

Cross applications for summary judgement regarding validity of an intercompany Declaration of Trust. Requirements for summary judgment considered, including effect of “non admission” as contrasted with “denial” in pleadings. Whether voluntary declaration of trust comprising a “distribution” of company assets, and the effects of failure to certify company’s solvency at the material time (see ss 301-5 of Companies (Guernsey) Law 2008).

[2022]GRC041

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

BETWEEN:

JJW HOTELS & RESORTS HOLDING INC

Plaintiff

-and-

(1) BENJAMIN ALEXANDER RHODES

(2) ANDREA FRANCES ALICE HARRIS

(3) JJW LIMITED (in compulsory liquidation)

Defendants

**Hearing Date: 6th June 2022
Judgment given: 7th June 2022
Reasons provided: 21st June 2022**

Written judgment handed down: 4th July 2022

Before: Her Honour Hazel Marshall QC Lieutenant Bailiff

**Counsel for the Plaintiff: Advocate P Richardson
Counsel for the Defendants: Advocate A Lyall**

J U D G M E N T

Legislation and authorities referred to in the judgment:

Legislation:

Guernsey

The Companies (Guernsey) Law 2008 as amended ss 228, 301-5, 309, 406, 426
Royal Court Civil Rules 2007 rr 19, 52

England and Wales

Criminal Procedure Act 1865 ss 4 and 5

Cases:

Guernsey

Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited (2015)
(Unreported: Guernsey Judgment 38/2015)

Rawlinson & Hunter Trustees SA and another v ITG Limited and another (2015)
(Unreported: Guernsey Judgment 45/2015)

Jakob International Inv v HSBC Private Bank (CI) Limited (2016) (Unreported: Guernsey
Judgment 26/2016)

Alnashir Popat v Adil Popat and others [2019] GRC 050

Rawlinson and Hunter v Investec Trust Limited and another [2016] GLR 332

England and Wales

Knowles v Scott [1891] 1 Ch 717

In re Duomatic Limited [1969] 2 Ch 365

Aveling Barford Ltd v Perion Ltd [1989] BCLC 626

Easyair Limited v Opal Telecom Limited [2009] EWHC 339 (Ch)

In Soo-Kim v Youg [2011] EWHC 1781 (QB)

Progress Property Ltd v Moorgate Group Ltd [2012] UKSC 55

Introduction

1. It is unusual to have cross applications for summary judgment between a Plaintiff and a Defendant, each alleging that there is no real prospect of the other's case succeeding, but that is the situation before the court in this case.
2. The Third Defendant, JJW Limited (“**the Company**”) is a company incorporated in Guernsey in about 1992. It is now in compulsory liquidation pursuant to an order of this Court made on 31st July 2020. The First and Second Defendants are the present Joint Liquidators of the Company, Ms Harris having replaced, in 2021, one of the Joint Liquidators originally appointed.
3. The winding up order was made on the petition of Bank Aareal, presented on 30th April 2020. It was made after a fully contested hearing. The petition was based on an unsatisfied statutory demand, apparently relating to liability under a guarantee given in respect of an associated company.
4. The Plaintiff is JJW Hotels & Resorts Inc (“**Inc**”), a company incorporated in the British Virgin Islands in 2008. It is the 100% parent company of the Company, having acquired it by two transfers of shares from Sheikh Mohammed bin Issa Al

Jaber (who is mentioned below), being one transfer of 100 shares made on 8 January 2009 and a second of transfer of the one remaining share on 27 March 2009.

5. The ultimate beneficial owner of Inc and therefore also of the Company is Sheikh Mohammed bin Issa Al Jaber (“**the Sheikh**”). The JJW group of companies (as it has been referred to) is or was the vehicle for running various hotel and hospitality operations which are the business empire of the Sheikh and his family. The Company appears to have been concerned with those operations in Europe, in particular in Portugal, France, Austria, the UK but possibly also elsewhere.
6. The Company was latterly (since 2016) administered in Guernsey by Albecq Trust Company Limited. Management. It appears that, certainly prior to 2009, the Company itself was the principal holding company for the group, at least in Europe, and held the shares of several individual subsidiary companies which operated individual hotels. The evidence given is that in about 2008 a restructuring of the group was planned with a view to a public offering of shares, and it was advised that a new holding company be incorporated in the British Virgin Islands to take over and combine all the group interests. That company was Inc. It was intended to transfer the Company’s shares in the subsidiaries to Inc, but in the event, there was no actual transfer; the Company remained the legally registered owner of the shares in the subsidiary companies, and, indeed, it appears to have become the legally registered owner of other subsidiary companies later. In consequence of the liquidation of the Company, however, a dispute has arisen, as to whether the Company owns these share assets beneficially, or holds them as bare trustee for Inc, as Inc has claimed.

The dispute

7. In brief, in this action, Inc claims that pursuant to a document described as a Declaration of Trust, executed on 8 January 2009 by the Sheikh on behalf of both Inc and the Company, all the shares in the Company’s subsidiaries, whether then or thereafter vested in the Company, were declared to be held on trust for Inc, such that the Company is a bare nominee holder of those shares, has no beneficial interest in them (or, thus, the subsidiaries’ businesses) and is obliged to act in relation to the shares as directed by Inc, as the beneficial owner. Inc seeks judgment to this effect. It also claims damages from the Joint Liquidators in respect of the latter’s actions with regard to certain of the shares since being appointed. I will refer to the terms of the Declaration of Trust later.
8. The Joint Liquidators dispute these claims as follows:
 - i. They first put the authenticity and/or the actual operation of the Declaration of Trust of 8th January 2009 into issue, because of questions raised, they say, by the circumstances of how it emerged, and its inconsistency with what, from all their enquiries and investigations of the Company’s affairs, appears to have actually happened at the time.
 - ii. They go on to submit that, in any event, the terms of the Declaration of Trust are insufficiently certain to create a valid and effective trust,

either as a matter of their construction, or because they purport to relate to after-acquired property, and it is not possible to create a trust of future property by a voluntary disposition, such as the Declaration of Trust is.

- iii. They further submit, though, that even treating the Declaration of Trust as capable of being valid and effective according to its purported terms, the circumstances of its operation as asserted by Inc mean that it was unlawful. It falls foul (they submit) of certain provisions of Guernsey Company law – in particular ss 301-304 of the Companies (Guernsey) Law 2008 – because it was a distribution of the Company’s assets within the meaning of those sections, and the mandatory procedural requirements of those sections were not complied with, thus rendering the transaction expressly unlawful under s 305, and therefore void or unenforceable. They reject the Company’s response to this point (which is either that those requirements were not engaged, or that the two year time limit provided by s 309 of the Law for a company’s recovering the subject of any such defective distribution from its recipients has long been exceeded) as being either wrong or not applicable.
 - iv. They lastly argue that Inc’s purported claim against the Joint Liquidators personally is misconceived and/or discloses no reasonably arguable cause of action.
9. As will be apparent, each side considers that the demonstrable strength of its own case and the weakness of the other side’s case means that there is no need for a trial and it should be given summary judgment at this stage.

