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Circumstantial Evidence to Prove the Elements of Insider Trading in Malaysia and Australia

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ABSTRACT

Insider trading, although might profit the offender himself, it nevertheless brings more harm to society than its benefits. Several elements need to be proved before a person can be convicted under insider trading. As this is not a strict liability offence, the elements of mens rea need to be proved and it is quite difficult to prove it by using direct evidence. Therefore, indirect evidence is produced before the court to charge a person with insider trading. This raises a question whether it is reliable and sufficient to hold a person liable under this offence. The objective of this research is to examine whether the circumstantial evidence may be accepted by the court in cases involving insider trading and to analyze how circumstantial evidence helps the court to decide the mens rea by deducing it from the offender's behavior at the time of the commission of the offence. Qualitative methodology using primary sources such as statutes and cases is used to analyze the application of circumstantial evidence by the courts while secondary sources referred to are academic books and articles. It is found that most of the judges accepted circumstantial evidence to prove the elements of insider trading. It helps the court to understand the state of mind of the offender, decide who is an insider and determine the type of information whether it is material and generally available to the public. This research suggests that circumstantial evidence is necessary to assist the courts in the cases.

Keywords: Insider trading; circumstantial evidence; mens rea; insider; inside information

INTRODUCTION

Insider trading cases in Malaysia show an upward trend along with other types of white-collar crime such as money laundering.[1] Securities Commission Malaysia ("Securities Commission") confirmed that Datuk Sreesanthan Eliathamby, a corporate lawyer, has lost in his appeal against a High Court decision in November 2020 after he was found liable in insider trading of Worldwide Holdings Bhd ("Worldwide") shares in 2006. Sreesanthan, while acting as a legal adviser and thus in possession of material non-public information relating to the proposed privatisation of Worldwide by Perbadanan Kemajuan Negeri Selangor, acquired a total of 600,000 Worldwide shares between 7 June and 11 July 2006.[2] This shows that even a legal practitioner tends to commit this offence although there is a high probability that he must be aware of its illegality and consequences of his act. Apart from that, it is found that this offence can also be committed by a top-ranking authority in the company as in the case involving a former executive director of Patimas Computers Berhad, Dato' Ng Back Heang. He was found liable for insider trading when he disposed of 16.5 million Patimas shares that he owned by relying on the non-public information that he obtained through audit queries and issues about suspicious transactions between Patimas and its top debtors.[3] Generally, if an employee commits an offence for the benefit of the company, the company itself may be held accountable under vicarious liability.[4] However, in *Patimas*' case, only the former executive director was sued by the Securities Commission as he committed the offence for his personal benefit.

Insider trading can be defined as an act of selling or purchasing shares using confidential information that is unknown to the public. This kind of information may have a material effect on the price or value of the shares if it is widely known. Therefore, when an insider such as an employee of a company relies on this inside information to buy or sell shares, he commits an offence of insider trading. The prohibition of this offence is initially set out in section 89E of the Securities Industry Act 1983 but later this provision was repealed and replaced by section 188 of the Capital Markets and Services Act 2007. As Malaysian laws pertaining to insider trading were modelled from Australian Corporations Law 1990 (by way of amendments introduced in the

Corporations Legislation Amendment Act 1991), Australian cases regarding insider trading laws after 1991 have had persuasive effects in Malaysian courts.[5] If a person is found guilty of insider trading, he may be sentenced up to ten years imprisonment and to pay a fine of not less than one million ringgit.[6] Rule 601.2C under Business Rules of Bursa Malaysia Derivatives Berhad - Market Misconduct explains the standard of conduct required from a trading participant. A trading participant must not only obey the principles but he or she also has the duty to act with due skill, care and diligence and with due regard for the integrity of the market. He or she must avoid any actions that may cause disorder and unfairness in the market activity.[7]

