

Judicial Managers — Duties and Liabilities

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A lot has been said about judicial management, but very little about the judicial manager. This article will examine the role of the judicial manager and his duties and liabilities.

Duties

The judicial manager is central to the judicial management of a distressed company. He is an insolvency practitioner, who is not the auditor of the company.

He has a duty to manage the affairs, business and property of the company under judicial management and to do all such other things as the court may order. He has extensive powers to discharge that duty, which includes powers to take possession and sell the company's property, including charged assets.

He is also key to ensuring the company is restructured. He has a duty to prepare a proposal to achieve one or more of the purposes under section 405(1)(b) of the Companies Act 2016 (**the Act**). He convenes a meeting for the creditors to consider the same.

The judicial manager is responsible for implementing the proposal approved by the creditors. He has a duty to apply for the judicial management order (**JMO**) to be discharged if the purpose(s) for the JMO cannot be achieved.

Fiduciary

In equity, the categories of fiduciary relations are never closed.¹

A judicial manager is a fiduciary to the company. He exercises power and discretion that affects creditors and members of the company.² He is also deemed to be an agent of the company.³ In this regard, Commonwealth authorities indicate an administrator, a position analogous to a judicial manager, owes a fiduciary duty to the company.⁴

As a fiduciary, the judicial manager owes a duty to act in the best interests of the company. He is obliged to avoid conflicts of interest and prohibited from making unauthorised profits. Failure to do so exposes the judicial manager to a claim for damages as well as a liability to disgorge secret profits.

Negligence

Failure to exercise reasonable skill and care when discharging his duties could potentially expose the judicial manager to a suit for negligence. The judicial manager, as an insolvency practitioner, will be "... *judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner.*"⁵

1 *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 at p 294

2 *Frame v Smith and Smith* (1987) 42 DLR (4th) 81 at p 99; referred and followed in *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785 (FC)

3 Section 416(1)(a). All references shall be to the Companies Act 2016, unless otherwise stated.

4 *Macks v Viscariello* 126 ACSR 68; *Kyrris v Oldham* [2004] 1 BCLC 305

5 *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 at p 775

Penal sanctions

The judicial manager owes a duty to keep the company's creditors and the authorities informed about the status of the judicial management. The judicial manager commits an offence if he fails, without reasonable excuse, to carry out the following:

- (a) give notice on the company's documents and website that the company is under judicial management;⁶
- (b) send a copy of the JMO to the Registrar of Companies and the company;⁷
- (c) advertise the JMO;⁸
- (d) give notice of the JMO to all creditors;⁹
- (e) deal with the proceeds of sale of charged property in accordance with the court's orders;¹⁰
- (f) lodge a copy of the statement of affairs with the Registrar of Companies;¹¹
- (g) lodge with the Registrar of Companies an order that he was discharged because his proposal was not approved by the company's creditors;¹² and
- (h) lodge with the Registrar of Companies an order that he was discharged because his actions were unfairly prejudicial to the company.¹³

Unfair prejudice

A creditor or a member of the company, when the JMO is still in force, can seek protection from the court when the company's affairs, business and property are managed by the judicial manager in a manner that is unfairly prejudicial to the creditors or members.

An allegation that a judicial manager was negligent is unlikely to be sufficient to prove an allegation that the company's affairs have been managed in an unfairly prejudicial manner.¹⁴

The court, on proof of unfair prejudice, may make orders to:

- (a) regulate the future management of the company's affairs, business and property by the judicial manager;
- (b) require the judicial manager to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant had complained that the judicial manager has omitted to do;
- (c) require the summoning of a meeting of creditors or members for the purpose of considering such matters as the court may direct; or
- (d) discharge the JMO and make such consequential provision as the court thinks fit.¹⁵

6 Section 412(1)
 7 Section 418(1)(a)
 8 Section 418(1)(b)
 9 Section 418(1)(c)
 10 Section 415(6) and 415(7)
 11 Section 419(5)
 12 Section 421(7)
 13 Section 425(5)
 14 *Supra*, n 5 at p 782
 15 Section 425(3)

Applying for discharge

The court may, when an application is made to discharge the JMO, if it thinks fit, discharge the judicial manager from liability in respect of any act or omission in the management of the company; or discharge him in relation to his conduct as judicial manager.¹⁶

The discharge does not, however, relieve the judicial manager from any liability for misapplication or retention of money or property of the company due to negligence, default, misfeasance, breach of trust or breach of duty in relation to the company.¹⁷

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About the authors



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[Further discussions on judicial management and other corporate rescue mechanisms can be found in LHAG's articles, "**COVID-19 Crisis: Is Judicial Management a Viable Option?**" by partner, Mong Chung Seng, and associate, Iris Tang Shu Ni; "**COVID-19: Time for Businesses to Rethink and Restructure**" by partner, Andrew Chiew Ean Vooi; and "**COVID-19: A Dead End or a Way Out?**" by associates, Wong Han Wey and Khairul Anwar bin Hairudin.]

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¹⁶ Section 424(5)

¹⁷ *Ibid*