

court to order the winding up of a company where it is “*unable to pay its debts within the meaning given in section 407*” of the Law.

2. The Appellant is the Guernsey registered company in respect of which the order was made, JJW Limited (the "Company"). The presentation of the appeal was instructed by the person who was the sole director of the Company. The taking of the appeal was intimated to the Joint Liquidators appointed by the Royal Court but they chose not to participate in the appeal proceedings.
3. The basis upon which the order was made was the failure of the Company to pay or secure a debt demanded in a Statutory Demand, served in accordance with section 407 of the Law. The Statutory Demand in question was served on 25 March 2020 in respect of a debt of €22,091,922.13, being the amount of a judgment against the Company entered on 28 September 2017 by the Tribunal de Commerce de Paris (the September 2017 Judgment referred to below) and ordered to be upheld by the Paris Court of Appeal on 13 March 2019 (the March 2019 Judgment referred to below). The essence of the Company's defence before the Royal Court was that the Applicant, Aareal Bank AG (the "Bank"), was not a creditor as the alleged debt which formed the basis of the Statutory Demand was not currently enforceable because it was the subject of contested proceedings in the French Courts in which the Company was in the process of making a final appeal to the Cour de Cassation.
4. In its Grounds of Appeal, the Company contended that the Royal Court erred in its approach to the evidence of its experts on French law and to the evidence of French law generally. Had such errors not been made, it is said, the Royal Court would not have concluded that the Bank had the benefit of a final and enforceable judgment and that there was no genuine or substantial dispute as to the debt. The Royal Court had erred in failing to provide for a stay of execution in order to save the interests of the Company in its appeal in France. The Royal Court erred in identifying the nature of the test as to whether the debt was genuinely disputed on substantial grounds. The Royal Court had erred in not giving reasons, or any proper reasons, for not exercising their discretion to stay proceedings. The Royal Court erred in its approach to proportionality in the making of a winding up order. There had been no proper consideration of the Company's property rights as protected by Article 1 of the First Protocol of the European Convention on Human Rights. The Royal Court had erred in its approach to

the presumption of insolvency raised by the failure to pay the Statutory Demand in the circumstances which had arisen.

5. After the Grounds of Appeal had been lodged, after they had been amended, and shortly before this appeal was heard, the Cour de Cassation in France upheld the Company's appeal, quashed the judgment of the Paris Court of Appeal and remitted the matter to that court for further procedure.

Background

4. The Company, a non-cellular Guernsey registered company, incorporated on 1 September 1992, is the holder of well in excess of 99 per cent of the issued share capital of JJW France SA ("JJWF"), registered in Paris. However, whilst before the Royal Court the Company represented that it was the immediate parent company of JJWF, the evidence from the Company to this court was that, while at law this shareholding was held by the Company, in 2009 the Company had become and remains a bare trustee of the shareholding for a different company incorporated in the British Virgin Islands. Loosely these companies, with JJWF's subsidiaries, are referred to as the JJW Group. JJWF functions as a group operating company and itself has 99 per cent shareholdings in, among others, Median SARL ("Median"), and Amarante SARL ("Amarante"), each registered in Paris. Amarante holds, among other shareholdings, 100 per cent of the issued share capital in JJW Luxury Hotels SAS ("Luxury"), again registered in Paris. The Company has no substantial presence in Guernsey and is represented in the jurisdiction by its Registered Agent, Albecq Management Limited ("Albecq").
5. In 2007 the Bank granted a loan facility of €97m (the "Loan"), for the purpose of refinancing loans and capital expenditure, to four JJW Group companies, namely Amarante, Median and two companies now absorbed within Luxury (the "Borrowing Companies"). At that time the Company executed a First Demand Guarantee (the "Guarantee") for a sum equivalent to the opening amount of the Loan. JJWF also acted as a guarantor of the Loan.
6. The period of the Loan was five years with a final maturity date of 19 April 2012. On or about 30 June 2010, the Borrowing Companies ceased payment after paying six instalments.

