In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL LIST

2013: No. 266

AGRENCO LIMITED

Plaintiff

-v-

CREDIT SUISSE BRAZIL (BAHAMAS) LIMITED

Defendant

RULING

(in Chambers)

Date of hearing: March 31, 2014
Date of Ruling: April 10, 2014

Mr. Ben Adamson, Conyers Dill and Pearman Limited, for the Plaintiff

Mr. Martin Ouwehand, Appleby (Bermuda) Limited, for the Defendant

Introductory

1. On August 15, 2013, following an ex parte hearing, I granted the Plaintiff's application for an Order in the following terms:

> "*1. The Defendant be restrained until further order, whether by himself, his servants or agents or otherwise howsoever, from presenting any petition to this honourable Court for the winding up of the Plaintiff Agrenco Ltd. ("the Company") based upon the sum of US$50 million plus interest claimed in the statutory demand dated 25th July 2013 served on the Company on 25th July 2013…*"

2. In the First Nils Bjellum Affidavit, sworn in support of the injunction application, it was deposed that the exhibited statutory demand for the payment of the principal sum of US$50 million related to a guarantee provided by the Company for the primary indebtedness of a Portuguese indirect subsidiary under a credit agreement dated December 18, 2007 ("the Credit Agreement"). The Company's Brazilian subsidiaries had been in restructuring proceedings since August 2008 until, on July 26, 2013, the Defendant ("Credit Suisse") voted against the latest restructuring plan resulting in the subsidiaries being placed into liquidation. The Credit Agreement was governed by New York Law and advice had been received (which was exhibited) to the effect that under New York law the Company was entitled to complain that Credit Suisse's conduct amounted to a breach of its covenant of good faith under the Credit Agreement. He deposed:

> "*16. In the circumstances, I believe it would be wrong, inequitable and unconscionable for the defendant to continue to enforce the guarantee. I am also advised that, as a matter of Bermuda law, where the creditor has caused the default he cannot properly claim under the guarantee.*"

3. Counsel who appeared on the ex parte application conceded there was no clear evidence of damage flowing from the presentation of the Petition or of solvency. However, he indicated that available evidence suggested the Company was at least solvent on a balance sheet basis. He also very properly disclosed that the guarantee contained in the Credit Agreement had wide-ranging exclusions and waivers which restricted the Company's ability to cross-claim.

4. I found that a borderline case for the grant of interim injunctive relief had been made out, applying the principles from my own judgment in *Alpha Prime Fund Ltd.-v-Primeo Fund Ltd.* [2011] Bda LR 51.

5. By Summons issued on January 2, 2014, Credit Suisse applied to set aside the August 15, 2014 interim injunction. By the time this application was heard, the ground had shifted in two material respects. Firstly, the Company conceded that its New York law claim was merely a cross-claim so that the existence of the debt upon which the Statutory Demand was based was not disputed. And, secondly, the Company was no longer in a position to assert that it was solvent on a balance sheet basis.

Findings: the legal principles governing the restraint of the presentation of a winding-up petition against a company who asserts a cross-claim equal to the would-be petitioner's debt

6. It was essentially common ground between the parties that the Company bore the burden of establishing a *prima facie* case that presentation of a Petition based on the Statutory Demand would be an abuse of process because of the existence of a substantial cross-claim in an amount comparable to the debt based on the Statutory Demand. These principles are essentially the same as those according to which the English Companies Court decides whether or not to dismiss a winding-up petition which has been presented because of the existence of a serious cross-claim. They also correspond, evidentially, to the approach the Court will follow in deciding whether or not to dismiss, or restrain the presentation of, a petition said to be based on a debt which is disputed on substantial grounds. The relevant principles are summarised in French, '*Applications to Wind Up Companies*', 2nd edition, at paragraph 6.10.7.

