[2016] **JMSC Civ 51**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 05846

BETWEEN	**LINDON ANDREW ROBERTS**	**CLAIMANT**
	(also called "Half Pint")	
AND	**LOYAL HAYLET**	**DEFENDANT**

Mrs. Hannah Harris-Barrington and Miss Suzanne Dodd for the Claimant/Respondent

Mr. Chukuemeka Cameron instructed by Carolyn C. Reid and Company for the Defendant/Applicant

December 17, 2015 and April 7, 2016

Jurisdiction- Forum Non Conveniens- whether arbitration clause survives the expiration of a written agreement

SIMMONS J

[1] By a Notice of Application for Court Orders dated July 22, 2015 the defendant applied for a declaration that this Court has no jurisdiction in the matter or alternatively that the court should decline to exercise its jurisdiction. The defendant has also sought to have the claimant's claim form and particulars of claim struck out. In the alternative, the defendant has asked that the matter be stayed until arbitration is completed. Additionally, he requested an order that he be removed as a party to the claim.

[2] The grounds of the application are as follows:

(i) Rule 9.6 of the ***Civil Procedure Rules 2002*** (***CPR*****)** provides that a defendant who disputes the Court's jurisdiction to try the claim or argues that the Court should not exercise its jurisdiction may apply to the Court for a declaration to that effect or strike out or stay the claim.

(ii) Clause fourteen (14) of the contract dated 27th of December 1993, signed by the defendant on behalf of a limited liability company Loyal Haylet Management Inc and signed by the claimant, the subject matter of the dispute herein, provides that in the event of any dispute under or relating to the terms of the agreement, or breach thereof the same shall be submitted to binding arbitration with the American Arbitration Association of New York City.

(iii) The claim herein falls within the scope of the arbitration clause.

(iv) The claim herein has been filed in breach of the said clause.

(v) The contract was signed in the United States, the defendant is a citizen of the United States of America (the United States) and the company on whose behalf he signed is a company registered in the United States.

(vi) At the time of signing the contract both parties resided in the United States.

(vii) Section five (5) of the ***Arbitration Act*** provides that if any party to a submission commences any legal proceedings in the Court against any other party to the submission, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the

proceedings commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

(viii) Rule 19.2 (4) of the ***CPR*** provides that the court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.

(ix) The defendant at no time entered into a contract or business relationship with the claimant in his personal capacity. At all material times the claimant had entered into a contractual agreement with Loyal Haylet Management Inc a New York Corporation. At all material times the defendant acted on behalf of the company and not in his personal capacity.

[3] Both applications were scheduled to be heard on the same date. However, I thought it more prudent to deal with the issue of whether the court has the jurisdiction to deal with the claim before any further steps are taken in the matter.

BACKGROUND

[4] In 1993 the claimant/respondent who is an entertainer entered into a written agreement with Loyal Haylet Management Inc. (LHM) a management corporation operated by the defendant/applicant. The agreement was dated December 27, 1993.

[5] By virtue of this agreement the defendant, through LHM, agreed to handle matters pertaining to the claimant's entertainment career. Specifically, matters concerning publicity, public relations and advertising, selection of assistant artistic talent, embellishment of the claimant's artistic presentation, procurement of employment and engagements and various types of professional management and investment counselling for the claimant among other things.

[6] The agreement was for a period of one (1) year. However, it gave LHM the sole discretion and irrevocable right and option to extend the terms of the agreement for one (1) additional year. It also made provision for the parties to proceed to arbitration in the event that there was a dispute.

[7] Additionally, it stated that if the claimant entered into a recording or production deal with the assistance of LHM whilst it was in force, the agreement would be automatically extended and run coterminous with the terms of the recording or production deal.

[8] According to the claimant the agreement expired in 1996 but the business relationship between him and the defendant continued. In 2012 by way of a Power of Attorney dated May 11, 2012, the claimant appointed the defendant to be his lawful representative in relation to his professional career in the entertainment industry.

[9] The matter before this Court arises as a result of a breakdown in the aforementioned business relationship between the parties. The claimant, by way of claim form dated May 20, 2015 and filed on May 21, 2015, brought an action against the defendant for breach of contract, breach of trust, breach of fiduciary duty and negligence in relation to his alleged actions during the period 1992 to 2014.

