

Application for Leave to Appeal the decision of the Royal Court dated 29 August 2024, in relation to (i) that the Lieutenant Bailiff failed properly to consider the “matrix of fact” in a summary judgment context; and (ii) that the hearing was unfair, by reason of the way in which the Lieutenant Bailiff conducted it. Application refused.

[2025]GCA001

**IN THE COURT OF APPEAL GUERNSEY
(Civil Division)
Court of Appeal Case No: 590**

Date: 14 January 2025

Before:

**Clare Montgomery KC JA
Rt Hon James Wolffe KC JA
Michael Furness JA**

Application for Leave to Appeal

Between:

JJW HOTELS & RESORTS HOLDING INC

Applicant

-and-

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

Respondents

**Counsel for the Appellant: Advocate P Richardson
Counsel for the Respondents: Advocate A R Lyall**

JUDGMENT

WOLFFE JA

Introduction

1. On 29 August 2024 the Lieutenant Bailiff (Hazel Marshall KC) granted the Respondents’ application for summary judgment and dismissed the action. She refused the Applicant’s application for leave to appeal. The Applicant has renewed that application before the Court of Appeal. We refuse the application. This judgment explains our reasons.

Background: the previous proceedings

2. In July 2020 the Third Respondent was placed into compulsory liquidation. The First and Second Respondents are the present liquidators. In October 2021 the Applicant's advocates produced to the liquidators of the Third Respondent a document dated 8 January 2009 ("the Trust Declaration") which bore to be a declaration of trust granted by the Third Respondent in favour of the Applicant in respect of shares held by the Third Respondent in certain subsidiary companies.
3. In December 2021 the Applicant brought proceedings in the Royal Court inter alia for a declaration that, pursuant to the Trust Declaration, the Applicant was the beneficial owner of the shares. The Liquidators defended those proceedings and applied for summary judgment on the basis that the Trust Declaration was a distribution for the purposes of section 301 of the Companies (Guernsey) Law 2008 and that there was no certificate of solvency as required by section 303.
4. Following a hearing in June 2022 the Lieutenant Bailiff granted the liquidators' application for summary judgment and dismissed the action. She issued a written judgment dated 4 July 2022 ([2022] GRC024). The Applicant appealed. In September 2021 the Applicant's advocates intimated a document ("the Putative Certificate") dated 5 February 2009 headed "JJW Limited Director's Certificate". It bore to have been signed by Sheikh Mohammed Bin Issa Al Jaber ("the Sheikh"), a director and the founder of the Applicant and the Third Respondent.
5. Clause 14 of the Putative Certificate stated:

"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."

The Putative Certificate did not identify the Transaction Document.

6. The Applicant's written submissions to the Court of Appeal stated (emphasis added):

"This document is important for a number of reasons. *Although it relates to a different transaction, it shows that the company did indeed satisfy the solvency test at the relevant time.* If no certificate was executed in relation to the Declaration of Trust the omission was a pure technicality. ..."

The written submissions expressly stated that "[n]o Trust Deed Certificate of Solvency has been located" and intimated that leave would be sought to rely on the Putative Certificate at the hearing.

7. The Applicant did not in fact apply to the Court for leave to rely on the documents. The appeal was heard by the Court of Appeal (Anderson of Ipswich, Perry and Mountfield JJA) on 7 December 2022. During the hearing, Advocate Richardson responded to a question from Lord Anderson of Ipswich about the Putative Certificate in the following terms: "That was to be the subject of an application to adduce evidence. We are not in a position to progress that ... So I think I have to ask the court to perform those mental gymnastics to just ignore any reference to that, that has found its way into the submissions".
8. The Court of Appeal dismissed the appeal ([2022] GCA 077). The Court concluded inter alia: (i) that the Trust Declaration was a distribution; (ii) that section 303(4) of the Companies Law is mandatory in its terms; (iii) that, in the absence of a certificate, factual inquiry into the question of whether the third Respondent was in fact solvent was irrelevant; and (iv) that there was no reason to disturb the Lieutenant Bailiff's conclusion that the possibility of further factual investigation changing the complexion of the evidence was "vanishingly small".

9. Amongst the Grounds of Appeal argued before the Court of Appeal was Ground 4, which was to the effect that the Royal Court should have conducted an inquiry into whether the third Respondent was solvent immediately after the Trust Declaration was granted. The Respondents' primary position in response was that the solvency of the third Respondent was irrelevant to the question of whether summary judgment should be given. The Court stated that this submission was well-founded, and explained (at paragraph 33):

“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 s. 305 no distribution is lawful unless under ‘*this Law, any other enactment or 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 certificate of solvency required by statute.”

10. The Applicant applied for leave to appeal to the Judicial Committee of the Privy Council. In November 2023, the Judicial Committee refused leave on the basis that the Applicant “does not present arguable grounds in law which, in combination, would be sufficient to achieve success on appeal”.

The present action

11. The Applicant tabled the present action in April 2024. Like the previous proceedings, it seeks a declaration that, pursuant to the Trust Declaration, the Applicant was the beneficial owner of the shares. The pleadings are in all material respects identical, with the exception that reference is now made to the Putative Certificate. The pleadings state:

“A document dated 5 February 2009 whereby a director of the Third 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. For the avoidance of doubt the Declaration of Trust was validly and properly entered into.”

