

Scomi Group Berhad Revives Its Judicial Management Moratorium

On 16 December 2021, Scomi Group Berhad (**Scomi Group**) made a stock exchange announcement¹ that the Court of Appeal granted an interim preservation order to prevent legal proceedings against Scomi Group. The interim preservation order was pending Scomi Group's appeal against the High Court's decision to dismiss its judicial management application.

In effect, Scomi Group seems to have obtained a moratorium against all legal proceedings despite the dismissal of its earlier judicial management application.

There are some interesting issues that arise from this development.

Background Facts

By way of background, on 14 April 2021, Scomi Group filed an application for a judicial management order².

By virtue of section 410 of the Companies Act 2016 (**CA 2016**), the effect of filing the application is that Scomi Group enjoyed an automatic moratorium from legal proceedings. The moratorium would last until the decision of the judicial management application.

Eventually, on 4 October 2021, the High Court dismissed the judicial management application³.

1

https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=3219201

2

https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=3147930

3

https://www.bursamalaysia.com/market_information/announcements/company_announcement/announcement_details?ann_id=3197896

The High Court's grounds for dismissal were essentially that:

1. A public listed company cannot apply for judicial management. A listed company falls within the exclusion of section 403 of CA 2016 of "*a company subject to the Capital Markets and Services Act 2007*".
2. Secured creditors had opposed the judicial management. Therefore, there was the veto under section 409(b) of the CA 2016 where the "*making of the order is opposed by a secured creditor*."

On 7 October 2021, Scomi Group filed an appeal to the Court of Appeal.

On 8 October 2021, Scomi Group filed an application under section 44 of the Courts of Judicature Act 1964 (**CJA**) to preserve and prevent any legal proceedings against Scomi Group pending the disposal of the appeal.

Essentially, section 44 of the CJA allows the Court of Appeal to grant "*any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding*" of the appeal.

On 16 December 2021, the Court of Appeal granted the moratorium order.

The Law on Section 44 of the CJA

Section 44 of the CJA allows for the grant of wide forms of relief and there is no real limit to the type of orders to be granted.

The Court of Appeal can make any interim order to preserve the integrity of the appeal (***Silver Concept Sdn Bhd [2004] 4 MLJ 113*** at 120) and so that no successful appeal should be rendered nugatory (***See Teow Guan & Ors [2008] 1 MLJ 305*** at [10]).

Some examples of the types of section 44 of the CJA Orders:

- An injunction.
- A stay of execution.
- A post-judgment Mareva injunction.
- Interim orders in relation to the composition of board of directors.
- An interim preservation order akin to a restraining order to restrain legal proceedings. This was in the MDSA Resources Sdn Bhd matter for an appeal against the dismissal of a sanction of a scheme of arrangement⁴.

Application in a Judicial Management Context

At first glance, this Scomi Group moratorium order is seemingly similar to the MDSA Resources restraining order. However, in the MDSA Resources matter, the restraining order to protect the integrity of the appeal was after an advanced scheme of arrangement. The scheme creditors had already overwhelmingly voted in favour of the scheme but where the sanction was dismissed. The restraining order granted under section 44 of the CJA was merely to restrain the scheme creditors in order to protect the status quo of the appeal against the dismissal of sanction.

In this case of Scomi Group, it is more nuanced. On the one hand, Scomi Group has the right to bring to the appeal the novel issue of interpreting whether a listed company can apply for judicial management and the issue of the secured creditor veto.

On the other hand, the making of a moratorium order revives a blanket stay of all legal proceedings. Nevertheless, if there are any aggrieved creditors or parties by the stay, they could try to apply for leave to proceed.

⁴ <https://www.theedgemarkets.com/article/hatten-land-subsiidiary-obtains-interim-protection-against-creditors-pending-appeal>

The facts of the Scomi Group interim moratorium order are also reminiscent of the Court of Appeal decision in ***CIMB Islamic Bank Berhad v Wellcom Communications (NS) Sdn Bhd*** [2019] 4 CLJ 1. The High Court in that case had also dismissed the company's judicial management application. However, the company applied to the High Court for a stay of the dismissal. The High Court allowed the stay and the effect was then the revival of the moratorium. On appeal, the Court of Appeal set aside this High Court stay decision. It was an abuse of process. There could not be a stay of the dismissal of the originating judicial management application itself.

By now applying this **Scomi Group** decision, it is possible to apply to the Court of Appeal for an order to revive the moratorium even after the dismissal of the judicial management application. Nonetheless, in my view, the courts should be vigilant in balancing the grounds for preserving the status quo of the appeal and ensuring that the interests of the creditors are also not unduly prejudiced.

Author:

Lee Shih is the Managing Partner of the boutique law firm, Lim Chee Wee Partnership. He is a Council member of the Insolvency Practitioners Association of Malaysia and a committee member of the INSOL Small Practice Group.

Email: leeshih@lcwpartnership.com