

Appellant sought summary judgment that an alleged intercompany Declaration of Trust was valid and effective. Nine grounds of appeal were considered

[2022]GCA077

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

ON APPEAL FROM THE ROYAL COURT

CIVIL DIVISION APPEAL No. 561

8 December 2022

BEFORE:

**Lord Anderson of Ipswich K.B.E. K.C., President
David Perry K.C.
Helen Mountfield K.C.**

BETWEEN:

JJW HOTELS & RESORT HOLDINGS INC. Plaintiff/Appellant

and

**(1) BENJAMIN ALEXANDER RHODES Defendants/Respondents
(2) ANDREA FRANCES ALICE HARRIS
(3) JJW LIMITED (IN COMPULSORY LIQUIDATION)**

**Advocate P. Richardson for the Appellant
Advocate A.R. Lyall for the Respondents**

ANDERSON JA:

This is the judgment of the Court.

Introduction

1. The Third Respondent, JJW Limited (“**the Company**”), is a Guernsey company which ran various hotel and hospitality businesses in Europe. It has been in compulsory liquidation since July 2020. The First and Second Respondents are its Joint Liquidators (“**the Joint Liquidators**”). The Appellant, JJW Hotels and Resort Holdings Inc (“**Inc**”), is a company incorporated in the British Virgin Islands and the sole owner of the Company. The ultimate beneficial owner of the Appellant is Sheikh Mohammed bin Issa Al Jaber (“**the Sheikh**”).
2. Before the Royal Court, the Appellant sought summary judgment on its claim for a declaration that an alleged Declaration of Trust (“**the Declaration of Trust**”), executed on 8 January 2009 by the Sheikh on behalf of both the Appellant and the Company, was valid and effective. The purported effect of the Declaration of Trust was to constitute the Appellant the beneficial owner

of all the shares legally owned by the Company in its subsidiaries. The Appellant also sought damages against the Joint Liquidators in respect of their actions in relation to some of the shares. The Respondents in return claimed summary judgment against the Appellant and the striking out or dismissal of the Appellant's Cause.

3. In a judgment given on 7 June 2022 and handed down in writing on 4 July ([2022] GRC041), the Lieutenant Bailiff (Her Honour Hazel Marshall QC) refused the Appellant's application for summary judgment and struck out its Cause against the Joint Liquidators. The Respondents' application for summary judgment was granted. The only matter before this Court is Inc's appeal against the grant of summary judgment.
4. We gratefully adopt the Lieutenant Bailiff's history of the matter at [10]-[26] of the judgment under appeal, whose accuracy is not disputed by the parties, and her description at [27]-[31] of the Declaration of Trust.

The judgment under appeal

5. The Respondents' challenge to Inc's claim was summarised by the Lieutenant Bailiff in the following terms (at [8]):
 - 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 requirement of those sections were not complied with, thus rendering the transaction expressly unlawful under s305, and therefore void or unenforceable. They reject the Company's [Inc'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."
6. Having at [53] dismissed with "*no hesitation*" Inc's application for summary judgment (a decision which Inc does not seek to challenge on appeal), the Lieutenant Bailiff at [75] granted the Respondents' application for summary judgment on the third of the grounds summarised above ("**the unlawfulness ground**").
7. In summary, the Lieutenant Bailiff accepted at [57]-[59] the Respondents' submission that

- a. the essence of sections 301-305 is to prohibit a company from handing over its assets to or for the benefit of a member, whether by way of dividend or return of capital, unless it can solemnly certify, through its directors, that the company will remain solvent after such distribution has been made;
 - b. the Declaration of Trust purported to be a transfer of the beneficial ownership of the shares to Inc, which could be lawful only if certified by a solvency resolution of the Board of the Company; and that
 - c. the evidence was compelling, in all the circumstances, that no such solvency resolution was ever made.
8. Though it was not strictly necessary to do so in view of her conclusion on this ground, the Lieutenant Bailiff went on to consider the first and second of the grounds that she had summarised (see para 5 above). She concluded that the second ground was not suitable for summary judgment, since an investigation would be required for its resolution. On the first ground, the Lieutenant Bailiff expressed strong suspicions about the authenticity of the Declaration of Trust but declined to hold on a summary judgment application that it was a forgery, since further evidence might still be adduced on the topic ([88]-[89]).
9. The Lieutenant Bailiff appeared however to accept the Respondents' further argument under the first ground that the Declaration of Trust, even if validly executed, had not been acted on or intended to be acted on and could not therefore be invoked with retrospective effect ([90]-[96]). She indicated that she "*would, therefore, give the Defendants summary judgment upon their counterclaim on this basis as well*", but that "*this does not need to form the basis of my decision since I regard the 'unlawfulness' point discussed above as stronger, and really incontrovertible*". No ground of appeal was advanced in relation to this part of the judgment, but since the Respondents did not invite us to conclude that it formed a separate and distinct basis for the grant of summary judgment, we need say no more about it.

