HIGH COURT OF AUSTRALIA

HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No P60/2011

NIGEL CUNNINGHAM SWIFT MANSFIELD — APPELLANT

AND

THE QUEEN & ANOR — RESPONDENTS

Matter No P61/2011

JOHN KIZON — APPELLANT

AND

THE QUEEN & ANOR — RESPONDENTS

Mansfield v The Queen
Kizon v The Queen
[2012] HCA 49
14 November 2012
P60/2011 & P61/2011

ORDER

Matter No P60/2011

Appeal dismissed.

Matter No P61/2011

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

M L Bennett with L Ristivojevic for the appellant in P60/2011 and for the second respondent in P61/2011 (instructed by Bennett + Co)

S A Shirrefs SC with S P Gifford for the appellant in P61/2011 and the second respondent in P60/2011 (instructed by Holborn Lenhoff Massey)

W B Zichy-Woinarski QC with R V C Fogliani for the first respondent in both matters (instructed by Commonwealth Director of Public Prosecutions)

CATCHWORDS

Mansfield v The Queen
Kizon v The Queen

Corporations law – Insider trading – Appellants allegedly possessed inside information concerning listed public company – Appellants allegedly bought or procured purchase of shares in that company – Information was false – *Corporations Act* 2001 (Cth) prohibits certain conduct by person who possesses inside information about company – Whether person in possession of false information can contravene insider trading prohibitions.

Words and phrases – "information".

Corporations Act 2001 (Cth), Pt 7.10.

1 HAYNE, CRENNAN, KIEFEL AND BELL JJ. The *Corporations Act* 2001 (Cth) prohibits trading in securities by persons who possess information that is not generally available and know, or ought reasonably to know, that, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of the securities. It will later be necessary to make more particular reference to the relevant provisions of the Act (which were altered during the times relevant to these matters) but the general tenor of the provisions is sufficiently captured by the description just given.

2 It was alleged in these matters that, in January 2002, Mr Malcolm Day, the managing director of a listed public company (AdultShop.com Limited – "AdultShop") told one of the appellants (Mr Mansfield) that AdultShop's expected profit for the then current year had risen from $3 million to $11 million and that its expected turnover had risen from between $30 million and $50 million to about $111 million. It was alleged that Mr Mansfield then told the other appellant (Mr Kizon) what Mr Day had said.

3 It was alleged that Mr Day and Mr Mansfield later had other conversations in which Mr Day gave optimistic assessments of AdultShop's financial performance and that Mr Mansfield told Mr Kizon what Mr Day said in those conversations. It was alleged that there were other conversations between the men but what was said in all these other conversations need not be described. It is useful, however, to refer to a conversation alleged to have taken place in June 2002 between Mr Day and Mr Kizon. It was alleged that Mr Day told Mr Kizon that "Packer [a well-known businessman] had bought 4.9% of AdultShop" and that the projected revenue for AdultShop for the following month would exceed what had been forecast. It was alleged that Mr Kizon told Mr Mansfield what Mr Day had said in this conversation.

4 It was alleged that, knowing the matters revealed in the conversations, Mr Mansfield and Mr Kizon bought or procured the purchase of AdultShop shares, and thus contravened the *Corporations Act*.

5 Argument of the appeals in this Court proceeded on the footing that what Mr Day said to Mr Mansfield and to Mr Kizon was false. In particular, AdultShop's expected profit and turnover for the period of which Mr Day spoke in his conversation with Mr Mansfield had not risen, and neither Mr Packer nor any company associated with Mr Packer had bought 4.9 per cent of the issued capital of AdultShop. Interests associated with Mr Packer had for two days held a little under 1.5 per cent of the capital of AdultShop but, at the time of the alleged conversation between Mr Day and Mr Kizon which was described above, all of those shares had been sold.

The issue

6 The central question in these appeals was: did the appellants possess "information" that was not generally available? The appellants argued that, to establish contravention of the relevant provisions of the *Corporations Act*, the prosecution must prove that the "information" which the appellants possessed was "a factual reality". They alleged that Mr Day had told them lies about AdultShop and that "a lie cannot constitute information".

7 The appellants' arguments should be rejected and each appeal dismissed. If the alleged conversations took place, each appellant possessed information about AdultShop that was information not generally available. Mr Day communicated knowledge about a subject (the expected profit and turnover of the company or a particular shareholding in the company) and what Mr Day communicated was not generally available. That the knowledge communicated was not true does not deny that it is "information". It will have to be decided at a new trial whether the information was material, in the sense that, had it been generally available, a reasonable person would have expected it to have a material effect on the price or value of AdultShop's shares.

