

SHORT PARTICULARS OF CASES
APPEALS

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AGIUS v THE QUEEN (S28/2013)

Court appealed from: New South Wales Court of Criminal Appeal
[2011] NSWCCA 119

Date of judgment: 24 May 2011

Special leave granted: 15 February 2013

The Appellant (and others) faced trial before Justice Simpson on an indictment containing two counts of conspiracy, described in the following terms:

- "1. *Between about 1 January 1997 and about 23 May 2001 at Sydney, New South Wales and elsewhere did conspire with each other and with Owen Trevor DANIEL to defraud the Commonwealth. Contrary to section 86(1) and section 29D of the Crimes Act 1914 (Cth). (Law Part Code 11102).*
2. *Between about 24 May 2001 and about 10 April 2008 at Sydney, New South Wales and elsewhere did conspire with each other and with Owen Trevor DANIEL to dishonestly cause a loss, or to dishonestly cause a risk of loss, to a third person, namely the Commonwealth, knowing or believing that the loss would occur or that there was a substantial risk of the loss occurring. Contrary to section 135.4(5) of the Criminal Code. (Law Part Code 41506)."*

Notwithstanding that the indictment alleged two counts of conspiracy, the Commonwealth Director of Public Prosecutions alleged that only a single conspiracy or course of conduct occurred. That conduct allegedly began with an initial agreement in early 1997, through its progressive implementation, until its finalisation in April 2008. That two separate counts were called for arose because the conduct in question was criminalised by two different legislative regimes.

On 27 April 2011 the Appellant (and his co-accused) filed notices of motion seeking a permanent stay of the second count. It was submitted that the Appellant (and the others) should not have been charged with two separate offences because the allegations against each of them involved a *single* conspiracy spanning the periods of operation of two legislative regimes. On 4 May 2011 the applications for a permanent stay of the second count were refused.

On 24 May 2011 the Court of Criminal Appeal (Tobias AJA, Johnson and Hall JJ) dismissed the Appellant's (and the others') appeals. Their Honours held that the second count was not doomed to fail so as to warrant it being permanently stayed. On 15 June 2011 this Court (comprised by Justices Gummow and Bell) refused the Appellant (along with his co-accused) special leave to appeal against the Court of Criminal Appeal's judgment.

On 31 July 2012 a jury convicted the Appellant (and one of his co-accused) of the two counts in the indictment. On 23 August 2012 the Appellant was sentenced to 8 years, 11 months imprisonment, with a non-parole period of 6 years and 8 months. As at the time of writing, no appeal against that conviction has been determined by the Court of Criminal Appeal. A fresh application for special leave to appeal (against the Court of Criminal Appeal's judgment dated 24 May 2011) was however successful before Justices Heydon and Bell on 15 February 2013.

The grounds of appeal include:

- The Court of Criminal Appeal erred in finding that proof of the conspiracy alleged in Count 2 of the indictment did not require evidence of an agreement entered into on or after 24 May 2001.

LEE & ANOR v NEW SOUTH WALES CRIME COMMISSION (S29/2013)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 276

Date of judgment: 6 September 2012

Special leave granted: 15 February 2013

During 2009 and 2010 the Appellants were charged with various offences pertaining to the possession of prohibited drugs, prohibited firearms and stolen property. In June 2010 the Respondent (“the Crime Commission”) sought orders compelling each of the Appellants to be examined before the Supreme Court pursuant to s 31D(1) of the *Criminal Assets Recovery Act* 1990 (NSW) (“the Act”). Section 13A(1) of that Act provides that a person being examined cannot be excused from answering any question on the ground that their answer might tend to incriminate them.

On 28 February 2011 Justice R S Hulme refused the Crime Commission’s application. (At that time the Appellants’ trial was underway and a separate trial of the First Appellant on one charge had not commenced.) His Honour held that the removal of the right to avoid giving self-incriminating answers during an examination by s 13A(1) of the Act created a risk of prejudice to a fair trial of the Appellants. That risk was not overcome by the limited protections provided by ss 13A(2) and 62 of the Act. Those protections were the non-admissibility in criminal proceedings of answers (to which objection could have been taken) given during examination and the power to make non-publication orders.

On 6 September 2012 the Court of Appeal (Beazley, McColl, Basten, Macfarlan & Meagher JJA) unanimously allowed the Crime Commission’s appeal. Their Honours held that effect must be given to Parliament’s intention, manifested in s 13A(1) of the Act, to abrogate the common law privilege against self-incrimination. Such an intention was supported by s 63 of the Act, which provides that the mere existence of criminal proceedings is not a ground for a stay of proceedings under the Act. The Court of Appeal found that the Registrar had appropriate powers to minimise any risk of prejudice that might arise during an examination. It then ordered that each of the Appellants be examined pursuant to s 31D(1) of the Act.