7. Upon the failure of the Borrowing Companies to make further repayments, the Bank called in the First Demand Guarantee and, on 5 March 2012, commenced proceedings against the Company in the Commercial Court of Paris for payment of €22,091,922.13. By rulings dated 17 April 2012, the Commercial Court of Paris opened what have been referred to as "Safeguard Proceedings" in respect of JJWF and the Borrowing Companies. In those proceedings the Bank declared that it was due an amount in excess of €96m in respect of the Loan. On 16 July 2013 a seven-year Safeguard Plan was adopted for JJWF and the Borrowing Companies.
8. It appears that the putting into place of the Safeguard Plan became protracted and it was not until September 2017 that the Commercial Court of Paris was able to deal with the Bank's own proceedings to enforce the First Demand Guarantee and to compel the Company to pay the sum of €22m (the "September 2017 Judgment"). The September 2017 Judgment set out in considerable detail the parties' contentions and the determination of the court in favour of the Bank. The court granted provisional enforcement.
9. The September 2017 Judgment was appealed by the Company, the Borrowing Companies and JJWF. By judgment dated 13 March 2019, the Paris Court of Appeal rejected the appeal and upheld the September 2017 Judgment in all of its provisions, again setting out the arguments and counterarguments in some detail (the "March 2019 Judgment"). The Company, JJWF and the Borrowing Companies then appealed the March 2019 Judgment to the Cour de Cassation. The Bank sought to have the appeal to the Cour de Cassation struck out, but this application was dismissed on 18 June 2020.
10. Just prior to the dismissal of the strike out application, on 25 March 2020, the Bank served on the Company, at the offices of Albecq in Guernsey, the Statutory Demand to which we have referred above. In accordance with the Statutory Demand, the Company had until 17 April 2020 to make payment or provide security to the Bank's reasonable satisfaction; and, as the Statutory Demand was not satisfied, the Bank, on 30 April 2020, made application for the compulsory winding up of the Company pursuant to section 408(1) of the Law (the "Application").

11. The proceedings below took place in July 2020 when the Company opposed the winding up application. There was a hearing of the application on 13 July 2020 which concluded with an adjournment until 23 July 2020, when the hearing resumed. The purpose of the adjournment was to allow the Company an opportunity to provide further information as to various matters including solvency. We refer below to the Company's evidence in this regard. On 31 July 2020 the Royal Court gave its decision, and the reasoned judgment was handed down on 2 September 2020. The appeal hearing before the Cour de Cassation did not take place until 2 February 2021.
12. For the purposes of the Application the parties had, on 5 May 2020, entered into a consent order as to the timing for lodging affidavits and skeletons. In particular it was agreed:
- "1. The Applicant and the Company be permitted, pursuant to Rule 10(1) of The Evidence in Civil Proceedings (Guernsey and Alderney) Rules 2011, to adduce expert evidence from an expert in French law in relation to the enforceability and effect of the Judgment and the decision of the Paris court of appeal dated 13 March 2019;"*
13. Before the Royal Court the Company explained why there had been a delay in responding to the Statutory Demand, but there was no indication that, had the Statutory Demand been seen at or around the time that it was served, the claim would have been satisfied. Nor was there any suggestion that service had been invalid.
14. For the Bank, it was pointed out not only that non-compliance with the Statutory Demand created a presumption that the Company was unable to pay its debts, but also that the evidence of the Safeguard Proceedings demonstrated that the companies involved were insolvent, giving further justification for the granting of the winding up order.
15. In resisting the making of the orders the Company argued, in essence, that the existence of the ongoing proceedings in France, especially the appeal to the Cour de Cassation, showed that the March 2019 Judgment did not constitute or evidence a debt finally due and exigible. Accordingly, the Bank could not show the Royal Court that it was a creditor for the purpose of section 408 of the Law (the section which identifies the persons entitled to apply for a compulsory winding up) and, similarly, that it was not a party with a legitimate interest.

