
**Trinity Term**
**[2018] UKSC 42**
*On appeal from: [2018] EWCA Crim 724*

# JUDGMENT

# R *v* Mackinlay and others (Respondents)

**before**

**Lady Hale, President**
**Lord Mance**
**Lord Hughes**
**Lord Hodge**
**Lord Lloyd-Jones**

## JUDGMENT GIVEN ON

## 25 July 2018

**Heard on 23 May 2018**

*Appellant*
*(Director of Public Prosecutions)*
Timothy Straker QC
John McGuinness QC
Tom Little QC
(Instructed by Crown Prosecution Service, Special Crime & Counter Terrorism Division)

*Respondent*
*(Craig Mackinlay)*

Richard Price QC
David Mason QC
Francis Hoar
(Instructed by Manleys Solicitors)

*Respondent*
*(Nathan Gray)*
Patrick Gibbs QC
(Instructed by Manleys Solicitors)

*Respondent*
*(Marion Little)*
Clare Montgomery QC
Stephen Ferguson
Sarah Hannett
(Instructed by Blackfords LLP)

*Intervener*
*(The Electoral Commission)*
Richard Gordon QC
Gerard Rothschild
(Instructed by Fieldfisher LLP)

**LORD HUGHES: (with whom Lady Hale, Lord Mance, Lord Hodge and Lord Lloyd-Jones agree)**

*A preliminary issue appeal*

1. This appeal raises a point of pure statutory construction relating to the manner in which election expenses are required to be calculated and declared. It is important to appreciate that the point is raised not, as it might in other circumstances have been, on an application for judicial review or a declaration as to the law, but as a preliminary question in a criminal prosecution. The defendants 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 1996 Act"). The criminal trial, although technically begun by the preparatory hearing, has yet to take place, and no jury has yet been sworn. No one can yet know what the real issues will turn out to be at that trial. No one can yet know what the evidence will be, still less which facts will be disputed and which common ground. The present question of statutory construction may arise at the trial, or it may not. If it does arise, it is unknown at this stage what its impact may be on the trial. For this reason it is important that this judgment is directed to the pure question of law, and that as little as possible is said about what the allegations are or what the facts may turn out to be, lest there be risk that the jury's consideration of the case is affected. It is also for this reason that there are automatic statutory restrictions in the 1996 Act upon reporting of preparatory hearings and any appeals therefrom. This judgment is public and can be reported in the usual way. But reporting must not go beyond what is in this document together with the formal details permitted by statute: see the section on reporting restrictions in para 31 at the end of this judgment.

*The Certified Question*

2. The question of law certified by the Court of Appeal (Criminal Division) as a point of law of general public importance was 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?"

3. Whilst that question might also arise in other contexts connected with elections, in the present case it is raised by one of the realities of modern campaigning. Political parties are often national in organisation. At a general election, a national party may typically field candidates standing as adherents to the party in all or many of the constituencies in the country. At such an election, the legislation imposes separate limits on the expenditure which is permitted to the candidate locally and to the party nationally. Both the constituency candidate and the national party are required to submit returns setting out their expenditure, and demonstrating that it falls within the limits applied to them. But national party activity will typically amount to some support for the constituency candidates standing in its interests. Especially if the constituency is regarded by a party as marginal, the activities of the national party in the constituency may well be extensive. So also they may if the constituency candidate is a leading member of the national party, or for that matter if one of the competing candidates is a prominent member of another party. The question will arise when expenditure undertaken by the national party falls to be accounted for as candidate expenditure, and to be limited by the ceiling applied to constituency candidates, and when it should be returned by the national party and governed by the different limit applied to national parties. An illustration of the question is given by what was described by the judge as "the battlebus issue". If the national party sends a liveried coach containing activists into key constituencies and they there campaign for the party and/or its candidates, do the expenses fall to be accounted for nationally or locally? That is by no means the only possible example of the problem, nor is it the only one which may be in issue in the proposed trial in the present case. Anyone familiar with modern election campaigns will appreciate that there may be many other situations where work undertaken by national parties potentially overlaps with, or arguably amounts to, the support of one or more local candidates. The certified question which this court is called upon to answer is likewise only one of a number of technical questions of electoral law which may bear upon this potential overlap. This judgment is, however, confined to that certified question.

