IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2012-085-009093
[2014] NZHC 1244

THE QUEEN

v

JOHN ARCHIBALD BANKS

Hearing:	19–22, 26–27 and 29 May 2014
Appearances:	P E Dacre QC and A Van Echten for the Crown DPH Jones QC and K Venning for the Defendant
Verdict and Reasons for Verdict:	5 June 2014

REASONS FOR VERDICT OF WYLIE J

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Introduction

[1] The Honourable Mr John Banks is charged with one count of transmitting a return of electoral expenses, knowing it to be false in one or more material particulars.

[2] The indictment reads as follows:

> **The Solicitor-General** charges that **John Archibald Banks** on or about the 9th day of December 2010 at Auckland, being a candidate, transmitted a return of electoral expenses knowing it to be false in one or more material particulars.
>
> **Particulars:** The return of electoral expenses and donations for the 2010 Auckland mayoral election signed by the said John Archibald Banks listed as "anonymous" the following donations and in respect of which he knew the identity of the donor:
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> i) Donation in the sum of $15,000 made by Skycity Management Limited and received on or about 24 May 2010;
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> ii) Donation in the sum of $25,000 made by Megastuff Limited on behalf of Kim Dotcom and received on or about 14 June 2010;
>
> iii) Second donation in the sum of $25,000 made by Megastuff Limited on behalf of Kim Dotcom and received on or about 14 June 2010.

[3] I have found Mr Banks guilty of the charge. I am not persuaded beyond reasonable doubt that Mr Banks knew that the return of electoral expenses was false in relation to the $15,000 donation made by SkyCity Management Limited (SkyCity), but I am sure that Mr Banks knew that the return was false in relation to the two donations, each of $25,000, made by Megastuff Limited, on behalf of Mr Dotcom.

[4] These are my reasons for returning this verdict.

Judge alone trial

[5] This matter proceeded as a Judge alone trial.

[6] The information against Mr Banks was laid on 10 December 2012. Sections 105 and 106 of the Criminal Procedure Act 2011 apply to Judge-alone trials. However, those provisions only came into force on 1 July 2013. Pursuant to s 397 of the Act, this matter has been determined in accordance with the law as it was before that date.

[7] A Judge hearing a criminal trial without a jury is required to deliver reasons for his or her verdict. The Court of Appeal in *R v Connell*[1] held that this requires:

> ... a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

[8] In *R v Eide*,[2] the Court of Appeal confirmed this principle, but noted that there can be problems with "short-form" judgments. It made the following observations:

> [21] The problems with short-form judgments are particularly acute in fraud prosecutions. The parties (that is, the prosecutor and accused) are obviously entitled to know the key elements of the Judge's reasoning. In a case of any complexity, this will not be possible unless the Judge provides an adequate survey of the facts. As well, in this context a Judge is addressing an audience which is wider than the prosecutor and accused. If the verdict is guilty, the Judge should explain clearly the features of the particular scheme which he or she finds to be dishonest. There is a legitimate public interest in having the details of such a scheme laid out in comprehensible form. Similar considerations apply if the verdict is not guilty. Further, some regard should be had to how the case will be addressed on appeal. A judgment which is so concise that some of the key facts in the case are required to be reconstructed by this Court on appeal is too concise.

[9] In the more recent case of *Wenzel v R*,[3] the Court of Appeal again endorsed the *Connell* approach and affirmed the comments in *Eide*.

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1 *R v Connell* [1985] 2 NZLR 233 (CA) at 237–238.
2 *R v Eide* [2005] 2 NZLR 504 (CA) at [21].
3 *Wenzel v R* [2010] NZCA 501 at [39]–[40].

[10] I have set out the reasons for my verdict relatively fully. I have done so for the following reasons.

(a) First, Mr Banks is entitled to know why I have reached my verdict. He is entitled to know that I have considered the main issues, the evidence I have accepted and, where I have reached findings on the credibility of witnesses, why I have made those findings.

(b) Secondly, Mr Banks is a sitting Member of Parliament. He was formerly a member of the Cabinet and a Minister of the Crown. He is a member, and was formerly the leader, of the ACT Party. Mr Banks is the only member of the ACT Party currently in Parliament and the ACT Party currently supports the Government. My verdict may have consequences at a political level.

(c) Thirdly, there has been, and still is, considerable public interest in this case. There is a legitimate public interest in the verdict and in my reasons for reaching that verdict.

[11] However, I caution that this trial involved events which took place in late-2010. Most witnesses were interviewed in mid-2012. They gave their evidence at trial in mid-2014. Memories have understandably dimmed. There are conflicts between a number of the witnesses. Some of these conflicts are important and I have addressed them. Other of the conflicts are peripheral to the matters ultimately in issue. It was not necessary for me to resolve all of the factual conflicts and I have not attempted to do so.

Structure

[12] I first address some of the more significant rules of law and practice that I took into account as the sole judge of the facts in this case. I then address the law which applies to the charge and discuss the elements of the offence from a legal perspective. Next, I set out my findings in relation to the overall factual setting. Finally, I set out my analysis of the principal evidence relevant to the elements of the offence, and detail my reasoning and my overall conclusions.

Relevant rules of law and practice

[13] This was a criminal trial. It follows that the Crown had to prove each element of the charge beyond reasonable doubt before I could bring in a verdict of guilty.

[14] The starting point was the presumption of innocence. The onus was on the Crown. It had to prove that Mr Banks was guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof, which the Crown could meet only if I was sure that Mr Banks was guilty. It was not enough for the Crown to persuade me that Mr Banks was probably guilty or even that he was very likely guilty of the charge he faced. Having said this, it is virtually impossible to prove everything to an absolute certainty when dealing with the reconstruction of past events, and the Crown did not have to do so. Rather, it had to prove the charge beyond reasonable doubt. A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of Mr Banks, after I had given careful and impartial consideration to all of the relevant evidence.[4]

[15] Secondly, Mr Banks did not give evidence at the trial. There was no obligation on him to do so and the fact that he did not give evidence did not add to the case against him. Mr Banks did call evidence. Again, he did not have to do so. That Mr Banks did call evidence did not change the burden of proof. Mr Banks did not have to prove his innocence. Rather, it was for the Crown to prove his guilt.

[16] Thirdly, the Crown invited me to draw inferences, particularly as to Mr Banks' knowledge at the relevant time – namely, when the return of electoral expenses was transmitted. Whether I drew the inferences the Crown asked me to draw was for me to determine, as judge of the facts. The inferences I drew were conclusions drawn from facts that I accepted were reliably established. They were not guesses.

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4 *R v Wanhalla* [2007] 2 NZLR 573 (CA) at [49].

[17] Fourthly, Mr Banks called a large number of character witnesses.[5] They gave evidence as to his honesty, trustworthiness and integrity. I was told that Mr Banks' honesty and integrity defines him. Mr Jones QC, acting for Mr Banks, emphasised this evidence and submitted that it was relevant to Mr Banks' credibility in his police interview and also to the likelihood that he would have committed the offence charged.

[18] I accepted this submission,[6] and I took the evidence into account in assessing Mr Banks' guilt. I bore in mind, however, that, logically, there is always a first time for everyone who offends, and that evidence of good character is not itself a defence.

[19] Finally, I record that the matters at issue in this case have been the subject of considerable debate, both in Parliament, and in the news media. I ignored this material. I considered the charge and reached my verdict solely on the evidence adduced before me at the trial.