16. Separately, the Affidavit evidence produced by the Company, it was argued, gave clear and compelling evidence that the alleged debt being pursued was genuinely disputed and that the basis of the dispute was real and substantial. This rebutted, so it was said, the presumption in relation to insolvency which might otherwise be raised by failure to satisfy a statutory demand served in accordance with section 407(a) of the Law.
17. Further, it was contended, in the whole circumstances the Royal Court should exercise discretion not to wind up the Company. The Bank already had sufficient protection and would suffer no genuine prejudice. By contrast, if the Application was granted, this would be potentially disastrous not only for the Company but also for the entire group. Among other matters, the various companies within the group were responsible for the employment of 1300 people; and the winding up of the Company, being (so it was said) the parent company of the JJW Group, was likely to impact financing across the whole group and might also have a damaging impact on existing contracts. It was said that aside from the expired Statutory Demand there was no evidence before the Royal Court of the Company's insolvency.

The Judgment Below

18. The Royal Court noted that, in the absence of any applicable definition in the Law, the word "creditor" could be given its ordinary meaning as being a person to whom a debt is payable. In its Statutory Demand, the Bank had relied on a judgment debt following the decision of the Paris Court of Appeal; but the opinions of the experts on French law, which had been put before the Royal Court, disagreed as to the effect of the March 2019 Judgment. In the opinion of the expert for the Bank, the March 2019 Judgment had a final and enforceable effect. French Counsel adduced as an expert for the Company, on the other hand, expressed opinions to the contrary. A preliminary point, however, arose because of the proximity of the principal expert for the Company to the group of companies to which the Company was said to be the immediate parent.
19. The Royal Court, relying upon the views set out in Helical Bar plc v Armchair Passenger Transport Ltd [2003] EWHC 367 (QB) at [29] as to the approach to be taken by a court in considering an expert's

interest in proceedings, noted that the principal expert for the Company, M. Cotret, was an integral part of the legal team for the group of companies of which the Company was then said to be the immediate parent. Even so the Royal Court determined, at [33]:

"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."

20. After consideration of the evidence of the respective experts, the Royal Court concluded:

"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 complaints of the Company that the effect of the 19 March 2019 appeal means that the judgment is (sic) against the Company is not enforceable. This accords with the principle set out in Dicey, 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."

21. Having identified that the Bank was entitled to use the Statutory Demand procedure, the Jurats proceeded to find that the Statutory Demand had been validly served; as, indeed, was not in issue.

22. The Royal Court then noted, under reference to Minister of the Public Service Department v Miller and Baird (CI) Limited 2009-10 GLR 142, that a winding up application could be resisted on the grounds that there was a genuine and serious dispute. On the legal test, the Deputy Bailiff directed the Jurats that the test should be, as set out in Commissioners of Customs and Excise v Arena Corporation Limited [2004] EWCA Civ 371, that any dispute should be on substantial grounds; meaning that the dispute had to be real as opposed to frivolous. As the Deputy Bailiff expressed it, this meant that the dispute had to be both genuine and serious.

23. On this issue, the view of the Jurats was expressed as follows at [45]:

"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."

24. The Jurats then turned to consider the evidence adduced by the Company to rebut the presumption of insolvency. On this, the determination of the Jurats expressed in [49], is as follows:

"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 [the] Company is more probably than not insolvent."

25. Finally, the Royal Court considered whether, in all the circumstances, it ought to exercise its discretion to wind up the Company. As it set out at [50], the Royal Court took into account the prejudice that might be suffered by the Company and underlying companies as a consequence of winding up. The Royal Court noted that there was no indication that, as a holding company, the Company had any

employees. The immediately underlying company, JJWF, appeared already to be in some form of receivership. It was the employees of the companies underlying JJWF who were far more directly impacted by proceedings; and those employees had exercised a direct influence over the manner in which the French proceedings were being undertaken. The Jurats found that there was no evidence provided to the Royal Court about how the winding up of the Company would impact on group companies not caught by the receivership proceedings in respect of the Borrowing Companies. In all these circumstances the Jurats considered that this was not an appropriate case in which to exercise discretion to stay proceedings pending the outcome of the hearing before the Cour de Cassation.