[10] On June 5, 2015, Campbell J ordered the defendant to make full and frank disclosure of the claimant's business affairs and to deposit all outstanding sums into an account. This order was granted for twenty eight days.

[11] The claimant filed an amended application for court orders on the 8th July 2015 in which he sought an order of mandamus, damages and disclosure among other orders. That matter was scheduled to be heard on the 11th August 2015 but was adjourned at the request of his counsel.

CLAIMANT'S SUBMISSIONS

[12] Mrs. Harris-Barrington submitted that this Court has the jurisdiction to hear this case as the claimant resides in Jamaica and the defendant is a Jamaican citizen who resides and conducts business in the country.

[13] Counsel argued that the defendant has sought to challenge the Court's jurisdiction because he is aware that the claimant cannot easily travel to the United States due to tax troubles with the Internal Revenue Service (IRS). She submitted that these troubles exist because the defendant appropriated money from the claimant and caused him to fall into arrears with the payment of his taxes.

[14] Counsel further submitted that the defendant is a party to this action in his personal capacity because the contract on which the defendant relies expired in 1996 and all the terms and conditions expired with it and all that remained was a verbal contract.

[15] It was also submitted that the defendant is a proper party because the contract was signed by the defendant in his personal capacity as there was no company seal or stamp on the contract purporting to be from LHM. It was submitted that under the laws of the state of New York, a document which was signed by an officer of a company cannot be treated as having been executed on that company's behalf unless its seal was affixed to the said document. Reference was made to section 107 of the **Business Corporation Law** in support of that submission.

[16] Counsel also submitted that between 1992 and at all other material times, the defendant was a fiduciary agent for and on behalf of the claimant. It was alleged that the defendant used the Power of Attorney dated May 11, 2012 to misappropriate sums from the claimant's Universal Royalty Account.

[17] She stated that cheques were written by the defendant in his personal capacity which show that sums were taken from the claimant's account for the benefit of the defendant.

[18] It was argued that because of the defendant's actions and the breaches of trust the claimant cannot return to the United States until his name is cleared.

DEFENDANT'S SUBMISSIONS

[19] Mr. Cameron cited the case of ***Spiliada Maritime Corp v Cansulex Ltd*** [1986] 3 All ER 843 and noted that it gives remarkable guidance as to how Courts should deal with the issue of *forum non conveniens*.

[20] Reference was also made to the case of ***Olint TCI Corporation Limited (In compulsory Liquidation) v David Smith, Tracey-Ann Smith and Gilbert Wayne*** Supreme Court, Jamaica No.2009 HCV 06432, judgment delivered 15 June 2011 in which the principles outlined in the ***Spiliada*** case were applied. In that case, the Court found that the damage complained of was sustained in Jamaica and that the Jamaican Court had the jurisdiction to deal with the claim. Fraser J concluded that the:-

> *"....the balance of convenience points to Jamaica being the appropriate forum for this action. In Jamaica rather than the Turks and Caicos Islands, the case may be tried more suitably for the interests of all the parties and the ends of justice".*

[21] A number of cases dealing with the issue of *forum non conveniens* and the treatment of the various factors were cited. The cases of ***SRM Partners LP (A Delaware Limited Partnership) v Palmyra Properties Limited (In receivership) and Palmyra Resort & Spa Limited*** (unreported), Supreme Court, Jamaica [2012] JMSC Civ 121, judgment delivered 17 September 2012 and ***Construction Developers Associates Limited v Attorney General of Jamaica et al*** (unreported), Supreme Court, Jamaica [2014 JMSC COMM 3,

judgment delivered 21 February 2014 were among the many cases referred to by counsel.

[22] Counsel submitted that New York is the most appropriate forum to deal with the issue of the breach of contract because the contract which has been allegedly breached was formed in the United States and a former contracting party is a company registered under the laws of New York, United States.

[23] It was submitted that the parties in the instant case are more connected to the United States because the company with which the contract was signed is incorporated in the United States and still operates there. It was also submitted that it would be expensive and time consuming for this Court to obtain information from a foreign Court regarding the incorporation of the company. Such information would however be readily available in the United States.

[24] The defendant argued that witnesses to the creation of the contract and the incorporation of the company are not Jamaican based. It was submitted that a principal witness which the Courts would need to hear from is the Attorney-at-law who represented the claimant for the period of the execution of the contract and that attorney is a resident of the United States. The defendant, though Jamaican, is also a resident of the United States and conducts business there.

