

Case Update: Case Update: A Second Judicial Management Order – Extending JM Past 12 Months

The High Court in *Syed Ibrahim & Co v Trans Fame Offshore Sdn Bhd [2022] MLJU 1380* involved the Court granting a second judicial management order. In effect, this allowed for the company to be under judicial management even past the initial 12-month period of the first judicial management order.

Summary of the Decision and Significance

The Court granted a judicial management order dated 11 December 2020 over the distressed company, Trans Fame Offshore. With the extension to the judicial management order, the eventual extended judicial management order would expire on 9 December 2021.

The creditors of Trans Fame Offshore then voted and approved the judicial manager's statement of proposal. The repayment to the creditors was to be made in three tranches. During the term of the judicial management, the judicial manager only managed to pay out the first tranche.

A creditor of Trans Fame Offshore applied to place Trans Fame Offshore back into judicial management. With the expiry of the first judicial management order after 12 months, this would in effect allow the company to be in judicial management longer than the 12 months.

The Judge held that there is nothing within the Companies Act 2016 (CA 2016) to bar a fresh application for judicial management. A reading of the CA 2016 shows that it is silent that a judicial management application is restricted to a one-time application only.

Essentially, the Court held that any judicial management applications, including subsequent judicial management applications, must necessarily comply with all the requirements of the CA 2016.

Further, such applications must be made bona fide and with full and frank disclosure of all the material facts pertaining to the company. It will then be a question of deciding each case on the merits of the case before the Court in the subsequent judicial management application. The Court will also ensure that there has been no abuse of the court process in doing so.

Background Facts

On 11 December 2020, Trans Fame Offshore had been placed into judicial management in the first set of judicial management proceedings (**1st JM Proceedings**). One of its creditors, Neptune Asia Services, had obtained the judicial management order (**1st JM Order**) and with Datuk Mohd Afrizan appointed as the judicial manager.

The 1st JM Order was due to expire on 9 December 2021.

On 31 July 2021, the judicial manager obtained approval from the creditors of the judicial manager's Statement of Proposal. The Statement of Proposal proposed a repayment plan to the creditors in three tranches. Two tranches were expected to be received during the term of the 1st JM Order.

The first tranche with a 10% repayment was paid out.

The applicant in this case, the firm of Syed Ibrahim & Co, is a creditor of Trans Fame Offshore and with the applicant's proof of debt admitted in the judicial management process in the 1st JM Proceedings.

On 19 November 2021, the applicant wrote to the judicial manager on the progress of the pay-out of the second tranche distribution. The judicial manager essentially replied that there are potential funds to be recovered but the recovery process would take time. The process would go beyond the expiry of the 1st JM Order.

On 1 December 2021, the applicant sent a letter to the judicial manager to seek consent for the applicant to file a fresh set of judicial management proceedings against Trans Fame Offshore. On 2 December 2021, the judicial manager's solicitors replied with the judicial manager's consent.

On 4 December 2021, the applicant filed a second set of judicial management proceedings (**2nd JM Proceedings**) against Trans Fame Offshore and sought the appointment of Datuk Mohd Afrizan as the judicial manager again. The applicant also applied to have an interim judicial manager, Datuk Mohd Afrizan, to be appointed to preserve the status quo of the company.

In the meantime, in the 1st JM Proceedings, the 1st JM Order was about to lapse on 9 December 2021. The judicial manager, Datuk Mohd Afrizan, obtained an Order dated 9 December 2021 (**Interim Order**) in the 1st JM Proceedings for an interim order under section 424(2)(d) of the CA 2016.

The Interim Order in the 1st JM Proceedings was to be in place pending the disposal of the 2nd JM proceedings such that:

- All assets, documents, books and accounts of the company be preserved and held as stakeholder by the Judicial Manager from 10 December 2021.
- The shareholders of the company are not allowed to assume management control of the company.

- All powers conferred on the Judicial Manager under section 414 and Ninth Schedule of the CA 2016 shall continue to apply.