*The legislation*

4. Since the 19th century, legislation has imposed limits upon a candidate's election expenses. The current statute is the Representation of the People Act 1983 ("RPA 1983"). Some of the rules and concepts in that Act effectively date from Victorian times; others have been added by successive modern adjustments, and amendments have continued since 1983.

5. Until 2000 there were no rules about national expenditure by political parties. They were introduced by the Political Parties, Elections and Referendums Act 2000 ("PPERA 2000"). That Act also made some amendments to RPA 1983.

6. The two statutes adopt similar general schemes to control expenses. The principal (but not the only) controls are these.

(i) They list, in Schedules to the Acts, the kinds of expenditure which count as declarable expenses (and some kinds which do not).

(ii) They prescribe who may incur those expenses, and thus fix responsibility on identifiable persons. In the case of constituency expenses, those persons are the candidate, his agent, and others if authorised by either of them. In the case of party expenses, those persons are the party treasurer and deputy treasurer, or others if authorised by either. Similarly, the statutes prohibit payment of expenses by persons other than those specified.

(iii) They impose financial limits on the expenses which may be incurred and paid.

(iv) They require a specified person to make a return of the expenses incurred. In the case of the constituency, that person is the appointed election agent of the candidate. In the case of party expenditure, it is the party treasurer. Moreover, the returns must be accompanied by formal declarations of accuracy. Those must be made by the person making the return and, in the case of the constituency, also by the candidate.

(v) Each of the statutes contains a provision including in the expenses which must be declared, and which must fall within the relevant limit, the cost of things which are supplied either free of charge or at a discount to the candidate or party as the case may be, where that cost would, if paid for by the candidate or party, be election expenses. These are sometimes referred to, although not in all the statutes, as "notional expenditure".

As will be seen, the certified question in this case asks about the relationship between the second and fifth of these controls.

7. It is a feature of the legislation that the two categories of expenses, local and national, whether or not they may in practice overlap, are treated as mutually exclusive. When PPERA 2000 introduced controls over party expenditure it labelled it in section 72 "campaign expenditure", and defined it as:

> "(2) 'Campaign expenditure', in relation to a registered party, means (subject to subsection (7)) expenses incurred by or on behalf of the party which are expenses falling within Part I of Schedule 8 and so incurred for election purposes."

The meaning of "election purposes" in this subsection is wide: it is defined thus in subsection (4):

> "'For election purposes', in relation to a registered party, means for the purpose of or in connection with -
>
> (a) promoting or procuring electoral success for the party at any relevant election, that is to say, the return at any such election of candidates -
>
> (i) standing in the name of the party, or
>
> (ii) included in a list of candidates submitted by the party in connection with the election; or
>
> (b) otherwise enhancing the standing -
>
> (i) of the party, or
>
> (ii) of any such candidates,
>
> with the electorate in connection with future relevant elections (whether imminent or otherwise)."

It follows that if the definition stopped there, all party activity which has the purpose of enhancing the standing of <u>any</u> of its candidates would count as campaign expenditure. The mutual exclusion of party expenses and local candidate expenses is, however, achieved by subsection (7), to which the foregoing definition is expressly made subject. That provides (as amended by section 20 of, and paragraph 5(2)(a) of Schedule 6 to, the Recall of MPs Act 2015):

> "'Campaign expenditure' does not include anything which (in accordance with any enactment) falls to be included in -

(a) a return as to election expenses in respect of a candidate or candidates at a particular election, or

(b) ... [not here relevant]."

8. The principal debate in this appeal centres on two provisions of RPA 1983, sections 90ZA and 90C. As the numeration suggests, both are additions to the statute as originally enacted. Section 90C was added with effect from July 2001 by section 134(1) of PPERA 2000. Section 90ZA was inserted by section 27(2) the Electoral Administration Act 2006 and came into force in September 2006.

