

THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2024/0011

(On appeal from the Commercial Division)

BETWEEN:

CULGOA LIMITED

Appellant

and

BASEMENT INVESTMENTS LIMITED

Respondent

Before:

The Hon. Mde. Esco L. Henry
The Hon. Mde. Petra Nicola Byer

Justice of Appeal
Justice of Appeal

[Ag.]

The Hon. Mde. Gertel Thom

Justice of Appeal

[Ag.]

Appearances:

Ms. Elizabeth Jones, KC with her Ms. Arabella di Iorio and Mr. Paul Adams for the Appellant

Mr. David Brownbill, KC with him Mr. Nicholas Burkill, Ms. Catherine Harston and Ms. Holly Challenger for the Respondent

2025: October 16, 17;
2026: February 26.

Civil Appeal – Summary Judgment – Part 15 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2023 – Test for summary judgment – Real prospect of success – Distinction between legal theory and factual matrix – Equity – Express bare trusts – Beneficial ownership – The “three certainties” – Certainty of intention – Construction of transfer documents – Gratuitous transfers – Presumption of resulting trust – Appellate

interference – Exercise of judicial discretion – Whether decision was clearly or blatantly wrong – Standard for interfering with discretionary assessment on summary judgment

On 12th June 2023, Culgoa Limited (“Culgoa”) initiated a claim in the Commercial Division of the High Court of the Virgin Islands concerning a 2008 transfer of 144,470.65 shares in Egerton Capital European Fund Plc (“the Egerton Shares”) to Basement Investments Limited (“Basement”). Culgoa was the original legal and beneficial owner of these shares. Culgoa’s ultimate ownership was held through three BVI discretionary trusts established by the late Mrs. Stella Shawzin (“Stella”) for her three daughters. In 2008, a transfer of the Egerton Shares was executed from Culgoa to “Basement”, another company established by Stella unbeknownst to her three daughters. This transfer was facilitated by Mr. Nigel Hutchings, a trusted friend and advisor of Stella, who acted as a director for both Culgoa and Basement.

The transfer was effected through formal documentation, specifically the Egerton Transfer Form, which contained a declaration as to the basis upon which Basement received the shares. The form indicated that Basement was taking the shares “free and clear” but also noted that the shares were to be dealt with at the direction of Stella. Culgoa subsequently brought the claim in the Commercial Division, seeking declarations that Basement held the Egerton Shares on an express bare trust for Culgoa. They alleged that the transfer was an internal administrative move and that there was never an intention for Culgoa to divest its beneficial interest to Basement.

Basement applied for reverse summary judgment under Part 15 of the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023, contending that Culgoa had no real prospect of establishing that Basement held the shares on trust for it. Basement argued that the evidence, including emails from Mr. Hutchings and the actions of Stella, demonstrated that the parties treated the shares as belonging to Stella or her estate, rather than being held on trust for Culgoa. The learned judge, Wallbank J, granted summary judgment in favour of Basement, finding that while Culgoa’s legal theory was internally coherent, it was “fanciful” when viewed against the factual matrix which showed that Stella was and had always acted as the ultimate beneficial owner with the power to direct the transfer.

Culgoa appealed, arguing that the learned judge had erred in principle and had applied the summary judgment jurisdiction too robustly. Culgoa argued that the judge had impermissibly evaluated disputed factual matters, that the existence of the trust should have been left for determination at trial, and that the judge placed excessive weight on the wording of the transfer form. Culgoa further suggested that additional evidence might emerge through disclosure which could support its claim, and it sought to rely on equitable presumptions concerning gratuitous transfers and beneficial ownership.

Held: dismissing the appeal and awarding costs to the respondent to be assessed by a judge of the Commercial Court, that:

1. The decision of a judicial officer whether or not to grant an application for summary judgment is wholly within the remit of judicial discretion. This Court will not disturb

such a decision unless the appellant demonstrates that the learned judge committed a blatant error of principle or reached a conclusion that exceeded the generous ambit within which reasonable disagreement is possible. In the context of CPR Part 15, the judge is performing a balancing act, and provided the judge applied the correct legal test for "real prospect of success," the appellate court must accord significant weight to the lower court's assessment of the case's viability.

Dufour and Others v Helenair Corporation Ltd. and Others (1996) 52 WIR 188 followed; **Myett's Enterprises Limited v Leigh and ors** BVIHCVAP2020/0005 (delivered 19th May 2021, unreported) followed.

2. Pursuant to CPR Part 15, the court may give summary judgment if it considers that a party has "no real prospect" of succeeding. A "real" prospect must be one that is more than merely arguable; it must be realistic and not fanciful. The court is not required to accept assertions that are inherently incredible or contradicted by contemporaneous documents. To allow a matter to proceed to trial on the vague hope that "something might turn up" in the course of discovery or cross-examination is to invite speculation, which is contrary to the overriding objective of the CPR.

Part 15 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** applied; **Bank of Bermuda Limited v Pentium (BVI) Limited and anr** BVI Civil Appeal No. 14 of 2003 (delivered 20th September 2004, unreported) followed.

3. For an express trust to exist, the "three certainties" must be present: certainty of intention, certainty of subject matter, and certainty of objects. Certainty of intention requires an objective assessment of whether the transferor intended to create a trust relationship. The learned judge was correct to look beyond the "internally coherent" legal theory of Culgoa to the factual matrix. The necessary intention can be inferred from conduct, and the evidence regarding Stella's role as the directing mind, indicated that the transfer was intended to place the shares at her disposal, which is fundamentally inconsistent with the manifestation of a sufficient intention to create an express bare trust in favour of Culgoa.

Knight v Knight (1840) 49 ER 58 followed; **Pleshakov v Sky Streams Corporation** [2021] UKPC 15 followed.

4. In construing the Transfer Form, the court must perform a unitary exercise, considering the language used against the background knowledge available to the parties at the time. While the form stated that there was no change in beneficial ownership, it also indicated that Basement received the shares "free and clear" to be dealt with at the direction of Stella. Where a document is capable of two constructions, the court is entitled to prefer the construction consistent with business common sense. The notion that the shares were moved from one entity to another only for the second entity to hold them for the first "made no logical or business sense" in the context of the family's administrative reorganisation.

Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 followed.

5. A gratuitous transfer of legal title may raise a presumption of a resulting trust, suggesting the transferor did not intend to make a gift. However, this is a mere rule of evidence that is easily rebutted by direct evidence of the transferor's actual intention. Because Culgoa specifically pleaded an express bare trust, which requires a positive intention, the learned judge was entitled to conclude that the evidence of the parties' conduct and the "free and clear" language of the transfer form negated that specific cause of action. The Court found no basis to suggest that the beneficial interest remained with Culgoa as a matter of express intent.