Generally, the advantage of insider trading is that it will benefit its perpetrator by profiting him or her with the purchase of shares at lower prices which later becomes higher after the inside information is made known to the public. Similarly, it may also prevent losses to the perpetrator if he or she manages to sell the shares at a higher price before their value falls due to the announcement of the information. It is important to note here that the degree of confidential information plays an important role in determining whether a person can be guilty of insider trading or not. Nevertheless, it is found that the disadvantages are more prevalent and have effects on the community at large. The Reporter, published by the Securities Commission, stated that insider trading is regarded as a serious offence because it involves misappropriation. The insider takes advantage of the confidential information belongs to the company for his own benefit. The current situation can have a deep impact on the state's economy.[8] Plus, relying on this inside information, the insider unjustly enriches himself at the loss of another person. This will cause injustice to the other market participants or traders who are not in a position to gain access to similar inside information. As a result, people's confidence in the stock market confidentiality will be undermined by the activities of insider trading.[9]

There is also a study done previously to look at the effect of insider trading on stock characteristics. It is found that the price, return and volume of the stocks are affected due to the increasing number of purchases by the outside investor when they find out about insider trades. As a result, it increases the volume and price of the stock.[10] In short, insider trading has a substantial effect on market liquidity and transaction, resulting in it being declared illegal by most countries in the world.

CONCEPT OF EVIDENCE

The laws pertaining to evidence in Malaysia are governed under the Evidence Act 1950 (Act 56) ("EA 1950").[11] EA 1950 does not specify that the rules of evidence are only applicable in criminal cases. On the contrary, it is also applied in civil cases although the burden of proof might be different. In the case of *Saminathan & Ors v Public Prosecutor*[12] the court held that law of evidence applies in both civil and criminal cases, to prosecution and defence, and on the evidence admitted, the methods of demonstration and inference do not differ in civil and criminal cases. In delivering his judgement, Buhagiar J. referred to the Halsbury's Laws of England, second edition which he quoted in verbatim:

> "The rules of evidence which govern the proof of facts in a criminal trial are substantially the same as those which apply in a civil trial, but there are some particular points of difference arising from the special nature of criminal proceedings."

The judge also explained the burden of proof in civil cases where a preponderance of probabilities is satisfactory to be accepted by the court. However, in criminal cases, the conviction of the accused must be proved beyond reasonable doubt while for the defence argued by the accused, it is sufficient for the court to accept it if he manages to raise a reasonable doubt. The relevant provisions and cases in the Malaysian Evidence Act 1950 are analysed in order to get a sound finding.[13] Evidence literally means one or more reasons for believing that something is or is not true.[14] Evidence is defined under the Act as oral evidence and documentary evidence.[15] Oral evidence is the statement given by a witness in court. Section 59 explains that all facts may be proved by oral evidence unless it is related to the contents of documents. Chapter V of the Act enlightens the application of documentary evidence to be tendered in court. Basically, documentary evidence is divided into two categories which are the primary evidence such as the original copy of the document.[16] The photocopy of the original one is considered as a secondary evidence.[17] Although the definition above does not include real or physical things as evidence, it can be understood that it is also admissible in court by virtue of section 60(3) which states that if oral evidence refers to the existence of any material thing, the court may request it to be produced before the court.

On top of that, the classification of evidence may also be divided into direct and indirect evidence, which is also known as circumstantial evidence, as stated in Halsbury's Laws of Malaysia.[18] Section 60 mentions that oral evidence must be direct. It also discusses what is meant by direct evidence. For example, in a case of murder, the witness himself sees the accused stab the deceased or the accused tells the witness that he intends to murder the deceased. It can also be any other facts related to the facts in issue perceived by the witness with his own senses.

The application of indirect evidence can be seen in EA 1950 under Chapter II related to the discussion of the relevancy of facts. First of all, it must be understood that section 5 of EA 1950 will accept the evidence given if the evidence is related to the fact in issue or if it is a relevant fact. According to the illustration in section 3, facts in issue whether by themselves or supported by other facts are able to constitute the ingredients of offence and it must be proved by the plaintiff or the prosecution because this fact is necessary to show the existence, nature of right or liability asserted or denied in any suit or proceeding. However, direct evidence might be difficult to obtain in order to prove facts in issue. Therefore, proving the facts in issue by inferring it from relevant facts is admissible in court. The court in *Public Prosecutor v Dato' Seri Anwar Bin Ibrahim (No 3)*[19] explained the following:

> "Questions of admissibility of evidence are questions of law and are determinable by the judge. If it is the duty of the judge to admit all relevant evidence, it is no less his duty to exclude all irrelevant evidence. Section 5 of the Evidence Act 1950 declares that evidence may be given in any suit or proceeding of the existence or nonexistence of every fact in issue and of such other facts as declared to be relevant and of no others. It follows from this that a party to a suit or proceeding is entitled to give evidence of only facts which are declared relevant under the provisions of the Evidence Act 1950. The judge is empowered to allow only such evidence to be given as is, in his opinion, relevant and admissible and in order to ascertain the relevancy of the evidence which a party proposes to give, the judge may ask the party proposing to give evidence, in what manner the alleged fact, if proved, would be relevant, and he may then decide as to its admissibility…"

In short, indirect evidence is the application of relevant facts that helps the court to infer another fact which aims to prove fact in issue. Section 5 emphasizes the importance of the relevancy in evidence law as any irrelevant facts would be inadmissible in court. Nevertheless, section 3 stated that this fact must be within the provision of EA 1950 relating to the relevancy of the facts. According to the EA 1950, indirect evidence may include circumstantial evidence and fact that leads to fact in issue. They are discussed in section 6, section 7 and section 8. Illustrations under section 6 explains an example of relevant fact in connection with fact in issue. An accused murder the deceased by beating him. Therefore, whatever was said or done by the accused, the deceased or the bystander during the commission of crime or after completion of crime has formed part of the transaction and is accepted as relevant facts.

Examples of circumstantial evidence can be referred to in section 7 and section 8 EA 1950. Section 7 explains three types of facts that are relevant. Firstly, the facts that constitute the state of things under which they happened. Second is the facts that show the occasion, cause or effect of facts in issue. Third is the facts which afforded an opportunity for the occurrence of the crime. In *Syahin Hafiy Danial bin Soh Ahmad Luptepi Amin v Mansur bin Yunus & Anor,*[20] a collision occurred between two motorcycles. The second respondent rode the first motorcycle while the first respondent was the pillion passenger and the appellant rode the second motorcycle. The respondent suffered personal injuries as a result of the accident and filed a negligence suit in the sessions court against the appellant. The court allowed the appeal and held that both the appellant and the respondent were equally negligent in causing the accident. The fact that the second respondent had no valid license to ride a motorcycle at the time of the accident is relevant under section 7 of EA 1950 and should have been taken into consideration by the learned judge. How it is relevant is wisely explained by the court in the appeal case. Absence of valid license showed that the respondent had not undergone lessons to ride a motorcycle and had not passed a competence test. Therefore, the second respondent did not possess sufficient competence to ride the first motorcycle at the time of the accident. This fact of incompetency of the second respondent was the occasion, cause or effect, immediate or otherwise of the accident; and it constituted the state of things under which the accident happened which afforded an opportunity for the accident to occur. The court ordered the second respondent to contribute 50% of the appellant's liability.

In addition, facts which show motive, preparation and previous or subsequent conduct of the accused or victim are also considered as relevant facts by virtue of section 8. In *Public Prosecutor v Dato' Sri Mohd Najib Hj Abd Razak,*[21] the accused was charged under Section 23 of the Malaysian Anti-Corruption Commission Act for an offence of using his office or position in a public body for gratification. The issue before the court is whether the accused could be said to have an interest in the company SRC International Sdn. Bhd. with his involvement in the Cabinet meetings considering a proposal on the government extending a guarantee to the financing granted by Kumpulan Wang Persaraan (Diperbadankan) to SRC International Sdn. Bhd. The court relied on section 8(2) of EA 1950 which provides that the conduct of an accused antecedent or subsequent is relevant if it relates to the facts in issue or relevant fact. In this case, there are a series of action taken by the accused in respect of SRC International Sdn. Bhd. including its set up, financing, guarantee arrangement and ownership structure before and after the participation of the accused at the two Cabinet meetings which approved the government guarantees would fall within the scope of facts under section 8 of the EA 1950. The court found that the accused had an interest beyond that of public office.