On 14 March 2013 the Appellants filed a Notice of a Constitutional Matter in accordance with s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General for the Commonwealth, New South Wales and Queensland have advised this Court that they will be intervening in this matter.

The grounds of appeal include:

- The Court of Appeal erred in holding that Hulme J had erred in declining to make orders allowing the examination on oath of Jason (Do Young) Lee and Seong Won Lee to proceed.

- The Court of Appeal erred in holding that s 31D of the Act requires the Court to determine an application for an examination order without regard to the capacity of that order to prejudice the fair trial of the person proposed to be examined.

ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LTD & ORS v GLOBAL GAMING SUPPLIES PTY LTD & ORS (S168/2012)

ARISTOCRAT TECHNOLOGIES AUSTRALIA PTY LTD & ORS v ALLAM & ORS (S169/2012)

Court appealed from: Full Court of the Federal Court of Australia
[2012] FCAFC 34

Dates of judgment: 21 March 2012 & 25 May 2012

Date referred to Full Bench: 16 November 2012

The Aristocrat group of companies (“Aristocrat”) designs, manufactures and supplies gaming machines both in Australia and internationally. Aristocrat also develops and supplies components, software and conversion kits for its machines. Mr Francis Cragen and his company Impact Gaming Pty Ltd (“Impact”), and Mr Anthony Andrews and his company Global Gaming Supplies Pty Ltd (“Global”), dealt in second-hand gaming machines. In 2004 those companies and their principals (together “the joint venturers”) began working closely together on the refurbishment and export of Aristocrat’s machines. Mr Riad Allam is a gaming machine technician who carried out work for both Impact and Global. After materials had been seized (pursuant to a Federal Court order), Aristocrat alleged infringements of both its copyright and its trade mark. During the trial, Justice Jacobson provisionally admitted into evidence certain chains of emails (“the emails”), noting that they were not tendered as proof of the facts stated in them.

On 15 December 2009 Justice Jacobson held that Mr Allam (by direct acts) and the joint venturers (by offering certain gaming machines for sale) had infringed Aristocrat’s copyright. His Honour found that Mr Allam had made counterfeit compliance plates, memory chips and copies of Aristocrat’s software for use on machines which were then sold by the joint venturers. Justice Jacobson also found that the emails made it plain that Mr Andrews and Mr Cragen had countenanced Mr Allam’s infringing acts.

Mr Allam and the joint venturers separately appealed, while Aristocrat cross-appealed in both matters.

On 25 May 2012 the Full Court of the Federal Court (Bennett, Middleton & Yates JJ) unanimously allowed both of the appeals and both of the cross-appeals. Their Honours held that Justice Jacobson had erred by treating the emails as evidence of the joint venturers’ knowledge of Mr Allam’s infringing acts. The Full Court found that the emails could show no more than a tendency to engage in infringing transactions. (They could not even be used for that purpose however, as the requirements of s 97 of the *Evidence Act* 1995 (Cth) had not been met.) Their Honours also found that Justice Jacobson had mistakenly treated Aristocrat’s claim of infringement of its trade mark as co-extensive with its copyright claim. They then remitted the trade mark claim to Justice Jacobson for determination.

The questions of law said to justify the grant of special leave to appeal (in both matters) include:

- Is it legitimate to apply s 97 of the *Evidence Act* 1995 (Cth) to evidence of a person's awareness or state of mind about that person's own prior business activities where the issue is the person's knowledge or reason to believe under s 38 of the *Copyright Act* 1968 (Cth) or participation in a common design in respect of later business activities?

The Respondents in S168/2012 and the Second, Third, Fourth, and Fifth Respondents in S169/2012 ("the Global Respondents") have filed a joint proposed notice of contention, the grounds of which include:

- The Full Court erred in upholding (at appeal judgment [307], [308] – [362]) the primary judge's conclusion that the Global Respondents had infringed the copyright of Aristocrat by selling 58 electronic gaming machines within 9 transactions.
- The Full Court ought to have held that the primary judge erred by making findings of infringement against the Global Respondents with respect to the 58 machines the subject of the transactions referred to above.

The First and Sixth Respondents in S169/2012 have also filed a joint proposed notice of contention, the grounds of which include:

- The Full Court ought to have held that the evidence did not establish that the impugned gaming machines contained Aristocrat game software that had been reproduced by Mr Allam.
- The First and Sixth Respondents support the proposed notice of contention as filed by the Global Respondents, *mutatis mutandis*, in so far as it relates to any transaction maintained by Aristocrat against either or both of them or the question of section 115(4) damages.

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 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.