12. The Respondents applied for summary judgment on the grounds that the action had no reasonable prospects of success, or for the claim to be struck out on the grounds that it disclosed no reasonable grounds for bringing the action. The Respondents contended that the action was barred by estoppel *per rem judicatam* and, in any event, that the Putative Certificate did not satisfy the requirements of section 303 of the Companies Law.
13. The Respondents' application for summary judgment was supported by an affidavit by the First Respondent. In response, the Applicant filed an affidavit by the Sheikh dated June 2024. The affidavit contains uncontentious (and quite detailed) narrative of the procedural history of the case. Parts of it (for example, paragraphs 45 to 47) contain what are, in effect, legal submissions. The impression that it is a document to which there has been legal input is reinforced by the use throughout of defined terms.
14. The annexes to the affidavit include the Putative Certificate, which the affidavit defines as “the Solvency Certificate”. The Sheikh depones:

“33. On the 5 February 2009 I certified by paragraph 14 of the Solvency Certificate that the Third Defendant was not insolvent or unable to pay its debts as they became due or would become insolvent or unable to pay its debts 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.”

15. The affidavit does not identify the “Transaction Document” referred to in the Putative Certificate; nor does it contain any factual information about the context, genesis and purpose of the Putative Certificate. It does not explain the relationship, if any, between the Putative Certificate and the Trust Declaration, though - like the pleadings in the action - it is framed in a manner which is liable to create an impression that the Trust Declaration is the “Transaction Document”.

16. Amongst the documents annexed to the Sheikh’s affidavit is an affidavit of Alexandre Ippolito which bears to have been sworn on 28 November 2022. This explains that Mr Ippolito is a partner in White & Case, Paris, and that he had been the main partner in that firm dealing with the affairs of the Applicant and associated companies. Mr Ippolito states:

“3. I confirm I was asked by the Sheikh in recent years on several occasions to look at what records we still retained in respect of JJW Limited now in liquidation.

4. A Director’s Certificate was recently located by me which is exhibited at (AP1 (p)) and which makes reference at para. 15 to a solvency test.

5. I was asked by one of the advisers to the Sheikh Mr Stephen Le Ray why I did not locate the Director’s Certificate in the documents submitted to the Sheikh earlier, notably in September 2021.

6. I replied by email which is exhibited at APO2 (p) to the effect that in my understanding not being an IT specialist the system of email recovery had changed since 2009 but eventually I got access to it in June 2022.”

17. The annexes to Mr Ippolito’s affidavit included the Putative Certificate and the email from Mr Ippolito to Mr Le Ray, which is dated 14 November 2022 and states:

“The answer is quite easy and straightforward. In 2021 I had not full access to the file since our system has changed since 2009 so I had to apply for recovery of the past e-archives but could not get the requested access in due time whereas I obtained such access after a while early 2022 and was thus able to find the relevant document and share it with you.

Not knowing the full background I am happy for you to prepare a certificate on the above which I may further sign.”

18. The documents annexed to the Sheikh’s affidavit also included a letter from Mr Ippolito to the Sheikh dated 20 September 2021. This letter stated that Mr Ippolito had worked for the Sheikh’s group during 2007, 2008 and 2009 on different projects, including a “full restructuring of your European hospitality business”. The letter explained that “complications arose as to the tax related costs and adverse impacts of the planned transfers” of certain entities and a decision was accordingly made and implemented to transfer the beneficial interest in those entities to the Applicant, with the legal ownership remaining with the Third Respondent as trustee for the Applicant. Whilst this letter contains information about the genesis of the Trust Declaration, it provides no information about the Putative Certificate and the relationship (if any) of that document to the restructuring described in the letter or to the trust arrangement.

19. The hearing of the Respondents’ application for summary judgment took place on 29 August 2024. Having heard counsel, the Lieutenant Bailiff issued an ex tempore decision, in which she granted summary judgment and dismissed the action. On 6 September 2024 she issued a written judgment. She rejected (paragraph 37) Advocate Richardson’s submission, for the Applicant, that cause of action estoppel did not apply where the previous decision had been a summary judgment. She held (paragraph 38), accordingly, that cause of action estoppel

applied and that this was a complete end to this action. On the hypothesis that she was wrong in that view, she proceeded to address issue estoppel. On this, she held (paragraph 41) that the very point in issue – namely the validity of the Trust Declaration – had been in issue, and had been litigated, in the previous proceedings. She rejected Advocate Richardson’s contention that it would be unjust to refuse to allow the issue to be re-litigated. She held (paragraph 62) that the Putative Certificate had been available and could have been relied upon by the time of the final disposal of the previous proceedings, and arguably even at the time of the hearing before her. She, further, took the view (paragraph 75) that there was no real likelihood of any further evidence coming forward that could support the contention that the Putative Certificate was a valid certificate of solvency for the purposes of section 303. She relied in that regard (paragraph 79) on the respective dates of the Trust Declaration and the Putative Certificate. She also relied (paragraph 80) on the absence of anything which linked the Putative Certificate to the Trust Declaration. Even if the action was not barred by estoppel, she would have granted summary judgment (paragraph 91) because there was no real prospect, as a matter of substance, of the section 303 point being defeasible.

