

## **Case Update: Federal Court Decides on Duty of Liquidator of a Wound-up Listed Company**

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In the Federal Court decision of ***Bursa Malaysia Securities Berhad v Mohd Afrizan bin Husain [2022] 4 CLJ 657***, the Court addressed two main issues. First, whether Bursa was obliged to immediately delist a listed company upon the company being served with a winding up order (pursuant to Rule 16.11(2) of the ACE Market Listing Requirements (AMLR)). Second, the duty of a liquidator as the person in control of the management of a listed corporation to ensure compliance with the Listing Requirements.

### **Summary of the Decision and Significance**

The Federal Court considered the following 5 questions of law and answered them as follows.

***#1: Whether compliance with the Listing Requirements is consistent with and/or within the scope of the liquidator's powers and/or duties under the Companies Act 2016 or otherwise in law.***

The answer is yes. This duty to comply exists independently of whether or not the liquidator signs the express letter of undertaking to comply with the Listing Requirements. There is an express duty on the part of a liquidator of a listed corporation to comply with the Listing Requirements as long as the wound up company remains listed. See as well section 480 of the Companies Act 2016. A court appointed liquidator is an officer of the court and he must comply with the law.

***#2: Whether on a proper construction/interpretation of Rule/Paragraph 16.11(2) of the Listing Requirements, Bursa Securities is not obliged to immediately and summarily de-list a listed corporation upon the listed corporation being served with***

***a winding-up order without regard to any appeals/legal challenges to the winding-up order but should only do so upon a final determination on the said appeals/legal challenges.***

The answer is yes. Bursa Securities is not obliged to immediately and summarily de-list a wound up listed corporation.

***#3: Alternatively, whether Bursa Securities is entitled to exercise its discretion to modify and/or waive compliance of its own rules, including Rule/Paragraph 16.11(2) of the Listing Requirements by virtue of, amongst others, Rule 2.07(2) of the AMLR and Paragraph 2.06(2) of the Main LR.***

The answer is yes. There is such discretion.

***#4: If: –***

***(i) the answer to Question 1 is in the affirmative; and***

***(ii) the answer to Question 2 and/or 3 is in the affirmative***

***whether the liquidator, as the person in control of the management of a listed corporation in liquidation, must undertake to continue to comply with the Listing Requirements as consideration for the continued listing of a listed corporation in liquidation.***

The answer is yes. The liquidator must undertake to continue to comply with the Listing Requirements.

***#5: Whether a director in a listed corporation in liquidation can continue to ensure compliance of the Listing Requirements by the listed corporation without the authorisation by the liquidator and/or Court.***

The answer is no. The director cannot provide the requisite disclosure as required under the Listing Requirements without the consent, authorisation or approval of the liquidator.

The liquidator is the person in control of the listed corporation in liquidation. It is incumbent on the liquidator to procure the directors to make the requisite disclosure in compliance with the Listing Requirements.

## **Brief Facts**

The brief key facts are set out below.

Wintoni is a public listed company listed on the ACE Market and was under the supervision of Bursa pursuant to the ACE Market Listing Requirements (ACE LR).

On 17 August 2017, the Court made a winding up order against Wintoni. The Court appointed the liquidator, Mohd Afrizan, as the liquidator of Wintoni.

Bursa did not de-list Wintoni. With Wintoni continuing to be listed, the liquidator was now the Controlling Person of Wintoni for the purposes of Rule 2.22 of the ACE LR.

On 20 September 2017, the liquidator provided an undertaking to Bursa to comply with the ACE LR.

On 31 October 2017, the liquidator made a general announcement stating that, among others, the liquidator would not prepare Wintoni's financial statements.

In March 2018, Bursa conducted an inquiry against Wintoni on the delay in the announcements and issuance of Wintoni's financial statements.

The liquidator responded that it was not his role or function as liquidator to do so. As Wintoni had ceased operations, he was not in a position to prepare the financial statements.

Bursa commenced enforcement proceedings against, among others, the liquidator for breaches of the ACE LR.

On 6 May 2019, Bursa imposed a public reprimand on the liquidator and directed him to make the necessary arrangement including working with and/or delegating the function

to Wintoni's directors to ensure announcement/issuance of the financial statements within three months.

The liquidator filed judicial review proceedings at the High Court to challenge these decisions.