The Judgment of the Cour de Cassation: Fresh Evidence

26. Upon an enquiry by this court as to whether the Cour de Cassation had issued judgment, we were informed that it had; and the Judgment and a translation into English were supplied to us. Shortly thereafter there was a change of representation for the Company and, on 8 April, there was an application on behalf of the Company to admit further evidence. We agreed to accept that application, allowed the Bank some time to respond and indicated that we would hear argument on the morning set for the hearing of the appeal. We also requested parties to submit succinct written skeletons as to the effect of the judgment of the Cour de Cassation.
27. In its application to admit further evidence, the Company asked the court to exercise its discretion pursuant to Rule 12(2) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964 (the “1964 Rules”) to admit into evidence the expert report of one Professor Xavier Lagarde dated 17 March 2021, the Judgment of the Cour de Cassation dated 24 March 2021 together with a translation into English, and a supplemental report of Professor Lagarde dated 30 March 2021.
28. For the Company, Advocate Barclay emphasised that Rule 12(2) of the 1964 Rules provides that, subject to exceptions, this court has full discretionary power to receive further evidence upon questions of fact. There is a proviso that, in the case of an appeal from a judgment after trial or hearing on the merits, no such further evidence should be admitted, except on special grounds; but there is a stated exception in respect of evidence as to matters which have occurred after the date of the trial or hearing. The documents sought to be adduced all related to matters which had occurred

after the date of the initial hearing on 13 and 23 July 2020 and, therefore, no special grounds were required.

29. Were special grounds to be considered, submitted Advocate Barclay, it was clear that this court would exercise its powers in accordance with the principles as set out in Kirk v Blackwell [1986] 4 GLJ 65, Smith v Slawther (CA) 1997-99 GLR 106 and Smith v Atlantique Holdings Ltd (CA) 2013 GLR 279.

These were:

- (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
 - (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
 - (3) the evidence must be apparently credible, although it need not be incontrovertible.
30. Applying those principles, Advocate Barclay submitted, the material did not exist at the time of the original hearing and, although Professor Lagarde's first report of 17 March 2021 predated the judgment of the Cour de Cassation, it provided important commentary when dealing with his second report.
31. It was also clear, Advocate Barclay submitted, that the evidence would have had an important influence on the result of the case. Had the learned Deputy Bailiff had the benefit of the judgment of the Cour de Cassation and Professor Lagarde's reports, she would not have reached the conclusion which she did as to the finality of the Court of Appeal judgment.
32. Further, in considering whether there was a genuine and substantial dispute regarding the debt, the Royal Court had been sceptical of the company's prospects of success before the Cour de Cassation, and it was this that led it to the view at [45] that there was not a genuine and substantial dispute.
33. Had the appeal to the Cour de Cassation been determined at the time of the hearing in July 2020 it was impossible that this would not have influenced the Jurats' thinking.

34. On the third part of the test, the Judgment of the Cour de Cassation being a public document, the associated translation having been produced by a certified translator of the Court of Appeal, and Professor Lagarde being an eminent jurist, the proposed new evidence was clearly credible.
35. As to the effect of the judgment of the Cour de Cassation, the March 2019 Judgment of the Paris Court of Appeal having been quashed and the matter remitted back to that court for redetermination by a different judge, the September 2017 Judgment, on which the Statutory Demand was based, remained subject to appeal and was not final. Further, because the September 2017 Judgment and the March 2019 Judgment had expressed their rulings in the same manner, the September 2017 Judgment was likely to be reversed.
36. In essence, it was submitted for the Company, the decision of the Cour de Cassation supersedes all expert evidence lodged in the proceedings before the Royal Court and places it beyond argument that if the March 2019 Judgment conferred standing on the Bank to apply for a compulsory winding up order, such standing no longer exists. Separately, the Royal Court's finding that the alleged debt was not subject to a genuine dispute was plainly wrong and the Bank's application should have been dismissed. In such circumstances, the Company would not be relying upon the majority of the Grounds of Appeal in the Amended Grounds.
37. For the Bank, Advocate Williams indicated that, whilst in practice an appeal to this court takes effect by way of a review of the decision below, there were no reported Guernsey authorities dealing with the true nature of an appeal seeking to set aside a compulsory winding up order made by the Royal Court. In his submission, however, persuasive guidance could be found in the decision in Re Industrial & Commercial Securities plc (1989) 5 BCC 320, 324 F-H (Knox J). There it was said that there should not be anything equivalent to a rehearing as there were various characteristics in a winding up order which indicated that the critical date for review is the date when the order was made. A winding up order affects a very large number of people and is quite distinct from adversarial litigation: those affected include creditors other than the petitioning creditor. To treat matters as if adversarial might create a risk of serious prejudice to the general body of creditors. Here, therefore, the task of this

court is to review the matters before the Royal Court as at the time it exercised its discretion in order to assess whether the decision was properly made.