The Application for Leave to Appeal

20. The Applicant advances two grounds in its Notice of Appeal. It contends: (i) that the Lieutenant Bailiff failed properly to consider the “matrix of fact” in a summary judgment context; and (ii) that the hearing was unfair, by reason of the way in which the Lieutenant Bailiff conducted it.
21. On 18 October 2024, the Bailiff gave directions which envisaged: (i) that the Applicant was to set out in writing the basis of the application; (ii) that the Respondents, if they wished to do so, could make submissions as to why leave should not be given; and (iii) the parties were to indicate if they wished to be heard or were content that the application be dealt with on the papers.
22. The Applicant has filed written submissions in support of the application. The Respondents intimated that they are content to rest on the submissions which they advanced before the Lieutenant Bailiff. The parties have agreed that the application should be dealt with on the papers. The application was placed before me. In light of the allegations being made about the way that the Lieutenant Bailiff conducted the hearing before her, I obtained and listened to the audio recording of the hearing. Having done that, I referred the matter to a full Court for a decision on the question of leave.

The approach to be taken to leave to appeal

23. The Applicant accepts, under reference to *Salter Rex & Co v. Ghosh* [1971] QB 597, that a decision on summary judgment is an interlocutory decision which requires leave to appeal under section 15(1)(e) of the Court of Appeal (Guernsey) Law 1961. The Applicant points out, under reference to *Fort Trustees Ltd v. ITG* [2021] GCA 029, that an application to the Court of Appeal is a renewal of the application for leave and not an appeal against the refusal of leave by the Royal Court.
24. The approach which falls to be taken to an application for leave under section 15(1)(e) was explained in *ITG Ltd v. Glenalla Properties Ltd* [2022] GCA 091. The judgment of the Court in that case states (paragraph 40) that the Court should not grant leave unless it is at least satisfied: (i) that the appeal has real prospects of success; or (ii) that, even though the appeal has no real prospects of success, there is an issue which in the public interest should be examined by the Court of Appeal. Other factors may justify refusing leave, particularly where the decision in question has not finally determined the proceedings, but in the present case, we are concerned with a decision which had the effect of bringing the proceedings to an end.

Ground of Appeal 1

25. Ground of Appeal 1 challenges the substance of the Lieutenant Bailiff's decision. The Applicant contends, first, that the proceedings are not barred by cause of action or issue estoppel. First, it is said that a summary judgment does not give rise to a cause of action estoppel. Second, it is said that the current proceedings are not identical to the previous proceedings since the latter did not determine the status of the Putative Certificate. Third, it is said that the Putative Certificate was not "available" at the original summary judgment hearing in June 2022. The Lieutenant Bailiff erred, so the Applicant contends, in focusing on the availability of the document at the time of the hearing of the appeal in December 2022.
26. The Applicant further contends that the Lieutenant Bailiff erred in finding that the question of whether there would be a "grave injustice" if the Applicant were not permitted to re-litigate the issue "did not begin to arise". The Applicant contends that outside the narrow sense of cause of action estoppel, the true question is whether the failure to raise an issue in earlier proceedings would make it abusive to raise that issue in later proceedings. It relies on a lengthy quotation, said to reflect the holding in *Virgin Atlantic Airways Ltd v. Aircraft Interiors UK Ltd* [2014] AC 160 but which is in fact taken from the submissions of Henry Carr QC recorded at pages 165-166 of the Appeal Cases report, on *Taylor v. Lawrence* [2022] EWCA Civ 90, *Minister for Immigration and Border Protection v. WZARH* [2015] HCA 40, *Attorney General v. Michel* 2006 JLR (N) 15 and *Coles v. Ravenshear* [1907] 1 KB 1. It contends that it would be an injustice not to allow "the Company to be saved and trading it back to health", which would safeguard its long-term viability, protect its market presence and assets and ensure the protection of stakeholder interests.
27. The Applicant contends that the Lieutenant Bailiff perpetrated an injustice in reaching a conclusion that the Putative Certificate was not "available" in the first action without considering evidence from the Sheikh or from Mr Ippolito's firm about the status of the Putative Certificate, and in rejecting the possibility that further evidence of fact or circumstance could emerge such as to justify the conclusion that the Putative Certificate did "comply with purpose of section 303 of the Companies Law". The Applicant points out that the very fact that the Putative Certificate had emerged showed that the Lieutenant Bailiff's conclusion in the 2022 proceedings that there was no realistic possibility of new evidence emerging had been wrong. It was premature, so the Applicant contends, to grant summary judgment in this case when there is said to be a possibility of further evidence being available at trial which could cast a different complexion on the case.
28. We have concluded that this Ground of Appeal has no real prospects of success.
29. The Lieutenant Bailiff concluded: (i) that the present action is barred by cause of action estoppel; (ii) that if she was wrong about that, the action is, in any event, barred by issue estoppel on the basis that the Putative Certificate was available (and therefore any argument about its effect could have been advanced) at the time of the previous proceedings; and (iii) that, in any event, the Putative Certificate, on its face, could not be a solvency certificate in relation to the Trust Declaration as required by section 303 of the Companies Law. In order to show that this Ground of Appeal has real prospects of success, the Applicant requires to attack each of these conclusions.
30. If the only issue had been whether the previous summary judgment was a final determination of the cause of action so as to give rise to cause of action estoppel, we would have granted leave to appeal. Neither party cited any authority on the point; and the Applicant was able to point to the characterisation of a summary judgment as interlocutory, and not final, for the purposes of leave to appeal. There would be merit in an authoritative ruling on the issue. In the absence of contentions on the issue, we express no view as to whether a similar argument could be advanced in respect of issue estoppel.