Further, application of the circumstantial evidence in the scope of section 7 and section 8 are clearly illustrated in the famous old case, *Sunny Ang v PP.*[22] The appellant in this case was charged for the murder of his girlfriend, Jenny by taking her out to sea on the pretext of collecting corals when he had in actual fact pre planned her death by drowning. The relevant facts forming the facts in issue are the conduct of the accused and Jenny before and after the commission of crime. In this case, the appellant renewed one of the lapsed insurance policies belonged to Jenny on the day the murder took place for another five days, appellant's mother was named as the beneficiary in Jenny's policies and will, the appellant allowed Jenny who was a novice scuba diver to go down into the waters near Pulau Dua alone although it was not safe for her, the appellant did not go down into the water himself after the disappearance of Jenny, there was a lack of urgency in the conduct of the appellant after the disappearance of Jenny and less than 24 hours after her disappearance, the appellant made claims on the three insurance companies which had issued policies covering her against accidents. All these details were accepted by the court as relevant facts to prove the crime. The court also considered the bankruptcy of the appellant as a motive to kill Jenny. The court also found out that the appellant had made some preparation for the murder when he had dived in these waters on previous occasions and was in a position to know that the waters near Pulau Dua were dangerous. Besides that, the heel straps of the flipper worn by Jenny were severed most probably by a knife or sharp instrument. There was no direct evidence to show who had cut the strap but the juries believe that it was the appellant who had cut it. Interesting fact in this case is that, although Jenny's body was never found, the appellant was found guilty of murder. His conviction was solely based on circumstantial evidence.

In Australia, the court also applies and accepts circumstantial evidence as a method to infer a further fact. In *R v Antonio Tartaglia*,[23] Sulan J from the Supreme Court of South Australia mentioned two steps in assessing circumstantial evidence. First, the judge must look at the facts which the prosecution relies on as circumstantial evidence and decide which facts would be admissible. Second, the judge must consider what is the inference he could draw from those facts. Lee J in the *R V James William Shepherd*,[24] also stated that in order to convict an accused by relying on circumstantial evidence, the court must ensure that the circumstantial evidence must not only be consistent with the guilt of the accused, but it must also be inconsistent with his innocence.

It can be seen that circumstantial evidence is admissible by both courts of Malaysia and Australia. However, while presenting this type of evidence before the court, rule of relevancy must be adhered to in order to be accepted by the court.

WHO IS AN 'INSIDER'

Capital Markets and Services Act 2007 (CMSA 2007) which effective on 28 September 2007 has consolidated the Securities Industry Act 1983 (SIA 1983) and Futures Industry Act 1993. It aims to regulate matters related to markets and intermediaries in the capital markets.[25] There are several elements to constitute insider trading. Firstly, the act must be committed by an insider. Section 188(1) of CMSA 2007 states that a person is an insider if he possesses a kind of information that is not generally available or he knows or ought reasonably to know that the information

is not generally available and this information would have material effect on the price or value of securities if it is widely known by the public. From this definition, it can be seen that the insider is not limited to the employer or employee of the company only. It can be anybody who has knowledge on the confidential and price sensitive related information. Information under CMSA 2017 may include matters of supposition and other indefinite matters that are not known by the public, intention, negotiations or proposals relates to commercial dealings or dealing in securities, financial performance of a company, information that a person proposes to enter to and matters relating to the future.[26] This is supported by the case *Nooralina bt Mohd Shah Amran bin Awaluddin v Public Prosecutor*[27] where the court referred to the definition of information in section 89 of SIA 1983 (which now has been replaced by section 183 of CMSA 2017). The provision set out the categories of information from paragraph (a) to (f) to determine whether a person is an 'insider' under s 89E (1) of SIA 1983. The court held that it is the duty of the prosecution to prove that the person possesses, knows or ought reasonably to know that the information falls under either one of the above categories to be considered as an insider. In *Suruhanjaya Sekuriti Malaysia v Chan Soon Huat,*[28], the court ruled that the defendant, an ex-director of his company is an insider as he was aware about the cancellation of a contract which is considered as a material information and tended to have material effect on the price or value of his company's shares. This information will affect the mind of a reasonable person who invests in his company to decide whether or not to acquire or dispose of the shares. An insider also need not be an insider at all. It can be a stranger to the company as explained by the court in *Suruhanjaya Sekuriti Malaysia v Lim Kok Boon & Anor*.[29]In the case of *Suruhanjaya Sekuriti v Lim Chiew*[30], the inside information is the proposed take-over of the Multi-Purpose Holdings' shares in Magnum Corp Bhd, by Bolton Berhad. The defendant was held as an insider as he was the director and a member of the Audit Committee of Magnum Corp Bhd. He had knowledge of the proposed take-over, supported with the facts that the defendant's office is located in the same building as Multi-Purpose's company. Multi-Purpose's secretary also testified that most people of the organization would aware of this information as they were rushing to take steps such as notifying KLSE (now is Bursa Malaysia) to suspend the counters. Telephone records also showed that there were calls from the defendant' office to a company named JB Securities Sdn Bhd, who took the defendant's instruction to purchase 590 lots of the Bolton shares.

