Application for summary judgment on grounds of *res judicata.* Difference between cause of action estoppel and issue estoppel discussed. Application granted.

[2024]GRC069

IN THE ROYAL COURT OF GUERNSEY

Civil Matter Civil 2571

Before:

HER HONOUR HAZEL ELEANOR MARSHALL
LIEUTENANT BAILIFF
(Sitting alone)

Between:

JJW HOTELS & RESORTS HOLDING INC

Plaintiff

(1) BENJAMIN ALEXANDER RHODES
(2) ANDREA FRANCES ALICE HARRIS
(3) JJW LIMITED (in compulsory liquidation)

Defendants

(No 2)

Hearing: 29 August 2024
Judgment given: 29 August 2024

Advocate for the Appellant: Advocate P RICHARDSON

Advocate for the Respondent: Advocate A R LYALL

Legislation considered:
Companies (Guernsey) Law 2008

Cases cited:

Guernsey
Tranquility Holdings v Invista Real Estate etc Limited, Royal Court Judgment 38/2015
Rawlinson & Hunter v Investec Trust Limited and anor [2016] GLR 332
Popat v Popat [2019] GRC 50
JJW Hotels & Resort Holdings Inc v Rhodes and ors (No 1) [2022] GRC041,
JJW Hotels & Resort Holdings Inc v Rhodes and ors (No 1) [2022] GCA 077
ITG Ltd v Glenalla Properties Ltd [2022] GCA 091
Landl & ors v Hogg & ors [2024] GCA027 and GCA 052

England and Wales
Arnold v National Westminster Bank plc [1991] 2 AC 93
Easyair Ltd v Opal Telecom Limited [2009] EWHC 339
Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160

Text books referred to:
Spencer-Bower & Hadley on *Res Judicata, 6th Ed* at 7.03

J U D G M E N T (approved)

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1. This judgment is given after a hearing that I held this morning. It is an *ex tempore* judgment. Accordingly, if it is reduced to writing, while the reasons which I give for my decision will not change, I reserve the right to expand on them, elaborate on them and possibly add any further reasons that occur to me but the basis of my decision is contained in the following judgment.

2. The Plaintiff in this matter, JJW Hotels & Resorts Holding Inc, is a company incorporated in the British Virgin Islands and is the parent company of the Third Defendant, JJW Limited, which is presently in compulsory liquidation and has been since 31 July 2020. The first and the second Defendants are its liquidators. A certain Sheikh Mohammed Bin Issa Al Jaber ("**the Sheikh**") is the founder and director of the Plaintiff and also the founder and the former director of the Third Defendant.

3. In the matter before me today Advocate Richardson has appeared for the Plaintiff and Advocate Lyall has appeared for the Defendants.

4. By this application the Defendants apply under the familiar terms of rules 19 and 52 of the Royal Court Civil Rules 2007 for Defendants' summary judgment against the Plaintiff, or, alternatively, to strike out the Plaintiff's claim in this action, which is Civil Action no.2571.

5. The action itself concerns the validity of a document which is described as being a Declaration of Trust dated 8 January 2009 whereby the Third Defendant declared that it

held the shares of several subsidiary companies and, in particular, companies operating hotels in France and Germany on trust for the Plaintiff.

6. There has been previous litigation between the same parties, (see Report [2022] GRC041) in which the Plaintiff also sought to claim beneficial ownership of these shares pursuant to this Declaration of Trust, a document which was executed by the Sheikh on behalf of both the Plaintiff and the Third Defendant.

7. The Defendants applied for summary judgment dismissing that claim. On 7 June 2022 I granted such summary judgment giving a full written judgment on 4 July 2022 and I refer to my judgment in that action for the full background to the matter which I do not need to recite again here.

8. In essence, my judgment was based on the point that whether or not the Declaration of Trust was actually genuine, and whether or not it was effective as a Declaration of Trust, having regard to the way in which it was expressed which were matters on which it would not have been appropriate to grant summary judgment or strike out the Plaintiff's cause, the Declaration of Trust was void because there had been no supporting Certificate of Solvency as required by s 303 of the Companies (Guernsey) Law 2008 ("**the Companies Law**") if such a Declaration of Trust were to be effective and validly made. I will refer to that part of the Law later. I indicated also that, whilst this was the ground on which I would give summary judgment, I would also have given summary judgment to the liquidators on the basis that there was no evidence at all that the Declaration of Trust was ever actually acted upon at any time before the Third Defendant went into liquidation or, indeed, for some time afterwards with evidence being that it was still the Third Defendant who claimed ownership of the valuable assets such as these shares at the time of the contested winding up petition. However, I said that while I would have given summary judgment on that basis, ie in effect that the Declaration of Trust was either a sham, or executed in some kind of escrow which had not ever been treated as falling in, I did not need to do so because I regarded the s. 303 point as being sufficiently strong and determinative that I preferred to rely on that.

9. My judgment was appealed but in a judgment delivered following a hearing on 8 December the Court of Appeal dismissed that appeal (see [2022] GCA 077). The Plaintiff applied for leave to appeal to the Judicial Committee of the Privy Council but that leave was refused in November 2023.

10. This present action was initiated I think on 23 March 2024 but it was tabled on about 24 April 2024. In it the Plaintiff again claims a declaration that the relevant shares were and are held by the Third Defendant on trust for the Plaintiff. I refer to the Cause in the matter which recites at para.1 the terms of the relevant Declaration of Trust. I need not go into those. At para.2 it refers to:

> *2. "A document dated 5 February 2009 whereby a director of theThird Defendant, His Excellency Sheikh Mohammed Bin Issa Al Jaber, certified by para.14 of the document that the Third Defendant was not insolvent or unable to pay its debts as they become due or would become insolvent as they became due as a result of entering into the transaction document."*

11. In the original document the phrase "transaction document" has capital letters, although it does not in the pleading. Then for good measure, the paragraph goes on to state:

> *"For the avoidance of doubt, the Declaration of Trust* [which has already been defined as 'the trust deed previously referred to'] *was validly and properly entered into."* 12. To make the point again it is then said:

> *3. "For the further avoidance of doubt, the Third Defendant wasat all material times solvent and/or was authorised under the relevant statutory provisions or rule of law.*

and again

> *4. "Further to the terms of the Declaration of Trust, the Plaintiff has been the beneficial owner of the shares and the subsidiaries since 8 January 2009."*

13. There is then the remainder of the pleading which, as pointed out by Advocate Lyall is in fact materially identical to the original pleading in the first action.