The test for summary judgment

10. Rule 19 of the Royal Court Civil Rules 2007 grants the power to the court, on the application of any party, to give summary judgment against another party on the whole of a claim or any particular issue, on the grounds 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.”

Those criteria are similarly worded to those set out in the Civil Procedure Rules of England and Wales (CPR 24.2), and no reason was suggested to us why they should be interpreted any differently.

11. This Court noted, in *Rawlinson and Hunter v Investec Trust Limited and another* [2016] GLR 332 at [100], a list of considerations paraphrased from the judgment of Lewison J in the English case of *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] as relevant to the decision whether to grant summary judgment:

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

- (2) A realistic 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 defendant] 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 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."

12. The issue of burden of proof on a summary judgment application was addressed by Sir Richard Collas, Bailiff, in the Guernsey case of *Tranquility Holdings Limited v Invista Real Estate Investment Management (CI) Limited* (Judgment 38/2015) by reference to paragraph 24.2.5 of the White Book. That paragraph, in its current version, states that:

"... the overall burden of proof rests on the applicant [for summary judgment] to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. The existence of this burden is indicated by para. 2(3) of the Practice Direction supplementing Pt. 24: the applicant must (a) identify concisely any point of law or provision in a document on which they rely, and/or (b) state that the application is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relate, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial. The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial."

It goes on however to note that:

"If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of r.24.2 ('no real prospect ... no other reason ...') indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction: the court is not required to accept without analysis everything said by a party in his statements before the court (*ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472; [2003] CP Rep 51 at [10]). In evaluating the prospects of success of a claim or defence judges are not required to abandon their critical faculties (*Calland v Financial Conduct Authority* [2015] EWCA

Civ 192 at [29]). However, the proper disposal of an issue under Pt 24 does not involve the judge in conducting a mini-trial (*Swain v Hillman* [2001] 1 All ER 91).”

Translating those principles into the context of the current case, it was for the Company and Joint Liquidators (as applicants for summary judgment) to state their belief that on the evidence Inc had no real prospect of successfully defending the claim, and that there was no other reason why a disposal of the claim should await trial. The evidential burden then shifted to Inc to put forward evidence, carrying some degree of conviction, to rebut that statement of belief. The overall (legal) burden of establishing grounds to believe that Inc had no real prospect of success and that there was no other reason for a trial however lay on the applicants for summary judgment.

Grounds of appeal

13. Nine grounds of appeal against the Lieutenant Bailiff’s conclusion on the unlawfulness ground were set out in Inc’s Notice of Appeal, and developed before us in writing and orally. In broad outline, Grounds 1, 4, 5, 6, 7 and 8 raise questions of legal interpretation, by reference in particular to the Companies (Guernsey) Law 2008 (“**the Companies Law**”). Grounds 2, 3 and 9 bear on the issue of whether it was appropriate to grant summary judgment without the opportunity to provide further evidence at or in advance of trial.

The Companies Law

14. Before addressing the grounds in detail, it is convenient to set out the material provisions of the Companies Law. Sections 301-309 as amended appear in Part XVII (Capital and Shares). They reflect the long-established common law rule, intended for the protection of creditors, that:

“a distribution of a company’s assets to a shareholder, except in accordance with specific statutory procedures, such as a winding up of the company, is a return of capital, which is unlawful and ultra vires the company”

(*Progress Property Company Ltd. v Moorgarth Group Ltd.* [2010] UKSC 55 at [15]).

15. Sections 301-305 and 309 provide in relevant part (omitting, *inter alia*, those provisions concerned only with the distribution of dividends) 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, or
- (b) the incurring of a debt to or for the benefit of the member,

in respect of the member's interests, and whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means.

...