[25] Furthermore, Counsel stated that in this matter the damage complained of arose out of acts allegedly committed in the United States.

[26] It was further argued that where a contract contains an arbitration clause that clause is prima facie evidence as to the country having jurisdiction. The existence of the arbitration clause subjecting the parties to arbitration conducted by the American Arbitration Association of New York City in the event of breaches is prima facie evidence as to the United States having jurisdiction.

[27] In applying the case of ***Construction Developer's Associates Limited*** (supra), it was submitted that when the parties elected arbitration for the state of New

York as their means of dispute resolution, they chose the laws of that place to govern the procedures of arbitration.

[28] The claimant, it was submitted, would not suffer any prejudice as a result of the matter being dealt with by the American Arbitration Association of New York City because he has a competent counsel who is a resident of the United States whose duty would be to ensure that his rights will not be infringed.

[29] Counsel argued that if this Court tried the matter it may bring an unjust result because there are so many connecting factors linking the case to the United States as opposed to Jamaica.

[30] Counsel submitted that the defendant only wants the matter to be administered in light of the provisions of the contract and he is therefore not seeking any procedural advantages via his application.

[31] Counsel also submitted that a factor to be taken into consideration is whether the law of the foreign court applies and the difference between same and the local legislation. It was submitted that the American Arbitration Association of New York City has its set of rules and procedures which in some respects differ from the provisions of the ***Arbitration Act*** of Jamaica. Consequently, to achieve a just result the United States should be the forum to determine the matter.

[32] It was submitted that this Court should consider the enforceability of a judgment in Jamaica. Counsel stated that in the case of ***SRM Partners*** regard was had to the fact that the companies had assets in Jamaica. LHM has no assets in Jamaica therefore it may be more difficult to enforce a judgment granted by the Jamaican Courts. Therefore, the claimant, it was contended, would be in a better position to enforce any orders against LHM in the United States as opposed to Jamaica.

THE ISSUES

1. Whether or not the agreement that subsisted between the parties was entered into between the claimant and Loyal Haylet Management Inc. or the claimant and the defendant in his personal capacity?

2. Whether or not the arbitration clause in the agreement dated December 27, 1993 survives the expiration of the agreement and is applicable to the claim before this Court?

3. Whether or not there is another available forum in which the case could be tried which is more appropriate than this Court?

Whether or not the agreement that subsisted between the parties was entered into between the claimant and Loyal Haylet Management Inc. or the claimant and the defendant in his personal capacity?

[33] The resolution of this issue is important because the defendant has been named in his personal capacity as a party to this action. If the contract that subsisted between the parties was entered into by the defendant in his personal capacity then very little weight can be placed on the written agreement (which is relied on heavily by the defendant) and the defendant, as an individual is much more amenable to the jurisdiction of this Court. Furthermore, it would be improper to remove him as a party to the proceeding.

[34] In his affidavit dated July 16, 2015 the defendant states that he signed the management contract on behalf of LHM in his capacity as president of the company. The defendant's evidence is that at the time of signing the contract he was not signing in his personal capacity.

[35] The claimant contends that the defendant is a party to this action in his personal capacity because the contract on which the defendant relies was signed by the defendant in his personal capacity as there was no company seal or stamp on

the contract which purported to be from LHM. She stated that in those circumstances, its existence as a legal entity is doubtful.

[36] Counsel for the claimant submitted that by virtue of section 107 of the **New York Business Corporation Law** the corporation's seal is required. Counsel used this section as authority for the position that any legal or official document that emanates from a corporation requires a corporate seal.

[37] The case of ***In the Matter of Pope and Lord, Inc v Knight State Bank*** United States Court of Appeals, Eleventh Circuit, decided on December 27, 1983 was also cited in support of the argument of the necessity of the corporate seal.

[38] Section 107 of the **New York Business Corporation Law** reads as follows:

> *"The presence of the corporate seal on a written instrument purporting to be executed by authority of a domestic or foreign corporation shall be prima facie evidence that the instrument was so executed"*

[39] In my judgment this section simply means that for the purposes of a contract governed by New York law, the presence of a corporate seal would shift the burden of proof to the party who argues that the person signing for that entity lacked authority.

