

Application pursuant to section 406(e) of the Companies (Guernsey) Law, 2008 for an order to be made for the Compulsory Winding up of a Company.

[2020]GRC046

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

IN THE MATTER OF JJW LIMITED

AND

IN THE MATTER OF PART XXIII OF THE COMPANY (GUERNSEY) LAW 2008

Between:

AAREAL BANK AG

Applicant

-and-

JJW LIMITED

Respondent

Hearing dates: 13 July & 23 July (pm only) 2020

Decision given: 31 July 2020

Judgment handed down: 2 September 2020

Before: Jessica E Roland, Deputy Bailiff and

Jurats: J G Hooley, A S Boyle and P M Burnard

Counsel for the Applicant: Advocate A C Williams

Counsel for the Respondent: Advocate A R Cole

Cases, texts & legislation referred to:

The Companies (Guernsey) Law, 2008

The Evidence in Civil Proceedings (Guernsey and Alderney) Law 2009

In the matter of Synergy Capital Limited and In the Matter of Part XXIII of the Companies (Guernsey) Law, 2008 (Royal Court, 20 July 2012)

Public Services Department v Miller and Baird (CI) Limited (2009-10) GLR 142
Re GBI Investments Limited [2010] EWAC 37(Ch)
Propinvest Group Limited (Guernsey Judgment 34/2011)
Re a Company (No 006685 of 1996) [1997] BCC830
Re Lummus Agricultural Services Ltd 1999 B.C.C. 953
Helical Bar plc and Armchair Passenger Transport Ltd (2003) EWHC 367 (QB)
Commissioners of Customs & Excise v Arena Corporation Ltd [2004] EWCA Civ 371
Dicey, Morris & Collins on the Conflict of Laws, 15th Ed.
White Book, [2020] Edition
McPherson's Law of Company Liquidation 4th Ed

Introduction

1. Aareal Bank AG made an application dated the 30th April 2020 pursuant to section 406(e) of the Companies (Guernsey) Law, 2008 (the "Law") for an order to be made for the compulsory winding up of JJW Limited (the "Company" or "JJW"). In support of that application the Applicant filed the first affidavit of Wilhelm Schneider dated 28th April 2020. JJW, then represented by Carey Olsen, indicated prior to the original date for the hearing of the matter, that the Company was disputing the application. A Consent Order was agreed, dated the 5th May 2020, dealing with directions for both parties in relation to the matter including the filing of expert evidence.
2. The matter was then listed before the Deputy Bailiff and Jurats on the 13th July 2020. In addition to the first affidavit of Wilhelm Schneider, the Applicant filed two opinions of Monsieur Thomas Lyon-Caen. JJW filed the affidavit of Zahy Deen and the Witness Statement of Dr Sergio Borges, Chief Financial Officer of the JJW Group (the Group). The Company also filed two opinions of Monsieur Laurent Cotret.
3. After both parties had completed their submissions on the 13th July 2020 which supplemented the skeleton arguments that had already been filed, the Deputy Bailiff informed the Parties that the Jurats required further evidence to be filed in relation to the Company and the JJW Group. This evidence was in relation to the both financial standing and solvency of the Company and the Group. Both parties were directed to file evidence in English setting out the list of the securities securing the loan (as defined below), the latest valuation of the underlying assets securing the loan and any other obligations including borrowing secured against that secured asset. The Deputy Bailiff indicated that the Jurats had formed the view at this stage of the proceedings the Company had failed to provide sufficient evidence in relation to its solvency but that the Court was giving the Company the opportunity to remedy the situation. The Company was therefore directed that it should file further evidence in relation to its solvency.
4. As a consequence of these directions the Applicant filed a second affidavit of Wilhelm Schneider dated 17th July 2020, the Company filed a second affidavit of Dr Sergio Borges dated 17th July 2020 and a further affidavit of Laurent Cotret dated 17th July 2020. The matter continued on the afternoon of 23rd July with judgment being reserved.

Background

5. The Company is a Guernsey registered company, incorporated on the 1st September 1992 as a Non-cellular Company with Registration No. 25826. The Company is the parent company of an international hotel group the JJW Group. In accordance with the structure chart of the JJW Group, filed on behalf of the Applicant and not disputed by the Company during the course of

the hearings, JJW Limited is a holding company which holds 99% of the shares in JJW France SA, which in turn owns various hotels and other properties.

