

**N8472**

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]

**OS (COMM) NO. 15 OF 2020**

BETWEEN:  
**CAKARA ALAM (PNG) LIMITED**  
*Plaintiff*

AND:  
**EAST AROWE TIMBER RESOURCE LIMITED**  
*Defendant*

Waigani: Anis J  
2020: 20<sup>th</sup> August & 3<sup>rd</sup> September

***ORIGINATING SUMMONS – application to set aside Creditor’s Statutory Demand – s. 338(1) and (4)(a) – Companies Act 1997***

***PRACTICE AND PROCEDURES – application for extension of time to apply to set aside Creditor’s Statutory Demand – s. 338(3) – Companies Act – whether s. 338(3) is an applicable source for seeking extension of time to apply to set aside a Creditor’s Statutory Demand***

**Cases Cited:**

*In the Matter of Piunde Ltd* (2015) N5971  
*In the Matter of Koitaki Plantations Ltd* (2017) N6670  
*In the Matter of Nivani Ltd* (2016) N6389

**Counsel:**

*Mr T. Tape*, for the Plaintiff  
*Mr M. Wenge*, for the Defendant

## RULING

3<sup>rd</sup> September, 2020

1. **ANIS J:** This was a hearing in relation to the plaintiff's Amended Originating Summons filed on 30 January 2020 (**AOS**). The hearing was contested. I reserved my ruling to a date to be advised.
2. Parties have been notified so I will rule on it now.

### BACKGROUND

3. On 13 December 2019, the plaintiff was served with a Creditor's Statutory Demand dated 27 November 2019 (**Statutory Demand**) by the defendant. The Statutory Demand was issued under s. 337 of the *Companies Act 1997 (the Companies Act)*. The debt claimed in the Statutory Demand was for a sum of K3,039,185.82. The plaintiff does not deny receiving the Statutory Demand on 13 December 2019. But it denies the debt and it intends to contest the claim. As such, it files the AOS under s. 338(3) and (4) of the *Companies Act*.
4. It intends to first of all seek an extension of time because it is already out of time to file its application to set-aside the Statutory Demand. This relief is pleaded as its first relief in the AOS. Then or subject to leave being granted, it intends to apply to set aside the Statutory Demand. The latter is sought as the second relief in the AOS.

### PRELIMINARY MATTER

5. In the AOS, the first relief reads,....*An order that the time to make this application to set aside the Statutory Demand dated 27<sup>th</sup> November 2019 under Form 42 of the Companies Act 1997 (as amended) be extended to the date of this application or such other date pursuant to Section 338(3) of the Companies Act (as amended).*
6. Section 338(1), (2), (3) and (4) of the *Companies Act* states:

**338. Court may set aside statutory demand.**

(1) *The Court may, on the application of the company, set aside a statutory demand.*

(2) *The application shall be made, and served on the creditor, within one month of the date of service of the demand.*

(3) *No extension of time may be given for making or serving an application to have a statutory demand set aside, but, at the hearing of the application, the Court may extend the time for compliance with the statutory demand.*

(4 ) *The Court may grant an application to set aside a statutory demand where it is satisfied that—*

(a) *there is a substantial dispute whether or not the debt is owing or is due; or*

(b) *the company appears to have a counterclaim, set-off, or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off, or cross-demand is less than the prescribed amount; or*

(c) *the demand ought to be set aside on other grounds.*

7. The plaintiff concedes to filing the AOS outside the 1-month period requirement under ss. (2) of s. 338. However, its argument in law is this. It says the use of the term “may” under ss. (3) of s. 338 gives the Court the discretion to grant extension of time for a party to file proceedings in situations such as this where it is out of time under ss. (2) of s. 338 of the *Companies Act* to challenge a Creditor’s Statutory Demand.

8. The defendant argues otherwise. It says the plaintiff has admitted in evidence of receiving the Statutory Demand on 13 December 2019 and of not filing its originating summons within 1 month thereafter, that is, before or by 13 January 2020. As such, it submits that the originating summons and the subsequent AOS were filed after the 1 month which is in breach of s. 338(2) of the *Companies Act*. It, however, submits in the alternative, that given that the application is now before the Court, that the Court may and should exercise its power under s. 338(3) and extend time for the plaintiff to comply with the Statutory Demand.

9. Given that it is not disputed that the AOS was filed outside the 1-month period contrary to s. 338(2), the first query I have is this, whether the AOS is incompetent or whether it is properly before me in terms of requesting for extension of time to comply with s. 338(2). I note that the plaintiff has invoked the process that is provided for under s. 338 of the *Companies Act*. The section and the provisions, in my view, are express. It firstly permits one to apply under it to set-aside a Creditor’s Statutory Demand. It also states that such an application, if made, must be made within 1 month from the date of service of a Creditor’s Statutory Demand. Then it also states that no extension of time may be sought under the provision.

## **CONSIDERATION ON PRELIMINARY ISSUE**

10. I have considered the submissions of the parties. My view is this. Section 338 exclusively provides for a person who intends to apply to set aside a Creditor's Statutory Demand, that is, under s. 338(1). It also expressly disallows a person from seeking an extension if he, she, or it is out of time to apply to set aside a Creditor's Statutory Demand, that is, under s. 338(3). See cases: *In the Matter of Piunde Ltd* (2015) N5971. *In the Matter of Koitaki Plantations Ltd* (2017) N6670 and *In the Matter of Nivani Ltd* (2016) N6389. I will also say this. Section 338(3) is not a source nor is it a law, that permits a person to invoke to apply for extension of time to file his, her or its application to set aside a Creditor's Statutory Demand. Quite to the contrary, s. 338(3) is a law that expressly disallows the Court from doing that very thing.

## **SUMMARY**

11. I therefore find the AOS incompetent, void and an abuse of process. The AOS shall fail for these reasons.

12. Relief 2 is dependent upon the Court granting relief 1. The plaintiff was hoping that upon being granted extension of time, that it would apply to set aside the Statutory Demand under s. 338(4)(a) of the *Companies Act*. Given my ruling on the first issue, this relief shall also fail.

13. Finally, I refer to the alternative argument by the defendant. I will say that given my finding, there is nothing before the Court for consideration.

## **COST**

14. An award of cost is discretionary. I will order cost to follow the event.

## **ORDERS OF THE COURT**

15. I make the following orders:

1. The proceeding is dismissed.
2. The plaintiff shall pay the defendant's cost of the proceeding on a party/party basis which may be taxed if not agreed.
3. Time for entry of these orders is abridged to the date of settlement by the Registrar which shall take place forthwith.

The Court orders accordingly.

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Kandawalyn Lawyers: *Lawyers for the Plaintiff*  
Reymond Obora Lawyers: *Lawyers for the Defendant*