38. As to the appropriate test for allowing fresh evidence to be adduced, fresh evidence should not be admitted where it related to matters falling within a field or area of uncertainty already taken into account by the lower court: Mulholland and Another v Mitchell [1971] 1 All ER 307.
39. The proposed evidence should not be admitted. As regards the report of Professor Lagarde dated 17 March 2021, given the purpose stated in the report, this was a clear attempt to have a second bite at the cherry and to remedy the failings at first instance. The amended Grounds of Appeal included, among other matters, that the Royal Court failed to accord sufficient weight to the expert evidence of M. Cotret and the appeal on that matter should be by way of review of the issues addressed before the Royal Court.
40. As regards the judgment of the Cour de Cassation, it was clear from [51] of the Royal Court Judgment that the Jurats specifically considered whether to stay the winding up application pending the conclusion of proceedings in the Cour de Cassation, including the possibility that the appeal could be successful. The Jurats had concluded, in all the circumstances, that to do so would not be an appropriate exercise of their discretion. That decision-making process, having taken into account the uncertainty of outcome in the outstanding French appeal, could not be said to have been falsified by subsequent events. Further, having regard to the amended Grounds of Appeal, the outcome of the proceedings before the Cour de Cassation was irrelevant to a review of the Jurats' exercise of discretion not to stay the winding up application notwithstanding the pending appeal before the Cour de Cassation.
41. In any event, the Cour de Cassation judgment did not affect, by itself, the enforceability of the September 2017 Judgment. The Bank is entitled to enforce that judgment debt especially as it enjoys the benefit of provisional enforcement. Further, the Cour de Cassation did not remark on the merits of the September 2017 Judgment but determined matters largely on procedural grounds. The Company's dispute in the French proceedings remains unintelligible: there is an assertion that the loan

facility was illegal, but it is not disputed by the company that the entire loan facility of €97m was drawn down and some repayments made.

Discussion

42. We decided to refuse the application to admit fresh evidence. Our reasoning starts with a consideration of the nature of an appeal to this court against a compulsory winding up order made by the Royal Court. On this we find ourselves in agreement with the views expressed by Knox J. in Re Industrial and Commercial Securities plc. At 324 [F]-[H] the learned judge expressed the view of the Companies Court (Chancery Division) in the following terms:

"In my judgment, there is jurisdiction for the single judge to make an order that the registrar could have made at the date when he did make the order, but that does not mean, in my judgment, that there is anything equivalent to a hearing de novo.

There seem to me to be various characteristics to a winding-up order which indicate that the critical date is the date when the order was made, and that it is at that date that the court should decide whether or not the winding-up order was properly made.

First of all, it seems to me that a winding-up order operates in rem and affects a very large number of people, and is quite distinct from either litigation between two individuals or litigation where discretionary remedies as opposed to accrued rights are in question.

The people who are affected by winding-up orders certainly include the liquidator, the contributories, and most notable creditors in the plural, and I deliberately include the creditors other than the petitioning creditor.

In my judgment, there would be a risk of serious prejudice to the general body of creditors if a winding-up order, properly made when it was made, was open to an appeal simply by paying off the petitioning creditor..."

43. Indeed, we would go further. It is not only that there would there be a risk of serious prejudice to the general body of creditors if, for example, a winding up order, properly made when it was made, was open to an appeal simply by the petitioning creditor being paid his debt. We agree with Knox J. that a winding up determination is not merely adversarial: something has happened which potentially affects the general body of creditors even if it is only one of them that has noticed a salient insolvency issue or, separately, is in the position to take the protective steps which may, in the end, benefit others than them. It is that other creditors, through due diligence, will become aware of the winding up order and its basis but, knowing that there has been an issue in respect of the solvency of the company in question, may well deal with their affairs and potential claims upon the basis that a protective order is

in place and that they do not, individually, have to take separate protective steps. The issues in this appeal therefore, are: first whether the Royal Court had jurisdiction to make the order, second whether it had a basis for the order, and third whether there was some error going to the exercise of discretion. Clearly the Royal Court had jurisdiction over a Guernsey registered company, and we turn now to the basis.