[40] In other words, the presence of a corporate seal, without more, indicates that the contract was entered into by a corporation. It does not, in my opinion, create a requirement for the use of the corporate seal.

[41] Importantly, section 202(a)(3) of the **New York Business Corporation Law** states as follows:

> *"Each corporation, subject to any limitations provided in this chapter or any other statute of this state or its certificate of incorporation, shall have power in furtherance of its corporate purposes:*

> *To have a corporate seal, and to alter such seal at pleasure, and to use it by causing it or a facsimile to be affixed or impressed or reproduced in any other manner"*

[42] Section 202, it seems, gives the corporation the power to have a corporate seal but does not mandate it.

[43] I must point out that Counsel for the claimant in her submissions extracted section 402 of the **New York Business Corporation Law**. This section addresses the contents of a certificate of incorporation and it makes no reference to the corporate seal, consequently, I failed to appreciate the relevance of the section to the matter at hand.

[44] In the case of ***In the Matter of Pope and Lord, Inc v Knight State Bank*** (supra), Roger and Latha P Lord purported to convey a security interest of real property to Knight State Bank by executing a deed on behalf of a corporation called Pope and Lord Inc. They signed the deed without any indication that they were doing so in their capacity as corporate officers and there was no corporate seal affixed to the document.

[45] The principal question was whether there was a valid corporate conveyance of a security interest of real property to Knight State Bank by the bankrupt corporation, Pope and Lord Inc.

[46] It was held that the deed was not properly executed and the conveyance could not have conveyed the corporate bankrupt's interest in the property. Therefore, Knight State Bank was to be treated as an unsecured creditor in the corporation's bankruptcy proceedings.

[47] My understanding of the ***Pope*** case is that the deed of conveyance that was allegedly done on behalf of the corporation, on the face of it, showed no indication that it had been done on the corporation's behalf. There was no corporate seal and the signees did not sign in their corporate capacity.

Consequently, whether the conveyance was done on behalf of the corporation was open to doubt and the conveyance could not be regarded as valid.

[48] The case is not authority for the position that ***any*** legal or official document that emanates from a corporation requires a corporate seal.

[49] Notably, the ***Pope*** case deals with a deed and in many jurisdictions the law dictates that in order to be validly executed a deed requires adherence to certain formalities. In paragraph five (5) of the judgment it was stated that the Georgia Code requires a certain formality for the execution of deeds conveying an interest in real property. Paragraph eleven (11) of the judgment indicates that it appears settled in Georgia law that a corporate deed must be executed in the proper manner.

[50] I must point out that in paragraph five (5) of her submissions Counsel stated that the decision emanated from the New York Court but the decision was handed down by the Georgia Court.

[51] It seems as though the information on a website was what misled Counsel for the claimant. She placed great emphasis on a passage which it seems she obtained from a website. The passage states that any legal or official document that emanates from a corporation requires a corporate seal. However, from my analysis of the authorities that have been cited, this does not appear to be the case.

[52] The contract dated December 27, 1993 indicates, in the first paragraph, that it is between LHM which has its principal place of business at 134-39 225th Street, Laurelton, New York 11413 in the United States and the claimant. Therefore, it is clear on the face of it, that it involves a corporation. Furthermore, as the contract was not executed as a deed, it seems to me that the formalities associated with the execution of a deed would not be applicable.

[53] For the reasons stated, I am of the view that the contract dated December 27, 1993 was not signed by the defendant in his personal capacity. Whether the business relationship that subsisted between the parties when the contract expired was between the claimant and the defendant in his personal capacity is less clear.

[54] The claimant presented cheques dated 1999 which show that sums were paid out to the defendant in his personal capacity. These cheques appeared to be signed by the defendant himself. The cheques make reference to the claimant's stage name "Half Pint" which suggests some connection with the claimant's entertainment career and a reasonable inference of a business relationship between the two.

[55] I am therefore, unable to accept the defendant's argument, that he never entered into a contract or had business relationship with the claimant, in his personal capacity at any time and, that at all material times he was acting on behalf of LHM.

Whether or not the arbitration clause in the agreement dated December 27, 1993 survives the expiration of the agreement and is applicable to the claim before this Court?

