Application for leave to appeal to the Judicial Committee of the Privy Council. The Appellant's appeal does not fall within the exception to section 16 of the Court of Appeal (Guernsey) Law, 1961 and as such does not lie as of right and special leave is required.

[2021]GCA025

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY
ON APPEAL FROM THE ROYAL COURT

CIVIL DIVISION APPEAL No. 547

25 June 2021

BEFORE:

James McNeill QC, President

Clare Montgomery QC JA

George Bompas QC JA

IN THE MATTER OF JJW LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO PART XXIII OF THE COMPANIES (GUERNSEY) LAW, 2008, AS AMENDED

Between:	**JJW Limited (in liquidation)**	**Appellant**
	and	
	Aareal Bank AG	**Respondent**

Advocate J. Barclay for the Appellant
Advocate A. Williams for the Respondent

Bompas JA:

1. This is the judgment of the Court.

2. In a judgment given on 21 April 2021 by the President, McNeill JA, we dismissed the appeal of the company, JJW Ltd ("the Company") against an order for its compulsory winding up made on 31 July 2020 by the Royal Court (Roland DB, with Jurats Hooley, Boyle and Burnard). The Company now applies for leave under section 16 of the Court of Appeal (Guernsey) Law, 1961 to appeal from this Court's decision to the Judicial Committee of the Privy Council.

3. In making this application the Company accepts that in the present case the application for leave does not fall within the exception to section 16 of the 1961 Law, so that the Company's appeal does not lie as of right and special leave is required. Where special leave is required, this Court will give the leave sought if the appeal raises an arguable question of law of general public importance, that being the test which the Privy Council guides itself by. In cases where the test is not considered to be met, this Court will refuse leave and it will be for the appellant to satisfy the Privy Council that leave should nevertheless be given.

4. The compulsory winding up order was made on the application of Aareal Bank Ltd, the Respondent. Three sections of the Companies (Guernsey) Law, 2008 are in point.
    a. Section 406 sets out the circumstances in which a company may be wound up by the court: this includes the case where the company is unable to pay its debts within the meaning given in section 407.
    b. Section 407 provides that a company is deemed to be unable to pay its debts not only if it is proved to the satisfaction of the Court that the company fails to satisfy the solvency test (as to which, see section 527 of the Companies Law), but also if a creditor "*to whom the company owes a sum exceeding £750 which is then due*" serves a written demand for payment (a statutory demand) and the company neglects to pay the sum or secure the payment. (In summary the solvency test is not satisfied unless the company is <u>both</u> able to pay its debts as they fall due <u>and</u> has a surplus of assets over liabilities.)
    c. Section 408 allows an application for a compulsory winding up to be made by, among others, a "*creditor*"; and an order may on such an application "*operates for the benefit of all of the company's creditors in the same way as if the application had been presented by them*".

5. The Respondent had, before making its application, served a statutory demand on the Company. This demand was based on a judgment ("the 2019 Judgment") given by the Court of Appeal of Paris dated 13 March 2019, upholding a first instance judgment ("the 2017 Judgment") for some €22 million given on 20 September 2017 by the Tribunal De Commerce De Paris. The judgments had been in respect of a claim by the Respondent on the Company's guarantee of loans made by the Bank to other companies.

6. However, at the time of the hearing before the Royal Court the 2019 Judgment was subject to a pending appeal by the Company to the Cour de Cassation. There was an issue of French law, that is a factual issue, before the Royal Court concerning the effect of the pending appeal on the Respondent's judgment debt created by the 2017 and 2019 Judgments. The Royal Court, having heard expert evidence, held not only that the Respondent was a "creditor" of the Company (as obviously it was), but also that it was one to whom the Company owed a sum in excess of £750 which was then due.

7. Accordingly, so the Royal Court found, the Respondent both (a) had standing to make an application to the court up as a creditor within section 408 of the Companies Law, and to seek to show the Company to be insolvent (that is, "unable to pay its debts") and appropriate to be ordered to be wound up under section 406 of the Companies Law, and also (b) qualified as being able to serve a statutory demand so as to establish deemed insolvency.

8. In this regard the Royal Court was not impressed with the Company's evidence as to solvency and indeed explained (at the end of [49] of their judgment) that "*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*". In other words, the finding as to the Company's inability to pay debts within section 407 of the Companies Law did not depend simply on the Company's failure to respond appropriately to the statutory demand.

9. The Royal Court went on to decide, in the circumstances of the case, to exercise its power to make the winding up order sought. This was a matter for the Royal Court in exercise of its discretion conferred by section 406 of the Companies Law.

10. Before us the Company sought to introduce fresh evidence. In part this was directed at challenging the Royal Court's conclusion that the Respondent's debt was one which was due, notwithstanding the pending appeal. This was no more than a re-run of evidence which the Company had had ample opportunity to put forward to the Royal Court.

11. In part, however, this fresh evidence was directed as showing that, shortly before the Company's appeal came on for hearing, the Cour de Cassation had quashed the 2019 Judgment and had remitted to the Paris Court of Appeal the Company's appeal against the 2017 Judgment; and this, it was said, could be shown to mean that the Respondent was not in truth a creditor owed a debt then due.

12. We refused the Company's fresh evidence application and dismissed the Company's appeal. In short, we considered that the questions before this Court, namely whether the Respondent was a "creditor" within the relevant provisions of the Companies Law, and if so whether the Company was unable to pay its debts and ought to be wound up, were appropriately to be judged as at the time of the Royal Court's decision to order the winding up.

13. We did not see that the proposed fresh evidence by the Company would satisfy the requirements usually applied for the admission of fresh evidence on an appeal. And we did

not see any error in the Royal Court's findings or in its approach to its decision, which could justify this Court in setting aside the Royal Court's decision.

14. For good measure we noted that even if the fresh evidence were admitted, and established that the result of the Cour de Cassation's decision was that the Respondent was not after all someone to whom there was now a debt due (that is a presently due and payable debt, as opposed to a future or contingent one), there was also evidence now before the Court, from the Company itself, that the Company has no assets at all and has material liabilities. This would simply reinforce the Royal Court's conclusion as to the Company's inability to pay its debts within section 407 of the Companies Law.

15. On behalf of the Company Advocate Barclay has submitted that "*the new facts in this case give rise to an important point of law as to whether a person … can be said to constitute a creditor for the purposes of section 407 of the Companies Law in circumstances where a statutory demand is based on an order of a foreign court which is provisional and subject to appeal".*

16. We do not accept that the suggested question would arise on the Company's appeal, or that it is one suitable for leave to appeal to be given. The Royal Court's decision was reached on the basis of evidence before it concerning the effect of the 2019 Judgment in the light of the then pending appeal. That assessment of the evidence is not to be faulted, and neither is the decision reached on the basis of the evidence. The proposed new evidence about the position as it was before the Royal Court could and should have been brought at the time of the hearing before the Royal Court if it were to be relied upon.

17. If, in contrast and contrary to our decision, the time when the question falls to be answered is the time of the appeal hearing, when the Cour de Cassation had remitted the Company's appeal back to the Court of Appeal, the difficulty for the Company is that the question does not in fact arise: the Respondent still has the benefit of a judgment in its favour and is a creditor, whether or not it has standing to serve a statutory demand, and still the Company is unable to pay its debts.

18. We therefore refuse the Company's application.