

‘Artificial price’ in the context of market manipulation

Justin Simpkins reports on *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30

The full bench of the High Court, in a joint judgment, recently clarified the meaning of ‘artificial price’ in s 1041A of the *Corporations Act 2001* (Cth). Section 1041A prohibits a person from taking part in or carrying out one or more transactions that have or are likely to have the effect of creating an artificial price, or maintaining at a level that is an artificial price, for trading in financial products on a financial market operated in this jurisdiction.

Background

JM had been charged with 39 counts of market manipulation contrary to s 1041A and two counts of conspiring with others to commit market manipulation. The CDPP had alleged that JM entered into an arrangement with family members whereby his daughter bought shares in a company [‘X Ltd’] at a price and in circumstances that prevented the day’s closing price for the shares falling below a point at which a lender to JM would make a margin call requiring JM to provide additional collateral for the loan.

The CDPP alleged that the purchase was made for the sole, or at least the dominant, purpose of ensuring that the price of the shares did not fall below the price at which the lender would be entitled to make a margin call on her father’s loan, and the transaction had the effect of creating an artificial price for the shares or maintaining the price at a level that was artificial.

Before empanelling the jury the trial judge reserved three questions for determination by the Victorian Court of Appeal.¹ The three questions were:

1. For the purpose of s 1041A of the *Corporations Act 2001* (Cth), is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an ‘artificial price’?
2. Was the closing price of shares in [X Ltd] on the ASX on 4 July 2006 an ‘artificial price’ within the meaning [of] s 1041A(c) of the *Corporations Act 2001* (Cth)?

3. Was the price of shares in [X Ltd] on the ASX on 4 July 2006 maintained at a level that was ‘artificial’ within the meaning of s 1041A(d) of the Act?

Victorian Court of Appeal

The Court of Appeal reformulated the questions so as to focus on whether the expression ‘artificial price’ in s 1041A had a particular technical legal meaning as opposed to its sense in ordinary English or some non-legal technical sense.²

The Court of Appeal held that the expression ‘artificial price’ in s 1041A ‘is used in the sense of a term having legal signification (as opposed to its ordinary English or some non-legal technical sense) and its legal signification is of market manipulation by conduct of the kind typified by American jurisprudential conceptions of ‘cornering’ and ‘squeezing’.³

High Court

The High Court held that the Court of Appeal erred in reformulating the reserved questions and reinstated the original questions. The High Court noted that the mere fact that a question reserved for determination by the Court of Appeal may be contingent on the prosecution establishing the relevant facts to the requisite standard of proof did not make the question hypothetical.⁴

The High Court held that the Court of Appeal was wrong to conclude that s 1041A should be construed as directed to ‘market manipulation by conduct of the kind typified by American jurisprudential conceptions of ‘cornering’ and ‘squeezing’.⁵

As to the operation of s 1041A, the High Court held that:

Market manipulation is centrally concerned with conduct, intentionally engaged in, which has resulted in a price which does not reflect the forces of supply and demand.⁶

The references in s 1041A to a transaction which has, or is likely to have, the effect of creating an ‘artificial price’, or maintaining the price at a level which is ‘artificial’, should be construed as including a transaction where the on-market buyer or seller of listed shares undertook it for the sole or dominant purpose of setting or maintaining the price at a particular level.

The price that results from a transaction in which one party has the sole or dominant purpose of setting or maintaining the price at a particular level is not a price which reflects the forces of genuine supply or demand in an open, informed and efficient market. It is, within the meaning of s 1041A, an 'artificial price'.⁷

As s 1041A prohibits transactions which are likely to create an 'artificial price', it is not necessary to demonstrate that the impugned transactions did in fact create or maintain an artificial price.⁸

Proof of a dominant, as distinct from sole, purpose of setting or maintaining a price would establish that the relevant transaction established or maintained an artificial price.⁹

The High Court held that the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining

a particular price for that share on the ASX was an 'artificial price' for the purpose of s 1041A of the Corporations Act, that the closing price of shares in [X Ltd] on the ASX on the relevant date was an 'artificial price' and that the price of shares in [X Ltd] on the ASX on 4 July 2006 was maintained at a level that was 'artificial'.

Endnotes

1. Pursuant to s 302 of the *Criminal Procedure Act 2009 (Vic)*
2. *Director of Public Prosecutions (Cth) v JM* (2012) 267 FLR 238
3. At 316
4. At [30]-[31]
5. At [77]
6. At [70], referring to the fundamental point that should be taken from *Cargill Inc v Hardin* 452 F 2d 1154 (1971)
7. At [72]
8. At [73]
9. At [75]

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