6. The Registered Agent is Albecq Management Limited (“Albecq”). The sole director is Zeina Rizkallah, whose service address is in France. There was no evidence of any substantive presence in Guernsey.
7. The ultimate owner of JJW Limited is Sheikh Mohammed BIN ISSA AL JABER who owns JJW through MBI International Holdings Group Inc (which is a BVI company) and MBI and Partners (UK) Limited UK which is a company based in England.
8. In 2007 the Applicant granted to four companies in the JJW Hotel Group, namely: Hôtel Balzac, Hôtel de Vigny, Amarante and Median, the original borrowers, a loan facility of €97,000,000 (“the Loan”). This was in order to refinance loans and capital expenditure. In a separate document dated 19th April 2007, the Company executed a First Demand Guarantee for a sum equivalent to the opening amount of the loan. After a failure by the underlying companies to make loan repayments, the Applicant called in the First Demand Guarantee for a sum of €22,091,922.13. The Company did not make any payments to satisfy this demand. Proceedings were issued in France against the Company in 2012.
9. In September 2017 in the Tribunal De Commerce De Paris judgment was entered against the Company in the sum of €22,091,922.13. Judgment was also taken against Amarante SARL, JJW Luxury Hotels SAS (which absorbed two of the original borrowers Hotel Balzac and Hotel de Vigny and had taken over their rights and obligations), Median SARL (together “the Borrowers”) and JJW France (as another guarantor of the loan).
10. As a consequence of the judgment in September 2017 the Tribunal De Commerce De Paris ordered a provisional enforcement of the judgment. In reliance on this, Notice of Garnishment was served on the 27th April 2018 upon the Company at Albecq’s offices in Guernsey at the request of the Applicant. There were subsequent proceedings in relation to this enforcement action on the 11 November 2018 and the 16 January 2020.
11. The September 2017 judgment was appealed by the Company, the Borrowers and JJW France. On the 13th March 2019, the Paris Court of Appeal dismissed the appeal. This judgment has been appealed by the Company, the Borrowers and JJW France to the Cour de Cassation in Paris. The Applicant filed a petition to have the appeal dismissed but this was unsuccessful (“the Strike Out Application”). An estimate of 18-24 months’ time was given to the Court as the time period for when the Cour de Cassation may hear the appeal although neither advocate had clear information on when this would actually occur.
12. In parallel with the proceedings in relation to the borrowings and the guarantee, there have been what is phrased as ‘Safeguard Proceedings’ or a “Safeguard Plan” which commenced in April 2012 in relation to Amarante SARL, JJW Luxury Hotels SAS, Median SARL and JJW France, which appear to be an equivalent of administration proceedings. On the 26 June 2020 these proceedings were before the Tribunal de Paris and each of the four entities of the JJW Group were placed in receivership. This was, according to the judgments of the Tribunal de Paris (which are titled Termination of the Safeguard Plan Commencement of Judicial Reorganisation Proceedings), due to the failure of the entities to pay the instalments required by the Safeguard Plan. The Tribunal de Paris, rather than placing the entities in judicial liquidation, commenced a judicial reorganisation for each of the four entities. It would appear from the English translations of the judgments that although there were grounds for judicial liquidation, that the maintenance of the jobs of the employees of each entity was one of the factors that led the Court to decide that judicial reorganisation was the appropriate outcome.