History

10. It is convenient to set out the relevant history of the matter largely by reference to the way it emerged since the winding up of the Company.
11. As previously mentioned, the winding up petition was presented on 30th April 2020. It was founded on a judgment in French proceedings, apparently based on a claimed guarantee liability to Bank Aareal, which had been contested. For context, it should be noted that this does not appear to have been the only litigation in which the Company or its associated group companies was embroiled in at the time. At least two other sets of proceedings involving claims by or against the Company in England are mentioned in the papers. One is a claim made by liquidators of MBI International & Partners Inc (MBI being another company owned by or associated with the Sheikh) in which the Company is one of five Defendants, and the other is a claim in which the Company is one of six claimants against a Mr Ahmed Salfiti, a former director of MBI, launched in January 2019, being a claim for breaches of fiduciary and other duties.
12. The winding up of the Company was resisted, but was nonetheless ordered on 31 July 2020. For present purposes it is to be noted that in May 2020, in the winding

up proceedings, Dr Sergio Borges, who was described as the Chief Financial Officer of the JJW Group, swore a witness statement in support of the proposition that the Company was not insolvent, stating that the Company was the ultimate holding company of the JJW hotel group and held, or had immediate access to, net assets worth in excess of €1.3 Billion. It was nonetheless found that the Company was insolvent and unable to pay its debts within the meaning of Guernsey law: see s 406 of the Companies (Guernsey) Law 2008 as amended (“**the Companies Law**”).

13. Attempts were made to appeal the winding up order, but these ultimately failed, in the Court of Appeal in April 2021, and permission to appeal further, to the Judicial Committee of the Privy Council, was refused. Applications were then apparently made directly to the JCPC for permission to appeal, first by JJW’s former sole director, Mrs Rizkallah-Reichardt (“**Mrs R-R**”) and later, in August 2021, by Inc itself, as sole shareholder. Perhaps remarkably, as at 25 March 2022 at any rate (and I was not informed that there had been any change), these applications remained undetermined. But this means that the governing position therefore remained and remains that the Company is in compulsory liquidation, and the Joint Liquidators therefore are charged with the function of effecting the winding up of the Company according to Guernsey insolvency law principles.
14. From the time of the winding up order, the Joint Liquidators therefore pursued their duties as liquidators, seeking to identify and take charge of the Company’s assets and to identify its liabilities. They did not (but they say this is not unusual) get enthusiastic co-operation from those who had been concerned with the Company’s affairs, and found obtaining information quite difficult.
15. In August 2020, they had administered a questionnaire to Mrs R-R. In her answers, on 22 September 2020, she identified certain shares in “*JJW France*” and “*Erste Wiener*” as being assets of the Company which she was aware the Joint Liquidators had not taken control of, but she said that these were “*hold as trusty for JJW Hotels and Resorts*” [sic]. This was the first time the Joint Liquidators became aware of any assertion of a trust.
16. Although on 25 September 2020, Mrs R-R consented in a court order to provide the Joint Liquidators with the documents effecting such trust arrangements, she did not do so. In November 2020, in evidence given by her in support of attempts to appeal against the winding up of the Company, she mentioned that the inconsistency between Dr Borges’ sworn evidence noted above and her own statements that the Company’s assets were held in trust for Inc had been drawn to her attention, but that, whilst she had no doubt that Dr Borges would have conscientiously believed his evidence to be true, her own investigations had satisfied her that the shares were indeed held in trust for Inc, and that, regrettably, therefore, the evidence given by Dr Borges had been incorrect. However, she did not produce any supporting documents, but merely explained that her “*detailed investigations*” had involved reviewing materials available “*to the Company*” and information gleaned from: its Guernsey resident agents; MBI (the JJW Group’s in-house lawyers); the Company’s former directors; the Company’s beneficial owner (ie the Sheikh); and the JJW Group’s auditors and legal advisers. She simply narrated that, from this,

she was satisfied that in 2009 the Group had undergone a major re-organisation, on advice from White & Case, (a French law firm) and that this had included advice

“as to the transfer of the beneficial ownership of JJW France [the company on which proceedings were focused at that time] to JJW Hotels [ie (Inc)]”.

stating further that

“....it was not possible to recover any documentation that formalised the transfer of the beneficial interest from the Company to [Inc]”.

17. At a hearing regarding the potential appeal against the winding up order, in December 2020, Counsel for the Company told the Court that there were no documents, whilst apparently also showing to the court a diagram of the structure of the JJW Group which showed the Company as an owner of subsidiaries, without any reference to any trust arrangement.
18. Further investigations by the Joint Liquidators had suggested that there were yet other share assets which Mrs R-R had not declared or identified. They were particularly concerned with shares in the French company Tremoille Holdings SAS. On 17 February 2021, they therefore applied to this Court under s 426 of the Companies Law for directions, in particular, that they could and should treat the shares in JJW France SAS, Erste Wiener AG and Tremoille Holdings SAS as assets of the Company and not as subject to the trust arrangements alleged by Mrs R-R, whilst accepting that they should not, pending any further order, make any actual distributions to the Company's creditors. The Joint Liquidators sought to notify every party with a potential interest in this issue, including Inc, of the application which they were making. Inc did not appear, and has subsequently, belatedly, contested that the notice had been correctly served on it. However, the matter appears to have been fully argued with all the evidence available at that time, and nothing would now turn on that point today.
19. Although outside the time for filing evidence in that application Mr Stephen Le Ray of Albecq sent an email letter dated 21 April 2021 to the Joint Liquidators by way of relaying relevant information from the owners of the JJW Group - in effect the Sheikh. The Sheikh himself confirmed in a letter that he had no documents. The gist of the information otherwise relayed was that as at January 2009, the Sheikh had been the sole director of both Inc and the Company. There had been a proposal to restructure the group in order to make a public offering of shares. White & Case (a firm of French lawyers) had recommended the formation of a new company in order to acquire the assets of the Company, for the better commercial advantages this would bring, and Inc had been formed in September 2008 for this purpose. On further advice it was discovered that such a transfer, to the extent that it related to properties, would give rise to a tax liability. It had therefore been decided that the beneficial interests would be transferred to Inc but not the legal title. Therefore, the business and undertaking of the Company was transferred to Inc in 2009 but any assets retained by the Company where the beneficial interests had been transferred were held by the Company on bare trust for Inc. He concluded:

“No written formal records were kept of this transfer other than we note that as a private group with common beneficial owners and boards of directors such absence of corporate governance was not uncommon at this time.”

In his evidence on behalf of Inc in this application Mr Le Ray has stated that at the time he sent this email (April 2021) he was unaware of the Declaration of Trust.

20. After (again) a contested hearing, in which the above material and more was available to the Deputy Bailiff, she granted the liquidators the directions and relief which they sought, on 6 May 2021.
21. On 8 July 2021 the Joint Liquidators received a demand from Ashton & Co acting for Inc, requesting, on the basis that Inc was indeed the beneficial owner of shares in subsidiaries held by the Company, that the Company should transfer title to those shares to another Guernsey company, JJW Holdings Ltd. Unsurprisingly, the Joint Liquidators declined to act on the basis of this assertion in the absence of supporting evidence.
22. In late September 2021, it is said, on behalf of Inc, that the auditors of the JJW Group, UHY United (formerly EY, formerly Ernst & Young) in Cairo, located the Declaration of Trust. They said, I think, that it was found amongst other documents which had been in the possession of a Mr Emad Ragheb, the previous managing partner of Ernst & Young.
23. On 5 October 2021 Mr Le Ray emailed a copy of this document to the Joint Liquidators, together with a copy of a letter written by Mr Alexander Ippolito of White & Case to Sheikh Al Jaber at the London address of “JJW Hotels and Resorts UK Holdings Limited”. This stated that he (Mr Ippolito) had worked, together with his partners, on “*different projects*” for the JJW Group during 2007-9 and went on to confirm, from a review of his historical files, that one such major project was a complete restructuring of the JJW Group’s European enterprise, involving

“the combination of all your group’s hospitality operations under a new entity, JJW HOTELS AND RESORTS HOLDING INC set up in the BVI...”

He continued:

“As part of this restructuring process complications arose as to the tax related possible costs and adverse impacts of the planned transfers, notably in case the entities which shares were to be transferred would qualify as real estate companies.

