



25 July 2018

PRESS SUMMARY

R v Mackinlay and others (Respondents) [2018] UKSC 42
On appeal from [2018] EWCA Crim 724

JUSTICES: Lady Hale (President), Lord Mance, Lord Hughes, Lord Hodge, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

This pre-trial appeal concerns a point of pure statutory construction. The Respondents face charges of knowingly making false declarations in relation to election expenses, or aiding and abetting or encouraging or assisting such offences. The parties asked the judge to determine the point on a preparatory hearing, pursuant to Part III of the Criminal Procedure and Investigations Act 1996.

The question of law certified by the Court of Appeal (Criminal Division) as a point of law of general public importance is as follows:

“Do property, goods, services or facilities transferred to or provided for the use or benefit of a candidate free of charge or at a discount (as identified in section 90C(1)(a) of the Representation of the People Act 1983 (as amended)) only fall to be declared as election expenses if they have been authorised by the candidate, his election agent or someone authorised by either or both of them?”

The Court of Appeal held that section 90C of the Representation of the People Act 1983 (the “RPA 1983”) requires authorisation of expenses before the need for them to be declared arises.

JUDGMENT

The Supreme Court unanimously allows the appeal, answering the certified question in the negative. Lord Hughes gives the judgment with which the other justices agree.

REASONS FOR THE JUDGMENT

The concept of authorisation of expenses is frequently resorted to in the legislation [16]. The critical question is whether this concept also governs the notional expenditure provision in section 90C of RPA 1983 [17].

Section 90C asks, by subsections (1)(a) and (b), three questions about the notional expenditure it is considering. If the answer to all of these questions is yes, then subsection (2) stipulates that the expenditure shall be treated as incurred by the candidate for the purposes of the Act.

The questions, which equally apply to goods, property or facilities, are:

1. Were the services provided for the use or benefit of the candidate either free of charge or at a discount of more than 10% of commercial value;
2. Were they made use of by or on behalf of the candidate; and

3. If the services had actually been paid for (expenses actually incurred) by or on behalf of the candidate, would those expenses be election expenses incurred by or on his behalf (and thus subject to the various controls imposed by the Act)? [18]

There is no room in these questions for an additional requirement that the provision of services must have been authorised by the candidate or his election agent, or by someone authorised by either of them. The test is whether the goods, property or facilities are used by, or on behalf of, the candidate. This differs from the test in section 90ZA(4) of RPA 1983 for expenses actually incurred which does require authorisation. The ambit of the use test is not resolved by the question asked and will depend on the facts as they emerge in each case. [19, 25].

Section 90ZA(1) confirms this analysis by the express provision that the definition of election expenses therein is subject to section 90C. Rather than 90C incorporating the words of 90ZA(4), it imports an additional category of expenditure to be included in 90ZA(4), namely expenses notionally incurred by the candidate [20].

The plain reading of the Act cannot be displaced by possibly inconvenient or even newly recognised consequences [27-28]. The point that the candidate and election agent risk the commission of criminal offences is well made. The more serious offence of knowingly making false declarations requires a dishonest state of mind. While the strict liability offence is different, section 86 of the Act provides for relief from sanctions where the offence has been committed despite good faith [29].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
<http://supremecourt.uk/decided-cases/index.html>