HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

JEFFREY JOSEPH BRAYSICH APPELLANT

AND

THE QUEEN RESPONDENT

Braysich v The Queen [2011] HCA 14
11 May 2011
P32/2010

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Western Australia made on 16 October 2009 dismissing the appeal against conviction and, in its place, order that:*

   (a) the appeal to that Court be allowed;

   (b) the appellant's convictions be quashed; and

   (c) the matter be remitted to the District Court of Western Australia for a new trial.

On appeal from the Supreme Court of Western Australia

Representation

M J McCusker QC with S J Lemonis for the appellant (instructed by Ainslie van Onselen)

W B Zichy-Woinarski QC with W F Gillan for the respondent (instructed by Commonwealth Director of Public Prosecutions)

CATCHWORDS

Braysich v The Queen

Criminal law – Evidence – Burden of proof – Defences – Directions to jury – Appellant charged with creating a false or misleading appearance of active trading in securities – Appellant deemed to have created false or misleading appearance of active trading if proved to have caused a sale of securities where, to his knowledge, there was no change in beneficial ownership of securities – Section creating offence included a defence to prove that the purpose or purposes of the trades was not or did not include purpose of creating a false or misleading appearance of active trading ("proscribed purpose") – Where appellant did not give direct evidence of whether subjective purpose or purposes included proscribed purpose – Trial judge ruled defence not raised and withheld defence from jury – Whether character evidence as to honesty and other evidence in defence case sufficient to require defence to be left to jury – Whether, taking evidence at its highest, jury could conclude on balance of probabilities that appellant lacked proscribed purpose.

Corporations – Financial services and markets – Market misconduct and other prohibited conduct – False trading and market rigging.

Words and phrases – "balance of probabilities", "evidential burden", "false or misleading appearance of active trading", "legal burden".

Corporations Act 2001 (Cth), s 1401.
Corporations Law, ss 998, 1311(1).

FRENCH CJ, CRENNAN AND KIEFEL JJ.

Introduction

1 Following a trial before a judge and a jury in the District Court of Western Australia, the appellant, a stockbroker, was convicted on 10 November 2007 of 25 counts of creating a false or misleading appearance of active trading in securities on the stock market. The offence was created by s 998(1), read with s 1311(1), of the Corporations Law of Western Australia, as incorporated into the *Corporations Act* 2001 (Cth) ("the Corporations Act") by operation of s 1401 of that Act[1].

2 The convictions should be quashed. The trial miscarried. The Crown case on each of the counts was that the appellant had caused a sale of listed shares to be made in circumstances in which, to the appellant's knowledge, there was no change in their beneficial ownership. If that fact were established he was, by force of s 998(5) of the Corporations Law, deemed to have created a false or misleading appearance of active trading in the shares. The finding of fact and the application of the deeming provision were therefore sufficient for conviction. The appellant, however, wished to rely at trial upon a statutory defence, under s 998(6) of the Corporations Law, that the purpose or purposes for which he caused the sales to take place did not include the purpose of creating a false or misleading appearance of active trading. It is common ground that he would have had the burden of establishing that defence on the balance of probabilities.

3 The trial judge ruled at the close of the appellant's testimony that he had not raised the statutory defence. On the basis of that ruling his Honour refused to allow the appellant to call expert evidence to rebut an expert witness called by the Crown in anticipation of the appellant's reliance upon the defence. Counsel was not permitted to address the jury on the defence and the jury were told that it had no application to the appellant. The defence was able to be availed of by his co-accused, who had been his client and one of the principals in the impugned transactions. The trial judge directed the jury accordingly.

4 The Court of Appeal of the Supreme Court of Western Australia (Pullin, Buss and Miller JJA) dismissed an appeal against conviction[2]. It held that the statutory defence was properly withheld from the jury and the objection to the appellant's expert evidence properly allowed. The Court of Appeal also held

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1 See further at [5]-[8].

2 *Braysich v The Queen* (2009) 260 ALR 719.

that, in any event, there had been no substantial miscarriage of justice and that, had it come to a different view of the trial judge's rulings, it would have dismissed the appeal[3]. In this Court, the Crown expressly disclaimed reliance upon and support for that aspect of the Court of Appeal's decision. The appeal to this Court is brought by special leave granted on 30 July 2010 by Hayne and Bell JJ. Its outcome turns upon whether the trial judge erred in withdrawing the statutory defence from the jury and in not permitting the appellant to call expert evidence said to be relevant to that defence. In our opinion his Honour did so err.

The statutory framework

5 The indictment, dated 9 August 2007, alleged contraventions by the appellant of ss 998(1) and 1311(1) of the Corporations Act. The reference to those provisions was incomplete. The conduct said to constitute the offences occurred in 1998. The relevant offence creating provisions at that time were ss 998 and 1311 of the Corporations Law, given statutory force in Western Australia by the *Corporations (Western Australia) Act* 1990 (WA).

6 Section 1401 of the Corporations Act relevantly incorporates into that Act provisions of the Corporations Law of the various States and Territories which had given rise to criminal liabilities in existence immediately before the commencement of the Act on 15 July 2001[4]. That section creates new and substituted liabilities under the incorporated provisions which are equivalent to the old liabilities. It follows that the matter founding the jurisdiction of the District Court of Western Australia was the justiciable controversy arising from contested allegations of contraventions by the appellant of the "substituted, carbon-copy" of ss 998 and 1311 of the Corporations Law[5].

7 The relevant parts of s 998 as it stood at the time of the alleged offences were:

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3 Applying the proviso in s 30(4) of the *Criminal Appeals Act* 2004 (WA), discussed in *Mahmood v The State of Western Australia [No 2]* [2008] WASCA 259.

4 Corporations Act, s 1401(2).

5 Applying the explanation of the operation of s 1401 in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 92 [115] per Gummow, Hayne and Crennan JJ; [2006] HCA 44.

"(1) A person shall not create, or do anything that is intended or likely to create, a false or misleading appearance of active trading in any securities on a stock market or a false or misleading appearance with respect to the market for, or the price of, any securities.

…

(5) Without limiting the generality of subsection (1), a person who:

(a) enters into, or carries out, either directly or indirectly, any transaction of sale or purchase of any securities, being a transaction that does not involve any change in the beneficial ownership of the securities;

…

shall be deemed to have created a false or misleading appearance of active trading in those securities on a stock market.

(6) In a prosecution of a person for a contravention of subsection (1) constituted by an act referred to in subsection (5), it is a defence if it is proved that the purpose or purposes for which the person did the act was not, or did not include, the purpose of creating a false or misleading appearance of active trading in securities on a stock market.

…

(9) The reference in paragraph (5)(a) to a transaction of sale or purchase of securities includes:

(a) a reference to the making of an offer to sell or buy securities; and

(b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or buy securities."

Section 1311, a general offence provision, provided that a person doing an act that the person was forbidden to do by or under a provision of the Corporations Law was guilty of an offence unless that or another provision of the Law provided that the person was guilty, or not guilty, of an offence.

8 Section 998 of the Corporations Act, now repealed, differed slightly in its language from s 998 of the Corporations Law[6]. The operation of s 1401 of the Corporations Act is such that the text of s 998 of the Corporations Law is the applicable text for the purposes of this appeal.

The charges against the appellant

9 The indictment contained 26 counts against the appellant[7], which took the following three forms:

1. That the appellant created a false or misleading appearance of active trading in the ordinary fully paid shares of Intrepid Mining Corporation NL ("Intrepid") on the Australian Stock Exchange ("the ASX"), in that he caused to be made an offer to buy [a number of] ordinary fully paid shares in Intrepid and thereby caused to be carried out a transaction that did not involve any change in the beneficial ownership of [an equal or lesser number of] the shares, contrary to ss 998(1) and 1311(1) of the Corporations Act[8].

2. As above, save that the charge was that the appellant caused to be made an offer to sell[9].

3. As in 1 above, save that the allegation was that he "caused to be carried out a transaction that did not involve any change in the beneficial ownership in respect of [a number of] ordinary fully paid shares in Intrepid". The charge did not indicate whether the transaction involved an offer to sell or to buy the shares[10].

The appellant was convicted on all but one of the counts[11].

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6 The *Financial Services Reform Act* 2001 (Cth), s 3 and Sched 1(1) repealed s 998 of the Corporations Act and replaced it with s 1041B of the Corporations Act on 11 March 2002.

7 The indictment was a joint indictment against the appellant and his co-accused, who was charged with 259 counts.

8 Counts numbered 260-262, 264, 265, 267, 269, 270, 272 and 276-278.

9 Counts 263, 268 and 271.

10 Counts 266, 273-275 and 279-285.

11 Count 283.

10 An account of the evidence at trial and the conduct of the trial is set out in the reasons for judgment of Bell J[12]. It is sufficient for the purposes of these reasons to refer to salient features of the prosecution and defence cases and the contested rulings of the trial judge.

The prosecution case

11 The prosecution case against the appellant involved the following contentions:

- The appellant was a broker with Paul Morgan Securities Pty Limited ("Paul Morgan") in Sydney.
- The appellant's co-accused, Dean Scook, was, at the time of the transactions giving rise to the charges, a client of Paul Morgan. Two other men (Lance and Steven Masel) and companies controlled by them were also involved in the transactions[13].
- A finance company called Walthamstow Pty Ltd ("Walthamstow"), controlled by the Masels[14], advanced money to Scook and Challiston Pty Ltd ("Challiston"), a company controlled by Scook, between November 1997 and April 1998 under loan facility letters and bridging loans to enable Challiston to buy shares in Intrepid on the market or by placement[15].
- Under the finance arrangements, Walthamstow would pay the purchase price of the Intrepid shares acquired by Challiston at settlement[16].
- As security for its advances, Walthamstow held, in its own name, the Intrepid shares acquired by Challiston[17].

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12 Reasons for judgment of Bell J at [68]-[78].

13 Lance Masel had died by the time of the trial.

14 (2009) 260 ALR 719 at 724 [12](a).

15 (2009) 260 ALR 719 at 724 [17](c).

16 (2009) 260 ALR 719 at 724 [17](a), (b) and (d).

17 (2009) 260 ALR 719 at 724 [17](b) and (c).

- Challiston retained a beneficial interest in the Intrepid shares which it had purchased with Walthamstow's advances[18].

- The appellant had opened a trading account at Paul Morgan in the name of Challiston and commenced taking instructions to trade on the Challiston account on market on 20 January 1998.

- The appellant, between 2 February 1998 and 27 February 1998, on 26 occasions, caused the sale of Intrepid shares on account of Walthamstow (as vendor) to Challiston (as purchaser). The appellant rebooked each of the shares to Walthamstow on or before the settlement date under a rebooking procedure[19].