9. Section 90ZA of RPA 1983 contains the current meaning of "election expenses" (ie, in relation to general elections, those incurred by constituency candidates). It provides:

"90ZA Meaning of 'election expenses'

(1) In this Part of this Act 'election expenses' in relation to a candidate at an election means (subject to subsection (2) below and section 90C below) any expenses incurred at any time in respect of any matter specified in Part 1 of Schedule 4A which is used for the purposes of the candidate's election after the date when he becomes a candidate at the election.

(2) No election expenses are to be regarded as incurred by virtue of subsection (1) above or section 90C below in respect of any matter specified in Part 2 of Schedule 4A.

(3) In this section and in section 90C below, 'for the purposes of the candidate's election' means with a view to, or otherwise in connection with, promoting or procuring the candidate's election at the election.

(4) For the purposes of this Part of this Act, election expenses are incurred by or on behalf of a candidate at an election if they are incurred -

(a) by the candidate or his election agent, or

(b) by any person authorised by the candidate or his election agent to incur expenses.

(5) [not here relevant]

(6) In this Part and in Part 3 of this Act, any reference (in whatever terms) to promoting or procuring a candidate's election at an election includes doing so by prejudicing the electoral prospects of another candidate at the election.

(7) Schedule 4A has effect. [Note: this schedule specifies the kinds of expenditure which are categorised as election expenses.]

(8) [not here relevant]."

10. Section 90C of RPA 1983 contains provision for things supplied to a candidate either free of charge or at a discount. It provides (as amended by section 74(1) of, and paragraph 117 of Schedule 1 to, the Electoral Administration Act 2006):

"90C Property, goods, services etc provided free of charge or at a discount

(1) This section applies where, in the case of a candidate at an election -

(a) either -

(i) property or goods is or are transferred to the candidate or his election agent free of charge or at a discount of more than 10% of the market value of the property or goods, or

(ii) property, goods, services or facilities is or are provided for the use or benefit of the candidate free of charge or at a discount of more than 10% of the commercial rate for the use of

the property or for the provision of the goods, services or facilities,

and

(b) the property, goods, services or facilities is or are made use of by or on behalf of the candidate in circumstances such that, if any expenses were to be (or are) actually incurred by or on behalf of the candidate in respect of that use, they would be (or are) election expenses incurred by or on behalf of the candidate.

(2) Where this section applies -

(a) an amount of election expenses determined in accordance with this section ('the appropriate amount') shall be treated, for the purposes of this Part of this Act, as incurred by the candidate, and

(b) the candidate's election agent shall make a declaration of that amount,

unless that amount is not more than £50.

This subsection has effect subject to Part 2 of Schedule 4A to this Act.

(3) Where subsection (1)(a)(i) above applies, the appropriate amount is such proportion of either -

(a) the market value of the property or goods (where the property or goods is or are transferred free of charge), or

(b) the difference between the market value of the property or goods and the amount of expenses actually incurred by or on behalf of the candidate in respect of the property or goods (where the property or goods is or are transferred at a discount),

as is reasonably attributable to the use made of the property or goods as mentioned in subsection (1)(b) above.

(4) Where subsection (1)(a)(ii) above applies, the appropriate amount is such proportion of either -

(a) the commercial rate for the use of the property or the provision of the goods, services or facilities (where the property, goods, services or facilities is or are provided free of charge), or

(b) the difference between that commercial rate and the amount of expenses actually incurred by or on behalf of the candidate in respect of the use of the property or the provision of the services or facilities (where the property, goods, services or facilities is or are provided at a discount), as is reasonably attributable to the use made of the property, goods, services or facilities as mentioned in subsection (1)(b) above.

(5) Where the services of an employee are made available by his employer for the use or benefit of a candidate, then for the purposes of this section the commercial rate for the provision of those services shall be the amount of the remuneration and allowances payable to the employee by his employer in respect of the period for which his services are so made available (but shall not include any amount in respect of any contributions or other payments for which the employer is liable in respect of the employee).

(6) In this section 'market value', in relation to any property or goods, means the price which might reasonably be expected to be paid for the property or goods on a sale in the open market; and paragraph 2(6)(a) of Schedule 2A to this Act shall apply with any necessary modifications for the purpose of determining, for the purposes of subsection (1) above, whether property or goods is or are transferred to a candidate or his election agent."