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669 followed.

6. It is incumbent on a party responding to a summary judgment application to put forward sufficient evidence to show a real prospect of success. If a party relies on the possibility of further evidence emerging at trial, they must describe the nature of that evidence and its source; otherwise, they are merely playing for time. Culgoa failed to identify any tangible evidence that could be deployed at trial to rebut the contemporaneous documentation. Consequently, it was entirely open to the learned judge to exercise his discretion to stop the matter from proceeding on a case that had no reasonable prospect of success.

Korea National Insurance Corp v Allianz Global Corporate & Specialty AG [2007] EWCA Civ 1066 followed; **Bank of Bermuda Limited v Pentium (BVI) Limited and anr** BVI Civil Appeal No 14. of 2003 (delivered 20th September 2004, unreported) followed.

JUDGMENT

- [1] **BYER JA [Ag.]**: This appeal arises from a decision of Wallbank J ("the learned judge"), delivered on 18th April 2024, granting summary judgment ("the Judgment") in favour of Basement Investments Limited ("Basement") against Culgoa Limited ("Culgoa") pursuant to Part 15 of the **Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023** ("the CPR").
- [2] The underlying claim, filed on 12th June 2023 in the Commercial Division of the High Court of the Virgin Islands, concerned the transfer of 144,470.65 shares ("the Egerton Shares") in Egerton Capital European Fund Plc ("Egerton") from Culgoa to Basement (the "Egerton Transfer"). Culgoa sought declarations that Basement

held the shares as bare trustee, an account of its dealings, equitable compensation for any shortfall, and costs (“the express trust claim”).

- [3] Culgoa and Basement are both companies incorporated in the British Virgin Islands (“BVI”). Culgoa is owned (through a nominee) by the trustees of three discretionary trusts governed by BVI law, settled by the late Mrs. Stella Shawzin (“Stella”) for the benefit of herself, her three daughters, and their respective issue. At the material time, Basement was owned by nominee companies for Stella and later settled by her into a Jersey law discretionary trust known as the Carastel Trust.
- [4] In or around 2008, Mr. Nigel Hutchings, a director of both companies, executed the Egerton Transfer from Culgoa to Basement. It was alleged and pleaded that this transfer occurred without the knowledge or approval of Culgoa’s other director, Cordico Management AG, or the trustees of the underlying BVI trusts. Indeed, in the submissions filed by Culgoa in support of the appeal, they made it clear that since Culgoa was the legal and beneficial owner of the Egerton shares before the Egerton transfer and there being no change in the beneficial ownership of the Egerton shares, that it must have therefore followed that Basement took the shares as a bare trustee for Culgoa under an express bare trust.
- [5] Basement, disputing this claim, applied for summary judgment on the basis that Culgoa had no real prospect of establishing that Basement held the shares on trust for it. The learned judge accepted that submission and entered judgment for Basement, with costs.
- [6] The learned judge’s findings in relation to the summary judgment were that, Culgoa Limited, had no real prospect of succeeding on its claim relating to the transfer of the Egerton Shares. Based on the contents of the evidence before the Court, the learned judge found that Culgoa had no realistic prospect of

establishing that Basement either took the Egerton Shares on trust for Culgoa or currently held those shares on trust for Culgoa.

- [7] The learned judge therefore found that there was no triable issue, emphasising that even if the matter proceeded to trial, the outcome would inevitably be the same. The learned judge, in considering that Culgoa's position rested primarily on a legal argument, which although the learned judge accepted was internally coherent and attractive, he ultimately found that it could not succeed on the facts, as the broader factual matrix comprising the pleadings and the evidence did not support the existence of any express trust over the Egerton Shares.
- [8] The learned judge in fact noted that while the legal submissions of Culgoa were flawless in theory, he could not properly consider the legal argument in isolation. The appellant's argument as explored by the lower court was that, notwithstanding the transfer of the Egerton shares, beneficial ownership never left Culgoa, the transaction having given rise to an implied or resulting trust in its favour or being otherwise ineffective and liable to be unwound. The learned judge accepted that while this submission was legally coherent, it faced fundamental limitations due to the absence of supporting evidence. The argument proceeded on legal principle alone and could not withstand the wider factual matrix, especially, as on the evidence, Stella was treated as the ultimate beneficial owner of Culgoa with authority to effect the transfer; Basement held the monies for its own account and not on trust; and the intended benefit was to be settled in a separate trust for only one of the daughters to the exclusion of the other two.
- [9] Indeed, any determination would have required the consideration of both the law and the underlying factual evidence, the latter of which did not sustain Culgoa's case. The learned judge further found that, in spite of his expressed personal reluctance about the outcome, acknowledging that, on a broader view of fairness, the inability to unwind the transfer might result in some injustice to those behind Culgoa, he emphasised that such personal views were irrelevant in the face of the

limitation regime, which served important public policy objectives, including certainty in commercial transactions and civil affairs.

[10] For these reasons, despite the outcome being undesirable from the learned judge's personal perspective, he concluded that he was bound to dismiss the claim and urged the parties to move forward and put the matter behind them.

[11] Dissatisfied with the finding of the learned judge, Culgoa filed a notice of Appeal on 9th July 2024, asking this court to set aside the orders of the learned judge and to order that Basement pay Culgoa's costs of the summary judgment hearing and on this appeal.

[12] In furtherance of the appeal, Culgoa filed an application on 8th April 2025 seeking: (i) leave to amend its claim form and statement of claim, (ii) leave to amend its notice of appeal, (iii) permission to adduce fresh evidence, and (iv) permission to rely on supplemental submissions, if necessary.

[13] The application came before this Court for hearing on 16th October 2025, before the full court, and the following orders were made:

- (1) Culgoa's application to amend its Claim Form and Statement of Claim filed on 12 June 2023 was refused.
- (2) Culgoa's application to amend its Notice of Appeal filed on 9 July 2024 was refused.
- (3) Culgoa's application to adduce fresh evidence on appeal, including in support of its proposed amendments to the Claim Form and Statement of Claim, was refused.
- (4) Culgoa's application to rely on paragraph 47 of its skeleton arguments as additional written submissions on the substantive appeal fell away.
- (5) The costs of this application were to be costs in the appeal.

[14] The Court indicated that its full reasons were to be provided subsequently.