By contrast, court's decision in *BSNC Corporation Bhd v Ganesh Kumar Bangah*[31] showed that a person, although holding the position of a director, may not be considered as an insider by the court due to the fact that at the time of trading, he does not know about the material information. On 17 May 2007 the plaintiff sold all its shares in MOL Access Portal Bhd ('MOLACS') to the defendant at 30 sen per share. During this time, one of the MOLACS shareholders, Berjaya Sompo also acquired MOLACS shares in the open market which triggered a mandatory take-over to be made. A mandatory general offer was made to the remaining shareholders at a price of 58 sen per share. However, it was not offered to the plaintiff as his shares now belonged to the defendant. The plaintiff sued the defendant for breach of fiduciary duties as he was the chief executive officer and executive director of MOLACS. The plaintiff also claimed that the defendant was an insider because he possessed price sensitive information i.e., the mandatory general offer. Nevertheless, the court found that it was the plaintiff who approached the defendant first to sell its shares in MOLACS. Besides that, the mandatory general offer was triggered by the purchases of Berjaya Sompo and not by the defendant. The court was satisfied that the defendant was not an insider as he has no knowledge of the impending mandatory general offer. Other than that, Azizul Azmi Adnan J in the recent case of *Suruhanjaya Sekuriti Malaysia v Sreesanthan Eliathamby*[32] has explained six elements of insider trading. Firstly, the defendant was in possession of information. Second, the information in question was not generally available. Third, the defendant knew or ought reasonably to have known that the information was not generally available. Fourth, it must also be shown that if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities. Fifth, the defendant traded in the securities to which the information relates while in possession of the information and lastly, the securities in question came within the definition of "securities" applicable at the material time.

In Australia, matters related to corporations, financial products and services are governed by Corporations Act 2001 (CA 2001).[33] The prohibition

of insider trading is specified in section 1043A of CA 2001. A person is regarded as an insider if he possesses inside information. Inside information is explained in section 1042A of CA 2001 which stated its characteristics i.e., the information is not generally available and if it were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products. Securities, derivatives, interests in investment schemes, debentures, government stocks or bonds, superannuation products, other than those prescribed by regulations and any other financial products that are able to be traded on a financial market are six examples of Division 3 financial products.[34] Rolfe J in *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd and Others*[35] stated that in order to determine whether a person is an insider or not, the court must answer three questions. The questions are whether there was information, is it generally available and if yes, would a reasonable person have expected it to have the effect specified. The court also ruled that Australian law does not now require an insider to have some connection with the company such as being an officer, contractor or employee of it. Therefore, this can be a guideline to the court to determine the issue of an insider. In *R v Nicholas Glynatsis,*[36] the offender was a senior consultant in an accounting firm. He had access to a business process and business management system which contained confidential and price-sensitive information. He used his position to access documents on this system to identify proposed transactions such as corporate takeovers. The court held that he was the true insider in this case. In essence, in order for a person to be considered as an insider, the information possessed by him or her must meet two conditions. Firstly, this information is not known by the public. Secondly, the information has material effects on the value of securities if it becomes widely known.

In Malaysia, the explanation of inside information is quite general as long as it has a material effect on the price or the value of securities. Australia meanwhile, specifically defines inside information in section 1042A of CA 2001 i.e., the information must have a material effect on the price or value on either one of the six types of Division 3 financial products. Nevertheless, both laws require that the information must be something that can affect price and value in trading activities to hold a person accountable as an insider.

