IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA
(COMMERCIAL DIVISION)
ORIGINATING SUMMONS NO. WA-28JM-22-12/2021

In the matter of Trans Fame Offshore Sdn Bhd (formerly known as Transfame Sdn Bhd) (Company No. 1995010-10606) (339807-A)

And

In the matter of a Judicial Management pursuant to Sections 404, 405, 406, 407, 408, 410, 411 and the Ninth Schedule of the Companies Act 2016

And

In the matter of Sections 414, 418, 419 and 420 of the Companies Act 2016

And

In the matter of the Companies (Corporate Rescue Mechanism) Rules 2018

BETWEEN

SYED IBRAHIM & CO
(APPLYING AS A LEGAL FIRM) …APPLICANT

AND

TRANS FAME OFFSHORE SDN BHD
(UNDER JUDICIAL MANAGEMENT)
(FORMERLY KNOWN AS TRANSFAME SDN BHD)
(COMPANY NO. 199501010606 (339807-A) …RESPONDENT

AND

1. **BAP RESOURCES SDN BHD**
   (COMPANY NO.: 201201003655 (977180-U)
2. **PENGIRAN DATO' AWANG DAUD BIN AWANG PUTRA**
   (NO. K/P: 601019-13-5647)
3. **BEN LINE AGENCIES SDN BHD …INTERVENERS**

JUDGMENT

(Enclosure 1, 22 & 46)

Originating Summons

1. In the Originating Summons dated 28.9.2021 (OS) in enclosure 1, the Applicant has applied pursuant to sections 404, 405, 406, 407, 408, 410 and 411 and the Ninth Schedule of the Companies Act 2016 for inter alia the order that the Respondent be placed under judicial management of a judicial manager.

2. The grounds in support of the OS are briefly as follows:-

(a) The Respondent is currently placed under Judicial Management via an order dated 11.12.2020 ("JMO") obtained through an Originating Summons No.: WA-28JM-21-09/2020 ("OS 21"), which was filed by one of its creditors, Neptune Asia Services Sdn Bhd;

(b) The JMO expires on 9.12.2021;

(c) The Applicant is a creditor of the Respondent recognized in the Statement of Proposal in OS 21 tabled to at the meeting of creditors by a judicial manager of the Respondent on 31.7.2021;

(d) The proposals made in the Statement of Proposal demonstrated the ability of the Respondent to maintain a "going concern" status or alternatively, to work towards a more advantageous realisation of the Respondent's assets than in a winding up for the benefit of its creditors but realistically, the completion of such steps will exceed the term of the JMO;

(e) The Statement of Proposal recognises 265 creditors. The Statement of Proposal was approved on 31.7.2021;

(f) The Statement of Proposal proposes a repayment plan to Creditors in 3 tranches, whereby 2 tranches were at the time of proposal, expected to be received during the term of the JMO;

(g) The first tranche is fixed at a 10% pay out and the same has been fulfilled. The second tranche and third tranche distributions are yet to be determined and will be contingent

upon the probability of recovery of funds and/or claimable losses from contract claims, project owners and third parties who caused losses to TFO;

(h) On 19.11.2021, the Applicant made an enquiry with the Judicial Manager in OS 21 with regards to the pay out of the 2nd tranche distribution;

(i) Vide a letter from the solicitors of the Judicial Manager in OS 21 dated 30.11.2021, the Judicial Manager in OS 21 explained that there are potential funds to be recovered from project owners which are intended to be utilised to pay for the second tranche distribution. The recovery process will take time and will go beyond the expiry of the JMO;

(j) The recovery of proceeds from Projects and proceedings represents the cash inflow of the Respondent which is vital for the Respondent and for the pay out of its creditors;

(k) An occurrence of winding up, as set out in Part 13.1 of the Statement of Proposal, will be very disadvantageous to Creditors as any returns to Creditors are not expected to exceed RM0.10 for every RM1.00 owed to Creditors;

(l) The expiry of the JMO in OS 21 eventually means that the Respondent and its assets and business will be returned to the directors and shareholders in the absence of any other order made;

(m) There is a complete lack of commitment from the current directors or shareholders of the Respondent to ensure the best interests of these 265 creditors upon the upliftment of the JMO in OS 21;

(n) The Respondent has come this far where the Judicial Manager in OS 21 has successfully managed to make a pay-

out of 10% to the creditors of the Respondent and is working towards the second and third tranche and therefore, the fate of these 265 Creditors should not be placed at risk in the hands of the Respondent's directors or shareholders;

(o) If the Respondent's current state of affairs is allowed to continue in the hands of its current shareholders and directors, the rights and interests of these 265 creditors will be severely prejudiced.