Indictment and trial

8 The appellants were tried together in the District Court of Western Australia on an indictment alleging five counts of conspiracy[1] to commit offences against insider trading provisions of the *Corporations Act* with respect to securities in AdultShop. The indictment further alleged (for the most part as counts alternative to the conspiracy counts) that Mr Mansfield or Mr Kizon had committed the substantive offences alleged to be the subject of the conspiracy counts. The indictment also charged the appellants with offences relating to trading in securities of another listed company but no issue arises in this Court about those counts and they need not be noticed further.

9 The prosecution provided particulars of the "information" which it was alleged that the appellants had possessed. Those particulars followed a common form exemplified by the particulars given of count 1:

> "In relation to AdultShop, the information of which the two accused were possessed was to the effect that:

---

1 Contrary to s 11.5(1) of the *Criminal Code* (Cth).

a. The expected profit for AdultShop for the 2002 financial year had risen from $3 million to $11 million;

b. The expected turnover for AdultShop for the 2002 financial year had risen from between $30 million and $50 million, to about $111 million;

c. The information at sub-paragraphs a. and b. above had been obtained on or about 4 January 2002 as a result of private conversation between Malcolm Day, the Managing Director of AdultShop, and a person or persons the said Malcolm Day apparently treated as a confidant."

10 At trial the case was conducted by the prosecution on the basis that the first two sub-paragraphs of the particulars (which set out the substance of what Mr Day had said) identified the relevant "information" and that the third sub-paragraph of the particulars set out facts and circumstances relevant to the materiality of that information.

11 No evidence was led by the prosecution to establish the truth of any of the statements allegedly made by Mr Day to either Mr Mansfield or Mr Kizon. Evidence was led which showed that any statement that "Packer had bought 4.9% of AdultShop" was false.

12 At the close of the prosecution case, Mr Mansfield and Mr Kizon submitted that there was no case to answer in respect of any count and that the trial judge (Judge Wisbey) should find[2] the appellants not guilty. Each appellant submitted that the prosecution had not established that he had possessed "information".

13 The trial judge ruled that the relevant provisions of the *Corporations Act* were contravened only if the "information" alleged to be not generally available, and to have been acted upon by the accused, was "a factual reality". The trial judge entered judgments of acquittal on all of the counts of the indictment that related to trading in the securities of AdultShop.

---

2 *Criminal Procedure Act* 2004 (WA), s 108 as picked up and applied by *Judiciary Act* 1903 (Cth), s 68(1).

Appeals

14 The prosecution appealed[3] to the Court of Appeal of the Supreme Court of Western Australia against the judgments of acquittal entered by the trial judge. That Court (Buss JA and Murray J, McLure P dissenting) allowed[4] the appeal, set aside the judgments of acquittal and ordered that a new trial be had.

15 By special leave the appellants appealed to this Court.

Relevant provisions of the *Corporations Act*

16 At the time of the earliest of the alleged offences, the *Corporations Act* dealt with certain prohibited conduct in relation to securities in Div 2 of Pt 7.11 (ss 995-1001D) and dealt separately with the subject of "insider trading" in Div 2A of Pt 7.11 (ss 1002-1002U). Division 2 of Pt 7.11 prohibited[5] misleading or deceptive conduct in or in connection with any dealing in securities and created various offences, including stock market manipulation[6], false trading and market rigging transactions[7] as well as offences depending upon a fraudulent intent[8], an offence of disseminating information about illegal transactions[9] and offences in connection with continuous disclosure requirements[10].

17 For present purposes, the central provision of Div 2A of Pt 7.11 was s 1002G, which prohibited certain conduct by persons in possession of "inside information". The appellants were charged with conspiracy to commit a contravention of s 1002G (contrary to s 1311(1) of the *Corporations Act*) and

---

3 *Criminal Appeals Act* 2004 (WA), s 24(2)(e)(i).

4 *R v Mansfield* [2011] WASCA 132.

5 s 995.

6 s 997.

7 s 998.

8 ss 999 (False or misleading statements in relation to securities) and 1000 (Fraudulently inducing persons to deal in securities).

9 s 1001.

10 ss 1001A-1001D.

Mr Mansfield was charged with committing the substantive offence. Sub-section (1) of s 1002G identified when the other provisions of the section were to apply. It provided:

> "Subject to this Division, where:
>
> (a) a person (in this section called the ***insider***) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and
>
> (b) the person knows, or ought reasonably to know, that:
>
> (i) the information is not generally available; and
>
> (ii) if it were generally available, it might have a material effect on the price or value of those securities;
>
> the following subsections apply."

18 Sub-section (2) of s 1002G relevantly provided that the insider must not (whether as principal or agent) buy or sell, or procure another to buy or sell, the securities. Sub-section (3) relevantly provided that the insider must not, directly or indirectly, communicate the information or cause it to be communicated to another, if the insider knows or ought reasonably to know that the other person would be likely to buy or sell or procure another to buy or sell the securities.