I have been informed and can thus confirm on that basis that in view of such complications the decision was finally reached and then implemented to just transfer the beneficial ownership on those entities to JJW HOTELS AND RESORT HOLDING INC rather than to transfer these entities shares legal ownership out of JJW LIMITED so that accordingly, JJW LIMITED remained as a trustee to hold to the shares and the subsidiaries for the benefit of the beneficial owner.”

He also included consolidated financial statements of Inc for the years ending 31 December 2018 and 2019, signed off on 20 May 2020 and 3 September 2021 respectively, proposing these confirmed the trust relationship between the Company and Inc. The Joint Liquidators suggest that this is a rather ambitious reading of the notes to the financial statements, even if (which they cannot) those notes could be regarded as being relevantly “*contemporaneous*”. Mr Le Ray further requested the Joint Liquidators to cease taking any action in respect of the affairs of the Group companies.

24. Through Mourant as their advocates, the Joint Liquidators responded on 12 October 2021 that in the absence of any contrary court order, they must and would continue to operate on the basis of the 6 May directions, and they invited Inc to have the issue of beneficial ownership properly determined by the Royal Court.
25. Between 22 October and 12 November, Ashton & Co made arguments in support of the validity of the Declaration of Trust and again demanded that the Joint Liquidators should desist from taking any actions in respect of the affairs of group companies. The Joint Liquidators rejected these arguments, and reiterated their earlier position.
26. After some initial disagreement as to whether a determination of the validity of the Declaration of Trust could properly be achieved by an application in the liquidation, or whether a separate action was required, and with AFR now acting for Inc in place of Ashton & Co, these proceedings were issued by Inc on 8 December 2021 and tabled on 17 December 2021. Defences and a Counterclaim were served on 4 February 2022. A Réplique and Defences to Counterclaim in very brief form were tabled on 4 March 2022.

The Declaration of Trust

27. On 14 February 2022, the Joint Liquidators sought to inspect the original of the Declaration of Trust, which was then in France. Inc’s Advocates notified the Joint Liquidators that it could be inspected and would be couriered over. On 15 March Mr Rhodes inspected the document, in fact, I am told, at the Joint Liquidators’ own offices in London, and was allowed to take high resolution pictures, although the document itself, naturally, is retained by the Inc’s legal advisors.
28. There is some mystery about the document itself. The terms of the Declaration of Trust are on two pages of typescript. The original document which was copied to the Joint Liquidators was of four pages, actually comprising two copies of the terms of the Declaration of Trust, in identical terms but separately executed (as can be seen quite clearly from examining the copy), all being held together with one staple. The document inspected by Mr Rhodes was merely two pages and the staple had been removed. AFR say that this had happened before they received the document.
29. In those circumstances, the Joint Liquidators indicated to AFR, after the inspection, and together with raising certain questions about the document and its emergence, that they would propose to have the document forensically examined. They have not yet made any such application to the court. On 5 April 2022 AFR responded

that they could see no basis for the court to agree to an expert examination of the document.

30. As to its terms, the Declaration of Trust declares itself to be made on 8 January 2009 between Inc (as the “Beneficial Owner”) and the Company (as the “Trustee”). It recites (this is a literal transcription) that

“A. The Beneficial Owner is a parent company which owns 100% of the JJW LIMITED (“Trustee”) shares of its subsidiaries (“Shares”) companies incorporated in the Guernsey.

B. the Shares of the Subsidiaries are legally owned by the Trustee.

C. The Trustee acknowledges that it holds the Shares of the Subsidiaries as nominee for the Beneficial Owner

D. The Trustee wishes to enter into this Deed with the Beneficial Owner to regulate its ownership of the Shares in the Subsidiaries”

There then follow “OPERATIVE PROVISIONS” which state, first, that

“1. The Trustee declares that it holds the Shares of the Subsidiaries as nominee upon trust for the Beneficial Owner absolutely”

and then elaborate, in Clause 2, on the Trustee’s duties and actions, consistently with this being, indeed, a bare trust, albeit with a degree of discretion to act as appears to be in the Beneficial Owner’s best interests, which is conferred by Clause 3. Clause 4 is an English Law clause.

31. The document is then signed and delivered on behalf of both Inc and the Company by Sheikh Al Jaber as Chairman in each case, and in each case witnessed by Mr Ahmad Kaddaf.

These Applications

32. By an Application dated 14 March 2022, Inc claims summary judgment against all three Defendants on the entirety of its claims made in the Cause, namely both for a declaration that the Declaration of Trust was valid and binding on the Company and therefore on the Joint Liquidators, and also for a judgment for damages against the Joint Liquidators themselves for damages as a result of their interference in handling the assets claimed to be owned beneficially by Inc, namely, of course, the relevant subsidiary shares.

33. By an Application dated 14 April 2022, the Joint Liquidators claim summary judgment against Inc on its claim that the Declaration of Trust was valid and effective, and also in their own favour on their counterclaim against Inc that the Declaration of Trust was invalid and void, and also to strike out, or for summary judgment with regard to, Inc’s claims made against the First and Second Defendants personally on the grounds that they disclose no reasonable cause of action and/or stand no real prospect of success.

34. Those applications came before the court at the hearing of this matter on 6 June 2022. Inc has been represented by Advocate Richardson, appearing, with the court's permission owing to special circumstances, on Teams from the UK mainland. The Defendants have been represented by Advocate Lyall.
35. I should record that, in the interim, the Joint Liquidators had sought further directions in the liquidation, under s 426 of the Companies Law, to the effect that the operation of the Deputy Bailiff's directions of 6 May 2021 with regard to the three particular subsidiary companies referred to should be extended to apply to all subsidiaries of the Company. This application was initially listed on 7 April 2022 but was then adjourned (I think for evidence) until 1 June 2022, to be heard before me, that being my first acquaintance with this case. At that hearing I was minded, on the evidence, to grant the directions sought, but it seemed convenient, with the imminence of this hearing which might well clarify the situation further, not to do so then, except specifically to continue the interim direction in relation to Tremoille Holdings SAS, because operational action might possibly be required immediately in that particular case. I therefore stood over the final making of the extension order to be reviewed again at the hearing of these applications, but with the exception and permission regarding Tremoille Holdings SAS still operating in the interim.

The Law

36. Both Advocates are agreed with regard to the law and the relevant tests relating to the granting of summary judgment and the striking out of claims or defences.
37. The court's power to grant summary judgment is contained in the Royal Court Rules 2007 at r 19. This empowers the court, on application by any party, to give summary judgment against another party on the whole of a claim or any particular issue, on the grounds (see r 19 (2)): that

“... (a) *the plaintiff has no real prospect of succeeding on the claim or issue, or*

(b) *the defendant has no real prospect of successfully defending the claim or issue,*

and there is no other compelling reason why the claim or issue should be disposed of at a trial.”