[20] I record that this is but a potted and truncated summary of some of the more important rules of law and practice which I applied in this trial. It is not, and is not meant to be, exhaustive.

The applicable law – The Local Electoral Act 2001

[21] The charge was brought under s 134 of the Local Electoral Act 2001 (as it was in 2010). Relevantly, it then provided as follows:

> **134 False return**
>
> (1) Every candidate commits an offence who transmits a return of electoral expenses knowing that it is false in any material particular, and is liable on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine not exceeding $10,000.
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> …

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5 Ms MB Quinn, Mr IM Revell, Mr DJ Hay, Dame Jennifer Gibbs, Mr RB Langridge, Ms PM White, Mr RWJ Wilson and Mr JA Jamieson.

6 *R v Aziz* [1996] AC 41 (HL), cited with approval in *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [29].

[22] To put the offence in context, s 109 of the Act, as it stood in 2010, required every candidate at any local election to transmit to the electoral officer a return setting out the candidate's electoral expenses, the name and address of each person who made an "electoral donation" to the candidate, and the amount of each electoral donation. If an electoral donation of money, or of the equivalent of money, was made to the candidate "anonymously", and the amount of that donation exceeded $1,000, then the amount of the donation, and the fact that it was received anonymously, also had to be set out. The return had to be filed within 55 days after the date on which the successful candidate at any election was declared to be elected.

[23] Every return had to be in the form which was prescribed in Schedule 2 to the Act or to similar effect. Although it is referred to in the Act as a return of electoral expenses, the form was in two parts. The first part provided for electoral expenses to be set out. The second part provided for electoral donations to be set out.

[24] The words "electoral donation" were defined in s 104. In 2010, it relevantly provided as follows:

> **electoral donation**, in relation to a candidate at an election,—
>
> (a) means a donation (whether of money or the equivalent of money or of goods or services or of a combination of those things) of a sum or value of more than $1,000 (such amount being inclusive of any goods and services tax and of a series of donations made by or on behalf of any one person that aggregate more than $1,000) made to the candidate, or to any person on the candidate's behalf, for use by or on behalf of the candidate in the campaign for his or her election; and
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> …

[25] The amount of any particular donation was clearly relevant. Small donations of less than $1,000 did not have to be set out in the return. Donations of more than $1,000 did have to be disclosed, but there was no statutory limit on the amount of any one donation, nor on the total donations, which a candidate could receive.

[26] The word "anonymous" was also defined in s 5 of the Act. In 2010, in relation to an "electoral donation", it meant a donation that was made in such a way that the candidate concerned did not know who made the donation.[7]

[27] The definition emphasised the way in which a donation was made and the candidate's knowledge of the donation. It was clear that the donation must have been actually made, and not just promised and, under s 109, it was only donations which had been received that had to be set out in the return.

[28] There were four elements to the offence created by s 134(1). They were as follows:

(a) Was the person whose conduct is under scrutiny a candidate?;

(b) Did the candidate transmit a return of electoral expenses?;

(c) Was the return of electoral expenses false in any material particular?; and

(d) Did the candidate know that the return of electoral expenses was false in any material particular at the time of the transmission?

[29] Both Mr Jones and Mr Dacre QC for the Crown were agreed that these were the elements of the offence. I comment briefly on each.

(a) Is the person whose conduct is under scrutiny a candidate?

[30] The Act was directed to the modernisation and regulation of local elections and polls. Inter alia, it placed various obligations on candidates in local elections. The obligation to file a return of electoral expenses imposed by s 109 was on the candidate; it was the candidate whose knowledge was in issue when determining whether an electoral donation could be said to be anonymous; it was the candidate who committed the offence under s 134(1) if a false return was filed.

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7 Local Electoral Act 2001, s 5(1), definition of "anonymous".

(b) Transmission of return of electoral expenses?

[31] The word "transmit" was not defined in the Act. Its ordinary English meaning is simply to cause a thing to pass, go or be conveyed to another person, place or thing.[8] The use of the word in the Act was consistent with this meaning and I adopted it.

(c) Was the return false in any material particular?

[32] The word "false" was also not defined in the Act. As a matter of ordinary English usage, the word has two distinct meanings – erroneous and purposely untrue.[9] This was noted by the Court of Appeal in the context of the Customs Act 1966. It said as follows:[10]

> Recourse to any standard dictionary demonstrates that the word "false" has two distinct and well recognised meanings, both of which may be used in relation to statements or representations: erroneous, wrong, not true; or purposely untrue, mendacious, deceitful. The sense in which it is used depends on the context in which it appears…

[33] In the present case, the context was the Local Electoral Act. Inter alia, one of the principles the Act was intended to implement was the promotion of public confidence in local electoral processes.[11] The disclosure of significant donations over $1,000, as required by the Act, contributed to the provision of a transparent electoral system. I note and agree with the observations of Heath J at an earlier stage in this case.[12]

> Disclosure of donations is a transparent means by which electors can ascertain who has contributed money to fund a particular election campaign. In 1986, the Royal Commission on the Electoral System[13] (albeit in the context of elections held under the Electoral Act 1993) observed that "in the absence of disclosure ... there is no way of knowing whether or not a candidate's financial position is likely to influence decisions taken if the candidate is elected, or whether the candidate is improperly accepting

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8 *The New Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 2 at 3329.

9 *The New Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) vol 1 at 919.

10 *Minister of Customs v Admail International Ltd* CA71/89, 31 October 1989 at 4; see also *R v Gill* (1999) 19 NZTC 15,526 (CA) at [17]–[21].

11 Local Electoral Act 2001, s 4(1)(c).

12 *Banks v District Court at Auckland* [2013] NZHC 3221 (HC) at [5].

13 Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (December 1986).

> personal donations in exchange for promises of future action once elected". The statutory provisions dealing with the need for disclosure of donations must be read in that context.

[34] Some assistance can also be gleaned from s 134(2)(a). It created an offence of strict liability where a candidate transmitted a false return, but provided that a candidate could escape liability if, inter alia, he or she proved that there was no intention "to misstate or conceal the facts".

[35] In my judgment, the word "false" used in s 134(1) should properly be construed to mean erroneous, wrong or untrue. There is no need to go further and require that an electoral return is false only where it is purposely untrue, mendacious or deceitful. It is unnecessary to attribute to the word any mens rea element, because knowledge of the falsity was a separate element to the offence created by s 134(1).[14]

[36] The words "any material particular" also drew their meaning from the context in which they appeared. The word "material" introduced a question of degree. Clearly, the statute implied that not every particular would be material. For example, if a donor's name was simply misspelt, I doubt that any Court would find falsity in a material particular. In the present case, s 109 assisted in determining what materiality embraced. Where a donor donated more than $1,000, the section required the disclosure of the name and address of the donor. It also required disclosure of the amount of the donation. Where a donation of more than $1,000 was made anonymously, then that fact had to be set out as well as the amount of the donation. The scheme of the Act was such that the public, who had the right to inspect returns of electoral expenses,[15] could readily see who had financially supported a candidate, and therefore could ascertain to whom a candidate might be beholden. Where anonymity could properly be claimed, a candidate would not be beholden because he or she would not know who had made the donation. Nevertheless, the amount of the donation, and the fact that it was made anonymously, were required to be disclosed. The disclosure of identity, where known, and anonymity, where properly claimable, were, in my judgment, material particulars. So was the amount of any donation over $1,000.

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[14] *R v Gill*, above n 10, at [20].
[15] Local Electoral Act 2001, s 110.