19 Sections 1002A-1002D gave further content to four of the elements of s 1002G: "information" (s 1002A(1)); what is information that is "generally available" (s 1002B); when a reasonable person would be taken to expect information to have a "material effect on the price or value of securities" (s 1002C); and trading and procuring trading in securities (s 1002D). For present purposes, it is important to refer to only s 1002A(1) and its provision about "information", and s 1002C and its provision about material effect on price or value.

20 Section 1002A(1) provided, so far as presently relevant, that:

> "In this Division and in section 1013:
>
> ***information*** includes:

(a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and

(b) matters relating to the intentions, or the likely intentions, of a person."

21 Section 1002C provided:

"For the purposes of this Division and section 1013, a reasonable person would be taken to expect information to have a material effect on the price or value of securities of a body corporate if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, buy or sell the first-mentioned securities."

22 Although the offence created by s 1002G may sometimes be referred to as an offence of "insider trading", it is more accurately described, in the words of the heading to the section, as "Prohibited conduct by [a] person *in possession of* inside information" (emphasis added). That is, s 1002G prohibited persons in possession of information of a certain character from trading in shares. The relevant character of the information was that it "is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities" of the relevant body corporate. And by operation of s 1002C, "a reasonable person would be taken to expect information to have a material effect on the price or value of securities of a body corporate if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not" to trade in those securities. Noticeably absent from these provisions was any requirement that the information in question come from *within* the corporation the securities of which were the subject of the prohibition.

23 The *Financial Services Reform Act* 2001 (Cth) ("the FSR Act") made numerous amendments to the *Corporations Act*. So far as now relevant, with effect from 11 March 2002, the FSR Act repealed[11] Ch 7 of the *Corporations Act* and substituted[12], among other provisions, a wholly new Pt 7.10 (ss 1040A-1044A) dealing with "[m]arket misconduct and other prohibited conduct relating to financial products and financial services". Division 2 of the new Pt 7.10 (ss 1041A-1041K) dealt with prohibited conduct other than insider

---

11 s 3, Sched 1, item 1.

12 s 3, Sched 1, item 1.

trading prohibitions and Div 3 (ss 1042A-1043O) dealt with insider trading prohibitions.

24 The general scheme of the new insider trading prohibitions did not differ in any presently relevant way from the provisions it replaced. The new s 1043A prohibits a person who possesses information that the person knows, or ought reasonably to know, is not generally available and that, if it were, a reasonable person would expect it to have a material effect on the price or value of particular securities (or certain other identified financial products) from trading in the securities or procuring another to do so. As in the earlier form of the prohibition, "information" is defined[13] as including "matters of supposition", "other matters that are insufficiently definite to warrant being made known to the public" and "matters relating to the intentions, or likely intentions, of a person". Section 1042D identifies when a reasonable person would take information to have a material effect on price or value.

25 Because argument of the present matters proceeded on the basis that the appellants' arguments about what is "information" applied equally to the new Div 3 of Pt 7.10 and to the provisions which were repealed, it is not necessary to set out the text of the new provisions or to notice any of the textual differences between the new and the former provisions.

The appellants' arguments

26 The central proposition advanced by the appellants proceeded in three steps. First, they submitted that the word "information" in the relevant provisions of the *Corporations Act* takes its ordinary meaning. Second, they submitted that the word "information", in its ordinary usage, means "[k]nowledge communicated concerning some particular *fact*, subject, or event"[14] (emphasis added). Third, they submitted that it followed that, if what is communicated is not fact but fiction, the knowledge imparted is not properly described as "information".

27 The appellants sought to support this central proposition in several ways. Both appellants submitted that construing "information" to exclude false information is consistent with other elements of the insider trading provisions and with other provisions of the *Corporations Act* generally. Both submitted that

---

13 s 1042A.

14 *The Oxford English Dictionary*, 2nd ed (1989), vol VII at 944, "information", meaning 3a.

the interpretation they advanced was more consistent with the legislative purpose of prohibiting insider trading than an interpretation that encompassed false information. Mr Mansfield further submitted that the interpretation the appellants urged was consistent with equivalent provisions in overseas jurisdictions.

28 For the reasons that follow, the appellants' central proposition, and each of their supporting submissions, must be rejected. For the purposes of the insider trading provisions that apply in these matters, "information" includes false information.

Ordinary usage of "information"

29 The word "information" in its ordinary usage is not to be understood as confined to knowledge communicated which constitutes or concerns objective truths. Knowledge can be conveyed about a subject-matter (whether "fact, subject, or event") and properly be described as "information" whether the knowledge conveyed is wholly accurate, wholly false or a mixture of the two. The person conveying that knowledge may know or believe that what is conveyed is accurate or false, whether in whole or in part, and yet, regardless of that person's state of mind, what is conveyed is properly described as "information".