- Even though the shares were rebooked to Walthamstow after their purported sales to Challiston, Challiston remained at all times their beneficial owner[20].

- The appellant was generally aware of the financial arrangements between Walthamstow and Challiston.

- The Crown relied upon the rebooking procedures, inter alia, to support the inference that the appellant knew that the shares were to be held by Walthamstow as security for its advances to Challiston.

The prosecution did not allege that the appellant and Scook were involved in a joint criminal enterprise. There was no allegation of joint or common purpose or of accessorial complicity on the part of the appellant.

12 Admissions made by the appellant at trial included:

- that Challiston was the buyer and Walthamstow the seller of the relevant shares;

- that Scook gave instructions for the buy order;

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18 (2009) 260 ALR 719 at 725 [18].

19 (2009) 260 ALR 719 at 723-725 [10]-[19].

20 (2009) 260 ALR 719 at 724-725 [17]-[18].

- that Paul Morgan was the broker for both buyer and seller; and

- the time and place of each of the buy orders, sell orders and trades[21].

The appellant did not admit that he effected all of the relevant transactions. He denied that they did not involve any change in beneficial ownership and denied that he knew that Challiston was the beneficial owner of the shares held in Walthamstow's name[22].

The defence case

13 The appellant's evidence-in-chief included the following elements:

- nothing was ever said to him by the Masels to the effect that any shares sold on Walthamstow's account were not beneficially owned by it;

- he was told by Scook that he wanted his purchases of Intrepid shares rebooked to Walthamstow and sales to come from Walthamstow;

- he was asked by Paul Morgan's compliance manager, Carol Simpson, to ensure that there would be a change in beneficial ownership in any sale from Walthamstow to Challiston;

- in February 1998 he effected buy orders and sell orders in relation to the Challiston and Walthamstow accounts. Buy orders were on the Challiston account and there were sell orders to the market on the Walthamstow account;

- he would always rebook the shares sold to Challiston to the account of Walthamstow on the fifth working day after receiving and effecting the instruction;

- he tried to ensure that he wrote separate orders so that shares held by Walthamstow for Challiston were sold to the market and not issued to Challiston;

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21 (2009) 260 ALR 719 at 726 [20].

22 (2009) 260 ALR 719 at 726 [23].

- he did not ever knowingly execute a sell order with respect to Intrepid shares from Walthamstow to Challiston which did not involve a change of beneficial ownership; and

- he did not make any trade between the two companies where he knew that there was no change in beneficial ownership and went "to quite a lot of trouble to not do that."

14 In cross-examination the appellant said that he understood the purpose of the rebooking was "[f]or us to get paid." He thought it was part of a finance arrangement between Messrs Masel and Scook. He accepted that he had never before come across an arrangement which required rebooking of the type in question. It was completely new to him in his many years of experience as a broker.

15 At one point in his cross-examination, the following exchange took place:

Q. Did it cross your mind that Mr Scook – and I am here harking back of course to the business rules – was a person that you must have understood would have an interest in creating a false appearance of active trading?
A. No.
Q. It didn't occur to you?
A. No, it wouldn't have occurred to me there that he was a person who wanted to create false active trading. We are talking about 29 or 30 January.
Q. Did you not know that he was a person who was taking a very active interest in trading in IRO?
A. No, sir.
Q. Did you ever come to that realisation?
A. In what period please, sir?
Q. At any time did it occur to you that Mr Scook was a person who was doing a lot of trading in Intrepid shares?
A. In 2003 when I got the brief?
Q. It never occurred to you even at the end, towards 27 February, that Mr Scook was doing a lot of trading in these shares?
A. No.
Q. You went and spoke to Mr Scook and what did you ask him?
A. I asked him why we were rebooking the stock and he said, 'It's the way I'd like to do it.' He said that he can go speak to the Masels and ask them to pay for the shares on T plus five and that they would then sell the shares and I'd been asked by Carol to get a copy of any agreement if there was one and he said to me the agreements were varied and that therefore it would be of no benefit.

Q. Did you convey this then back to Ms Simpson?
A. Yes.

16 Six character witnesses were called on behalf of the appellant. They all deposed to his honesty.

17 The Crown case against the appellant appears to have been a strong one. However, as explained below, in determining whether the statutory defence should be left to the jury, it was necessary for the trial judge to take the evidence at its most favourable to the appellant and to consider whether it would be open to the jury, in respect of each of the charges, to be satisfied on the balance of probabilities that the appellant did not have the purpose of creating a false or misleading appearance of active trading in the securities. Questions of the weight to be accorded to the evidence and the credibility of the appellant were matters for the jury.

The expert evidence

18 The expert witness called by the prosecution, Professor Raymond da Silva Rosa, gave oral evidence about answers he had provided, in two written reports, to questions posed to him by the Australian Securities and Investments Commission in relation to the trades effected by both the appellant and his co-accused. In brief his answers were:

- the Intrepid shares traded by the appellant for each day covered by the 26 counts against the appellant ranged from 1.58 per cent to 58.14 per cent of the total volume of Intrepid shares traded on each of those days;
- the most likely effect of the transactions would have been to increase the price of Intrepid shares;
- Intrepid's adjusted share price increased over the period of the trades from $1.22 to a maximum of $1.42 before closing at $1.30 on the last day of the period;
- the transactions would have created, or contributed to, the appearance of an informed investor taking a position in Intrepid;
- the transactions would have contributed to an appearance of active trading in Intrepid shares; and
- it was likely that had the transactions not occurred, investors would have had less confidence that there was a liquid market in Intrepid shares.

19 The appellant was subject to substantial cross-examination on issues about which Professor da Silva Rosa had given evidence. Those issues concerned the volume of transactions in Intrepid shares, the significance of that volume for the appearance of the liquidity of the stock and the effect, on the perceived volume of sales and the price of the stock, of the execution of the transactions late on a trading day.

The ruling on the appellant's expert evidence

20 After the appellant had given evidence, counsel for the Crown foreshadowed an objection to the two expert witnesses which the defence had indicated it wished to call. Reports prepared by the appellant's experts had been provided to the prosecution prior to commencement of the trial[23]. No proofs of evidence or reports were put before the trial judge. All that the judge had before him was the oral description, proffered by Crown counsel, who described the proposed testimony as:

- a critique by Dr Michael Aitken of Professor da Silva Rosa's reports in relation to the transactions in which the appellant was involved and of Professor da Silva Rosa's conclusion that changes in the prices and volumes of Intrepid shares could have no reasonable explanation other than an attempt to manipulate the share trading. Dr Aitken was formerly a professor at the University of Sydney and was an expert in stock exchange surveillance systems and trading[24]; and

- consideration by Mr Guy Le Page, a geologist and investment analyst, of factors affecting the value of shares, the state of the nickel market in 1997 and 1998 and whether there could have been factors affecting the price of Intrepid shares other than an attempt to manipulate the market.

21 The trial judge said, in his ruling on the objection, that "the proposed evidence, does not have probative consequence in the issue to be determined by the jury." His Honour's reasons for reaching that conclusion did not elucidate its basis beyond his evident acceptance of the submission made by counsel for the Crown that "the evidence cannot properly be [led] because it does not go to any issues between the [C]rown and Braysich particularly having regard to the nature of the evidence given by Braysich." That evidence, as described by the trial judge, was that the appellant at no stage knew or believed that the shares in the

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23 (2009) 260 ALR 719 at 754 [142].

24 (2009) 260 ALR 719 at 754 [142].

Walthamstow account were held by that company other than as their beneficial owner. His Honour also referred to the appellant's evidence that "he took positive steps because of some concerns to ensure that the position was that these transactions involved a change in beneficial ownership."

22 The logic of the ruling seems to have been that the appellant's case that he did not know or believe that there was no change in beneficial ownership involved an implied disclaimer of the statutory defence. The logic was erroneous. The implication could not follow from the appellant's case. It would have been open to the appellant to say that he believed there was a change in beneficial ownership and to contend, by reference to his own direct evidence or otherwise, that he did not have any purpose of creating a false or misleading appearance of active trading. It would have been open to him to maintain the latter contention, even if the first were rejected. It was not to the point that he did not expressly state that he had no such subjective purpose. In principle he could point to any evidence, his own and/or that of other witnesses, which, as a matter of logic or human experience, was inconsistent with the existence of the proscribed purpose and therefore tending against the probability that he had that purpose. He could invite the jury, on the basis of such evidence, to conclude that it was not likely, on the balance of probabilities, that he had the proscribed purpose. The judge's ruling was framed on a basis which prematurely foreclosed those possibilities and thus the question whether, at the close of the appellant's case and that of his co-accused, there was evidence upon which the jury properly instructed could reasonably find the statutory defence made out.

The trial judge's ruling on closing addresses

23 Before addressing the jury in closing, counsel for the appellant said to the trial judge:

> "My understanding from your Honour's ruling yesterday is that I am not permitted to address the jury on the question of the statutory defence of 'no purpose.' It was on that basis that the two witnesses were excluded so I wouldn't want to trespass on your Honour's direction."

The trial judge said:

> "They were excluded on the basis there's no evidence of other purpose."

Counsel responded:

> "I understood it was your Honour's ruling, I just wanted to make sure that that means I can't address on it."

The prosecutor added that there was no point addressing on the question since there was no evidence of it. The trial judge said:

> "Anyway, consistent with the view I have taken, I will be telling the jury that that isn't an issue. So under those circumstances, it would seem that it ought to be left alone."

Counsel for the defence said:

> "I understand that, your Honour, I with respect disagree."

In the circumstances his Honour's remarks amounted to a ruling, although it might have been expressed more definitively, that there was no evidence upon which the statutory defence could be left to the jury. Given that his Honour justified the ruling by reference to his decision on the admissibility of the appellant's expert evidence it was underpinned by a logic dependent upon the evidence given by the appellant and upon the absence of any statement by him about his purpose. The ruling was not based upon a consideration of the whole of the evidence. Moreover, the observation by his Honour that "there's no evidence of other purpose" appears to have involved a misconstruction of the statutory defence. It implied a requirement that the appellant establish positively that he had some purpose other than the proscribed purpose in order to make out the defence. Section 998(6) only required him to negative the proscribed purpose.

The trial judge's direction to the jury

24 The trial judge directed the jury that all counts against the appellant alleged that he created a false or misleading appearance of active trading. His Honour gave some general directions about the law:

> "Where a count alleges that the accused person created a false or misleading appearance the [C]rown is relying upon what is called a deeming provision and it is important that you understand this."

He outlined the operation of s 998(5), and said:

> "so a person who carries out a transaction that doesn't involve any change in the beneficial ownership of the securities –
>
> > is at law deemed to have created a false or misleading appearance of active trading –
>
> unless he establishes a defence about which I will speak shortly."