(d) Knowledge of the falsity

[37] Section 134(1) used the word "knowing". In order to have committed an offence under the section, it was necessary that, when the candidate transmitted the return of electoral expenses, he or she knew that it was false in a material particular.

[38] In the criminal law generally, it is commonly accepted that there is more than one way in which a person can be said to "know" something.[16]

[39] First, knowledge can consist of actual knowledge or correct belief.[17] For example, in *R v Simpson*,[18] the Court of Appeal was dealing with an assault on an officer in the execution of his duty. At issue was whether Mr Simpson assaulted the constable with intent to obstruct him in the execution of his duty. The Court noted that the intent required was founded on Mr Simpson's assumptions as to the status of the person assaulted and the duty on which he was engaged. It said as follows: [19]

> ...We use the term "assumption" to refer comprehensively to any positive state of mind in relation to these matters. In our opinion what the Crown must prove is that the defendant assumed that the person he assaulted was a constable who was acting in the execution of his duty and that he did intend to obstruct him in the performance of his duty.

This type of knowledge was further considered by the Court of Appeal in *R v Crooks*,[20] in the context of a charge of receiving. The offence required receipt of stolen goods knowing that they had been dishonestly obtained. The Court observed as follows: [21]

> ...A person is said to "know" something when he has ascertained, by physical or mental perception, a state of facts or circumstances which creates in his mind a certainty that the point of his inquiry is free from doubt...

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16 AP Simester and WJ Brookbanks, *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at [4.5]; see also David Ormerod, *Smith and Hogan's Criminal Law*, (13th ed, Oxford University Press, Oxford, 2011) at [5.25]–[5.27].

17 Simester and Brookbanks, above n 16. at [4.5].

18 *R v Simpson* [1978] 2 NZLR 221(CA).

19 At 225.

20 *R v Crooks* [1981] 2 NZLR 53 (CA).

21 At 56; and see, in regard to belief, *Kerr v R* [2012] NZCA 121 at [14]–[19].

[40] Secondly, knowledge can be attributed to a defendant where he or she is "wilfully blind". While a precise definition of wilful blindness remains elusive,[22] it seems that in New Zealand, a defendant is wilfully blind if he or she deliberately chooses not to inquire whether something is true because he or she has no real doubt what the answer is going to be, or because he or she wants not to know.[23] In such cases, the law can, in appropriate cases, presume knowledge on the part of the defendant.[24]

[41] The Court of Appeal also discussed this type of knowledge in *Crooks*. It held as follows:[25]

> …But where the circumstances are so compelling in their attribution of dishonest origin to the property acquired as to create an inference that the accused was aware that the property was stolen, it is permissible for a trial Judge to direct the jury that a failure by the defendant to make some inquiry may be taken into account in considering whether knowledge or belief has been established beyond reasonable doubt by the prosecution…
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> ...The question will be whether the defendant himself, in abstaining from inquiry, can fairly be inferred to have taken that course because he knew what the answer was going to be. If that was his motive, then his concern as to the origin of the property, whether admitted or proved, was more than mere suspicion. What he had in his mind was in truth a belief, and the jury would be entitled to infer that it was his belief which motivated his decision not to inquire.

The Court went on to say:[26]

> If the jury are satisfied that the defendant, whilst lacking direct knowledge on the point, nevertheless formed the view when receiving it that the property had been dishonestly obtained, then they are entitled to consider the question why he made no inquiry. *If they come to the conclusion that the defendant deliberately abstained from inquiry because he knew what the answer was going to be, then they will be entitled to infer that his omission to inquire stemmed not from mere suspicion, but from an actual belief on his part that the goods had been dishonestly obtained. But if the jury should decide that the state of mine of the defendant was such that he merely entertained a doubt as to whether or not the property had been honestly obtained then they must not use against him, as evidence of guilt, the fact that he failed to inquire. This is because he may have abstained from inquiry*

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22 *Smith and Hogan's Criminal Law*, above n 16, at 5.2.7; Bruce Robertson (ed) *Adams on Criminal Law – Offences and Defences* (online ed) at [CA 20.32].

23 Simester and Brookbanks, above n 16, at [4.5.1]; *Adams*, above n 22, at [CA 20.32].

24 *Hickman v Turn and Wave Ltd* [2012] NZSC 72, [2013] 1 NZLR 741 at [149]–[152], in the context of s 37 of the Securities Act 1978.

25 *R v Crooks*, above n 20, at 58.

26 At 59 (emphasis added).

> *because he was gullible, or careless, or believed that his suspicion about the transaction might in fact be unjustified.*

The Court held that the trial Judge had not erred in directing the jury, that if they accepted that the accused had turned a blind eye to the acquisition, then "they were entitled to infer that no questions were asked because the [accused] knew what the answer would be".[27]

[42] The principle of wilful blindness was further affirmed by the Court of Appeal, (sitting as a full court), in *Millar v Ministry of Transport*. It was considering whether mens rea was a necessary ingredient to the offence of driving while disqualified. McMullin J observed as follows:[28]

> For over a century there have been cases in which it has been held that wilful blindness can be regarded as the equivalent of intent. *R v Sleep*[29] is an early instance of an accused's guilt being put on the basis either of an actual intent or the wilful shutting of his eyes. *R v Crooks*[30] is a recent case in which the "blind eye" direction was discussed in a receiving case. Many of the decided cases concern the position of an aider and abettor said to have connived at an offence by wilfully shutting his eyes to an obvious means of knowledge. *When a person deliberately refrains from making inquiries because he prefers not to have the result; when he wilfully shuts his eyes for fear that he may learn the truth; he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring...*

[43] It was also considered by the Court of Appeal in *R v Martin*.[31] The Court observed, in the context of a charge of importing cocaine under the Misuse of Drugs Act, as follows:[32]

> Mr King is wrong in suggesting wilful blindness will not suffice. In a case such as this, it will suffice *if the Crown can prove beyond reasonable doubt that the accused (importer) had her suspicions aroused as to what she was carrying, but deliberately refrained from making further inquiries or confirming her suspicion because she wanted to remain in ignorance.* If that is proved, the law presumes knowledge on the part of the accused. The fault lies in the deliberate failure to inquire when the accused knows there is reason for inquiry.

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27 At 59.
28 *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 674 (emphasis added).
29 *R v Sleep* (1861) LJMC 170.
30 *R v Crooks*, above n 20.
31 *R v Martin* [2007] NZCA 386.
32 At [10] (emphasis added).

> … There is a very useful discussion on this topic in Simester and Brookbanks *Principles of Criminal Law*.[33] The two professors suggest that the concept of "wilful blindness" can arise in two situations. The first arises where the accused "shuts his eyes and fails to inquire 'because he knows what the answer is going to be'", citing *R v Crooks*.[34] The second situation arises "if the means of knowledge is easily to hand and D realises the likely truth of a matter but refrains from inquiry *in order* not to know". While we do not disagree with the professors' categorisations, we consider that the difference between the two situations is largely semantic. We think in most situations the "wilful blindness" test could be summarised as we have done at [10] above. Certainly trial judges should attempt to encapsulate the "wilful blindness" concept in one formulation, not two, when providing an explanation to a jury. The precise formulation in any given case should be carefully tailored to the facts of that case.

[44] Perhaps not surprisingly, there are no cases which have dealt with the meaning of the words "knowing [the return of electoral expenses] to be false" contained in s 134(1) of the Local Electoral Act.