Grounds of Appeal

[15] On the notice of appeal, Culgoa advanced two main grounds of appeal:

- (1) Whether the learned judge erred in properly applying the test of **Bank of Bermuda Limited v Pentium (BVI) Limited**¹ in granting summary judgment in favour of Basement.
- (2) Whether the learned judge, erred in concluding that the claim was fanciful or stood no reasonable prospect of success at trial and in doing so:
 - (a) misconstrued evidence concerning Stella's beneficial ownership;
 - (b) treated the transfer form ("Transfer Form") as conclusively transferring beneficial title;
 - (c) placed undue weight on the statement [in the Transfer Form] that Basement took the shares "on its own behalf";
 - (d) making unsupported findings about Stella's intentions;
 - (e) failed to apply the principle that beneficial title does not ordinarily pass on a gratuitous transfer; and overlooked the likelihood that additional relevant evidence might emerge at trial.

[16] At the hearing of the appeal on 16th October 2025, Culgoa's counsel indicated to the court that Culgoa would no longer be pursuing the argument against the findings of fact made by the learned judge in relation to the intentions of Stella in the entire transaction.

[17] That being said, I need to say from the outset that when the grounds of appeal were in fact considered and the submissions were advanced by both sides in

¹ BVI Civil Appeal No 14. of 2003 (delivered 20th September 2004, unreported) at paragraph 18.

relation to them, it became clear to me that the two grounds of appeal were inextricably linked in that the thrust of Culgoa's arguments, even though seemingly two-fold, morphed into one fundamental ground. The argument raised is, that the learned judge had erred in granting judgment in favour of Basement and that when he did so, he failed to appreciate that the threshold for summary judgment had not been met on the factual matrix that was presented to him and he should have therefore permitted the claim to proceed to trial.

- [18] Thus, even though I appreciate that it was in fact one global complaint, I will present the arguments advanced by both Culgoa and Basement on the two stated grounds of appeal separately, but I will deal with them globally thereafter.

Ground 1: Whether the learned judge erred in properly applying the test of Bank of Bermuda Limited v Pentium (BVI) Limited in granting the Judgment in favour of the respondent.

Culgoa's Submissions

- [19] Culgoa's starting point was the learning contained in the case of **Myett's Enterprises Limited v Leigh and ors**,² which espoused the circumstances that empower this Court to interfere with the exercise of discretion by the court below. At paragraph 10 thereof the court in the **Myett** stated:

"It is well-settled that appellate courts are reluctant to interfere with the exercise of discretion by the court below. The guiding principles on appellate interference with the exercise of discretion by a trial judge or master are well-known and often cited by this Court. There is therefore no need for extensive reference to authorities. It is sufficient to refer to the guidance of Chief Justice Sir Vincent Floissac in **Dufour and Others v Helenair Corporation Ltd. and Others**³ which has been consistently applied by this Court:

² BVIHCVAP2020/0005 (delivered 19th May 2021, unreported) at paragraph 10.

³ (1996) 52 WIR 188.

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”⁴

- [20] In using these words, counsel argued that this appeal fell squarely within the guiding principles for appellate intervention and submitted that the learned judge was clearly wrong in principle by finding that the express trust claim did not require a trial and, having relied on incorrect assumptions, gave weight to certain factors when he was not entitled to do so.
- [21] It was argued that the learned judge's decision was inconsistent with his own observations during the hearing, where he described the result as 'right, but repulsive,' admitted that he 'did not like the result of this,' and recognised that it would result in 'those sitting behind Culgoa [being] done an injustice.' He further acknowledged that he had been persuaded by Culgoa's case 'up to half an hour ago,' and characterised Culgoa's legal argument as 'impeccable,' 'solid,' and 'flawless.'
- [22] Counsel found it therefore striking that, despite those observations, the learned judge nevertheless concluded that the case was not fit for trial. Given that he was persuaded by Culgoa's position until shortly before delivering judgment, counsel submitted that it was difficult to understand how he could at the same time have found that the case had no reasonable prospect of success.

⁴ Ibid [190]–[191].

[23] It was further submitted that, on an application for summary judgment, the learned judge descended too far into the role of a trial judge and sought to make findings as to important, disputed factual matters based on incomplete evidence. In so doing, counsel stated that the learned judge had preferred, Basement's version of events even though, on its face, that version implied a gross breach of fiduciary duty owed and potentially fraud by Mr. Hutchings, a common director of both companies.

[24] Culgoa submitted that the learned judge misapplied the principles governing summary determination and went on to rely on the dicta of Lord Briggs in the case of **Sagicor Bank Jamaica Limited v Taylor-Wright**,⁵ where he stated:

“Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary”.

[25] Having relied on the **Sagicor** authority, counsel argued that properly understood, the case makes clear that where the relief sought turns on the resolution of disputed factual issues or competing inferences from contemporaneous documents, the matter is generally unsuitable for summary disposal. In the present case, the remedies sought which depended on establishing the parties' intention, the nature of the transfer, and the status of beneficial ownership necessarily required factual exploration. Counsel contended that by nonetheless concluding that the claim was fanciful, the learned judge failed to appreciate that like the case of **Sagicor**, the case at bar mandated a more cautious approach and that these issues could only be resolved at trial.

[26] Counsel then went on to submit that, while the CPR permits the court, particularly the trial judge, to determine whether a matter requires a trial, the learned judge

⁵ [2018] UKPC 12.

misapplied those principles. Despite repeatedly acknowledging the strength and cogency of Culgoa's legal case, the learned judge nevertheless concluded that it had no realistic prospect of success, which in counsel's opinion constituted a clear misapplication of the principles governing summary judgment.

[27] Counsel submitted that, had the learned judge properly directed himself to the genuine issue for determination, he would have recognised that the matter could not appropriately be decided summarily, especially considering that the true crux of the case for Culgoa was whether Stella had been appointed as the beneficial owner of the Egerton Shares which for Culgoa was a factual determination that would have to be made in due course.

[28] However, it was argued that it was clear that the learned judge failed to consider on the pleadings and the evidence before him whether Culgoa had met the threshold of a case that should proceed to be determined on the facts at trial, but instead, engaged in a premature assessment of which case was more likely to succeed, which they maintained was a function reserved for the trial judge and not the judge on a summary judgment application.

[29] Counsel concluded that, by departing from the correct threshold test applicable to summary judgment, the learned judge erred in law and in principle. Accordingly, they argued that ground 1 of the appeal ought to be allowed.

Basement's Submissions

[30] In response, counsel for Basement, also placed reliance on the established principles that that an appellate court should exercise great restraint in interfering with a judge's discretionary assessment and nowhere more so than on a summary judgment application. They therefore contended, that in order for an appellate court to interfere with such an assessment, it had to be decisively demonstrated that the judge had plainly misapplied the law, taken into account irrelevant

considerations, or reached a conclusion outside the permissible ambit of reasonable disagreement.