13. Relying on the judgment of the 13th March 2019, the Applicant, on the 25th March 2020, using the services of HM Sergeant, served a Statutory Demand in accordance with section 407 of the Law on the Company at Albecq's offices. The Statutory Demand demanded that the Company pay to the Applicant €22,091,922.13. In accordance with the Statutory Demand, the Company had until the 17th April 2020 to pay the Applicant. As the Company did not satisfy the Statutory Demand, on the 30th April 2020 the Applicant made an application (the "Application") for the compulsory winding up of the Company pursuant to section 408(1) of the Companies Law.
14. The Company, in their response to the Application in the affidavit of Zahy Deen, say that although the Statutory Demand was served by the Sergeant at Albecq's offices, the Statutory Demand was not received by Mr Deen due to both Albecq and Mr Deen's offices being closed at that time due to Covid-19. Mr Deen says that as a consequence, the first time he saw the Statutory Demand was when a director of Albecq received notice of the Application served by the Sergeant on Friday 1st May 2020 and sent it to him by email (his offices still being closed due to Covid-19). However, as it is the Company's case that the Applicant is not entitled to be paid under the Statutory Demand; the delay in Mr Deen receiving the Statutory Demand has little consequence in these proceedings. It is not said, for example, by Mr Deen that if he had seen the Statutory Demand on or around the time it was served, that the Statutory Demand would have been paid or that it had been invalidly served.
15. In addition to the non-compliance with the Statutory Demand, which creates a presumption that the Company is unable to pay its debts under the Law i.e. that it is deemed insolvent, the Applicant invited the Court to draw an adverse inference, based on a lack of conclusive documentary evidence that the Company is in fact solvent. Further that there is evidence before the Court that the Borrowers and JJW France were placed in receivership prior to the Guernsey hearing which demonstrates that the JJW Group is insolvent and the correct exercise of the Court's discretion is for the Company to be placed in compulsory liquidation and to make the winding up order sought.
16. The Company resists the making of the orders sought. The Company argues that the Statutory Demand is unenforceable due to the ongoing proceedings in France such that the Applicant is not a creditor.
17. Although section 408 of the Law provides that an application for the compulsory winding up of a company may be made to the court by a creditor, there is no definition of creditor in Part XXIII or Part XXIV of the 2008 Law. The Company argues that if the expert evidence of Monsieur Cotret is relied upon such that the Court of Appeal judgment of March 13th 2019 is found not to be final or "exigible" due to the fact that it has been appealed and will be challenged in the Cour de Cassation which could lead to the judgment debt being overturned then this judgment should not be relied on to give the Applicant the status of creditor. The Applicant would fall at the first hurdle and cannot use the Statutory Demand procedure as a means of commencing the winding up procedure.
18. The Company also argues that there is a substantive and genuine dispute in relation to the debt.
19. The Company says that there is sufficient evidence before the Court such that it has rebutted the presumption in relation to insolvency and in the absence of the Applicant proving that it is in fact insolvent, that the Court should not conclude that it is. The Company points to the information provided by the Chief Financial Officer, both in the witness statement of the 19th May 2020 and in the further information filed at the request of the Court in the affidavit of Sergio Borges dated the 17th July 2020.

20. The Company says that in all the circumstances the Court should exercise its discretion not to wind up the Company, taking account all the circumstances of the case and the prejudice to the Company and the Group of the Company being wound-up which would be catastrophic and therefore the discretion should be exercised in the Company's favour.

Directions to the Jurats as to Guernsey Law

21. Having thus briefly summarized the facts and events leading up to the issue of the Application, the Deputy Bailiff will now set out the directions she gave to the Jurats and which they are obliged to accept and follow.
22. The Deputy Bailiff is the sole judge of matters of the law and the Jurats must follow and accept her directions as to the Law. The Jurats are the sole judges of fact and were directed to ignore any view of the Deputy Bailiff where she may express or appear to express a view as to the factual issues.
23. The burden of proof rests on the Applicant and not on the Company. The standard of proof is the normal civil standard of the balance of probabilities which has been said to mean something is more than likely so than not.
24. The non-payment of a Statutory Demand creates a presumption that a Company is unable to pay its debts. Even though the Company failed to deal with the Statutory Demand within the prescribed time-frame, it is still open to the Company to allege that the Applicant was not a creditor and therefore unable to rely on section 407 of the Law to seek to wind the Company up. If a Statutory Demand has been served upon a company it may oppose the winding up order on the basis that there is a genuine and serious dispute in relation to the debt. That although it may have many of the same overlapping factors and considerations, this was not the same as whether a judgment was final and conclusive.
25. The presumption of insolvency is a rebuttable presumption therefore the Company can adduce evidence as to its solvency and the Court, even where a company is unable to pay its debts, has a discretion under s406 (e) whether to grant an application for winding up.
26. In accordance with section 20 (3) of The Evidence in Civil Proceedings (Guernsey and Alderney Law 2009, expert evidence is a matter for the Deputy Bailiff alone.