11. There are further provisions in the statutes for other kinds of elections, including referendums, and also for expenditure at elections by those who are neither

candidates nor political parties, such as pressure groups. The latter expenditure is called "controlled expenditure". These provisions are, like those relating to constituency candidates and central parties, relatively complex. It is not necessary to refer to them in detail, but it is relevant to note that in several respects they adopt forms of control parallel to those outlined at para 6 above, including provisions for notional expenditure. Controlled expenditure, campaign expenditure and candidate's election expenses are, once again, made mutually exclusive, each with the others, by section 87(1) of PPERA 2000.

12. For each type of regulated expenditure, the statutes require a return. In the case of election expenses by a candidate, the duty to make the return falls on the candidate's appointed election agent. Section 81(1) RPA 1983 (as amended by section 24 of, and paragraph 27 of Schedule 4 to, the Representation of the People Act 1985 and by section 138(1) of, and paragraph 7(2) of Schedule 18 to, PPERA 2000) provides:

> "81. Return as to election expenses
>
> (1) Within 35 days after the day on which the result of the election is declared, the election agent of every candidate at the election shall deliver to the appropriate officer a true return containing as respects that candidate -
>
> (a) a statement of all election expenses incurred by or on behalf of the candidate; and
>
> (b) a statement of all payments made by the election agent together with all bills or receipts relating to the payments."

The return must, by section 82(1) and (2), be accompanied by declarations by both the agent and the candidate that it is accurate. The potential consequences of failure to deliver an accurate return and declaration are serious. By section 82(6) knowingly to make a false declaration is the criminal offence of corrupt practice, whilst by section 84 simple failure to make a correct return or declaration is the offence of illegal practice. The former carries imprisonment and a fine, by section 168. The latter carries a fine, by section 169. Both have the further notable effect, by section 173, of disqualification from the House of Commons or other elective office, subject, in the case of specified excuses and proof of good faith, to the court's power to relieve of that consequence (section 86).

*The rival submissions*

13. The Crown's case is that campaigning activity undertaken in a constituency by the central national party may be free or discounted services within section 90C, and thus be accountable for by the candidate, whenever:

> (i) it amounts to services "provided for the use or benefit of the candidate" (section 90C(1)(a)(ii)); and
>
> (ii) they were "made use of by or on behalf of the candidate" (section 90C(1)(b)); and
>
> (iii) they were so made use of "in circumstances such that if any expenses were to be … actually incurred by or on behalf of the candidate in respect of that use, they would be … election expenses incurred by or on behalf of the candidate" (section 90C(1)(b)).

If those three conditions are met, say the Crown, section 90C(2) applies, and the expenses are to be "treated … as incurred by the candidate" and must be declared as such by his election agent.

14. The defendants contend that such campaigning by the national party cannot amount to election expenses for which the candidate has to account unless he or his agent, or someone authorised by either of them, has authorised the expenditure. Authorisation is, say the defendants, a central feature, throughout the legislation, of responsibility for electioneering expenses. Section 90ZA(4) so provides for a candidate's election expenses, and says plainly that such expenses are only incurred (and thus declarable) if they are incurred by the candidate, or his election agent, or someone else authorised by either of them. Say the defendants, provisions essentially mirroring section 90ZA(4) are to be found throughout the legislation and are applied to all the various forms of electioneering expenses, such as the party's campaign expenditure, the controlled expenditure of pressure groups, and referendum expenditure.

15. Both parties also relied on consequentialist arguments supporting the construction for which they contended. The Crown suggested that unless its construction is adopted the evasion of controls on expenditure would be encouraged. It also submitted that its construction is consistent with a desire to maintain equivalence between the position of a candidate supported by a national party and an independent candidate who has no national organisation behind him. For their part, the defendants contended that unless authorisation is kept firmly at the centre

of responsibility for declaring expenses, the task of an election agent would become impossible wherever the national party undertakes campaigning activity which in fact benefits the local candidate, but which he has not sought out, required or authorised; that would apply, say the defendants, in a great number of constituencies, if not in most.

