

**PAPUA NEW GUINEA
IN THE NATIONAL COURT OF JUSTICE**

MP 232 OF 2009

IN THE MATTER OF THE COMPANIES ACT

AND:

**IN THE MATTER OF CAKARA ALAM (PNG) LIMITED
(In Liquidation)**

Waigani: Hartshorn, J.
2009: 19th & 20th August

COMPANIES ACT – LIQUIDATION – Application for termination of liquidation - s. 300 Companies Act - Factors for consideration

Facts:

Cakara Alam (PNG) Ltd was put into liquidation by order of the National Court on 14th July 2009 and Mr. James Kruse was appointed its liquidator. Mr. Peter Ling a director of Cakara Alam applies for the liquidation to be terminated pursuant to s. 300(2) *Companies Act*. The application for termination of the liquidation is consented to by the liquidator and the petitioning creditor, Inter Oil Products Ltd. However, East Arowe Timber Resources Ltd, a company that supported the petition for Cakara Alam to be placed into liquidation, opposes the application for termination.

Held:

1. The liquidation of Cakara Alam (PNG) Limited as ordered by this court on 14th July 2009 is terminated pursuant to s. 300(1) and (2) *Companies Act*.

2. pursuant to s.300(4) *Companies Act*:

- i) the liquidator shall pay from his liquidation account all creditors as indicated in paragraph 9 of his affidavit sworn 19th August 2009,
- ii) Cakara Alam (PNG) Ltd and Mr. Peter Ling are to ensure that all creditors listed in column "C" of annexure "JK2" of the affidavit of James Kruse sworn 19th August 2009 are paid pursuant to each creditor's repayment agreement with Cakara Alam (PNG) Ltd and Mr. Peter Ling's undertaking.

Cases cited:

Wep Kilip & In the Matter of Kamsi Trading Limited (2005) SC784

Counsel:

Mr. F. Griffin, for the Applicant

Mr. I.R. Shepherd, for the Liquidator

Mr. D.D. Kombagle, for the Petitioning Creditor

Mr. L. Kari, for East Arowe Timber Resources Ltd

20th August, 2009

1. **HARTSHORN, J:** Cakara Alam (PNG) Ltd was put into liquidation by order of this court on 14th July 2009 and Mr. James Kruse was appointed its liquidator.

2. Mr. Peter Ling a director of Cakara Alam applies for the liquidation to be terminated pursuant to s. 300(2) *Companies Act* which provides his entitlement to do so. The application for termination of the liquidation is consented to by the liquidator and the petitioning creditor, Inter Oil Products Ltd.

3. East Arowe Timber Resources Ltd, a company that supported the petition for Cakara Alam to be placed into liquidation, opposes the application for termination.

4. The main grounds relied upon for the termination of the liquidation are:

a) there is agreement to pay the petitioning creditor's debt by September 2009,

b) Cakara Alam is a solvently trading and profitable company,

c) the liquidator is in receipt of sufficient funds to be able to pay all ascertained admitted claims including claims where agreement has been reached with creditors, and the costs of the liquidation,

d) Mr. Ling has given an undertaking that Cakara Alam will ensure settlement of the debts of all genuine creditors and the costs of the liquidation.

5. East Arowe opposes the application for termination on grounds amongst others that:

a) it is owed money by Cakara Alam,

b) akara Alam is in breach of logging and marketing agreements,

c) ll creditors have not been ascertained and the time by which creditors must lodge a claim has not expired,

d) akara Alam's conduct is contrary to commercial morality or public interest.

Law

6. Section 300(1) *Companies Act* confers upon this court the discretion to terminate the liquidation of a company if it is satisfied that it is just and equitable to do so. Some factors for consideration in determining such an application were detailed by Lay J. in *Wep Kilip & In the Matter of Kamsi Trading Limited* (2005) SC784 following a review of English, Australian and New Zealand authorities. They are:

- a) whether notice of the application has been given to all creditors and contributories,
- b) the nature and extent of the creditors must be shown and whether all debts have been or will be discharged,
- c) the attitude of creditors, contributories and the liquidator,
- d) the current trading position and general solvency of the company should be demonstrated, solvency being of significance,
- e) any non-compliance by directors with their statutory duties should be explained,
- f) the background and circumstances that led to the order of the liquidation being made,
- g) the nature of the business carried on should be demonstrated and whether the conduct of the company was in anyway contrary to commercial morality or public interest.

Whether notice of the application has been given to all creditors and contributories

7. There is no evidence that all creditors and contributories have been served. There is however, evidence from the liquidator that he has worked with the staff and directors of Cakara Alam to identify creditors. There are about 30 creditors including those permitted to be considered since liquidation. Those ascertained with admitted debts will be paid by the liquidator or by Cakara Alam if the liquidation is terminated. East Arowe submits that all creditors have not been ascertained and the period given for creditors to lodge their claims has not expired. I am satisfied that all creditors who wished to give notice of a claim have done so and that in respect of those that are entitled to lodge a claim but have not, the liquidator with the assistance of the staff and directors of Cakara Alam has been able to ascertain them.

The nature and extent of creditors

8. There is evidence of the creditors that have been ascertained by the liquidator and their debts. According to the liquidator and on the information that he has supplied, the total admitted debts including liquidation costs are about K2,168,500. All of the ascertained admitted creditors will be paid leaving a surplus cash balance of about K 458,000.