38. The considerations to be applied in this are to be found in the well-known passages of Lewison J's judgment in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] as approved by the Guernsey Court of Appeal in *Rawlinson and Hunter v Investec Trust Limited and another* [2016] GLR 332):

“(1) *Does the claim [or defence] have a realistic as opposed to a fanciful prospect of success?*

(2) *A realist claim [or defence] is one which is more than merely arguable and must carry some degree of conviction.*

- (3) *The court must not conduct a “mini-trial”.*
- (4) *That said the court may appraise and analyse what is said by a claimant [or respondent] as it may be clear, perhaps from contemporary documentation that the factual assertions have no real substance.*
- (5) *The court’s conclusions may be instructed both by evidence actually placed before it and evidence that can reasonably be expected to be available at trial.*
- (6) *Where reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available, the court is entitled to hesitate about making a final decision without a trial.*
- (7) *It may be important to identify that important material in the form of documents or oral evidence is likely to exist and can be expected to be available at the trial. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the issues at trial.*
- (8) *Short points of law or construction which may be determinative should be dealt with sooner rather than later.”*

39. The court’s power to strike out a claim or defences is contained in RCCR r 52, and, so far as material here, can be used where it appears to the court (see r 52(2)):

“... (a) *that the pleading discloses no reasonable grounds for bringing or defending an action*”

40. The considerations to be applied in this are summarised for Guernsey law in *Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited* (2015) (Guernsey Judgment 38/2015):

“a) Claims which are suitable for striking out on ground (2) include those which raise an unwinnable case where continuation of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2002] LTL February 2 2000 CA).

b) The principal test is whether the party’s case is “bound to fail” which creates a high threshold before a pleading, or part thereof, will be struck out. Simply because a case might be weak is not sufficient to justify striking out.

c) A statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19 2000. unrep. CA)

d) Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party

concerned an opportunity to amend (*In Soo-Kim v Youg* [2011] EWHC 1781 (QB)).

e) *The court may strike out as an abuse of the court's process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars without first giving the claimant an opportunity to amend (See *In Soo-Kim v Youg* [2011] EWHC 1781 (QB)).*

f) *The purpose of the particulars of claim were explained by Moore-Bick LJ in *Credit Suisse AG v Arabian Airarft & Equipment Leasing Co* 2014 CP Rep 4:*

“Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said the fact give rise to a right to the remedy being claimed.”

g) *It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (*Farsah v British Airways*, the Times January 26 2100 CA referring to *Barrett v Enfield BC* [1989] 3 WLR 83 (HL)).”*

41. I was also referred to further commentary on these tests by the Deputy Bailiff (as he then was) in *Rawlinson & Hunter Trustees SA and another v ITG Limited and another* (Judgment 45/2015 at [13]- [15]), *Jakob International Inv v HSBC Private Bank (CI) Limited* (Judgment 26/2016 at [15]) and *Alnashir Popat v Adil Popat and others* [2019] GRC 050, which I will not cite at length. It suffices to say that they all emphasise the high hurdle which is to be surmounted by a party seeking summary judgment or a strike out. The second case emphasises that descriptions of the test such as “unarguable” “bound to fail” and “unwinnable” are interchangeable and mean the same thing, and the third notes how “comparatively little” the respondent to an application for summary judgment or a strike out has to provide, in order to justify the defeat of the application and his case continuing to trial.

Disputes on the Declaration of Trust

(1) Plaintiff's application for summary judgment

42. For Inc, Advocate Richardson argues that Inc's case on the Declaration of Trust is so obviously uncontested and uncontestable that the Defendants (effectively the Company) have no real prospect of succeeding in their Defences. His principal thrust is that the Declaration of Trust has not been “denied” by the Liquidators in

their Defences, but merely “not admitted”. He submits that, in fact the document “*speaks for itself*” which I take to mean that once it is proffered but not denied, the evidence of its contents is the only evidence and simply carries the day. But if that is wrong he submits that on any basis, all the Plaintiff needs to do - which it obviously can - is to prove the document, and that is the end of the Defences, and therefore the case. He further relies on the fact that whilst the Joint Liquidators may have suggested that there should be a forensic examination of the document, they have not tried to make any application for this, and so the document is simply incontestable.

43. He submits that the circumstantial evidence relied on by the Joint Liquidators does not amount to a substantive defence. They rely on three broad points: First that there is no apparent record, direct or indirect, of the existence or the operation of the Trust Deed in the records of the Company, second, that the Trust Deed is allegedly inconsistent with the contemporaneous financial statements of the Company and third that it is allegedly inconsistent with statements made in the history of the proceedings by Inc and others. Noting that the Defendants themselves have apparently not located any financial statements of the Company for the precisely relevant time itself (2009), he points out that “something was obviously going on” in January 2009, because that is the date when it is recorded that Inc became registered as the owner of 100 shares in the Company, which were transferred to it by the Sheikh. He submits that the alleged inconsistencies with statements made by or on behalf of Inc or the Sheikh, are insufficient to undermine the force of the Declaration of Trust itself as a document which is apparently valid and authentic on its face, because they are easily explicable as simply the product of mistakes, or mislaying, or forgetfulness in relation to a document executed as much as 13 years ago, especially in view of the fact that the obligation on Guernsey companies to keep records imposed under s 228 of the Companies Law, is only to do so for six years.
44. Advocate Lyall, unsurprisingly, submits that the evidence referred to above, and further matters pointed out by him in submissions, very clearly raise a sufficiently arguable question mark over the Declaration of Trust that the case must at least go to a trial; it cannot simply be determined in favour of Inc on the basis of the apparent existence of a document and the simplistic and self-serving assertions which are made on behalf of Inc and those with similar interests.
45. He submits that the thrust of the Joint Liquidators’ case is clear and reasonable. It would be improper to assert positively that the document was a sham or a forgery at this stage in the proceedings because the Joint Liquidators do not have (yet) sufficiently strong evidence to do so, but “not admitting” the document does not mean an acceptance that it is genuine. The document does not “speak for itself” and the Joint Liquidators are entitled to say that investigation and examination of the document may reveal more. When evidence going to actual formal proving of the Declaration of Trust, is focused on, it may turn out to be appropriate to make a positive denial allegation, but it would not be right to do so at this stage. A forensic examination of the document would be appropriate in the course of trial preparation, but if it is not agreed by the Plaintiffs at this early stage, nothing can

be read into the Joint Liquidators' failure to make such an application so far, as to do so would be premature.

46. As regards the absence of any record of, or allusion to, the Declaration of Trust in the Company's records, he submits that this is quite remarkable in that there is absolutely NO such evidence, at all, and Inc cannot point to anything which constitutes such a properly contemporaneous direct record or clear acknowledgment. The consolidated financial statements of Inc for 2018 and 2019, disclosed in October 2021, are not contemporaneous; they were signed off well after the importance of the existence of the Declaration of Trust was highlighted in the liquidation proceedings. The same applies to a set of accounts at such time, purporting to be those of the Company alone (ie not part of any consolidation, which would ignore the precise ownership of assets all under the umbrella of the consolidated entity), which purported to show that the Company's only asset was a claim against its parent company, Inc, for the nominal value of the 101 shares which it holds, and which subscription was therefore presumably never paid on their issue.
47. He submits, further, that insofar as there is any evidence from which inferences can reasonably be drawn, this is more consistent with the non-existence of the Declaration of Trust than with its ever having existed or having been operated. It is therefore rather implausible to suggest that this is simply a case of a document - a very important document, if its impact as asserted by Inc is to be accepted - having been lost (as was Inc's case until the sudden discovery of this document in September 2021, amongst documents said to have been retained in the hands of an employee of its auditors) or of its having been forgotten about by all those concerned with managing or scrutinizing its affairs, because of the passage of time. Dr Borges' immediate reaction was that the Company was the beneficial owner of the assets in its name. Moreover, whilst the Joint Liquidators do not have accounts for the Company for the calendar year 2009, they do have the audited signed-off accounts of the Company for the year to 31 December 2008, which were signed off in May 2009. As this sign off was after the Declaration of Trust had supposedly taken effect, normal good accounting practice would have required such an event to be mentioned in the auditors' notes, as a material change in the Company's affairs, occurring post balance sheet. But there is no such note. He also points out that there are several witnesses from whom one would have expected to have evidence supporting Inc's assertions that the Declaration was made and took effect when it did, if they were so obviously true, such as those who executed the Deed of Trust itself (ie the Sheikh and Mr Kaddaf). One would also expect more direct evidence from those who claim to support the document, such as Mr Ipolitto of White & Case, whose evidence, (Advocate Lyall points out) is both carefully worded and is all indirect, based on information given to him, and his claimed review of papers rather than assertions of any memory, or record, or personal involvement. All these matters suggest that the Company certainly has at least an arguable defence to Inc's claim, and quite clearly that the dispute ought to be allowed to proceed to a trial.