PROHIBITED CONDUCTS BY AN INSIDER

Once it is established that he or she is an insider, the court must also be satisfied that the insider commits the prohibited conducts under CMSA 2017. Firstly, an insider is prohibited to trade the securities under section 188(2)(a). The trading activities include acquiring and disposing the securities while in possession of inside information. Similarly, an insider also cannot procure another person directly or indirectly to acquire or dispose of the securities. Section 187 describes 'procure' as to incite, induce, encourage or direct an act or omission by another person. Secondly, an insider is not allowed to communicate this inside information to another person if he knows or ought to know that this person will trade the securities after knowing about the information. This prohibition is specified in section 188(3). For instance, A tells his wife that his company is going to have a major expansion plan by merging with another company. This information may increase the value of the company's share if it is known by the public in future. Relying on this information, A's wife buys some of the company's shares. A might be found guilty under insider trading although the purchase was done by his wife and not by himself. Malaysia's prohibited conduct for an insider is similar with legal provision in Australia, section 1043A of CA 2001 to be exact. An insider whether as a principal or an agent is not allowed to apply for, acquire or dispose of the Division 3 financial products or procure another person to commit such acts. Likewise, the insider cannot communicate the information to another person if he knows that this person will commit the prohibited acts of an insider with regard to Division 3 financial products.

APPLICATION OF CIRCUMSTANTIAL EVIDENCE IN INSIDER TRADING

Both Malaysia and Australia authorities may decide whether to take action against the insider in breach of insider trading's provision in civil action or criminal action. In Malaysia, section 375 of the CMSA 2007 stated that the Securities Commission needs to obtain consent of the Public Prosecutor to institute a criminal action. In Australia, Corporations Act 2001 was amended to insert new penalty provisions. This enables the Australian Securities and Investments Commission to pursue harsher civil penalties and criminal sanctions.[37] Generally, direct evidence has

higher degree than indirect evidence and it might be admissible and stand on its own without the need of other supporting evidence to prove the elements of offence. Nevertheless, it is quite difficult to have direct evidence i.e., the witness in the case of insider trading. To apply the direct evidence, the witness must see or hear by himself that the insider commits the prohibited conduct which is very rare in insider trading that is usually done in secretive ways so that the insider may benefit alone from the price changes in the securities. Zulqarnain bin Hassan J in *Pendakwa Raya v Tiong Kiong Choon & Anor*[38] was in opinion that there is a need to look at the circumstantial evidence in deciding the case related to insider trading:

"It is important to note that this type of modern white-collar crime has to be looked at in its circumstances and context, not otherwise. The concept of trading, the way and nature it is committed, business considerations, category of people that trades, specific knowledge and skill a person has, technical and accounting difficulties involved, related internal rules and regulatory frameworks and others, all have to be considered and put into perspective."

To begin with, circumstantial evidence may be used to determine the relationship between an insider and the inside information. McLure P. in the case of *R v Mansfield and Another*[39] elaborated on how an insider has knowledge about the confidential information:

"In order to establish that an accused is in possession of inside information for the purposes of s 1043A(1), there must be a proven correlation or correspondence between the inside information in the possession of the accused and the inside information in the possession of the entity entitled to it. The correspondence does not have to be coextensive. Inside information in the possession of the accused may be the product of inferences, deductions or assumptions made by the accused (or by a real insider and communicated to the accused). However, the inference, deduction or assumption in the accused's possession must be based on (caused or contributed to by) inside information, being actual events or information from within the entity entitled to possess or use it. An inference or deduction can be wrong or misleading even if based on actual inside information."

This case stated that the correlation between the inside information and the insider must be proved first. The insider might infer or assume the material information based on the actual event or information he obtains from the company. This connection can only be deduced by observing the circumstances surrounding the insider at the time of the offence committed. The insider in *Sreesanthan*[40] is the perfect example of how the defendant obtained the confidential information by way of inference or assumption. In 5 May 2006, a representative from CIMB Investment Bank Berhad ("CIMB") obtained legal advice from the defendant on legal aspects of their plan in privatisation. The discussion was about the manner of privatisation would take place, whether by way of a scheme of arrangement or by way of a selective capital reduction. The communication between CIMB representatives and the defendant continues until June 2006. The court agreed that it is during this time that the defendant came into possession of information that Perbadanan Kemajuan Negeri Selangor ("PKNS") was proposing to privatise its listed subsidiary. As Worldwide Holdings Berhad ("Worldwide") was the only listed subsidiary of PKNS, the defendant had deduced that Worldwide was going to be privatized by PKNS. Therefore, the defendant acquired 600,000 shares in Worldwide Holdings Berhad in June and July 2006.