14. The Defendants then applied for summary judgment in this action on the grounds that this action has no reasonable prospects of success, or for the claim to be struck out on the grounds that it discloses no reasonable grounds for bringing the action.

15. Not actually in his Application, but subsequently in his skeleton argument Advocate Lyall submits that the bringing of this second action at all is an abuse of the process. That I think would be covered, though, by the terms in which the Application has actually reasonably been brought because, if it is an abuse of process, then it would have no reasonable prospect of success or disclose no reasonable grounds for bringing the action at all.

16. The Defendants' Application is supported by an affidavit of one of the liquidators, Mr Rhodes, which sets out the background in some detail and exhibits a lot of the documents that are referred to. In response, the Plaintiff has filed an affidavit of the Sheikh himself, an affidavit which implies that the document of 5 February already mentioned is the relevant Certificate of Solvency necessitated by s 303 of the Companies Law to make the Deed of Trust valid.

17. I think at this stage I should say that I expressed some reservations about the evidence of the Sheikh himself on the grounds that this is not a gentleman who appears to have English as his first language, and that much of what he said appeared to be in specialist formal legal language, and to assert as he apparently appears to do that this document can be described as a "Certificate of Solvency" when that, of course, is a legally defined concept in the Law. As I said, I expressed some reservations about this but, in the circumstances, no point has been taken about the terms of the affidavit and who may actually have drafted the affidavit. No request has been made for cross-examination and I confirm, therefore, that I take the affidavit evidence of the Sheikh himself at face value. In view of my reservations, however, Advocate Richardson said that, in practice, the key paragraphs that were relied on were really paras. 7 and 8 and paras.40 and 41 of his

affidavit, which were in fairly simple terms and therefore, as they were the kernel of the affidavit, I could at least rely on the fact that the Sheikh must be taken, having sworn this affidavit, to have had a sufficiently full understanding of what they actually said. I will return to those paragraphs later, but, as I said, I make the point clear at this stage that I am not in any way, in this judgment at any rate, suggesting that there is actually any defect in the evidence of the Sheikh as proffered, and I take it at face value for what it says.

18. Section 303 of the Companies Law, which it is probably advisable to refer to at this point and as to the meaning of which there was a dispute in the previous action, is in terms as follows. Section 303(1) says:

> *"This section applies to distributions other than dividends."*

There was originally a dispute as to whether the Declaration of Trust was a "distribution" at all and therefore even required a certificate under s. 303. I held that it was and that point was upheld on appeal.

19. Section 303(2) then says:

> *"(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." 20.*

Section 303 (3) then says*:*

> *"(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."* 21. By section 303(4):
>
> *"(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."*

22. Then there are provisions with regard to the application of the solvency test that I need not read. The important point is that it is that section which provides that it is necessary for there to be the relevant certificate in order for a valid distribution actually to be made and it is that section which in the previous action it was held this situation fell foul of.

23. That is the legal context. I will refer in a moment to the relevant documents but I should at this stage refer to the law on summary judgment and striking out.

24. Both advocates are completely agreed on the law which in fact is now very familiar, so I will not, therefore, cite all the authorities. The law in relation to rule 19 of the RCCR, giving the test for striking out and approved by the Court of Appeal in Guernsey in *Rawlinson & Hunter v Investec Trust Limited and anor* [2016] GLR 332, is summarised in eight principles formulated by Lewison J in *Easyair Ltd v Opal Telecom Limited* [2009] EWHC 339. I need not set them out in full here, and the test has been further synthesised recently by the Court of Appeal in *Landl and ors v Hogg and ors* [2024] GCA027 and 052. In essence the test is whether the cause of action discloses a case with a real or realistic, as opposed to a merely fanciful, prospect of success.

25. Advocate Richardson further relies in particular on *Popat v Popat* [2019] GRC 50, where the Deputy Bailiff stated the principles at length but stressed that there is a high threshold placed on a party that seeks summary judgment. He cites, in particular, paragraph [48] of that judgment in which the Deputy Bailiff held that:

> *"Although the case set out is not as clear as I think it could be, I am persuaded by Advocate Ozanne that Adil has not surmounted the high threshold placed on him. If nothing else, I am satisfied there is a case that can be advanced that will depend heavily on the evidence to be adduced and so it cannot be said to be unwinnable or that it has no real prospect of success."*

26. The law in relation to the test for strike-out under rule 52 of the RCCR is again set out in well-known authority, and that is the test set out by the then Bailiff in *Tranquility Holdings v Invista Real Estate etc Limited*, which is Guernsey Judgment 38/2015, at para.4. Again, I do not think I need actually read all those familiar principles out.

27. In essence, the test at the end of the day is that the court must be satisfied for the purpose of summary judgment or strike-out - and they largely overlap - that the case

    that is being advanced has no real prospect of success in the sense of a prospect of success other than fanciful. It is a very low threshold in that sense.

28. Other than if it is fanciful, the case ought to be allowed to go on trial. However, it is possible, and it has certainly been approved by the Court of Appeal in recent cases such as I think in particular *Landl and ors v Hogg* and ors [2024] GCA052, that if a point of law or a discrete point can be decided on a summary judgment application and there is no real prospect of further evidence emerging that could change the complexion of the case (which prospect the court obviously must be astute to be alive to), then summary judgment can be given (see paras [34]-[36]). The same basic principles apply to both a summary judgment and a strike-out application, so, in short, those are the principles upon which I am proceeding.

29. The relevant arguments give rise to the following points. Advocate Lyall submits first that these proceedings cannot proceed and should not be allowed to proceed at all because they fall foul of the rules about estoppel *per rem judicatam*.