25 Directing the jury specifically in relation to the appellant, the trial judge said:

> "In respect of the counts against Mr Braysich, if you are satisfied that he executed – arranged the transaction deliberately, or facilitated the transaction is probably a better word, deliberately, and that the shares being sold were beneficially owned by Challiston and consequently there was no change in beneficial ownership and he had knowledge that there was no change in beneficial ownership, the proper verdict would be one of guilty. So that is in respect to the Braysich counts. The [C]rown must satisfy you beyond reasonable doubt (1) that he facilitated the transaction, secondly that it was a transaction where there … was no change in beneficial ownership and thirdly and importantly that he had knowledge that there was no change in beneficial ownership."

26 The following day his Honour gave the jury a further direction in relation to the appellant. In the course of that direction he said:

> "As I said to you yesterday, the defence of other purpose to which I made reference in respect of the created counts alleged against Mr Scook, is not applicable with Mr Braysich, who says that he at all times believed that there was a transfer of beneficial interest in respect to these transactions, so that defence is not a matter that comes up in consideration when looking at the counts against him."

This direction, like the response to the appellant's counsel at the close of the evidence, reflected the reasoning that lay behind his Honour's decision that the appellant's expert witnesses could not be called.

27 Counsel for the appellant maintained, before the trial judge, that the statutory defence was open to his client and that the jury ought to have been directed accordingly. The trial judge declined to redirect the jury.

28 The basis upon which his Honour directed the jury that the "no purpose" defence was not available to the appellant was its implied preclusion by the appellant's evidence that he believed that there had been a transfer of the beneficial interest in the shares the subject of the respective transactions. That was an erroneous basis. The different question to which the Court of Appeal directed its attention, was whether there was any evidence sufficient to go to the jury upon which they could conclude on the balance of probabilities that the defence was made out.

The reasoning of the Court of Appeal

29 The principal judgment in the Court of Appeal was delivered by Buss JA, with whom Pullin and Miller JJA agreed. His Honour's reasoning involved the following steps:

- If the prosecution proves beyond reasonable doubt that the accused knowingly engaged in the activity described in s 998(5)(a) then, subject to s 998(6), the prosecution will have established the offence created by the first limb of s 998(1) read with s 1311(1)[25].

- The accused will have "knowingly engaged" in the activity described in s 998(5)(a) if he or she knew that the transaction of sale or purchase of securities did not involve any change in the beneficial ownership of the securities[26].

- If the prosecution proves beyond reasonable doubt that the accused knowingly engaged in the "relevant activity", the accused will be convicted unless he or she, in reliance on the statutory defence, proves on the balance of probabilities that none of the purposes for which he or she engaged in the relevant activity included the purpose of creating a false or misleading appearance of active trading[27].

- The defence will not be made out if the accused "merely raises a reasonable doubt as to whether he or she had the proscribed purpose, or merely establishes that there is a reasonable and rational inference, available on the evidence, that he or she did not have the proscribed purpose."[28] That was a statement about the legal burden resting on an accused who invoked the statutory defence.

- The trial judge was not bound to leave the statutory defence to the jury "unless there was evidence on the basis of which the jury, acting reasonably and properly directed, could conclude that the defence had been made out." It was "necessary that there be evidence on the basis of which the jury, acting reasonably, could be satisfied, on the balance of

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25 (2009) 260 ALR 719 at 733 [54].

26 (2009) 260 ALR 719 at 733 [54].

27 (2009) 260 ALR 719 at 743 [94]-[96].

28 (2009) 260 ALR 719 at 743 [97].

probabilities, that none of the appellant's purposes for entering into or carrying out any transaction, the subject of a count against him, included the purpose of creating a false or misleading appearance of active trading in Intrepid shares on the ASX."[29]

- It was necessary for the appellant to prove on the balance of probabilities a negative proposition about his subjective state of mind[30].

- The appellant did not give any evidence to the effect that his subjective purposes did not include the proscribed purpose[31]. Buss JA accepted, correctly, that it "may not be essential, in a particular case, that there be direct evidence as to the accused's subjective purposes, including the absence of the proscribed purpose; that is, it may be possible, in a particular case, for the absence of the proscribed purpose to be inferred from other (objective) evidence."[32]

- Evidence as to the appellant's good character and reputation for honesty did not bear upon his subjective purpose or purposes[33].

- The defence under s 998(6) may be available to an accused who denies knowledge that transactions within s 998(5)(a) involved no change in beneficial ownership[34].

- The fact that the appellant was a stockbroker executing the trades in question in the ordinary course of his business on instructions from his clients and the absence of any evidence that either Mr Scook or Steven Masel ever told him that the purpose of either of them was to create a false or misleading appearance of active trading and his alleged belief that they were reputable people "[did] not address the appellant's subjective purpose or purposes."[35]

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29 (2009) 260 ALR 719 at 748-749 [118].

30 (2009) 260 ALR 719 at 749 [120].

31 (2009) 260 ALR 719 at 749 [123].

32 (2009) 260 ALR 719 at 750 [125](a).

33 (2009) 260 ALR 719 at 751 [125](g).

34 (2009) 260 ALR 719 at 750 [125](a).

35 (2009) 260 ALR 719 at 750 [125](b) and (c).

- The evidence relied upon by the appellant[36] was, at best, circumstantial evidence from which an inference could be drawn that at all material times he was acting in the ordinary course of his business as a stockbroker in carrying out the relevant transactions[37].

- The absence of any direct evidence as to the appellant's subjective purpose or purposes, including the absence of any direct evidence that he did not enter into or carry out the transactions for the proscribed purpose, was a "critical omission". The circumstantial evidence was not "sufficient" to require the trial judge to leave the statutory defence to the jury[38].

- On the evidence as a whole the jury acting reasonably could not have been satisfied, on the balance of probabilities, that none of the appellant's subjective purposes for entering into or carrying out any transaction the subject of a count against him, included the proscribed purpose[39].

- Professor da Silva Rosa's evidence ceased to be relevant to the appellant because the appellant did not invoke the statutory defence[40].

Grounds of appeal

30 The grounds of appeal in this Court were:

> "1. The Court of Appeal erred in law in holding that it is not an error of law for a Trial Judge to direct the jury that a statutory defence open to an accused (the onus of proof of which lies on the accused) is not available to the accused and cannot be considered by the jury because in the opinion of the Trial Judge there is insufficient evidence (albeit some circumstantial evidence) from which the jury could conclude on the balance of probabilities that the defence had been made out.

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36 Set out more fully by Buss JA at (2009) 260 ALR 719 at 749-752 [123]-[125].

37 (2009) 260 ALR 719 at 752 [126].

38 (2009) 260 ALR 719 at 752 [126].

39 (2009) 260 ALR 719 at 752 [126].

40 (2009) 260 ALR 719 at 756 [151].

2. The Court of Appeal further erred in law in holding, in effect, that if an accused does not give direct evidence to 'invoke' the statutory defence then it is not an error of law for the Trial Judge to direct defence counsel that it is not open to defence counsel to raise that defence for the consideration of the jury, and then to direct the jury that the defence (although available to a co-accused) is not available to the accused.

3. The Court of Appeal further erred in law in [not] holding that it was an error of law for the Trial Judge before the defence had closed its case to direct that the defence could not call two expert witnesses (whose evidence arguably would have supported the statutory defence) on the ground that the Trial Judge at that stage did not consider the statutory defence was available."

The grounds of appeal direct attention to the proper function of the trial judge in a trial by jury and the relationship of that function to the directions that may be given to a jury on whether there is evidence before them upon which a particular defence is open.

The evidential burden and the function of the trial judge

31 The indictment, alleging, as it did, offences against a law of the Commonwealth[41], attracted the mandate in s 80 of the Constitution that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury". That section constitutes "an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England."[42]

32 In a trial by jury the issues of fact are decided by the jury "in the presence and under the superintendence of a judge empowered to instruct them on the law"[43]. It is an "elementary principle of the criminal law that unless express statutory provision to the contrary be made, the onus lies upon the Crown

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41 As noted earlier, s 1401 of the Corporations Act created new and substituted liabilities, under the provisions of the Corporations Law as incorporated into the Corporations Act, equivalent to the pre-existing liabilities for contraventions of the Corporations Law.

42 *R v Snow* (1915) 20 CLR 315 at 323 per Griffith CJ; [1915] HCA 90.

43 *Cesan v The Queen* (2008) 236 CLR 358 at 390 [103] per Gummow J; [2008] HCA 52, citing *Capital Traction Co v Hof* 174 US 1 at 13-14 (1899).

throughout to negative defences sufficiently raised."[44] The authority and responsibility of the judge to instruct the jury on questions of law requires the judge "to put to the jury every lawfully available defence open to the accused on the evidence even if the accused's counsel has not put that defence and even if counsel has expressly abandoned it."[45] It may also require a direction to the jury that there is no evidence capable of supporting a particular defence to the charge and that they are not to consider that defence in their deliberations[46]. In such a case the accused is said to have failed to meet the "evidential burden" necessary to raise the defence. Such a direction may be made in respect of a defence which, if open, the prosecution, bearing the "legal burden" of proof, would have to negative beyond reasonable doubt[47]. It may also be made in respect of a statutory defence, such as that created by s 998(6), which by statute the accused is required to establish[48]. The standard of proof necessary to discharge the legal burden imposed upon the accused in such a case is proof on the balance of probabilities[49].

33 The distinction between the "legal burden" and the "evidential burden" has been explained in this Court as the difference between "the burden … of *establishing a case*, whether by preponderance of evidence, or beyond a reasonable doubt" and "the burden of proof in the sense of *introducing*

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44 *King v The Queen* (2003) 215 CLR 150 at 168 [52] per Gummow, Callinan and Heydon JJ; [2003] HCA 42.

45 *Fingleton v The Queen* (2005) 227 CLR 166 at 198 [83] per McHugh J (footnote omitted); [2005] HCA 34, and see *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ; [1971] HCA 20.

46 *Da Costa v The Queen* (1968) 118 CLR 186 at 213-215 per Owen J, Kitto, Menzies and Windeyer JJ agreeing; [1968] HCA 51; *Lee Chun-Chuen v The Queen* [1963] AC 220 at 229-230 per Lord Devlin; *Parker v The Queen* (1964) 111 CLR 665 at 681-682; [1964] AC 1369 at 1392.

47 As to the defences at common law and created by statute where the accused bears an evidential burden, despite the prosecution's legal burden, see generally *Cross on Evidence*, 8th Aust ed (2010) at [7050].

