Insider Trading And The Vexed Question Of General Availability

Introduction

‘Insider trading is a curious animal: there are many more journal articles discussing what it should be than reported cases of what it is. We all think we know what it is, yet defining it in the clear language required of a statutory provision with criminal liability attached has proved problematic. Most people agree that it is undesirable, yet there is still debate on precisely why it should be so from a philosophical perspective’.


There is no doubt that in Singapore, insider trading is prohibited because it gives rise to information disparity which offends the principles of fairness and hurts the integrity of our securities markets. At the Second Reading Speech of the Securities and Futures Bill 2001, the then Deputy Prime Minister and Chairman, Monetary Authority of Singapore, Mr. Lee Hsien Loong, explained:

‘At the core, the mischief of insider trading lies in tilting the playing field unfairly against other market participants. Those who knowingly have inside information should be prohibited from trading…’

Under our insider trading laws, persons in possession of non-public material price sensitive information are prohibited from trading or procuring others to trade in the securities to which such information relates (see sections 218(2) and 219(2) of the Securities and Futures Act (Cap 289) (‘SFA’) and prohibited from communicating such information to others (see sections 218(3)
and 219(3) of the SFA). Philosophically, these prohibitions are aimed at ensuring that persons who are not seized of the same material price sensitive information are not placed at a disadvantage when they trade with those who possess such information.

When then, is information treated, for the purposes of our insider trading legislation, to be ‘generally available’ and not just within the domain of a selected few? Since the coming into force of Singapore’s new insider trading regime under the ‘SFA’ in 2002, there has been no litigation brought, and hence no opportunity for judicial pronouncements to be made, on this question.

This article considers two pertinent decisions of the New South Wales Criminal Court of Appeal on this question and suggests that there are cogent and persuasive reasons for the Singapore Courts to adopt the approach taken in Australia.

By way of a quick overview, for an insider trading contravention to be made out, there must be (i) possession of information of a material price sensitive nature that is not generally available; (ii) knowledge that the information is not generally available and of a material price sensitive nature; and (iii) the carrying out of a prohibited act whilst in possession of such material price sensitive information (ie dealing in the relevant securities, procuring another to deal in the relevant securities, or communication of the material price sensitive information to another) (see sections 218 and 219 of the SFA).

A comprehensive treatment of the prerequisites to make out an insider trading contravention under the SFA is outside the scope of this article. This article looks only very briefly at when information is regarded to be ‘generally available’, such that the operation of the insider trading prohibitions under the SFA is not triggered.
General Availability

The test of general availability is encapsulated in section 215 of the SFA. This section, like the Australian provision from which it was derived, ie section 1002B of the Corporations Law, contemplates three alternative scenarios under which information is regarded to be generally available, namely, where:

- the information consists of readily observable matter;

- the information has been made known in a manner that would or would be likely to bring it to the attention of persons who commonly invest in securities and a reasonable period for dissemination has elapsed since it was so made known; or

- the information consists of deductions, conclusions or inferences made or drawn from either or both of the information referred to in the preceding limbs.

It is noteworthy that limb (b) is expressly stated in section 215 of the SFA as ‘without limiting the generality’ of the ‘readily observable’ limb (limb (a)).

The Decision In R v Firns

The first two limbs of the Australian equivalent of Section 215 of the SFA were considered in the 2001 New South Wales Criminal Court of Appeal (‘Court’) decision of R v Firns [2001] NSWCCA 191. In a 2-1 majority decision, it was held in Firns that if information is readily observable in an overseas jurisdiction, the general availability test under the first limb is satisfied and it is not necessary for the information to be also readily observable in Australia. The dissenting judge, Carruthers AJ, was, however, of the view that the words ‘readily observable matter’ cannot be
allowed to operate in a vacuum. In His Honour’s view, for the information to be generally available on the basis that it consists of readily observable matter, it must at least be readily observable by members of the Australian public.

_Firns_ had involved a company, Carpenter Pacific Resources NL (‘Carpenter’), an Australian company listed on the Australian stock exchange (‘ASX’). Its main business at the material time was holding exploration licences in Papua New Guinea (‘PNG’) through wholly owned subsidiaries. One of Carpenter’s subsidiaries had been involved in litigation where it was challenging the validity of certain regulations in PNG which had the effect of reducing the value of its exploration licence. The subsidiary had lost at first instance and the matter had gone on appeal to the Supreme Court of PNG. The appeal judgment which was handed down in open court upheld the appeal and declared the regulation invalid. Kruse, an employee of Carpenter, was present in the PNG courtroom where the judgment was handed down. Firns (whose father was an executive director of Carpenter) received news of the successful appeal from his father within half an hour of the judgment having been handed down. Both Firns and Kruse purchased shares in Carpenter before the outcome of the appeal was disclosed on ASX. Firns was convicted of insider trading whilst Kruse, who had been tried separately on the same facts, was acquitted. Firns appealed his conviction. The principal ground of appeal turned on whether the information used by Firns was ‘generally available’ in the sense that it consisted of ‘readily observable matter’ at the time that he purchased the shares. At the heart of the appeal was the interpretation to be given to the expression ‘readily observable matter’.