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) If, after a distribution is authorised and before it is made, the board ceases to be satisfied on reasonable grounds that the company will, immediately after the distribution is made, satisfy the solvency test, any distribution made by the company is deemed not to have been authorised.
 - (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 fixed preferential returns on shares ranking ahead of those in respect of which a distribution is made (except where that fixed preferential return is expressed in the memorandum or articles as being subject to the power of the directors to make distributions), but does not include debts arising by reason of the authorisation, and
 - (b) "**liabilities**" includes the amount that would be required, if the company were to be dissolved after the distribution, to repay all fixed preferential amounts payable by the company to members, at that time or on earlier redemption (except where such fixed preferential amounts are expressed in the memorandum or articles as being subject to the power of directors to make distributions) but, subject to paragraph (a), does not include dividends payable in the future.

...

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.

...

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.

(2) If, in relation to a distribution made to members -

- (a) the procedure set out in section 303, section 304, sections 310 to 325 or sections 329 to 335 has not been followed, or
- (b) reasonable grounds for believing that the company would satisfy the solvency test did not exist at the time the certificate was signed,

a director who -

- (i) failed to take reasonable steps to ensure the procedure was followed, or
- (ii) voted to approve the certificate (as the case may be),

is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from members.

(3) If a distribution is deemed not to have been authorised, a director who -

- (a) ceased after authorisation but before the making of the distribution to be satisfied on reasonable grounds for believing that the company would satisfy the solvency test immediately after the distribution is made, and
- (b) failed to take reasonable steps to prevent the distribution being made,

is personally liable to the company to repay to the company so much of the distribution as is not able to be recovered from members....”

16. The Respondents’ submission, accepted in the judgment under appeal, was and remains that the Declaration of Trust was a distribution within the meaning of s301, but not a dividend. It was therefore required by s303 to be authorised by the board of directors, by means of a signed certificate stating with grounds that in their opinion the company would, immediately after the distribution, satisfy the solvency test (“**solvency certificate**”). By s305, the distribution was unlawful and so void *ab initio* because it was not authorised under the Companies Law: no other enactment or rule of law was advanced by the Appellant as constituting authorisation.

17. That interpretation is challenged by the Appellant on a number of grounds related to the interpretation of the Companies Law, to which we now turn before considering the other grounds of appeal.

Was the Declaration of Trust a distribution?

18. The Appellant submits, as Ground 1 of its appeal, that the entering into of the Declaration of Trust did not amount to a ‘distribution’ within the meaning of s301 of the Companies Law. It seeks to draw a distinction between a distribution and a reconstruction in which no money or other assets go out of the group.
19. We reject this submission, which is unsupported by authority. The definition of distribution in s301 is broadly framed. It applies to the direct or indirect transfer of any property other than the company’s own shares, to or for the benefit of a member, by any means. Whether a transaction infringes the common law against return of capital is a matter of substance, not form: *Progress Property Company Ltd v Moorgarth Group Ltd* [2010] UKSC 55 at [16]. The same approach is to be applied in interpreting s301. There is no exception for intra-group transfers of assets, which may themselves be capable of defeating the interests of creditors in the same way as a transfer of assets to other shareholders.
20. Objection is taken by the Appellant to what it describes as a statement by the Lieutenant Bailiff that this point had been abandoned in the Royal Court. The Lieutenant Bailiff did not state in terms that the point had been abandoned, though she did remark at [60] that the point “*has not been persisted in ... probably because it is obviously bad*”. Whether or not the point was formally abandoned before the Lieutenant Bailiff, we agree that it is without merit.

Are the Joint Liquidators time-barred by s309?

21. The Appellant contends, as Ground 6 of its appeal, that if the Declaration of Trust was a distribution, it falls within s309(1) of the Companies Law. The effect of that, submitted Advocate Richardson, is that subject to the conditions in that section, the Joint Liquidators had only two years to seek the recovery of the distribution. He sought to maintain that the two-year period ran from the date of the distribution, notwithstanding that the two-year limitation period was only inserted into s309(1) by the Companies (Guernsey) Law 2008 (Amendment) Ordinance 2015. Recovery having not been sought within two years of 8 January 2009, any claim is now said to be time-barred. It is accordingly not open to the Joint Liquidators to rely in these proceedings on ss 301-305 as invalidating the effect of the Declaration of Trust, since to do so would be to circumvent both the limitation period and the qualifications in s309(1) on the right to “recover” the beneficial interests that were transferred under the Declaration of Trust in January 2009.
22. The Lieutenant Bailiff addressed this point at [72] of her judgment. She held that the Company was not seeking the recovery of any assets, but rather asserting its title as legally registered shareholder. Accordingly, s309 had no application to the present factual situation.
23. We consider that the Lieutenant Bailiff was right to reject the submission that the Company was required to seek recovery of the beneficial interest transferred under s309(1) in order to challenge the validity of the Declaration of Trust. Section 305 states unequivocally that no distribution of a company’s assets to its members is lawful, unless duly authorised. An unlawful act is *ultra vires* the powers of the directors and is not binding on the company: *Batty v Bourse Trust Company Limited* [2017] GLR 54 at [32]. The Company and the Joint Liquidators were entitled to rely upon the prohibition of unauthorised distributions in s305 and to seek summary judgment on this basis. They were not and are not required to institute proceedings for recovery