3. The Applicant had submitted inter alia that:

(i) it has the standing to apply for the prayers in the OS as it is a creditor of the Respondent

(ii) the Respondent's insolvency is not in dispute

(iii) the Respondent was placed under a judicial management order on 11.12.2020 (JMO) via originating Summons No. WA-28JM-21-09/2020 (OS 21) by one Neptuna Asia Services Sdn Bhd

(iv) a Statement of Proposal (SOP) was voted on pursuant to OS 21 wherein 94.82% of the creditors had voted in favour of the SOP, thereby achieving the 75% required statutory majority approval under section 421(2) of the Companies Act 2016

(v) the SOP recorded a total recognized debt of RM119,468,051.08 from a total admitted claim of 265 creditors of the Respondent and that the Respondent is currently sitting in a negative shareholders fund position where its total liability outweighed its total assets and shareholders equity

(vi) The Judicial Manager had in the Statement of Proposal proposed a repayment plan to Creditors in 3 tranches, where:

i. The first tranche is fixed at a 10% pay out and has been distributed to the creditors on 10.9.2021. The first limb of the proposal has been achieved;

ii. The second tranche and third tranche distributions are yet to be determined and will be contingent upon the recovery of funds and/or claimable losses from contract claims, project owners and third parties who caused losses to the Respondent.

(vii) The payment of the 1st tranche was made notwithstanding the Respondent is in an insolvent state.

(viii) The creditors of the Respondent are currently anticipating the pay-out of the second tranche and third tranche distributions

(ix) On 19.11.2021, the Applicant made an enquiry with the Judicial Manager in OS 21 with regards to the receipt of the 2nd tranche distribution

(x) By a letter from the solicitors of the Judicial Manager dated 30.11.2021, the Judicial Manager explained that there are potential funds to be recovered from project owners which are intended to be utilised to pay for the second tranche distribution and he is currently engaging in negotiation with the Respondent's project owners for an amicable settlement

(xi) Realistically, the second tranche distribution pay-out is expected to occur after the JMO expires the JMO had expired on 9.12.2021

(xii) the current OS and OS 21 shows a trend that none of the directors or shareholders of the Respondent are taking any

responsibilities to ensure the interest of these 265 creditors are protected.

Background

4. On 9.12.2021, this High Court on OS 21 had granted an order (9.12.2021 Order) that pending disposal of the OS herein all assets, documents, books and accounts of the Respondent be preserved and held by the JM in OS 21 i.e Datuk Mohd Afrizan. The said 9.12.2021 Order also stated that the shareholders of the Respondent were not to assume management control of the Respondent and all powers under section 414 and the Ninth Schedule of the Companies Act 2016 shall continue to apply.

5. On 10.2.2022, Datuk Mohd Afrizan was appointed as the interim judicial manager of the Respondent by this Court in the OS herein upon the application of the Applicant herein.

6. There is also before this Court a Notice of Motion in enclosure 22 (Enclosure 22) to amongst others appoint another nominee, being one Andrew Heng, as the Judicial Manager of the Respondent.

7. The 3rd Respondent has at the hearing of the OS informed this Court that they were supporting the OS.

Court's Findings

8. Under the law, the starting point for a judicial management application is Sections 404 and 405 (1) and (2) of the Companies Act 2016 which are set out below as follows:-

“*Section 404*

An application for an order that a company should be placed under a judicial management and for an appointment of a judicial manager may be made to the Court by the company or its creditor if the company or its creditor considers that:

(a) the company is or will be unable to pay its debts; and

(b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up.

Section 405

(1) Where a company or its directors, under a resolution of its members or the board of directors, or a creditor, including any contingent or prospective creditor or all or any of those parties, together or separately, makes an application under section 404, the Court may make a judicial management order in relation to the company if:

(a) the Court is satisfied that the company is or will be unable to pay its debts; and

(b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:

(i) the survival of the company, or the whole or part of its undertaking as a going concern;

(ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;

(iii) a more advantageous realisation of the company's assets would be effected than on a winding up."

6. It is to be observed that read collectively and as a whole, the express words in the above said sections 404 and 405 (1) and (2) of the Companies Act 2016 was framed by Parliament for the benefit of the company i.e in this case the Respondent, in that the company or its creditors have to consider under section 404 that there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up, whilst under section 405 the Court must consider the Court considers that the making of the order would be likely to achieve one or more of the following purposes:

(i) the survival of the company, or the whole or part of its undertaking as a going concern;
(ii) the approval under section 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;
(iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

9. In ***Leadmont Development Sdn Bhd v. Infra Segi Sdn Bhd & Another Case [2018] 10 CLJ 412 HC***, Wong Chee Lin JC (as she then was) had held that:

*"**[21]** It is clear from the Hansard, that the judicial management was introduced to rehabilitate companies that are under financial*

distress and to reduce the number of cases where companies are wound up.