31. We acknowledge that the way that the Lieutenant Bailiff approached issue estoppel can be criticised. She treated the “issue” in question as the validity of the Trust Declaration (which had been decided in the previous proceedings) rather than the status of the Putative Certificate for the purposes of section 303 of the Companies Law, an issue which was not determined in the previous proceedings. This is, it might be said, not a case where a party is seeking to re-litigate in the context of one cause of action an issue which has previously been determined in the context of another cause of action. Rather, it is a case where the Applicant wishes now to litigate an issue which was not determined in the previous litigation. But, in the context of this case, that change of focus would not affect the outcome.

32. In *Virgin Atlantic, supra*, Lord Sumption (in a judgment with which the other judges of the UK Supreme Court concurred) observed (at paragraph 22):

“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.”

Lord Sumption accordingly applied the same test to both situations. The Lieutenant Bailiff addressed whether the Putative Certificate was available at the time of the previous proceedings, such that the contention that it complied with section 303 could and should have been raised in those proceedings, which is the very test which Lord Sumption tells us should be applied.

33. The Applicant’s criticism of the Lieutenant Bailiff’s approach to this issue is that she erred in focusing on the availability of the Putative Certificate at the time of the appeal hearing, rather than at the time of the June 2022 hearing before her. That submission treats the test as if it were a technical rule, rather than a principle which is designed to avoid injustice where genuinely new matter which could not reasonably have been identified has emerged after the previous proceedings have been disposed of. Where a previous decision was appealed, there is no good reason, in our view, to confine consideration to the position at first instance at least in circumstances where the Court of Appeal has a discretion to admit additional evidence and will typically exercise that discretion in accordance with *Ladd v. Marshall* principles.

34. The Applicant’s written submissions in support of the present application appear to suggest (paragraph 32) that the Lieutenant Bailiff was incorrect to hold that the Putative Certificate was “available” at the hearing of the appeal. Any such contention would be untenable. On the material before us, the Putative Certificate was identified by Mr Ippolito in June 2022. It was accordingly available well before the hearing in the Court of Appeal. Although an application to have the document received was foreshadowed in correspondence in September 2022, and in the Applicant’s written submissions, no such application was made. Whilst the Putative Certificate was not “available” to the Court of Appeal – in the sense that the Applicant did not apply to have it admitted in evidence and the Court accordingly could not consider it – it was plainly available to the Applicant at that time.

35. Advocate Richardson explained to the Lieutenant Bailiff that no application had been made to have the Putative Certificate admitted because he did not, at the time, have the Sheikh’s affidavit and he only had an unsworn affidavit from Mr Ippolito. There are a number of difficulties with that explanation. First, Mr Ippolito’s affidavit, filed in the present proceedings, was sworn on 28 November 2022, more than a week before the date of the Court of Appeal hearing. Second, the evidence does not disclose why, when the document had been discovered in June 2022, Mr Ippolito swore his affidavit only in November. Third, if an

affidavit from the Sheikh was considered necessary to support the Putative Certificate, the evidence does not disclose why an affidavit was not obtained from him until June 2024.

36. The Lieutenant Bailiff was entitled to conclude that the Applicant, if it had exercised reasonable diligence, would have been in a position to make an application to the Court of Appeal to have the Putative Certificate admitted and to advance any argument which could properly have been advanced under reference to that document. Indeed, on the material before us, we regard the contrary contention as unarguable.
37. The Applicant's contention that the Lieutenant Bailiff erred in holding that any question of whether or not there was or would be some "grave injustice" to the Applicant if it were not permitted to relitigate the validity of the Trust Declaration "did not begin to arise" is equally unarguable. It is said that it would be an injustice "not to allow the Company to be saved". The difficulty for the Applicant is that matters are not at large. The barrier to re-litigating an issue which could and should have been raised in previous proceedings itself reflects principles of justice to which the law requires the Court to give effect.
38. Ultimately, we need not rest our conclusion that Ground 1 has no real prospects of success on any of these considerations. Even if there were to be no barrier to the present action arising from estoppel, this application would face a fundamental difficulty on the merits. The Applicant's written submissions in support of this Ground of Appeal contend that there is "a point of surrounding fact warranting further investigation by the Court" but do not identify what that "point of fact" is or might be. The submissions go on to quote passages from the submissions made to the Lieutenant Bailiff, in particular passages where Advocate Richardson supported the contention that there was a possibility of further evidence emerging by reference to the history in this case of documents (presumably the Trust Declaration and the Putative Certificate) being found in drawers and IT systems. The submissions conclude by stating baldly that a full hearing would "clarify any 'factual dispute or uncertainty'."
39. These wholly generic submissions do not explain or specify what facts, or what factual issue, could arise which would affect the Lieutenant Bailiff's conclusion that the Putative Certificate, on its face, cannot be a certificate of solvency which would support the Trust Declaration under section 303 of the Companies Law. The Applicant's written submissions do not articulate any challenge to the law articulated by the Court of Appeal in the previous proceedings. We must therefore proceed on the basis that the legal position set out at paragraph 33 of the Court's judgment, which we have quoted at paragraph 9 above, is sound. The Putative Certificate post-dates the Trust Declaration and, accordingly, would not satisfy the statutory requirements as explained in that passage. Even if the Putative Certificate were taken to be evidence that the third Respondent was, as a matter of fact, solvent at or around the relevant date, the Court of Appeal held in that part of its judgment that an inquiry into the factual solvency of the company is not a relevant answer to the absence of the statutory certificate required by section 303 of the Companies Law. The Lieutenant Bailiff was accordingly entitled – indeed bound - to conclude that the Putative Certificate cannot be a statutory certificate in terms of that section.
40. We accordingly do not consider that Ground of Appeal 1 has any real prospect of success.