under s309. No question of their entitlement to recovery from members and/or directors, or the retrospective application of any time bar, therefore, arises on this appeal.

24. It was further submitted, as Ground 7 of the Notice of Appeal, that the issue of whether s309 applied is an area of developing jurisprudence and a novel point of law such that it was inappropriate for the Royal Court to give summary judgment. Reliance was placed on the Royal Court's decision in *Tranquility Holdings Limited v Invista Real Estate Investment Management (CI) Limited*, and in particular on the comment of the then Bailiff, at [47(g)] of the judgment in that case, that:

“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 (*Farah v British Airways*, The Times, January 26 2000, CA, referring to *Barrett v Enfield BC* [1989] 3 WLR 83, HL).”

We note, in passing, that permission to appeal against this judgment was refused by Birt JA (Judgment 8/2016).

25. In this case the Lieutenant Bailiff at [74] of her judgment rejected as “*unduly mechanistic*” the submission that summary judgment should not be granted in an area of developing law. She added:

“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’ while there ought to be a trial in the light of the conclusions that I have firmly formed.”

26. We agree. Where an issue of law is a pure point of statutory interpretation, not dependent on the factual background, it will often serve no useful purpose, and be wasteful of court resources, to defer consideration of the issue until after a full trial of fact. We recall that the eighth of the considerations identified in *Easyair* and by this Court in *Rawlinson and Hunter* (para 11 above) is that short points of law or construction which may be determinative should be dealt with sooner rather than later. This is not a case like *Barrett v Enfield* [2001] 2 AC 550, in which the House of Lords declined to strike out a negligence claim based on hypothetical facts in what Lord Browne-Wilkinson described at 557F as a “*confused and developing area*” of the common law. Determining the relationship between ss301-305 on the one hand and s309 on the other is, as it seems to us, a pure exercise in statutory construction, appropriate for determination by way of summary judgment. The Royal Court performed that exercise correctly and would not have been materially assisted by doing so in the context of a trial.

Was any defect cured by the assent of the Sheikh?

27. Ground 8 of the appeal is founded on the *Duomatic* principle, to the effect that

“Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is binding as a resolution in general meeting would be.”

(*In re Duomatic Ltd.* [1969] 2 Ch 365). It was submitted on behalf of Inc that the consent of the Sheikh (as sole beneficial owner of Inc, the sole shareholder of the Company) to the entering into of the Declaration of Trust was as effective and binding as a resolution in general meeting,

and that the *Duomatic* principle accordingly cures any absence of a directors' certificate of solvency.

28. It was common ground before us that by way of exception to the *Duomatic* principle, “*a transaction which amounts to an unauthorised return of capital is ultra vires and cannot be validated by shareholder ratification or approval*”: *Aveling Barford Ltd. v Perion Ltd.* [1969] BCLC 626, per Hoffmann J at 630-631. Inc therefore accepted that it could rely on the *Duomatic* principle only if, by reason of the application of s309, s305 did not render the distribution unlawful. Since we have rejected that submission, the *Duomatic* principle cannot apply. We accordingly agree with the Lieutenant Bailiff, at [65] of the judgment under appeal, that it is not necessary to determine the issue of whether the Sheikh's consent to the entering into of the Declaration of Trust amounted to approval of the impugned transaction by the members of the Company.

Requirement to investigate solvency of the Company?

