

Creditor's Right to be Heard in Application for Judicial Management Order

by Andrea Chew Mei Yng

The judicial management order,¹ or JMO, is an alternative to the winding up of a company which is or about to become insolvent.² It is issued by the court if there is a reasonable probability of rehabilitating the company, preserving all or part of its business as a going concern or otherwise better serve the interests of creditors rather than winding up the company.³ The order is available on the application of the company itself or a creditor of a company.⁴

The notice of application must be advertised,⁵ and be "given" to the company itself⁶ and to a person who is or may be entitled to appoint a "receiver or receiver and manager"⁷ over a company's property under the terms of a debenture (**Debenture Holder**).⁸

The application

At the hearing of the application, the court may make a JMO if satisfied that it would be likely to achieve one or more of the following purposes:⁹

- (1) the survival of the company, or the whole or part of its undertaking as a going concern;
- (2) the approval of a compromise or arrangement between the company and its creditors and members;¹⁰

- (3) a more advantageous realisation of the company's assets than on a winding up of the company.

The court may also make the order if required in the public interest to do so.¹¹

However, the court must dismiss the application if it is satisfied that a receiver or a receiver and manager has been or will be appointed and the making of the order is opposed by a "secured creditor".¹² Presumably, "secured creditor" refers to the Debenture Holder. The Debenture Holder therefore can effectively veto against the making of the JMO.

Who may be heard?

In the recent decision of *Re Leadmont Development*,¹³ it was held that only such a Debenture Holder has a "special right" to oppose the making of a JMO. In the face of the relevant provisions of the Act,¹⁴ it is difficult to see how *Re Leadmont Development* could have been decided otherwise. The court found support in the provisions of the Act which have the following effect:

- (a) only the Debenture Holder can veto the making of the JMO;¹⁵
- (b) the Debenture Holder is the only creditor entitled to be served with the notice of application;¹⁶ and
- (c) other creditors may oppose only the nomination of the judicial manager.¹⁷

1 Judicial management came into operation in Malaysia on 1 March 2018: PU(B) 106/2018 Federal Government Gazette

2 The court must be satisfied that the company is or will be unable to pay its debts: Companies Act 2016 ("the Act"), s 404(a)

3 *Ibid*, s 404(b)

4 *Id*, s 404

5 In one widely circulated newspaper in Malaysia in the national language and one widely circulated newspaper in Malaysia in the English language: s 408(1)(a) of the Act

6 In a case where a creditor is the applicant: s 408(1)(b)(i) of the Act

7 It is difficult to see why a party empowered to appoint a receiver only should be able to oppose a JMO

8 Section 408(1)(b)(ii) of the Act

9 Section 405(1)(b) of the Act

10 Under s 366 of the Act

11 Section 405(5)(a) of the Act

12 Section 409 of the Act

13 *Re Leadmont Development Sdn Bhd* [2018] 1 LNS 1420; [2018] MLJU 1320 (HC)

14 Companies Act 2016

15 Section 409 of the Act

16 Section 408(1)(b)(ii) of the Act

17 Section 407(3) of the Act

So far as it lies in the hands of other creditors, they will have to hold their objection until a JMO is made and reject the judicial manager's proposal during the creditors' meeting.¹⁸ Alternatively, they may apply to set aside the JMO.

Although the court found a glaring lack of provision under the Act and the Rules¹⁹ for the setting aside of the JMO by a creditor, it nevertheless set aside the JMO, relying on its inherent jurisdiction to set aside an *ex parte* order where the order was obtained without full and frank disclosure of material facts or obtained *mala fide* or was otherwise defective on substantive grounds.²⁰

Should all creditors be heard?

While the application for a JMO is pending:²¹

- (1) the company cannot be wound up;
- (2) no security over the company may be enforced nor goods repossessed under any hire purchase or any such agreement without the leave of the court; and
- (3) no execution or legal proceedings shall be commenced or continued against the company and no distress for rent may be levied without the leave of the court.

Given that the rights of creditors are directly affected, it would be against the rules of natural justice if creditors are not heard on the application for the JMO.

As pointed out by the learned judge in *Re Leadmont Development*, the success of a judicial management is very much dependent on the creditors of a company. In that case, the JMO was set aside on the basis that more than 25% of the total value of creditors would be voting against any proposal made pursuant to the JMO.²²

Procedures surrounding the making of a JMO

When an applicant advertises the notice of application for a JMO, it will be a notice to the world at large that the application is made against a company.

