

## Dispute Resolution

### Case Note: Suruhanjaya Sekuriti Malaysia v Sreesanthan Eliathamby

In **Suruhanjaya Sekuriti Malaysia v Sreesanthan Eliathamby** [2021] 7 CLJ 913, the High Court clarified that the insider trading prohibitions under section 89E of the **Securities Industry Act 1983** (which have been re-enacted in substantially similar form in the **Capital Markets and Services Act 2007**) do not create strict liability offences. *Mens rea* still must be proven and is established when the accused or defendant knew or ought reasonably to have known that the information in his possession was not generally available. However, intent to use the inside information need not be proven.

The case involved a civil action brought by the plaintiff, Suruhanjaya Sekuriti Malaysia, for civil remedies for insider trading against the defendant, Sreesanthan Eliathamby (“Sreesanthan”) — a lawyer.

The High Court found that Sreesanthan had breached section 89E(2)(a) by acquiring 600,000 shares in Worldwide Holdings Berhad (“WHB”), a listed subsidiary of Perbadanan Kemajuan Negeri Selangor (“PKNS”), in June and July 2006 while in possession of material non-public information.

The information in question was the proposed privatisation of WHB by PKNS (“Information”), which only became public knowledge in August 2006. Sreesanthan sold his WHB shares in September 2006 and recorded a gain.

The High Court Judge held, among others, as follows:

1. Sreesanthan came into possession of the Information during his interaction with personnel from CIMB Investment Bank Berhad (“CIMB”) in May and June 2006, when they sought advice from Sreesanthan on legal aspects of the proposed privatisation. While CIMB’s personnel testified that they had told Sreesanthan the identity of PKNS but could not recall whether the identity of WHB was revealed to him, the identity of WHB could have been easily deduced by Sreesanthan as PKNS only had one listed subsidiary. Further, Sreesanthan’s law firm (where he headed the

# Legal Updates

SEPTEMBER 2021

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corporate department) was subsequently engaged to prepare the documentation for the proposed privatisation, and lawyers in the firm (including Sreesanthan) knew that the target company was WHB. Therefore, at the time Sreesanthan acquired the WHB shares, he possessed the Information.

2. The Information was not generally available at the time Sreesanthan acquired the WHB shares. The earliest the Information became generally available was in August 2006 through an article in *The Star*, and further details only became generally available thereafter when the proposed privatisation was announced to Bursa Malaysia. Sreesanthan's reliance on an investment research report published by CIMB Securities Sdn Bhd to argue that the Information had entered the public domain since April 2006 was rejected, since the report did not mention the proposed privatisation and in any event would typically have restricted circulation.
3. Any reasonable person in the position of Sreesanthan ought to have known that the Information communicated to him in contemplation of a corporate proposal that had not yet been announced would be information that was not generally available
4. The Information was material because if it was generally available, a reasonable person would expect it to have a material effect on the price or value of WHB shares. This was evidenced by the sharp increase in the price of WHB shares following the publication of article in *The Star* and thereafter the announcement to Bursa Malaysia. The applicable test is an objective test, and therefore Sreesanthan's state of knowledge or belief regarding the materiality of the Information is irrelevant.

Sreesanthan was ordered to pay RM1,989,402 (being three times the difference between the price at which he acquired the shares and at which the shares would likely have been acquired had the Information been generally available), and a civil penalty of RM1,000,000. Sreesanthan was also barred from becoming a director of any public listed company for a

period of 10 years. The High Court felt that the orders were justified as they were:

*“necessary, in the interest of justice and in order to preserve and maintain confidence in the fairness and integrity of the securities markets, for financial services professionals (like the defendant) to be held to the highest standards of good conduct.”*

The High Court’s interpretation of the *mens rea* requirement seeks to strike a balance, in that the accused or defendant must know or ought reasonably to have known that the information in his possession was not generally available but need not intend to use the inside information.

That said, the case underscores the need for caution when dealing with non-public material information, a message that should not go unheeded.

