COMPANY LAW

DE-LISTING OF A COMPANY FOLLOWING ISSUANCE OF A WINDING UP ORDER...

On 20 January 2021, the Court of Appeal made a landmark decision that a listed company must be de-listed once it has been served with a winding-up order. This was ruled in the Court of Appeal's unanimous decision to dismiss an appeal against the decision handed down by the High Court on 15 June 2020 in a suit brought by Bursa Malaysia Securities Berhad ("Bursa") against Mohd Afrizan Bin Husain ("Dato Afrizan") as liquidator for Wintoni Group Berhad ("Wintoni").

It is undeniable that this will affect companies facing financial struggles who wish to take advantage of Bursa's practice (if any) of granting companies some "*breathing space*" before de-listing. This is especially so in light of the current on-going pandemic and its economic consequences which will likely result in more companies being wound up in the near future.

So why did the Court come to the decision? Will the public benefit from it? How will this affect the companies' operations? Does this affect the duties and responsibilities of liquidators? What can we expect next?

This article will hopefully shed some light on these questions.

BRIEF HISTORY OF WINTONI

Wintoni was categorised as a Guidance Note 3 (GN3) company in February 2016 and was subsequently suspended from trading on 8 May 2017. On 17 August 2017, Wintoni was wound up pursuant to an Order made by the High Court.

On 6 May 2019, Bursa had amongst others, publicly reprimanded Wintoni, its former directors, and Dato Afrizan for alleged breaches of the Bursa Malaysia Securities ACE Market Listing Requirements ("**LR**").

On 17 September 2019, all proceedings in relation to the winding-up of Wintoni were terminated.

Pursuant to the aforementioned public reprimand, Dato Afrizan filed a judicial review application in High Court for a *Certiorari* Order to *inter alia* quash Bursa's decision to publicly reprimand him and a *Mandamus* Order to direct Bursa to issue an announcement that the public reprimand imposed against him is nullified and invalid. The application was allowed by the High Court on 15 June 2020, which brought about the current appeal.

On 9 December 2020, Wintoni announced its diversification of business. Pursuant to the latest announcement made by Wintoni in January 2021, Bursa has extended the deadline for Wintoni to submit a regularisation plan until 31 June 2021.

MANDATORY DE-LISTING OF A WOUND UP COMPANY

To date, the Grounds of Judgment by the Court of Appeal has not been made available as yet. However, given the fact that the Court of Appeal had affirmed the decision made by the High Court, we gather that in this case, the Court is actually giving effect to the express provision in the LR.

In this regard, it should be noted that the de-listing of a wound-up company is specifically provided for under Rule 16.11(2)(d) of the LR which reads, amongst others, that "*The Exchange shall de-list a listed corporation… upon a winding-up order being made against a listed corporation*".

The Court held that as the relevant provision uses the word *"shall"*, the de-listing of a wound-up company is therefore mandatory. The Court also drew comparison to Rule 16.11(1) of the LR, which uses the word *"may"*, thus granting Bursa the discretion to de-list a company in any of the circumstances stated in Rule 16.11(1) of the LR.

The Court further held that the different wordings adopted in the two rules show that the lawmakers clearly intended for the de-listing in Rule 16.11(2) to be mandatory.

PROTECTION OF SHAREHOLDERS AND/OR POTENTIAL SHAREHOLDERS

If one were to look at the Grounds of Judgment of the High Court, the other main reason behind the Court's decision appears to be to protect the shareholders and/or potential shareholders. The High Court, unfortunately, did not elaborate further on this. Nevertheless, we wish to highlight the following points.

The legal counsel for Bursa had submitted to the Court of Appeal that immediate de-listing of a company upon a winding-up order being made, without regard to the proceedings to challenge the winding-up order, would cause serious inconvenience and injustice to the company and its investors. In this instance, Bursa submitted that its decision not to de-list Wintoni immediately has proven to be justified as the winding-up order was subsequently terminated and Wintoni is no longer in liquidation.

On the other hand, while liquidation may bring certain advantages to a company (e.g. outstanding debts may be written off and legal processes may be halted), it almost always means bad news for its shareholders. It is undeniable that news of a company being wound up would likely affect the price of its shares in the stock market *i.e.* it may become low. If the company is able to make a comeback, then the value of its shares could come back with it. However, it is rather uncommon and/or difficult for a company to successfully make a comeback and/or terminate its winding-up proceedings, as what happened with Wintoni.

Once a company is de-listed, its shares are no longer tradeable on the stock exchange. Therefore, there won't be any more trading of the shares or for a share price to be determined. Shareholders are left to receive whatever, if any, distribution of capital on completion of liquidation. Regard should be made to the fact that while shareholders are not personally responsible for the debts of the company, their rights will rank behind *inter alia* the rights of creditors.