30. There are two kinds of estoppel by *res judicata*. The first is cause of action estoppel and the second is issue estoppel. Cause of action estoppel, has been described in the case of *Arnold v National Westminster Bank plc* [1991] 2 AC 93 and was elaborated in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160, in particular by Lord Sumption. He says, at para.22:

> *"[Arnold v National Westminster Bank plc [1991] 2 AC 93] is accordingly authority for the following propositions:*
>
> *(a) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.*
>
> *(b) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or nonexistence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised* [That is what has subsequently I think been known as *Henderson v Henderson* estoppel].
>
> *(c) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."* 31. He goes on:
>
> *"23. It was submitted to us on behalf of Virgin that recent caselaw has re-categorised the principle in Henderson v Henderson so as to treat it as being concerned with abuse of process and to take it out of the domain of res judicata altogether. In these circumstances, it is said, the basis on which Lord Keith qualified the absolute character of res judicata in Arnold v National Westminster Bank by reference to that principle is no longer available, and his conclusions can no longer be said to represent the law.*
>
> *"24. I do not accept this. The principle in Henderson v Henderson has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in Yat Tung [[1975] AC 581]. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, Johnson v Gore-Wood..."*

32. That is the essence of the law in relation to the distinction between cause of action estoppel and issue estoppel.

33. Advocate Lyall submits that this case is quite simply cause of action estoppel. The cause of action in the original matter was a cause of action whereby the Plaintiff claimed beneficial ownership of the particular shares in question relying on the validity of the Declaration of Trust document. The cause of action in this case is exactly the same; the Plaintiff claims to be entitled to the beneficial ownership of these shares in reliance on the validity of the Declaration of Trust. All that has changed is that the Plaintiff has now sought to allege some further facts and different facts in relation to that self-same cause of action.

34. However, it is the case that, if this is cause of action estoppel, the fact that the cause of action has already been decided is absolute. Even if new evidence or further material emerges later, the cause of action has been decided once and for all between the parties to it and nothing will actually be admitted that will contradict that decision. Advocate Lyall says that that is the position here. I have not yet related or referred to the particular documents that are in issue and allegedly material in these proceedings because, at the moment, that simply does not arise in relation to Advocate Lyall's first submission which, as I have said, is that the cause of action is exactly the same in this second action as it was in the first action and, therefore, there is a complete cause of action estoppel *per rem judicatam*. This action cannot be brought.

35. Advocate Richardson denies that that is the case, although he accepts that if it were cause of action estoppel that would be an absolute bar to these proceedings being brought. He submits that the position is not cause of action estoppel, but is issue estoppel and therefore it is capable of being susceptible to the "special circumstances" defence, as it were, to a plea of estoppel which is acknowledged in the paragraph that I have just read in the *Virgin Atlantic* case. He submits that that categorisation is correct on the basis that the previous judgment was a judgment based on a summary judgment application and was not given at a full trial after a hearing of all the facts. He submits that the essence of the estoppel that is created under a cause of action estoppel is that there should have been a full hearing between all the parties, in which all the material facts and matters of evidence at the time were weighed up and actually determined in order to reach the decision on the particular cause of action. That did not happen in this case because it was a summary judgment/strike-out application which produced the decision in the previous action and, therefore, it is not cause of action estoppel.

36. I unhesitatingly prefer Advocate Lyall's submission. The cause of action, it seems to me, is identical in this case with the previous case, and it matters not that the cause of action was dismissed as between the parties on an application for summary judgment. Summary judgment <u>is</u> a trial of the action. It only proceeds if the court is actually content that the circumstances before it are such that it can give judgment on the cause of action on the basis of a summary procedure, with all necessary evidence and arguments and so forth, for that decision, having been adequately presented before it. If it is not so content, then it must send the matter for a full trial but the fact that the relevant judgment was given on a summary judgment or strike-out application does not in itself mean that there

has not been a trial of the action and a determination of the cause of action. It simply means that the procedure that was adopted was a summary procedure.

37. Advocate Lyall points out that this can be tested by the proposition noted with authorities, in Spencer-Bower & Hadley on *Res Judicata, 6th Ed* at 7.03, that the principle of cause of action estoppel applies to a judgment made by consent (although not if the action is discontinued), the former implying a trial procedure, whilst the latter does not. I accept this and I seem to recall that the same point would also prevent any such estoppel arising out of a judgment in default. None of that is the position here, however, but it supports, in my view, the proposition which is obvious even in principle, that a judgment which is given on the basis of a summary procedure is nonetheless a valid, binding and absolute determination of the relevant cause of action.

38. On that basis, therefore, that is a complete end to this action and this Application can be decided entirely in favour of the liquidators in short order.

39. However, in case that is wrong, I proceed to consider the arguments in relation to the question whether, if the principles merely of issue estoppel apply, that is a matter that might still enable Advocate Richardson's client to bring these proceedings now.

40. Now, the position with regard to issue estoppel is that issue estoppel prevents a party from relitigating an issue in one of two cases. The first is that it was a necessary issue to a decision that was actually made and decided in a previous hearing, even though it was not in itself the whole matter, but only an issue which it was necessary to decide within that whole matter as a fundamental plank of the final determination. Such an issue is to be regarded as having been finally decided between the parties if it also later falls to be necessary for determination in relation to any new and different cause of action that is the subject of the second proceedings. The second case, though, is that the doctrine applies also in relation to matters or issues which could and should have been raised in the previous proceedings but which were not; in other words, matters that a party may have decided, or been unable, to raise in the previous proceedings, or simply chose not to, for example because the issue was not viewed as significant and was therefore conceded rather than go to the expense and trouble of having it determined. The question then arises whether, in fact, the party in question should be estopped from disputing that point subsequently in a subsequent set of proceedings about transactions where it may be more important, and he wishes to raise it. In that situation, it has always been held that that kind of issue estoppel is not absolute but the point can be litigated (it is not re-litigated by definition in that situation) as a matter, within the discretion in the court to permit this. The issue at the end of the day will often depend on whether, in all the circumstances, the court feels that the particular matter not only could but really should, have actually been raised previously.