[45] Mr Jones submitted that the state of knowledge required by s 134(1) is actual knowledge. He referred to s 134(2) of the Act. As I have already noted, it provided that every candidate committed an offence who transmitted a return of electoral expenses that was false in any material particular, unless the candidate proved that he or she had no intention to misstate or conceal the facts, and that he or she took all reasonable steps to ensure that the information was accurate. Mr Jones argued that this provision created an offence of strict liability, because no element of knowledge was required. He contrasted this provision with subs (1), which required knowledge of the falsity. He argued that it followed that actual knowledge of falsity was required under subs (1). He also relied on a judgment of Heath J in *Mortimer v Commissioner of Inland Revenue*.[35]

[46] I do not accept Mr Jones' submission, for the following reasons:

(a) I cannot see that the strict liability offence created by s 134(2) dictated what constituted knowledge in s 134(1). The two subsections dealt with different situations and they were conceptually different;

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33 AP Simester and WJ Brookbanks *Principles of Criminal Law* (3rd, Brookers, Wellington, 2007) at [4.5.1].

34 *R v Crooks*, above n 20, at 58.

35 *Mortimer v Commissioner of Inland Revenue* (2002) 20 NZTC 17,797 (HC).

(b) I do not consider that the decision in *Mortimer* assists. Heath J was there dealing with s 62(1)(d) of the Goods and Services Tax Act 1985. It provided that every person committed an offence who made a false return, knowing it to be false, or being reckless as to whether it was false. Heath J held that knowledge in that context meant "actual knowledge".[36] In my view, this finding was confined to the context in which it was made. Recklessness involves actual knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur.[37] Wilful blindness is to be distinguished from recklessness, and s 134(1) does not extend to recklessness.

(c) In one other case, *Severinsen v Department of Social Welfare*,[38] an offence requiring knowledge, but not extending to recklessness, was not construed as being limited to actual knowledge. Penlington J, interpreting s 127 of the Social Security Act 1964, held that the phrase "knowing it to be false in a material particular" extended to wilful blindness.

(d) I also note that, in the present case, in rejecting Mr Banks' application for judicial review of the District Court decision made in relation to committal, Heath J accepted that wilful blindness would suffice, noting that:[39]

> A fact finder would necessarily consider whether Mr Banks deliberately refrained from reading the donation part of the return in order to deny knowledge of the absence of disclosure…

[47] Underpinning the doctrine of wilful blindness is the principle that a defendant should not be able to shield himself or herself from criminal liability by deliberately remaining in ignorance. As Cooke P, for himself and for Richardson J, put it in

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36 At [36].
37 *R v Martin*, above n 31, at [12].
38 *Severinsen v Department of Social Welfare* HC Hamilton AP1/94, 31 May 1994 at [19].
39 *Banks v District Court at Auckland* [2013] NZHC 3221 (HC) at [42].

Millar v Ministry of Transport, the doctrine of wilful blindness carefully applied, should be "a major safeguard against spurious claims of lack of knowledge".[40]

[48] In my judgment, the knowledge required by use of the phrase "knowing [the return of electoral expenses] to be false" in s 134(1) of the Act embraced not only actual knowledge, but also wilful blindness in the sense I have discussed. It follows that the Crown had to prove beyond reasonable doubt either that Mr Banks actually knew or correctly believed the return of electoral expenses to be false, or that, having formed the view that the return was likely to be false, he deliberately refrained from making further inquiries because he knew what the answer was going to be, or because he wanted not to know.

Overall factual setting

The mayoral campaign

[49] Mr Banks has long been involved in politics. He has been and he still is involved in national politics. The evidence disclosed that he first stood for Parliament in about 1978. He ultimately served as a Member of Parliament and he was the Minister of Police for a number of years commencing in about September or October 1990. As I have already noted, he is currently a Member of Parliament and was, until recently, a Cabinet Minister. He has also been involved in local politics. He was Mayor of Auckland from 2001–2004. He stood for the mayoralty again in 2004, but was unsuccessful. He was re-elected Mayor in 2007 and he held the office until 2010.

[50] Mr Banks was a candidate in the 2010 Auckland mayoral election. This was the first election for the Mayor of the new Auckland "Super City", where a single Council replaced several smaller Councils.[41]

[51] Nominations for the mayoral election opened on 23 July 2010, and they closed on 20 August 2010. Nomination forms were required to be accompanied by a deposit of $200.

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40 *Millar v Ministry of Transport*, above n 28, at 669.

41 See the Local Government (Tamaki Makaurau Reorganisation) Act 2009; Local Government (Auckland Council) Act 2009.

[52] Mr Banks completed the required nomination paper, and the $200 deposit was tendered from his campaign bank account. The nomination was processed by the electoral officer on 19 August 2010, and a receipt was issued to Mr Banks on the same day.

[53] The election was conducted by way of postal vote. Voting documents were delivered between 17 and 22 September 2010, and election day was 9 October 2010. The results of the election were declared on 14 October 2010.

[54] Mr Banks' mayoral campaign was unsuccessful.

Information provided to candidates

[55] Part of the nomination form comprised a largely blank return of electoral expenses form. The electoral expenses part of the form did set out the estimated maximum electoral expenses which, under the legislation, a candidate could spend in the last three months of the election. It also, on the page headed "electoral donations", summarised the relevant statutory provisions, and recorded when a donation could properly be said to be anonymous.

[56] The electoral officer, Mr Ofsoske, told me that candidates also received a comprehensive candidate information booklet. The booklet had a section dealing with the required return of electoral expenses. In addition, the electoral office ran meetings or seminars for potential candidates.

[57] Mr Banks stated in his police interview that he could not remember seeing the candidate information book. Nor could he recall receiving an invitation to attend any of the candidates' meetings or seminars, and Mr Ofsoske could not recall seeing Mr Banks at any of the meetings/seminars which were held, (and he attended all but one or two of those meetings).

Mr Banks' campaign team

[58] For the 2010 mayoral campaign, Mr Banks put together an experienced campaign team comprising approximately 15–20 people. The main members of the

team were Mr Lance Hutchison – a bank manager and a Justice of the Peace, Ms Michelle Boag – a consultant who has been involved in politics for a number of years, including serving a term as President of the National Party, and Mr Aaron Bhantaghar. Mr Hutchison was the treasurer responsible for campaign finances; Ms Boag was in charge of fundraising and she chaired campaign meetings; Mr Bhantaghar was the strategist for the campaign. They were all volunteers. There was also one salaried team member – Mr Scott Campbell. Mr Campbell is a strategic communications and public relations consultant. He worked very closely with Mr Banks during the campaign. He was described by others as being Mr Banks' "handler".

[59] Some members of the team had worked with Mr Banks on previous electoral campaigns. Mr Hutchison, for example, had worked with Mr Banks on three, or perhaps four, earlier campaigns.

Fundraising for the mayoral campaign

[60] Fundraising was a matter of significant concern from the outset. The campaign team thought that it might need to raise up to $1 million. Various brainstorming sessions were held and a wish list was put in place. The campaign team hoped to attract 10 major donors, each donating $25,000. Prospective major donors were identified from the National Business Review rich list. Anybody on the campaign team could approach these individuals, including Mr Banks.

[61] General fundraising was also promoted. The campaign team ordered a number of deposit slip books, so that pre-printed bank deposit slips giving the campaign's bank account details could be handed out to prospective donors.