44. The basis was the September 2017 and March 2019 Judgments upon which the Statutory Demand was founded. The question which arises is as to whether they can be founded upon when subject to an appeal procedure. On this we find ourselves in agreement with the views expressed by Warren J. in *El-Ajou v Dollar Land (Manhattan) Limited* [2007] BCC 953, 955, where the learned judge said:

" 8. The reasoning by which the courts have rejected petitions where the debt is bona fide disputed on substantial grounds is because in such a case the Petitioner cannot be said to be "a creditor" for the purposes of the statutory provisions. See, for instance, the decision in Mann -v- Goldstein [1968] 1WLR, p.1091 , adopted by the [Court of Appeal in Stonegate Securities -v- Gregory \[1980\] Ch. 576](#) . I quote from the earlier judgment:

For my part I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court"

9. In a case where the Court has ruled in favour of a Claimant that a debt is due, then the Claimant is, in my judgment, unquestionably a creditor, even if the Judgment is the subject matter of an appeal. If the creditor then petitions for a winding-up based on the judgment debt, it is no defence to the petition that the Judgment may be overturned on appeal. It may be that the Respondent could, depending on the facts, obtain a stay of the petition pending an appeal. In the present case I attempted to carry out a careful balancing exercise when ruling on the terms on which a stay of my Order should apply. Those terms were intended to apply to all methods of enforcement so that if the terms were not fulfilled, it would be open to Mr. El-Ajou to enforce his Judgment against Manhattan in any way, including by way of a winding-up petition. I do not consider the present case to be one where, as a matter of discretion, it would be appropriate to order a stay of the petition pending the appeal from my Judgment. That was what I hoped I had done in making the order I did. In any event, there has been no further application before me to stay Mr. El-Ajou's petition. The application before me is essentially that there should be an administration rather than a winding-up."

45. In the present case the order following the September 2017 Judgment specifically grants the benefit of provisional enforcement and, when initially appealed there was no application for a stay. The Bank therefore has the benefit of a judgment in its favour for a defined sum of money in a determination

which has the authority of *res judicata* and the benefit of provisional enforcement. Advocate Barclay sought to persuade us that the decision of Warren J. could be distinguished upon the basis that the determination there was as regards a domestic judgment debt whereas the present circumstances related to a foreign judgment in respect of which there had been no Guernsey enforcement proceedings. We find no substance in those submissions. The point being made by Warren J., with which we agree, is that a court has ruled in favour of a claimant that a debt is due; and that this, ineluctably, determines that the claimant is a creditor, even if the judgment is the subject matter of an appeal. It may be that a stay could be obtained but, if not, there is a judgment debt.

46. In our judgment the issue for this court on appeal is unaffected by the fact of an appeal process in France or indeed the determination of the Cour de Cassation. The court quashed the March 2019 Judgment but did not take any other step which might be argued to have a direct effect on the September 2017 Judgment.

47. Separately, approaching matters from the three principles identified by Advocate Barclay, the evidence may not have been available at the time of the July 2020 hearing and may indeed be credible; but in our judgment it would not have had an important influence on the result of the case. The Royal Court was aware of the appeal process and aware of the uncertainty in outcome but, having considered all the matters before it, reached the view that it would not be a proper exercise of its discretion to grant a stay. The Royal Court's process of reasoning had been that there was no clear evidence of a genuine underlying dispute [43] – [45], that there was a lack of evidence and opacity as to the Company's solvency [46] – [49] and that the submissions as to prejudice were insufficient to support an exercise of discretion not to wind up [50]. In all of those circumstances the decision of the Cour de Cassation, in our judgment, would not have had an important influence on the result of the case. We therefore refused the application for fresh evidence to be admitted.

