Case Update: Biaxis Decision – Stringent Requirements for a Judicial Management Application

The High Court decision of *Re Biaxis (M) Sdn Bhd* [2020] MLJU 1188 set stringent requirements for a company to successfully apply for judicial management. These requirements may set an unnecessarily high bar for a distressed company to meet.

Summary and Significance

Biaxis (M) Sdn Bhd (Biaxis) applied for a judicial management order. Judicial management is a corporate rescue mechanism. The process involves the court appointing an insolvency practitioner to be the judicial manager of the near-insolvent company. Judicial management allows the distressed company to enjoy a moratorium from legal proceedings. The judicial manager is to try to reach a proposal with the company's creditors to essentially try to save the company or achieve a better outcome than liquidation.

Beyond the requirements set out in the Companies Act 2016 (CA 2016), the Judicial Commissioner also set out additional procedures for the making of a judicial management order. The requirements essentially required the nominated judicial manager to affirm either an affidavit in support or to at least, produce an expert report. The nominated judicial manager would have to essentially produce a statement of proposal as close as possible to the final form.

Due to this decision, I have now observed judicial management applications being filed and where there is an additional affidavit in support filed by the proposed judicial manager.

Further, this case involved a secured creditor exercising its veto against the judicial management application. The court emphasised the exceptionally high standard of justifying the public interest in order to override the secured creditor's veto. That would mean that almost no company can meet such an exceptional public interest requirement.

Brief Facts

Biaxis is a construction company. It was a financially distressed company and applied for a judicial management order. Biaxis nominated a judical manager candidate in its application.

A secured creditor, Maybank, opposed the judicial management application.

Decision

The Judicial Commissioner set out overall guiding principles in whether to grant a judicial management order or not.

Seven Guiding Principles

First, the Court reiterated that the judicial management order would have to achieve one or more of the purposes set out in section 405(1)(b) of the Companies Act (CA 2016). The survival of the company, the approval of a section 366 scheme, or a better realisation of the company's assets than in winding up.

Second, the Court emphasised that the thread running through the judicial management process is the judicial manager's statement of proposal tabled to the creditors as the rescue proposal. But, the Court remarked that this statement of proposal would have or should have been formulated earlier – at the preparation stage of the application.

Third, the applicant company would not have been able to come up with the proposal on its own. Neither could the company consider on its own whether there could be the achievement of the objectives of survival of the company or better realisation. The company would have needed to engage a insolvency practitioner i.e. the nominated judicial manager from the very outset.

Fourth, and related to the point above, the nominated judicial manager should also affirm an affidavit in support of the judicial management application. There are several reasons for this. The nominated judicial manager is seen as the mastermind for the proposal and plays a key role throughout the judicial management process. He has the expertise to consider whether the proposal can achieve the survival of the company or better realisation. He is able to provide an objective view, being a professional without any vested interest. At the very least, though not encouraged, the nominated judicial manager should prepare an expert report to support the application.

Fifth, the Court was mindful that the quality and quantity of evidence from the applicant and nominated judicial manager will vary from case to case. It will also depend who the applicant is. For instance, more is expected where it is the company itself applying compared with a creditor applying. The creditor would have limited access to information.

Sixth, the applicant and/or the nominated judicial manager should do the following:

- demonstrate that the application and proposal is bona fide.
- demonstrate that they have used their best efforts to gather all relevant information, to get the proposal as close as possible to its final form, and

to secure the commitment of parties who are injecting money, and identify outstanding issues.
- explain the rational of the proposal and how it will achieve the goal within the given time frame.
- make full and frank disclosure of any material risks to the creditors ending up in a less advantageous position, all previous judicial management applications and their outcomes, and any other relevant matters.

Seventh, the applicant should state that they consider there is a reasonable probability of achieving the goals. The nominated judicial manager should state that he considers the proposal is likely to achieve the goals. As the expert, that is the very least that he should say in order to persuade the court.