[31] Basement contended, therefore, that this did not apply in the case at bar. They submitted that the learned judge correctly identified and applied the applicable test for summary judgment and properly exercised his discretion in granting judgment in its favour. It was contended that the learned judge faithfully followed the principles established in **Bank of Bermuda Ltd v Pentium (BVI) Ltd** and **Korea National Insurance Corp v Allianz Global Corporate & Specialty AG**,⁶ and correctly concluded that the appellant had failed to demonstrate a real prospect of success at trial.

[32] Basement argued, that Culgoa had adduced no credible or admissible evidence to support its contention that an express trust existed or was created upon the transfer of the Egerton shares to Basement. They submitted that, at the summary judgment stage, the learned judge, was required to consider whether the evidence before him was capable of establishing an intention underlying the transfer to Basement, and whether there was anything to indicate that Basement had taken the Egerton shares as an express bare trustee for Culgoa.

[33] In this regard, Basement contended that the sole document before the court being the actual Transfer Form, clearly reflected that the Egerton shares were transferred to Basement in its own right. Basement further maintained that, as Culgoa had failed to produce any contemporaneous records evidencing an intention to create a trust, such as resolutions, correspondence, financial statements, or agreements either before or after the transfer, the learned judge was wholly entitled to find that Culgoa had not met the threshold required for the matter to proceed to trial.

⁶ [2007] EWCA Civ 1066 at paragraph 14.

- [34] Basement further rejected Culgoa's contention that the evidence was incomplete and that there was a possibility of further evidence being produced on disclosure. Basement argued that references to any unproduced internal documents of Culgoa or the BVI trustees were speculative and immaterial to the pleaded issues and could not in any event have assisted Culgoa's case where there was no evidential basis to suggest that any formalities which were required to effect the transfer, had not been duly complied with, as argued by Culgoa.
- [35] Relying on the case of **Pleshakov v Sky Stream Corporation**,⁷ counsel for Basement submitted that the decisive question before the judge was whether on the evidence Culgoa had shown that there was an intention of any kind to create an express trust in favour of Culgoa. Culgoa having however failed to produce any evidence whether by way of documentation or surrounding circumstances to support this, the learned judge's decision was properly reasoned, supported by the evidence that was before him, and fell well within the generous ambit of judicial discretion.
- [36] Basement therefore submitted that there was no error of principle or misdirection that would justify appellate interference with the summary judgment determination.

Ground 2: Whether the learned judge, erred in concluding that the claim was fanciful or stood no reasonable prospect of success at trial; in doing so: (i) misconstrued evidence concerning Stella's beneficial ownership; (ii) treated the Transfer Form as conclusively transferring beneficial title; (iii) placed undue weight on the statement that Basement took the shares "on its own behalf" (iv) failed to apply the principle that beneficial title does not ordinarily pass on a gratuitous transfer; and (v) overlooked the likelihood that additional relevant evidence might emerge at trial.

Culgoa's Submissions

⁷ [2021] UKPC 15.

- [37] Culgoa maintained throughout its submissions on this ground that its claim was far from fanciful. It rested this argument on a simple and what they considered logical premise: (a) that they remained the beneficial owner of the Egerton Shares following their transfer to Basement, and (b) that Basement therefore held those shares in trust for them. The claim, based on this premise, it was submitted, therefore raised serious and genuine questions regarding the conduct of Mr. Hutchings, particularly his apparent unilateral decision to transfer a valuable asset without consideration or proper disclosure. The learned judge's own expression of discomfort and recognition of the 'injustice' of the result, it was said, underscored why this matter ought to have been examined at trial rather than dismissed summarily.
- [38] Further, counsel for Culgoa contended that given that the factual record was incomplete and with disclosure from Basement remaining outstanding, it was plainly premature to dispose of the claim at the summary stage. Indeed, in the submission of Culgoa, it was admitted that only through disclosure and oral evidence could the true nature of the transaction and Mr. Hutchings' role be properly assessed.
- [39] Culgoa therefore contended that the proper course should have been for the learned judge to allow the matter to proceed to trial, where the competing factual narratives could be explored and tested through witness examination and documentary evidence.
- [40] Having said this, learned counsel for Culgoa identified several erroneous findings made by the learned judge which enabled his conclusion that the claim was fanciful. Further, counsel submitted that even if the learned judge had correctly directed himself as to the applicable test, he was wrong to conclude that the case had no realistic prospect of success.

- [41] Culgoa therefore reiterated their primary position that Basement held the Egerton Shares on bare trust for them as confirmed by the express wording of the Egerton Transfer, which recorded that there was ‘no change in beneficial ownership.’
- [42] Counsel argued that this statement created a strong inference that the transfer was intended only to effect a change in legal title, leaving beneficial ownership with Culgoa. This interpretation, it was submitted, aligned with the presumption of a resulting trust which may arise upon a gratuitous transfer, as recognised in the case of **Westdeutsche Landesbank Girozentrale v Islington LBC**.⁸
- [43] Thus, Culgoa submitted that the competing explanation advanced by Basement that Culgoa had earlier executed a (unproduced) nominee agreement showing that they were in fact holding the shares for Stella, and that Basement thereafter acquired them beneficially was stated by Culgoa to be speculative, unsupported by evidence, and internally inconsistent. That account, counsel argued, clearly implied serious misconduct by Mr. Hutchings and was therefore not appropriate to be dealt with outside of a full evidential inquiry at trial.
- [44] Culgoa further argued that the learned judge erred in attaching determinative weight to the declaration in the Transfer Form⁹ and that Basement took the shares ‘on its own account.’¹⁰ Counsel submitted that this clause, was contextually contained in a portion of the Transfer Form that was intended to speak to and satisfy Irish regulatory requirements and was not inconsistent with the contemporaneous statement on the same form that there was ‘no change in beneficial ownership.’ When read together, those provisions, it was submitted, supported Culgoa’s position that beneficial ownership had in fact remained unchanged.

⁸ [1996] AC 669.

⁹ Hearing Bundle, Volume 4, Appendix 1, pages 10–17 (30th September 2025).

¹⁰ Hearing Bundle Volume 4, Appendix 1, page 14 (Declarations) (30th September 2025).

- [45] Culgoa also challenged the learned judge's observation that there had been 'no explanation' given for what essentially transpired, that is, a transfer that left beneficial ownership unchanged. Counsel submitted that the learned judge had misapplied the burden of proof: once the document on its face indicated that beneficial ownership remained vested in Culgoa, the evidential onus shifted to Basement to disprove that inference.
- [46] It was further contended that the learned judge overlooked plausible explanations consistent with Culgoa's case, including, that the Egerton Transfer formed part of an intended restructuring under which beneficial ownership would pass only after additional approvals or documentation were obtained but were never completed.
- [47] Culgoa also maintained that the learned judge erred in suggesting that the claim was statute-barred. It was argued that, insofar as any impropriety was concealed by Mr. Hutchings, section 25 of the **Limitation Ordinance 1991**¹¹ would postpone the application of any relevant limitation period. Thus, without disclosure, the extent of any concealment and the knowledge of Culgoa's other directors could not properly be determined on a summary basis.
- [48] In all circumstances, Culgoa submitted that the claim raised serious and triable issues concerning the intention behind the Egerton Transfer, the proper construction of its terms, and the conduct of Mr. Hutchings. These matters, it was said, required the scrutiny of a full trial.
- [49] In oral argument, learned King's Counsel reiterated much of what was contained in her written submissions. However, she did take the court through a thorough examination of the evidence that was before the learned judge which she contended clearly showed that there were fundamental issues which needed full investigation.