Datuk Liang Teck Meng (Simpang Renggam):

minta Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan menyatakan berapakah jumlah kes syarikat yang digulungkan sepanjang tempoh 2010 hingga 2014 dan apakah peranan kerajaan dalam menangani kes syarikat yang digulungkan?

Timbalan Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (Dato' Paduka Ahmad Bashah bin Md Hanipah):....

Jumlah syarikat yang digulungkan sepanjang tempoh 2010 hingga bulan Ogos 2014 adalah sebanyak 9,010. Dari jumlah tersebut sebanyak 3,396 syarikat telah digulungkan secara sukarela manakala sebanyak 5,614 syarikat telah digulungkan melalui perintah mahkamah. Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan prihatin berhubung keperluan memperkenalkan satu mekanisme untuk menyelamatkan syarikat-syarikat yang mengalami masalah kewangan. Namun masih boleh dipulihkan untuk beroperasi secara sedia kala.

Dalam hal ini, Suruhanjaya Syarikat Malaysia yang merupakan agensi kementerian ini telah mengambil inisiatif untuk memperkenalkan beberapa mekanisme penyelamat korporat melalui pembaharuan yang sedang dilakukan kepada Akta Syarikat 1965. Mekanisme yang dicadangkan ini akan menjadi satu alternative kepada penggulungan atau pembubaran syarikat. Antaranya ialah pengurusan kehakiman..."

10. The above judicial management regime is thus quite different from a liquidation scenario where the Court essentially looks at the interest of the creditors per se which prevails over the interest of the company or its shareholders whereas in a judicial management proceedings, the Court is concerned with amongst other things the probability of rehabilitating the company or of preserving all or part of its business as a going concern.

11. I will now address the issue of whether a second JM application can be made. A reading of both the said sections 404 and 405 (1) and (2) of the Companies Act 2016 shows that it is silent as to whether parliament had intended the Companies Act 2016 to restrict any applications for a JM pursuant to the judicial management provisions to be restricted to a one time application only. Had Parliament intended to do so, it would surely have provided a section to that effect.

12. In deciding on the above issue, I have taken into account Section 17A of the Interpretation Act 1948 which provides that "*In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object*.

13. I am therefore adopting the ratio of the Federal Court in ***Pengusaha Tempat Tahanan Perlindungan Kamunting Taiping & Ors v Badrul Zaman bin PS Md Zakariah [2018] 12 MLJ 49*** where the Federal Court had stated that:-

"In interpreting the provisions of an Act of Parliament, the trend now is to adopt such a construction as will promote the legislative intent or purpose underlying the provisions. This purposive approach has been given statutory recognition for the courts to adopt by virtue of s. 17A on the Interpretation Acts 1948 and 1967. The Federal Court in DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 3 CLJ 69; [2002] 2 MLJ 11; and Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 4 CLJ 285; [1994] 3 MLJ 345 had adopted the purposive approach by making reference to the Parliamentary reports or Hansard as an aid to statutory interpretation in interpreting the provisions of Acts of Parliament. In that case, Haidar FCJ, in delivering the judgment of the court remarked: "It will give statutory force to the courts to look the policy speech of the Minister or the promoter of the Bill in Hansard for the purpose of an aid to the interpretation of statutes."

14. That being said, any applications, including subsequent JM Applications, under the judicial management provisions of the Companies Act 2016 must necessarily comply with all the requirements of the said Act as aforementioned. It also goes without saying that in any judicial management applications, including subsequent JM Applications in particular, such applications must be made bona fide and with full and frank disclosure of all the material facts pertaining to the company, and it is for the Applicant to satisfy the burden of proof on a balance of probabilities to the Court that the requirements under the Companies Act 2016 have been not only complied with but also the criterias therein fulfilled. It will then

be a question of deciding each case on the merits of the case before the Court in the subsequent JM Application based on a case to case basis whilst ensuring that at all times there has been no abuse of the court process in doing so.

15. For the sake of completeness, I have also considered Section 406 of the Companies Act 2016 which states:

> (1) A judicial management order shall remain in force for a period of six months from the date of the making of the order, unless the judicial management is otherwise discharged, but the Court may, on the application of a judicial manager, extend this period for another six months subject to such terms as the Court may impose.