Discussion

27. In the matter of Synergy Capital Limited and In the Matter of Part XXII of the Companies (Guernsey) Law, 2008 (Civil Action File No. 1685 in the Royal Court, 20 July 2012), the question of the definition of creditor was dealt with by the then Deputy Bailiff at paragraph 53 where he said:

“In the absence of any applicable definition in the 2008 Law, the word can be given its ordinary meaning as being a person to whom a debt is payable. This potentially, although not necessarily, encompasses future and contingent pecuniary claims. This is consistent with the 2008 Law which contains many references to a company's debt.”

28. In this case, the Applicant relies on a judgment debt from the French Court of Appeal as the debt requiring payment under the Statutory Demand. In respect of that judgment debt, the opinions of the experts of French law put before the Court disagree on its effect.

29. The Applicant says that it has a final and enforceable judgment against the Company. The Applicant argues that the evidence filed by their expert which opines that this is the case, Monsieur Lyon-Caen, should be preferred over the evidence of Monsieur Cotret, the expert put forward for the Company. Monsieur Lyon-Caen, is an independent lawyer with no actual or apparent interest in the outcome of the proceedings and this contrasts, the Applicant says, with Monsieur Cotret, the expert put forward by the Company.
30. Monsieur Cotret is quite open in the first paragraph of his legal opinion that he was asked in “[his] capacity as legal counsel of the JJW Hotel Group and in particular of the Company JJW Limited”. It also became apparent following the filing of the documentation in relation to the Termination of the Safeguard Plan dated 26 June 2020 that Monsieur Cotret appeared as counsel for the Borrowers and JJW France in those proceedings.
31. Advocate Williams raised the issue of Monsieur Cotret’s lack of independence and submitted that his evidence should be inadmissible. However, he accepted that an interest does not automatically render the evidence of the proposed expert inadmissible but the interest may nevertheless affect the weight placed on his evidence. The Company says, in relation to Monsieur Cotret, the Court should be comforted by the fact that the document contained Monsieur Cotret’s confirmation that he is aware of his obligations to the Court in relation to giving expert opinion and that given that Monsieur Cotret has made such a declaration, equal weight can be placed upon his opinion in relation to French law.
32. Relying on the principle set out at rule 35.4.3 of the White Book and the approach set out in Helical Bar plc and Armchair Passenger Transport Ltd (2003) EWHC 367 (QB) at paragraph 29, which outlines the principles which apply equally in this jurisdiction, the approach to questions of an expert’s interest in the proceedings were summarised as follows:-
1. *It is always desirable that an expert should have no actual or apparent interest in the outcome of proceedings.*
 2. *The existence of such an interest, whether as an employee of one of the parties or otherwise does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.*
 3. *Where the expert has the interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.*
 4. *The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.*
 5. *The questions that have to be determined are whether:*
 - (i) *The person has relevant expertise and;*
 - (ii) *He or she is aware of their primary duty to the court if they give expert evidence and are willing and able, despite their interest or connection with the litigation or a party thereto to carry out that duty.*
 6. *The judge will have to weigh the alternative choices open if the expert evidence is excluded, having regard to the over-riding objective of the CPR.*
 7. *If the expert has an interest which is not sufficient to preclude him from giving evidence, the interest may nevertheless affect the weight of his evidence.”*