[56] One of the grounds relied upon by the defendant in his application to decline jurisdiction is that clause fourteen (14) of the agreement dated December 27, 1993 provides that in the event of any dispute under or relating to the terms of the agreement, or breach thereof the same shall be submitted to binding arbitration with the American Arbitration Association of New York City.

[57] The defendant also based his application on the ground that the claim falls within the scope of the arbitration clause and the claim was filed in breach of the clause.

[58] The claimant, on the other hand, has argued that the contract on which the defendant relies has expired and all the terms and conditions expired with it. However, it is well established that some obligations may continue after a contract expires. For example, the contract may require that a former contracting party continues keeping information that was obtained during the course of the contract confidential.

[59] It is therefore not unusual that an arbitration provision in a contract may survive the expiration of the contract. It has been said that an arbitration clause is a collateral term in a contract. It relates to the resolution of disputes and not to performance. So, even if performance comes to an end on account of repudiation, frustration or breach of contract the arbitration agreement survives for the purpose of resolving disputes arising from or in connection with the contract.

[60] Clause seventeen (17) of the agreement dated December 27, 1993 stated that it should be constructed in accordance with the laws of New York. Therefore, I will make reference to American case law. Though quite interestingly, the English position appears to be the same (See ***Heyman and Another v Darwins Ltd*** [1942] 1 All ER 337).

[61] In ***Rockwood Automatic Machine Inc, v Lear Corporation*** 31 N.Y.S.2d 349 (Sup. N.Y. Ct. 2006) the Supreme Court of the State of New York stated as follows:

> *"New York courts also generally apply this formulation.* ***Matter of Primex International Corp v Wal-Mart Stores, Inc.,*** *89 N.Y. 2d 594, 601-02 (1997) ("the prevailing general rule of both New York and Federal common law of contracts is that, absent a clear manifestation of contrary intent, it is presumed that the parties intended that the arbitration forum for dispute provided in an agreement will survive termination of the agreement as to*

> *subsequent disputes arising thereunder, whether its cessation was the result of the expiration of its term, exercise of a unilateral termination option, or breach")*[1]

[62] Resultantly, though the contract expired in 1996 the arbitration clause remains enforceable for the resolution of disputes arising from or in connection with the agreement.

[63] This Court must therefore determine whether the dispute in the instant case arises from or in connection with the agreement.

[64] The bone of contention is really the defendant's handling of the claimant's financial affairs. The claimant alleged that in twenty two (22) years the defendant has not given a single account of how much the claimant has earned or even been paid.

[65] Relevantly, clause thirteen (13) of the agreement deals with compensation. It reveals that for its services LHM should receive twenty five percent (25%) of all income or compensations received by the claimant from any source. It indicates that LHM's compensation shall include any and all of the claimant's activities in connection with matters such as motion pictures, television, radio, music, literary, theatrical engagements, personal appearances, public appearances in places of amusement and entertainment, records and recordings, publications, and the use of the claimant's name, likeness and talents for advertising and trade.

[66] Clause thirteen (13) continues by stating that ***the percentage compensation will be payable following the expiration of the term*** upon and with respect to any and all engagements, contracts and agreements entered into during the term of the agreement and upon any and all extensions and renewals, which though discontinued during the term of the agreement resumes within a year after. It further states that ***such compensation shall continue to be payable as long***

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as any income from the foregoing continues to be payable to the claimant. [added emphasis]

[67] The compensation clause, quite noticeably, has far reaching implications for the claimant's financial affairs.

[68] It seems to me that if the issue concerns how much money the defendant has unlawfully obtained as compensation by virtue of the claimant's engagement of his management corporation then the arbitration clause would be applicable.

[69] Clause seven (7) of the agreement addresses the authority to deposit cheques. It states that LHM has permission to deposit any cheques received on the claimant's behalf. It continues by stating that the authority relates only to depositing cheques and not to the withdrawal of any cheques or money from the claimant's account.

[70] If it is being contended that this clause was breached then the arbitration clause would also be applicable.

[71] In the claimant's particulars of claim it was noted that at all material times from 1992 until present (2015) the claimant had been in a contractual arrangement with the defendant. It was stated that the terms of the contract was that the claimant was to be free from worry in relation to the handling of his business affairs and the defendant as a competent individual would collect outstanding monies, pay the claimant seventy five percent (75%) of income after deduction of taxes and expenses and pay himself the remaining fifteen percent (15%). The defendant would be responsible for paying all the claimant's business debts including any outstanding taxes for the Half Pint Music Company.