48 *Parker v The Queen* (1964) 111 CLR 665 at 681-682; [1964] AC 1369 at 1392.

49 See eg *Sodeman v The King* (1936) 55 CLR 192 at 216 per Dixon J; [1936] HCA 75; *Johnson v The Queen* (1976) 136 CLR 619 at 644 per Barwick CJ, 653-654 per Gibbs J, 660 per Mason J agreeing; [1976] HCA 44.

evidence"[50] (emphasis in original). It has also been explained in the 8th Australian edition of *Cross on Evidence* by reference to the distinction between the functions of judge and jury[51]:

> "The concept of the evidential burden is the product of trial by jury and the possibility of withdrawing an issue from that body. Unlike the concept of the legal burden it is not a logical necessity of litigation about questions of fact: 'If it were to be said of any issue, that it was not covered by an evidential burden, the only effect would be to remove the judge's filtering power in respect of that issue'."

What the preceding passage makes clear is that the term "evidential burden" directs attention to the function of the trial judge when instructing the jury about the issues which they are required to determine.

The question for the trial judge

34 There are some "defences" in respect of which the accused bears no evidential burden because the negativing of such defences is an integral part of the prosecution's positive case, on which it bears the legal burden. It is not necessary here to discuss which defences fall into that category and which defences give rise to an evidential burden on the accused.

35 Where, as in the present case, a statute creating an offence provides for a defence and imposes the legal burden of establishing that defence on the accused, then the accused also bears the evidential burden. For that evidential burden to be met there must be evidence upon which the trial judge can properly direct the jury that the defence is open as a matter of law.

36 If a trial judge has to consider whether, at the close of the evidence in a criminal trial, a particular defence should be left to the jury, the question which the trial judge will have to ask himself or herself will be:

1. In a case where the legal burden is on the prosecution and the evidential burden on the accused – is there evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to

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50 *Purkess v Crittenden* (1965) 114 CLR 164 at 167-168 per Barwick CJ, Kitto and Taylor JJ; [1965] HCA 34.

51 *Cross on Evidence*, 8th Aust ed (2010) at [7200] (footnote omitted).

have a reasonable doubt that each of the elements of the defence had been negatived[52]?

2. In a case in which both the legal burden and the evidential burden rest upon the accused – is there evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to conclude on the balance of probabilities that the defence had been established?

It is the latter question which should have been asked in this case at trial. It can be reframed by reference to s 998(6) into an inquiry whether there was evidence from which a reasonable jury, properly instructed, could find that it was more likely than not that the appellant lacked the proscribed purpose. Put another way – was there evidence from which the jury could conclude that it was unlikely, in the sense of improbable, that the appellant had the proscribed purpose?

37 The appellant was not required to produce evidence of his subjective purpose or purposes in order to meet the legal burden of establishing the statutory defence. The legal burden on him was to prove on the balance of probabilities that he lacked the proscribed purpose. One way of doing that was to adduce or point to evidence inconsistent with the proposition that he had that purpose. He did not have to point to evidence of his actual purpose in order to invoke the defence. Any evidence that could support an inference that the appellant did not have the proscribed purpose was relevant to the statutory defence. The question whether he had discharged the "evidential burden" was to be answered accordingly.

38 It may be observed that the appellant never had the benefit of a consideration by the trial judge of the whole of the evidence in light of the question which the trial judge was required to ask himself in determining whether the defence should be left to the jury. In fairness to the trial judge, it does not appear that he had the benefit of submissions directing him to that question. That question was only asked and answered adversely to the appellant by the Court of Appeal. An important element of the evidence relevant to the discharge of the evidential burden by the appellant was evidence of his good character.

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52 A question on the formulation of which there is "little direct authority" – *Cross on Evidence*, 8th Aust ed (2010) at [7050]. See *Stingel v The Queen* (1990) 171 CLR 312; [1990] HCA 61 in relation to the defence of provocation.

The evidence of good character

39 Section 998(6) imposed a legal burden on the appellant to negative, on the balance of probabilities, a dishonest purpose. The appellant called extensive evidence going to his honesty. The question arises – how should such evidence have been used? In this case, the answer is not difficult.

40 In *Attwood v The Queen* the Court said[53]:

> "The expression 'good character' has … a known significance in relation to evidence upon criminal trials; for it denotes a description of evidence in disproof of guilt which an accused person may adduce. He may adduce evidence of the favourable character he bears as a fact or matter making it unlikely that he committed the crime charged."

Their Honours quoted with approval the observation of Cockburn CJ in *R v Rowton*[54]:

> "The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried."

The statement in *Attwood* and the quotation from the judgment of Cockburn CJ were reiterated in *Simic v The Queen*[55] albeit with the qualification, apparently directed to the statement by Cockburn CJ, that it "did not purport to be a full statement of the law on the subject".

41 The admission and use of evidence of good character has a long history. It dates back, as Gummow J pointed out in *Melbourne v The Queen*[56], to a time before the accused became a competent witness when there was generally no question of a jury using such evidence in an assessment of the accused's testimonial credit. Its history has been characterised by conceptual confusion between reputation and actual disposition. As McHugh J said in *Melbourne*, character refers to the inherent moral qualities or disposition of a person. It is to be contrasted with reputation, which refers to the public estimation or repute of a

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53 (1960) 102 CLR 353 at 359; [1960] HCA 15.

54 (1865) Le & Ca 520 at 530 [169 ER 1497 at 1502].

55 (1980) 144 CLR 319 at 333; [1980] HCA 25.

56 (1999) 198 CLR 1 at 26 [68]; [1999] HCA 32.

person irrespective of that person's inherent qualities[57]. The evidence in the present case went to the actual disposition of the appellant. The witnesses called on his behalf testified to their dealings with him, and knowledge of him, as an honest person.

42 In the end, as Gummow J said in *Melbourne*[58]:

> "The issues in the particular case and the nature of the evidence of 'good character' which is proffered will guide the process of reasoning of the tribunal of fact on the path to providing an answer to the ultimate question of whether the accused is guilty beyond reasonable doubt."

The same proposition applies to the use of evidence of good character in support of the statutory defence in this case.

43 In discussing what is required of a judge directing a jury where evidence of good character has been called, Hayne J, in *Melbourne*, referred to the common example of an accused of previous undoubted honesty in money matters being tried for an offence of fraudulently obtaining financial advantage. In such a case, as his Honour observed[59]:

> "the judge may think it appropriate to draw the attention of the jury to the fact that prior good character may be thought, by them, to make it less likely that the accused acted with dishonest intent."

His Honour added the caveat that on those bare facts there is no requirement that the judge give such a direction. But his observation recognised the potential relevance of evidence of honesty to the likelihood that an accused person has acted dishonestly.

44 The statutory defence in s 998(6) raises an issue of honesty. The purpose of creating a false or misleading appearance of active trading is a dishonest purpose. Evidence of the appellant's honesty was capable of supporting a submission that it was improbable that he acted with that dishonest purpose. The Court of Appeal's dismissal of the evidence of the appellant's good character as evidence which "does not address his subjective purpose or purposes"[60] was an

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57 (1999) 198 CLR 1 at 15 [33].

58 (1999) 198 CLR 1 at 28 [72] (footnote omitted).

59 (1999) 198 CLR 1 at 57 [156].

60 (2009) 260 ALR 719 at 751 [125](g).

error. The Court failed to consider the relevance of the evidence to the question whether the appellant was unlikely to have had the proscribed dishonest purpose.

Grounds 1 and 2 – whether the evidential burden was discharged

45 The appellant's submissions pointed to a number of aspects of the evidence at trial, including his own evidence, that were said to be relevant to the presence or absence of the proscribed purpose. As already explained, in assessing that evidence and its relevance, it is necessary to bear in mind that the purpose which he was required to negative on the balance of probabilities was a dishonest purpose.

46 Evidence upon which the appellant relied in contending that he had met the evidential burden included:

1. His evidence given in cross-examination that it did not cross his mind, nor did he understand, that Mr Scook had an interest in creating a false appearance of active trading.

2. His evidence that he acted only upon instructions from people known to him to be reputable business people.

3. His evidence that he was aware that the ASX business rules required him to consider whether the person placing an order with him might have an interest in creating a false appearance of active trading and whether the relevant order appeared to have a legitimate commercial reason.

4. Evidence from six character witnesses as to his honesty.

47 Whatever weight might be attached to these aspects of the evidence in light of the evidence taken as a whole, it cannot be said they were irrelevant to whether the appellant lacked the proscribed dishonest purpose in effecting the transactions the subject of the charges against him. A jury, if they considered such evidence at its most favourable to the appellant, could well ask: is it really likely that an honest man who is acting on instructions from reputable people, who he has no reason to believe have a dishonest purpose, is himself acting with the dishonest purpose of creating a false appearance of active trading in shares – when he was aware of the requirements of the business rules of the ASX and of the law? It may be said that the narrow focus of the question renders it artificial. However, it is framed as it is to illustrate that there was a basis rooted in logic and experience upon which a reasonable jury, considering the evidence identified above, might come to a conclusion in favour of the appellant on the balance of probabilities. The reality of the jury's ultimate decision-making would be more complex because they would have to decide whether to accept all or any of those

favourable elements of the evidence and weigh them up against evidence in the case pointing in another direction. Nevertheless, the question as framed is one which counsel for the defence could fairly have put to the jury and should have been allowed to put to the jury in his closing address. It was evidence which, viewed at its most favourable to the appellant, could have led the jury to be satisfied on the balance of probabilities that he lacked the proscribed purpose under s 998(6). In coming to a contrary conclusion the Court of Appeal erred.

48 It is true that much of the appellant's evidence was directed to his assertion that he did not know of the absence of any change in beneficial ownership of the shares the subject of the impugned transactions. There is a question whether evidence directed to that assertion is to be excluded from consideration in relation to the statutory defence. It may be said that the sequence of decision-making required of the jury by the structure of s 998 would render evidence of the requisite lack of knowledge irrelevant to the absence of the proscribed purpose. The assumed sequence involves the following steps:

- If the jury were to decide that they were not satisfied beyond reasonable doubt that the appellant knew that there was no change in the beneficial ownership of the shares involved in the transactions, the appellant would be acquitted – cadit quaestio.

- If the jury were to decide that they were satisfied beyond reasonable doubt that the appellant had the requisite knowledge, then they would necessarily have rejected the evidence that he did not have that knowledge.

- It is only if the jury were satisfied beyond reasonable doubt that the appellant had the requisite knowledge that they would need to consider the statutory defence (assuming that defence to be open on the evidence). On this basis it might be argued that evidence by the appellant that he lacked the incriminating knowledge should not be taken into account in deciding whether he discharged the evidential burden imposed by the statutory defence.