33. Expert evidence plays a vital role in civil litigation. The purpose of an expert is to assist the court by giving an independent and objective view. However Monsieur Cotret is evidently an integral part of the legal team for the JJW Group. In June 2020 he appeared as an advocate in the French courts on behalf of the Group. He has during these proceedings given both expert evidence and evidence as counsel for the Company. It was open to the Company to obtain alternative expert evidence from an independent French lawyer. This was not done. There was even the potential of seeking leave to file additional expert evidence in the period between July 13th 2020 and the second part of the hearing heard on the 23rd July 2020 when the matter was adjourned for more information to be provided in relation to the solvency of the business and the underlying assets and security. This was not attempted. Whilst Monsieur Cotret does appear to have relevant expertise and says he is aware of his primary obligation to the Court, this does not mean that the interest that Monsieur Cotret has as lawyer for the Group can be ignored. Nevertheless on balance and taking into account the overriding objective, rather than being an absolute bar resulting in the exclusion of the evidence, this lack of independence should go to the weight that is placed on the opinion of Monsieur Cotret.
34. Having come to this conclusion, it is necessary to consider which of the expert's evidence is preferred.
35. Monsieur Cotret's opines that the judgment is not final and enforceable as there is an appeal before the Cour de Cassation and that could be successful. He refers to a document which is attached to his opinion from a Professor Jeuland although this pre-dates the Application so is not expert evidence in relation to the Application. In his updated opinion dated July 10th 2020 he opines that the claim by the Applicant has been seriously weakened by the order of the Cour de Cassation in the Strike Out Application and that the amount demanded in the Statutory Demand is not due because of the pending proceedings. In his updated opinion he refers to a document which he says is an opinion from a Maitre Emmanuel Piwnica whom, he says is a lawyer specialising in Cour de Cassation proceedings. However the attachment is not identified as an expert opinion nor does it identify who drafted it or whose opinion it is. No weight is therefore put on this attachment. Although Monsieur Cotret makes no reference to it in his opinion, the Court notes that this is the same name as one of the lawyers who is listed as appearing for the Company in the judgment of the Strike Out Application.
36. The evidence of Monsieur Lyon-Caen in summary is that the debt is as a consequence of a judgment which is final and enforceable. The fact that there is an appeal to the Cour de Cassation does not mean it is not a final decision.
37. In Monsieur Lyon-Caen's second opinion dated 2nd July 2020, he confirms his opinion despite the dismissal of the Applicant's Strike Out Application in the Cour de Cassation. Monsieur Lyon-Caen said that this decision makes no difference to the enforceable character or effect of the Court of Appeal decision in relation to debt owed by JJW. He says, notwithstanding the 18th June 2020 decision, JJW remains liable to pay €22,091,922.13 to Aareal Bank AG, pursuant to the judgment as upheld by the Court of Appeal decision; the Court of Appeal decision upholding the judgment is final; and the Court of Appeal decision upholding the judgment is enforceable by Aareal Bank AG against JJW Limited.
38. Monsieur Lyon-Caen's opinion is supported by the English translation of the judgments of the 26th June 2020 (post-dating the Strike Out Application) which by reference to each of the Borrowers and JJW France which are subject to the Termination of the Safeguard Plan state that the 13 March 2019 is a final judgment and *res judicata*. Whilst the judgments refer to the appeals of the Borrowers and JJW France to the Cour de Cassation and not directly to appeal of JJW nevertheless it is supportable of the view that the judgment of the Court of Appeal in relation to JJW will have the same status. It is notable from the documentation before the

Court in relation to the judgment of the unsuccessful Strike Out Application that the judgment appears to support the contention that it is the relationship with the JJW France and the Borrowers' appeal which prevented the Company's appeal from being struck out (a view that appears to be supported by the opinions of all the experts) and does not caveat its enforceability against the Company. The Court also notes that in the ruling of the Enforcement Judge dated 11 November 2018 in relation to the opposition by the Company the Garnishment referred to above that *"the fact that other companies in the Group have not been ordered to pay a principal amount and the failure to add to the debt to their liabilities under their insolvency proceedings has no effect on the certain, liquid and enforceable nature of the bank's claim in respect of JJW Limited."*

39. The conclusion that the Court of Appeal judgment is final and enforceable is supported by the judgments of the Appellate Court of Paris dated 16 January 2020 on the Company's appeal from the ruling of the Enforcement Judge where the Appellate Court rejected the claims of the Company that the effect of the 19 March 2019 appeal means that the judgment is against the Company is not enforceable. This accords with the principle set out in Dacey Morris & Collins Rule 42 paragraph 14-026 that at common law, a foreign judgment may be final and conclusive even though an appeal is actually pending in the foreign country where it was given.
40. On balance taking into account the issues of weight due to Monsieur Cotret's lack of independence and the supporting evidence before the Court, the Deputy Bailiff concluded that the expert evidence of Monsieur Lyon-Caen relied on by the Applicant is to be preferred over that of Monsieur Cotret and thus the Court should treat the judgment debt in France as final and enforceable. Having come to this conclusion, the Deputy Bailiff directed the Jurats that the Applicant was a creditor and thus the Applicant did have locus to use the Statutory Demand procedure.
41. In relation to the Statutory Demand itself, the Jurats found that the Statutory Demand had been validly served.
42. The focus of the expert evidence was predominantly on whether the judgment was final and conclusive, however as confirmed in Minister of the Public serviced Department v Miller and Baird (CI) Limited 2009-10GLR 142 a winding up application can be resisted on the grounds that there is a genuine and serious dispute. The legal test in the English cases the court was referred to have been expressed in several different ways but the Deputy Bailiff directed the Jurats to the test in Commissioners of Customs & Excise v Arena Corporation Ltd [2004] EWCA Civ 371

"The court will not make a winding-up order against a company where the petition debt is genuinely disputed by the company on 'substantial grounds'. In this context 'substantial' means that the dispute must be 'real as opposed to frivolous'.