[62] Donations to the campaign could be made in a number of ways:

(a) they could be paid directly into the campaign bank account – for example, by direct credit, by internet payment, by using the pre-printed bank deposit slips, or by using standard bank deposit slips, having first ascertained the campaign's bank account details. The account details were available on the campaign's website;

(b) they could be posted by cheque to a private bag address in Takapuna. That postal address was monitored by Mr Hutchison. He collected and dealt with all mail received;

(c) they could be handed direct to a member of the campaign team, including Mr Banks; or

(d) they could be handed over at general fundraising events.

[63] Mr Banks made a number of contributions to the campaign. He made an initial donation to get the campaign underway and he was the campaign's largest donor by a considerable margin.

[64] The fundraising system adopted for the 2010 campaign had been in place over a number of preceding campaigns. It had been inherited by Mr Hutchison and Mr Banks, in his police interview, said that it had been in place for every campaign since 2001. Mr Banks also stated in his police interview that legal advice in relation to donations had been obtained in 2007, in relation to that campaign. There was no evidence suggesting that fresh advice was taken for the 2010 campaign.

[65] There was evidence suggesting that, at one stage, the use of a secret trust was considered. This would have been a way of more readily ensuring the anonymity of donors. It was rejected as not being within the spirit of the law. The campaign team, including Mr Banks, wanted the campaign's financial affairs to be transparent.

[66] The campaign had a bank account with Westpac. That bank account had been in place for a number of years. For the 2010 electoral campaign, the name of the bank account was changed to "Team Banksie 2010". Both Mr Banks and Mr Hutchison were signatories on the account, but Mr Hutchison was the only person who had online access to the bank account, and he received the bank statements at his home address. Mr Banks had no access to the online banking records. Nor did he see or look at the bank statements. As Mr Hutchison put it, the campaign was set up so that there was a "total brick wall between us, the finance team", and Mr Banks. He said that Mr Banks was not really kept informed about

expenses, and that the only time dollars were mentioned was when the finance team needed another top up donation from Mr Banks personally.

How donations were sought

[67] Mr Banks, in his police interview, said that the campaign team was largely responsible for obtaining donations, and that it was kept "at arm's length". He said that if he saw somebody in the street who said that they would like to do something for his campaign, he would thank them, and indicate that he would get somebody to contact them. He might give them one of the pre-printed deposit slips so that they could put money into his campaign account. He said that he would tell people that they could make an anonymous donation, and if they were to do so, he would be very grateful. He said that he asked hundreds of people for money, and that if somebody in the street said, "Listen I'm supporting you", he would say, "Where's your money?" He said that if somebody said they would give him some money, he would ring them back the next day and thank them very much. When Mr Banks was explaining his understanding of anonymous donations, he noted as follows:

> Well if I stopped you in the street and gave you a chit and you brought in $1,000 and I didn't know you'd done it, well you're anonymous.

He did say that if somebody said that they would support him, he would invariably write to that person quite quickly, and thank them for their support. He stated that if everybody who said that they would donate had given him money, millions would have been raised. In his words, "Many said they'd support me, few did."

[68] As Mr Hutchison put it, Mr Banks was thanking people all of the time for their "support". The thinking was that, despite what they had said, people might or might not have supported the campaign financially. If they had done so, then they were being thanked. If they had not done so, the "thank you for your support" was intended to be a reminder.

[69] Ms Boag confirmed that she was in charge of approaching people who had the ability to make larger donations, and requesting substantial donations from them. She said that she identified the individuals, some of whom she could approach on a personal basis. She also said that the team would meet with Mr Banks on a regular

basis, and that Mr Hutchison would update her and Mr Banks as to the state of the fundraising campaign and the total raised. She would report that she had approached:

> this many people, that I thought that some of them, you know, I might say well I think that that one has committed to a donation, that one hasn't, but again I would not necessarily know whether that had come through because sometimes people say yes I will give you a donation and it never arrives.

When she was asked about persons who had given donations over the $1,000 threshold, she said that she would not necessarily have told Mr Banks about these donations.

[70] Mr Hutchison himself did not approach anybody for a major donation. He understood that Ms Boag had approached a number of potential major donors. He did not understand Mr Banks to have succeeded in getting any $25,000 donations and said that Mr Banks never told him that he had done so.

The return of electoral expenses

[71] Mr Hutchison prepared the electoral return at issue in this case.

[72] Mr Hutchison prepared the schedule of electoral expenses from a spreadsheet he kept of expenses as they were incurred, and by reference to the invoices which he retained in a folder. In declaring donations, he used the bank statements as his primary source of information. When each bank statement came in, Mr Hutchison would go through it. Many of the credit entries on the bank statements did not disclose the name of the person or entity depositing the funds. Beside most of these deposits, he would record the word "anonymous" because the bank statement did not contain any narrative disclosing the depositor's name. Where the depositor's name was disclosed, he would often write the word "check", and he would, if possible, check with the donor to see whether he or she wanted the donation to be anonymous. He said that he would record a donation as being anonymous, if the donor wanted it to be anonymous, and if "we" – by which he meant the whole campaign team – did not know who the donation had come from.

[73] Mr Hutchison did speak to Ms Boag on occasion to see if she knew where particular donations had come from.

[74] Mr Hutchison did not ask Mr Banks where particular donations might have come from. He said that the reason for this was because some people might have wanted to make their donations anonymously. He was adamant that he had not asked Mr Banks about any of the donations at issue in this case. Mr Hutchison also told me that he never had any general discussions with Mr Banks about donations. He said that, at the outset of the campaign, the rules for donations were set out, and that there were no discussions during the campaign because, from the outset, the finance team was in charge of all finances and cashflow, and that this was intentional. The idea was that Mr Banks should concentrate on running the City (as the incumbent Mayor) as well as campaigning as part of the electoral campaign. He said that he never asked Mr Banks "who he had seen" and that there were no generalised discussions regarding donations. He accepted that he was dependent on what Mr Banks told him about any donations he (Mr Banks) was aware of.

[75] Mr Hutchison told me that Mr Banks did tell him that he had collected one donation, that he had picked up the cheque from the donor and banked it. Mr Banks told Mr Hutchison the amount of the donation, so that Mr Hutchison could pick it up when it came through on the bank statement. The identity of this donor was disclosed in the return of electoral expenses transmitted.

[76] Mr Hutchison explained that the same system for dealing with donations that came in had been used in earlier campaigns that he had run for Mr Banks.

[77] Mr Hutchison had never read the Local Electoral Act. Nor had he seen or considered the candidate information booklet, but he had read the relevant parts of the return of electoral expenses that was required to be transmitted to the electoral officer. As I have already noted, it summarised the relevant statutory provision dealing with electoral expenses and donations.

[78] It was Mr Hutchison's decision whether or not donations to Mr Banks' campaign would be declared as anonymous. In reaching his decision on each donation, he applied what he called a "litmus test" – that is whether or not Mr Banks, as the candidate, knew who had made the donation. As he put it, "it was my call that it met all the criteria for listing as anonymous".

[79] The return at issue is dated 9 December 2010. There were two pages setting out in detail the electoral expenses incurred. There were then five pages setting out the donations received. In a number of cases, the identity of the donor was disclosed. In other cases, it was recorded that the donation was anonymous. In each case, there was a description of the donation – generally recording that it was by way of bank deposit, and in each case, the amount of the donation was set out. There were a number of donations for $15,000 recorded, but none of these donations was attributed to SkyCity. There were also five donations of $25,000 recorded. All were recorded as being anonymous, and none of them were attributed to either Mr Dotcom, or Megastuff Limited.