[72] The terms of the contract noted by the claimant in his particulars of claim are different from the terms of the written contract dated December 27, 1993.

[73] The written contract was entered into between the claimant and LHM. The claimant's pleadings suggest that the agreement that subsisted after the written

agreement expired was entered into between himself and the defendant in his personal capacity.

[74] The written agreement did not state that the defendant was to be paid fifteen percent (15%) of monies collected. Also, under the terms of the written contract, neither the defendant nor his management corporation was responsible for paying the claimant's business debts.

[75] On the claimant's allegations, a different agreement subsisted after the written agreement expired. It is quite probable that a different agreement came into existence because, as was previously mentioned, the claimant presented cheques dated 1999 which show that sums were paid out to the defendant in his personal capacity and these cheques appeared to be signed by the defendant himself. The cheques make reference to the claimant's stage name "Half Pint" which suggests some connection with the claimant's entertainment career and a reasonable inference of a business relationship between the two.

[76] It must be emphasised that an arbitration clause will only survive termination of the agreement in relation to subsequent disputes arising thereunder. In my view, it would be too wide an approach to say that the dispute, in its entirety, is connected to the claimant's engagement of the defendant's management corporation by way of the written agreement dated December 27, 1993.

[77] The claimant, by his averments, has indicated that when the business relationship between himself and LHM ended another business relationship between himself and the defendant in his personal capacity began and the dispute, according to him, arises from this relationship as well.

[78] In so far as the dispute relates to the latter business relationship, I would have to disagree with the defendant that the claim falls within the scope of the arbitration clause.

[79] Noticeably, the defendant made no mention of the Power of Attorney that permitted the defendant to act as the claimant's lawful representative in relation to his professional career in the entertainment industry. The Power of Attorney was given to the defendant himself and not to LHM. That document gives a Jamaican address for the defendant and it states that it is governed by the laws of Jamaica.

[80] It must be remembered that the claimant has not only brought an action for breach of contract, he has also sought relief for breach of trust and breach of fiduciary duty. In this regard, his claim would not fall within the scope of the arbitration clause.

Whether or not there is another available forum in which the case could be tried which is more appropriate than this Court?

[81] The leading case on jurisdictional issues is the House of Lords decision of ***Spiliada Maritime Corp v Cansulex Ltd*** (supra). The judgment of Lord Goff is useful and can be summarised in the following way:

> *i. The starting point, or basic principle, is that a stay on the grounds of forum non conveniens will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.*
>
> *ii. The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. There is no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that "where there can be pointers to a number of different jurisdictions" there is no*

reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

iii. When considering whether to grant a stay or not, the court will look to what is the "natural forum" as was described by Lord Keith of Kinkel in The Abidin Daver, "that with which the action has the most real and substantial connection". In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

iv. If the court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the Abidin Daver made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.

[82] In his submissions Counsel for the defendant relied on the case of ***SRM Partners LP (A Delaware Limited Partnership) v Palmyra Properties Limited (In receivership) and Palmyra Resort & Spa Limited*** (supra). In that case, F. Williams J endorsed the factors highlighted in ***Halsbury's Laws of England***, 4th Edition, Volume 8(3), paragraph 131 as those which the Court should consider in deciding whether or not there exists another forum which is "clearly and distinctly" more appropriate.

[83] The factors were stated to include the following:-

1. The residence of the parties

2. The factual connection between the dispute and the Courts, such as the place where the relevant events occurred, and the residence of the witnesses

3. The law which will be applied to resolve the dispute

4. The possibility of a *lis alibi pendens* or other proceedings; and

5. The question whether other persons may become parties to the litigation.

[84] The factors listed are not exhaustive and the weight given to the various factors will vary from case to case and in some cases some factors will be of very little assistance and will not require great consideration.

[85] Counsel also cited cases such as ***Construction Developers Associates Limited v The Attorney General of Jamaica et al*** (supra), which dealt substantially with the arbitration agreement between the parties. The present case can be distinguished from these cases because of the extensive nature of the dispute; resultantly, the arbitration clause does not feature quite as prominently. In my opinion, it is merely a part of a much bigger picture.