30 Both appellants relied heavily upon dictionary definitions of "information", but these definitions do not establish the appellants' central proposition about ordinary usage. It will be recalled that one definition of "information" is "[k]nowledge communicated concerning some particular fact, subject, or event". Both appellants fixed on the word "fact", which may indeed imply truthfulness. But no distinction between truth and falsity is implied by the other elements of the definition. In particular, no distinction of that kind is to be made in respect of "information" that is "[k]nowledge communicated concerning some particular ... subject".

Other statutory provisions

31 Contrary to the appellants' submissions, other elements of the insider trading provisions do not support the construction they proffer – that "information" does not include false information.

32 First, the reach of the word "information" is of course increased by the *Corporations Act* providing[15], for the purposes of the provisions now in issue, that "information" includes "matters of supposition", "other matters that are insufficiently definite to warrant being made known to the public" and "matters relating to the intentions, or the likely intentions, of a person". Contrary to the appellants' submissions, the inclusion of matters of these kinds within the reach of the term "information" emphasises that it is not to be read as confined to matters shown to be true.

33 Secondly, the requirement that the information be "not generally available", found originally in s 1002G, and now in the definition of "inside information" in s 1042A, does not support the interpretation that "information" excludes false information. To understand why this is so, something more needs to be said about how this particular submission proceeded.

34 In the Court of Appeal, McLure P, in her dissenting reasons, understood[16] the reference to information "not generally available" to mean "confidential information" that could be said to "belong to" someone. The appellants in this Court submitted that information could only be said to be confidential information that belongs to someone where that information conveys a fact and not a fiction.

35 The premise for this submission should be rejected. The provisions now under consideration do *not* refer to who provided the information or to what connection that person had with the corporation in question. And because the provisions now under consideration do *not* direct attention, let alone confine the application of the prohibition, to information coming from *within* the corporation the securities of which are traded, it is wrong to approach the construction of the relevant provisions from some assumption that they deal with "confidential information" of the corporation. That expression is not used in the provisions. Its introduction into the debate is apt to mislead.

36 That the current provisions do not direct attention to confidential information belonging to someone (whether the particular corporation or anyone else) can be understood by reference to the legislative history of the provisions now under consideration. Insider trading prohibitions of the kind now in issue were introduced into the legislative predecessors of the *Corporations Act*

---

15 s 1002A(1) and later s 1042A.

16 [2011] WASCA 132 at [12].

following a report[17] on insider trading in Australia by the Standing Committee on Legal and Constitutional Affairs of the House of Representatives. That report, known as the Griffiths Report, recommended substantial changes to the provisions that then regulated insider trading. Like the *Securities Industry Act* 1980 (Cth), which had formed a part of the earlier co-operative scheme, the *Corporations Act* 1989 (Cth) (and thus the Corporations Law of each State) prohibited persons who were or had been connected with a corporation from dealing in the securities of that corporation if, because of the connection, the person was in possession of information not generally available which, if it were, would be likely materially to affect the price of those securities[18]. The change proposed[19] by the Griffiths Report, and subsequently implemented, was to alter the focus of the prohibition from the *connection* which a person had with a corporation to the *use* of certain information.

37 The appellants further submitted that provisions found elsewhere in the *Corporations Act* support their central proposition that "information" excludes false information. They do not.

38 First, the market misconduct provisions of the *Corporations Act* (at the times relevant to these matters Div 2 of Pt 7.11 and then Div 2 of Pt 7.10) amply demonstrate that "information" should be understood to include false information. So, for example, s 999, and later s 1041E, prohibited the dissemination of information that is false in a material particular or materially misleading. Yet if the appellants were right, "information" in its ordinary meaning excludes falsehoods.

39 Second, the existence of the market misconduct provisions does not require the interpretation that "information" excludes false information. Again, to understand why this is so, something more needs to be said about how the submission proceeded.

40 The appellants observed that the prohibition of, for example, misleading or deceptive conduct penalises the maker of a misleading or deceptive statement and enables recovery by the person misled or deceived. They then submitted

---

17 Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Fair Shares for All: Insider Trading in Australia* (1989) ("Griffiths Report").

18 Griffiths Report at 8 [2.1.24].

19 Griffiths Report at 22-23 [4.3.3]-[4.3.7].

that, in the words of Mr Kizon's written submissions, "[i]t would be anomalous if that same person should also be prosecuted because the false statements they were induced by also constituted inside information under the Act".