*Analysis*

16. It is plainly correct, as Ms Montgomery QC contended for the defendants, that the concept of authorisation of expenses is frequently resorted to in the legislation. In applying the control which restricts those who may incur constituency election expenses, section 75 RPA 1983 does so by making it an offence to incur such expenses unless one is the candidate, his election agent, or a person authorised in writing by the election agent to do so. Similar provisions are to be found in the controls relating to party campaign expenses (section 75(1) PPERA 2000) and to controlled expenditure by recognised third parties (section 90 PPERA 2000). The same concept is employed in what the defendants contend is the crucial section relating to constituency election expenses, namely section 90ZA(4) RPA 1983. That, as has been seen, addresses the question of when election expenses are to be regarded for the purposes of the Act as incurred "by or on behalf of a candidate". This question has to be addressed because in several places the Act attaches consequences when expenses have been incurred "by or on behalf of a candidate". The duty to make a return under section 81 arises when expenses are thus incurred, but not otherwise. The monetary limit on expenses imposed by section 76(1) of RPA 1983 is similarly imposed in relation to expenses incurred by or on behalf of the candidate. And section 73(1) of RPA 1983, which prohibits the payment of election expenses otherwise than via the election agent, speaks once again of prohibiting the payment of expenses which are incurred "by or on behalf of" the candidate. What section 90ZA(4) undoubtedly does is to say that actual (as distinct from notional) constituency election expenses are only incurred by or on behalf of the candidate if they are incurred either by the candidate himself, or by his election agent, or by someone authorised by either of them. It is no doubt correct that the effect of section 90ZA(4) is that authorisation (by candidate, election agent or person authorised by either) is ordinarily a necessary feature of constituency election expenses falling within that section and thus within the rules about monetary limit (section 76) and payment (section 73). It is also correct that there are broadly similar provisions in PPERA 2000 employing the concept of authorisation in the equivalent contexts of party campaign expenses and third party controlled expenses when it comes to monetary limits and the prohibition of payment by other people.

17. The critical question, however, is whether this concept of authorisation also governs the notional expenditure provision in section 90C of RPA 1983, and for that matter its equivalents in PPERA 2000 for party campaign expenses and third party controlled expenses. The certified question (see para 2 above) asks in terms whether

the conditions set out in section 90ZA(4) apply to notional expenditure within section 90C. The defendants contend that they do. The Court of Appeal was persuaded that they were right. In the end this depends on the words of the statute.

18. Section 90C asks, by subsections (1)(a) and (b), three questions about the expenditure it is considering. If those questions are answered "yes", then by subsection (2) it stipulates that the expenditure shall be "treated … as incurred by the candidate" for the purposes of the Act. That is a deeming provision. If the conditions are satisfied, the notional expenditure becomes by statute the same as if it had been actually incurred by the candidate, even though it has not actually been incurred by him. The three questions can be simplified for present purposes by expressing them in terms of services, but of course the same applies to goods, property or facilities. The questions posed by subsections (1)(a) and (b) 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? (subsection (1)(a))
>
> 2. Were they made use of by or on behalf of the candidate? (subsection (1)(b)) 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)? (also subsection (1)(b)).

19. There is no room in this sequence of conditions or questions for an additional requirement that the provision of the services must have been authorised by the candidate or his election agent, or by someone authorised by either of them. The test is a different one from that in section 90ZA(4) for expenses actually incurred. The test is use, by or on behalf of the candidate (although see para 25 below).

20. This analysis is confirmed by the express provision in section 90ZA(1) that the definition of election expenses there provided is subject to section 90C. What section 90ZA(4) does is to stipulate when election expenses, defined as subject to section 90C, are incurred by or on behalf of the candidate. But section 90C(2) includes also as expenses incurred by the candidate those which satisfy the conditions of section 90C(1)(a) and (b). In short, rather than section 90C incorporating the words of section 90ZA(4), it provides an additional category of expenditure which has to be included within subparagraph (a) of that latter subsection - that is to say as expenses notionally incurred by the candidate.

21. There is nothing in the Act (or for that matter in the equivalent provisions of PPERA 2000) which necessitates departure from this natural reading of section 90C.