7. Argument really centred on how the Court should approach the evidence. Mr. Adamson relied on the comparatively liberal, pro-company, approach adopted by the Court of Appeal majority in a 1964 judgment subsequently reported as *In re Portman Provincial Cinemas* [1999] 1 W.L.R. 157. Mr. Ouwehand relied upon the more critical review of the evidence which was undertaken in a case in which he unsuccessfully appeared for the company, *Re Pan Interiors Ltd.* [2005] EWHC 3241 (Ch). In that case, Warren J felt constrained to acknowledge that the principles applicable to dismissing a petition based on a substantial cross-claim and restraining the presentation of a petition for similar reasons were the same, even though where a petition debt does exist, "*to restrain the presenting of the petition would be to interfere with what would otherwise be a legitimate approach to the seat of justice*" (at paragraph 35).

8. In my judgment, where a would be petitioner is admittedly owed an undisputed sum and the company seeks to restrain the presentation of a petition based on the existence of an allegedly substantial cross-claim in a larger or corresponding amount, the company's evidence may fairly be scrutinised more carefully because the creditor's constitutional rights of access to the Court under section 6(8) of the Bermuda Constitution are engaged. The fact that the company is insolvent is also recognised as potentially weakening the starting assumption that any cross-claim is genuine.

9. Another feature which ought in my judgment result in this Court being cautious about restraining the presentation of a petition based on an undisputed debt against an insolvent company did not appear to be explicitly addressed in the authorities cited by counsel. It is well recognised that an unpaid creditor who petitions is asserting a representative right on behalf of unsecured creditors as a class. It is one thing to dismiss such a petition after it has been advertised and other creditors have been afforded an opportunity to apply for substitution if necessary. It is another to prevent

such a petition from being filed, and potentially prejudicing the rights of other unsecured creditors of an insolvent company, purely because the company appears to have a substantial cross-claim. On the other hand, I accept Mr. Adamson's submission that a factor mitigating in favour of an injunction is the possibility that the winding-up of the Company might for practical purposes result in the extinction of its cross-claim.

10. Mr. Ouwehand referred the Court to the following instructive passages in the judgment of Ola Mae Edwards JA in the Eastern Caribbean Court of Appeal (BVI) case of *Angel Wise Limited-v-Stark Moly Limited*, HCVAP 2010/030, Judgment dated February 13, 2012 (unreported):

> "*[23] Australian case law is replete with helpful pronouncements on the applicable principles to be applied in determining applications to set aside statutory demands. Sections 459E9 (when a creditor may serve a statutory demand); 459G (power to an applicant to apply to a court for an order setting aside a statutory demand under specified circumstances); 459H10 (provisions concerning the grounds for setting aside the statutory demand and the determination of the application by the court); and 459J11 (other reasons for setting aside the statutory demand) of the Corporations Act 2001 of Australia are comparable to sections 155, 156, 157(1) and 157(2) respectively of the Act.*
>
> *[24] In Eyota Pty Ltd v Hanave Pty Limited McLelland C.J. said the expression genuine dispute in the Australian legislation:*
>
> > '*connotes a plausible contention requiring investigation, and raises much the same sort of considerations as the "serious question to be tried" criterion which arises on an application for an interlocutory injunction or for the extension or removal of a caveat. This does not mean the court must accept uncritically as giving rise to a genuine dispute, every statement in an affidavit "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself, it may be " not having sufficient prima facie plausibility to merit further investigation as to [its] truth" (cf Eng Mee Yong v Letchumanan [1980] AC 331 at 341), or a "patently feeble legal argument or an assertion of facts unsupported by evidence"...But it does mean that, except in such an extreme case, a court required to determine whether there is a genuine dispute should not embark upon an inquiry as to the credit of a witness or a deponent whose evidence is relied on as giving rise to the dispute. There is a clear difference between, on the one hand, determining whether there is a genuine dispute and, on the other hand, determining the merits of, or resolving, such a dispute.*'

11. In *Angel Wise Limited*, the Eastern Caribbean Court of Appeal upheld the conclusion of Bannister J that there was no substance to the company's assertion,

supported by expert evidence, that the loan agreement upon which the statutory demand was based was unenforceable under Singaporean law.