**CONTACT US FOR FURTHER INFORMATION REGARDING DISPUTE RESOLUTION MATTERS.**

## Financial Services

### Exposure draft on policy document of Bancassurance/Bancatakaful

An exposure draft was issued by the Central Bank of Malaysia on the policy document of Bancassurance/Bancatakaful for public's feedback by 30 September 2021.

The exposure draft sets out the proposed requirements on a bancassurance/bancatakaful arrangements whilst facilitating the sustainable development of bancassurance/bancatakaful as an effective channel for needs-based sales of insurance and *takaful* products in Malaysia.

The exposure draft sets out, among others:

- it will apply to persons licensed under the **Financial Services Act 2013** and **Islamic Financial Services Act 2013** as well as prescribed institutions under the **Development Financial Institutions Act 2002** (collectively, Financial Service Providers).
- the requirements therein will apply to existing and new bancassurance/bancatakaful arrangements, including the renewals, unless specified otherwise.
- the Financial Service Providers must ensure governance arrangements that the management of its bancassurance/bancatakaful business are consistent with the requirements set out in the policy documents such as *Corporate Governance and Fair Treatment of Financial Consumers*.
- the Financial Service Providers shall ensure each bancassurance/bancatakaful agreement clearly sets out the accountabilities of insurer/takaful operators and its bancassurance/bancatakaful partners.
- it will supersede the (i) Guidelines on Bancassurance; (ii) Guidelines on Bancatakaful, each issued on 17 June

2010; and (iii) Circular on Marketing of Bancassurance/ Bancatakaful Products issued on 24 December 2008.

## Amendment to Financial Services (Requirements and Submission of Documents or Information) (Registered Business) Order 2013

Part 1 of Schedule 1 to the Financial Services (Requirements and Submission of Documents or Information) (Registered Business) Order 2013 will be amended by the Financial Services (Requirements and Submission of Documents or Information) (Registered Business) (Amendment) Order 2021 P.U. (A) 351/2021 (the Amendment Order).

Pursuant to the Amendment Order, an applicant who is not a financial institution regulated by Bank Negara Malaysia is required to have a minimum capital funds of:

- a) RM300,000, if the actual or projected amount of the average monthly transaction value is less than RM10 million; and
- b) RM1 million, if the actual or projected amount of the average monthly transaction value is more than RM10 million.

*“Average monthly transaction value”* refers to the calculation of:

- the actual amount which is calculated based on 12-month moving average; and
- the projected amount which is calculated based on an estimation of the average monthly amount for a period of 12 following months.

The Amendment Order will come into operation on 1 October 2021 and affects those who intend to apply to be registered to provide merchant acquiring services under the **Financial Services Act 2013**.

**CONTACT US FOR FURTHER INFORMATION FINANCIAL SERVICES MATTERS.**

# Tax & Revenue

## Tax Matters During the National Recovery Plan Phases

In view of the implementation of the National Recovery Plan in Malaysia, the Inland Revenue Board (“IRB”) has issued a list of Frequently Asked Questions on tax matters arising during this period. The FAQ ([updated as at 13 September 2021](#)) is accessible via this [link](#).

### Income tax

The following Rules have been gazetted on 8 September 2021:

- (i) [Income Tax \(Special Deduction for Reduction of Rental to a Small and Medium Enterprise\) Rules 2021](#) — deemed to have effect from year of assessment 2020; and
- (ii) [Income Tax \(Special Deduction for Reduction of Rental to a Tenant other than a Small and Medium Enterprise\) Rules 2021](#) — deemed to have effect from year of assessment 2021.

A practice note on [Explanation Relating to Expenditure or Additional Expenses for the purpose of Deduction Allowed in the Income Tax \(Deduction for Expenditure on Issuance of Sukuk and Retail Sukuk Structured pursuant to the Principle of Wakalah\) Rules 2021 \[P.U.\(A\) 5/2021\] \(Practice Note No. 2/2021\)](#) has recently been published on 3 September 2021 on the Inland Revenue Board of Malaysia’s official website.

**CONTACT US FOR FURTHER INFORMATION REGARDING TAX & REVENUE MATTERS.**

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