



## HIGH COURT OF AUSTRALIA

11 May 2011

### BRAYSICH v THE QUEEN [2011] HCA 14

Mr Braysich, a stockbroker, was convicted by a jury of 25 counts of creating a false or misleading appearance of active trading in securities on the stock market. The prosecution case before the District Court of Western Australia on each count was that Mr Braysich caused a sale of listed shares to be made in circumstances in which, to his knowledge, there was no change in the beneficial ownership of the shares. If the prosecution established that fact, Mr Braysich was, under the relevant legislation, deemed to have created a false or misleading appearance of active trading in the shares. Mr Braysich sought to rely on a statutory defence, that the purpose or purposes for which he caused the relevant trades to take place was not, or did not include, the purpose of creating a false or misleading appearance of active trading ("the proscribed purpose").

Mr Braysich did not give direct evidence as to the presence or absence of the proscribed purpose. The evidence put forward included character evidence bearing on his honesty, evidence of his awareness of the ASX business rules requiring him to consider whether a client might have an interest in bringing about a false or misleading appearance of active trading, evidence that he acted only upon instructions from people known to him to be reputable business people, and a statement that it did not cross his mind that his co-accused, a client giving instructions on the relevant trades, had an interest in creating a false appearance of active trading.

At the close of Mr Braysich's testimony, the trial judge ruled that he had not raised the statutory defence, and on that basis refused to allow him to call expert evidence to rebut an expert witness which the prosecution had called in anticipation of the statutory defence. Counsel for Mr Braysich was not permitted to address the jury on the statutory defence, and the jury was told that it had no application to Mr Braysich.

Mr Braysich's appeal to the Court of Appeal of the Supreme Court of Western Australia was dismissed. The Court of Appeal observed that to establish the statutory defence, it was necessary that he prove a negative proposition about his subjective state of mind. It held that Mr Braysich's failure to lead direct evidence as to purpose was a "critical omission", and that the circumstantial evidence was not sufficient to require the trial judge to leave the defence to the jury.

Today the High Court, by majority, allowed Mr Braysich's appeal. It held that taking the evidence at its highest, it would be open to a reasonable jury to conclude that, on the balance of probabilities, Mr Braysich did not have the proscribed purpose, and ought therefore to be acquitted. The Court noted that the statutory defence raises an issue of honesty, and that the proscribed purpose is a dishonest purpose. The Court of Appeal therefore erred in dismissing evidence of Mr Braysich's good character, and other evidence upon which he relied, as evidence which did not address his subjective purpose or purposes. The Court quashed his convictions and remitted the matter for retrial in the District Court.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*