¹¹ Limitation Ordinance 1961 (Cap 43. , s 25.

- [50] Counsel submitted that the judge erred in concluding that the claim was fanciful, as the material before him raised clear triable issues on intention, the meaning and effect of the Transfer Form, the nature of the alleged gratuitous transfer, and the question of beneficial ownership.
- [51] In addressing intention, counsel relied specifically on the email exchanges between Mr Hutchings (Culgoa) and Mr. Sutton (Basement) surrounding the 2008 transfer.¹² She emphasised that these emails referenced further steps (a resolution by the Trustees of the BVI Trusts and a board resolution of Culgoa to appoint the Egerton Shares in favour of Stella) that were required to be undertaken, prepared or approved, giving the court the clear indication that the Transfer Form did not and could not embody the entire transaction. Counsel argued that these communications showed the parties understood the transfer as part of a multi-step arrangement, not as an immediate beneficial conveyance.
- [52] She submitted that this evidence, taken at its highest, raised a genuine factual dispute inappropriate for summary disposal.
- [53] Turning to the Transfer Form itself, counsel argued that the learned judge adopted an unduly literal construction by treating the statement that Basement took the shares 'on its own behalf' as determinative. She contended that, in light of the emails, the proper approach was to construe the form as simply transferring legal title only, with beneficial ownership to be settled upon completion of the additional contemplated steps.
- [54] Counsel maintained that the learned judge erred by isolating the form from the wider transactional context and by failing to acknowledge that Culgoa's argument on a contrary construction was, at minimum, arguable and that it had a realistic prospect of establishing that Basement held the Egerton Shares on a bare express trust for Culgoa.

¹² Appellant's Bundle for Interlocutory Appeal, Tab 11, 409 (e-copy) (filed 9th July 2025).

- [55] On the question of gratuitousness, counsel submitted that the learned judge again made premature findings. She argued that the same contemporaneous emails suggested the transfer was linked to a broader commercial arrangement and could not be assumed to be gratuitous simply because the form did not mention consideration.
- [56] Whether the transfer was gratuitous depended, she said, on evidence of the surrounding arrangement of another matter unsuitable for determination without a trial.
- [57] Finally, counsel argued that the learned judge wrongly treated beneficial ownership as conclusively passing with the Transfer Form. She submitted that the emails exchanged, viewed cumulatively, supported the inference that beneficial ownership was not intended to pass until the contemplated further steps were completed.
- [58] Counsel contended that by disregarding this material, the judge effectively resolved the factual dispute in Basement's favour, contrary to the principles governing summary judgment. In raising this, counsel suggested that the judge's approach overlooked the central, factual disputes arising directly from the contemporaneous correspondence. Once that evidence was properly considered, intention, construction, consideration, and beneficial ownership all raised triable issues requiring determination at trial.

Basement's Submissions

- [59] In response, the nub of the submissions for Basement was that the learned judge did not err in concluding that Culgoa's claim had no realistic prospect of success. The judge's findings, it was said, were fully supported by the evidence and by the application of orthodox legal principles.

[60] Counsel submitted that when the evidence that was before the learned judge is examined, it was clear that Stella was correctly treated as the beneficial owner by both Culgoa and Basement. In the submission of Basement, the learned judge was entitled to rely on the submitted documents that clearly documented all the relevant parties who were involved in the transfer process.

[61] Basement therefore contended that the construction of the Transfer Form adopted by the learned judge was entirely orthodox. The learned judge, it was submitted, properly applied the established principles of contractual interpretation as set out in **Rainy Sky SA v Kookmin Bank**¹³ where Lord Clarke of the Supreme Court of the United Kingdom stated that:

“The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other”

and as applied in the trust context in **Ong and others v Ping**¹⁴ which highlighted what considerations a court should assess, the court noted:

“49. In my view, once that submission is disposed of, Mr Ham’s case runs into difficulties. He still, however, has the point that a consideration of the terms of the settlement as signed invites the inference that, by signing it, Madam Lim intended to create a settlement whose trusts bit on nothing, because, despite Mr Hyde’s advice to her to complete Schedule 1, she had not done so. The question for the reasonable person tasked with determining what Madam Lim was up to when executing the settlement is whether (i) she intended to create a settlement with elaborate trusts that applied to nothing, or (ii) she intended its trusts to apply to the house. No third alternative was suggested.”

¹³ [2011] 1 WLR 2900 at paragraph 21.

¹⁴ [2017] EWCA Civ 2069 at paragraph 49.

[62] In considering the Transfer Form, the appropriate question, counsel argued, was whether the Transfer Form, read in its full context, disclosed an intention that Basement held the Egerton Shares on an express trust. The learned judge, it was said, correctly concluded that this did not, having considered the express statement on page 9 of the Transfer Form, which stated that:

“I/we declare that I am/we are applying for the shares on my own/our own behalf and that I am/we are entitled to the shares in respect of which this declaration is made and that I am/we are not currently resident or ordinarily resident in Ireland, and should I/we become resident in Ireland I will/we will so inform you, in writing, accordingly.”

[63] It was submitted that this evidence showed a consistent background demonstrating an intention that Basement took the shares beneficially, and in the absence of any contrary evidence from Culgoa suggesting the existence of an express trust, the learned judge was entitled to find that Culgoa could not prove what they had in fact pleaded in the in the claim form as filed.

[64] It was further submitted that Culgoa’s suggestions in the court below of any possible alternative purposes for the transfer, such as a phased restructuring or an incomplete transaction, were speculative, un-pleaded, and unsupported by evidence. The only contemporaneous explanation appearing on the Transfer Form described the transaction as ‘restructuring of affairs for family reasons’ with ‘no change of beneficial ownership.’ When asked to explain this statement, before the court below, Culgoa offered no clarification.¹⁵ Basement maintained that this failure to do so confirmed there was no other intended purpose for the transfer.