12. I am required in all the circumstances of the present case to assess whether or not the cross-claim relied upon by the Company has "*sufficient prima facie plausibility to merit further investigation as to [its] truth*".

Findings: does the Company's cross-claim appear sufficiently serious to justify restraining the presentation of a petition based on Credit-Suisse's admitted liquidated debt so that the relevant cross-claim can be fully investigated?

The Credit Agreement

13. Section 11.02 ("Guarantee Unconditional") of the Credit Agreement provides in salient part as follows:

> "*The obligations of the Guarantors under this Article 11 shall be unconditional and absolute and, without limiting the generality of the foregoing, shall not be released, discharged or otherwise affected by:…*
>
> *(e) the existence of any claim, set-off or other rights that any Guarantor may have at any time against the Borrower, either Agent, any other Secured Party or any other Person, whether in connection herewith or with any unrelated transactions*…"

14. This clause explains why the Company was unable to dispute the existence of the debt upon which the Statutory Demand is based. The primary obligation the Company assumed to Credit Suisse is under Section 11.01, under which the Company "*unconditionally Guarantees the full and punctual payment and performance…of all obligations of the Borrower under the Loan documents…as a primary obligor and not merely as a surety*". The Agreement is governed by New York Law.

The Peter Chaffetz Affidavit on New York law

15. Peter Chaffetz opines on the New York law cross-claim asserted by the Company against Credit Suisse based on facts supplied to him. The central allegations appear to me to be the following:

(1) between October 10, 2008 and September 20, 2010, Nelson de Sampaio Bastos was a director of the operating companies in judicial restructuring who:

(a) had a conflict of interest as agent of Credit Suisse and other creditors, and

(b) "*took several decisions that ensured that the …Agrenco Group entities, would be forced into bankruptcy and into the control of their creditors, including Credit Suisse*" (paragraph 2.1.6);

(2) the day before the Statutory Demand was served, "*Credit Suisse…used its dominant voting position in one of the creditor classes in Brazil to reject the restructuring of the Operating Companies. By doing so and by having participated in the prior collusion of Nelson Bastos and other creditors, Credit Suisse ensured that there would be no money at the Operating Company level that could be used by Agrenco or Agrenco Madeira to meet their obligations under the Credit Agreement*" (paragraph 2.1.9).

16. Chaffetz then opines that under New York law Credit Suisse under the Credit Agreement is subject to an implied covenant of good faith and fair dealing. He asserts that: "*A party breaches the duty of good faith when it frustrates the fundamental purpose of the contract or exercises its rights under the contract as part of a scheme to 'deprive the other party of the fruit of its bargain*'" (paragraph 3.4). He then concludes that the "*the facts alleged above, if proven, would support a cause of action on the part of Agrenco against Credit Suisse for breach of the duty of good faith…it is likely that a New York court would conclude that…Credit Suisse had a duty to refrain from actions that were calculated to prevent Agrenco from being able to repay its obligations under the Credit Agreement…*" (paragraph 3.7). A similar conclusion would be reached if Credit Suisse were proven to have colluded with the Brazilian liquidator to put the Agrenco Group on a worse financial footing (paragraph 3.8).

17. The deponent is known to the Court as a competent and experienced New York lawyer. His independence was not challenged, unlike that of the New York law deponent relied upon by Credit Suisse, who is an attorney (albeit a former judge) with the firm of White & case who act for Credit Suisse in connection with this matter. I see no reason to question at this stage the soundness of Peter Chaffetz's general analysis of New York law principles, which are articulated in very balanced and temperate terms.