41 The appellants' arguments proceeded from the premise that Mr Day had engaged in misleading or deceptive conduct, at least contrary to s 1041H and perhaps contrary to its predecessor, s 995. Their arguments may have gone so far as to assume that Mr Day had committed offences against provisions prohibiting market misconduct such as s 999 (concerning false or misleading statements in relation to securities), s 1000 (concerning fraudulently inducing persons to deal in securities), or their later equivalents (ss 1041E and 1041F). But whether the appellants' arguments made an assumption of that latter kind need not be examined. It is enough to acknowledge that there may be cases where a person conveys false information to another, knowing or intending that the recipient will trade in the relevant securities, and two offences are committed. The person supplying the information may contravene one or more provisions prohibiting market misconduct and the person receiving the information may contravene the provisions prohibiting conduct by persons in possession of inside information. Such a result is consistent with the purpose of prohibiting insider trading. As explained later, that purpose can be described as the maintenance of a free and fair market for securities.

42 The appellants assumed that if Mr Day contravened s 1041H he would be liable to the appellants in a civil action under s 1041I for any loss or damage they suffered by that conduct. Whether loss suffered by them acting in contravention of the insider trading prohibitions of Div 3 of Pt 7.10 would be recoverable in an action under s 1041I may be open to question[20] but need not be decided. Even if the loss were recoverable that does not entail that "information" when used in Div 3 of Pt 7.10 should be read as confined to information that, at the time it was made available, was not misleading or deceptive or likely to mislead or deceive. There is no textual or other basis for reading down the references to information in Div 3 of Pt 7.10 or in the earlier provisions of Div 2A of Pt 7.11 in this way.

43 The other provisions of the *Corporations Act* to which the appellants pointed do not support their submissions that "information" excludes false information.

---

20 See *Travel Compensation Fund v Tambree* (2005) 224 CLR 627; [2005] HCA 69.

Purpose of prohibiting insider trading

44 Both appellants submitted that excluding false information from the meaning of the word "information" was more consistent with the purpose of prohibiting insider trading than including it. This submission should be rejected.

45 It may readily be accepted that the provisions now under consideration have, as the Griffiths Report acknowledged[21], the purpose identified[22] in 1981 by the Committee of Inquiry into the Australian Financial System ("the Campbell Committee") of ensuring "that the securities market operates *freely and fairly*, with all participants having equal access to relevant information" (emphasis added). And as the Campbell Committee pointed out[23], "[i]nvestor confidence ... depends importantly on the prevention of the improper use of confidential information".

46 But contrary to the appellants' submissions, it does not follow that the *only* information to which the provisions now in issue apply is information that could be described as the corporation's confidential information or information that is wholly or even substantially true. The reference made by the Campbell Committee, and picked up by the Griffiths Report, to "the improper use of confidential information" does not require either of those conclusions. The facts of these cases show why that is so.

47 If, as counsel for Mr Mansfield submitted, Mr Day's motive for saying what he did to Mr Mansfield and Mr Kizon was "pumping the stock of AdultShop", the market would not operate freely or fairly if the appellants acted upon what Mr Day said and invested in AdultShop shares. Prohibiting those who received false information from Mr Day that was material to the price or value of AdultShop shares from trading in those shares allows the market to operate freely and fairly. It matters not whether what Mr Day said was true or was information actually derived from the company. The operation of the market would be adversely affected by trading that was founded on information not generally

---

21 Griffiths Report at 17 [3.3.6].

22 Australia, Committee of Inquiry into the Australian Financial System, *Australian Financial System: Final Report of the Committee of Inquiry*, (1981) at 382 [21.118].

23 Australia, Committee of Inquiry into the Australian Financial System, *Australian Financial System: Final Report of the Committee of Inquiry*, (1981) at 382 [21.118].

available which, if generally available, would reasonably be expected materially to affect the price or value of the securities.

International practice

48 In this Court, Mr Mansfield sought to explain the "international regulatory situation". His written submissions elaborated on the insider trading prohibitions of the United Kingdom, Germany, France, Spain, the Netherlands, the European Union, New Zealand, Canada, South Africa and the United States as a step towards his conclusion that "the international regulatory approach to insider trading is consistent only with the appellant's primary submission that 'information' necessarily means a matter of fact or precise circumstances as opposed to a falsity".

49 Mr Mansfield's written submissions did not explain why this Court should construe Australian legislation by reference to international practice – assuming that his summary of the laws of these foreign jurisdictions is correct – beyond the bald assertion that "[t]he construction of 'information' submitted by the appellant is consistent with this global regulatory framework". In oral argument, counsel for Mr Mansfield amplified the submission by explaining that "the Griffiths Report highlighted 13 years ago the importance of [the] Australian regulatory framework being viewed in the context of the international regulatory framework. What was apposite 13 years ago is even more apposite today in terms of the globalisation of securities markets worldwide".