[80] The return was signed by Mr Banks on 9 December 2010. I discuss the circumstances below. It was required to be transmitted to the electoral officer on or before 10 December 2010. Mr Hutchison gave evidence that, immediately after Mr Banks signed it, he lodged it with the electoral officer. Mr Hutchison noted:

> It was the last thing of a disappointing campaign and it was actually a pain to put the return together.

[81] Against this background, I turn to discuss the elements of the offence, and the particulars alleged in the indictment.

Elements of the offence – evidence, reasoning and conclusions

Was Mr Banks a candidate?

[82] There was no dispute in regard to this issue. Mr Jones accepted that Mr Banks was a candidate. I have already detailed the nomination form signed by Mr Banks and the receipt he received for it.[42]

Did Mr Banks transmit the return of electoral expenses?

[83] Again, there was no issue in this regard. Mr Jones, on behalf of Mr Banks, accepted that Mr Banks, via Mr Hutchison, transmitted the return of electoral expenses to the electoral officer.[43]

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[42] See above at [52].
[43] See above at [80].

Was the return of electoral expenses transmitted by Mr Banks false in one or more material particulars?

[84] The falsity alleged by the Crown was the recording of three donations as coming from anonymous donors, when the identity of those donors was known to Mr Banks.

[85] There were three different particulars detailed in the charge – one in relation to a donation made by SkyCity and the other two in relation to donations made by Megastuff Limited on behalf of Mr Dotcom. The SkyCity donation needs to be considered separately from the donations from Mr Dotcom because the donations were made in very different circumstances.

(a) The SkyCity donation

[86] SkyCity had not previously donated to an Auckland mayoral campaign. In 2010, it was approached by the campaign team working for one of the two main candidates, Mr Len Brown, and asked to donate. The decision was made at Chief Executive and Board level to make a donation to Mr Brown's campaign, and to make a similar donation to the other main candidate – Mr Banks.

[87] A cheque for $15,000 to support Mr Brown's campaign was handed to Mr Brown at a luncheon attended by SkyCity's Chief Executive, Mr Nigel Morrison.

[88] In regard to the donation to Mr Banks, a meeting was set up between Mr Banks and Mr Morrison. A Ms Anna McKinnon, who was Mr Morrison's executive assistant, could not recall whether she arranged the meeting or whether Mr Morrison did it himself. Mr Morrison recalled that Ms McKinnon had either directly or indirectly arranged the meeting. The meeting was scheduled for 24 May 2010.

[89] On 21 May 2010, Ms McKinnon requested SkyCity's accounts department to raise a cheque for $15,000, being the amount which was to be donated to Mr Banks' campaign. The cheque was initially drawn in favour of Mr Banks personally. It was in the wrong name and a Mr Andrew Gaukrodger, who was SkyCity's manager of

Government and Industry Affairs asked Ms McKinnon to organise a new cheque in the name of Team Banksie 2010.

[90] When the new cheque was prepared, it was signed by an unknown signatory, and then countersigned by Mr Morrison. Ms McKinnon put the cheque in an envelope and the envelope was sealed. It was a SkyCity envelope with the SkyCity logo on its corner. Ms McKinnon said that there was no compliments slip with the cheque, and Mr Morrison doubted that there would have been a compliments slip in the envelope. Ms McKinnon handed the envelope to Mr Morrison.

[91] The meeting which had been set up with Mr Banks took place on Monday, 24 May 2010. Mr Morrison met with Mr Banks personally. Mr Morrison said that the sole purpose of the meeting, which he described as very short, was "to hand over a donation". This duly occurred.

[92] Mr Banks then returned to his office at the Town Hall. He handed the envelope to his "handler", Mr Campbell, and told Mr Campbell to give the envelope to Mr Hutchison. Mr Banks then went into his office.

[93] Mr Hutchison was, in fact, only some 10 paces away, but that would not have been known to Mr Banks. Mr Hutchison did not generally work at the Town Hall, and there was no direct line of sight to him. There is no evidence suggesting that Mr Banks knew that Mr Hutchison was nearby.

[94] Mr Campbell said that the envelope was sealed when he received it. He said that he gave the envelope to Mr Hutchison, telling him, "Banksie told me to give you this", or words to that effect. Mr Hutchison also said that the envelope was sealed when he got it.

[95] Although there is no evidence to suggest that Mr Banks knew precisely what was in the envelope, there are a number of established facts from which the inference can be drawn that Mr Banks knew that the envelope contained a donation. There are the circumstances of the meeting with Mr Morrison, the handing over of the envelope and the fact that it had a SkyCity logo on it. Further, Mr Banks instructed

Mr Campbell to hand the envelope to Mr Hutchison. Mr Hutchison was in charge of finances. The fact that Mr Banks asked that the envelope be given to him suggests that Mr Banks was aware that the envelope contained a cheque. In my view, Mr Banks must have known that the envelope contained a donation. Mr Jones, on Mr Banks' behalf, accepted that this was the case.

[96] Mr Hutchison initially thought that the SkyCity donation had come in the mail, but accepted that it may have been handed to him by Mr Campbell. He opened the envelope. He thought that there was a compliments slip inside it, and said that, at some stage, he rang SkyCity. He thought (but was not sure) that the person he spoke to was a Mr Peter Treacy – SkyCity's general counsel, that he thanked Mr Treacy for SkyCity's support of Mr Banks' campaign, and that he asked Mr Treacy whether SkyCity would like a receipt for the donation. He also said that he asked Mr Treacy whether SkyCity wanted the donation recorded, and that Mr Treacy told him that it should be treated as being anonymous. He recorded on the bank statement that the donation should be recorded as anonymous. The narration read as follows:

> Deposit slip – wants kept anonymous – check??

Mr Hutchison explained that this narration may not have all been written at the same time, and that he may have written the word "check" initially, and the balance after he had spoken to a person at SkyCity.

[97] Given the evidence of Ms McKinnon and Mr Morrison, I doubt that there was a compliments slip with the cheque. The envelope was, however, marked as coming from SkyCity. It may also be that Mr Hutchison was mistaken when he said that he spoke to someone at SkyCity. I do not accept that he spoke to Mr Treacy. Mr Treacy gave evidence and could not remember any such conversation. Nor do I consider that Mr Hutchison spoke to either Mr Gaukrodger or Mr Morrison. Had he spoken to any one of those three individuals, he would not have been told that the donation was to be treated as anonymous. Clearly, SkyCity did not want the donation to be anonymous. It wanted it to be open and in the public domain. Mr Morrison, Mr Treacy and Mr Gaukrodger knew this. It may be that Mr Hutchison spoke to somebody else in SkyCity's accounts department, who mistakenly told him that SkyCity wanted the donation to be anonymous. In any

event, I consider that whether or not Mr Hutchison contacted anybody at SkyCity is beside the point. The key issue is whether Mr Banks had knowledge of the donation from SkyCity.

[98] In his police interview, Mr Banks stated that he had no recollection of the meeting at SkyCity's offices. He said it was his understanding that the SkyCity donation was made anonymously.

[99] Having considered all of the relevant evidence, I am satisfied beyond reasonable doubt that Mr Banks did know that he was receiving a donation from SkyCity. I accepted the evidence of the various SkyCity witnesses in this regard, and also the evidence of Mr Campbell and Mr Hutchison. I reject Mr Banks' assertion in his police interview that the donation was made anonymously. While there was no direct evidence that Mr Banks knew the amount of the donation, it was a donation from a major corporate entity – indeed, on the evidence, Auckland's largest rate payer. In my view, it could reasonably be inferred that the donation would have been for a not insignificant sum. Mr Jones responsibly accepted that I could properly infer that any donation would have been known by Mr Banks to be of "a declarable amount".