Ground of Appeal 2

41. Ground of Appeal 2 is to the effect that the hearing before the Lieutenant Bailiff was unfair. The Applicant contends that the Lieutenant Bailiff had formed a pre-conceived view of the matter, was actually or apparently biased against the Applicant, entered into the arena and did not give the Applicant a fair trial or a fair opportunity to present its case. The Applicant states that the Lieutenant Bailiff interrupted Advocate Richardson over eighty times during a period of 101 minutes, whereas she interrupted Advocate Lyall around nine times during a period of

48 minutes. Whilst the Applicant accepts that in modern litigation it is to be anticipated that the court will form some initial view of the relative strengths of the parties' arguments, it contends that the Lieutenant Bailiff's "interruptions, comments, attitude and borderline cross-examination" of Advocate Richardson far exceeded the boundaries of an "initial view". The Applicant alleges that the Lieutenant Bailiff was not open to that initial view being displaced; and that this would give rise to a reasonable perception by a fair minded and informed observer that she had a predetermined view of the case.

42. The Applicant refers to exchanges between the Lieutenant Bailiff and Advocate Richardson about the Sheikh's affidavit (including comments by the Lieutenant Bailiff expressing scepticism about the Sheikh's command of the English language) to support a contention of apparent bias and want of judicial impartiality. The Applicant relies on *Simon v. The Committee for Health and Social Care, States of Guernsey* [2022] CoA 532 for the relevant test and refers to a number of features of the hearing to contend that the fair minded and informed observer would conclude that there was a real possibility of bias. Further, the Applicant contends, under reference to *Jones v. National Coal Board* [1957] 2 QB 55 that the Lieutenant Bailiff "entered the arena", participating in and interfering with the conduct of the Applicant's case excessively and in a way which compromised the fairness of the hearing. Her interventions, comments, assertions and conduct, so it is said, went far beyond case management and/or clarification. It is said that she effectively involved herself in the challenge or presentation of the case to such an extent as to create the appearance of bias and absence of impartiality. It is said that her interruptions of Advocate Richardson hindered his ability to present the Applicant's case effectively and persuasively.
43. The Applicant was, it goes without saying, entitled to a fair hearing before the Lieutenant Bailiff regardless of the merits of its substantive position. If Ground of Appeal 2 were to be well-founded, it would be necessary to grant leave to appeal even though we have concluded that Ground of Appeal 1 has no real prospects of success. For the following reasons, we have concluded that Ground of Appeal 2 is not well-founded and that we should refuse leave on that Ground also.
44. It is evident from the transcript that the Lieutenant Bailiff had read the papers carefully in advance. She had identified the key issues and had formed a preliminary view adverse to the Applicant's position. She cut short Advocate Lyall's submissions to give her own summary of the contentions which she understood the Respondents to be advancing. Once Advocate Lyall had confirmed that (with one addition) the Lieutenant Bailiff had correctly understood his position, she invited submissions from Advocate Richardson. From the outset the Lieutenant Bailiff made no secret of her scepticism about the Applicant's position. The submissions proceeded by way of a robust and lengthy dialogue between judge and advocate. During that exchange the Lieutenant Bailiff pressed Advocate Richardson on every point. At some points, her approach could fairly be described as brusque, though those passages require to be put in the context of exchanges which were neutral in tone.
45. It does not follow that the Applicant did not receive a fair hearing. In the forensic tradition which Guernsey shares with the jurisdictions of the United Kingdom, judges are not expected to sit mute during advocates' submissions. Whilst practice varies from judge to judge, that tradition sanctions – and, indeed, encourages – disclosure of the judge's thinking. The professional advocate generally welcomes this since it enables the advocate to seek to address any concerns which the judge may have. Further, as the Applicant acknowledges, modern practice encourages a proactive approach to case management. It is not, in that context, a legitimate criticism that a judge has, through advance reading, formed views about the core issues in the case and the respective merits of the parties' contentions. As the hearing proceeds, judges may react to counsel's submissions. Expressions of scepticism, or even of disagreement with the submissions of counsel – and a robust approach to the management of a hearing to make sure that the essential issues are addressed - are not indicative of bias, unless

the judge conveys an unwillingness to be persuaded or does not allow the litigant a fair opportunity to set out its position on the critical issues.