50 The practice of other jurisdictions is interesting, and may be of interest to the legislature. Indeed, as noted by counsel for Mr Mansfield, "the Griffiths Report urged *the legislature* to consider" the "full panoply of international regulation[s]" (emphasis added). But it was not shown that the legislation now under consideration was based on any particular legislative model. General reference of the kind made by Mr Mansfield to other statutory regimes does not assist in the resolution of the question of construction raised by these appeals for determination in this Court.

Conclusion and orders

51 The appellants have failed to establish their central proposition about the ordinary usage of the word "information" and each of their secondary submissions in support of that central proposition. The appeals to this Court should be dismissed.

52 HEYDON J. Each appellant was charged with crimes arising out of, inter alia, their conduct on or about 4 January 2002. On that day, s 11.5(1) of the *Criminal Code* (Cth) provided that a person who conspired with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, was guilty of conspiracy to commit that offence. At that time, s 1002G(2)(b) of the *Corporations Act* 2001 (Cth) created an offence of that kind. Commission of the offence depended on the accused being an "insider". "Insider" was defined as "a person [who] possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate." Section 1002G(2)(b) provided that an insider:

> "must not (whether as principal or agent):
>
> …
>
> (b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities."

53 It is convenient to analyse the legal issues in these two appeals by reference to s 1002G(2)(b). Though it has now been repealed and replaced by similar legislation, it was the relevant provision in force at the time part of the conduct alleged against the appellants took place.

54 The prosecution alleged that the appellants had two pieces of information. The first was that for the 2002 financial year the expected profit for a particular business had risen from $3 million to $11 million. The second was that the expected turnover of that business had risen from $30-50 million to about $111 million. In fact, neither the expected profit nor the expected turnover had risen.

55 The question in this appeal is whether the propositions about profit and turnover were prevented from being "information" because they were false. The appellants submitted that to be "information" a proposition had to "correspond with the factual reality", or "be a factual reality", or exist as "a matter of fact or precise circumstances as opposed to a falsity." It was said that "one cannot be 'informed' by a falsity", that "a lie cannot constitute information", that one must not read the statutory language "to include lies", and that information "does not include lies and falsehoods".

56 Sometimes the word false is used to mean incorrect. Sometimes it is used to mean knowingly incorrect. In a similar way, the phrases just quoted from the appellants' submissions waver between contending that "information" should not be construed to include that which the supplier knew to be false, and contending that "information" should not be construed to include that which was actually

false, whether the supplier knew it or not. From the point of view of the recipient, and from the point of view of the effect of the recipient's use of the information on the market, the difference cannot matter. But the wavering is perhaps a sign of fallacy in the appellants' positions.

57 Section 1002A(1) defined "information" as including:

> "(a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and
>
> (b) matters relating to the intentions, or the likely intentions, of a person."

58 The appellants' arguments were advanced under three headings. The first related to the supposed ordinary meaning of "information". The second concerned the structure of the legislation. The third depended on legislation outside Australia.

The ordinary meaning of "information"

59 A general expression like "information" can certainly have different meanings in different contexts. But there are numerous authorities holding that "information" can include what is false. Thus in the Supreme Court of the Australian Capital Territory, Blackburn CJ said: "information can be true or untrue"[24]. In the Federal Court of Australia, Whitlam, Tamberlin and Sackville JJ said that in ss 424(1) and 424A(1) of the *Migration Act* 1958 (Cth) "information" included material that was not reliable or that lacked a sound factual basis[25]. Weinberg J held that the statutory duty of a bankrupt to provide written information to the bankrupt's trustee could be satisfied by the provision of incomplete or inaccurate information[26]. Hill J held that a reference to "information" in s 10 of the *Crimes Act* 1914 (Cth) included false information[27]. And Muirhead J held that for the purposes of the *Freedom of Information Act* 1982 (Cth) "deliberately false information, albeit malicious, coming into the

---

24 *Hook v John Fairfax & Sons Ltd* (1982) 42 ACTR 17 at 19.

25 *Win v Minister for Immigration and Multicultural Affairs* (2001) 105 FCR 212 at 217-218 [17]-[22]. See also *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 206 ALR 471 at 476-477 [24].

26 *Wharton v Official Receiver in Bankruptcy* (2001) 107 FCR 28 at 38-40 [57]-[68].

27 *Esso Australia Ltd v Curran* (1989) 39 A Crim R 157 at 165.

hands of a department, which does not at the time of receipt know whether it is true or false is nevertheless at that time fairly labelled 'information'."[28]

60 The tendency of these authorities, on which the prosecution relied in this Court, is adverse to the appellants' interests. Although to some extent the reasoning in those cases depended on arguments drawn from the language of legislation in which the word "information" appeared, it also depended on views as to the ordinary meaning of that word.