16. In ***Re Gold Coast Morib International Resort Sdn Bhd and another case [2021] MLJU 126*** this Court had considered and decided the effect of Section 406 of the Companies Act 2016 and held:

> "***[29]*** *Under* ***section 406****(1) of the* ***Companies Act 2016****, the duration of the JMO is stated to be:-*
> *"(1) A judicial management order shall remain in force for a period of six months from the date of the making of the order, unless the judicial management is otherwise discharged, but the Court may, on the application of a judicial manager, extend this period for another six months subject to such terms as the Court may impose."*

[30] *By the word "shall" in the said* ***section 406****(1) of the* ***Companies Act 2016****, it is clearly parliament's intent to make it mandatory that such a JMO is to be in force or in other words, valid for a period of only six months from the date of the making of the order. Such JMO will from the natural and ordinary meaning of the words in the said sub section be, in this Courts view, immediately terminated on such date unless the JMO is either*

- *(i) discharged or*
- *(ii) extended for a period of another 6 months on the application of a judicial manager*

[31] *On the trite principle that parliament does not legislate in vain, and by adopting a purposive approach as to the intent of Parliament, I hold that by an examination of the language used in* ***section 406****(1) of the* ***Companies Act 2016*** *and Division 8 Sub Division 2 of the* ***Companies Act 2016*** *as a whole, the intent of parliament is to end the judicial management if the purpose of the JMO being to achieve the survival of the* ***company*** *as a going concern and/or that a more advantageous realisation of the* ***company****'s assets would be effected than on a winding up cannot be achieved within the initial 6 month period under* ***section 406****(1) of the* ***Companies Act 2016****."*

17. From the decision in the above said case, I hold that although the initial Judicial Management Order in OS 21 has expired on 9.12.2021, and thus the said Judicial Management Order in OS 21 is brought to an end, I hold that the said section 406 of the

Companies Act 2016 does not bar a fresh application for judicial management being made subject to the conditions this Court has mentioned above.

18. This Court now has to consider whether section 405 of the Companies Act 2016 has been made out on a 'more probable than not' basis i.e in the words of the said section "that the making of the order would be likely to achieve one or more of the following purposes" as decided by this Court in ***Spacious Glory Sdn Bhd v Cocount Three Sdn Bhd [2020] 1 LNS 1617***:

> ***"[28]*** *The term 'likely' has not been defined in the Companies Act 2016 but the term 'likely' has been held in the UK in the case of AA Mutual International Insurance Co Ltd Re [2004] EWHC 2430 (Ch) to mean the applicant to demonstrate on a balance of probabilities that it is 'more probable than not' that this criterion will be fulfilled. I respectfully adopt the same definition for the purposes of defining the term 'likely' under Section 405 of the Companies Act 2016".*

19. It was argued by the Applicant that the payment of the 1st tranche by the JM in OS 21 shows that the interest of the creditors have been better served than on a winding up and that the threshold to satisfy the granting of a JMO under sections 404 and 405 of the Companies Act 2016 have been met. With respect, I do not entirely agree with this proposition as the Court is still obliged to look into the entire circumstances before it to determine if indeed a more advantageous realisation of the company's assets would be affected than on a winding up in the matter herein.

20. From the case before me, it is undisputed that:

    (a) the OS herein is a second attempt to place the Respondent under a JMO albeit by different creditors of the Respondent
    (b) the SOP under the previous JMO vis a vis OS 21 had obtained more than the 75% required statutory majority approval under section 421(2) of the Companies Act 2016
    (c) only the 1st tranche of payment pursuant to the approved SOP had been paid out by the said previous JMO vis a vis OS 21 and that the 2nd tranche of payment was delayed

21. In coming to my decision herein I have also considered that enclosure 22 which was filed by the 2nd Intervener had amongst others proposed another nomination to be the JM, i.e Andrew Heng instead of the Applicant's proposed nominee, Dato Mohd Afrizan. I do agree with learned counsel for the Applicant the 2nd Intervener by his conduct of filing the said enclosure 22 and seeking the said prayer indicates that the 2nd Intervener supports JM Application herein.

22. I have also observed from the summary of the cash movement averred to in the Affidavit of the Interim Judicial Manager herein in enclosure 33 that the cash balance of the Respondent as at 25.2.2022 is RM8,822,913.75 with some of it recovered by the said the Interim Judicial Manager as the previous JM in OS 21, I have also noted that the cash inflow even after expiry of last JMO i.e between 10.2.2022 to 25.2.2022 was the sum of RM197,910.23.