46. An oral hearing involves a dynamic exchange between advocate and judge. In the present case, there was a lengthy exchange between the Lieutenant Bailiff and Advocate Richardson. It would, in our view, be wrong in principle to focus on particular passages in isolation from the hearing as a whole.
47. It is unsurprising that the Lieutenant Bailiff had formed an initial view that the Applicant's case faced serious difficulties. The Applicant was seeking to relitigate the very point about the validity of the Trust Declaration which had been decided in the previous case. There were obvious estoppel issues. The previous case had foundered because there was no certificate of solvency as required by section 303 of the Companies Law. The Applicant now put forward the Putative Certificate. Yet the Applicant itself had told the Court of Appeal in the previous proceedings that the Putative Certificate did not relate to the Trust Declaration and that no Trust Declaration certificate of solvency had been found. There was an apparent change of position for which the pleadings and the affidavit evidence did not provide an explanation.
48. The Lieutenant Bailiff conducted the hearing in light of that initial impression of the case. At an early stage she identified the issues which she considered required to be addressed. She disclosed her thinking to Advocate Richardson both at the outset and throughout the hearing. In the course of the hearing, she canvassed with Advocate Richardson the issues which arose and – critically - gave him an opportunity to address her concerns. Although Advocate Richardson's submissions on the various points which she raised with him were often short, the audiotape does not suggest that he was discomfited by the way in which the Lieutenant Bailiff was approaching the hearing or that he was unable to make, or was prevented from making, fuller submissions if he had wished to do so or could properly have done so. Indeed, the written submissions in support of this Ground of Appeal do not identify *any* contention of fact or law which Advocate Richardson would have wished to advance and which he did not advance during the course of the hearing.
49. Against that background, we address the specific points advanced in the Applicant's written submissions.

Adverse comments regarding the Sheikh's affidavit.

50. At an early point in the submissions, Advocate Richardson took the Lieutenant Bailiff to the Sheikh's affidavit. The Lieutenant Bailiff sought information about the Sheikh's nationality and residence and asked whether he spoke English. She stated that she had concerns about the affidavit, inasmuch as it was written in legal language and contained things which might not be expected even from a native speaker. The tone in which she asked those questions clearly communicated scepticism. She stated that she was "just wondering a bit" whether she should accept the Sheikh's affidavit without cross-examination. The Applicant, in its written submissions, contends that this passage indicates a predisposition towards the Respondents' version of events, which gave rise to an appearance of bias and lack of judicial impartiality.
51. Having considered the whole of the relevant passage, we do not consider this to be a fair criticism. We have already described the Sheikh's affidavit. The Lieutenant Bailiff had legitimate questions about its provenance and value. In response, Advocate Richardson pointed out that the affidavit had been sworn and filed, and that no objection had been taken to it. Following further exchanges, during which Advocate Richardson further pointed out that no affidavit had been filed in rebuttal of the Sheikh and that there had been no application to cross-examine, the Lieutenant Bailiff accepted the position:

“You have fairly said at the moment that ‘In fact they are not concerns that can actually concern the court today because they are points that are not being taken and it is a summary judgment application.’ and so I think we can move on from there.

52. The exchange between judge and advocate then proceeded to focus on the content of the affidavit. The whole passage suggests that, far from having a closed mind, the Lieutenant Bailiff was open to being persuaded (and, indeed, was persuaded) to depart from her initial view, even though that view had been expressed robustly.

Preconception

53. The Applicant rightly accepts that, in modern practice, it is inevitable, intended and efficient, that a judge, who will have read into the case in advance, will have formed an initial view of the relative strengths of the parties’ arguments. The Applicant contends that the Lieutenant Bailiff’s approach “far exceeds” the stating of “an initial view”. It is true that, at the outset and in the course of the hearing, the Lieutenant Bailiff expressed views on the issues. Whilst some judges would have carefully qualified such observations to make clear that the views being expressed were “preliminary” or “initial”, we do not consider that the failure to do this is, of itself, indicative of a closed mind. The real question is whether, whilst expressing the views which she did, the Lieutenant Bailiff remained open to persuasion. A consideration of the hearing as a whole suggests that she was. We have already referred to the way in which she approached the Sheikh’s affidavit. There are lengthy passages of the hearing during which she was clearly attending to Advocate Richardson’s submissions, albeit that she was also testing them. And she appears to have been at pains to ensure that she had Advocate Richardson’s submissions on the critical issues in the case. For example, at pages 38 and 39 of the transcript, she is recorded as inviting him to elaborate on his submission that the Putative Certificate was not reasonably available at the time of the previous proceedings and the following passages disclose her proactively seeking to elicit and clarify the points upon which Advocate Richardson rested that submission.

Entering into the arena

54. The Applicant relies on *Jones v. National Coal Board* [1957] 2 QB 55 to support a criticism of the judge’s interventionist approach to the hearing. *Jones* was concerned with judicial intervention in the course of evidence. The dicta in that case cannot be applied, without modification, to submissions from counsel. In our tradition, this may often involve an active dialogue between judge and advocate. There is, of course, scope for different judicial approaches. Some judges will prefer to allow counsel to develop their argument at length. Others may take a more interventionist approach. The same judge may approach different hearings in different ways. It is not unusual for a judge, during an oral hearing, to test counsel’s arguments, and to put to counsel – sometimes robustly – difficulties with the position which counsel is advancing, whether those be difficulties that the judge identifies, or points which have been raised by the other side. Whilst the Lieutenant Bailiff took an interventionist approach to the hearing before her in this case, that does not justify the conclusion that the hearing was unfair, unless the Applicant did not have a fair opportunity to make submissions on the critical issues which the judge would have to decide.

