

DIRECTOR OF PUBLIC PROSECUTIONS (CTH) v JM (M73/2012)

Court appealed from: Court of Appeal of the Supreme Court of Victoria
[2012] VSCA 21

Date of judgment: 14 June 2012

Date of special leave referred: 14 December 2012

On 2 September 2011 the respondent (JM) was arraigned in the Supreme Court and pleaded not guilty to 39 counts of market manipulation contrary to s 1041A of the *Corporations Act 2001* (Cth) and 2 counts of conspiring to take part in transactions contravening that provision. Section 1041A prohibits a person from carrying out or taking part in a transaction that has, or is likely to have, the effect of creating or maintaining an artificial price for a financial product.

In preliminary hearings the applicant (CDPP) initially sought to have the trial judge hear and decide the issue of the meaning of the words “artificial price” before trial. After hearing submissions from the parties, the trial judge decided to state a case and reserve three questions of law for determination by the Court of Appeal, in accordance with s 302 *Criminal Procedure Act 2009* (Vic), the first of which was:

For the purpose of s1041A of the Corporations Act 2001 is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an ‘artificial price’.

JM submitted to the Court of Appeal that the questions amounted to a request for an advisory opinion. A majority of the Court of Appeal (Nettle & Hansen JJA, Warren CJ dissenting) declined to answer Question 1 in the form submitted as they were of the view that it was a question of mixed fact and law, dependent upon assumed but as yet, unfound facts. The majority declined to answer Questions 2 & 3. The majority restated Question 1 as a “pure question of law”; the Case Stated was remitted to the trial judge for amendment of Question 1 and then referred back to the Court of Appeal. The question (after amendment) was:

Is the expression “artificial price” in s 1041A of the Corporations Act 2001 (Cth) used in the sense of a term having a legal signification (as opposed to its sense in ordinary English or some non-legal technical sense): and, if so, what is its legal signification?

The CDPP contended that for a price to be ‘artificial’ it was sufficient that the price was the result of a transaction entered into for the sole or dominant purpose of setting a particular price. JM contended that ‘artificial price’ was an economic concept related to abuse of market power. A majority of the Court of Appeal (Nettle and Hansen JJA, Warren CJ dissenting) concluded, after examining the history of the legislation, that ‘artificial price’ in s 1041A was used in a sense of legal signification reflecting American jurisprudential conceptions of market ‘cornering’ and ‘squeezing’, that is, the misuse of monopoly or dominant market power, by the cornering of supply or taking advantage of short supply, in order to drive up or drive down true market prices to what is conceived of as being an ‘artificial’ level. The question of whether conduct amounts to ‘cornering’ and ‘squeezing’

is largely one of fact and degree involving determinations of whether the requisite domination or monopoly exists, whether an artificial price is caused by the exercise of that power and whether the dominant party intended to bring about that artificial price. The majority noted that, as Parliament had specifically provided in ss 1041B and 1041C of the Act for churning and price rigging, the presumption of statutory interpretation expressed in the maxim *specialia generalibus derogant* implied that s 1041A was directed to different kinds of activities. The majority held that the Question involved no reference to facts not agreed or determined.

Warren CJ (dissenting), on the basis of the legislative history and also jurisprudence on the subject, rejected JM's submission that creation of an artificial price required misuse of market dominance. Her Honour considered there was nothing in the definition of 'artificial price' that suggested it was only concerned with market power manipulation. She defined 'artificial price' as a price which does not come about through transactions reflecting basic forces of supply and demand working in an open, efficient and well-informed market. Warren CJ held s 302 of the *Criminal Procedure Act* in any event enables the reserving and answering of questions by reference to facts that have been assumed.

On 14 December 2012 Hayne, Heydon & Bell JJ referred the special leave application to an enlarged bench to be argued as on appeal. JM has filed a Notice of Cross-appeal. Notice of Constitutional Matter has been given and the Attorney-General for Victoria is intervening.

The questions of law said to justify the grant of special leave are:

- Did the majority of the Court of Appeal err in their application of the principles of statutory construction (as elucidated in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 335) in determining the meaning of the expression "artificial price" in s 1041A of the *Corporations Act 2001*?
- Did the majority of the Court of Appeal err in determining that the legal signification of the expression "artificial price" in s 1041A of the *Corporations Act 2001* was of market manipulation by conduct of the kind typified by American jurisprudential conceptions of "cornering" and "squeezing"?

The questions of law said to justify the grant of special leave to cross-appeal include:

- Did the Court of Appeal err in remitting Question 1 to the judge for amendment and in answering Question 1 as so amended because the question:
 - a) Was not one that had arisen within the meaning of ss 302(2) and (5) of the *Criminal Procedure Act 2009* (Vic), properly construed;
 - b) Was not capable of being answered as part of an exercise of judicial power particularly in federal jurisdiction.