Attitude of creditors and contributories

9. The petitioning creditor consents to the application and the shareholder of Cakara Alam has authorised the application for termination to be made. All of the creditors ascertained by the liquidator that have agreed to be paid by either the liquidator or Cakara Alam if the liquidation is terminated can be presumed to support the application. East Arowe which alleges that it is a creditor, opposes the application. Its claim in the liquidation was not admitted by the liquidator. The attitude of another non admitted creditor, Milupol Development Corporation is not known but I will assume for present purposes that it opposes the termination.

Current trading position and general solvency of the company

10. The liquidator has identified significant property and assets of Cakara Alam and has received forecasted profit and loss statements for the 6 months to December 2009 indicating that Cakara Alam will trade profitably. From the liquidator's evidence the sum of about K 458,000 will remain following payment of all ascertained admitted creditors. Mr. Jacky Lee, a director of Cakara Alam, deposes that the value of Cakara Alam's assets is K7,117,203.16. From this information, I am satisfied that it can be concluded that Cakara Alam can be categorised as being solvent.

Non-compliance with statutory duties

11. There is no evidence of non-compliance with statutory duties by the directors.

Circumstances of liquidation order

12. Mr. Lee deposes amongst others that he and Cakara Alam were not aware that the liquidation application would be heard on 14th July 2009. He deposes as to there being a debt but not for the amount claimed, the instruction of lawyers and those lawyers not being aware of the application. To my mind the explanation is not satisfactory. It is clear that Cakara Alam knew about the petition before the liquidation order was made and for whatever reason, the matter was not properly attended to. After the liquidation order was made however, the directors and shareholder have acted quickly to attempt to rectify matters. This is evidenced amongst others by the application to terminate the liquidation being filed 8 days after the order was made.

Nature of business

13. There is evidence as to the nature of the business. Mr. Lee deposes that Cakara Alam is the holder of 3 timber permits issued under the *Forestry Act*. As to whether the conduct of Cakara Alam is contrary to commercial morality or public interest, there is no evidence to my mind, of conduct that could be termed as such. Counsel for East Arowe submits that the conduct of Cakara Alam in its dealings with East Arowe is evidence of its conduct being contrary to commercial morality and public interest. I am mindful that the dispute between East Arowe and Cakara Alam is the subject of litigation presently before this court. As mentioned, the liquidator considered and then did not admit East Arowe's claim.

14. Counsel for East Arowe conceded that if the liquidation was terminated, any claims that East Arowe has against Cakara Alam would not be affected. I note in this regard that if the liquidation continues, East Arowe would need to challenge the liquidator's decision concerning its claim in the liquidation or seek leave of this court to continue with its proceedings against Cakara Alam. The same applies to the claim of Milupol Development Corporation.

15. Counsel for East Arowe submitted that East Arowe's claim could easily be ascertained by the liquidator and it should be admitted. That is not the issue. The liquidator has made a determination on the basis of information he has received concerning the legitimacy of the claim, as he is entitled to do.

16. Counsel for East Arowe sought to invoke s.155(4) *Constitution* in aid of his client's opposition to the application for termination of the liquidation. It is settled law that s. 155(4) can be invoked to ensure that the primary rights of a party are protected in the absence of other law. Here, if the liquidation continues, East Arowe can challenge the liquidator's decision, or it is required to seek leave of this court to continue its litigation. If the liquidation terminates, East Arowe can continue its litigation without having to seek leave under the *Companies Act* to do so. If the liquidation is terminated, East Arowe's rights are not extinguished. Indeed, it can be argued that they may be enhanced as Cakara Alam will be trading and therefore more likely to pay any judgment that may be awarded to East Arowe. Consequently s.155(4) is not of assistance in the circumstances.

17. When regard is had to the facts that the liquidator has worked together with the staff and directors of Cakara Alam to ascertain all creditors, the assets of Cakara Alam are substantially in excess of its debts and on the information provided it is solvent, all ascertained admitted creditors will be paid leaving a surplus cash balance of about K 458,000, the ascertained admitted creditors can be presumed to agree to the termination, the liquidator, petitioning creditor, directors and shareholder support a termination and the only objection is from a creditor whose claim has not been admitted and whose claim will not be affected if there is a termination, I am satisfied that in the circumstances it is just and equitable for the liquidation of Cakara Alam to be terminated.

Orders

18. a) the liquidation of Cakara Alam (PNG) Limited as ordered by this court on 14th July 2009 is terminated pursuant to s. 300(1) and (2) *Companies Act*.

b) pursuant to s.300(4) *Companies Act*:

i) the liquidator shall pay from his liquidation account all creditors as indicated in paragraph 9 of his affidavit sworn 19th August 2009,

ii) Cakara Alam (PNG) Ltd and Mr. Peter Ling are to ensure that all creditors listed in column "C" of annexure "JK2" of the affidavit of James Kruse sworn 19th August 2009 are paid pursuant to each creditor's repayment agreement with Cakara Alam (PNG) Ltd and Mr. Peter Ling's undertaking.

c) time is abridged.

d) costs are in the cause.

Young & Williams Lawyers: *Lawyers for the Applicant*

Blake Dawson Lawyers: *Lawyers for the Liquidator*

Posman Kua Aisi Lawyers: *Lawyers for the Petitioning Creditor*

PNG Legal Services Lawyers: *Lawyers for East Arowe Timber Resources Ltd*