Concerning the mens rea for insider trading, the court in *Sreesanthan* also held that as insider trading prohibitions is not a strict liability offence, mens rea therefore is needed to constitute this offence. The mens rea is that the accused or the defendant knew or ought reasonably to know that the information in his possession was not generally available. Intention to use the inside information is not the mens rea of this offence. In this case, the issue arose regarding the mens rea element i.e., whether the defendant bought the shares while in the possession of material non-public information. There are several facts considered by the court. First, CIMB representatives acknowledged the fact that they had told the defendant about PKNS's plan to privatise its subsidiary which the defendant assumed to be Worldwide. Second, this fact was later confirmed by the defendant's staff who had prepared a joint venture agreement between PKNS and Worldwide. She discussed this agreement with the defendant at the end of June 2006 and this was accepted by the court as the only direct evidence in this case. Third, CIMB representatives had met with Menteri Besar Selangor to present the proposal. There was evidence showed that the representative had made several calls to the defendant both before and after the meeting with the Menteri Besar. Fourth, it was only on 19 August 2006 that the information

regarding the privatization of Worldwide become known to the public as the article regarding it was published by the Star newspaper. Fifth, the proposed privatisation by PKNS was also considered as material information due to the facts that there was a sharp increase in the share price following the announcement of this information in Star newspaper. Sixth, it is also a reasonable assumption to predict the increase of price so that the shareholders of Worldwide would have sufficient incentive and they will vote in favour of the privatization. The plaintiff succeeded in proving the mens rea of the defendant based on the above relevant facts. In the United States, the offender of insider trading could also be found guilty by relying on circumstantial evidence. In *United States v. Rajaratnam*,[41] the Court of Appeal was convinced that the defendant/appellant was aware about the inside information when he used this information to trade the securities. This usage fulfilled the "knowing possession" requirement under the United States law.

In *Chan Soo Huat,*[42] material information was the issuance of the cancellation notice in a construction project which may affect the price of the company's shares to drop. The court looked at the conduct of the defendant before and after the announcement of the material facts took place. The defendant had resigned from WCT Berhad (WCT), but he maintained close relationship with the other directors of WCT. The timing of the defendant's share disposal occurred unnaturally as it was disposed of a day after the WCT director got the cancellation notice which was the material information in this case. The disposal of shares also ceased just a day before WCT's announcement of the cancellation notice to Bursa Malaysia. The disposal happened in mere four trading days and this was the largest selling off by the defendant in the preceding five years. The defendant was the director's friend since teenager so he was not just a business associate. He had free access and visited WCT's office and contacted one of the directors frequently. The defendant held the shares and warrants of WCT continuously for four years before disposing of almost all of it which happened right after WCT knew of the cancellation. The court held that based on these circumstantial evidences, the defendant had the inside information when he executed the disposal of shares. In *Pendakwa Raya v Tiong Kiong Choon & Anor,*[43] the inside information was the audit adjustments proposal and also the fact that the company would be classified as an affected issuer pursuant to the Listing Requirements of Bursa Malaysia Securities Berhad. The court held that the second appellant was in possession of the inside information as he was the Managing Director and the ultimate decision maker of the company's financial matters. The court was of the opinion that the company's representatives cannot approve the adjustments in the financial meeting as they had to obtain the approval of the second appellant. The second appellant was also the one who explained the details of the adjustments that needed to be done by the company. The meeting was also attended by the second appellant's wife and both of them were the company's executive directors. Therefore, there was an irresistible conclusion that the second appellant was in possession of the inside information which was relayed by his wife.

In *Suruhanjaya Sekuriti Malaysia v Lim Kok Boon & Anor,*[44] the first defendant informed the second defendant regarding his company's confidential information. The court ruled that by looking at the plain words of section 188(3) (a) of the CMSA, it was no longer necessary for the prosecution or plaintiff to prove the mens rea relating the purpose of using or communicating the confidential information. In tipping prohibition, the mens rea needed to be proven are only that the first defendant knew or reasonably knew that the information was not generally available and that he must know or ought to reasonably know that the second defendant would trade the shares based on the information given. In the Australian case of *R V Rene Walter Rivkin*,[45] the appellant was charged under the offence of procuring Rivkin Investments Pty Limited to purchase 50,000 of Qantas Airways Limited shares ("Qantas"). The appellant was told by Mr McGowan that there was a plan to merge Impulse Airlines with Qantas. In fact, Mr McGowan later warned the appellant that he could not now trade in Qantas shares, because the appellant now knew about the proposed deal between Impulse Airlines and Qantas. The court rejected the appellant's argument that he was not relying on the information from Mr McGowan when purchasing the Qantas shares but the trading decision was based on his own knowledge and discussion with SEATS Market Central operator. The court was of the opinion that even though the appellant must have known or predicted the increase of price in Qantas shares based on his experience as a stockbroker, share trader, investment manager and adviser, he still was not allowed to trade. The law does not require the insider trader to use the relevant information. It is