22. The third condition/question is an essential part of the operation of section 90C. Unless the services (etc) fall within one of the categories of election expenses caught by the Act, and particularly by Schedule 4A (as inserted by section 27(5) of the Electoral Administration Act 2006), and unless payment by the candidate himself, if made, would amount to election expenses, section 90C simply does not bite. It is not, however, necessary to adopt the defendants' construction of the Act in order for the third condition/question to have content.

23. It would appear to be true that one consequence of the addition of section 90C to the Act is to qualify the effect of a modest exemption for small expenditure, always in the Act and now contained in section 75(1ZA) (as inserted by section 131(3) of PPERA 2000) and (1ZZB) (as inserted by section 25(3) of the Electoral Administration Act 2006). Those provisions exempt from the rule that unauthorised persons may not incur expenses in support of a candidate small payments (now not exceeding £700) made independently of any similar ones. The effect of section 90C would appear to be that, although by section 75 the payer of such small sums is not guilty of the offence of making an impermissible payment, nevertheless services (etc) provided by someone who spends such a sum upon them may count as notional expenditure which must be declared and counted towards the statutory limit if (but only if) the services are made use of by the candidate or on his behalf. Those are, however, not necessarily inconsistent provisions.

24. It is no doubt true that in practice it is difficult to envisage the *transfer* of property or goods, also covered by the notional expenditure provisions of section 90C, occurring without the concurrence of the candidate. That may be relevant to the proper construction of the expression "made use of by or on behalf of the candidate", or for that matter to whether any declaration made is knowingly false, but it cannot be a reason to import into any part of section 90C the wording of section 90ZA(4).

25. The Court of Appeal drew attention to the second condition/question set out in para 18 above, posed by section 90C(1)(b). It drew attention to the fact that the subsection is satisfied when the services (etc) are made use of by anyone, on behalf of the candidate, and that it is not limited to use by the candidate or his election agent. It is, however, important to observe that section 90C(1)(b) is not satisfied merely by the services (etc) being for the benefit of the candidate. There is a plainly deliberate difference of expression between subsections (1)(a)(ii) and (1)(b). The services (etc) have, by (1)(a)(ii) to be provided "for the use <u>or benefit</u>" of the candidate (emphasis added). But their cost only counts as notional expenditure if they are "made use of by or on behalf of the candidate": subsection (1)(b). Mr Straker QC, for the Crown, was at pains to submit that making use of the services

(etc) involves some positive activity by the candidate or someone on his behalf. Ordinarily, one would also expect that it would involve conscious activity. It is not enough that the services enure for the benefit of the candidate unless he or someone on his behalf makes positive use of them. Care will have to be taken upon the question of who may be found to be acting on behalf of the candidate in making positive use of such services, but the problem of who acts on behalf of a candidate, and when, is not an unfamiliar one in election law. It does not seem likely that use by a campaigner would be held to be by or on behalf of a candidate who had positively refused to accept the benefit of the services (etc). There may, on some facts, be a difference between the critical requirement for use by or on behalf of the candidate and the suggested one of authorisation, but in many cases those factual issues may well be closely related.

26. The legislation contains provisions also for regulating donations. In RPA 1983 they are found in section 71A (as inserted by section 130(2) of PPERA 2000) and Schedule 2A (as inserted by section 130(3) of, and Schedule 16 to, PPERA 2000). In summary, donations must be made to the candidate or election agent, and must not be accepted unless made by a "permissible donor", as defined in section 54 PPERA 2000. The provision of free or discounted services may also amount to a donation - see paragraph 2(1)(e) of Schedule 2A. The maker of a donation may commit an offence if he makes it to someone other than the candidate or agent. The agent must include in the return required by section 81 the details of any donation accepted either by him or the candidate: Schedule 2A paragraphs 10-12. No doubt, ordinarily at least, acceptance of a donation will involve the awareness of the recipient, in the same way as a transfer of property or goods to either of them would. It may well follow that the agent or candidate could not be said to be a secondary party to a donor's offence of impermissible donation unless they knew of it, and perhaps that a donation of which neither is aware has not been "accepted" for the purpose of inclusion in the return. That, as above, may help to throw light on the meaning of the expression in section 90C(1)(b) "made use of by or on behalf of the candidate". But it affords no reason for importing the terms of section 90ZA(4) into section 90C. Rather, the donation provisions are broadly consistent with the construction of section 90C here set out.