Decision

48. I have no hesitation in preferring Advocate Lyall's arguments to those of Advocate Richardson. In my judgment there is quite clearly sufficient substance in the issues raised by the Joint Liquidators that both the execution and provenance of the claimed Declaration of Trust and any implications of the apparent lack of any evidence of its being operated in practice, requires investigation. It is capable of grounding a properly arguable defence to Inc's claim that the Declaration of Trust can and must be taken at face value, so as to remove beneficial ownership of the share assets which are legally registered in the Company's name from the pool of assets which can properly be applied for the payment of the Company's creditors in an insolvent liquidation.
49. I will just make one comment about the distinction which Advocate Richardson seeks to draw between the effects of a "non-admission" of a document and the effects of "denying" it.
50. This is a procedural point relating to the technicalities of pleading. Where a party "does not admit" an alleged fact, the strict position is that he requires his opponent to prove it. (Often, this is emphasised as putting the opposition to "*strict proof*" but this is tautologous and simply a pleader's flourish; a fact is either proved, or it is not.) If a case proceeds to trial on such a pleading, then the correct position is that the party requiring proof of the fact is entitled to cross-examine witnesses who are called to prove the fact, and, obviously, to make submissions as to whether the evidence is, overall, sufficient to prove the fact on balance of probability, but he is not entitled to introduce independent evidence in rebuttal of the alleged fact into the trial. To do that, he needs to deny the fact in question, because he is then positively asserting that it is not true, and becomes entitled to lead evidence in support of that positive assertion.
51. As a matter of trial procedure, the distinction becomes blurred, because of the principle that a cross-examining party may put evidence (eg, inconsistent documents or anything else) to a witness in cross-examination, but doing so does NOT necessarily mean that that material becomes, itself, evidence in the case, capable of being relied on independently. This needs further or other procedures or facts to enable such materials to be introduced as actual evidence, and positively relied on in that way. The classic example in English law is where the cross-examiner puts a witness's previous inconsistent statement to the witness, and the witness denies its content. The inconsistent statement then does become direct evidence in the case - but only by force of a statute (Criminal Procedure Act 1865 ss 4 and 5, which also apply in civil proceedings.) Otherwise, the only evidence in the case is that given orally at the trial by the witness, complete with his assertions, admissions or denials, and any duly proved documents.) Thus, for example, materials only used to refresh a witness's memory technically do not become actual evidence in the case itself, without more. These rules of admissibility of evidence in a trial have very much lost their force with the general abolition of the rules excluding hearsay, the introduction of witness statements into procedure, the introduction of standard disclosure obligations, and the general tendency of parties to produce trial bundles which, regardless of admissibility, contain just about everything that can be thought of, out of convenience, and because of a general principle, also of convenience of procedure and in consequence, that if a party does

not object to the inclusion of materials into a trial bundle he is apparently conceding its admissibility and its use as evidence at the trial.

52. Against this background, however, the possible procedural objection that, since the Joint Liquidators have only (and quite properly in the circumstances) “not admitted” the authenticity of the Declaration of Trust rather than “denying” it (and thus positively asserting that it is not authentic in all its respects), the court should proceed to evaluate an application for *summary judgment* on the basis that the only evidence on the topic which can and will be called is the supporting evidence of Inc, falls away. Even if the case proceeded to trial on the pleadings as they stood now, I have no doubt that in the course of trial preparation processes, the true position of the parties will have been refined and elaborated on, and any relevant evidence going to the genuineness of the document, whether positive or merely argumentative, would be collated and admitted, and if necessary, the Joint Liquidators would easily be permitted to amend their pleading, even if on appropriate terms, because Inc would, by then, know perfectly well what they were alleging. There is no question but that by the time of any trial, Inc will be fully aware of the nature of the case which it would be required to meet. I therefore hold that no weight can be given to the precise form of the Joint Liquidators’ current pleading in this regard.

53. For the above reasons therefore, I will dismiss the Plaintiff’s application for summary judgment on this issue.

(2) Defendant’s applications for summary judgment

54. It is now convenient to turn to the Defendant’s applications for summary judgment.

55. The Company and the Joint Liquidators cross-claim for summary judgment on their Defences and their counterclaim on three separate bases. The first concerns, in effect, the degree of doubt that the Declaration of Trust ever was entered into at the time, or that it was ever put into operation. The second is that, on its true construction, it is not effective as a Declaration of Trust anyway, and the third is that, even assuming both the above points in the Plaintiff’s favour, the Declaration of Trust was effected unlawfully and was and is void, under ss 301-305 of the Companies Law. It is convenient to deal with this last point first.

(a) The Declaration of Trust was unlawful and void

56. Advocate Lyall submits that even if taken at face value, the Declaration of Trust offends the provisions of ss 301-304 of the Companies (Guernsey) Law 2008 (as amended) and was and is unlawful under s 305 and consequently void and unenforceable. One must first, therefore, examine the relevant provisions. Quoting only the material or potentially material provisions, these are as follows:

“Distributions and dividends

Meaning of distribution.

301. In this Law "**distribution**", in relation to a distribution by a company to a member, means –

(a) the direct or indirect transfer of money or property, other than the company's own shares, to or for the benefit of the member

Meaning of dividend.

302. (1) In this Law "**dividend**" means every distribution of a company's assets to its members, except distributions by way of

(a) an issue of shares as fully or partly paid bonus shares,

(b) a redemption or acquisition of any of the company's own shares or financial assistance for an acquisition of the company's own shares,

(c) a reduction of share capital

(d) ...[etc]

(2) For the avoidance of doubt, a dividend may be in the form of money or other property.

Procedure for making a distribution other than dividend.

303. (1) This section applies to distributions other than dividends.

(2) The board of directors of a company may authorise a distribution if –

(a) it is satisfied on reasonable grounds that the company will, immediately after the distribution, satisfy the solvency test, and

(b) it satisfies any other requirement in its memorandum and articles.

(3)....

(4) The board of directors must approve a certificate stating –

(a) that in their opinion the company will, immediately after the distribution, satisfy the solvency test, and

(b) the grounds for that opinion,

and the certificate must be signed on their behalf by at least one of them.

(5) In applying the solvency test for the purposes of this section –

(a) "**debts**" includes ...[etc]

(b) "**liabilities**" includes.... [etc]

Procedure for paying a dividend.

304. (1) *A company may pay a dividend if –*

(a) the board of directors is satisfied on reasonable grounds that the company will, immediately after payment, satisfy the solvency test, and

(b) it satisfies any other requirement in its memorandum and articles.

(2) The dividend may –

(a) be of such amount,

(b) be paid at such time, and

(c) be paid to such members,

as the board thinks fit.

(3)-(5)

(6) The board of directors must approve a certificate stating –

(a) that in their opinion the company will, immediately after payment of the dividend, satisfy the solvency test, and

(b) the grounds for that opinion,

and the certificate must be signed on their behalf by at least one of them.

(7) In applying the solvency test for the purposes of this section –

(a) "debts" includes ... [etc] and

(b) "liabilities" includes...[etc].

Prohibition of unauthorised distributions.

305. No distribution of a company's assets to its members is lawful unless it is authorised under this Law, another enactment or any rule of law."

57. Advocate Lyall observes that the essence of these provisions is that a company cannot hand over its assets to or for the benefit of a member, whether by way of dividend, or by way of a return of capital, unless it can solemnly certify, through its directors, that the company will remain solvent after such distribution has been made. In this way a general "solvency" test has replaced the former rigid rule that distributions by way of dividend could not be made out of capital, and a distribution by way of return of capital required compliance with strict procedures and often, I think, an order of the court. The principal that a company cannot return its assets to its members (or even, I think, indirectly to ultimate owners in respect of a hierarchical ownership structure) is fundamental to the system which permits the privilege of limited liability companies: see *Progress Property v Moorgate Group Ltd* [2012] UKSC 55, and also *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626, which held that even a purported

sale of an asset to a member, if at an undervalue, was *ultra vires* the Company and void, as a “dressed up” distribution.