[100] Mr Jones put it to me that the Crown had to prove that Mr Banks had knowledge of the way in which the donation had been recorded in the electoral return, and that the way in which it had been recorded was false. I come to knowledge shortly. For present purposes, I was satisfied beyond reasonable doubt that the electoral return was false in a material particular, because it declared the SkyCity donation as anonymous, in circumstances where Mr Banks knew that SkyCity had made a donation to his mayoral campaign, and where it could reasonably be inferred that Mr Banks would have known that the donation was for a sum in excess of $1,000.

(b) The Dotcom donations

[101] Mr Banks first met Mr Dotcom in April 2010. The meeting was suggested to Mr Dotcom by his head of security, a Mr Wayne Tempero. Mr Tempero arranged the meeting. Mr Banks and a friend of his, a Mr Wall, travelled to the Dotcom Mansion

by helicopter. Mr Dotcom arranged for the helicopter. The primary issues discussed were Mr Dotcom's goals. He hoped to undertake venture capital investment in this country. There was also a short discussion about Mr Dotcom's residence application and Mr Banks offered to assist in this regard.

[102] A second meeting took place in early June 2010, when Mr Banks and his wife attended at Mr Dotcom's mansion in Coatesville for lunch.

[103] There was significant debate before me as to whether the lunch was on 9 June 2010, or 5 June 2010.

[104] Both donation cheques drawn on Megastuff Limited's account were dated 9 June 2010. In his evidence-in-chief, Mr Dotcom said that he thought that the lunch meeting was on the same day. In the course of cross-examination, he became more positive about this and said that the cheques were written on the same day as the lunch. Mr Tempero, under cross-examination, and Mr Dotcom's accountant, a Mr McKavanagh, in his evidence-in-chief, also said that the cheques were signed on the same day as the lunch.

[105] Mrs Amanda Banks – Mr Banks' wife – gave evidence suggesting that the lunch was, in fact, on Saturday, 5 June 2010. She produced copies of her work records in this regard, and the evidence of her employer, a Mr Musuku, was admitted by consent. It became clear that Mrs Banks was working on Wednesday, 9 June 2010. It also became clear Mr Banks had electoral commitments on that day and Mr Campbell gave evidence that Mr Banks met those commitments.

[106] I accept that the lunch was, in fact, on 5 June 2010, and that Mr Dotcom, Mr Tempero and Mr McKavanagh were wrong in this regard.

[107] To return to the lunch, Mr Dotcom said that the only people at the lunch table were him, his wife – Mona Dotcom, Mr Banks and Mrs Banks. So did Mrs Dotcom and Mr Tempero. Mr Dotcom said that Mr Tempero was seated at a bar nearby, only a few metres away. Mrs Dotcom and Mr Tempero confirmed this. Mrs Banks said that, initially, there were just the four of them present at the lunch table, but she went

on to say that they were joined by two American businessmen. Mr Banks, in his police interview, said that there were "numerous business looking people" present – he thought they were from Germany, England and America.

[108] I do not accept Mrs Banks' evidence in this regard. Nor do I accept Mr Banks' statement in his police interview. It might be that there were foreign businessmen visiting the house at the time (indeed, both Mr Dotcom and Mr Tempero accepted this), and it might well be that Mr and Mrs Banks were introduced to them at some stage, but I am not persuaded that they attended the lunch. No other relevant witness remembered the businessmen being at the lunch.

[109] In any event, I consider both of these details to be largely peripheral. The key issue was what was said at the lunch. The evidence in this regard was relatively consistent.

[110] Mr Dotcom said that, during the course of the lunch, Mr Banks said that he was raising money for his mayoral campaign, and that that task was proving quite difficult. Mr Dotcom said that he very quickly offered $50,000 to the campaign, and that this statement was made in the presence of Mr Tempero, and his butler. He thought that his wife had left the lunch table with Mrs Banks to see the Dotcom's children. He said that Mr Banks looked very surprised, that he had "big eyes", and that he accepted the offer. Mr Dotcom said that he asked Mr Tempero to go and see Mr McKavanagh and get a cheque from him. He said that Mr Banks then said, "Make it two cheques instead of one for $25,000 each". Mr Dotcom said that Mr Banks said that this would enable him to keep the donation anonymous. Mr Dotcom said that he was irritated by this request, and that he did not understand why Mr Banks wanted the donation to be kept anonymous. Mr Dotcom said that Mr Banks explained that if he was to help Mr Dotcom, it would be "better if nobody knows about your donations". Mr Dotcom also said that he discussed with Mr Banks other assistance he might be able to provide to Mr Banks' campaign. Mr Dotcom suggested, for example, that he might be able to run campaign ads on his websites and that Mr Banks liked the idea of a digital campaign. In his evidence-in-chief, Mr Dotcom said that he could not recall exactly when he signed the two cheques, but that he believed it was on the same day as the lunch. Later, when being

cross-examined, he firmed up in this regard. He said that the cheques were signed on the same day as the lunch.

[111] Mrs Dotcom gave evidence that Mr and Mrs Banks arrived for lunch at the Coatesville Mansion by car. She said that Mr Dotcom, Mr Banks, Mrs Banks and she were sitting around the table for lunch, and that Mr Tempero was nearby, around the kitchen bar. She said that she and Mrs Banks were present when Mr Banks told them how hard it was to accumulate money because of the economy, and that Mr Dotcom then offered to donate $50,000 to the mayoral campaign. She said that Mr Banks was really happy about the offer. She said that when Mr Dotcom asked Mr Tempero to find Mr Kavanagh, Mr Banks asked Mr Tempero to put "the cheque into two 25,000, so he can put it anonymously". She said Mr Dotcom then told Mr Banks, "I'm ok to put my name in there, I have no issue with that", and that Mr Banks replied that, "he will not be able to help Kim in the future if his name is on it". Mrs Dotcom said that she did not know when the cheques were signed, as Mr Kavanagh was not on the property at the time.

[112] Mr Tempero gave evidence that Mr and Mrs Banks arrived for lunch in a silver Commodore. He said that Mr and Mrs Dotcom and Mr and Mrs Banks were seated at the table, and that he was in the kitchen bar area, within earshot. He could not remember if Mr Banks brought it up, but he said that during the lunch, Mr Dotcom offered to make a $50,000 donation. He said that both Mrs Dotcom and Mrs Banks were present. He said that Mr Dotcom asked him to see whether Mr McKavanagh was on the property, and to get him to write a cheque. He said that before he could leave to find Mr McKavanagh, Mr Banks said, "Don't make it one cheque of 50, make it two cheques to $25,000 each". He said Mr Dotcom told Mr Banks he did not mind putting his name on the cheque, but that Mr Banks responded that it was better to make the donation anonymous, so that he could help Mr Dotcom in the future. Mr Tempero said that he went to find Mr McKavanagh. He initially could not recall whether Mr McKavanagh was there or not, although he thought, on balance, that he may not have been. After being referred to his earlier police statement, he recollected that Mr McKavanagh was present. He could not properly recall the signing of the cheques, but he believed that they were signed in his presence. He said that after the lunch, he escorted Mr and Mrs Banks to their car.

He could not recall it accurately, but he thought that Mr Banks may have given him some deposit slips at that stage.

[113] I considered each of them, Mr Dotcom, Mrs Dotcom and Mr Tempero to be reliable and credible witnesses. I elaborate on this below.