49 Such logic, while attractive, should not be treated as exhaustive of the reasoning to be applied in determining whether evidence of lack of incriminating knowledge, for the purpose of s 998(5), may be relevant to the statutory defence. The jury may reach a finding adverse to an accused on the question of knowledge by a variety of paths. That finding will involve rejection of the accused's evidence in so far as it bears directly upon his knowledge. Nevertheless, elements of the evidence relating to the circumstances in which an accused person claimed not to have had the relevant knowledge may not have been rejected and may be relevant to the existence of the proscribed purpose. It is not

necessary for the disposition of this appeal to determine whether, and to what extent, such evidence might have remained "in play". A cautious approach to ruling it out is indicated.

50 In the present case, the jury returned verdicts of guilty on the relevant counts, each of which necessarily involved a finding, adverse to the appellant, that he knew that there was no change in the beneficial ownership of the shares in each of the relevant transactions. Those verdicts cannot be relied upon in this appeal. They could only be invoked, as they were by the Court of Appeal, to determine whether, notwithstanding legal error by the trial judge, there had been no substantial miscarriage of justice. That determination by the Court of Appeal was not supported or relied upon by the Crown.

51 The appeal should succeed on grounds 1 and 2, which overlap. The submissions in support of both were ultimately directed to the sufficiency of the evidence at trial to discharge the evidential burden resting on the appellant in respect of the statutory defence under s 998(6). There was evidence upon which that defence should have been left to the jury.

Ground 3 – the expert evidence

52 The record concerning the content of the expert evidence which the appellant wished to adduce was sketchy. There were no expert reports or proofs of evidence marked for identification or otherwise before the District Court. Counsel said very little about the content of that evidence at trial. If there is a retrial, no doubt the foundation for the admission of such evidence will be elaborated with some particularity and the trial judge fully apprised of its significance. It is clear enough that the basis upon which the trial judge rejected the evidence at the close of the appellant's testimony was erroneous. However, having regard to the success of the appellant on the first two grounds of appeal, it is unnecessary to deal further with this ground.

Conclusion

53 The order of the Court should be:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Western Australia made on 16 October 2009 dismissing the appeal against conviction and, in its place, order that:

   (a) the appeal to that Court be allowed;

(b) the appellant's conviction be quashed; and

(c) the matter be remitted to the District Court of Western Australia for a new trial.

54 HEYDON J. I agree that the appeal should be dismissed for the reasons given by Bell J, and would add only three things.

55 It was submitted for the appellant that one purpose of his conduct was performing a service for a client in return for a fee and that that was a purpose which was not the purpose of creating a false or misleading appearance of active trading in securities on a stock market. But the purpose of performing a service for a client for a fee is a purpose compatible with the existence of a purpose of creating a false or misleading appearance, unless there is evidence that the first purpose is the sole purpose. The evidence in this case could not establish that the first purpose was the sole purpose. As Bell J points out, a person may act with the purpose of bringing about a result (like creating a false or misleading appearance of active trading) without necessarily having a financial or other interest in that result. And a person may also act with the purpose of bringing about that result even if another purpose was to perform a service for a client in return for a fee. The purpose of performing a service for a fee does not exclude the purpose of creating a false or misleading appearance of active trading. Each item on which the appellant relied in support of his argument that evidence existed to justify his defence under s 998(6) of the *Corporations Act* 2001 (Cth) was not inconsistent with the defence in the sense that it did not contradict it[61]. The difficulty is that none of them supported it.

56 Secondly, even if the expert evidence filed by the appellant was capable of constituting evidence of the appellant's purpose, which is a proposition postulating a very indirect and Byzantine form of reasoning, the trial judge's failure to take it into account was not wrong. That is because it was never tendered. No argument was ever put as to why a tender should have succeeded in relation to the s 998(6) defence. Nor was it demonstrated in this Court how the expert evidence supported the s 998(6) defence.

57 Thirdly, s 998(6) is unorthodox. It reverses the burden of proof, and calls for proof of a negative proposition. The appellant's testimony did not contain direct evidence of that negative proposition. What is the evidentiary significance of a person in the position of the appellant failing to give direct testimony? In a civil case, *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd*[62], Handley JA extended the principles of *Jones v Dunkel*[63] to a case where a

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61 For the legislative background, see n 66 in the reasons for judgment of Bell J.

62 (1991) 22 NSWLR 389 at 418-419.

63 (1959) 101 CLR 298; [1959] HCA 8.

party failed to ask a witness questions in chief on a particular topic. He said[64]: "I do not consider that inferences should be drawn favourable to a party whose counsel refrained from asking any question on [the particular] topic." Could that reasoning be employed in a criminal case like the present[65]? Could it be employed adversely to the accused? Could it be employed on a submission that there was no evidence to support the s 998(6) defence? These questions were only briefly raised in argument. In view of the existence of other reasons for dismissing the appeal, it is not necessary to examine them.

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64 *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 419.

65 Cf *Dyers v The Queen* (2002) 210 CLR 285 at 291 [6]; [2002] HCA 45.

BELL J.

Introduction

58 The appellant was convicted, following a trial before Wisbey DCJ and a jury in the District Court of Western Australia, of 25 counts of false trading on the stock market. Each count charged the appellant with having created a false or misleading appearance of active trading in the ordinary shares of Intrepid Mining Corporation NL ("Intrepid") on the Australian Stock Exchange ("the ASX")[66]. A person who enters into, or who carries out, the sale or purchase of any securities in circumstances that do not involve any change in the beneficial ownership of the securities is taken to have created a false and misleading appearance of active trading in those securities under a deeming provision[67]. It is a defence to a prosecution that depends upon the operation of the deeming provision if the accused proves that the purpose or purposes for which he or she engaged in the transaction was not, or did not include, the purpose of creating a false or misleading appearance of active trading in the securities ("the proscribed purpose")[68].

The procedural history

59 The prosecution depended upon the deeming provision in proof of each of the counts. None of the transactions were said to have involved a change in the beneficial ownership of the shares.

60 At the time of these events the appellant was a director of a stockbroking firm, Paul Morgan Securities Pty Ltd ("Paul Morgan Securities"). One of his clients was Dean Scook, who controlled a company, Challiston Pty Ltd ("Challiston"). Another was Steven Masel. Another was Lance Masel, who with

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66 The offences were alleged to have occurred in February 1998. At the time, the offence was created by s 998(1), read with s 1311(1), of the Corporations Law. A contravention of s 998(1) of the Corporations Law occurring before the commencement of the *Corporations Act* 2001 (Cth) ("the Corporations Act") is a pre-commencement liability under s 1401(1) of the Corporations Act for which substituted liability equivalent to the pre-commencement liability applies under s 1401(3) of the Act: see *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 88-92 [103]-[115] per Gummow, Hayne and Crennan JJ; [2006] HCA 44.

67 Corporations Act, s 998(5).

68 Corporations Act, s 998(6).

Steven controlled a finance company, Walthamstow Pty Ltd ("Walthamstow"). Challiston and Walthamstow each had accounts with Paul Morgan Securities.

61 In late 1997 and early 1998 Dean Scook entered into a series of share finance facilities with Walthamstow in order to fund the purchase of parcels of shares in Intrepid. One of Walthamstow's requirements under the finance arrangements was that the shares purchased by Dean Scook or Challiston were to be held in Walthamstow's name as security for the loan monies. Shares purchased by Challiston through Paul Morgan Securities as sponsoring broker on CHESS[69] were "re-booked" by the appellant on the instructions of Dean Scook or Steven Masel to the Walthamstow account.

62 The offences related to the placement of orders by the appellant effecting the purchase by Challiston of parcels of Intrepid shares that were held on the Walthamstow account as security for the loan advances made by it to Challiston. Beneficial ownership of the shares at all times remained with Challiston. The transactions were carried out between 2 and 27 February 1998.

63 Since the prosecution depended upon proof of acts that engaged the deeming provision it was not necessary to prove that any transaction had created a false or misleading appearance of active trading on the ASX. Nonetheless, expert evidence to prove that the transactions had created that appearance in order to rebut the anticipated statutory defence was led in the prosecution case.

64 The appellant gave evidence that he had not known that there had been no change in the beneficial ownership of the shares. However, he did not state that he had not had the proscribed purpose in carrying out the transactions. He proposed to lead expert evidence to counter that led in the prosecution case. The trial judge found that expert evidence was not relevant to any issue between the parties. His Honour considered that the statutory defence had not been raised in circumstances in which the appellant's case was that he did not know the character of the transactions.

65 The appellant was convicted of 25 of 26 counts charged in the indictment against him[70]. He was sentenced to 12 months' imprisonment on one count, subject to him being immediately released on entering a bond to be of good behaviour for a period of two years[71]. He was fined the sum of $1,000 on each of the remaining counts.

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69 The Clearing House Electronic Subregister System, operated by the ASX.

70 The appellant was acquitted of count 283. Alibi evidence had been led in relation to this count.

71 *Crimes Act* 1914 (Cth), s 20(1)(b).

66 It was a joint trial. Dean Scook was charged in the same indictment with 259 counts of false trading in Intrepid shares. One hundred of these counts charged offences in the alternative. In the event, Dean Scook was convicted of 158 offences. Many of the transactions charged against Dean Scook had been carried out by him through other firms of stockbrokers. The prosecution did not contend that the appellant was aware of these other transactions. It did not seek to make a case that Dean Scook and the appellant had been engaged in a joint criminal enterprise.

67 The appellant unsuccessfully appealed against his convictions to the Court of Appeal of the Supreme Court of Western Australia (Pullin, Buss and Miller JJA). He appeals by special leave to this Court on grounds which challenge the rejection of the expert evidence in his case and the refusal to leave the statutory defence for the jury's consideration. For the reasons that follow I would dismiss the appeal.

The evidence

68 The central issue in the appeal concerns the sufficiency of the evidence to raise the statutory defence and for this reason it is helpful to refer to the appellant's evidence in somewhat greater detail. What follows is a summary of parts of that evidence.

69 In January 1998 the appellant opened accounts for Challiston and Walthamstow with Paul Morgan Securities. In late January 1998 on Dean Scook's instructions the appellant effected the purchase of a parcel of Intrepid shares for Challiston. Dean Scook asked the appellant to re-book the shares to the Walthamstow account. The appellant did so. In the result the shares purchased by Challiston were held in Walthamstow's name with Paul Morgan Securities as the sponsoring broker. Re-booking was unusual. Ordinarily, it was carried out to correct errors.