This means that the dispute must be both genuine and serious.

43. The Company submits that it is a genuine and serious dispute because it is appealing the 19 March 2019 Court of Appeal judgement to the Cour de Cassation and because the French proceedings challenge the validity of the underlying debt upon which the guarantee was founded. These are because of the lack of justification or "défaut de cause" because the Guarantee was not in favour of the Applicant but rather another entity Aareal Bank France; and because it is an accessory to the loan agreement which is "null and void" due to the terms of the Loan. Whilst this is a case where there are legal proceedings in another jurisdiction as opposed to mere allegations of dispute nevertheless the Court necessarily has to take a view on the evidence of whether there really is a dispute which is genuine and substantive as urged by Chadwick J in Re a Company (No 006685 of 1996) [1997] BCC830C.

44. The Company submits that it is sufficient that there are conflicting opinions as to matters of French law for the Court to decide that there is genuine dispute on substantive grounds.
45. The Jurats reviewed the evidence before the Court in relation to the dispute. Monsieur Cotret's evidence has very brief reasons as to why the Company says the underlying debt on the guarantee is not owed as set out above. The argument on the lack of justification appears to rest on the reference to Aareal Bank France as one of the parties to the original guarantee although it was executed by the Applicant. There are also an argument which go the nature of the type of guarantee. However, it does not appear to be disputed by the Company that loan repayments were initially made under the terms of the Loan which then ceased. In the September 2017 judgment for example, reference is made by the Court to the availability of the sums provided by the Loan to the Borrowers from the Applicant. In legal argument the Court was referred back to the statements made by Monsieur Cotret. The Court noted the lack of any success based on these arguments in the journey of the judgment debt through the French courts which have on each occasion dismissed the same arguments that Monsieur Cotret asserts are the basis for the dispute. The fact that the Company has commenced a further appeal does not of itself mean that there is a genuine and substantial dispute. There is no evidence before the Court of any test or leave that was required to commence the appeal. The Strike Out Application appears to have been defeated without assessment of the likelihood of success of the appeal by the Company. In some circumstances it may be sufficient that there are two conflicting experts' opinions to show that there is a genuine dispute on substantive grounds, however on the facts of this case it is not sufficient here particularly in circumstances where Monsieur Cotret's lack of independence goes to the weight the Court places on his evidence. The Jurats taking this into account and assessing all the evidence before them conclude that there is not a genuine and substantial dispute.
46. Having come to the conclusion that there was no genuine dispute, the Jurats next considered the Company's insolvency. As is set out above, the failure to pay a Statutory Demand only provides a presumption that the Company is unable to pay its debts. As is set out clearly in the exert of McPherson's Law of Company Liquidation 4th Ed, paragraph 3-022:

“... the company might be able to present evidence, besides arguing that the debt on which the petition is founded is disputed, that rebuts the presumption of insolvency.”

47. To rebut the presumption a company that wishes to establish the fact of solvency must adduce evidence for that purpose. It was in order to give the Company a further opportunity to rebut the presumption that the Court directed the Company to provide evidence in support of the assertion in the witness statement of Dr Sergio Borges dated 19th May 2020 that the Company was solvent. The Deputy Bailiff specifically drew the Company's attention to the paragraph in *McPherson* and emphasized the need for the Company to provide the best evidence available to it.
48. In response the Company filed the Second Affidavit of Dr Sergio Borges dated 17th July 2020 containing very limited additional information and without any documentary evidence to support the contents of the affidavit. It appears from that affidavit, which refers as it did in his first statement to the Company's concern about sensitive commercial material, that this may seek to justify the Company's decision not to provide “the best evidence” which the Court required to rebut the presumption created by the non-payment of the sum in the Statutory Demand. However, if there is sensitive commercial material there are a multitude of ways that the Guernsey Royal Court regularly uses that can ensure that that commercial sensitivity is protected. It is noted that none of the possible routes was even attempted by the Company. An assertion was made by Dr Borges about the ability to use of funds of the Group “*if and when it was required to make a payment to the Applicant in order to satisfy the contested debt.*”. This was not supported any evidence in relation to the funds nor any