58. He submits that the Declaration of Trust falls within the terms of s 301 as a “distribution”. It purports to be a transfer of property (the beneficial ownership of shares) to a member (its parent company, Inc). It does not fall within the terms of s 302, so it is not a “dividend” - although similar arguments would apply if it were: see s 304.
59. The distribution therefore required, under s 303, on a mandatory basis, to be certified by a “solvency resolution” of the Board of the Company, showing a consideration of the point which had actually taken place, and signed on behalf of the Board by at least one of their number. There was not, and it has never been suggested that there was or could have been, any such certifying resolution. Other Board resolutions have been found by the Joint Liquidators in the company’s records, but there is neither hide nor hair of any such resolution as this, and that evidence is compelling, in all the circumstances, that no such resolution was ever made.
60. Advocate Richardson contests this argument under the Defendants’ application at several points. He submits that there is in fact no sufficient evidence that the section was ever engaged at all, ie the Declaration of Trust did not even constitute a “distribution”. This was a point raised by Ashton & Co in their brief period of acting for Inc. They suggested that the section did not apply to a transfer of shares made as an intragroup transfer. This point has not been persisted in, however, and that is probably because, in my judgment it is obviously bad. Sections 301 and 302 contain no such exception, nor is it suggested that one could be gleaned from any other enactment.
61. His second submission was that a conclusion that the Declaration of Trust did fall within the definition of a “distribution” was a decision which required a factual investigation, such that it would not be appropriate to found a summary judgment upon it and there must be a trial. The factual investigation, he submitted, was whether the transaction had actually conferred a “benefit” on Inc, within the meaning of s. 301, given the fact that there was evidence that, at the relevant time, there had been a major restructuring of the JJW Group, the details and effects of which the court could not be fully aware of on this application.
62. I reject that submission. The section does not require that any such distribution be demonstrated to be for “the benefit of” a member if the distribution is “to” a member. The simple fact of transferred ownership is enough. The obvious purpose of the additional words was to catch distributions made as a member might wish or direct and thus prevent avoidance of the requirements of the section. In any event, I consider it fanciful to suggest that there could be any scenario, even in the context of a group restructuring, in which a transaction such as this could be argued not to be for the benefit of the recipient, or, indeed of Inc, the well-being of whose affairs was plainly in the kernel of what was going on in January 2009.

63. I had, at one point wondered whether there was a timing point in issue, because the Declaration of Trust is dated 8th January 2009, and this was the same day as the acquisition by Inc of 100 shares in the Company. The Declaration of Trust could possibly have preceded the transfer of shares. However, (a) this point was not raised at all by Advocate Richardson, which suggests very clearly to me that the relationship was taken to have been in place already, and (b) even making due allowance for the slightly strange and stilted language of the first recital to the Declaration of Trust, it appears to me that that document was itself intending to acknowledge, and indeed rely on, the fact that Inc (the Beneficial Owner) was already the parent of the Company (the Trustee).
64. Advocate Richardson's third point was that with the Declaration of Trust having been executed by the Sheikh himself, as well as by him as Chairman of Inc, the Declaration of Trust was fully validated under the well known *Duomatic* principle (*In re Duomatic Limited* [1969] 2 Ch 365) which is to the effect that a resolution or action which is approved unanimously by all the members of a company is as valid as a resolution of the company itself made at a properly convened meeting. This can therefore cure any objection that a transaction is invalid because it is not authorised by the necessary resolutions of the Company. Advocate Lyall submits, however, that this principle cannot apply in the situation where the transaction is actually *ultra vires* the company itself, as contrasted with being *intra vires* but procedurally defective in its execution, and that in any event such a principle cannot validate an act of the company which is intrinsically unlawful as such. He cites the *Aveling Barford* case (above) in support of this proposition.
65. In my judgment, Advocate Lyall is correct. I do not need to consider whether the evidence factually amounts to a combined approval of the impugned transaction on behalf of the company by the totality of its members, because I accept that the *Duomatic* principle cannot operate to give validity to the Declaration of Trust if it is unlawful under the Companies Law.
66. Advocate Richardson's fourth point is to remind me of s 228 of the Companies Law, which provides that a Guernsey company has a duty to keep records of minutes and resolutions, etc, only for a minimum of six years. Any such resolution is now 13 years old. The current absence of such a resolution is therefore no breach of duty and could be accounted for by a perfectly lawful document destruction policy. This means, he argues, that the lawfulness point could not be decided before the introduction of wider evidence and a proper investigation, at a trial, of whether there had, indeed, been a resolution made, record of which might have been perfectly lawfully destroyed, or just lost.
67. I reject this argument as well. Of course I recognise that where there is the real prospect that a further factual investigation could change the complexion of evidence relied upon on a summary judgment application sufficiently far as to undermine the apparent position at the time of the application, the matter would have properly to go to trial. But the assessment of such a possibility must, in itself,

amount to an assessment that there is a “real prospect” of such a situation emerging and appearing to be the case on balance of probability. To my mind that proposition only has to be stated for it to be apparent that the likelihood of its properly emerging in this case is vanishingly small to the point of being fanciful. Given the history of the conspicuous absence of any sign of documents supporting Inc’s position, except for the eventual production of the Declaration of Trust document itself, I cannot see that there is any serious prospect of such a solvency certificate being discovered, or any credible evidence being discovered that it ever existed.

68. This is not least because, in order to have complied with the requirements of ss 303, it would have been necessary for those in charge of administering the Company to appreciate that those requirements existed, in order to legitimise the Declaration of Trust. In the context of all the absence of evidence, that they had even had the Declaration of Trust itself in mind as operating, the possibility of such an ancillary consideration having entered into any one’s mind at the time seems to me to be fanciful,. But even then, the point is that, if they had appreciated the need for any such certificate, it is even less plausible that it would not have been preserved, at least with the Declaration of Trust itself, and that it would have been allowed to disappear, whether in pursuit of a lawful document destruction policy or not. It is to be noted that other board resolutions and records from the relevant time do seem to have been preserved.
69. Advocate Richardson’s fifth point is that the Joint Liquidators’ claim for judgment on their counterclaim should go to trial, because it is, or is sufficiently arguable, that the claim is time-barred by s 309 of the Companies Law (as amended). This section reads, so far as potentially material:

“Recovery of distributions.

309(1) A distribution made to a member at a time when the company did not, immediately after the distribution, satisfy the solvency test may, within a period of two years beginning immediately after the day of the distribution, be recovered by the company from the member except to the extent that –

(a) the member received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test,

(b) the member has altered his position in reliance on the validity of the distribution, and

(c) it would be unfair to require payment in full or at all”.

Further subsections impose personal liability on any director who allows a distribution to be made without satisfying the requirements of ss 303 or 304, or without having reasonable grounds to believe the company was and would remain solvent, to make good any part of the distribution which cannot be recovered, unless the company was, in fact, solvent at the time. By s 309 (5) the court can adjust

both any recovery from a recipient, and a director's liability, insofar as a lawful and valid distribution of a lesser amount could have been made.

