reduction, or whether it was effectively done by the Special Resolutions. Additionally, there are mechanisms by which an aggrieved shareholder may challenge such reduction, which would not include a challenge to a Writ or service thereof out of the jurisdiction. In my view, the criticism of the Special Resolutions demonstrates that it gives rise to yet another issue to be tried, which involves the 1st and 2nd defendants and the plaintiffs. Further, contrary to being a document, the non-disclosure of which would persuade a court to refuse leave to serve Mr Boon with Notice of the Writ out of the jurisdiction, the fact that the document is referred to in the evidence for Xaibas and Mr Boon as "partially signed" prompts the question whether it is valid and ought to be considered at all.

91. The principles as set out in **Essex Global Capital, LLC v Purchasing Solutions International, Inc** [2019] 1 BHS J. No. 60 are noted. In particular it is noted that an applicant has a duty in an ex parte application to act in the utmost good faith and is required to disclose to the Court all matters which are material to be taken into account by the Court in deciding whether to grant relief ex parte. Ruminating on all of these matters, I am not convinced that there has been non-disclosure on the part of the plaintiffs which impels the Court to set aside the Writ and all subsequent proceedings in this matter. Further, for these reasons, I do not consider that the Court can, at this stage, definitively form the view that the 2020 agreement is void and/or impossible ab initio or that it has been repudiated by the Special Resolutions, as the 1st and 2nd defendants prompt the Court to find. These arguments and any supporting evidence must be tested at trial.

Strike Out and Abuse of Process

92. Mr Boon and Xaibas argue that this case does not simply warrant the stay of these proceedings but also the striking out of the Writ and all subsequent proceedings on the following grounds:

(1) the court at this time has no jurisdiction to hear these proceedings as the Supreme Court is not the proper forum for the resolution of this dispute;

(2) the plaintiff obtained leave to serve the Notice of Writ of Summons out of the jurisdiction on grounds which were not applicable;

(3) the Writ of Summons filed on 22 March 2022 to commence proceedings, was not marked 'Not for Service Out of the Jurisdiction' as it should have been;

(4) the contract purported to have been made on 29 February 2020, which is the primary subject matter of these proceedings is void and/or impossible ab initio;

(5) the contract purported to have been made on 29 February 2020, which is the primary subject matter of these proceedings, had been repudiated and therefore treated as having been brought to an end; and

(6) these proceedings are frivolous, vexatious and/or an abuse of the court's process.

93. The plaintiffs have countered this position with an argument that such arguments for a strike out of the Writ and all subsequent proceedings are inappropriate when one has entered a conditional appearance. There are specific types of arguments which may be advanced, that irregularities on the issue or service of the Writ or Notice of the Writ out of the jurisdiction or a challenge to the jurisdiction. The 1st and 2nd defendants therefore contended that they can make their application pursuant to the Court's inherent jurisdiction.

94. The Court has decided not to grant a stay or set aside the Writ and all subsequent proceedings on the basis of the grounds put forward by the 1st and 2nd defendants. However, the Court has not dealt with an application to strike out the action on the basis that it is frivolous, vexatious and/or an abuse of the process of the court. For three reasons which follow, the Court refuses to strike out the action.

(1) A strike out application is made pursuant to **RSC Order 18 rule 19** and is inappropriate upon entry of a conditional appearance, by which a party having done so may only seek: (i) an order to set aside the writ; (ii) an order to set aside service of the writ; (iii) an order to set aside notice of the writ; (iv) an order declaring that the writ or notice has not been duly served; or (v) an order discharging a previous order giving leave to serve the writ or notice on him out of the jurisdiction. (See **T v The Superior General of the Sisters of Nazareth and others** [2016] NIMaster 10). These reliefs operating on a conditional appearance, do not include striking out the action on the basis it is frivolous, vexatious and/or an abuse of process.

(2) The Court, while recognizing that its inherent jurisdiction is "a fundamental one" will not exercise such jurisdiction in this case where to do so would be inconsistent with the available rules of the Supreme Court concerning applications which may be made on the entry of a conditional appearance. The Privy Council in **Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 discussed the approach of courts called upon to apply their inherent

jurisdiction in cases where the rules of court contain provisions which govern the application:

> "56. The answer, therefore, on the first issue is that there is no doubt that there is an inherent jurisdiction to stay proceedings. But that does not in itself answer the question whether the inherent jurisdiction may be exercised to the extent that the CPR themselves contain provisions for applications for stays which are subject to procedural conditions and time-limits. The authorities strongly suggest that the inherent jurisdiction to stay proceedings is such a fundamental one that it will not normally be displaced by express powers to grant a stay. It was so held by the BVI Court of Appeal in *Addari v Addari* (2005), a decision on a leave application.
>
> "57. But the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: *Raja v Van Hoogstraten (No 9)* [2008] EWCA Civ 1444, [2009] 1 WLR 1143. That decision concerned the court's power under the inherent jurisdiction to set aside an order made without notice *ex debito justitiae*. It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction."

(3) Even if the Court was of the view that it could entertain a striking out application in relation to this action, such relief would not be granted as the Court, for the various reasons given in this Ruling in connection with the grounds relied upon by Mr Boon and/or Xaibas, does not hold the view that those grounds are sufficiently made out and/or are sufficiently meritorious to support such relief at this stage in the litigation. Further, there is no convincing argument advanced to support a finding that this matter is frivolous, vexatious or an abuse of the Court's process.

95. In the circumstances, the Court refuses to stay or set aside the Writ of Summons and all subsequent proceedings in this action. The Court refuses to strike out the proceedings and

equally finds no basis upon which it ought to grant an injunction to restrain the plaintiffs from bringing any further actions without the leave of the Court as prayed for by the 1st and 2nd defendants. For the reasons given, the Court dismisses the application of the 1st and 2nd defendants and orders that:

(1) the 1st and 2nd defendants' conditional appearance shall stand as unconditional;

(2) the costs of and occasioned by the application shall be paid to the plaintiffs by the 1st and 2nd defendants to be summarily assessed if not sooner agreed; and

(3) the plaintiffs shall file and serve a pro forma bill of costs within 30 days for a summary assessment of costs in the event costs are not agreed by the parties.

96. A case management conference will be convened by the Court at a time convenient to the parties to advance this matter. The Court will invite the 4th defendant to make any application it deems necessary. The Court thanks Counsel and their teams for their helpful submissions.

Dated 04 July 2025

Simone I Fitzcharles

Justice