70 The officer charged with ensuring compliance with the ASX business rules at Paul Morgan Securities was Carol Simpson. She asked the appellant for further information about the re-booking of the Challiston shares to the Walthamstow account. She told the appellant that she wanted to make sure that there had been a change in the beneficial ownership of the shares. The appellant knew that Walthamstow was acting for Dean Scook or Challiston in connection with the purchase of Intrepid shares but he did not know the details of the finance arrangements. He was aware that under the ASX business rules it was necessary that there be a change in the beneficial ownership of securities that were traded. Steven Masel, on behalf of Walthamstow, advised Paul Morgan Securities that Dean Scook was authorised to sell shares held on its account.

71 Following his discussion with Carol Simpson, the appellant asked Dean Scook about the nature of his finance arrangements with Walthamstow. Dean Scook said that he had a long association with Walthamstow and that there were a variety of finance agreements between them. He did not disclose the details of these arrangements. The appellant told Dean Scook that Carol Simpson was concerned about the re-booking of transactions because of the possibility of trading without a change of beneficial ownership. Dean Scook assured the appellant that this would not occur. He undertook to inform the appellant whether he was selling shares which he owned or shares that Walthamstow owned. The appellant relayed the contents of this discussion to Ms Simpson. He proposed that he would keep a record of sales on the Walthamstow account in which Walthamstow was the owner and those in which Dean Scook was the owner. Ms Simpson agreed to this proposal.

72 Following these discussions, during February 1998 the appellant placed buy and sell orders effecting the purchase by Challiston of Intrepid shares held on the Walthamstow account. Instructions for the buy orders were always given by Dean Scook. The appellant received instructions for the sell orders from Dean Scook or Lance Masel. Settlement was on a "T plus five" basis, meaning within five working days from the date of the transaction. After placing the buy orders the appellant would speak to Steven Masel, or Steven Masel would contact the appellant, and instructions would be received to re-book the shares to the Walthamstow account.

73 The appellant did not put through sell orders on the Walthamstow account without being advised whether the shares belonged to Walthamstow or to Challiston. He kept a record of the advice that he was given concerning the ownership of the shares, designating parcels as "Lance" or "Dean" parcels respectively. In this way the appellant sought to make sure that he did not trade shares belonging to Challiston held on the Walthamstow account to Challiston. He did not knowingly execute any sell orders from Walthamstow to Challiston that did not involve a change in beneficial ownership. On the occasions when Dean Scook told the appellant that the sell order related to shares owned by him, the appellant ensured that the stock was not purchased by Challiston.

74 The appellant did not press Lance Masel or Dean Scook for more information about their dealings. He regarded himself as providing "an execution service". It was a service that did not include the provision of advice to either client.

75 It did not occur to the appellant that Dean Scook had an interest in creating a false appearance of active trading in Intrepid's shares. The appellant had not perceived any irregularity about the conduct of Dean Scook's trading. Dean Scook was a "believer" in Intrepid, whereas the appellant believed that Lance Masel had made a profit and that he was "moving on".

76 The appellant was pleased when the Masels started trading with Paul Morgan Securities since he was keen to see the firm grow. At the time the appellant opened the Walthamstow account, it appeared that Walthamstow was an existing Intrepid shareholder. The Masels were major traders on the ASX and the appellant assumed that their holdings in Intrepid were substantial.

The expert evidence

77 Professor Raymond da Silva Rosa, the Director of the Western Australian Centre for Capital Markets Research at the University of Western Australia, gave evidence for the prosecution of the effect of the transactions charged against Dean Scook ("the yellow trades"), the effect of the transactions charged against the appellant ("the green trades") and the combined effect of the yellow and green trades on the appearance of trading on the ASX. His report and a supplementary report, both containing opinions about the effect of the green trades, were in evidence. Parts of the reports dealing with the green trades were projected onto a screen during the course of his oral evidence.

78 Professor da Silva Rosa said that the green trades would have been likely to increase the price of Intrepid shares. He believed that they would have created, or contributed to, the appearance of an informed investor in possession of "positive news" about Intrepid taking a position in the stock. He also believed that the green trades would have contributed towards the appearance of active trading in Intrepid. In the absence of the green trades Professor da Silva Rosa said that it was likely that investors would have had less confidence that there was a liquid market in Intrepid shares.

The conduct of the trial – the expert evidence

79 The determinations of the admissibility of the appellant's expert evidence and the availability of the statutory defence were not assisted by the informality with which each was approached by trial counsel. At the end of the appellant's evidence the prosecutor informed the Court that expert reports by Dr Michael Aitken and Mr Guy Le Page had been served on the prosecution before the trial. The prosecutor foreshadowed that he would object to the admission of expert evidence in the appellant's case on the ground of relevance. The appellant's counsel did not tender the reports and seek a ruling on the admissibility of the opinions expressed in them. It does not appear from material in the appeal books that counsel made the submissions that were developed on appeal as to the claimed relevance of opinion evidence to a circumstantial case supporting the statutory defence.

80 There was no evidence before the trial judge or on appeal as to the contents of either report. From the prosecutor's summary of their contents, it appears that each report was directed to establishing that there existed reasonable explanations for the changes in the price of Intrepid shares, and in the volume of

trading in Intrepid stock, other than that the market in Intrepid's stock was being manipulated to convey a false or misleading appearance of active trading.

81 The appellant's expert evidence was not formally rejected, neither report having been tendered. The trial judge did indicate his acceptance of the prosecutor's submission. His Honour said the expert evidence did not "have probative consequence in the issue to be determined by the jury." Following this indication the appellant's counsel raised the use that was to be made of Professor da Silva Rosa's reports. The prosecutor responded by expressing his willingness to withdraw "the report". In context, the exchange is to be understood as referring to both of Professor da Silva Rosa's reports. The two reports were withdrawn and thereafter no further reference was made to Professor da Silva Rosa's evidence in the trial.

82 The material parts of the trial judge's remarks made in response to the foreshadowed objection are set out below:

> "[T]he subsection [s 998(6)] provides that it is … a defence if it is proved that the purpose or purposes for which Braysich did that act was not or did not include the purpose of creating a false or misleading appearance. Mr Braysich gave evidence and enunciated in very clear terms that he at no stage had knowledge or belief that the shares in the Walthamstow account were held by that company other than as the beneficial owner and that he did not engage in any transaction in the knowledge that there was no change in beneficial ownership.
>
> In fact his evidence is to the effect that he took positive steps because of some concerns to ensure that the position was that these transactions involved a change in beneficial ownership. It is proposed by Mr Braysich to call at this stage the two experts, the content of whose evidence has been outlined a short time ago. The Crown asserts that the evidence cannot properly be led because it does not go to any issues between the Crown and Braysich particularly having regard to the nature of the evidence given by Braysich.
>
> In my view, having regard to the way the case has proceeded, there is no room in the evidence of Braysich or the other material adduced in the Crown case and the case of the accused, Scook, from which the jury would be entitled to infer another purpose. The case against Braysich stands or falls on the deeming provision."

<u>The availability of the statutory defence</u>

83 Following the judge's "ruling" on the relevance of the expert evidence, the appellant's counsel raised the question of the statutory defence:

"McCusker, Mr: Secondly, while I am on my feet, your Honour, I think I correctly understand your Honour to say that when I address the jury I am not permitted to put to them that purpose is an issue.

Wisbey DCJ: We can discuss that later but there is no – the case presented by – the evidence presented by Mr Braysich is otherwise.

McCusker, Mr: Perhaps we can have a discussion about that later.

Wisbey DCJ: Yes."

84 Contrary to the tenor of the concluding portion of this exchange, the appellant's counsel appears to have considered that the trial judge had ruled that the statutory defence was not available. After the close of the appellant's case, when the issue properly fell for consideration, the only discussion concerning the defence was:

"McCusker, Mr: Your Honour, just before the jury comes in, there is one matter I would like to clarify, I did raise it yesterday. My understanding from your Honour's ruling yesterday is that I am not permitted to address the jury on the question of the statutory defence of 'no purpose'. It was on that basis that the two witnesses were excluded so I wouldn't want to trespass on your Honour's direction.

Wisbey DCJ: They were excluded on the basis there's no evidence of other purpose.

McCusker, Mr: I understood it was your Honour's ruling, I just wanted to make sure that that means I can't address on it.

Wisbey DCJ: Yes. Do you wish to be heard on this, Mr Hall?

Hall, Mr: I would have thought from Mr McCusker's point of view there is no point in addressing on it since there is no evidence of it.

Wisbey DCJ: Anyway, consistent with the view I have taken, I will be telling the jury that that isn't an issue. So under those circumstances, it would seem that it ought to be left alone.

McCusker, Mr: I understand that, your Honour, I with respect disagree."

85 The trial judge directed the jury that the defence under s 998(6) did not apply to the trial of the appellant. At the conclusion of the summing up the appellant's counsel sought to preserve his position. He submitted that:

"Just for the record I think your Honour has ruled on both these points but we do maintain that the defence under sections 998(5) [sic, s 998(6)] is available to Mr Braysich."

86 It does not appear from the material in the appeal books that the appellant's counsel at any time explained to the trial judge the basis upon which the statutory defence was said to have been raised. On appeal to this Court, it is said that his Honour, wrongly, concluded that the appellant's failure to give evidence that he did not have the proscribed purpose was determinative against the defence. Particular criticism is directed to the statement that there was no basis upon which the jury might uphold the defence because the case "stands or falls on the deeming provision" given that the defence is confined to a prosecution in which the deeming provision is engaged.

87 The trial judge's *ex tempore* remarks were made in the context of his consideration of the relevance of expert evidence to the issues in the trial. It is not clear that his Honour, assisted by relevant argument, would have been of the view that absence of the proscribed purpose within the meaning of s 998(6) could only be established by direct evidence. It is not clear that he was doing more than expressing his view about the capacity of the evidence to support the statutory defence in this case.

The reasons of the Court of Appeal

88 The central issue in the Court of Appeal was whether the trial judge erred in withholding the statutory defence. The Court of Appeal found that he had not. In the Court of Appeal's view, even if it was an error of law not to leave the defence, it was not an error that had occasioned a substantial miscarriage of justice. In this Court the respondent acknowledged that if the statutory defence should have been left for the jury's consideration, it would not be appropriate to dismiss the appeal upon the basis that no substantial miscarriage of justice had occurred[72].

89 The Court of Appeal accepted that direct evidence of an accused person's purpose or purposes, including the absence of the proscribed purpose, is not a condition of raising the statutory defence[73]. However, it concluded that the evidence was insufficient to raise the defence[74].

90 The Court of Appeal grouped the evidence relied upon in support of the appellant's circumstantial case that he did not possess the proscribed purpose into

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72 *Criminal Appeals Act* 2004 (WA), s 14(2).

73 *Braysich v The Queen* (2009) 260 ALR 719 at 750 [125].