Returning to the ongoing 2nd JM Proceedings, on 10 February 2022, the Court granted the Order appointing Datuk Mohd Afrizan as interim judicial manager over the company.

Another creditor had also filed an application to nominate another proposed judicial manager, Andrew Heng, as judicial manager of the company.

For the hearing of the 2nd JM Proceedings, the Court now considered whether to grant, in effect, a 2nd JM Order and to consider the two proposed candidates for judicial manager.

Decision

First, the Court considered whether a second judicial management application could be made. The Court read sections 404 and 405 of the CA 2016. The provisions are silent as to whether Parliament had intended the CA 2016 to restrict any judicial management applications to a one-time application only. Had Parliament intended to do so, it would surely have provided a section to that effect.

Second, the Court also took into account the purposive statutory interpretation and the underlying legislative intent of judicial management to rehabilitate the company. Nonetheless, any applications, including subsequent judicial management applications, must necessarily comply with all the requirements of the CA 2016.

Such applications must be made bona fide and with full and frank disclosure of all the material facts pertaining to the company. It will then be a question of deciding each case on the merits of the case before the Court in the subsequent judicial management

application. The Court will also ensure that there has been no abuse of the court process in doing so.

Third, the Court also considered the wording of section 406 of the CA 2016. This provision sets out that a judicial management order shall remain in force for a period of 6 months from the making of the order. The judicial manager may apply to extend this period for another 6 months. The Court decided that section 406 does not bar a fresh application for judicial management.

Fourth, on the merits of the application, the Court did find a chance of rehabilitating the company or of preserving all or part of its business as a going concern. There could be further pay-out to the creditors, the possibility of further recovery of substantial sums of money to the company, the company's PETRONAS licence had been renewed and the company had successfully bid for the PETRONAS Myanmar project.

Fifth, the Court also found that Datuk Mohd Afrizan was the better and more suitable candidate to continue to be the judicial manager.

Comments

This case highlights one key issue once there is a judicial management order in place. The maximum 12-month lifespan. As I have written before, there is at least one High Court decision that has set aside the extensions of a judicial management order after that 12-month period.

This case is helpful in establishing that there is nothing to prohibit the filing of a second judicial management application in order to place the company back under the control of the judicial manager. Especially here, being under the same judicial manager.

However, there is the issue of the gap in time between the company having the first judicial management order expire, the company then reverting back under the control of the directors, and the eventual granting of a second judicial management order. The gap could be months or longer.

Hence, the Court allowed the Interim Order to attempt to bridge this gap. However, I do have some concerns whether the Interim Order could be granted and where it, in effect, artificially extended the first judicial management order and the tenure of the first judicial manager.

The Interim Order was granted under section 424(2)(d) of the CA 2016. This provision states that the Court on the hearing of an application for the discharge of a judicial management order may “*make an interim order or any other order that the Court thinks fit.*” My view is that any such interim order can only continue to subsist within the lifespan of the judicial management proceedings. But with the 12-month time limit and with the judicial manager no longer there, there could not have been the extension of the judicial manager’s powers under the terms of any interim order.

To overcome the practical difficulties of the 12-month lifespan of a first judicial management, certain interim solutions were showcased. The company continued to be under the control of a judicial manager or insolvency practitioner through the granting of the Interim Order and the appointment of an interim judicial manager in a second set of judicial management proceedings.

As noted by the Court, the Court will be conscious of any abuse of process and that the judicial management application must be made bona fide. In a situation where the statutory purpose of rehabilitation can be achieved, the Court will be willing to make a second judicial management order and make interim orders to preserve the status quo.

In my view, the best solution is for an amendment to our CA 2016 to remove the 12-month mandatory lifespan. Allow the Court to have the ultimate discretion and for the process to be subject to terms as may be imposed by the Court. This would then follow the original wording as contained in section 227B(8) of the previous Singapore Companies Act:

“(8) A judicial management order shall, unless it is otherwise discharged, remain in force for a period of 180 days from the date of the making of the order but the Court may, on application of a judicial manager, increase this period subject to such terms as the Court may impose.”

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