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## Would A Listed Company Be Delisted Immediately Upon Being Served With A Winding Up Order?

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In *Bursa Malaysia Securities Berhad v Mohd Afrizan bin Husain*<sup>1</sup>, the Federal Court held that Bursa Malaysia Securities Berhad (Bursa) is not obliged to immediately and summarily delist a listed company upon the service of a winding up order. A delisting should only take place upon a final determination of appeals. Thus, a liquidator of a company in liquidation must continue to comply with the relevant listing requirements as provided under the law.

This alert focuses on the appeal filed by Bursa where the Federal Court's ruling will be examined in the context of its significance to listed companies in liquidation.

### Facts

Wintoni Group Berhad (Wintoni) was a listed company on the ACE Market of Bursa. On 17.8.2017, the High Court wound up Wintoni and the respondent, Mohd Afrizan bin Husain (Afrizan) was appointed as the liquidator of Wintoni. Shortly after his appointment, Afrizan provided a letter of undertaking (LOU) to Bursa undertaking to comply with the ACE Market Listing Requirements (AMLR) in consideration of Bursa allowing the continued listing of Wintoni on the official list. Compliance with the AMLR included the preparation of the financial statements of Wintoni. At the material time, as there were ongoing appeals filed against the winding up order, Bursa did not delist Wintoni.

Despite the issuance of the LOU, Afrizan, being the liquidator of Wintoni, failed to comply with the AMLR. Consequently, Bursa publicly reprimanded Afrizan for his breaches of the AMLR. Dissatisfied with Bursa's decision, Afrizan commenced judicial review proceedings at the High Court seeking to quash Bursa's decision to publicly reprimand him for his failure to comply with the AMLR. The High Court and

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<sup>1</sup> [2022] 4 CLJ 657

Court of Appeal found in favour of Afrizan. Subsequently in September 2019, Wintoni successfully obtained an order to terminate the winding up of Wintoni.

## The High Court's Decision

The High Court allowed Afrizan's judicial review application and held that:

- (a) The obligation to prepare Wintoni's outstanding financial statements is outside the scope of powers and/or duties of a liquidator as set out in the Companies Act 2016. The LOU was null and void pursuant to Section 24 of the Contract Act 1950 as it was not issued in accordance with legal provisions and principles.
- (b) The LOU provided by Afrizan was general in nature and did not specify that Afrizan was to prepare Wintoni's financial statements and related reports.
- (c) Rule 16.11(2) of the AMLR is a mandatory provision stipulating that Bursa "shall" delist Wintoni when the court makes the winding-up order. This was clearly distinguishable from the word "may" used in the discretionary provision of Rule 16.11(1) of the AMLR. Thus, it is important that listed corporations which have been issued with a winding-up order such as Wintoni, be delisted in order to protect investors and prospective investors.

## The Court Of Appeal's Decision

The Court of Appeal dismissed Bursa's appeal and held that:

- (a) Upon a literal interpretation of Rule 16.11(2) of the AMLR, it is non-negotiable that the said rule stipulates mandatory requirements for de-listing and Bursa cannot rely on Rule 2.07(2) of the AMLR to waive a mandatory requirement.
- (b) In respect of Afrizan's LOU, it was qualified by the words "insofar as the same apply to me" and since Afrizan had no duty to ensure Wintoni's timely

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issuance of financial statements, he did not breach the AMLR.

## Legal Issues At The Federal Court

The Federal Court considered the following 5 issues:

- (a) Whether compliance with the AMLR is consistent with and/or within the scope of a liquidator's powers and/or duties under the Companies Act 2016 or otherwise in law.
- (b) Whether on a proper construction/interpretation of Rule 16.11(2) of the AMLR, Bursa 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.
- (c) Alternatively, whether Bursa is entitled to exercise its discretion to modify and/or waive compliance of its own rules, including Rule 16.11(2) of the AMLR by virtue of amongst others, Rule 2.07(2) of the AMLR and Rule 2.06(2) of main listing requirements.
- (d) If the answer to (a) is in the affirmative and the answer to (b) and/or (c) 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.
- (e) 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.

In allowing Bursa's appeal, the Federal Court answered the first to the fourth questions in the affirmative and the fifth question in the negative. The Federal Court held that:

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- (a) The word “shall” does not always mean that it is being used mandatorily and should be construed in the context of the entirety of Rule 16.11(2) of the AMLR and the Capital Markets and Services Act 2007 (CMSA).
- (b) Bursa, whose primary duty was to protect the interest of the public investors under the CMSA 2007, has the discretion to defer the delisting of a listed corporation in liquidation until all legal challenges/appeals against the winding-up order have been exhausted.
- (c) In cases where it may not be in the public interest for the protection of investors for a wound-up company to be delisted, Rule 16.11(2) of the AMLR cannot be construed as mandatory statutory directive for Bursa to immediately delist a listed corporation in liquidation upon a winding up order being made at first instance.
- (d) The listing status of a company has a value attached to it which would be irrevocably lost if delisting were to immediately happen upon a winding up order being made. An immediate delisting will have an immediate impact on all investors who have invested in the listed corporation and such damage is irreparable in that if the winding up order is reversed on appeal or stayed, the delisting would have occurred and there would not be any opportunity to reverse its effect.
- (e) The LOU was clear beyond dispute in that Afrizan was bound by the law as set out in the CMSA and AMLR. Afrizan’s conduct in trying to avoid such an express and unequivocal legal obligation in the interests of both Wintoni and the public investor by suggesting that Bursa was bound to delist Wintoni thereby absolving him from any need to comply with the LOU was unacceptable.
- (f) Where a wound-up corporation continues to be listed, the liquidator who is the person in control of the listed corporation must comply with and/or ensure compliance by the listed corporation with the listing requirements.

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## Commentary

The Federal Court's decision in this case is timely. In a plethora of cases, winding up orders have been successfully challenged, as in this case. In turn, this has resulted in the companies being reinstated to its position as if the winding up orders were never issued. But what was not discussed was the commercial impairment it had caused to the companies due to impact of delisting. This Federal Court decision may be seen as departing from the literal rule of interpretation. However, this ruling seems to equip Bursa with a wider discretion on whether to delist a company. A draconian exercise which lasting impact must be exercised carefully and slowly. This judgment brings security to future listed corporations in liquidation and protects the interests of the corporation, its shareholders and/or all public investors before all challenges and/or appeals in respect of the winding up order is exhausted. With Bursa being clothed with the discretion to wield its powers on a case-by-case basis, it is hoped that such interpretation would ensure the protection intended by the legislature.

The Federal Court's decision also settles the scope of the powers and duties of a liquidator in control of a listed corporation in liquidation. This is evident from the painstaking analysis undertaken by the Federal Court which expressly held not only that a liquidator of a listed corporation in liquidation has to comply with the duties set out in the Companies Act 2016 but also to comply with all written laws which include the listing requirements.

This decision provides the much need clarification on how the listing requirements are to be interpreted. Even though the operations of a company would not be affected by the delisting of a company, it would undoubtedly affect the confidence of the shareholders and/or public investors which would in turn affect the commercial standing, reputation and longevity of a listed company.

This alert was authored by Lisa Yong, an associate with the firm's Dispute Resolution practice.

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