Interruptions

55. The Applicant states that during the hearing Advocate Richardson was “interrupted” by the Lieutenant Bailiff on around eighty occasions. A contrast is drawn with the number of interruptions during Advocate Lyall’s submissions.
56. The approach which the Lieutenant Bailiff took to the respective submissions of the two counsel was clearly conditioned by her pre-reading of the case. Nothing, in our view, can be

taken from the contrast between the number of “interruptions”. In fact, Advocate Lyall’s opening submissions were cut short completely by the Lieutenant Bailiff. That was a legitimate approach to the efficient management of a hearing in the circumstances of this case.

57. We are not convinced that every intervention by the Lieutenant Bailiff should fairly be characterised as an “interruption”. Whilst there were points during the hearing the Lieutenant Bailiff does appear to have interrupted Advocate Richardson, there were also lengthy passages where judge and counsel were apparently in dialogue without over speaking. And the interruptions included interventions apparently calculated to clarify Advocate Richardson’s position.
58. The critical question is whether, in the course of the hearing, Advocate Richardson was able to advance the submissions which he wished to advance on the critical issues. Our impression that he was is confirmed by the fact that the Applicant’s written submissions identify no factual or legal submission which Advocate Richardson was inhibited or prevented from advancing. We illustrate the point in the next section, where we address the specific complaint that the Applicant was not allowed to present its case or develop its argument.

Not allowing the Plaintiff to present case or develop its argument

59. The Applicant points to two specific passages in the transcript under this head. The first is a passage at pages 7C-D where Advocate Richardson states: “Can I just finish this point because it is important”. The written submission contends that the Lieutenant Bailiff “again interrupts him” not allowing for a fair opportunity to address argument on the point. This criticism is, in our view, unwarranted. The passage in question appears during the exchange about the Sheikh’s affidavit. The transcript reads as follows:

“ADVOCATE RICHARDSON: Can I just finish this point because it is important, in my submission, because it leads on to another point? So the affidavit was filed and served. No affidavit was filed in rebuttal of those particular paragraphs and furthermore there was and has been no application to cross-examine –

LIEUTENANT BAILIFF MARSHALL: No, quite.

ADVOCATE RICHARDSON: - the deponent if those paragraphs [were going to?] be challenged and, madam, I will not take you to the reference but there was an implicit criticism of the appellants in the Court of Appeal judgment for not taking that cause of action with an unchallenged affidavit from Miss or Mrs Harris. The reference for that is in the Court of appeal judgment in paragraph 49 which is at page 26 in volume A. I am sorry, it is tab 5. So you see in paragraph 48 if you turn the page there –

LIEUTENANT BAILIFF MARSHALL: Miss Harris is ... that is the liquidator, is it not?

ADVOCATE RICHARDSON: Sorry, I do not know if it is Miss or Mrs Harris –

LIEUTENANT BAILIFF MARSHALL: Yes.

ADVOCATE RICHARDSON: So my apologies if I am ... so you can see in paragraph 48 the Court of Appeal referred to an extract from the affidavit which is obviously [inaudible] did not agree with but then in 49 say, ‘It was accepted that the hearing [inaudible] the appellant [inaudible] responded to Miss Harris’s affidavit and also to have her cross-examined,’ and we have exactly the same position here where Sheikh Al Jaber has put in that affidavit with very clear factual evidence as to the nature of the certificate and its effect and, as with Miss Harris’ affidavit in the Court of Appeal [and judge?] before you, that he not been recorded, nor has he been required to attend for cross-examination.”

This passage discloses a number of relevant points. First, Advocate Richardson insisted on being allowed to “finish this point” and the Lieutenant Bailiff allowed him to do so. Secondly, the further “interruption” which is said to have prevented a fair opportunity to address

argument was an expression of acknowledgment or agreement (“No quite”). Thirdly, that “interruption” clearly did not put Advocate Richardson off his stride. Indeed he developed the point further and, as we have already observed, the Lieutenant Bailiff was persuaded by his submissions to depart from her initial reaction to the affidavit.

60. The other “interruption” of which specific complaint is made is at page 32E of the transcript, where Advocate Richardson states: “I have not finished the submission”. Again, his statement has to be put in its context. It appears at a point in the submission where the Lieutenant Bailiff is discussing with Advocate Richardson the question of whether the Putative Certificate could satisfy the requirements of section 303 of the Companies Law in respect of the Trust Declaration.

“ADVOCATE RICHARDSON: ... As I have said before, there is no prescribed form, sorry -

LIEUTENANT BAILIFF MARSHALL: No, that is right, that is fair.

ADVOCATE RICHARDSON: I think, with respect my submission [inaudible]. So if one looks at section 303(4)(a) -

LIEUTENANT BAILIFF MARSHALL: I know, but the whole thing ... looking at it, you cannot just say, ‘This is a document that says the company is solvent. I pick that paragraph out and therefore it could be a solvency certificate’ –

ADVOCATE RICHARDSON: I have not finished the submission.

LIEUTENANT BAILIFF MARSHALL: All right. In that case, I have looked at paragraph ... surprisingly –

ADVOCATE RICHARDSON: [Inaudible] evidence that I will take you to –

LIEUTENANT BAILIFF MARSHALL: Surprisingly enough I had looked at paragraph 40. You want me to look at that [inaudible]:

‘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.’

Yes. Where is the transaction document?