substance given to when or how this would or could be achieved. Evidence was filed by Monsieur Cotret, this time not as an expert but purely in his capacity as counsel for the JJW Group, in relation to the direction that the Parties file evidence in English setting out the list of the securities securing the loan the latest valuation of the underlying assets securing the loan and any other obligations including borrowing secured against that secured asset. The Applicant filed a second affidavit of Wilhelm Schneider dated 17th July 2020 in relation to the direction on assets and charges against those assets.

49. The lack of evidence and the opacity of the limited evidence provided by the Company in relation to the solvency of the Company or the Group particularly after the direction to provide best evidence on this; the lack of transparency with regard to the Group in relation to their financial status which also appears to have been a feature of the French proceedings; the underlying receivership proceedings in France which appear to indicate very strongly that the JJW Group is in severe financial distress; Monsieur Cotret's description of JJW France, JJW Luxury Hotels, Amarante and Median having been placed in receivership proceedings; the English translations of the 26th June 2020 judgments showing that the French Court have appointed a number of officials (including amongst others the official receiver) to assist with the receivership of the Borrowers and JJW France and that there were grounds for judicial liquidation (although that route was not selected by the Court); the fact that the Court heard little or no information about the companies in the portfolio making up the JJW Hotel Group other than JJW France and the Borrowers despite enquiry of the Parties' advocates by the Jurats; the uncontested evidence filed by Wilhelm Schneider that the Borrowers and JJW France are required by French law to file annual accounts and have not done so since 2016; and having considered all the evidence before them, the Jurats have come to the conclusion that the Company has failed to rebut the presumption that the Company is unable to pay its debts that the non-payment of the Statutory Demand created and that Company is more probably than not insolvent.
50. Despite the conclusions set out above, it is still a discretion of the Court whether or not to wind the Company up. In exercising its discretion, the Court has taken into account very carefully all the circumstances of the case and all of the evidence presented to the Court. The Jurats weighed up the prejudice that may be suffered as a consequence of winding up of the Company. JJW Ltd is a holding company. Reference was made on a number of occasions by the Company about the impact of the winding up upon the employees of the Group however no information has been provided to the Court to evidence this bald statement. The Jurats have come to the conclusion that given that JJW is a holding company, there is no evidence that the Company itself has any employees. There is one director who is based in France (who has not given any evidence). The Company holds the shares in JJW France, this entity, which in turns holds the shares in the other companies, is already in receivership. The employees and the underlying Companies in the JJW Group are far more directly impacted by the receivership proceedings in France. Further it would appear due to the nature of French receivership proceedings the employees have exercised a direct influence over the manner in which those proceedings are undertaken and that it is the actions in relation to those proceedings that will impact on them rather than what is happening with Guernsey holding company. Furthermore, it was open to the Company to provide evidence in relation to the impact on those employees, over and above simple statements of the employees' existence but it chose not to. The Jurats have also taken into account the impact on the other Group companies if JJW is wound up. As set out above, in relation to the companies which are not caught by the receivership proceedings, the Court has little or no information, despite an opportunity for the Company to provide it and therefore no assistance can be found there. No evidence was provided to the Court about how the winding up of the holding company would impact on them at all or over and above the proceedings already ongoing in France.
51. The final issue considered by the Jurats was whether nevertheless it should exercise its discretion to stay the application pending the conclusion of the proceedings in the Cour de

Cassation. The Jurats considered this carefully, including the possibility that the appeal could be successful, but concluded in all the circumstances of this case it was not an appropriate exercise of their discretion to stay proceedings pending the outcome of this hearing at some point in the future.

Conclusion

52. Accordingly, the Jurats unanimously decided that given their conclusions on the matters as set out above and there being no other reason to prevent them from exercising their discretion in favour of making the orders sought by the Applicant, the Application should be granted.