The Court justified the above requirements and guidelines. That is taking into account the following factors:

- there is an automatic moratorium.
- there is a real risk of mala fide applications to take advantage of the automatic moratorium.
- unsecured creditors are prohibited from opposing the application.
- with only 60 days to put the final proposal to the creditors, the proposal should be at an advanced stage.
- the proposal put to the creditors should essentially be the same as assessed by the court.
- when the creditors vote on the proposal, they are resting on the assurance that the court has assessed the veracity of the proposal.

Secured Creditor's Veto and Public Interest

Next, the Court also considered the secured creditor's opposition to the judicial management application. Section 409(b) of the CA 2016 states that the Court shall dismiss the application if the making of the order is opposed by a secured creditor.

Nonetheless, section 405(5)(a) of the CA 2016 allows for an overriding consideration. The Court can still appoint the judicial manager "*if the Court considers the public interest so requires*".

The Court set out one illustration of what the Court would consider the public interest. In this time of the COVID-19 pandemic, if a company who alone possesses the vaccine makes an application for a judicial management order, the Court may in such exceptional circumstances consider that the public interest requires that the judicial management order be made.

Application to this Case

The Court then applied these guidelines to the case. The Court found that there was no expert report from the nominated judicial manager. Further, there was no concrete proposal and the applicant only provided a draft indicative term sheet.

With Maybank's opposition as a secured creditor, there was also no public interest exception to override the veto.

Commentary

The Difficult Requirements to Meet

This decision sets out stringent requirements for the filing of a judicial management application. This decision requires a detailed statement of proposal and an almost full-fledged restructuring proposal at the time of filing the application. The same judicial commissioner also made a similar ruling in another judicial management case of *Sin Soon Hock Sdn Bhd* [2020] MLJU 1242.

Arguably, this Malaysian approach goes against the grain of judicial management principles in Singapore as well as the administration case law from the UK (from which judicial management is inspired from).

First, judicial management and administration focuses on the speed of allowing the distressed company to enjoy moratorium protection and to have the court-appointed insolvency practitioner to take charge. The requirements from this *Biaxis* decision mean that a lot of time and money will be spent with a potential judicial manager candidate. This is for a proposal or expert report to be produced to the court.

Second, prior to this decision, I am aware that most judicial management applications filed in Malaysia would have contained a general consent by the nominated judicial manager, possibly the judicial manager's CV and some form of general statement or proposal at most.

Third, requiring the nominated judicial manager to develop the in-depth proposal at the time of filing the judicial management application is difficult. One reason is that there is no certainty as to who the court will in the end appoint as the eventual judicial manager. While the company may nominate one candidate, a majority in value of the unsecured creditors may then nominate a different judicial manager (see section 407(3) of the CA 2016).

In addition, requiring the development of the in-depth proposal is also not consistent with the similar scheme of arrangement framework. In a scheme, the court can grant a restraining order and leave to convene creditors' meeting with a basic outline of a scheme. There need not be a near-finalised scheme ready for tabling. The reason is that the distressed company must be given time to work with its advisors to develop the scheme, to engage with creditors, to negotiate and fine-tune the details with the creditors.

Finally, a judicial manager candidate would only be able to properly have mandate to work on the statement of proposal after the order is made. The candidate would only then have the powers of the judicial manager. He or she would have management control of the company and would act as an officer of the court. With the complete access to the documents and business of the distressed company, it is for the judicial manager to craft the right proposal and to also decide which of the statutory purposes the statement of proposal can meet.

The Secured Creditor's Veto and the Public Interest

On the veto, this decision confirms the high threshold for satisfying the public interest to override the secured creditor's veto. Unlike in Singapore and in the UK, Malaysia's judicial management provision allows any secured creditor to veto. Combined with the restrictive guidelines of this decision, this makes judicial management a limited corporate rescue tool.

However, what is interesting is that this judicial management application was filed in November 2019. This was prior to the **15 January 2020 date** when the Companies (Amendment) Act 2019 came into force. This Amendment Act is significant in that **it allowed any secured creditor to veto** the judicial management application. Prior to the Amendment Act, the veto provision essentially was confined only to a qualifying debenture holder. So, a query whether the post-Amendment Act secured creditor veto should have applied at all in this case.

Unfortunately, we will not see the Court of Appeal re-hear these issues. The applicant did not appeal against this High Court decision.