23. From the documents before me, in particular the Affidavit of the Interim Judicial Manager in enclosure 33, it is my finding that he has averred:

(i) that RM8,822,913.75 can be paid to creditors, with a potential of 5% payout if the JM is ordered
(ii) there is a possibility of recovery of RM43 million from the AGRU Project with Muhibbah Engineering
(iii) there is also a possibility of recovery of RM900,000 from the Kikeh/Sepawi Project from PTT Exploration and Production (PTTEP)
(iv) the Petronas Licence to the Respondent has been renewed for the period until 2023
(v) the Respondent has successfully bid for the Petronas Myanmar project for the sum of RM90,047
(vi) the Respondent stands a fair chance to bid for contracts of short, medium term as sub contractor where the Company's expertise can be utilized
(vii) the permanent and contract staff of the Respondent have been reduced and its branch offices in Miri and Kota Kinabalu have been closed

24. I have viewed the same against the objections raised by the 1st and/or 2nd Interveners to the OS which is essence consist of

24.1 there are substantial debtors of the Respondent being MMHE and Muhibah Engineering;
24.2 that Datuk Mohd Afrizan was unable to perform the necessary actions under the SOP to recover the debts owed

to the Respondent wherein the 2nd tranche of payment would not have been an issue

24.3 it will take time for the Respondent to recover its debts and to restructure the company

25. I hold that based on the evidence before me, there is still a chance of the probability of rehabilitating the company or of preserving all or part of its business as a going concern due to the following factors :-

(i) RM8,822,913.75 can be paid to creditors, with a potential of 5% payout if the JM is ordered

(ii) the possibility of recovery of RM43 million from the AGRU Project with Muhibbah Engineering

(iii) the possibility of recovery of RM900,000 from the Kikeh/Sepawi Project from PTT Exploration and Production (PTTEP)

(iv) the Petronas Licence to the Respondent has been renewed for the period until 2023

(v) the Respondent has successfully bid for the Petronas Myanmar project for the sum of RM90,047 during the time of the previous JMO in OS 21

26. I further hold that Datuk Mohd Afrizan has from the facts before me conducted himself with sufficient efficiency as the JM in OS 21 and as the Interim JM herein and that to contend that he was inefficient to recover the debts from the Respondent's substantial creditors is in my view not supported by the facts which I have evaluated as I find that the said Datuk Mohd Afrizan had filed an application in OS to seek a refund of the RM5,150,000 bank guarantee made out to

MMHE and has set aside legal costs to pursue the said claim as per the SOP.

27. It is also my finding that Datuk Mohd Afrizan has engaged in prolonged negotiations between the Respondent and its debtors which led to the late payout for the 2nd tranche distribution and that he has discovered the possible recovery of RM900,000 from the Kikeh/Sepawi Project from PTT Exploration and Production (PTTEP) which was not claimed by the previous directors and/or the management of the Respondent prior to the JMO in OS 21. On this I find that the 2nd Intervener has, with respect, not made out a case for the appointment of Andrew Heng and I find no prejudice will befall the 2nd Intervener should Datuk Mohd Afrizan be appointed the JM in this OS.

28. Thus, in the circumstances before me, I hold that Datuk Mohd Afrizan is the better and more suitable candidate to continue to be the Judicial Manager in the OS herein for the above reasons and to ensure the continuity as well as smooth process of the work done by him in OS 21.

29. I hereby

    (a) grant order in terms of paragraphs 1 to 8 of the OS in enclosure 1 with costs of RM10,000 to be paid by the 1st and 2nd Intervener jointly herein to the Applicant; and
    (b) hereby dismiss paragraph c of enclosure 22 with costs of RM2,500 to be paid by the said 2nd Intervener to both the Judicial Manager and the Applicant severally.

Dated: 16th day of June 2022

sgd.

NADZARIN WOK NORDIN

HIGH COURT JUDGE

KUALA LUMPUR HIGH COURT

Parties:

Mak Lin Kum and Layyin Teh for the Applicant in JM22
[Messrs Syed Ibrahim & Co.]

Kennie Ang for the Respondent/Interim Judicial Manager
[Messrs Ang & Lau]

Noor Akhza for the 1st Intervener (BAP Resources Sdn Bhd)
[Messrs Aqeeb & Co.]

Tay Yi Kuan for the 2nd Intervener (Pengiran Dato' Awang Daud bin Awang Putra)
[Messrs Roshan]

Matthew Van Huizen for the Intervener (Ben Line Agencies (Malaysia) Sdn Bhd
[Messrs Joseph & Partners]