ADVOCATE RICHARDSON: That is the trust deed.

LIEUTENANT BAILIFF MARSHALL: Is it?

ADVOCATE RICHARDSON: Yes.

LIEUTENANT BAILIFF MARSHALL: How do I get that?

ADVOCATE RICHARDSON: If you go to page 1019.

LIEUTENANT BAILIFF MARSHALL: 1019, right.

ADVOCATE RICHARDSON: There is a letter to Sheikh al Jaber from Mr Ippolito describing the –

LIEUTENANT BAILIFF MARSHALL: This is a letter of 2021.

ADVOCATE RICHARDSON: Yes. September 20th 2021.

LIEUTENANT BAILIFF MARSHALL: Right, yes.

ADVOCATE RICHARDSON: Paraphrasing it, there was a restructuring and as part of the restructuring you will see in the final paragraph –

LIEUTENANT BAILIFF MARSHALL: This document itself was in the original proceedings because I have seen it before. Yes, so we have already had that, right, all right.

ADVOCATE RICHARDSON: The question you asked me was, ‘How do I get what the transaction [inaudible]?’ and I am answering that.

LIEUTENANT BAILIFF MARSHALL: All right, righto.

ADVOCATE RICHARDSON: I am not relying on this document as a basis for reopening the case directly –

LIEUTENANT BAILIFF MARSHALL: No, right.

ADVOCATE RICHARDSON: - but it does obviously form part of the evidence.”

61. The exchange then continued, with Advocate Richardson advancing a submission, under reference to Mr Ippolito’s letter, that “there is clearly matters which require investigation ... We say ‘It is the restructuring including the trust deed and that is what the directors certificate relates to.’” After further exchanges as to what the certificate related to, at page 36, Advocate Richardson returned to what he described as a “pathway” through which the Applicant could “get to section 303 and compliance with the Companies Law”. The Lieutenant Bailiff responded by saying:

“All right. So you basically say that, and I get your point, ‘There is no form that is actually required of this.’ Right. So what are you going to take me through and any further points in relation to the actual document itself that you say, ‘Show how it complies with 303’?”

Thus prompted by the Lieutenant Bailiff, Advocate Richardson then proceeded to make submissions (recorded over two pages) seeking to advance a submission that the Putative Certificate did indeed comply with the requirements of section 303. This included a lengthy discussion with the Lieutenant Bailiff about the key question of whether the certificate required to precede the distribution, during which Advocate Richardson advanced a submission (not repeated in the Grounds of Appeal or submissions to us) that the two documents had only to be “sufficiently contemporaneous” and that this raised a question of fact.

62. This passage likewise discloses a number of relevant features. The first is that the interruption of which specific complaint is made did not deter Advocate Richardson from making clear to the Lieutenant Bailiff that he had not finished his submission. The second is that Advocate Richardson proceeded, firmly but courteously, to continue with his submission, addressing first (as an effective advocate would) the issue which was clearly (and legitimately) troubling the Lieutenant Bailiff as to the basis upon which he asserted that the Putative Certificate could support the Trust Declaration – a matter upon which no light was cast by the Sheikh’s affidavit. The third is that the Lieutenant Bailiff accepted his point that section 303 does not require a specific form of certificate and specifically invited him to show her how he contended that the document complied with the requirements of section 303. Fourth, Advocate Richardson then took up that offer, going through the requirements in turn and advancing his submissions on them.

Bias

63. The Applicant articulates accurately the test for apparent bias: “The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”. The hypothetical observer is “not unduly sensitive or suspicious”, but equally is not complacent, and will be informed about the relevant context. In the present case, as we have observed, at the outset of the hearing, and in the course of exchanges with counsel, stated views about the issues in the case. But the question is whether the fair-minded and informed observer would conclude from those statements, and from the way that the Lieutenant Bailiff conducted the hearing generally, that there was a real possibility that she was biased.
64. The hypothetical observer would be well aware of the forensic tradition which we have already described. Specifically, that observer would be aware that it is legitimate for a judge to read into the case and to form an initial view and that it is entirely acceptable for a judge to disclose his or her thinking to counsel both at the outset and during the hearing. The observer would understand that judges may test and challenge the submissions of counsel and to do so robustly; and that judges, by virtue of their training and experience, are used to re-assessing preliminary or initial views in light of further information or argument.

65. The hypothetical observer would also be aware of the background circumstances of this case which the judge would likely have noted when reading into the case. Against that background, the fair-minded and informed observer would understand that the judge would reasonably come to the hearing with a number of questions and concerns about the Applicant's position, which the Applicant would require to address and allay. The fair-minded and informed observer would also appreciate that it would be wrong to take particular passages in the hearing out of context. The observer would note, for example, that, after initial scepticism about the Sheikh's affidavit, the Lieutenant Bailiff listened to Advocate Richardson's submissions and accepted that she should take it at face value. The observer would also observe that, as we have noted, there were points during the hearing when the Lieutenant Bailiff specifically invited Advocate Richardson to amplify his submissions.
66. The allegation of apparent bias is founded on the specific allegations about the way that the Lieutenant Bailiff conducted the hearing, with each of which we have already dealt. We have also considered the hearing in the round. For all the reasons which we have given in relation to those specific allegations, as well as these additional reasons, we reject the allegation of apparent bias.
67. We accordingly refuse leave to appeal.