IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P61 of 2011

BETWEEN:

JOHN KIZON
Appellant

and

THE QUEEN
First Respondent

and

NIGEL CUNNINGHAM SWIFT MANSFIELD
Second Respondent

APPELLANT'S REPLY SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION ON THE INTERNET

1. I certify that this submission is in a form suitable for publication on the Internet.

PART II: REPLY SUBMISSIONS

MANNER IN WHICH THE "INFORMATION" WAS PLEADED AND ARGUED AT TRIAL

2. The Crown in Part IV of its submissions contends that it alleged, as a component of the insider information particularised, the fact that the information was in each instance imparted to either Kizon or Mansfield by Day, the managing Director of AdultShop. At [5](b) of its submissions the Crown asserts that the source of the alleged information (contained in sub-paragraph (c) of the particulars extracted at that paragraph) is "part of the information allegedly possessed by the accused".

3. This contention stands in stark contrast to the manner in which the alleged information was pleaded, and the manner in which the information was presented to the jury at first instance and argued before the trial judge by the Crown.

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4. The wording of the particulars themselves makes this clear: in each of the relevant counts, the final sub-paragraph refers to "the information at sub-paragraphs a and b above had been obtained on or about 4 January as a result of a private conversation between Malcolm Day... and a person or persons the said Malcolm Day apparently treated as a confidant". That language draws a clear delineation between the information itself ("at sub-paragraphs a and b") and the source of the information, which follows.

5. The comments of the Crown Prosecutor extracted at [30] of the Appellant's submissions further demonstrates the manner in which the Crown case was presented at trial; that is, reinforcing that the source of the information was not itself a part of the particularised information. The remarks of the Senior Crown Prosecutor extracted at [31] of those submissions make the point explicitly: "*Paragraph (c) is not particulars of the information at all*".

6. Contrary to the assertion at [6] of the Crown's submissions, the source of the information (particular (c)), was not considered as being information, either in combination with particulars (a) & (b) or in isolation. This is clear from the concession made by Mr Woinarski QC - (at transcript 2468-2469) - that the jury would have to be satisfied that the accused possessed the information, which by reference to count 1 he said were the particulars (a) & (b). A concession he made only in respect of the conspiracy counts.

7. It is not disputed that the source of information can take on significance when assessing the materiality of any information imparted. It is also not disputed that the source of information can, in some circumstances, form part of the information itself. The Court of Appeal in *R v Rivkin [2004] NSWCCA 7* held as much. For example, as contended by the Crown at [16] of their written submissions, the ordinary mean of "information" can include the concept of being told something. However the manner in which the information is particularised in a given case is critical. Here, the information was not particularised in terms of the accused having been told something. It was particularised in terms of the substance of the statements themselves.

8. The point becomes obvious when the particulars of the information in the present matter are contrasted to the way in which the information was particularised in the *Rivkin* matter as extracted at [63] of the Appellant's submissions-

> *"The expected profit for AdultShop for the 2002 financial year had risen from $3 million to $11 million".*

And

> *"Gerard McGowan said that there was a deal for the merging of Impulse's business with Qantas".*

9. The difference is stark. What the Crown seeks to do through its written submissions is resile from the manner in which the information was particularised at trial. The particulars of the relevant information in a prosecution for the offence of insider trading constitutes a critical aspect of the Crown case. It is essential for the conduct of a fair trial. *R v Hannes [2000] NSWCCA 503 [27]; Hanne v DPP (Cth) (No.2) [2006] NSWCCA 373; 447; R v Rivkin [2004] NSWCCA 7 [125].*

MEANING OF "INFORMATION"

10. Paragraph 30 of the Crown's submissions ignores that it was a requirement of the statutory framework prior to the 1991 Amendment Act that the information possessed was information derived from within the corporation that was not generally available. The Griffith Report regarded this as central to the offence of insider trading[1].

11. In a number of instances in its written submissions, the Crown conflates the definitions of 'information' and 'inside information' (see, e.g., [12] and [43]). 'Inside information' is necessarily a sub-set of that material which constitutes 'information' under the Act. The first step in the analysis under the Act is to determine that what was possessed by the accused falls within the meaning of information. The analysis of whether the alleged information then meets the criteria of 'inside information' (that is, whether it is generally available and whether a

[1] Paragraph 4.3.5

reasonable person would expect it to have a material effect on the price or value of Division 3 financial products) is a further step.

12. The statement at [12] that "it is the effect of the information viewed objectively to influence persons who commonly acquire Division 3 financial products... that is important" does nothing to advance an understanding of what constitutes information itself. The argument at [43] is therefore misconceived. The analysis proposed by the Appellant does not divert the focus of the insider trading prohibition away considerations of materiality. Such considerations are the focus of the step that follows a determination that an accused is in possession of information. The Crown seeks to conflate the two steps in order to expand the meaning of information beyond its ordinary meaning.

13. Paragraph 37 of the Crown's submissions falls into the same error. The real issue for consideration is an assessment of what is capable of influencing the relevant persons in determining whether "information" is in fact "insider information". That is not the issue for consideration when first determining that what is in the possession of the accused is in fact information. Nor does the moral turpitude of a person who acquires or disposes of shares [39] or the effect of such trading [44 & 50] assist in that assessment.

14. Paragraph 49 of the Crown's submission misstates the Appellants' position. As stated at [3] in the Appellant's written submissions, the question for determination is whether it is necessary that the inside information in the possession of the accused person in whole or material part correspond with actual information in the possession of the entity entitled to have or use it – not whether the information itself must be a factual reality. There may be situations where statements, which do not reflect a factual reality, can constitute information – for example, matters of supposition, or rumours which do not eventuate. Such rumours may constitute information if the rumour itself can be shown to have been honestly held, as they may reflect actual information in the possession of the entity entitled to use it. McClure P makes this point clearly in her dissenting judgment in the Court below.

15. The offence provisions referred to in [59] of the Crown's submissions are "offences relating to espionage and similar activities". For the purpose of Part 5.2 of the *Criminal Code (Cth),* the Parliament has expanded the meaning of information beyond its ordinary meaning. This provides no assistance in construing the meaning of 'information' and 'inside information' in Part 7.10 Division 3 of the Act.

16. Contrary to the contention in [64] of the Crown's submissions, the conclusion of McLure P that *"inside information must actually exist"* was not based on the manner in which she characterised the Crown's particulars. Her conclusion was based upon the meaning of 'information' and 'inside information' in the context of the statutory scheme[2]. It was that conclusion that led her to find that the Crown had failed to establish its case on the information as particularised[3].

Dated: 3 February 2012

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[2] *R v Mansfield* [2011] WASCA 132 at [9] to [14].
[3] Supra at [17].