sufficient that the insider trader merely possessed the information when they traded. To conclude, the intention to use inside information to trade in the stock market is immaterial. The prohibition or the mens rea element begins earlier than this i.e., it starts as soon as the insider realises that the information is confidential and price-sensitive information.

There are four actus reus which constitute the element of insider trading which are acquiring, disposing or procuring other people to acquire or dispose the securities. The insider also is not allowed to communicate the inside information to a third party which this action may also be called as a tipping offence. In the previous case of *Tiong Kiong Choon,* the second appellant was charged under section 188(3) (a) of CMSA 2007 when he communicated the inside information to the first appellant. There were several phone calls between the first appellant and second appellant which immediately after that, the first appellant entered the first order to sell the company's shares. Likewise, in *Lim Kok Boon & Anor,*[46] the issue was whether the establishment of insider trading element by communicating the price-sensitive information from a tipper to a tippee has been proved by the plaintiff using circumstantial evidence only. The court acknowledged that section 188(3) of CMSA 2007 enacts the "tipping prohibition" where the informant was referred to as the "tipper" and the recipient as the "tippee". The plaintiff relied on the defendants' telephone record, showing that there had been communications between them before the second defendant decided to acquire the shares. The plaintiff however had no direct evidence relating to the contents of any telephone conversations or other communications between the defendants. In *Lim Chiew*[47], the defendant argued that there was no dealing of the Bolton shares from his personal trading account, therefore, he was not liable for insider trading. However, the court found out that the defendant had given instruction to the third party namely JB Securities Sdn Bhd to buy and to sell 590,000 Bolton shares on his behalf and he had received a profit from this arrangement. In *R v Michael Ming Jinn Ho,*[48] the offender faced six charges of insider trading. The offender traded in shares and options while in possession of inside information as well as communicated the inside information to a third party. The offender acquired securities and also procured the acquisition of securities by associate family members and companies using three different brokers and seven different trading accounts. He was found guilty and sentenced to three years imprisonment.

In short, actus reus in insider trading can be done in various ways. Using another person's account to trade is not an escape from the liability in breaching prohibition of insider trading. A person may be convicted if it can be proved that he is involved in the trading activities either trading by himself or giving instruction to other people. If the insider is charged under a criminal offence, the burden of proof is on the prosecution to establish the elements of offence beyond reasonable doubt. Nonetheless, if the action taken is in civil claim, the plaintiff only needs to prove the elements of offence on the balance of probabilities.

CONCLUSION

Circumstantial evidence is usually relied on when there is no direct evidence i.e., the witnesses who can give testimony on the occurrence of the offence or incident happens. Most of the contentions from defence counsels is that the circumstantial evidence alone is not sufficient to prove the elements in insider trading, moreover to convict a person. Nevertheless, based on the cases explained before, circumstantial evidence has assisted the court in determining and understanding the state of mind of the offender while committing the insider trading. It is used to decide whether a person is an insider and to determine the type of information whether it is material and generally available to the public. Therefore, the circumstances referred to not only on one event per se but the court looks at the whole situation and action of the offender before or after the commission of the insider trading. The series or sequences of events resulting in the circumstantial evidence more convincing and reliable, directing to one conclusion only which is the mens rea and actus reus of the offender. If there is a gap in the sequence or inconsistency in the evidence, then the court has a choice to decline the evidence. It is not exaggerated to say that circumstantial evidence guides the court in reaching a fair judgment that considers both parties in the trial. For these reasons, the admissibility of circumstantial evidence in deciding insider trading cases must be continued by the court. It is hoped that future research should be done by focusing on the development of circumstantial evidence using the latest technology emerging in that time.

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