41. We are not in that second territory here, because in this case the very point in issue, namely, the validity of the Declaration of Trust, was in issue, and was litigated in the first action (treating it here as an issue instead of the entire cause of action). The validity of the Declaration of Trust was in issue and, consequently, the case which is actually most on point on this question is, indeed, the *Arnold* case itself.

42. That case was *Arnold and Others v NatWest Bank Ltd* [1991] 2 AC 94. What happened in that case was that the landlord and tenant had a rent review after the first five years of a 25 year lease in the course of which there was a dispute about the true construction of the rent review clause itself, and, in particular, whether, on the true construction of what the presumed terms of the hypothetical lease which was to be valued for the purposes of the rent review were, whether that hypothetical lease did or did not itself contain provisions for later rent review. The original arbitration decision was that the hypothetical lease did contain such provisions, but on appeal to the High Court, Walton J decided that that was wrong and it did not, thus raising the rent of a substantial office block by about 25%. Under English arbitration law at that time, the High Court decision was final and could not itself be appealed (although the tenant tried) and the tenant was stuck with this particular judicial holding, which raised the rent considerably.

43. Subsequently, superior English authority in different cases made it clear that Walton J's decision on construction had been wrong. So, on the following rent review the tenant sought to relitigate the true construction of the rent review clause. The landlord argued that this was *res judicata* and therefore could not be re-litigated. This was the point that went up to the House of Lords, with both the courts of first instance and in the Court of Appeal having held in the tenant's favour, but nevertheless as it was a point of some general importance it went to the House of Lords. It was there held that while issue estoppel was indeed an estoppel that prevented a party from raising a decided issue a second time, nevertheless, if there were "special circumstances" which meant that it would be unjust for the party to be prevented from relitigating the issue, then that prejudiced party could actually reopen the point itself. However, the requirement apart from apparent grave injustice, was that there should be new material which was not reasonably available, with due diligence, to the party in question at the time of the previous decision, and the special circumstances were, in effect, that this material completely changed the complexion of the case such that it would be unjust not to allow the injured party to reopen the matter. It was said in that case, bearing in mind the huge quantum of excess and unjustified rent that the tenant would be suffering through having to pay on a false basis, that such special circumstances were made out. The reason the material was not available to the tenant previously had been that the subsequent decisions on point of law had not then been made and there was therefore a "change in the law" subsequent to the issue that the tenant was now trying raise. The tenant was therefore allowed to relitigate the point and was allowed to contend for the more beneficial (to it) construction of the rent review clause. The tenant was not, though, allowed to go back and also seek to upset the previous decision that had actually been made in relation to the first rent review (as other authorities reveal). It was, though, allowed to relitigate the point in relation to the future rent reviews in which it would otherwise have suffered further financial prejudice.

44. That, therefore, is the test. Advocate Richardson submits, in effect, that test is met here. First of all he submits that there would be an injustice between the parties if the Plaintiff could not now litigate this point, because the beneficial ownership of these valuable shares is valuable and crucial and if the Plaintiff is not allowed to rely on the documents that it now wants to rely on to support its case to be their beneficial owner, there could therefore be a grave injustice to it.

45. Next, however, it is to be observed that the material has to be material which was not reasonably available with due diligence to the party in question at the time of the original proceedings. As I said, in *Arnold* that was made out because there was a subsequently effected change in the law. Advocate Lyall submits that in fact this material was available to the Plaintiff, acting with due diligence, at the time of the previous proceedings. Advocate Richardson submits that it was not.

46. I have not referred to the material yet. It is the document which is dated 5 February. 2009, which I mentioned at the outset, which is pleaded and also exhibited to the Sheikh's affidavit. It is a document headed, "JJW Limited, Director's Certificate," and above that it says, "A limited liability company incorporated in Guernsey," giving the registered number and its registered office. Then there is a "Your reference" which is blank and an "Our reference" which is a long reference which is comprehensible, no doubt, only to those who know the office codes. It is addressed to Carey Olsen, 7 New Street, St Peter Port, Guernsey, dated 5 February 2009 and it reads:

> *"Dear Sirs*
>
> *JJW Limited company number 25826 (the Company).*
>
> *All defined terms used in this certificate refer to the definitions given in the attached opinion unless the context requires otherwise."*

It says:

> *"You* [presumably, Carey Olsen] *have been asked to give an opinion in relation to the Company entering into the Transaction Document.*
>
> *I, Sheikh Mohammed Bin Issa Al Jaber understand that your opinion will be given in reliance on the matters certified below and, accordingly, I, a director of the Company, hereby certify as follows."*

47. It then contains various details of the company, such as certifying its incorporation and certifying the copies which it is said that Carey Olsen had been supplied with, of various documents, that they are full and complete, but it becomes material, Advocate Richardson says, in particular, at about clause 11 which reads:

> *"11. There has not been nor does there continue to be a reason for the Company to be struck off from the registry.*
>
> *12. No application for the Company's property to be declared en désastre has been made by the Company or, to the best of our knowledge and belief, by any other person.*
>
> *13. Neither an administration order nor any application for an administration order has been made in respect of the Company and no notice of appointment of a receiver, liquidator or administrator*

> *of the Company or any of its assets has been received, nor has any other insolvency procedure or proceeding been instituted or has the Company taken any step in a compromise or arrangement between the Company and its creditors or a class of them or between the Company and its members or a class of them.*
>
> *14. The Company is not insolvent or unable to pay its debts as they fall due and will not become insolvent or unable to pay its debts as they fall due as a result of entering into the Transaction Document."*

That, of course, is the clause that is quoted in the cause and the one on which Advocate Richardson particularly relies.

> *"15. All dividends or distributions including any financial assistance made by the Company were lawful and the Company was solvent immediately after the payment of any such dividend or distribution.*
>
> *16. The Company is not involved in any material litigation, arbitration or administrative proceedings which are current or threatened against the Company or any of its property, assets or revenues which could adversely affect the Company's ability to perform and observe its obligations under the Transaction Document."*

48. There are then further statements in relation to the company's status and documents that are filed, its tax position and so on and so forth, none of which is material. The final paragraph confirms the Sheikh's authority "*to give this certificate on behalf of the company*." At the end of all of it, it says, "*Yours faithfully*," and it is apparently signed by "*Sheikh Mohammed Bin Issa Al Jaber, Director*".