So long as a company remains listed, one of the possible scenarios is that the public may innocently buy the shares of a wound-up company as they may not be aware of the latest status of the company. Once they have done so, depending on the actual financial status of the listed company, it may likely mean that they will suffer losses as it is not easy for shareholders to recover their investment in a winding up scenario.

Some may claim that immediate de-listing will cause distress to companies as companies may be deprived of *"breathing space"* to *inter alia* regularise their operations and financials before de-listing. However, it is arguable that instead of allowing the companies *"breathing space"*, it is more important for the Courts and/or the law to protect the public and/or to ensure that companies do not abuse their *"breathing space"* to trick the public into buying up their shares.

It should also be noted that companies are not wound up overnight. In most cases it would take at least 6 to 9 months from the date the winding-up petition is presented before an order to wind up a company is finally made.

Ordinarily, once a listed entity is presented with a winding-up petition, an announcement will have to be made on the same. Even prior to this, some entities (e.g. Wintoni) would have already been declared as being in financial distress or under "PN17" or "GN3" category where the company would then have to submit a regularisation plan for approval failing which it will be de-listed.

Once such announcement (on there being a winding-up petition presented against the company) has been made, existing shareholders of a company ought to have been aware of its status such as to be able to make a call on their investments in the company. Therefore, if they still have shares in a company that is subsequently wound up and de-listed, arguably it can be said that they must have done so with the full knowledge of the risk entailed.

So in the circumstances that an order for winding up is ultimately made against a public listed entity, arguably, immediate de-listing in accordance with the express provision of the LR is justified.

IMPACT ON COMPANIES' OPERATIONS

In so far as the operations of a company are concerned, it is important to note that the de-listing of a company does not affect its operations per se. If a company is de-listed today, it does not mean that it would cease to exist tomorrow.

The company may still exist and continue to operate its businesses and proceed with corporate restructuring, and the shareholders may still be rewarded by the company's performance (if they do well after that) albeit as an unlisted entity – some companies may very well benefit from being de-listed as it would mean that they would not have to be under Bursa's scrutiny which may very well give more flexibility to turn around the company.

As for companies that are wound up – if there are no further appeals or stay of the winding-up order, there are existing provisions in the Companies Act 2016 which gives a company a certain period of time to regularise or *"wrap up"* their affairs before the

liquidator takes control of its operations, so again, it is not the case that a company would immediately cease to exist or stop operating upon the issuance of a winding-up order.

DUTIES AND RESPONSIBILITIES OF LIQUIDATORS The decision of the Court of Appeal also touched on the duties and responsibilities of liquidators of public listed companies, with regards to the requirement to prepare, finalise and circulate financial statements to shareholders.

Generally, a liquidator takes control over all of the administration of the company's business and affairs upon the granting of a winding-up order. In relation thereto, the de-listing of a company does not affect the duties and responsibilities of a liquidator. In other words, a liquidator still has to fulfil all his duties and responsibilities as provided for under the Companies Act 2016, after the de-listing of a wound-up company.

Albeit unrelated to the de-listing of a wound-up company, it is to be noted that the High Court has emphasised that liquidators appointed by the Court are agents of the Court wherein all actions of the liquidators are under the supervision of the Court in accordance with the requirements of Section 486 of the Companies Act 2016. Liquidators must strictly comply with the relevant legal provisions and must not do anything outside of their jurisdiction. The main task of a liquidator is to wind up the business of a wound-up company.

In this case, the Court held that the Applicant has the primary responsibility of winding up the business of Wintoni and the preparation of the Financial Statements requested by Bursa in this instance is not in line with the main duties of the Applicant and not based on any legal requirements. Hence, the Court held that the obligation to prepare the said Financial Statements was not within the duties of a liquidator as prescribed under the Companies Act 2016 but instead was that of the directors of the company.

WHAT HAPPENS NEXT? Parties, if unsatisfied with the Court of Appeal decision, have a final chance of appeal to the Federal Court. However, an appeal to the Federal Court is not as of right. There must first be an application for leave to appeal to the Federal Court wherein the Applicant must show that there is a question to be decided for the first time or a question of importance where a Federal Court decision would be to public advantage. Where leave is allowed, the Federal Court would then allow the appeal proper to be heard.

It remains to be seen whether Bursa would file an application for leave to appeal against the decision of the Court of Appeal. However, it has been reported that the Court of Appeal has allowed an application by Bursa for a stay of the Court of Appeal decision pending an appeal to the Federal Court.

Nevertheless, as of to date, the decision of the Court of Appeal, as well as the provisions in the LR still stands *i.e.* the de-listing of a listed company has to take place as soon as a winding-up order has been made or upon the commencement of voluntary winding up pursuant to Rule 16.11(2) of the LR.

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