IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P60 of 2011

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N:

NIGEL CUNNINGHAM SWIFT MANSFIELD
Appellant

-and-

THE QUEEN
First Respondent

-and-

JOHN KIZON
Second Respondent

APPELLANT'S (NIGEL CUNNINGHAM SWIFT MANSFIELD'S) SUBMISSIONS IN REPY

1. I certify that this submission is in a form suitable for publication on the Internet.
2. **1RS[7]**: The assertions contained in [7(c)] are irrelevant.
3. **1RS[9]**: The assertion that the appellant conducted his case on the basis that he accepted the truthfulness of the particularised information is incorrect. The case advanced by the appellant showed conclusively that particularised information (discounting the source) was factually incorrect.
4. **IRS[11]:** The submission is incorrect. As further explained, at page 2461 of the trial transcript, Mr Zichy-Woinarski QC submitted:

> *"Now, if we go back to that, your Honour, the element there specifies information, possessed information, they both possessed information. We say the information for Count 1 is either (a) ... (b) or a combination of them.*

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If the jury was satisfied beyond reasonable doubt that they possessed (a) and that was inside information, and the rest was made out then that element would be established. If they weren't so satisfied ... of (a) that it was inside information, they look at (b) and if they were satisfied that was inside information and it would have the material effect and was subject – and the objective and subjective first were satisfied then that would be all right. And if they weren't about that then they'd look at the combination of (a) and (b) and ask themselves that."

5. **1RS[12]:** Reliance on appeal of the of the obiter statement in *R v Rivkin* represents a change in the position of the Crown.

6. **1RS[17]**: The definition of a Division 3 *"financial product"* for the purpose of Part 7.1 Division 3 – Insider Trading Prohibitions is contained in section 1042A which by sub-paragraph (e) incorporates the general definition of a financial product contained in Part 7.1 Division 3 section 762A following. See in particular section 763A(1). There is nothing in the expanded class of financial product which is inconsistent with the appellant's contentions as to the meaning of *"information"*.

7. **1RS[18]**: The ordinary meaning of the word *"information"* identified by Buss JA at [105] is incorrectly summarised. It does not embrace the concept *"the concept of being told something"*. It extends to knowledge communicated or received concerning some fact or circumstance that is a communication concerning a fact. A communication of something that is not factual is never information. It simply a communication.

8. **1RS[19]**: The question of what constitutes *"supposition"* is irrelevant to the facts the subject of this appeal. In any event by subparagraph 1(a) (of the definition in section 1042A)the ordinary meaning of information is extended beyond its ordinary meaning. The contention of the first respondent is such that it would be included within the ordinary meaning.

9. It is open to argument (but not necessary for determination in the within appeal) that a supposition must have a factual basis – for example if a geologist sees in a core sample flecks of what he thinks to be gold and supposes from that observation that the tenement is a valuable tenement containing a significant gold

deposit but if the flecks turn out to be iron pyrites the supposition is not a relevant supposition for the purpose of the definition of information.

10. **1RS[21]:** Consideration by Courts in other statutory contexts have limited value or no value. The obiter statement in *Hook v John Fairfax* (1982) 42 ACTR 17 at [19] was irrelevant to the determination. The interpretation in the context of the *Freedom of Information Act, 1982* is consistent with the objects of the legislation.[1]

11. The principal decision relied upon is *Win v Minister of Immigration and Multicultural Affairs* (2001) FCR 212 at pages 217 to 218, [15] to [22]. The added emphasis in [18] to meaning 3(a) in the Macquarie Dictionary *"that of which one is apprised or told"* was the subject of analysis by the Full Court in the context of construing section 424(1) of the *Migration Act 1958* this concerned the scope of the Refugee Review Tribunal to take account of material before it. It is obvious that the Full Court accepted that the application of the word *"information"* to a fabrication was an extension of the ordinary meaning [19] (Page 218 Line 1 and 2) [21]) where their Honours say *"it is an every day occurrence for the RRT to reject as fabricated "information" provided by applicants"*. Their Honours in fact found that [22] information includes assertions made by persons. The fact of an assertion is consistent with the appellant's submission as to the ordinary meaning of the word information. The reference to *ESSO Australia Ltd v Curran* (1989) 39 A Crim R 157 at 165 should also be read in context. The issue before the Court was whether information sworn to by Curran was false and accordingly not information for the purpose of section 10 of the *Crimes Act.*[2] The comments by Hill J at 165 are *"Section 10 is not used in a technical sense but refers rather to the communication of material ..."* Similarly to the decision in Win [Supra] the information before the Justice of the Peace is the assertion.

12. **1RS[37]:** The assertion that the market trades on the basis of *"information"* is correct in so far as information is a matter of fact. To suggest that the market trades solely on the basis of information or that it trades without regard to the truthfulness of matters is a submission unsupported by authority or reference.

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[1] See section 3 and in particular section 3(2).

[2] Which provides *"if a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting ... he may grant a search warrant"*.

The market may trade on the basis of emotion (fear), prejudice (for example a reaction against a company's stance on a particular matter or other emotional sentiments). The fact that the market trades for a variety of reasons is no mandate for extending the meaning of information to include falsehoods.

13. **1RS[38]:** The first respondent's submissions conflate materiality with what constitutes information.

14. **1RS[40:** The submission begs the question. Moral turpitude (if the concept is relevant) arises by infringement of the statutory offence. A person who buys securities on the confidential tip of a taxi driver (when that turns out to be false and unfounded) may be criticised for stupidity or naivety but not for moral turpitude for dealing in *"inside information"*. The submission advanced by the first respondent is that such an investment would be a contravention of the statutory insider trading provisions.

15. **1RS[42]:** The appellant rejects the contention that he accepted the information was price sensitive and not generally available.

16. **1RS[43]:** The submission mistakes the appellant's contention. If a falsehood is released in the market and becomes *"generally available"* then the effect of this is the commission of an offence contrary to section 1041E(1) of the *Corporations Act*. The submission that the advantage gained by the appellant was the opportunity to engage in *"a risk reduced transaction"* is wrong in fact. What the appellant gained was an opportunity to engage in a transaction where his investment was induced by a false or misleading statement. The falsity of anything increased his risk of loss.

17. **1RS[44]:** The difficulties are overstated by the first respondent. It should be accepted that it would be a rare case (the present case being the first recorded instance) where persons were charged with the offence of insider trading when the trade was conducted on demonstrably false information. In every other instance the truthfulness of the information has easily been proved – the making of the takeover in the *Rivkin* case being a paradigm.

18. **1RS[45]:** The argument is circular. The evidence in this case does not demonstrate an effective *"insider trading"*. It demonstrates simply that the

appellant was misled by the conduct of Malcolm Day, that conduct itself being conduct prima facie contrary to the *Corporations Act,* section 1041E.

19. **1RS[48] - [49]:** The submissions are without substance and the examples given are fanciful. The suggestion that the legislative intent becomes unworkable if a person is able to defend an insider trading charge by establishing that what is asserted to be *"information"* is in fact fantasy, fiction or a falsehood is without substance.

20. **1RS[64]:** The first respondent does not deal with the civil right to recover damages for a contravention of section 1041E established by section 1041I. There is no comfortable fit between Divisions 2 and 3 of Part 7.10 for a person who trades on information that is a lie, has a civil right of action for damages, but may none the less be prosecuted for insider trading. It does not promote market integrity to attack the victim of misleading falsities (section 1041E).

Dated 3 February 2012

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