29. Grounds 4 and 5 of the appeal concern the solvency of the Company at the material time in 2009.
30. Ground 4 is that in the absence of a solvency certificate, the Royal Court should have conducted its own enquiry into whether the Company was solvent immediately after the Declaration of Trust was entered into on 8 January 2009. In suggesting that it was solvent, the Appellant claims the support of the Company's consolidated Financial Statement for the calendar year 2009, a document disclosed to the Respondents only shortly before the hearing.
31. Ground 5 is that the liabilities of the Company in January 2009 appear all to have been contingent; and that there is and was in 2009 no requirement to consider contingent liabilities for the purposes of the solvency test required by ss 301-305 of the Companies Law.
32. In relation to both Grounds, the Respondents first submit that the issue of whether the Company was solvent immediately after making the distribution is irrelevant to the question of whether summary judgment should be given. They dispute the probative value of the belatedly disclosed 2009 Financial Statement and add, in relation to Ground 5, that section 527 of the Companies Law in any event requires directors to have regard not only to current liabilities but to those that may be contingent, prospective or of uncertain value.
33. We consider the Respondents' primary submission to be well founded. Section 303(4) of the Companies Law is mandatory in its terms: “The board of directors *must* approve a certificate ...”. The certificate must precede the making of the distribution: the certificate is required to state the directors' opinion that “the company *will*, immediately after the distribution, satisfy the solvency test”. The certificate must also *state the grounds* for the directors' opinion. By s305, no distribution to members is lawful unless authorised under “*this Law, another enactment or any rule of law*”. No such other enactment or rule of law is relied upon by the Appellant. Neither is a financial statement prepared at a later date by independent auditors an acceptable substitute for the solvency certificate required by statute.
34. Advocate Lyall, for the Respondents, further points out that there is no reference in the 2009 Financial Statement (or indeed in any other contemporary document, save for the supposed Declaration of Trust itself) to the Company's shareholding in its subsidiaries having been placed on trust for the Appellant. He submits, and we agree, that this document does not constitute proof of the Company's solvency *after* the proposed distribution in circumstances when there is no evidence that Ernst & Young, the independent auditors who prepared it, were even aware that the proposed distribution had taken place.

35. Finally, in relation to Ground 5, we accept the Respondents' submission that contingent liabilities are relevant to the question of whether a company satisfies the solvency test. Section 527 of the Companies Law provides in relevant part as follows:

Meaning of "solvency test".

527. (1) For the purposes of this Law a company satisfies the solvency test if -
- (a) the company is able to pay its debts as they become due,
 - (b) the value of the company's assets is greater than the value of its liabilities ...
- (2) Without prejudice to sections 303 and 304, in determining whether the value of a company's assets is greater than the value of its liabilities, the directors -
- (a) must have regard to -
 - (i) the most recent accounts of the company, and
 - (ii) all other circumstances that the directors know or ought to know affect, or may affect, the value of the company's assets and the value of the company's liabilities, and
 - (b) may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances....”

36. These criteria are widely drawn and plainly require directors to have regard to contingent liabilities.

The prospect of further investigations

37. It remains to consider Grounds 2, 3 and 9 of the appeal, all of which are based on what is said to be the possibility that a solvency certificate might have come to light before a trial. In those circumstances, it is said, the grant of summary judgment was premature.

38. Under Ground 2, the Appellant takes issue with what is described, somewhat loosely, as the Lieutenant Bailiff's finding at [67] that “*on the balance of probability*” it was likely that a solvency certificate as required by s303 of the Companies Law would not be located or disclosed before a full trial of the action. It is suggested that this was the wrong test, and that it was in any event impossible for a judge to declare at an early stage in the proceedings what documents may or may not be located and disclosed.

39. Under Ground 3, the Appellant claims that the obligation to produce a solvency certificate lies with the Company and submits that the Company was therefore relying on its own failure to locate a document when it sought summary judgment in its favour. It is said that at the hearing of the summary judgment application on 6 June 2022, no evidence was produced as to what searches the Respondents generally undertook, or what enquiries they had made of the law firms, auditors and other third party advisers of the Company at the time of the production of the Declaration of Trust.

40. Under Ground 9, the Appellant points out that the Company had a legal obligation to retain company documentation (including any solvency certificate) for only six years, pursuant to ss 228 and 239 of the Companies Law. In the circumstances, it submits that the Royal Court erred

in basing its decision on the lack of an insolvency certificate that would have been issued 13 years earlier.