49. So that is the document that is relied on. That document, Advocate Lyall says, in the first place was available to the Plaintiffs at the time of the previous action with reasonable diligence and, to support that, he relies on certain correspondence which took place, in fact after the time of my judgment but before the Court of Appeal decision in the earlier proceedings.

50. On 23 September 2022 - that is in the time between my judgment and before the Appeal hearing - Mr Richards of AFR wrote to the clerk to the Court of Appeal in this court and he says:

> *"Further, I also attach a copy of an email dated 5 February 2009 and JJW Limited director's certificate also dated 5 February 2009 which we are instructed was located by White & Case after the 6 June 2022 hearing in the matter. By copy we would ask Mourant whether they are willing to agree to let these documents into evidence before the Court of Appeal, failing which the appropriate application will be made."*

51. Now, I have read the copy of the actual certificate but the email referred to is an email from a person at White and Case, in fact written to the Sheikh but copied to a Ms Rizkallah-Reichardt who I think was the actual managing director of the Third Defendant at that time. It refers to "*Project Sunshine (Bell)".* It contains two attachments one of which is "*Cert - Director's Certificate, Release of Escrow, February '09*" and the other of which is "*Paris 1920275*" which references are explained as follows, because the email says:

> *"Dear Sheikh Mohammed*
>
> *I hereby enclose an instruction letter to the escrow agent in order to request the release of funds and a director's certificate to be provided to Carey Olsen so that they may issue their legal opinion on the instruction letter. Please sign both letters, forward them to me, the PDF copies by email and the originals by courier."*

52. That is the covering letter. That is what was sent on 23 September 2022. I am dealing at the moment with simply the question of timing. That was sent on 23 September 2022 during the currency of the appeal in the first proceedings, so the document was there.

53. Mourant did object to those materials being included before the Court of Appeal. It will be noted that AFR had said that if the materials were not agreed to be included in the bundles for the Court of Appeal, then an application would be made. In fact, no application was actually made.

54. One of the reasons for Mourant's objection was, I understand, that they were unclear about what the status of the documents were said to be or what they were relied on for, i.e. whether it was sought to rely on the document as an actual Certificate of Solvency or merely as evidence of solvency on the part of the company at the relevant time.

55. Written submissions were then made to the Court of Appeal in which the Plaintiff submitted, relying on the 5 February 2009 document, that there was in fact clear, direct and contemporaneous evidence that the Third Respondent - that is the company - was indeed solvent immediately after the Declaration of Trust, referring to a certificate dated 5 February 2009 executed by the Sheikh and to the para.14 recital in that document, that the company was solvent. It is said in the submissions that:

> *"This document was not before the court at the hearing and leave will be sought to rely on it on appeal."*

56. So, again, that assertion was made, although no application to introduce the document was in fact made to the Court of Appeal. Within the Plaintiff's written submissions to the Court of Appeal it was said that this document was important, for a number of reasons. "*Although it relates to a different transaction*", it showed that the company did indeed satisfy the solvency test at the relevant time. The submission was therefore

that if no certificate was executed in relation to the Declaration of Trust, the omission was therefore purely a technicality, and the limitation period imposed by s. 309 of the

Companies Law (another argument being raised in relation to the first proceedings) should apply in such circumstances.

57. That was the actual submission that was made in the Court of Appeal but at para.67 of the submissions it was then further said:

> *"At present no Trust Deed Certificate of Solvency has been located."*

58. Thus, that was what was being said to the Court of Appeal, before the Court of Appeal hearing in the previous proceedings. On the basis of what was being said before the Court of Appeal, that shows perfectly clearly that the documents in question were there and were available.

59. Advocate Richardson says that the documents were not really available, and should be treated as not having been available, because it was not actually possible for them to be advanced in evidence at that time.

60. It would have been necessary, of course, to make a *Ladd v Marshall* application for the admission of those documents as further evidence on appeal, and it is significant that no such application was actually made. It is also significant, in my judgment, that it appears clear that the basis upon which it was suggested that those documents would be put in evidence before the Court of Appeal was not that they constituted a solvency certificate in relation to the Declaration of Trust, but actually only that they constituted evidence that the company had been solvent at the time of the Declaration of Trust, advanced in support of a submission that the failure to have a solvency certificate at the time of the Declaration of Trust was a mere formality, and that, therefore, as far as the requirement of the Law was concerned, there was a possibility that that need not be held to be mandatory and, accordingly, that the Declaration of Trust could be valid, even without it.

61. Those were propositions that were rejected, of course, by the Court of Appeal, but they were made in the previous proceedings, and insofar as the documents themselves might not have been actually advanced in the previous proceedings, plainly they were there, and application could and should have been made to rely on them, if they were going to be relied, and certainly if they were going to be relied on in support of any proposition that, after all, they did constitute a Solvency Certificate sufficient to satisfy s.303 (4). The important point for present purposes, though, is that this evidence shows quite clearly that those documents were available with due diligence.

62. It is arguable that this document was available or could have been available with due diligence even at the time of the hearing before me, bearing in mind that they were documents that can obviously be taken to have been known to the Sheikh, but it is quite plain that at the time of the actual final disposal of the first proceedings, and they had not been finally terminated at that stage because they were still in existence before the Court of Appeal, that material had been made available and could have been relied on, and indeed, it half was. It could have been relied on for whatever purpose was thought material and it is to be noted that at that time, the absence of a Certificate of Solvency, which was very clear to the parties as being a very material point, could actually have

been raised to be litigated if this document were genuinely thought to have been such, but it was not.

63. Advocate Lyall submits, therefore, that the requirement that the material now sought to be relied on should not have been available by reasonable diligence at the time of the first action which made the issue res judicata is simply not met.