[65] Basement also contended that the learned judge correctly rejected Culgoa’s reliance on any presumption of resulting trust which was not pleaded in any event. While such a presumption may arise in rare cases of gratuitous transfer (**Westdeutsche Landesbank Girozentrale v Islington LBC; Gany Holdings**

¹⁵ Hearing Bundle, Volume 4, Further Information (in response to the Request dated 22nd June 2023), pages 19-21.

(PTC) SA v Khan et al (British Virgin Islands)),¹⁶ the evidence before the learned judge on the application for summary judgment overwhelmingly demonstrated that the transfer was intended to be beneficial. Moreover, Culgoa's pleaded case for an express bare trust was inconsistent with any reliance on a resulting trust.

[66] The statement in the Transfer Form that Basement was not acting as a trustee, counsel argued, was conclusive. It directly answered the question of whether his client was acting as an express bare trustee for Culgoa and the learned judge was entitled to give it determinative weight.

[67] It was also contended, that there was no basis to suggest that further evidence might emerge at trial that could have materially altered the judge's findings. Culgoa had identified no document or witness that could reasonably affect the conclusion reached below.

[68] In all the circumstances, Basement submitted that the learned judge correctly granted summary judgment. The claim was without merit, the evidence fully supported the findings, and there was no triable issue requiring the matter to proceed to trial.

Discussion

[69] The starting point for me on this appeal, as argued and as has been clearly recognised by both Culgoa and Basement, is the recognition that the decision of a judicial officer whether or not to grant an application for summary judgment is wholly within the remit of judicial discretion which will only be disturbed if the judicial officer committed a blatant error of principle and consequently got it plainly wrong.¹⁷

¹⁶ [2018] UKPC 21.

¹⁷ Dufour (n 4) 191.

[70] That being said, the nub of the entire complaint (in the round) against the finding of the learned judge is that he misinterpreted and misapplied the threshold test as set out in the authorities and granted summary judgment. It would therefore be prudent and appropriate to remind myself of what that test in fact is and how the same is applied.

[71] In the case of **The Bank of Bermuda Limited v Pentium (BVI) Limited**¹⁸ (the authority relied on by Culgoa herein) the court stated that:

“a judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment a defendant is not entitled without more, merely to say that in the course of time something might turn up that would render the claimant’s case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim.”¹⁹

[72] Indeed, this is also the principle extrapolated from the case of **Korea National Insurance Corporation v Allianz Global Corporate and Speciality AG**²⁰ At paragraph 14 Lord Justice Moore-Bick stated it thusly:

“[I]t is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up.”

[73] In the court below, it is clear to me that the judge appreciated what was required of him and did so appropriately. He was required to examine the evidence that was placed before him and the pleadings that were filed and determine whether there was anything that could substantiate the claim as pleaded and in particular with

¹⁸ BVI Civil App No. 14 of 2003 (Saunders JA as he then was).

¹⁹ Ibid [9].

²⁰ [2007] EWCA Civ 1066 at paragraph 14.

reference to the case at bar, whether Culgoa could establish or show that there was an intention on the part of Culgoa or even Stella to create an express bare trust. Indeed, in his extempore judgment the learned judge was at pains to reference and quote extensively from all the authorities accepted by both sides that encapsulate what is required by the court on considering an application for summary judgment by is unequivocal reference to the cases of **Myetts Enterprises v Leigh**,²¹ which stated that the court needed to consider the pleadings and the evidence that is before it, which proposition was reiterated in **Sagicor Bank Jamaica Ltd v Taylor Wright**.²²

- [74] Additionally, the learned judge noted that the court must also consider the response of the respondent and relied on the authorities of **Bank of Bermuda Bank v Pentium (BVI) Limited**²³ and **Korea National Insurance Corporate v Allianz Global Corporate and Specialty AG**.²⁴ Thus, when the approach of the learned judge is considered, it is clear, that the learned judge was apprised of the relevant and appropriate test.
- [75] That being said, it was therefore clear that the learned judge, having reaffirmed his understanding of the law of summary judgment and what was required, went on to extensively deal with the same to show the parameters of the threshold and how the court must consider the evidence that is adduced and whether there is any indication that there could possibly be any other evidence that would be forthcoming bearing in mind the claim as pleaded and filed.²⁵
- [76] Additionally, it must be noted that the question for the learned judge at the hearing of the application for summary judgment was simply this: had Culgoa on the pleadings, on their own case shown that there was sufficient to go to trial on the basis that there had been an intention to create an express trust.

²¹ Supra (n 2).

²² Supra (n 6).

²³ Supra (n 1).

²⁴ Supra (n 9).

²⁵ Interlocutory Appeal Bundle, page 170 (line 13) - 173 (line 22).

[77] Thus, the learned judge was required to consider on the totality of the evidence before him the foundational requirements for the creation of an express trust. These were definitively articulated in the Court of Chancery decision in **Knight v Knight**,²⁶ where Lord Langdale MR established that such a trust will only be recognised and enforced in equity if the so-called “three certainties” are satisfied. These are: (i) certainty of intention, (ii) certainty of subject matter, and (iii) certainty of objects. Certainty of intention requires that the original owner clearly intended that the asset be held on trust; certainty of subject matter demands that the asset comprising the trust is capable of being clearly identified; and certainty of objects requires that the beneficiaries are ascertainable. Once these certainties are established, the trust must then be properly constituted, which necessitates the formal transfer of the trust property to the intended trustee so as to vest legal title in that person(s). This position has further been elucidated by the Privy Council, in **Pleshakov v Sky Streams Corporation**²⁷ where Lord Sales in considering the position therein as to the creation of an express trust stated that:

“47. The Board agrees with Mr Levy’s submission that as a matter of law it was not necessary for the judge to determine whether or not there was an oral contractual agreement between Mr Pleshakov and the respondents in order to reach the conclusion that the SSC shares were held by the respondents on trust for Mr Pleshakov absolutely. The creation of an express trust, whether a bare trust or otherwise, does not require any form of contractual agreement between the settlor and the beneficiaries. As Mr Levy points out, trusts can be created (and often are created) by the unilateral act of the settlor without any involvement on the part of the beneficiaries. All that is required for the valid creation of a trust is the three certainties identified in Snell’s Equity, 34th ed, para 22-012, referred to at para 41 above. The issue in the present case is whether it has been established that the settlor (ie the respondents) intended to create a trust of their shares when they set up SSC.

48. As Mr Levy submits, in relation to establishing certainty of intention to create a trust neither a written trust instrument nor any formal language is required (this may be subject to formality requirements imposed by statute, but there are none in this case). Informal language can be

²⁶ (1840) 49 ER 58 (HL) 68.