41. We first address the submission under Ground 2 that the Royal Court applied the wrong legal test at [67] of its judgment. The Lieutenant Bailiff was required to ask herself whether the Appellant had, in the words of Rule 19 of the Royal Court Rules 2007, no real prospect of succeeding on its claim. She stated at [67]:

“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 the proposition has only 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 ever being discovered, or any credible evidence being discovered that it ever existed.”

42. Applying the legal test as set out at para 12 above, the Company and the Joint Liquidators as applicants for summary judgment were required to state their belief that Inc as respondent had no real prospect of success, and that there was no other reason for a trial. They also faced the overall legal burden of proof on those issues. However, before that legal burden arose, it was for Inc to put forward evidence to rebut the applicants’ statement of belief – evidence that had to carry some degree of conviction and that the court was required to evaluate without abandoning its critical faculties. The Lieutenant Bailiff’s reference to the balance of probability in the above passage of her judgment should as it seems to us be read as alluding to the evidential burden resting on Inc rather than the overall legal burden. It is in any event apparent, from the strength of the Lieutenant Bailiff’s conclusions at [67] and [96] of her judgment, that she considered the Respondents’ legal burden of proving no real prospect of success to have been comfortably discharged.
43. The remainder of the submissions under this head go to the issue of whether the Royal Court was entitled to conclude that Inc had no real prospect of defending the claim, given what is said to be the possibility that further investigations prior to trial might yet turn up the missing solvency certificate required by s303 of the Companies Law. The points taken as Ground 3 and Ground 9, summarised above, are specific parts of that overall picture.
44. The Respondents point out that the Appellant at first denied the existence of a trust over the Company’s assets, or a trust evidenced by documents. In particular:
- a. The first suggestion of the existence of a trust over the Company’s assets emerged on 22 September 2020, and only after the making of a winding up order. The existence of a trust over the assets was directly contrary to the evidence led by the Company on the winding up application.
 - b. Between September 2020 and the production of the claimed Declaration of Trust on 5 October 2021, the Appellant asserted that the trust arrangement was oral, and not evidenced by any documents.

45. In the course of his impressive written and oral submissions, Advocate Lyall drew our attention to a series of investigations which, though extensive, failed to locate any evidence supporting

the supposed transaction. There was no real dispute as to this state of affairs, though the parties seek to derive opposite conclusions from it: the Respondents say that the prospect of further investigations turning up a solvency certificate is in all the circumstances remote to the point of being fanciful, whereas the Appellant contends that the investigations so far have been “*self-evidently insufficient*”, since they failed until very recently to identify the 2009 Financial Statement, and that summary judgment is not appropriate because it remains possible that something may turn up before trial.

46. The investigations referred to by the Respondents include those performed by a director of the Company, Ms Rizkallah-Reichardt. She swore an affidavit on 23 November 2020, in support of an application to extend time to appeal the winding up order, to the effect that she had undertaken a “*detailed investigation*” in which she considered “*all of the historic accounts and records that were available for the Company*”. She stated that she had liaised with or reviewed materials from a number of persons including the Company’s former directors and ultimate beneficial owner, the JJW Group’s auditors, and legal advisers instructed by various entities within the JJW Group. Despite these investigations, no documents relevant to the alleged transfer of the beneficial interest from the Company to JJW Hotels were located.
47. The Second Defendant Ms Harris, one of the Joint Liquidators, further deposed in her First Affidavit of 14 April 2022 at [20]-[21]:

“The Joint Liquidators have reviewed the records of the Company provided by Mr Le Ray and Albecq which are understood to be the complete records of the Company as suggested by Sheikh Al Jaber in a letter to Mr Toynton dated 22 March 2021 ... There is no reference in those records to the Document or to the existence of the alleged trust arrangement. There is nothing in the Company’s records as provided by Albecq or in any of the other documents and materials relating to the Company that have been gathered in by the Joint Liquidators that suggest the existence of a trust or that the Company was operating as trustees for JJW Holding.

The only purportedly contemporaneous document that is suggestive that the trust exists is the Document itself. The Joint Liquidators consider the existence of the alleged trust to be highly implausible and have serious doubts about the authenticity of the Document. The concern held by the Joint Liquidators is that the alleged trust arrangement is a creation designed to avoid the effect of the insolvency of the Company and circumvent the interests of creditors in the winding up. If the trust is found to exist then returns to creditors are likely to be substantially diminished or non-existent.”