70. Advocate Richardson argues, therefore, that the Joint Liquidators cannot rely on ss 301-5 as invalidating the effect of the Declaration of Trust and enabling "recovery" therefore of the beneficial interests thereby transferred, because they are many years out of time for any such action. The Declaration of Trust is therefore, in effect, impregnable.
71. Advocate Lyall submits that s 309 does not apply to the present case, because it is dealing with a different kind of situation, namely where the company has in fact effected a disposal of an asset or paid over money, thereby transferring title, but should not have done, because its directors did not think about, or made a mistake about, its solvency. He points out further that, in any event, the Company is not "recovering" anything in this situation at all. The Company has the legal title to the shares and is able to assert its rights on that basis. It is Inc which has to establish the validity of the Declaration of Trust in order to overturn that *prima facie* entitlement and prevent the Company from doing so.
72. I prefer Advocate Lyall's submission. In my judgment s 309 simply does not apply to the present factual situation, and still less does its time limit, which was actually added only by amendment. In that form, it could surely never have been intended to render a distribution to an associated company, which would defeat outside creditors, impregnable if not "recovered" within two years, because a distribution could be manipulated to a "friendly" recipient, and the creditors might have no cause or ability to cause its recovery before their interests were unlawfully defeated. That cannot, I would have thought, have been the intention of the statute. But, in any event, I prefer and fully accept the strength of Advocate Lyall's second point, namely that here, the Company is not seeking to "recover" any transfer which has been effectively made in practice at all, because all it has to do is to assert its title as legally registered shareholder, and it then becomes Inc's problem to assert its allegedly overriding rights. The Company is not demanding the return of anything. Section 309 therefore does not, in my judgment, provide any arguable defence to the Defendants' claim.
73. Finally Advocate Richardson invokes an over-arching point from the *Tranquility* case (above) at (g), that the court should not give summary judgment in an area of developing law. He submits that that is the case here, as there has so far been no case in Guernsey on the relevant sections. He submits, therefore, that the Defendants' counterclaim must at least be sent for full argument at a trial, for that reason.
74. I regard that argument as unduly mechanistic, and I reject it. There are no significant issues of discretion, or policy, or the incremental development of the law raised by the Defendants' claim. It is simply, as Advocate Lyall submits, a matter of statutory construction. As such it can be perfectly reasonably dealt with on a summary application such as this, and I do not consider that any previous absence

of authority constitutes any “other good reason” why there ought to be a trial in the light of the conclusions which I have very firmly formed.

Decision

75. It follows that I can and will give summary judgment for the Defendants upon their counterclaim in relation to the Declaration of Trust, on these grounds alone. Indeed, I in fact did so, on the day following the original hearing of the matter some days ago, because this matter seemed to me to be one which ought to be dealt with quickly, so as to minimise undesirable uncertainty, and possibly paralyse the conduct of any affected enterprises.

76. I therefore indicated, then, what were my decisions on these two main points (the Plaintiff’s application for summary judgment and the Defendants’ cross application for strike out/summary judgment regarding the validity of the Declaration of Trust), and also the Plaintiff’s claim against the Joint Liquidators personally (see below), as these were sufficient to dispose of the matter, but said that I would have required more time to deal with the remaining issues, and I would deal with these in my written judgment, which I now do.

Other issues

77. Advocate Lyall argued separately that his clients should be given summary judgment in terms of their counterclaim, against the validity of the Declaration of Trust, on several other grounds, which I will deal with in a convenient order.

(1) Trust Deed invalid for insufficient certainty.

78. He first submits that, even if the Declaration of Trust can be taken as authentic, at face value, it would not be effective to create the trust claimed by Inc, on the grounds that it lacks the required certainty of subject matter, which is necessary for the creation of a valid trust. There were two distinct strands to this submission, namely that the Declaration of Trust lacked sufficient certainty as a matter of construction, but also that the Declaration of Trust, being a voluntary declaration, could not, in any event, create a valid trust in relation to future property to be acquired by the Company, and many of the shares fell into this category.

79. Advocate Richardson submits that there is really no problem about the meaning and intention of the Document; it was intended to create a trust of all the subsidiaries of the Company, then and thereafter in its ownership. As regards the issue of this being apparently a voluntary declaration of trust, and therefore incapable of creating a trust of future property, he submits (I think) that with it being plain that this transaction was carried out in the context of a group re-organisation, other matters undertaken in that context would be sufficiently likely to generate any necessary consideration, such that the Declaration of Trust would be perfectly enforceable according to its purported and obvious terms.

80. I have already referred to the relevant terms of the Declaration of Trust, but I set them out here again for convenience in considering this point.

“The Beneficial Owner is a parent company which owns 100% of the JJW LIMITED (“Trustee”) shares of its subsidiaries (“Shares”) companies incorporated in the Guernsey.....

B. the Shares of the Subsidiaries are legally owned by the Trustee....”.

“1. The Trustee declares that it holds the Shares of the Subsidiaries as nominee upon trust for the Beneficial Owner absolutely”

81. It has been suggested, I think, that the Declaration of Trust is actually apt, according to its terms, to apply only to subsidiary companies incorporated in Guernsey. I am not sure that there actually are any, and whilst this is certainly an arguable point on this awkward wording it does seem to be a bizarre result in context. The general intention does appear to be to deal with all the Company’s Subsidiaries. The reference to Guernsey may merely be an ineptly placed, or expressed, reference to the Company itself. There might also be arguments or issues arising if there were Subsidiaries which were not wholly-owned, as I think there are. None of these points, though, would be sufficient for me to give summary judgment against the validity of the Declaration of Trust based upon them on their own, or even combined. I would not, therefore, dismiss strike out Inc’s claim for these reasons.

82. As regards the objection to the Declaration of Trust based on the point that it is a voluntary declaration of trust and is therefore incapable of creating a trust of shares acquired by the Company in the future, this has more substance.

83. The first point is whether that legal principle (ie that consideration is required, because such a disposition, operating in equity, can only take effect in contract) applies at all. The concept of consideration in Guernsey law may not be the same as in English law, owing to Guernsey law’s origins in Norman customary law rather than English common law. However, I would hold that it does, first because the Declaration of Trust is expressly declared to be subject to English law, but also because the concept of trust under which this instrument purports to operate is imported into Guernsey law from English law, and so would tend to import any intrinsic limits on its application found in English law, as part of the concept, as well.

84. The second point is whether the Declaration of Trust does indeed fall to be regarded as a voluntary disposition, as Advocate Lyall submits. Again, I would hold that it plainly does. There is no hint of any consideration recognised or acknowledged in the document itself, nor any matter which might, on investigation, be revealed to constitute it. The only mention there has been is the surrounding circumstance of a group restructuring, but in my judgment that is insufficient to show, assume, or even to suggest, the reasonable possibility of there being found to be any

consideration given in relation to the Declaration of Trust recorded in this document.

85. I accept, therefore, that it is not possible to create an enforceable trust of future property by voluntary disposition, but this does not mean that the Declaration of Trust would be entirely unenforceable for this reason. In my judgment (and subject to any arguments about the true construction of the document mentioned above) it could, and would, operate in relation to companies which were subsidiaries of the Company as at 8th January 2009. It would require an investigation to determine the scope of such ownership.

86. If these, therefore, were the only objections to the validity of the Declaration of Trust capable of being advanced I would give a judgment that the matter should go to trial, based on the principle of its being potentially valid *pro tanto*, and I would direct an appropriate enquiry to determine the assets upon which it operated. However, there is more.

(2) No reasonable prospect of the Plaintiff's establishing the validity of the Deed of Trust.

87. This is Advocate Lyall's wide and general challenge to the validity of the Declaration of Trust, and is the point which has caused me most concern. His general argument is that the Court should strike out the Plaintiff's claim, and give the Defendants summary judgment now, on the basis that the Plaintiff's case that the Declaration of Trust is a valid and enforceable instrument in principle (ie apart from any of the points considered above) stands no real prospect of success and this can be seen now, simply on the apparent merits of the case and the present evidence.