74 *Braysich v The Queen* (2009) 260 ALR 719 at 752 [126].

seven categories[75]. In summary, and preserving the Court of Appeal's lettering, this evidence was:

(b) the appellant was a stockbroker and the transactions were carried out in the ordinary course of his business on the instructions of his clients and did not involve the provision of any advice (the "execution service" evidence);

(c) Dean Scook and Steven Masel were known to the appellant and believed by him to be reputable. There was no evidence that either had told him that the purpose of either was to create a false or misleading appearance of active trading;

(d) the appellant had no motive to create a false or misleading appearance of active trading in Intrepid stock. The only benefit he received from executing the transactions was the receipt of discounted brokerage fees;

(e) Mr Scook's evidence was that it was not his purpose to create a false or misleading appearance of active trading in Intrepid;

(f) the appellant's purpose in completing two sell order notes had been to distinguish between shares sold on the Walthamstow account that were beneficially owned by it and those shares that were beneficially owned by Challiston;

(g) the appellant was of good character and had a reputation for honesty; and

(h) the cross-examination of the appellant by the prosecutor on matters relevant to whether the appellant had the purpose of creating a false or misleading appearance of active trading in Intrepid stock included the appellant's knowledge of the ASX business rules and his denials that certain transactions had raised his suspicions. It also included the appellant's belief that there existed legitimate commercial reasons explaining the transactions: that Dean Scook was a "believer" in the stock and that Lance Masel had made a profit and was "moving on".

91 The Court of Appeal said of the evidence summarised in (b), (c), (e), (f), (g) and (h) that in each case it did not address the appellant's subjective purpose or purposes[76].

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75 *Braysich v The Queen* (2009) 260 ALR 719 at 750-752 [125].

76 *Braysich v The Queen* (2009) 260 ALR 719 at 750-752 [125].

92 The Court of Appeal was critical of the appellant's submission that the evidence pointed to the absence of any financial motive for engaging in market manipulation. It characterised the evidence summarised at (d) above as misleading if relied upon to prove absence of motive[77]. The Court of Appeal noted that there was other evidence that was capable of bearing on the appellant's motive[78]. This evidence included that Paul Morgan Securities had received a fee in the order of $55,000 to $60,000 for underwriting a private placement of Intrepid shares. It also included evidence that Paul Morgan Securities and Saxby Bridge Pty Ltd, a company in which the appellant had a substantial shareholding, had obtained other benefits in connection with that placement.

93 The Court of Appeal said that in the circumstances of this case the absence of direct evidence of the appellant's purpose or purposes in carrying out the transactions was a "critical omission."[79] In its view, a jury properly directed as to the law and acting reasonably could not be satisfied on the balance of probabilities that the appellant's purposes did not include the proscribed purpose in carrying out the transactions. It followed that the trial judge had been correct in not leaving the statutory defence for the jury's consideration[80].

The appellant's submissions

94 The appellant contends that the Court of Appeal erred in much the same way that he submits the trial judge erred. His failure to give evidence, in terms, that he did not have the proscribed purpose is said to have been treated at trial and on appeal as determinative of the capacity of the evidence to raise the defence. A second complaint is that the Court of Appeal examined the evidence in isolation, concluding that individual facts or circumstances did not bear on proof of his purpose, without considering the capacity of the evidence as a whole to support the inference that it was probable that in carrying out the transactions he did not have the proscribed purpose[81]. The appellant's third complaint is that the evidence raising the defence ought to have included the expert evidence which the trial judge rejected.

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77 *Braysich v The Queen* (2009) 260 ALR 719 at 750 [125].

78 *Braysich v The Queen* (2009) 260 ALR 719 at 750-751 [125].

79 *Braysich v The Queen* (2009) 260 ALR 719 at 752 [126].

80 *Braysich v The Queen* (2009) 260 ALR 719 at 752 [127].

81 cf *R v Hillier* (2007) 228 CLR 618 at 638 [48] per Gummow, Hayne and Crennan JJ; [2007] HCA 13.

95 Before addressing these criticisms of the Court's reasoning it is convenient to consider proof of the offence created by s 998(1) of the Corporations Act as the offence stood at the time.

The offence of false trading

96 Section 998 relevantly provided:

> "(1) A person shall not create, or do anything that is intended or likely to create, a false or misleading appearance of active trading in any securities on a stock market or a false or misleading appearance with respect to the market for, or the price of, any securities.
>
> …
>
> (5) Without limiting the generality of subsection (1), a person who:
>
> (a) enters into, or carries out, either directly or indirectly, any transaction of sale or purchase of any securities, being a transaction that does not involve any change in the beneficial ownership of the securities;
>
> …
>
> shall be deemed to have created a false or misleading appearance of active trading in those securities on a stock market.
>
> (6) In a prosecution of a person for a contravention of subsection (1) constituted by an act referred to in subsection (5), it is a defence if it is proved that the purpose or purposes for which the person did the act was not, or did not include, the purpose of creating a false or misleading appearance of active trading in securities on a stock market."

97 Proof that a transaction created a false or misleading appearance of active trading in securities on the stock market will often be attended by the difficulty of distinguishing between transactions that have that effect because they are designed to have that effect and those that have that effect even though they are carried out for legitimate commercial purposes[82]. However, certain classes of transaction are well recognised as being carried out for the purpose of market

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82 *North v Marra Developments Ltd* (1981) 148 CLR 42 at 58 per Mason J; [1981] HCA 68; see also Goldwasser, *Stock Market Manipulation and Short Selling*, (1999) at 62.

manipulation. These include "wash sales" and "matched orders"[83]. "Wash sales" are transactions of sale and purchase in which there is no change in the beneficial ownership of the securities[84]. "Matched orders" are transactions in which a person making an offer to buy or sell securities knows that an associate has made, or will make, a corresponding offer to sell or buy the same number of securities at the same price. Section 998(1) makes it an offence to create a false or misleading appearance of active trading in securities on a stock market. Section 998(5) deems the conduct of "wash sales" in par (a) and "matched orders" in pars (b) and (c) to have the effect of creating that appearance.

98 The Court of Appeal, correctly, held that the presumption of mens rea is not displaced either expressly or by necessary implication in the offence found in "the first limb" of s 998(1) (creating a false or misleading appearance of active trading on a stock market)[85]. It said that the requisite blameworthy state of mind for this offence is purpose: the prosecution must prove that it was the accused's purpose to create a false or misleading appearance of active trading in the securities[86]. In the case of a prosecution invoking the deeming provision, the Court of Appeal said that it was necessary to prove beyond reasonable doubt that the accused *knowingly engaged* in the activity described in s 998(5)[87]. The analysis reads the requirement of knowledge into s 998(5). It is, of course, common to read a provision creating a serious criminal offence such as this offence[88] as requiring proof of knowledge or some other blameworthy state of mind[89].

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83 Goldwasser, "The Regulation of Stock Market Manipulation and Short Selling in Australia", in Walker, Fisse and Ramsay (eds), *Securities Regulation in Australia and New Zealand*, 2nd ed (1998) 515 at 519.

84 Section 998(7) provides that a purchase or sale of securities does not involve a change in the beneficial ownership for the purposes of the section if a person who had an interest in the securities before the purchase or sale, or an associate of the person in relation to those securities, has an interest in the securities after the purchase or sale.

85 *Braysich v The Queen* (2009) 260 ALR 719 at 741 [86].

86 *Braysich v The Queen* (2009) 260 ALR 719 at 742 [89].

87 *Braysich v The Queen* (2009) 260 ALR 719 at 743 [94].

88 The offence is punishable by a maximum sentence of five years' imprisonment and/or a fine of 200 penalty units: s 1311(3) and Sched 3 of the Corporations Act.

89 *He Kaw Teh v The Queen* (1985) 157 CLR 523; [1985] HCA 43.

99 An alternative interpretation of the provision, taking into account the relationship between sub-ss (1), (5) and (6), is that proof of knowledge is not a requirement of the engagement of sub-s (5). Section 998(5) does not create an offence. It is a provision that facilitates proof of the offence created by s 998(1). It might have been thought that the function of s 998(6) in a prosecution of a s 998(1) offence when "constituted *by an act* referred to in subsection (5)" (emphasis added) was to transfer the onus of negativing the existence of a blameworthy state of mind to the accused. It is not uncommon in the provision of a statutory offence to transfer the onus with respect to the mental element to the accused, requiring that he or she persuade the jury on the balance of probabilities of the absence of "any criminal intention."[90]

100 However, the Court of Appeal's analysis of the operation of s 998 accorded with the way in which the trial was conducted. At trial the prosecution accepted that it was required to prove three elements of the offence: (i) that the appellant entered into or carried out the transaction charged in each count; (ii) that the transaction did not involve a change in the beneficial ownership of the shares; and (iii) that the appellant knew that fact[91]. Since the analysis, which was favourable to the appellant, was not in issue in this Court it is appropriate, in addressing the grounds of challenge, to assume its correctness[92]. Proof that an accused had knowledge of the facts and circumstances making his or her act criminal will frequently serve to establish that he or she possessed the purpose, or intention, of producing the result that flowed from the doing of the act. The defence provided by s 998(6) recognises that entering into or carrying out a transaction of sale or purchase that is known not to involve a change in beneficial ownership might be for purposes that do not include the proscribed purpose.

The sufficiency of the evidence to raise the statutory defence

101 Section 998(6) is a true defence. The legal burden is placed upon the accused to prove that he or she did not have the proscribed purpose in entering into, or carrying out, the transaction. It requires the accused to prove a negative as to his or her state of mind at the time of the transaction. That burden is

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90 *Sweet v Parsley* [1970] AC 132 at 150 per Lord Reid.

91 *Braysich v The Queen* (2009) 260 ALR 719 at 724 [14].

92 Section 998 has been repealed. The offence of false trading and market rigging is now provided in s 1041B of the Corporations Act. This offence applies to all financial products traded on financial markets. The s 1041B offence contains a deeming provision that is broadly similar to that found in s 998(5). The fault element of the offence created by s 1041B is not specified and is accordingly to be ascertained by reference to Ch 2 of the *Criminal Code* (Cth).

discharged by proof on the balance of probabilities[93]. The accused must first discharge an evidential burden of demonstrating that there is sufficient evidence to warrant the defence being left for the jury's consideration. Proof of a person's state of mind is a fact which like any other may be proved by circumstantial evidence[94]. Provided that there was evidence upon which the jury acting reasonably could have concluded that the appellant's purposes in carrying out the transaction charged did not include the proscribed purpose, the trial judge was obliged to leave the statutory defence for the jury's consideration.