61 The present submission of the appellants appealed to what they called the ordinary meaning of "information". The appellants pointed out that the definition of information was inclusive, and its meaning was not limited to pars (a) and (b) of the definition. It was submitted that the meaning of "information" other than that meaning set out in pars (a) and (b) was the ordinary meaning. And it was submitted that in its ordinary meaning "information" requires truth or factual reality. Reliance was placed on par a. of the third meaning given for "information" in *The Oxford English Dictionary*: "Knowledge communicated concerning some particular fact, subject or event; that of which one is apprised or told; intelligence, news."[29] But "knowledge" concerning a subject is not necessarily factually correct; nor is "that of which one is apprised or told"; nor is "news". Reliance was also placed on the second meaning given for information in *The Oxford English Dictionary*: "The action of informing …; communication of the knowledge or 'news' of some fact or occurrence; the action of telling or fact of being told of something."[30] However, *The Oxford English Dictionary* gave the following example: "This I have by credible informacion learned." That example implies that there is such a thing as non-credible information.

62 The first definition in *The Macquarie Dictionary* for "information" is "knowledge communicated or received concerning some fact or circumstance; news."[31] The first three meanings given for "knowledge" are[32]:

> "1. acquaintance with facts, truths or principles, as from study or investigation; general erudition.

---

28 *McKenzie v Secretary to Department of Social Security* (1986) 65 ALR 645 at 648.

29 *The Oxford English Dictionary*, 2nd ed (1989), vol VII at 944.

30 *The Oxford English Dictionary*, 2nd ed (1989), vol VII at 944.

31 *The Macquarie Dictionary*, Federation ed (2001), vol 1 at 973.

32 *The Macquarie Dictionary*, Federation ed (2001), vol 1 at 1054.

> 2. familiarity or conversance, as with a particular subject, branch of learning, etc.
>
> 3. acquaintance; familiarity gained by sight, experience or report: *a knowledge of human nature*."

The problem for the appellants is that one can study or investigate without learning the truth. One can be familiar with a subject but make mistakes about it. And it is notorious that a supposed knowledge of human nature leads to considerable controversy about what its traits are and what flows from them.

63 If the appellants' submission were correct, in the expression "correct information" the word "correct" would be superfluous. It is not superfluous. To speak of "correct information" is not to speak tautologously. And the expression "incorrect information" is not oxymoronic. Nor is it self-contradictory.

64 A party to a contract who is disappointed because of a pre-contractual misrepresentation may claim: "You gave me some information during the negotiations; I acted on that information, but it was false information." That purchaser is using "information" in one of its ordinary meanings.

65 Hence the ordinary meaning of "information" does not assist the appellants. Indeed, the inclusion in the meaning of "information" of "matters of supposition", which may well be false, creates in this respect a consistency within the definition as a whole.

The legislative scheme

66 The second principal argument of the appellants was that their construction fitted the legislative scheme which deals with insider trading better than that of the prosecution.

67 The appellants' principal contention was that parts of the legislation prohibited the making of statements or the dissemination of information that is either false in a material particular or materially misleading, and gave a civil right of recovery for any person who suffered loss or damage as a result. This submission, incidentally, reveals a statutory assumption contrary to the first main argument of the appellants, that "information" can be "false". In any event, Mr Mansfield went on to submit:

> "Accordingly, the Act reveals an intention in circumstances where a falsity is disseminated or a fact is distorted and rendered false by a material particular or a material omission to penalise the maker of the statement and provide a mechanism for compensation for the person who relies upon the statement. This is the obverse for the insider trading provisions which penalise a person who relies upon the information to trade or communicate that information to a person who would trade".

And Mr Kizon submitted:

> "the legislature intended that a person who was misled or induced to deal, or is otherwise the victim of dishonest conduct, should be permitted to recover damages for their [sic] loss. It would be anomalous if that same person should also be prosecuted because the false statements [sic] they [sic] were induced by also constituted inside information under the Act."

Mr Kizon also submitted:

> "If the central objective is to ensure investor confidence in the integrity of securities markets, that objective is met *vis-á-vis* lies and false statements, by the provisions … prohibiting false statements, misleading conduct, etc."