64. Advocate Richardson's submission that that requirement is met depends on his assertion that in practice these documents could not be used in evidence at the time in the Court of Appeal, or at least, that it was understood that they could not. When asked why, he said that that was because they (meaning presumably the Plaintiff) did not have - there was not in existence - an affidavit of the Sheikh comparable to the affidavit that we now have in these proceedings and which he invites me to treat as an affidavit that says that this 5 February 2009 document, the director's document, was in fact a Certificate of Solvency, or was capable of being construed as a Certificate of Solvency. They (again meaning presumably the Plaintiff) did not have that affidavit at the time.

65. Nor did they have a sufficient affidavit from the gentleman who appears to have uncovered it, explaining why it was not available. This gentleman was a Mr Ippolito who worked for White & Case and who appears to have been the gentleman who uncovered this document and whose evidence seems to suggest that it was only uncovered later because he was not able to navigate a new system for the recording of documents; although he had been asked previously, because of the winding up which had started in 2020, for such documents as he had that related to the matter, he had not been able to access the IT system which governed the archive, because he did not know how it worked since it had changed from what he was used to, and that was why it had not been actually in his possession. That is said in a letter that Mr Ippolito wrote in November 2022, so actually itself even before the Court of Appeal hearing. Previously he had simply asserted, in 2021, the general fact of an intended scheme for rearrangement of the company's beneficial interests, reportedly to transfer these to the Plaintiff, and later linking the Declaration of Trust with this. I think it is only subsequently that Mr Ippolito in fact explained the reason why he says he had not, then, been able to actually access this particular document, although it is clear that he had managed to so do before the conclusion of the previous proceedings, because of the copy produced in September 2022.

66. Whether my factual account above is precisely accurate or not in its timing does not, in my judgment really matter, though, because the real point is that the document itself was actually copied and sent to the liquidators and was therefore available and, therefore, any question of its influence on the original cause of action in relation to the Declaration of Trust was one which certainly could and should have been raised at the time in relation to the issue of the validity of the Declaration of Trust. However, no application to introduce it was made and, indeed, it is apparent even from the transcript of the proceedings before the Court of Appeal, where the question of the status of that document was queried by the court because of the suggestion of an application being made, that no application was made. Indeed, Advocate Richardson even asked the court in effect to "ignore" that aspect, that particular document, in dealing with the appeal.

67. In my judgment, therefore, the requirement that the new material sought to be introduced to counter any previous issue estoppel should actually have not been available with due diligence at the time of the previous action in order to justify not enforcing such an issue estoppel (assuming that it should be treated as such) in relation to the validity of the Declaration of Trust is simply is not met on that basis.

68. The other requirement would be that the significance of the material itself should be such that it went entirely to change the complexion of the case, such as it could reasonably be expected to have the effect that a different result could be obtained.

69. Advocate Lyall submits, in effect, that when one looks at the document, it is simply not possible to construe it as ever being an adequate and relevant operative certificate under s 303 of the Companies Law, for a variety of reasons.

70. Advocate Richardson submits that that is not the case, because that is the kind of point that really ought to be allowed to go to a trial. He stresses his submission that the question is simply whether the document, as one sees it, raises a potentially arguable case that it is capable of being such a certificate, and that further evidence relating to circumstances at the time - no doubt in relation to this restructuring of the group company assets that I have referred to - and whatever was taking place between the people who were involved at the time, could actually support this, showing that something might emerge that could justify a conclusion that this document could qualify as a Certificate of Solvency.

71. I have used the words "something might emerge" deliberately as I think they are a quotation from the *Popat* case. This was a quotation that Advocate Richardson relied on. It dealt with the reasons given by the then Deputy Bailiff as to why he was not satisfied that the plaintiff's case in that action was unwinnable. He said:

> *"From what is currently pleaded, there is a pathway through these facts that could result in Alnashir proving the existence of the trust he says was created many years ago and of which he is a beneficiary where Adil became and so appears to continue to be a trustee. As such, it is not, in my judgment, an unwinnable case in the sense of being bound to fail even though I imagine Alnashir is aware of the evidential difficulties he will face subject to what Sam and Jaffer-Ali might have to say. It is not the court's task in determining the present application to resolve those difficult factual issues and, when considering whether this is a claim which has no real prospect of succeeding, I have taken into consideration that evidence will potentially be available from Sam and/or Jaffer-Ali which will assist Alnashir's primary contention about the initial creation of this trust; in other words, there is something further that can reasonably be expected at trial. Conversely, if that evidence would completely undermine Alnashir's contention, I wonder why Adil chose not to adduce it in support of his application, which is why I am satisfied that he has not discharged his burden to show that the action has no real prospects of success."*

72. Advocate Richardson relies on the reference to there being a "pathway".

73. It is apparent that the claim in that case, as I have already referred to, was not terribly well pleaded in the sense that the Deputy Bailiff thought that the pleading was perhaps vague and incoherent in places. That is said at [48]. He was, nonetheless, satisfied that there was potentially a pathway revealed in the pleading by which the case might be made out and that there might be, therefore, potential further evidence and that something further could reasonably be expected possibly to be there at a trial. That is the basis on which Advocate Richardson submits that today, in order to hold that this claim ought to proceed, I need only be satisfied that there is the potential for evidence to emerge at the trial, ie for there to be some pathway, which could justify the conclusion that this document that has now been produced is and could qualify - ie is capable of qualifying - as a Certificate of Solvency for the purpose of s. 303.

74. I prefer Advocate Lyall's submissions in this regard.

75. First, I hold that it is quite possible and, indeed, quite right - as recent authority in the Court of Appeal referred to above shows - that I can evaluate the evidence before me today, and, today, reach the conclusion that there is no real likelihood of any further evidence coming forward that could actually support the contention that this document is a valid Certificate of Solvency for the purposes of section 303 and I can do so from looking at the terms of the document.

76. The first point Advocate Lyall makes is that there is a point about the timing and the date. This document is a document that is dated 5 February 2009. The relevant declaration of trust was dated 8 January 2009. Advocate Richardson submits that that timing is not important. He submits that there is no express requirement in s. 303 as to the required time for any such certificate. He submits that it is therefore a matter, as he put it, of what he called "reasonable contemporaneousness" with the transaction that was sought to be upheld. I think he was constrained to submit that it must be reasonably contemporaneous because it could not be, I think he would accept, that you could have a case that a certificate could be given years after the event and still be held to be valid, although he pointed out that there is equally no contrary requirement of any particular timing in advance. Therefore, in principle, you could have a certificate that was well prior to the transaction document. If the Law itself does not actually lay down the timing, he submitted that the proper construction must be that the certificate only needs to be reasonably contemporaneous, and this document could therefore qualify.