The Rules provide that any creditor or member of a company may make a written request and payment to be furnished with a copy of the application and the supporting affidavit.²³ Further, any person who opposes the application may file and serve an affidavit opposing the application within a stipulated time.²⁴

This procedure is similar to that applicable in a winding up by the court. The petitioner for a winding up order is required to advertise the petition,²⁵ any creditor or contributory of the company may ask for a copy of the petition²⁶ and any person opposing the petition may file an affidavit in opposition within the stipulated time.²⁷

In a winding up by the court, any person who intends to appear during the hearing of the petition either in support or in opposition to it will be heard if he has served a notice of intention to appear on the petitioner.²⁸

However, in an application for a JMO, the legislation is inconsistent and ambiguous as to who may serve a

18 A judicial manager's proposal shall be approved by 75% of the total value of creditors whose claims have been accepted by the judicial manager and the proposal may be approved with modifications subject to the consent of the judicial manager: section 421(2) of the Act. If 75% of the total value of creditors do not approve the judicial manager's proposal, the court may order the JMO to be discharged: s 421(5)(a) of the Act.

19 Companies (Corporate Rescue Mechanism) Rules 2018

20 *Re Leadmont Development Sdn Bhd* [2018] 1 LNS 1420 at paragraph 78

21 Section 410 of the Act

22 In its application, the secured creditor exhibited letters from six other creditors who confirmed that they are opposed to the JMO and wish to have it set aside. The total value of debts of the secured creditor and the six other creditors amount to 46.9% of the total value of creditors: see *Re Leadmont Development Sdn Bhd* [2018] 1 LNS 1420 at paras 101-103

23 *Supra* n 19, r 12

24 Rule 15 of the Rules

25 Rule 24 Companies (Winding-Up) Rules 1972

26 Rule 27 of the Winding-Up Rules

27 *Ibid*, r 30

28 *Id*, r 28

notice of intention to appear. The Rules appear to provide that only a Debenture Holder or a secured creditor may serve a notice of intention to appear.²⁹ The prescribed form, however, suggests that “a majority in value of the creditors” (*sic*) may also serve the notice of intention to appear.³⁰

It is not clear from the prescribed form whether the “majority in value of the creditors” must be a single creditor or a group of them. How such “a majority in value of the creditors” can be determined at the application stage is also another issue.

Position in Singapore

The court in *Re Leadmont Development* was referred to a Singapore textbook³¹ which stated that the court could refuse to hear all other creditors (apart from a debenture holder who can appoint a receiver and manager) on the ground that they have no *locus standi*.

Unfortunately, the textbook was based on an earlier position under Singapore law. The current position in the legislation in Singapore is that while any person with the right to appoint a receiver and manager may veto against the making of a JMO, the court will only dismiss the application if it is satisfied that the prejudice that would be caused to the person if the order is made is disproportionately greater than the prejudice that would be caused to unsecured creditors of the company if the application is dismissed.³²

If an unsecured creditor wishes to be heard during the hearing of the application, all that is required of him is to serve a notice of intention to appear on the applicant within the stipulated time.³³

Position in the UK

In the UK, any person who appears to have an interest which justifies appearance may appear or be represented at the hearing of the administration application (the equivalent of a JMO application in Malaysia), with the permission of the court.³⁴

There is an opportunity for all creditors of the company to be heard before the making of an administration order.

Conclusion

In principle, it is difficult to justify not hearing the creditors at large on an application for an order which, if made, would affect the rights of all creditors, secured or unsecured.

The anomalies in the Act and the Rules are a constraint on the court acting in accordance with this principle. The court in *Re Leadmont Development* had to resort to invoking its inherent jurisdiction to circumnavigate procedural obstacles resulting from the current legislation.

It is submitted that certain provisions in the Act and the Rules should be reviewed and amended in the interest of a fair and efficient administration of company law. **LH-AG**

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²⁹ *Supra* n 19, r 13

³⁰ Form 10 of the First Schedule to the Rules

³¹ T C Choong and V K Rajah, *Judicial Management in Singapore* (Butterworths, 1990) at pages 97-98

³² Singapore Companies Act, s 227B(5)(b)

³³ Singapore Companies Regulations, reg 35(1)

³⁴ The Insolvency (England and Wales) Rules 2016, r 3.12(1)(j)