68 These submissions assume that legislation which deals with a particular problem is to be read as attacking that problem in only one way, to the exclusion of all other concurrent possibilities. As the prosecution submitted, the two groups of provisions – Pt 7.11 Div 2 and Pt 7.11 Div 2A in their form up to 11 March 2002 – sat comfortably together. One dealt with conduct which distorted the market by misleading or deceptive conduct, stock market manipulation, false trading and market rigging, making false or misleading statements or disseminating false or misleading information, fraudulently inducing persons to deal in securities, disseminating information about illegal transactions, and not complying with continuous disclosure requirements. The other dealt with the effects on the market of insider trading. The first group of provisions operated much more widely than the second, because those provisions were not confined to the conduct of "insiders". But contrary to the appellants' contention, the two groups of provisions were not mutually exclusive. They addressed different types of market misconduct from different angles. Even if, as the appellants perhaps questionably submitted, a person could both have obtained remedies under the legislation against someone who disseminated false information to him or her and have been punished for contravening the legislation, that does not point to the conclusion that "information" as defined in s 1002A did not include false propositions. The appellants' construction produces a stranger result than the prosecution's. Had the appellants profited from the trading, they would have been entitled to keep the profits if Mr Day, who conveyed the material to them, had lied, but would have been guilty of insider trading if he had told the truth. This irrational result would arise even though the conduct of the appellants, and their states of mind, would have been the same whether the information was true or false.

69 A further difficulty in the appellants' submission is that if it were sound, enforcement of the law would have depended on extensive inquiry in each case as to whether the alleged "inside information" was true, for unless it were true it could not be "information". This would have placed a burden of proof on the

prosecution which might be very difficult to discharge. It would have involved an assessment of criminal guilt in hindsight that would have left accused persons unsure whether or not, at the time they traded in securities, their conduct was or was not lawful.

70 Further, the appellants' submissions assume too stark a distinction between "true" information and "false" non-information. The propositions about profit and turnover in this case were, it seems, completely false. But what if they had been nearly true, for example, that expected profits had risen to nearly $11 million and expected turnover to nearly $111 million? What if they had been partly true and partly false in the sense that they had doubled? In these examples, the propositions would be of interest to investors. This is because they might have had a material effect on the price of securities. If the propositions were not generally available but could reasonably be expected to have a material effect if they were, it is not surprising or anomalous that the legislation would prevent insiders who were aware of the propositions from procuring others to subscribe for, purchase, or sell the relevant securities. The more "information" is to be construed as requiring close conformity to the truth, the more the legislation moves towards becoming a dead letter. That outcome suggests that conformity to the truth of "inside information" had, and has, nothing to do with the insider trading regime.

71 Mr Mansfield relied on the following passage of the Campbell Report[33], approved in the Griffiths Report[34], as stating the reason for prohibiting insider trading:

> "The object of restrictions on insider trading is to ensure that the securities market operates freely and fairly, with all participants having equal access to relevant information. Investor confidence, and thus the ability of the market to mobilise savings, depends importantly on the prevention of the improper use of confidential information."

The market does not operate freely and fairly if there is unequal access to the relevant propositions. If some participants know them but not others, investor confidence is damaged.

---

33 Australia, Committee of Inquiry into the Australian Financial System, *Australian Financial System: Final Report of the Committee of Inquiry*, (1981) at 382 [21.118].

34 Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Fair Shares for All: Insider Trading in Australia*, (1989) at 17 [3.3.6].

72 Valuable-seeming material may be true or false or partly true – which of these it is cannot be known until a time after it is acted on. But the legislation proceeds on the basis that "insiders" should not be allowed to use that material when it is not publicly available. A key element in the prohibition on insider trading is that which is indicated by the words in s 1002G(1)(a) – information which "a reasonable person would expect … to have a material effect on the price or value of securities". "Untrue" information can have that effect as well as "true" information. As Buss JA said in the Court of Appeal, "untrue" information may influence people who acquire securities in deciding whether or not to acquire or dispose of them if the untruthfulness is unknown to them. Or if the untruthfulness is known to them, those people can use this knowledge in deciding whether or not to acquire or dispose of the securities.

73 The insider trading provisions, read as a whole, catch conduct by those who trade on the basis of untruths.

Non-Australian legislation

74 Mr Mansfield submitted that "the international regulatory approach to insider trading is consistent only with [his] primary submission that 'information' necessarily means a matter of fact or precise circumstances as opposed to a falsity".

75 "Consistent" is an ambiguous word. On one meaning of the word as it is used in the sentence quoted, Mr Mansfield's submission is that the international regulatory approach proves that the construction advocated is sound. On another meaning of it as used in the sentence quoted, the submission is that the international regulatory approach does not contradict the construction advocated. The latter submission, however, does not assist Mr Mansfield: mere non-contradiction affords no positive support. The former submission does assist Mr Mansfield, but it is an invalid approach to the construction of Australian legislation.

76 The construction given to non-Australian legislation may be interesting and thought-provoking in the analysis of Australian law. But it is not directly relevant to the interpretation of Australian legislation unless the latter is modelled on the former or vice versa, or they share a common original, for example, a treaty or a statute. In this instance, neither is modelled on the other and they have no common origin. As Mr Mansfield submitted, some of the non-Australian enactments use words like "precise" and "specific" in relation to "information". However, these adjectives do not imply that the "information" must be "true".

Orders

77 Each appeal should be dismissed.