[86] I will address the issue of whether this Court has jurisdiction or should decline jurisdiction by emphasising that the burden of proof is on the defendant to show that there is another available forum which is more appropriate for the matter to be tried.

[87] It is now germane to consider the arguments which have been put forward by the defendant in an attempt to discharge his burden of proof. This Court must then determine what is the natural forum, that is, the forum with which the action has the most real and substantial connection.

[88] The submissions of Counsel for the defendant were, for the most part, centred on the written agreement dated December 27, 1993. However, from my previous

discourse it can be gleaned, that the agreement between the parties is not exactly black and white because the business relationship that subsisted between them which existed for quite some time seems to have been governed by written as well as oral terms.

[89] The written agreement was entered into between the claimant and LHM, a company that is registered under the laws of New York so its corporate records would presumably be in the United States. The formation of the agreement took place in the United States and the principal witnesses to its creation are based in that country. Furthermore, the arbitration clause indicates that in the event of a dispute, arbitration should be conducted by the American Arbitration Association of New York City.

[90] I will reiterate that the expired written agreement is only relevant in so far as the dispute between the parties arises from or in connection with it. The dispute in my view is also greatly connected with the arrangements which existed after the expiration of that agreement.

[91] The claimant has alleged that monies were paid to the defendant through BMG Publishing (a record music company which has a regional office in New York) and Universal Publishing (a music publishing company which has its headquarters in the United States). The claimant also alleged that the Half Pint Music Bank Account was, to his surprise, closed. He had been under the impression that the account had a considerable sum of money. Upon examining the cheques presented by the claimant it seems that the Half Pint Music Bank Account is or was an account held in the United States. The claimant's particulars of claim also mentioned tours in America and songs licensed with Broadcast Music Inc (a Performing Rights organization in the United States).

[92] It is manifestly clear that the bulk of the evidence is in the United States because this matter primarily concerns United States accounts and other United States

based assets. Therefore, information would be readily available in that jurisdiction. This would impact the convenience and expense of the trial.

[93] It is also more likely than not that the damage complained of were acts allegedly committed in the United States. In addition, potential witnesses would most likely be citizens of the United States or individuals who, like the defendant, reside in that country.

[94] Though I must point out that the residence of the parties to the action cannot be given great weight because one party resides in the US and the other in Jamaica so that factor, in and of itself, does not tip the scales in favour of one jurisdiction over the other.

[95] If the matter were tried in Jamaica and the claimant obtains a judgment in his favour the need to have the judgment recognised in another jurisdiction would arise. So enforcement would likely be a troublesome issue if the matter were to be tried here.

[96] The claimant, however, has not only based his claim on a breach of contract and it would certainly be injudicious to give no consideration to the effect of the Power of Attorney.

[97] As previously stated, the Power of Attorney was given to the defendant in his personal capacity and not to LHM and contained a Jamaican address for the defendant and that it was governed by the laws of Jamaica.

[98] Notwithstanding this, the forum which is suitable is the forum with which the action has the most real and substantial connection not the forum with which the action has the ***only*** connection. After all, disputes as to jurisdiction will often arise where the matter has some connection to two or more jurisdictions but the jurisdiction which should try the matter is the one which, after assessing the relevant factors, the action is more closely connected.

[99] Significantly, the claimant has alleged that the defendant used the Power of Attorney to misappropriate sums in excess of United States one hundred and seventy five thousand dollars (US$175,000.00) from the claimant's Universal Royalty account.

[100] Therefore, the unlawful acts allegedly committed by the defendant under the Power of Attorney are acts which are connected to the United States. Consequently, I am satisfied that there is an alternate available jurisdiction, which is the United States and, that that alternate jurisdiction is more appropriate than this jurisdiction.

[101] It must be stated, before continuing, that the United States is also appropriate because the arbitration clause in the written agreement may still be applicable as there are parts of the dispute which, it could be said, are connected with the written agreement.

[102] I must now consider whether there are circumstances by reason of which justice requires that this Court should exercise its jurisdiction. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in ***The Abidin Daver*** [1984] 1 All ER 470 made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.

[103] According to the claimant the defendant is trying to prevent the Court from exercising jurisdiction in the matter to 'unsuit' the claimant. It was alleged that the claimant cannot easily travel to the United States.