Contentions on Grounds of Appeal and Discussion

48. As presented to us by Advocate Barclay at the hearing, the overriding issues for the Company in its appeal were (i) that the Bank had no relevant standing to bring proceedings, (ii) that, even if there was standing, the Royal Court had erred in that the question as to whether there was a genuine dispute

was for the Deputy Bailiff and not for the Jurats, (iii) that the only conclusion open to the Royal Court had been that there was a genuine dispute, and (iv) that the decision of the Royal Court had been vitiated by fundamental error.

49. As to standing, the Statutory Demand was predicated upon the decisions of the Commercial Court and the Court of Appeal. But the Bank had elected not to seek recognition of those judgments in Guernsey. Accordingly, there was no judicial determination in Guernsey that the debt demanded was due and it followed that the debtor was able to dispute the debt. A foreign judgment debt was not due until the judgment was recognised either through reciprocal enforcement treaties or by common law judgment. Under the procedure chosen by the Bank, the Royal Court had jurisdiction only to grant a winding up order or not; it did not have jurisdiction to enter into recognition processes. Further, the learned Deputy Bailiff had accepted that it was not open to the Royal Court to enter into the merits of the dispute before the courts of the Republic.

50. In our judgment, this line of argument is misconceived. It proceeds upon the premise that, as regards issues which have become the subject of foreign judgments, the words 'debts' and 'creditor' in s. 407 of the Law mean something different than they do for domestic issues. A material point supporting the availability of the Statutory Demand procedure is that it allows a creditor an expedited route to protection. She or he is entitled to make a demand based upon underlying facts and contentions: the Demand may bring satisfaction, but if not, there will be a presumption of insolvency and statutory protective measures. It is, of course, open to the company in question to show that there is a genuine dispute; but an essential point is that a full judicial determination of the underlying basis for the Demand is not required. We cannot discern any rational basis for the opposite result in relation to issues over which the courts of another country have jurisdiction. The statutory procedure is to apply, here, to Guernsey registered companies with, among other matters, the purpose of giving protection to the creditors of the company in question wherever the creditor is based. There seems no rationale in suggesting that the fact that the law relating to the underlying dispute is that of another jurisdiction should place the creditor in a less protected position than the creditor in a Guernsey law dispute. The 'creditor' with the claim which might fall to be adjudicated on in another jurisdiction ought equally to be

able to press a Demand for what is said to be due, albeit not yet judicially recognised, and to have the benefit of the statutory presumption that the company is unable to pay its 'debts'.

51. If the foregoing analysis is correct, it matters not that a foreign judgment has not been recognised officially in Guernsey: it is perfectly sufficient for a creditor to be able to claim that a debt is due and to make a demand. She may or may not be in a stronger position with a judicial determination from a foreign jurisdiction; but she cannot be weaker. We note that the Royal Court's judgment, in the passage at [39] which we have quoted at [20] above, referred to the principle 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.
52. In considering whether the Royal Court had erred, in that the question as to whether there should be a stay upon the basis of a genuine dispute was for the Deputy Bailiff and not for the Jurats, Advocate Barclay freely conceded that this was not a point of conclusive importance, but submitted that it was of importance nonetheless. The submission on behalf of the Company was that there had been an improper exercise of discretion because the discretion to stay the application is the discretion of the Deputy Bailiff, informed by any relevant findings of fact of the Jurats, and not a discretion of the Jurats alone as appeared to have been the case here: see [51].
53. In essence there was just one single issue to be decided: how should the winding up application be disposed of, having regard to the evidence and submissions? Either the application could be dismissed, if the Company's arguments were accepted; or an immediate winding up order could be made, if they were not; or (unusually, and quite contrary to the court's well-established approach in winding up applications) the application could be deferred indefinitely to await the outcome of proceedings in France. The ultimate determination is one of mixed fact and law and, absent any erroneous directions on law and procedure, it is for the Jurats to consider the factual circumstances put before them and to identify whether any legal test is met and how a discretion is to be exercised. It is only open to this court to interfere with a decision within limited circumstances. As is well known, this Court has only limited power to interfere with the exercise of discretion by the Royal Court. Essentially, it must be possible to point to an error of principle, the taking into account of irrelevant

matters, a failure to take account of relevant matters or decisions which are plainly wrong. See Carlyle Capital Corporation Limited and Others v Conway and Others (11/2012) at [35]. None of those circumstances exist in the present case.