18. However, it is noteworthy that the opinion omits any explicit reference to what form of relief would be available to the Company if its claim succeeded and does <u>not</u> suggest that either:

(a) if the facts alleged were proved, Credit Suisse would be denied the ability to enforce the Credit Agreement altogether;

(b) the Company would likely be awarded damages of a commensurate amount to the sums claimed under the Statutory Demand; and/or

(c) that the merits of the hypothetical claim appear obviously strong.

How serious do the facts underlying the cross-claim appear to be?

19. I accept that the allegations that Nelson Bastos had a conflict of interest and was removed as a director on this ground seem on their face to be potentially serious ones. I cannot easily resolve the conflict between the Bjellum Affidavits and the Schroeder Affidavits in this regard (although the latter deponent appears to have entirely straightforward answers to the points advanced on behalf of the Company). However, Bastos left office in early 2011 and it is difficult to see why, if he (in concert with Credit Suisse) was involved in damaging the Agrenco Group's financial interests through those conflicts, no claim in this regard was pursued between 2011 and 2013. I find that the Bastos allegations, in these circumstances, lack substance.

20. The allegation that Credit Suisse took actions calculated to prevent the loan and/or the guarantee being repaid is on its face an improbable one. Such action would be inconsistent with a lender's commercial interests. The loan went into default in or about 2008, various notices of default were served and some of the guarantors commenced restructuring proceedings in Brazil. Credit Suisse and others voted against the relevant plan in 2013, five years later. When the Brazilian debtors were placed into liquidation following the negative vote, this was as a result of a Court order.

21. It seems to be clear that the Court considered the debtors' case that Credit Suisse and other creditors acted improperly in seeking their liquidation, because the validity of the vote was apparently supported by the Federal Public Prosecutor in a submission to the Court of Justice dated August 2, 2013. According to this submission, the creditors voted against the reorganization plan because it failed to meet their interests. Moreover, on August 26, 2013, it appears that the debtors' appeal against the Court of Justice decision was dismissed by the Brazilian Court of Appeal.

22. The Company is clearly insolvent and has been unable to meet its obligations as guarantor for several years. The Credit Agreement is governed by the law of one of the most commercially sophisticated jurisdictions in the world. Mr. Ouwehand submitted that it was impossible in these circumstances to regard as serious or substantial the claim that Credit Suisse's conduct in the Brazilian proceedings would be found by a New York court to have deprived the Company of the fruit of its

bargain-to such an extent that the unpaid lender's ability to recover on the guarantee was neutralized altogether. I agree.

23. The cross-claim I considered to be border-line at the ex parte stage does not withstand closer scrutiny. It lacks "*sufficient prima facie plausibility to merit further investigation as to [its] truth*": *Angel Wise Limited-v-Stark Moly Limited*, HCVAP 2010/030, Judgment dated February 13, 2012 (at paragraph [24]).

Will the cross-claim be extinguished altogether if a winding-up order is made?

24. Any liquidator adjudicating Credit Suisse's claim alongside other creditor claims would, it seems to me, be bound to take into account, to the extent legally permissible, the existence of a cross-claim available to the Company. I do not regard the possible extinction of the Company's claim if a winding-up petition is pursued as a material factor justifying continuing the injunction, particularly having regard to the improbable nature of the cross-claim itself.

25. However, if a further and final appeal against the decision to place the Brazilian operating subsidiaries into liquidation based (in part) on Credit Suisse's rejection of the restructuring plan were to vindicate the Company's position, any such decision would merely increase the prospects that a liquidator would find it impossible to ignore the cross-claim asserted by the Company in the present proceedings.

Conclusion

26. The August 15, 2013 ex parte injunction restraining Credit Suisse from presenting a winding-up petition based on the Statutory Demand must be discharged and/or set aside.

27. Unless either party applies by letter to the Registrar to be heard as to costs within 21 days, the costs of the present application shall be awarded to Credit Suisse to be taxed if not agreed on the standard basis.

Dated this 10th day of April, 2014 _____

IAN R.C. KAWALEY CJ