27. It is not necessary, in order to give effect to the plain reading of the Act here set out, to have resort to the Crown's consequentialist arguments, which do not in any event have great substance. There appears to be no particular reason why this reading of section 90C can alone deter deliberate evasion of the spending limits by the acceptance of services (etc) provided free or at a discount. Deliberate evasion would equally be deterred on the construction advanced by the defendants. It may well be that the problem of potentially overlapping campaigning by a national party and its local candidates does not apply to independent candidates who lack a national party behind them. But that independents do not have a national party behind them is a simple fact of electoral life, and applies whatever is the correct construction of section 90C. Moreover, independent candidates may in any event be offered services

(etc) from supporters other than a national party, and section 90C, whatever its correct construction, needs to and does apply to them also.

28. The plain reading of the Act here set out cannot be displaced by possibly inconvenient or even newly recognised consequences. It may or may not be true that the notional expenditure provisions, including section 90C, were directed principally at evasion of expenses controls by candidates (or parties) who might arrange for unregulated persons to provide goods, property, services or facilities for them either free or at a discount. It may or may not be true that the application of these provisions to the undoubtedly imprecise question of when expenditure is party expenditure and when it is candidate expenditure was not anticipated. It seems, from the material provided to this court, that the Electoral Commission's helpful guidance documents issued over several years, whilst they certainly both address the question of apportionment of expenditure between party and candidate, and deal with the concept of free or discounted services, nowhere appear to alert readers to the possible link between them, nor to the application of the notional expenditure rules to what must sometimes be a difficult exercise of separating local from national expenditure.

29. The potential difficulties for election agents, and for that matter for candidates, in knowing what must and must not be included in their returns, are indeed likely to be increased by the complications of national and local expenditure which in practice may overlap but by statute have to be mutually exclusive. The fact that they are mutually exclusive does not, as the defendants at one point submitted, mean that all expenditure defaults to constituency expenses. Indeed, it is because the two have to be separated, and if necessary maybe apportioned, that the task of the election agent is made more difficult. The point that the candidate and election agent risk the commission of criminal offences is well made. Criminal liability is no small matter even if regulatory statutes sometimes invoke it as if it were less significant than it is. But the more serious offence of knowingly making a false declaration is committed only when there is a dishonest state of mind, and the defendant knows that the declaration ought to include something which it does not: see the judgment of Lord Bingham of Cornhill CJ in *R v Jones and Whicher* [1999] 2 Cr App R 253, especially at 259B, which decision Mr Gordon QC, on behalf of the Electoral Commission intervening in the present case, took care to underline, and which the Crown has not suggested calls for any qualification. The strict liability offence is of course different, but the Act stipulates in section 86 for a specific power to relieve from sanctions where the offence has been committed despite good faith. The potential difficulties faced by agents are in any event more the consequence of the difficulty of separating national from local expenditure than of the terms of section 90C.

*Conclusion*

30. For the reasons set out above, this appeal must be allowed and the question which was certified by the Court of Appeal (para 2 above) must receive the answer "No". The test for the operation of section 90C is the threefold one set out above (see para 18).

*Reporting restrictions*

31. Section 37 of the Criminal Procedure and Investigations Act 1996 imposes statutory reporting restrictions in relation to the hearing of interlocutory appeals such as the present. The objective is to ensure that the jury's consideration of the evidence and issues put before it is not at risk of being affected by prior reporting, for example of the details of the allegations or of discussion of possible issues. Those restrictions apply to the hearing of this appeal. The court is satisfied that there is no reason to modify them in the present case, except to permit the reporting of this judgment. Until the conclusion of the trial, nothing may be reported except the following:

(a) the identity of the court(s) and the name of the judge(s);

(b) the names, ages, home addresses and occupations of the accused and witnesses;

(c) the offences charged, as summarised in this judgment;

(d) the names of counsel and solicitors engaged in the appeal;

(e) whether for the purposes of the appeal representation was provided to either of the accused under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012; and

(f) this judgment.