54. Turning to the submission that the only conclusion open to the Royal Court had been that there was a genuine dispute, Advocate Barclay submitted that, on this, the court was not being asked to interfere with an exercise of discretion: the issue as to whether there was a bona fide disputed debt raised a substantive point. It was of critical importance as it was clear that the ultimate determination at [51], that the Royal Court should not exercise its discretion to stay the application, was firmly based upon the findings at [43] – [45]. When those passages were considered it was clear that the Royal Court had not properly engaged with the Company's case that, in the circumstances which had come to pass, the Bank was precluded from suing upon the basis of the First Demand Guarantee.

55. In our judgment, the approach of the Royal Court cannot be faulted. The Royal Court correctly identified that the fact that there were legal proceedings in another jurisdiction did not, of itself, provide conclusive evidence that there was a genuine and substantive dispute between the Company and the Bank: [43]. The Royal Court then went on to appraise the evidence in relation to the dispute: [45]. The Royal Court was not impressed by the *'very brief reasons [from the Company's expert] as to why the Company says the underlying debt on the guarantee is not owed'*. The Royal Court went on to note that, whilst there had been an argument going to the nature of the type of guarantee given, *'it does not seem to be disputed by the Company that loan repayments were initially made under the terms of the Loan which then ceased.'* Whilst the Royal Court then proceeded to note the appeals and the conflicting opinions of experts, in our judgment, the Royal Court was well founded in identifying that, where a loan had been drawn down and repayments made, only the most cogent of reasoning would suffice to show that the loan was a sham, that no repayments were due and no guarantees were enforceable.

56. For all of these reasons we do not detect a case of the approach of the Royal Court being vitiated by fundamental error. The appeal will therefore be dismissed.

57. We would add that, even had we been persuaded that the Royal Court had been in error, the matters raised in [43]-[44] above would have given us pause before allowing the appeal in the whole circumstances before us.
58. A ground of appeal, not insisted upon by Advocate Barclay following his instruction on the change of counsel, had been that the Royal Court had failed to consider whether it was proportionate to order a winding up in that the Royal Court had been wrong to conclude that the Company should be found to be insolvent. The foundation for that ground lay in the Affidavit evidence of the Chief Financial Officer of the Company to the effect that the Company was the group holding company, that its winding up would be a disaster for the group, and that the Company “has unencumbered net assets with a value in excess of Euro 1,300,903,000”, comprising the shares in JJWF, and immediate and unfettered access to a very large amount of cash.
59. By the time that the case reached this court, Affidavit evidence of the Company’s sole director, Ms Rizkallah-Reichardt, had been adduced for other purposes connected with the appeal. This indicated that the Company had disposed of all its shares in JJWF in 2009, and now is a dormant bare trustee for a BVI entity (JJW Hotels & Resorts Inc). We record, however, that no documents evidencing the disposition of the shares have been produced, and no explanation is given as to the way in which the sole director came to determine that the disposition had been made.
60. Meanwhile, in September 2020 the Company’s Guernsey resident agent, Albecq, refused to hand over to the Liquidator the Company’s records on the basis of a lien for unpaid fees. Separately, Ms Rizkallah-Reichardt’s Affidavit exhibited evidence from the Liquidators that the Company has liabilities; and as the winding up has not yet been advertised, it is possible that further liabilities will come to light.
61. Further, in September 2020 the Company produced financial statements to the end of 2019 showing no income or outgoings and no liabilities and only £100 of assets. These accounts, it would appear, support the sole director’s evidence that the Company is simply dormant – and make it difficult to see how its winding up could have the devastating effects argued for by the Appellant before the Royal

Court. At all events no explanation has been offered as to how, on the evidence as it now appears, there could be such a critical impact on the Group.

62. In short, not only is the winding up not obviously disproportionate, but there is ground for considering the Company to be insolvent and an investigation of its affairs by Liquidators to be entirely appropriate.