48. Ms Harris added at [63]-[64] of her first affidavit that the contemporaneous records of the Company “*do not support and plainly contradict the alleged existence of a trust over its subsidiaries in favour of JJW Holding*”, and that “*While the books and records include various resolutions and documents dated 7 and 8 January 2009 ... there is no reference to the Document or any declaration of trust*”. She also exhibited documents indicating confirmation by the Sheikh, in email correspondence sent on his behalf, that “*no written formal records were kept of this transfer*” and that he has no relevant document relating to the Company.
49. As was accepted at the hearing before us, the Appellant neither responded to Ms Harris’s affidavit nor sought to have her cross-examined.
50. After production of the Declaration of Trust on 5 October 2021, the Respondents’ advocates wrote to the Appellant’s advocates on 12 October 2021 questioning both the validity of that document and the *prima facie* lawfulness of a distribution of assets to a member. The response did not suggest that a solvency certificate had been issued or that the transaction had been

otherwise authorised but argued that a beneficial interest had been transferred as part of an intra-group transfer and not as a dividend: the point we address at paras 18-20 above.

51. The Respondents further point out that the Appellant's Cause of 8 December 2021 failed to address the issue of lawfulness, and that even after that issue had been developed in the Defences, the Réplique and Defence to Counterclaim offered no more than a bare denial. Neither was any relevant evidence offered by persons likely to have had knowledge of the transaction in support of the Appellant's application for summary judgment of 14 March 2022, or in opposition to the Respondents' cross-application for summary judgment filed on 14 April 2022. Those persons include the Sheikh, who is said to have executed the Declaration of Trust; his daughter and two other directors of the Company at the material time; and Ahmad Kaddaf who witnessed the Declaration of Trust on 30 March 2009.
52. There was also no evidence relating to a solvency certificate from Ernst & Young Egypt, in whose records the Declaration of Trust is said to have been located; from Nabil Istanbouli who is said to have located it; or from White & Case LLP Paris, which is said to have worked extensively for the JJW Group during 2007, 2008 and 2009 and which provided a zip file of "*historic files*" which have not been disclosed to the Joint Liquidators. There was no suggestion that any of these potential witnesses were unable or unwilling to give evidence, or to provide documents to the Appellant. Indeed the Respondents said in their written submissions, without contradiction at the hearing, that the evidence suggests that all those involved in the transactions for JJW Group and the production of the Declaration of Trust have willingly cooperated with the Appellant in its investigations.
53. The Respondents point out not only that there is no contemporaneous evidence from any source supporting the existence of the trust, other than the Declaration of Trust itself, but that the Appellant has not at any time asserted, in evidence, pleadings or submissions, that the solvency certificate required by s303 of the Companies Law was completed.
54. As to Ground 3, the Respondents point out that the obligation to approve a solvency certificate rests not on the Company but on its directors.
55. As to Ground 9, the Respondents submit that ss 228 and 239 of the Companies Law, which require some company documentation to be retained for only six years, relate not to documents of the nature of a solvency certificate but to resolutions of members, minutes of general meetings and accounting records. They further point out that there is no evidence of any destruction policy having been applied by the Company; that it is a legitimate inference from the evidence (notably the first affidavit of Ms Harris: para 47 above) that no such policy was applied; and that any such policy is in any event unlikely to have disposed of documents held by third parties with which enquiries have already been made.
56. The Respondents ask us to conclude that irrespective of the authenticity or otherwise of the Declaration of Trust, the failure to produce evidence relating to compliance with s303, taken together with the weight of evidence suggesting that no such certificate was produced, fully justified the Royal Court in concluding that further investigations would be fruitless and that no such evidence could be expected to be available at trial. They point out that since the Appellant continues to assert that the Trust was not a distribution (with the consequence that no solvency certificate was required), the Lieutenant Bailiff was justified in describing as "*fanciful*" the notion that those administering the Company even appreciated that a solvency certificate was required.
57. We accept these submissions. The Lieutenant Bailiff correctly recognised, at [67], that if there were a real prospect of a further factual investigation changing the complexion of the evidence sufficiently to undermine the apparent position at the time of the application, the matter would

have properly to go to trial. Having regard however to the matters summarised above, we see no reason to disturb her conclusion that this possibility is vanishingly small. We accordingly reject Grounds 2, 3 and 9 of the appeal.

Conclusion

58. For these reasons, the appeal is dismissed. We will hear the parties on any consequential issues.