²⁷ [2021] UKPC 15 at paragraphs 47 to 48.

sufficient and the necessary intention can be inferred from conduct: *Paul v Constance* [1977] 1 WLR 527, 531G (Scarman LJ); *Dhingra v Dhingra* (1999) 2 ITELR 262 (CA), 265d (Lindsay J); and *Ong v Ping* [2017] EWCA Civ 2069, para 58 (Sir Colin Rimer). As Megarry J said in *In re Kayford Ltd* [1975] 1 WLR 279, 282, “the question is whether in substance a sufficient intention to create a trust has been manifested.”

[78] Having considered the evidence that was before him and bearing in mind what he was required to determine, the learned judge made certain findings that assisted him in exercising his discretion to order summary judgment of which Culgoa has complained. I will take each of those complaints on those findings in turn to see whether the learned judge had plainly gotten it wrong to permit interference by this court.

That the Learned judge erred in concluding that the (relevant) “professionals considered Stella to be the beneficial owner of both the Claimant and the Defendant for the purposes of the meaning of” beneficial ownership” in that document .In fact there was evidence that relevant professionals involved recognised or considered that further steps (namely an appointment to Stella or the entry into a nominee arrangement) were required for that to be so, and there is no evidence that such steps were taken.

[79] It is clear from the pleaded case and the evidence before the court that the learned judge, in assessing whether what was before him was supportive of the claim, determined that there was no material to support even the semblance of the creation of an express bare trust. Indeed, in considering the learned judge’s assessment of the evidence before him, his determination was a culmination of the wholistic banding together of various circumstances.

[80] One such strand that provided the basis for the final decision was his finding of how the commercial professionals who were involved in the ultimate transaction dealt with and considered the actions of Stella in the transaction.

- [81] In this regard the learned judge would have had before him the affidavit evidence of directors of companies who were trust professionals who dealt with both the Egerton Shares and the manner of the transfer of those shares and how those shares at the time of the transfer were held.
- [82] It was these professionals and the documents that they had produced, with no demurrer by Culgoa as to their authenticity, which he found clearly showed that Basement had accepted the transfer of the Egerton shares in their own right. In particular he was persuaded that it was clear on the Transfer Form, which is central to the case of Culgoa, that the shares were in fact not only not being transferred to an external party but that, further and more importantly, that the beneficial owner at the time of the transfer was Stella with the available inference that she was therefore entitled to undertake transactions in relation to the same upon her sole direction.²⁸
- [83] In assessing this evidence, the learned judge clearly considered its import. He accepted the affidavit evidence which showed that pursuant to a sequence of events Stella assumed de facto ownership of the shares and thereafter made the ultimate decision to dispose of the same to Basement. Indeed, the learned judge came to this determination having considered all the evidence including that of Wayne Elliott's²⁹, whose evidence placed squarely before the court that there were many important questions that had to be answered in relation to the transaction leading to the transfer of the Egerton Shares. Indeed, it was for Culgoa to persuade the learned judge that having identified the anomalies that they say went to the heart of the pleaded case which then merited investigation at trial. However, it was apparent that they were unable to do so.

²⁸ Interlocutory Appeal Bundle, Second Affidavit of Conor Delaney (filed 9th July 2025) at pages 249–257, paragraphs 10 to 25.

²⁹ Wayne Elliott, "Affidavit of Wayne Phillip Elliott" (filed on 5th February 2024) pages 258-267 of the Appellant's Bundle.

[84] On the contrary, the learned judge quite rightly in my opinion, found that the anomalies raised were speculative and could not contradict the contemporaneous information that related to the direct actions of Stella and the Egerton Shares. It was this contemporaneous transactional history upon which the learned judge was entitled to rely. The learned judge in my opinion was required to and, considered that if the persons who were at the very heart of the transaction, accepted that the same had been done as it should have been done, and that they accepted that the transfer effected the transfer of both the legal and equitable title from Culgoa, then the ineluctable conclusion that the judge was entitled to come to, was that the pleadings and evidence disclosed no underlying intention at the time of transfer that Culgoa would retain the beneficial interest in the shares and therefore there could be no triable issue fit for trial.

In light of the evidence of the intention of such intended further steps, reaching firm conclusions that the transfer form was the document intended to pass beneficial title and that there was no other possible explanation for the transfer.

Placing unwarranted and excessive weight on the statement in the transfer form that the Defendant was taking the shares “on [its] own behalf.”

[85] The learned judge in his analysis of the import of the Transfer Form clearly took into consideration the contentions of Culgoa as to how the same should be construed when he noted, that the starting point has to be that a company must be considered to hold both the legal and beneficial title to its assets.³⁰ In fact, the learned judge further stated that if indeed this was the state of affairs that pertained with the case at bar, then it was a clear cut case that Culgoa was still the beneficial owner of the assets and that the Respondent was holding the shares on trust for Culgoa.³¹

³⁰ Interlocutory Appeal Bundle, transcript, at page 177 (lines 18-21).

³¹ Interlocutory Appeal Bundle, transcript, at page 177 (line 22) to page 178 (line 1).

- [86] However, as the learned judge was quite right to do, he then went on to consider whether the evidence supported this contention and the import of the Transfer Form formed an integral part of that equation.
- [87] Having determined that he was entitled to take into consideration the contemporaneous transactional history to support the lack of intention, the learned judge however went even further and looked to the documents themselves that had been produced at the time of the transaction then went on to consider whether the Transfer Form could have assisted Culgoa for the meaning that they sought to attach to it. In so doing the learned judge relied on the accepted principles of interpretation of documents as espoused in the seminal case of **Rainy Sky SA v Kookmin Bank** which has been accepted and applied by our own courts. That is; in construing a document it must be considered in a single wholistic manner in which the language is considered as against what a reasonable person with the relevant information would consider to have been meant by the parties. **“In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”** (my emphasis added).
- [88] However, to my mind this is not the approach that was advocated by Culgoa who sought to advance that any interpretation of the Transfer Form had to be achieved through an objective exercise as to whether a trust was formed. This they insisted, having relied on legal commentary by Snell, in the text Snell's Equity, had to be performed by an analysis of the words used and thereby deducing whether a trust had been created whether or not, that had been the ultimate intention.³²
- [89] With all due deference to learned counsel for Culgoa, I do not accept their submission and their criticism of the learned judge in his approach to the interpretation of the Transfer Form. Before the learned judge was clear

³² John McGhee (ed), *Snell's Equity* (35th edn, Sweet & Maxwell 2025) para 22-013.

evidence, and to a large part uncontroverted, that Stella (again rightly or wrongly) on the face of the transactions, dealt with the Egerton Shares as the beneficial owner- and whether that meant the Anti Money laundering (AML) definition of beneficial owner or the equitable definition of beneficial owner, she dealt with them in a manner that on the face of it she could so do and was answerable to no one or no entity.