77. Advocate Lyall submits that that is just not the case, and that the terminology of s 303 which I have already read clearly envisages that the relevant certificate must be given in advance of the distribution itself.

78. At one time, Advocate Richardson seemed to be inclined to say that the terms of s. 303(3) suggested that it did not matter and a certificate could be given afterwards because it could be withdrawn afterwards, but I am not sure that he really did submit this, and in any event, that argument is not supported because the Law is, (in s.303 (3)) referring to the authorisation of the distribution, which necessarily predates the actual distribution itself. It is in fact notable that the terminology of s 303 in both ss 303(3) and (4) is in the future. It stipulates a certificate that the distribution "will not" affect the solvency of the company adversely. Also, as Advocate Lyall points out, s, 303(3) is envisaging that you will have the required declaration in advance because it provides for

the case where the certificate is made but subsequently circumstances change before the distribution actually takes effect - in which case, that certificate will not be valid and has to be reassessed. Whatever the precise wording, the effect of the provision is that a certificate already given will not suffice if the circumstances change, but this is provided for on the assumption that the certification has been in advance.

79. In my judgment, the very timing of this document shows that there is no realistic prospect that it could actually be regarded as being a Certificate of Solvency that was intended to authorise this particular transaction, ie the Declaration of Trust which was executed a month earlier. That is important because s. 304 plainly envisages that the directors' attention has to be drawn to the actual proposed transaction in question. They have to turn their mind to the question of the solvency of the company before and afterwards, on the assumption that that transaction goes ahead, and they have to provide a certificate to that effect. In other words the necessary certification of solvency cannot just happen, by a side wind, from something which refers to the solvency of the company and suggests it in another, different, context.

80. Then there is the question of its actual terms. I noted, although it might be a minor point, that the document itself does not actually purport to be a certificate of the board of directors. It talks about a single "director's certificate" in its heading. At the end, it is confirmed to be given on behalf of the company, not the Board. It does not actually refer to its being a certificate of solvency, either. It is just a general certification of various matters which happen to include solvency, in certain respects. That is not an auspicious start for suggesting that this could be a document solemnly required, to have a particular function as a Certificate of Solvency for a stipulated statutory purpose.

81. It is also to be noted that it is a letter to Carey Olsen, apparently not as an escrow agent (as I think I erroneously said at one stage) but to enable them to provide an opinion to give to an escrow agent. The information is actually being certified to Carey Olsen so that Carey Olsen can write some opinion that actually will reassure somebody else about something else. Moreover, that something else is "the release of funds". That is clear at least from the covering email, though possibly not from the document itself, but, at any rate, the point is that that has got nothing to do with any transfer of the beneficial interest in shares, which is what the essence of this particular action is concerned with, Therefore, on the face of it, this document does not purport to have any relationship to the Declaration of Trust of the beneficial interest in shares.

82. In fact, the 5 February 2009 certificate itself only refers to "the Transaction Document". It does not itself say what that document, or that transaction, is. It is quite opaque as regards that particular point.

83. Consequently, there is nothing in my judgment that actually links the document alleged to be capable of constituting a Solvency Certificate in respect of the Declaration of Trust - nor, indeed, which could link it with an adequate such authorisation certificate or solvency certificate – with the Declaration of Trust for the purpose of s. 303.

84. Advocate Richardson's contention is, in effect, that if the matter goes to trial, further evidence will or could emerge which could actually support this. Indeed, he relies on this because he submits that the assertion that it is such is unchallenged evidence for

present purposes, being contained in the Sheikh's affidavit in support of the Plaintiff's resistance to this Application. The evidence of the Sheikh is said to be unchallenged because there has been no riposte contesting it and therefore, he submits, the document has to be accepted as being proffered as what the Sheikh says it was, such that that contention could, in the circumstances, only be contested by going to trial. Advocate Richardson invites me to infer that the Sheikh was saying that this document was, in fact, the required Solvency Certificate.

85. Advocate Lyall says that is not the case even in principle, because the Sheikh's evidence was in fact adduced in answer to Mr Rhodes' affidavit in support of the Application. It was responsive evidence, in other words, and so what the court is actually faced with is two competing contentions and two alternative versions as to what the history of the matter really was. The court can possibly then say: "yes, well, that is a dispute that cannot be decided without a trial", but if it takes the view that the dispute is one that can clearly be decided at present, because, in fact, one competing contention is simply so unsupported by any contemporaneous evidence or reasonable argument or the possibility of any further evidence or reasonable argument emerging, then the court can reject that account at this stage. Advocate Lyall submits that that is what I should do.

86. Now, examining these submissions on the merits, it is also important to note what the Sheikh does not actually say. Both in the Cause itself, and in the relevant paragraphs of the Sheikh's affidavit which Advocate Richardson relied on as the most important paragraphs, we get the same notable and curious phraseology. The relevant paragraphs of the affidavit relied on by Advocate Richardson are paras.40 and 41, and 7 and 8 but, in particular, in paras. 40 and 41. The Sheikh refers to para.14 of the 5 February 2009 document, which he has by then decided to call the "Solvency Certificate". This is, obviously a self-serving definition which does not govern what the document actually is but is, at best, the Sheikh's own interpretation of it, and, as I pointed out to Advocate Richardson, that is a matter of law. (Advocate Richardson submits it is a matter of law and fact, but even if I accept that it is a matter of law and fact, it is the true construction of the certificate and the Companies Law which is the issue, and that is a judgment which is a matter for lawyers and not a matter for Sheikh Al Jaber himself.) The Sheikh there says:

> *"At paragraph 14 of the Solvency Certificate it states that the Company was not insolvent or unable to pay its debts as they became due or would become insolvent as they became due as a result of entering into the transaction document. For the avoidance of doubt, the Declaration of Trust was validly and properly entered into."*

87. So there is the juxtaposition of two sentences. It is the same juxtaposition as occurs in paragraph 2 of the Cause, which I read at the beginning of this judgment. It is also pointed out by Advocate Lyall that exactly the same juxtaposition occurs in para.33 of the Sheikh's affidavit, where he refers to having certified by para.14 of what he is describing as the Solvency Certificate that the Third Defendant was solvent. It is notable that he makes that certificate in relation to the transaction document and, again, in a separate sentence says:

"For the avoidance of doubt, the Declaration of Trust was validly and properly entered into."

