



HIGH COURT OF AUSTRALIA

27 June 2013

DIRECTOR OF PUBLIC PROSECUTIONS (CTH) v JM

[2013] HCA 30

Today the High Court unanimously held that buying or selling shares on the securities exchange operated by ASX Limited ("the ASX"), for the sole or dominant purpose of creating or maintaining a particular price, created or maintained an "artificial price" for those shares for the purposes of the offence of market manipulation under s 1041A of the *Corporations Act 2001* (Cth) ("the Act").

The High Court allowed an appeal by the Commonwealth Director of Public Prosecutions ("CDPP") regarding answers given by the Court of Appeal of the Supreme Court of Victoria to questions of law that arose before JM's trial on charges of 39 counts of market manipulation contrary to s 1041A of the Act and two counts of conspiring with others to commit market manipulation in relation to the trading of shares on the ASX. JM has pleaded not guilty to all charges.

Before a jury was empanelled, Weinberg JA, sitting in the Trial Division of the Supreme Court of Victoria, stated a case under s 302 of the *Criminal Procedure Act 2009* (Vic) and reserved three questions of law for the Court of Appeal. The questions asked whether the price of a share on the ASX, which had been created or maintained by a transaction carried out for the sole or dominant purpose of creating or maintaining a particular price for the share, was an "artificial price" for the purposes of s 1041A of the Act. The case stated set out the assertions of fact which the CDPP sought to establish at trial.

The Court of Appeal held, by majority, that the original questions formulated by Weinberg JA were inappropriate to answer because they were answerable only by reference to disputed facts. The Court of Appeal remitted the case stated to Weinberg JA for amendment of the first question reserved, to ask whether the expression "artificial price" in s 1041A of the Act was 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 was its legal signification. The Court of Appeal found that the expression "artificial price" in s 1041A had the legal signification of being market manipulation by conduct of the kind typified by American jurisprudential conceptions of "cornering" and "squeezing".

The CDPP sought special leave to appeal to the High Court against the orders made by the Court of Appeal, alleging that the answer given to the reformulated question was founded on a misconstruction of s 1041A of the Act. JM sought special leave to cross-appeal to argue that both the original and reformulated questions were hypothetical questions and that to answer the questions was beyond the judicial power of the Commonwealth.

The High Court granted both applications for special leave. The Court allowed the appeal and allowed the cross-appeal in part. The Court held that the original question should have been answered by the Court of Appeal, but that the reformulated question was not a question which arose before JM's trial. The construction of s 1041A of the Act adopted by the Court of Appeal

was held to be incorrect. The High Court held the price of a share on the ASX 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 was an "artificial price" for the purposes of s 1041A. No question concerning the judicial power of the Commonwealth arose.

- *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.*