88. On analysis, this argument has two distinct strands. The first is that the document is not authentic as to its execution, certainly on the date purportedly given to it. Advocate Lyall emphasises, and I think quite correctly and fairly, that there is not a shred of contemporaneous evidence, direct or circumstantial, to support the existence, execution or operation of the Deed of Trust itself at the time, and even the only non-contemporaneous evidence is self-serving. He points out the mysterious provenance of the document, and why it should have been (apparently) executed and then kept in duplicate. He remarks on the fact that such an important document should have been found only more than a year after a winding up order had been made, and when challenges to the winding up order on the grounds that the Company was solvent had failed. He points out that even the suggestion that there had ever even been such a trust, was only made after the winding up, and was initially only on the basis of hearsay and a vague "understanding" of deponents with no direct knowledge, based on documents and materials which were themselves not disclosed. He draws attention to the fact that even Mr Ipolitto, the only person purporting to have had some sort of knowledge directly at the relevant time, has written an apparently carefully worded letter, which does not actually say that he was involved in overseeing the Declaration of Trust or putting it into effect, and

contains no statement that he was actually aware of it or knew about it at the time. He observes that the financial statements prepared before the point became material are, at best, inconclusive, and insofar as any inferences can be drawn, they are in fact more consistent with there being no such trust. He points out how the actions of people involved with the Company were, again more consistent with there being no such trust than with it being operated or acknowledged - again until after the winding up. He reiterates the point that if this had been a solemn and carefully concluded disposition, then one would have expected not only references to it somewhere, but a formal Board resolution (conspicuous by its absence, when there are others) as to making it at all, and even consideration and legal advice as to any procedural requirements. There is nothing but purported *ex post facto* recollections to suggest that any such disposition was under consideration, let alone implemented.

89. These are powerful points. However, the argument amounts, in effect, to seeking a finding that the Declaration of Trust is a forgery. This is a strong holding to ask a court to make on a summary judgment application. On balance and with some hesitation, I would conclude that this point is not an appropriate matter for summary judgment, given the seriousness of such a finding, and the fact that there does still appear to be evidence which could be adduced on this topic (eg from the Sheikh, and the witness, if not others) which could shed light on that allegation. Although a court is entitled to draw adverse inferences from the fact that a party fails to produce evidence which would seem to be within his power to produce and which would support his case if it is correct, I do not think, on balance, that it would be right to do so on a summary judgment application here. However, much I may think that the outcome of any such investigation is likely to show that Advocate Lyall's comments were justified, I do not feel that I can therefore quite rule out any "real prospect of success" on such a grave matter, at this stage.
90. The second basis of such challenge, though, is that the evidence shows, and Advocate Lyall would submit beyond peradventure, that even if the Declaration of Trust was in fact executed as it purports to be, the instrument has simply not been acted on, and it therefore cannot now be invoked, all of a sudden, for retrospective effect.
91. I must say that I am very struck by the singular facts that there is not a shred of evidence, not just as to supporting an inference that the document did exist from 8 January 2009, but that, if it did exist, it was ever acknowledged, acted on or in any way taken account of by those administering or managing the Company's affairs or even those of the companies associated with it, so far as has been shown.
92. Even if I assume that the document was validly executed in accordance with its purport, it seems to me that I am driven to the conclusion that, although it was executed, no-one thought of actually acting on it or intended to act on it. The whole of the situation and the evidence carries the distinct flavour of this having been, at best, a document which was executed as a kind of insurance policy. It was not intended to be acted on, implemented, or used, unless and until there was some

reason of compulsion or expedience which prompted and required this. Until such a situation arose, it was left in the metaphorical bottom drawer, and was, quite intentionally, ignored.

93. I have to say that I consider this to be the inevitable interpretation of events, on the assumption that the Declaration of Trust was indeed executed as claimed, and as it depends on incontrovertible facts and truly contemporaneous documents I cannot see that there is any real possibility that this impression could or would be dispelled by any further evidence which could be called at a trial.
94. Can I and should I give summary judgment for the Defendant in such situation? In my judgment, yes. This document was not intended to have effect unless and until some party connected with it thought it would be advantageous to seek to rely on its apparent purport. That means that, assuming (here) that it was executed as it purports, (a) it was either executed, in effect, as a kind of escrow or (b) that it was a sham. As to (a) I am not sure that a party is entitled to have an escrow conditional only, in effect, on its own decision to declare it rather than some outside event, but in any event, any such expedience only came into effect after the winding up order, and so too late to have any effect on the Company's affairs or enable the Company to consent to it or implement it. As to (b), the alternative that the document was in effect a sham, (ie a document which was intended by the parties to give the impression to third parties that it created rights and obligations between them other than the rights and obligations they actually intended to create or operate) this feels very much more like the situation which has actually been revealed. In my judgment the court would not enforce the terms of an instrument prepared and dealt with on either such dubious basis as above, especially against the liquidator of one of the parties.
95. I feel sufficiently sure that this would be the ultimate conclusion of any trial, that I do not think there is any real prospect of Inc successfully proving otherwise. Thus, if the validity and force of the Declaration of Trust apart from any other vitiating factor (discussed above) were to be in issue, I consider that there is no real prospect that it would be upheld.
96. I would, therefore, give the Defendants summary judgment upon their counterclaim on this basis as well. However, this does not need to form the basis of my decision since I regard the "unlawfulness" point discussed above as stronger, and really incontrovertible.

Final claims against First and Second Defendants.

97. Finally, I deal with the last remaining aspect of these summary judgment/strike out applications namely the Plaintiff's application for a judgment against the Defendants for wrongfully interfering with the Company's assets since their appointment.

98. Obviously, in the light of my judgment that the Defendants are entitled to a summary judgment against the Declaration of Trust, which feeds total validity into their actions as Joint Liquidators of the Company, this claim falls away. However, I would have dismissed the Plaintiff's application and granted the Defendants' cross application to strike out for the following reasons.
99. First, this claim is so poorly and skeletally pleaded that it would be appropriate, in my judgment, to strike it out as a procedural abuse. It is "embarrassing". It is in fact so lacking in substance or any detail that I would not even allow permission to amend the pleading. First there is no suggested form of amendment, and the court should not, in my judgment ever, apart from extraordinarily special circumstances, give permission to amend a pleading without sight of, and therefore control of, what the proposed amendments are going to be. I would therefore strike the claim out, but would not regard this as a *res judicata* which would bar the bringing of a fresh action on properly pleaded terms, if this could in fact be done.
100. However, that is not the only reason for striking out this claim; I also take the view that not only does it disclose no reasonable cause of action, but I can see no way in which it could ever do so. The first reason for this is that on any basis, the acts of the first and second Defendants have been carried out with the authority of the court's order and directions. This must, in my judgment inevitably legitimise them, in principle. I do not think the fact that Inc were apparently not present at the hearing of the application for such directions in May 2022 alters that position. This is also because of the next reason.
101. The claim is also pleaded in terms which show that it can only rest on an assertion that the Joint Liquidators owed some duty of care to Inc, presumably as holding company of the Company. In my judgment this simply is not possible in law. There is authority (see *Knowles v Scott* [1891] 1 Ch 717) that liquidators do not owe any duty of care to shareholders in carrying out their functions as liquidators. Inc's claim against them personally cannot survive independently of their claim that the Joint Liquidators should, in effect, not be liquidating these assets because they are not the company's assets, which is their main claim. It is obvious that the Joint Liquidators have never assumed any responsibility towards Inc to protect their interests. I therefore cannot see any basis on which Inc could maintain any claim against the Joint Liquidators personally.

Conclusion

102. In the circumstance I have no hesitation in dismissing the Plaintiff's ambitious applications for summary judgment on their claim, and allowing the Defendants' applications to strike it out and/or for summary judgment on their counterclaim.
103. This now disposes of all the substantive issues in these applications. I will deal with costs or any further ancillary matters on paper, if so requested.

Lieutenant Bailiff Hazel Marshall QC

Dated 4th July 2022