



# In The Supreme Court of Bermuda

## COMMERCIAL COURT

2014: No. 329

**IN THE MATTER OF AGRENCO LIMITED**

**AND IN THE MATTER OF THE COMPANIES ACT 1981**

### **EX TEMPORE JUDGMENT**

(in Court)

Date of hearing: October 10, 2014

Mr. Henry Tucker, Appleby (Bermuda) Limited, for the Defendant

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

1. In this matter the Petitioner is a creditor which has presented a Statutory Demand under section 162 of the Companies Act 1981. And that section provides that where a statutory demand is served and the company has not paid the debt within three weeks, then the company is deemed to be insolvent. The Company appears today in opposition to the Petition, not contending that the debt is disputed. That issue was resolved previously in 2013: No. 266, Judgment dated April 10, 2014 now reported as *Agrenco Limited-v- Credit Suisse Brazil (Bahamas) Limited* [2014] Bda LR 38.
2. The Company invites the Court to adjourn the Petition for one week to enable the Company, very speculatively, to supplement the Affidavit filed by Mr. Bjellum which expresses the very indefinite hope that some form of restructuring of the operating companies, which are in bankruptcy in Brazil, may yield monies which can be distributed upwards to Agrenco Limited and to its creditors on terms which would make a winding-up unnecessary. Mr. Adamson has also argued that the effect of the winding-up order might be to prejudice those offers.

3. Mr. Tucker in reply has emphasised the right of a petitioning creditor to a winding-up order in circumstances where there is no basis for concluding that a winding-up order is not genuinely sought. And, in reliance on *In the Matter of LAEP Investments* [2014] Bda LR 35 (Hellman J), he has rebuffed the suggestion that the Petition can properly be opposed on the grounds that the Petitioner has some unique interest of its own which is inconsistent with the interests of creditors only.
4. The reality is that an unpaid creditor has an absolute right to a winding-up order. In this circumstance it is far from clear to me that the winding-up of the holding company will have an adverse position of the operating companies. In the event that there were to be some dramatic development which made a winding-up order inconsistent with the interests of creditors, the relief which could be obtained by the company<sup>1</sup> in those circumstances, no doubt with the support of the petitioning creditor, would be to apply to stay the winding-up proceedings.
5. And so it seems to me the appropriate order for the Court to make, in light of the fact that there is no substantive opposition to the Petition, is to make the winding-up order sought and grant the related relief of appointing the Official Receiver as Provisional Liquidator with unlimited powers and extend the time for convening the first statutory meetings by six months.
6. I should also add that I do not ignore the concerns that Mr. Adamson expressed about the limited role that the Official Receiver may play, bearing in mind that he is a statutory officer who is unable to deploy substantial resources. That concern, it seems to me, does not really mitigate against making a winding-up order. Because if the Official Receiver has no resources to take a very active role in the liquidation, it should be easy to persuade him to hold fire and take no action, if in fact there are material developments taking place at the operating company level.
7. And so, in these circumstances, I grant the application sought by the Petitioner<sup>2</sup>.
8. I add for completeness that I did receive a letter from a shareholder who describes himself as “*a regular citizen here in Brazil*”<sup>3</sup>. The position simply is that the rights of shareholders in an insolvent company are extinguished in favour of the creditors and so, regretfully, those concerns do not fall to be taken into account.

Dated this 10<sup>th</sup> day of October, 2014 \_\_\_\_\_

IAN RC KAWALEY CJ

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<sup>1</sup> I.e. acting by its liquidator.

<sup>2</sup> The Petition included the usual prayer for costs.

<sup>3</sup> As indicated in the course of the hearing, the general purport of the letter was to oppose on grounds which were not in Bermudian law terms coherent the making of a winding-up order.