

# BURSA WINGS CLIPPED, CANNOT ISSUE RESTITUTION ORDER, COURT RULES

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*The Court of Appeal has upheld the Kuala Lumpur High Court's 2012 judgment that Bursa Malaysia does not have unfettered discretion in issuing a restitution order to directors of listed companies, thereby clipping the wings of the regulator.*

In scrutinising the Capital Market and Services Act 2007 (CMSA 2007) and the Bursa-enacted Listing Requirements (LR) (paras 16.17-16.20), the three-men bench had on Tuesday unanimously upheld a High Court ruling made two years ago in a judicial review hearing, that the LR which Bursa relied upon to impose penalties, did not contain clear provisions allowing it to order any restitution against directors for losses to their companies.

The Court of Appeal comprising Justices Datuk Abdul Wahab Patail, Datuk Hamid Sultan Abu Backer and Datuk Umi Kalthum Abdul Majid upheld the ruling by High Court judge, Justice Datuk Abang Iskandar Abang Hashim, that any order of restitution must be done through a court order, rejecting Bursa's contention that the latter should be allowed an 'unfettered discretion' to institute penalties.

Abang Iskandar also said only the courts can order restitution and Bursa must apply to the court to enforce this.

He had held that "... a person wishing to obtain an order of restitution, an order that is very similar, if not synonymous with an order of restoration, must apply to the court for such an order. In that regard, it is noted that even the securities commission, which undoubtedly is the principal regulator of the capital market as created by the relevant statute, must also go to court and apply for an order of restitution."

"The power to impose a fine is expressly provided in the LR. However, there is nothing that is contained in the LR that can be used as a legitimate basis upon which an opinion can be safely and soundly predicated to say that the Bursa is properly clothed with the necessary jurisdiction to impose an order of restitution," he added.

Former Liqua Health Corp Bhd director, See Keng Leong, had sought to quash Bursa's order for him to pay RM15.6 million to Liqua.

See had represented Liqua Health Marketing (M) Sdn Bhd, a wholly-owned subsidiary of Liqua, in a distribution agreement with Wynsum Healthy Living Sdn Bhd.

Liqua had paid Wynsum RM15.6 million for health products, but the goods were never delivered. Liqua had then sued Wynsum for breach of contract and won. However, the judgment remains unsatisfied and Wynsum was wound up.

Apart from ordering the RM15.6 million restoration/restitution payment, Bursa's Listing Committee also slapped See with a RM500,000 fine for breach of fiduciary duties as well as a RM50,000 fine for a public announcement from Liqua on unaudited accounts relating to the Wynsum deal.

Another director, Goh Bak Min was also found guilty by Bursa's Listing Committee for the Wynsum deal and fined RM1 million.

Both men had their appeals to Bursa's Appeals Committee dismissed.

See sought a judicial review to quash the decision, citing that the Appeals Committee had acted in breach of "procedural fairness, natural justice and reasonableness".

He also accused the Appeals Committee of having "acted perversely" in upholding the decisions of the Bursa's Listing Committee.

Bursa was represented by Lim Chee Wee and Ong Doen Xian, while Razlan Hadri Zulkifli and Ng Wai Yen appeared for See.

When contacted by The Edge Financial Daily, Razlan said the judiciary's position on Bursa's powers was significant as it draws the line on the latter's powers.

"Bursa is still subject to the law and can't act willy-nilly," he said, adding that the regulator's internal processes needed to be scrutinised and the verdict will assist in promoting a transparent process in instituting penalties.

"At the moment there is no oral hearing allowed in the appeals process (with the Appeals Committee). Only written submissions are allowed.

"At least in a court of law, any ruling on penalties is open and transparent for all to see, not a closed-door committee," added Razlan.

In a written reply, Bursa's lead counsel Lim said the high court had earlier quashed the Appeals Committee's restoration order which directed See and Goh to restore RM15.6 million to Liqua arising

from Liqua's subsidiary having advanced this sum of money to a third party in breach of the financial assistance provisions of the LR.

"The restoration order serves to restore to the listed company the loss it suffered arising from the contravention by directors of the LR.

"Bursa took enforcement proceedings against these two directors who were found to have contravened the LR and were publicly reprimanded, fined RM1 million for Goh and RM550,000 for See," he said, adding that Bursa reserves further comments as it does not have the grounds of the Court of Appeals' decision.

Lim, however, said Bursa is considering filing an appeal to the Federal Court. – The Edge Financial Daily, October 24, 2014.

<http://www.themalaysianinsider.com/malaysia/article/bursa-wings-clipped-cannot-issue-restitution-order-court-rules>