[90] The Transfer Form upon which both sides relied although for obviously different reasons, stated that Basement received the Egerton Shares “free and clear” to be dealt with at the direction of Stella. In fact, the learned judge in considering the obvious meaning of the words contained in the Transfer Form within the context of a business transaction, found that if indeed the action of removing the Egerton Shares from Culgoa where they had been part of an operative trust of which Stella was the settlor, to be then transferred to another entity who then held the same shares as *qua trustee* for Culgoa, that entire process made no logical or business sense.

[91] In my mind, the learned judge was quite rightly entitled to place the reliance he did on the Transfer Form based not only on the unequivocal words contained thereon but that in the circumstances of the business affairs of persons who were dealing with millions of dollars’ worth of assets, there could be no other plausible explanation.

[92] Indeed, as said by Basement in their submissions³³ on this appeal and with which I wholeheartedly agree, Culgoa’s pleaded case has always been that there was an intention on the part of Culgoa and by extension Stella to create a bare trust. At no point in their pleadings did they raise the impropriety of the transfer or it being void but rather that the transfer having occurred that it in and of itself established an express trust in favour of Culgoa.

³³ Interlocutory Appeal Bundle, Transcript of Proceedings, Culgoa Limited v Basement Investment Limited, Thursday 18th April 2024, before Wallbank J, Appellant Bundle (filed 9th July 2024) page 193 (lines 1–18).

[93] Having pleaded their case in that way, I am of the opinion that it was open to the learned judge to look at the document that Culgoa relied upon for the creation of the express trust and in keeping with the learning in **Rainy Sky SA v Kookmin Bank** to construe it as he did, and find that the same showed no intention to, by its very words, to create an express trust in favour of Culgoa and consequently negated any such legal or evidentiary basis to support a realistic cause of action as pleaded.

Failure to give proper weight to the starting point that on a gratuitous transfer of legal title to shares from one company to another beneficial title would not pass.

[94] In my mind having determined that the learned judge was entitled to place the reliance he did on the Transfer Form, this complaint of Culgoa must be seen in its proper perspective.

[95] Culgoa's submission on this did not particularise the failing of the learned judge, save as to rely on a basic premise that where there has been an apparently gratuitous transfer of the legal title to assets between companies, that the beneficial title would remain with the transferor.

[96] However, what was not highlighted by Culgoa on this argument was that such a premise is merely a presumption and a presumption of a resulting trust, that can be rebutted by the assessment of the appropriate circumstances and evidence. This proposition of law was succinctly stated in the case of **Westdeutsche Landesbank Girozentrale v Islington BC**.³⁴ In that case, Lord Browne- Wilkinson had this to say:

“under existing law a resulting trust arises in two sets of circumstances(A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B

³⁴ [1996] AC 669 at page 708 (Lord Browne-Wilkinson).

:the money or property is held on trust for A (if he is the sole provider of the money)it is important to stress that this is only a presumption which **presumption is easily rebutted either by counter presumption of advancement or by direct evidence of A's intention to make an outright transfer.**" (my emphasis added).

[97] That being said, the relevance of this concern does not in my mind in any event assist Culgoa's argument. When this argument is followed to its logical conclusion, it would run thusly: *the Transfer Form did not pass the legal title, and there having been no intention from the words used on the Transfer Form to create a trust the only way a trust could have been formed is that there was either a constructive or resulting trust.* Indeed, the learned judge did in fact consider the applicability of the imposition of a trust of this nature and dismissed the same as it had not been pleaded or raised by the Culgoa.

[98] Additionally, the learned judge considered that if there was the imposition of a constructive trust, which is no more than an equitable remedy imposing a trust where none expressly exists, Culgoa would then be faced with the issue of limitation and based on the pleadings that would oust the ability to rely on such a construct.³⁵

[99] In my mind the learned judge, having considered the inappropriateness of relying on that equitable principle, and bearing in mind the pleaded case, was entitled to have not made a finding as to the gratuitous nature of the transfer.

Failure to give proper weight to the possibility of relevant additional evidence being available at trial including that the Defendant/Basement would then be obliged to disclose and /or would reasonably be expected to adduce if inference adverse to it were not to be drawn

³⁵ Interlocutory Appeal Bundle, Transcript of Proceedings, Culgoa Limited v Basement Investment Limited, Thursday 18 April 2024, before Wallbank J, Appellant Bundle (filed 9th July 2024) at page 185 (line 21) - 186 (line 14).

[100] When I consider this complaint made against the learned judge, I have to be reminded as to how this application was argued before him and also bear in mind that the onus was on Culgoa as the respondent to the application to show as stated by the court in the **Korea National Insurance Corporation v Allianz Global Corporate and Speciality AG**³⁶ case that there was some tangible evidence which they could be in a position to call and the general nature of that evidence. In my mind, the contention of Culgoa in support of this complaint is more to do with, seeking to shift the burden to Basement to prove that the transfer was conducted appropriately and less with their case and the evidence that they could rely on to displace the clear words contained in the Transfer Form.

[101] However, it must be remembered that this was not Basement's case. Basement maintained that, as far as it was concerned, Stella was the beneficial owner of the shares; she represented herself to Basement as the owner, and the shares were transferred on that basis. Whether Stella in fact owned the shares was, in any event, not an issue central to the pleadings. In my view, therefore, congruent with the learning in **Bank of Bermuda Bank v Pentium (BVI) Limited** and **Korea National Insurance Corporation v Allianz Global Corporate and Speciality AG** it was immaterial whether the learned judge failed to consider the possibility that additional evidence might become available.

[102] The failure of Culgoa therefore to point this court or even the court below to the evidence that they could have deployed which would have been relevant to the intention in the creation of the trust they say existed is in my mind fatal to their contention.

[103] When I therefore consider the totality of the evidence that was before the learned judge, the pleadings of Culgoa and how the case was argued before the learned judge, I reject Culgoa's submission that the learned judge had clearly gotten it wrong in the exercise of his discretion to grant summary judgment.

³⁶ Supra (n 9).

[104] In my view, this was a matter that had very precise pleadings and those pleadings supported a very narrow case, and the sole question raised on those pleadings was whether there was an intention at the time that the Egerton Shares were transferred from Culgoa that the shares were to be held on trust by Basement for Culgoa. Nothing in the evidence which was before the court and which the court considered, advanced a realistic basis for so establishing at trial and as such it was entirely open to the learned judge to exercise his discretion, stop the matter from proceeding to trial on a case that had no reasonable prospect of success and grant summary judgment.

Disposition

[105] The appeal is therefore dismissed with costs to Basement, to be assessed by a judge of the Commercial Court.

I concur.
Esco L. Henry
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal [Ag.]

By the Court

Chief Registrar