- The Court opined that information may be readily observable even if no one in fact observed it. In particular, the Court held that the information embodied in the PNG Supreme Court judgment was available, understandable and accessible to a significant group of the public, namely, those present in open court and hence, ‘readily observable’.
After examining both the drafting and legislative history of the provision, the Court observed that as indicated in the opening words of the second limb (our limb (b)), the generality of the words in the ‘readily observable’ limb (our limb (a)) is not to be limited by the second limb (our limb (b)). The Court noted that in the ‘readily observable’ limb, the legislature had deliberately held back from placing information under an embargo until the lapse of a fixed time or even a reasonable time from some fixed point of actual disclosure. The ‘readily observable’ limb, the Court held, was ‘inserted as an alternative in order not to penalise the efficient, the speedy or the diligent – at least to the degree encompassed by the opaque ‘readily observable matter’.

On the question of whether ready observability had to be from the stance of the hypothetical person ‘within Australia’, the Court noted that the statutory provision does not define the class of persons by whom the matter is to be ‘readily observable’ and that these persons cannot be confined to existing shareholders or even existing traders of shares on ASX. The Court stated that in any event, the latter class is a very wide one, since traders in Australian-listed shares are not confined to Australians, no matter how the term ‘traders of shares on ASX’ is defined. Further, the Court observed that whilst the protection of fair trading in the Australian sharemarket is the primary focus of the legislative scheme, a large proportion of investors in Australian corporations are non-Australian; and a considerable proportion of the shares listed on the ASX are shares of foreign corporations. Referring to the framework of the regime, particularly the extraterritoriality provision in section 1002 of the Australian Corporations Law, the Court concluded that the legislative scheme is not confined to protecting the interests of resident Australian investors or dealings in Australian shares. This, together with the recognition of modern telecommunication methods such as the telephone, the television, the internet (including email) and the fax, all of which formed a part of how Australians, and particularly investors, perceived events, led the Court to conclude that it would not be correct to test ready observability from the stance of the hypothetical person within Australia.
The Decision In R v Rivkin

Three years later, an interesting scenario arose for consideration in the case of *R v Rivkin* [2004] NSWCCA 7.

In the *Rivkin* case, Mr Rivkin had, in the course of a completely unrelated transaction, received information from Mr McGowan (the executive chairperson of Impulse Airlines) that he was trying to ‘merge’ Impulse Airlines with Qantas and was awaiting approval from the Australian Competition and Consumer Commission for that deal. Within hours of that conversation, Mr Rivkin gave instructions to his brokers to purchase Qantas shares. At trial, Mr Rivkin’s counsel contended that the information which Mr Rivkin possessed was generally available, due to the existence of rumours in the press about the possibility of deals being done between two of the then four airlines operating domestically, and rumours about the possible collapse of Impulse Airlines. However, the Prosecution was able to establish: (i) the absence of information in the media about the proposed ‘merger’ as described by Mr McGowan to Mr Rivkin; and (ii) evidence from the stockbroking industry to show that there were no rumours of such a proposal prior to its announcement. As the Prosecution’s evidence was accepted, it was unnecessary and neither the trial judge nor the New South Wales Criminal Court of Appeal considered whether the existence of rumours in the press about the proposed ‘merger’ resulted in the information being ‘generally available’.

Concluding Comments

If a case on the facts of *Firns* came before the Singapore Courts, or if by an extension to the facts in *Rivkin*, rumours or other information of a material price sensitive nature are reported in the press in an overseas jurisdiction (particularly where such press reports are also accessible via
internet), would the Singapore Courts regard such information to be ‘generally available’? This writer believes that there are good grounds for arguing that the approach taken by the majority in the *Firns* case is a sound one that should be followed. Such an approach would not only be consistent with the language of our legislation but would also support the underlying policy of the SFA which is premised on a recognition that capital markets have become increasingly sophisticated and globalised as a result of technological advances.

Quite apart from the fact that section 215 of the SFA is in *pari materia* with the equivalent provision considered in *Firns*, investors and corporates raising funds in Singapore’s securities markets, like those in Australia, are not merely domestic players but include international ones. Like the Australian regime, the Singapore insider trading regime is not confined to protecting the interests of Singapore based investors or dealings in shares of Singapore based corporates (*see section 213 of the SFA*). A parochial stance that general availability should be viewed only through the eyes of the hypothetical Singapore based investor is not only divorced from reality in the internet age but also antithetical to the internationalisation of Singapore’s securities markets.

Significantly, Singapore has long recognised the changing financial landscape, as well as the role of technology and the internet in opening up new opportunities for investors and Singapore’s securities markets. It was this very recognition that prompted the slew of changes which resulted in the SFA.

As stated at the Second Reading of the Securities and Futures Bill 2001:

‘Capital markets have become increasingly sophisticated, as a result of technological advances giving rise to competition and globalisation … Institutions no longer confine themselves to their domestic markets or their immediate hinterland, but reach out to pools of liquidity in other countries as well. The liberalization of the capital markets and increased competition has catalysed these processes.'
This fluid and rapidly-evolving financial landscape poses new demands on regulators. It is important that we create a sound and transparent legal framework within which players can operate.‘

DPM Lee Hsien Loong and Chairman, MAS (as he then was)
5 October 2001

Although the dissenting view of Carruthers AJ in *Firns* would be more protective of Singapore based investors, having regard to the international character of our securities markets and particularly Singapore’s positioning as an international financial centre, the better argument is that in this technological age, general availability should be viewed through the eyes of investors, both within and outside Singapore.

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