102 The determination of the sufficiency of the evidence to raise the defence was to be made after the close of the evidence. At that time it was necessary to identify the evidence upon which it would be open to find that the defence was made out. The determination is analogous to the determination of an application that there is "no case to answer". The capacity of evidence to prove a defence (on the balance of probabilities) or the elements of an offence (beyond reasonable doubt) is a question of law[95]. The determination requires that the evidence is taken at its highest. This recognises that weighing evidence, finding facts and drawing inferences from the facts are matters for the jury to decide. In the case of a defence, the jury may draw any inference fairly open on the evidence favouring its acceptance and reject those parts of the evidence that are against that acceptance.

103 The appellant's evidence at trial was directed to his primary case – that he did not know that there had not been a change in the beneficial ownership of the shares. His omission to state that he did not have the proscribed purpose in carrying out the transactions did not preclude him from reliance on that alternative case in the event that the jury decided the question of knowledge against him.

104 The jury was free to approach its deliberations in whatever way it chose[96]. However, as earlier noted, the statutory defence could only arise in the event that s 998(5) was engaged. The appellant was entitled to be acquitted in the event that the prosecution failed to prove to the criminal standard that in carrying out the transaction charged he knew there had been no change in the beneficial ownership of the shares. It was necessary for the trial judge to identify evidence

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93 *Sodeman v The King* (1936) 55 CLR 192; [1936] HCA 75.

94 *Plomp v The Queen* (1963) 110 CLR 234; [1963] HCA 44.

95 *Hocking v Bell* (1945) 71 CLR 430 at 497 per Dixon J; [1945] HCA 16. See also Glass, "The Insufficiency of Evidence to Raise a Case to Answer", (1981) 55 *Australian Law Journal* 842.

96 *Stanton v The Queen* (2003) 77 ALJR 1151; 198 ALR 41; [2003] HCA 29.

from which it was open to find that the appellant's purposes in carrying out the transaction *knowing* that it did not involve a change in beneficial ownership did not include the proscribed purpose. Once the issue of knowledge was determined against the appellant, as it had to be before consideration of the statutory defence arose, some parts of the evidence on which the appellant relied as supporting his circumstantial case, that he did not have the proscribed purpose, ceased to have the capacity to do that work.

105 The point is illustrated by the appellant's reliance on evidence that he had not suspected that Dean Scook wanted to manipulate the market in Intrepid's shares. In the Court of Appeal and in this Court the appellant submitted that it was open to reason from this evidence that it was unlikely that he had a purpose of creating a false or misleading appearance. However, regardless of whether the jury accepted the appellant's evidence on this topic, it was evidence that could not provide a basis for inferring that the appellant did not have the proscribed purpose in carrying out a transaction *knowing* that it involved no change in beneficial ownership. This explains the Court of Appeal's rejection of the evidence summarised in (c), (e), (f), (g) and (h) as not going to proof of the appellant's purpose. It is convenient to consider the refusal to receive the appellant's expert evidence before addressing the evidence summarised in (b) and (d).

The absence of the expert evidence

106 The Court of Appeal said that the trial judge had been right to exclude the appellant's expert evidence. This was a conclusion that flowed from the Court's acceptance that the appellant had not raised the statutory defence. The Court of Appeal said that Professor da Silva Rosa's evidence had ceased to be relevant when the statutory defence was not raised and it followed that no occasion arose to rebut that evidence. It said that the appellant was not entitled, by expert evidence or otherwise, to "go behind" the deeming provision once that provision was engaged[97].

107 The appellant complains that the Court of Appeal did not address the nub of his argument, which was that the expert evidence went to proof of his purpose within s 998(6). In his submission, the admission of Professor da Silva Rosa's evidence carried with it implicit recognition that proof that the transactions did, or did not, have the effect of creating a false or misleading appearance of active trading on the ASX was logically relevant to the assessment of whether in carrying out the transactions he had that outcome as one of his purposes.

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97 *Braysich v The Queen* (2009) 260 ALR 719 at 756 [151].

108 All that is known of the content of the opinion evidence that the appellant wished to lead is that it went to demonstrating that reasonable explanations could be posited for the changes in the price of Intrepid shares and in the volume of trading in Intrepid other than that the market in Intrepid stock was being manipulated. Proof of those explanations was not capable of affecting the likelihood that the appellant did not have the proscribed purpose in carrying out transactions of sale and purchase on the market knowing that they did not involve any change of beneficial ownership.

109 At the end of the appellant's evidence, when the prosecutor raised the question of the relevance of expert evidence to the issues in the trial, it was open to the trial judge to review the basis upon which Professor da Silva Rosa's evidence had been received and to exclude it. The prosecutor's submissions invited such a course. So much was acknowledged by his offer to withdraw Professor da Silva Rosa's reports. It is regrettable that no attention was given to Professor da Silva Rosa's oral evidence. It, too, should have been withdrawn and the jury should have been given a direction to put the whole of his evidence out of consideration when dealing with the appellant's case. However, there is no reason to doubt the Court of Appeal's conclusion that the omission did not occasion a miscarriage of justice. Neither party made any reference to Professor da Silva Rosa's evidence in the course of their closing addresses. Senior counsel for the appellant did not ask the trial judge to give any direction concerning the matter.

Conclusion

110 The appellant's circumstantial case that he did not have the proscribed purpose in carrying out the transactions knowing that they did not involve a change in beneficial ownership comes down to the evidence summarised in (b) and (d) above. Together they support his submission that he was doing no more than providing an "execution service": the appellant, a man of good character, carried out the transactions on his clients' instructions in his professional capacity as a stockbroker. From this evidence it is said to have been open to conclude that it was probable that the appellant's only purposes were to perform a service for his clients (the evidence summarised in (b) above) in return for discounted brokerage fees (the evidence summarised in (d) above).

111 In considering the sufficiency of the circumstantial evidence to raise the defence the appellant is right to point to evidence from which it was open to infer that he did not have a financial incentive to engage in manipulation of the market. Whether this was the inference to be drawn from the whole of the evidence was a matter for the jury to determine. In what follows, the assessment of the "execution service" evidence includes taking into account the appellant's lack of financial motive for manipulating the market in Intrepid's shares.

112 Although the Court of Appeal said that the evidence summarised in (b) above did not address the appellant's subjective purpose, it went on to acknowledge that the inference was open that at all material times the appellant was acting in the ordinary course of his business as a stockbroker in carrying out the transactions[98]. The Court of Appeal is to be understood as having concluded that the "execution service" evidence did not provide a sufficient foundation for leaving the statutory defence for the jury's consideration.

113 An understanding of the reasons for the Court of Appeal's conclusion requires consideration of proof of purpose within s 998(6) and what it means to create a false or misleading appearance of active trading in securities on a stock market.

114 In *North v Marra Developments Ltd*[99] Mason J said of a provision of a New South Wales statute framed in similar terms to s 998(1)[100] that:

> "The section seeks to ensure that the market reflects the forces of genuine supply and demand. By 'genuine supply and demand' I exclude buyers and sellers whose transactions are undertaken for the sole or primary purpose of setting or maintaining the market price."

His Honour went on to explain of the transactions under consideration in that case that absent disclosure to the market of their true nature they would appear to be real or genuine, there being no overt sign of market support or manipulation. This gave the transactions the false or misleading appearance[101].

115 His Honour's remarks have been frequently cited in cases dealing with similar legislation, including cases dealing with s 998(1)[102]. The Court of Appeal

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98 *Braysich v The Queen* (2009) 260 ALR 719 at 752 [126].

99 (1981) 148 CLR 42 at 59.

100 Section 70 of the *Securities Industry Act* 1970 (NSW) provided that "[a] person shall not create or cause to be created or do anything which is calculated to create, a false or misleading appearance of active trading in any securities on any stock market in the State, or a false or misleading appearance with respect to the market for, or the price of, any securities."

101 *North v Marra Developments Ltd* (1981) 148 CLR 42 at 59.

102 *Fenwick v Jeffries Industries Ltd* (1995) 13 ACLC 1334 at 1345-1346; *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd* (1998) 28 ACSR 58 at 62-63 per Gleeson CJ; *Australian Securities Commission v Nomura International plc* (1998) 89 FCR 301 at 391-392; *R v Manasseh* (2002) 167 FLR 44 at 57-58 [36].

drew on those remarks in its discussion of the meaning of creating a false or misleading appearance of active trading[103]. The Court of Appeal said that "active trading" requires something more than ordinary volume or price changes in the securities in question. In this respect it cited with approval[104] the following passage from "Regulation of Stock Market Manipulation"[105]:

> "The determination whether a particular pattern of new trading has created actual or apparent active trading is a function of the prior state of the market in the security, the number of shares actively traded, and the general level of market activity as well as of the particular trading attributable to the alleged manipulator. Therefore, generalization as to how much trading is active trading is impossible."

There was no issue as to the Court of Appeal's analysis in these respects.

116 Transactions of sale and purchase in which there is no change of beneficial ownership do not reflect genuine forces of supply and demand in the market, and for this reason, if the true circumstances are not disclosed, are apt to convey a false or misleading appearance of active trading. Section 998(6) recognises that a person may enter into, or carry out, such a transaction for purposes that do not include the purpose of creating that appearance. "Purpose" in s 998(6) is to be understood as connoting the intention of bringing about the result to which the intent is directed[106]. Thus, the appellant carrying out transactions of sale and purchase of shares in Intrepid on the ASX knowing that they were transactions in which there was no change of beneficial ownership of the shares might nonetheless demonstrate that his purposes did not include the proscribed purpose. Evidence identifying a commercial or other purpose for a person carrying out a transaction caught by the deeming provision (being a purpose other than the creation of a false or misleading appearance of active trading) may suffice to raise the defence. There was no evidence of that character here. The "execution service" submission tends to overlook the fact that a person may act with the purpose of bringing about a result without necessarily having a financial or other interest in that outcome.

117 The appellant, a stockbroker, was aware that trades not involving a change in beneficial ownership are not to be carried out on the ASX. He carried out such

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103 *Braysich v The Queen* (2009) 260 ALR 719 at 744 [102].

104 *Braysich v The Queen* (2009) 260 ALR 719 at 743-744 [100].

105 "Regulation of Stock Market Manipulation", (1947) 56 *Yale Law Journal* 509 at 525.

106 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 569-570 per Brennan J.

transactions. The fact that he did so in return for the payment of fees, on the instructions of valued clients, could not, without more, establish that it was probable that his purposes did not include the outcome that the conduct of transactions on the ASX not involving sales by a genuine seller to a genuine buyer was likely to produce.

118 The Court of Appeal was right to conclude that the evidence was insufficient to warrant leaving the statutory defence for the jury's consideration.

119 I would dismiss the appeal.