88. So there is no actual assertion that the relevant "transaction document "referred to in the certificate of 5 February was in fact the Declaration of Trust. That is simply an impression that is sought to be conjured up in the mind of the reader, by both the pleading and by the terms of the Sheikh's affidavit, that they must be referring to the same thing. However, they do not in terms do so, nor do they do so by any necessary implication, and in my judgment, the fact that they do not do so in practice is quite obvious. This is also reinforced by the fact that the Plaintiff itself quite plainly did not think it did. Indeed at a time when the Sheikh must have known about this particular document and as far as I can see known perfectly well what was going on, it was never contended that this document was *the* Solvency Certificate that was necessary in order to make the Declaration of Trust valid and effective according to Guernsey law, and the obvious reason is that no-one believed that it was.

89. For all those reasons, it seems to me that, at the end of the day, even if I were to hold that there were sufficient special circumstances, in terms of a potential injustice, that might justify allowing this material to be introduced in the form in which it is now sought to introduce it, this would have to be despite the fact that this material was certainly on the fringes of the evidence, and virtually introduced but not quite introduced, in the proceedings in the previous action itself, but was there regarded as, and proposed to be introduced for a completely different purpose, namely support merely of a general proposition of solvency, but it was even then abandoned as potential such evidence in those proceedings. In those circumstances, it seems to me that there is absolutely no realistic possibility that it could ever be successfully asserted now that this 5 February 2009 certificate was a valid and operative Certificate of Solvency in relation to the Declaration of Trust for the purpose of s. 303 of the Companies Law

90. In those circumstances, I conclude that even taking the statements made in the Sheikh's evidence in this action at face value, and as if this had been the first time in which this matter had been pleaded and pursued at all, so that I was simply considering this as a matter of summary judgment on the present pleadings, and without regard to the previous action and the issue estoppel which would have to be surmounted, there is no prospect - no realistic prospect - of the claim succeeding. It is fanciful to suppose that it could do so, and it is fanciful to suppose, again in the context of all the changes of position and changes of assertion that have taken place on the Plaintiff's part, that any further evidence could emerge that might actually enable such a Certificate to be asserted to have existed.

91. For all those reasons, I hold that, in fact, even if this case were to be treated as being one of issue estoppel as opposed to a cause of action estoppel (which I do not think is correct) there are no special circumstances and in any event, the qualifications for going behind any issue estoppel, which certainly does exist, are not met. Moreover, even if the matter had simply been at large, on the basis of the evidence before the court, I would hold that it would be appropriate to give summary judgment to the Defendants in relation to this action because it discloses no real prospect of the s. 303 point being defeasible.

92. For completeness, Advocate Lyall raised the point that in my previous judgment, I also said I would have given summary judgment to the Plaintiff on the basis of the fact that there was not a shred of evidence that the Declaration of Trust had ever actually been used, relied on or recognised in any way after the date on which it was purportedly entered into. There was no trace and no hint that it had ever actually been relied on, implemented, used or treated as being contemporaneously relevant to what was going on in the company at any time. It was not mentioned in the accounts where one would have expected it to have been mentioned if it had been intended to operate. There was no evidence of anybody having asserted that it was operative until after the winding-up of the Third Defendant. After that, it obviously became apparent that this might be a matter of importance in relation to the destination of the Third Defendant's assets in the winding-up, and the existence of the trust was suddenly asserted, but only even after this was the Declaration of Trust itself produced. In those circumstances, I said I would also have given summary judgment to the Defendants on that ground.

93. I am not sure, and I do not need to decide, whether that situation would also give rise to any estoppel *per rem judicatam*. Advocate Lyall was inclined, I think, to submit that it would because I had said, as indeed I did say, that I would also have given summary judgment on that basis, but it is also fair to say that I did say that I preferred to base my judgment in the first action on the absence of a valid s 303 certificate because I regarded that as a stronger and unanswerable point and, indeed, it has been referred to as the "killer" point throughout the proceedings today. It therefore might well be said that I did not actually give judgment on that basis in the first action.

94. Advocate Lyall submits, even so, that those facts have not changed and, therefore, any facts that inclined me to give summary judgment at that time would be just as applicable today. I have not gone into that argument at this hearing, as I have not had to. I am not prepared to say that it is necessarily the case; there might be other things in relation to the further matters explored since then which possibly might change the complexion of the case, in that regard, I suppose, although I am inclined to think that I would still give summary judgment on that basis.

95. The Court of Appeal, noted that there was no appeal against that holding of mine, but did not need to deal with any effects of that, in view of their dismissal of the actual appeal, in any event. It is also probably fair to say that since I did not expressly say that the clear findings that the Declaration of Trust had never been acted upon was another reason, as it were, another *ratio decidendi* for my summary judgment in the first case, the Plaintiff could well not have taken the point to appeal because I had not done so.

96. I therefore do not rest my decision today on that particular matter, although it still seems to me that those particular points have force and go to support and reassure me in my basic finding that it is right to give summary judgment. Nothing really has changed in relation to the cause of action that was sought to be advanced then and is sought to be advanced, again, now, and there are no grounds for going behind the cause of action estoppel created in the first action, which is absolute, nor for modifying any issue estoppel as an alternative analysis, and which, in any event, would have arisen in relation to asserting the validity of the Declaration of Trust for the purpose of enabling this claim to proceed.

97. On that basis, I will grant Defendants' summary judgment and/or strike out the Cause as requested in the Defendants' application.