Separately, in September 2019, a contributory of Wintoni obtained an Order to terminate the winding up of Wintoni.

The High Court allowed the liquidator's judicial review proceedings (see *Mohd Afrizan v Bursa Malaysia Securities Berhad* [2020] MLJU 757). Broadly, the grounds were:

- The obligation to prepare the financial statements was not within the duties of the liquidator as prescribed under the CA 2016. Instead, the obligation is on the Wintoni directors.
- The undertaking was in breach of the CA 2016 was in breach of the CA 2016 and therefore void for illegality.
- It was mandatory for Bursa Malaysia to have de-listed Wintoni upon it being wound up.

The Court of Appeal then heard and dismissed the appeal (see *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2021] 4 MLJ 819).

The Federal Court then decided as follows.

### **Bursa retains the discretion on timing of delisting of wound-up company**

The Federal Court first established that the AMLR traces its roots back to statute and has statutory force. There is also both a statutory and contractual relationship between Bursa and the listed company, as well as between Bursa and the person in control of the listed

company. The person having control of the listed company is contractually bound by Bursa's regulations.

The Court then dealt extensively with whether the word "*shall*" in the context of Bursa's duty to delist a wound-up company (under Rule 16.11(2) of the AMLR) was mandatory or only directory.

The Court held that the word "*shall*" should be construed in the context of the entirety of Rule 16.11(2), the AMLR and the Capital Markets and Services Act 2007 (CMSA), i.e. the "broader statutory context", including the primary function of Bursa to act in the public interest to protect investors. In a situation where it may not be in the public interest for the protection of investors for a wound-up listed company to be delisted, Rule 16.11(2) cannot be construed as a mandatory statutory directive.

It was noted that where a company is wound-up, the primary concern of Bursa is to ensure that there is continued compliance with the AMLR so that there is continued disclosure about the workings of the listed corporation. This keeps the investor public apprised of what is going on in the company.

Further, an immediate delisting may cause irreparable damage to investors. For instance, if the winding up order is then reversed on appeal or stayed, the de-listing would have already occurred and with no opportunity to reverse this.

The Federal Court concluded that Bursa may de-list the listed corporation after taking into consideration the relevant interests as outlined in the CMSA and the AMLR, at an appropriate time, and not immediately upon pronouncement of the winding up order.

### **The Liquidator has an Express Duty to Ensure Compliance with the Listing Requirements**

Next, the Federal Court clarified that there is an express duty on the part of a liquidator of a listed corporation to comply with the AMLR or the Main Listing Requirements as the

case may be, as long as the wound-up company remains listed. In this case, the liquidator had signed the letter of undertaking to comply with the AMLR.

But the Federal Court's grounds appear to also hold that besides the letter of undertaking, there is such an express duty to comply with the AMLR or the Main Listing Requirements.

The Federal Court referred to section 480 of the Companies Act 2016.

Section 480 states:

*“(1) Where a person other than the Official Receiver is the liquidator in a winding up of a company by Court, the Official Receiver shall take cognizance of his conduct and-*  
*(a) if the liquidator does not faithfully perform his duties and duly observe all the requirements imposed on him by any written law or otherwise with respect to the performance of his duties”*

...

*the Official Receiver shall inquire into the matter, and take such action thereon as he may think expedient.*

A court appointed liquidator is an officer of the court with express and clear duties and functions. It must follow that as an officer of the court, he is cognizant of, and complies with the law. The highest standards in respect of compliance with the law are required of him.

Next, a director of a wound-up company cannot continue to ensure compliance with the AMLR or other requirements where there is no authorisation by the liquidator as the liquidator is the person in control of the company.

Importantly, the Court held that it is the legal obligation of the liquidator to procure the directors to make the requisite disclosure in compliance with the AMLR where the liquidator is unable to do so personally or has no relevant knowledge.

## Comments

Liquidators of a wound-up listed corporation must now be very conscious of the duties imposed on them by virtue of the Listing Requirements and under the Capital Markets and Services Act 2007. As long as the wound-up corporation remains listed, the liquidator, being the party in control, has to ensure compliance with the Listing Requirements.

The liquidator would have to procure the relevant information from the directors or to direct the directors to provide the requisite disclosure to Bursa. This decision finds that this is a legal obligation on the part of the liquidator.

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