[104] In paragraph ten (10) of Counsel's submissions she stated that the claimant cannot return to America due to the fact that no taxes were paid on the money the defendant appropriated for his own use. She further stated that the royalties due to the claimant are being taken by the American Internal Revenue Service to satisfy the outstanding taxes.

[105] In paragraph sixteen (16) of said submission, Counsel stated that because of the actions of the defendant and the breaches of trust the claimant cannot return to the United States until his name is cleared and the defendant who conspired to prevent him from returning to America fully knows this which is why he has advocated the matter be tried in the United States.

[106] The Royalty Statements dated March 20, 2015 indicate that the payee was the claimant. However, the Royalty Statements dated June 19, 2015 indicate that the payee was the Internal Revenue Service (IRS). According to the claimant it was the defendant's duty to pay his (the claimant's) taxes. The amount paid over to the IRS suggests that the claimant's taxes were not being diligently paid.

[107] The circumstances in this case can therefore be distinguished from that in the case of ***Oppenheimer v Louis Rosenthal & Co AG*** [1937] 1 All ER 23 in which affidavit evidence was presented to the court to show that the plaintiff risked being imprisoned if he went to Germany to present his claim.

Slesser LJ said:

> *"The plaintiff is in effect unlikely to have in the foreign court the rights of advocacy which, according to English notions of justice, everyone ought to have. The evidence shows that it is doubtful whether the plaintiff would be able to be represented by an advocate. It would depend on obtaining the permission of the presiding judge. If he could not obtain this permission, he would have to be present personally. If so, there is an affidavit that he would run the risk of being confined, which risk would be especially grave if it were known that his purpose in returning to Germany was to present a claim against a German company. That evidence is uncontroverted".*

[108] Therefore, although the claimant may well be in trouble with the IRS there is no evidence before this Court that shows the existence of the debt and whether he would place himself in jeopardy by travelling to the United States. It is true that the claimant has said that he has no knowledge of his financial affairs but the

claimant has also fervently argued that he cannot return to the United States because of his tax troubles.

[109] The information regarding the claimant's alleged tax problems was provided by counsel in her submissions. It is however, unclear, what was the intention of counsel, when she chose to present her submissions in that format, which is akin to an affidavit. It is my understanding, that affidavits should only contain information that is within the personal knowledge of the deponent. The exceptions to this rule are where applications for summary judgment and interlocutory applications are being made, in which case the affidavit may contain matters based on the deponents information and belief. Part 30.3 of the ***CPR*** does however require the deponent to state the source of that information and belief. In addition part 30.2 of the ***CPR*** sets out the form in which such affidavits are to be drafted. The submissions are not in that form and do not state the source of the information and belief.

[110] It is my view that the information pertaining to the claimant's alleged difficulties with the IRS ought to have come from the claimant himself. There was also no evidence presented to the Court to support the submission that the defendant does not want to have the matter tried in Jamaica and that the claimant would be deprived of a proper forum if this Court does not try the matter.

[111] The claimant has revealed that he has a lawyer in the United States. In his particulars of claim he refers to Mr. Oliver Smith, who is based in the state of New Jersey. I venture to say that if the claimant is unable to travel to the United States he would still be able to instruct his Counsel and proceedings could be fairly conducted in his absence.

[112] Importantly, the legitimate personal or judicial advantage for the claimant in proceeding in Jamaica is not considered a decisive factor; if a clearly more appropriate forum overseas has been identified, generally speaking the claimant will have to take that forum as he finds it, even if it is in certain respects less

advantageous to him than the Jamaican forum. (See ***Spiliada Maritime Corp v Cansulex Ltd***) (supra).

[113] As stated previously, the arbitration clause may still be applicable to those parts of the dispute which, it could be said, are connected with the written agreement. Where those parts of the dispute that are not connected with the written agreement are concerned, it is also my view that the United States is the more appropriate forum to try the matter. It is the forum to which the matter is more closely connected.

[114] In my opinion, the claimant has not established that substantial justice cannot be done in the United States.

CONCLUSION

[115] In the circumstances, the court declines to exercise its jurisdiction in this matter and the proceedings are stayed on the basis of *forum non conveniens*. The Court also considers it desirable for the defendant to remain as a party to the proceedings. Costs of application are awarded to the defendant, such costs to be taxed if not agreed. The claimant is granted leave to appeal.