[114] Mr McKavanagh gave evidence that he was in his office at the Coatesville Mansion, when he saw Mr Banks arrive. He said that Mr Tempero came across a short time later, and asked him to prepare two cheques for Team Banksie 2010. He said Mr Tempero asked for two cheques, each for $25,000, and asked whether the donations could be kept anonymous. He said that after he had written out the cheques, he and Mr Tempero took them to the main house for signature. He could only recall Mr Dotcom, Mr Tempero and himself being present at the time, and he believed that he would have remembered if Mr Banks was present.

[115] I had reservations about the detail of much of Mr McKavanagh's evidence. He struck me as being a rather casual witness, and his evidence appeared to be, in large part, a reconstruction based upon what he thought might have happened. I did not consider him to be a reliable witness.

[116] Mrs Banks initially maintained that, during the lunch, there was no discussion of the mayoral campaign. In her evidence-in-chief, she said as follows:

> Q. Okay. Was there any discussion about the Mayoral campaign?
>
> A. No.
>
> Q. Was there any discussion about funding or donations for the Mayoral campaign?
>
> A. No.

She said that because the American businessmen were there, it did not occur to "[them to] have a conversation about a local issue".

[117] I did not consider Mrs Banks to be a reliable witness in this regard. First, she accepted under cross-examination that one of the purposes for the lunch visit was because Mr Banks was seeking support at the time. Further, she conceded under

cross-examination that there was a conversation about the campaign over lunch, but only in relation to Mr Dotcom helping by sending out data to email addresses in Auckland. She said that she heard no discussion about a financial donation or donations before she left with Mrs Dotcom to meet the Dotcom's children. She said that subsequently, she rejoined her husband in the dining room, and that a short time later, they left the mansion. Thirdly, she said that as they left, Mr Banks gave Mr Tempero some deposit slips, saying that he could take those, and "sort it out". This comment must have followed on from some discussion about the making of a donation. Finally, Mrs Banks ultimately accepted under cross-examination that on the drive home, she and Mr Banks discussed the possibility of Mr Banks receiving a donation from Mr Dotcom. Mrs Banks said that she was sceptical and that she said she would believe it when she saw it. All of this suggests to me that there must have been some discussion about donations between Mr Dotcom and Mr Banks.

[118] It is possible that there was a discussion, but that Mrs Banks was not there at the time. There are, however, difficulties with this scenario. The evidence suggested that Mrs Banks was in the company of Mrs Dotcom throughout. Relevant witnesses agreed that, at some stage, both women left the lunch room together to visit the Dotcom's children. Mrs Dotcom, however, said that she heard the discussion about the donations. If Mrs Dotcom was there, Mrs Banks must have been there. It seems to me likely that Mrs Dotcom was present – and that, therefore, Mrs Banks was also there. The conversation would have been relatively memorable because it was unusual and Mrs Dotcom was able to recollect the conversation clearly. Both Mrs Dotcom and Mr Tempero remembered that she was there and it seems to me that they were likely to have been correct in this regard.

[119] Mr Dotcom was initially not sure whether his wife was there. He only firmed up in his view that she was not there when he was under vigorous attack and when he was being accused of lying. At the same time, he also said that Mrs Banks was not there. I suspected that his later evidence that his wife and Mrs Banks were not there has to be seen in this light. In any event, I do not accept Mr Dotcom's evidence in this regard.

[120] When Mr Banks was interviewed by the police, he denied any "actual knowledge" of the donations made by Mr Dotcom through his company, Megastuff Limited. He did say, however, that he had a discussion about donations with Mr Dotcom. He said that he called Mr Dotcom and asked that the two of them went into a conservatory. He said as follows:[44]

> B …So I called him aside and we went out to his conservatory and I said, "I need some support from you. I'm raising a lot of money $25,000 lots. And he offered me 200,000. Plus he says I can give you quite a lot of access to social media…
>
> …
>
> So I asked him for 25 thous, thousand dollars and I think he said something like, "I could fund all of this campaign." That would've been a worry actually from anyone. We thought that $25,000 was a good number about right to ask from high networthers. And I said to him you can, if you want give me more with other entities and I mentioned the Pacific Cabling Company. I don't know whether he said, yes I'll support you, I don't know whether he said, no. But he sort of got up and wandered around. While he was talking he was wandering around a little so, he was looking at me like this as he was wandering around he didn't sit here looking at me like this, he was just sort of wandering around and looking at pictures of himself and going into a room where there were racing cars going round and looking at goldfish. A very strange man…
>
> …
>
> L See, this offer of money then, when you say you were shocked by amounts that which was talked about because he talked about funding the whole campaign. Um, you said $25,000.
>
> B Yes.
>
> L You said to him. Um, what was his reaction to, to that?
>
> B Nonplussed, not excited, no interest. I don't even recall him saying yes.
>
> L And who was present with you at the time when this offer was made from him?
>
> B I think just him and I sitting on a bench in a conservatory with a huge, I remember a statue of a fighting warrior on – was standing there in about 600 kgs of steel, quite intimidating, but he was wandering around. He, he wasn't interested in the conversation, I think he heard but it wasn't something that was really quite interested in.

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[44] "B" is Mr Banks. "L" is one of the interviewing officers, Detective Sergeant Carl Lewens.

A little later, Mr Banks answered as follows:[45]

> B …And of course it was at that lunch that I discussed the donations.
>
> A And who was it to, I may have missed, just to clarify who was it that raised that idea of donations?
>
> B Um, during the lunch I called aside DOTCOM to go out into the conservatory because there was something I wanted to discuss with him. I don't remember what I said, I raised it then.
>
> A And you've said that during the meeting obviously he's um, offered you $200,000 and you've explained that you thought that was a, -
>
> B - well just went nah, nah.
>
> A - outrageous amount?
>
> B Well I wouldn't have said that I would've just said, "Nah, nah, nah."
>
> A Um, and that you also made mention that he could fund your whole campaign.
>
> B No, no, no, the mention to fund the whole campaign I think came from Wayne TEMPERO…

Mr Banks also accepted that he told Mr Dotcom he could make any donation anonymously.

> L …What have you told your team, Lance Aaron, Michelle, about this, the possible donation?
>
> B Nothing, nothing
>
> L Why haven't you mentioned it to them Mr BANKS?
>
> B Well I wanted him to make it, ah, and I, I told him he could make it anonymous. I gave him slips, I think on that day, I think on that day I gave TEMPERO , ah, a number of slips
>
> L And the reason for giving him the slips?
>
> B Oh, I wanted the money…

There is also the following passage a little later in the interview:

> B Well I don't think DOTCOM, I don't remember DOTCOM ringing up and asking it to be anonymous. DOTCOM was told it could be anonymous, DOTCOM, ah, lodged that anonymously. I don't have any knowledge of DOTCOM ringing me up and saying is this

[45] "A" is the other interviewing officer, Detective Adam Bicknell.

> anonymous or Lance, or anyone else, no. No. Most people know that if they lodge some money it can be done anonymously and its anonymous and I respect it, it's not anonymous for me because for all of these people I couldn't careless if they weren't anonymous…

[121] Having considered the evidence in its totality, I am satisfied that Mr Dotcom's recollection of the discussion that he had with Mr Banks at the lunch was, in all essential respects, true and I accept it. Mr Dotcom's recollection was supported by Mrs Dotcom and by Mr Tempero and I accept their evidence as well. The evidence of Mr Dotcom, Mrs Dotcom and Mr Tempero is broadly consistent with Mr Banks' police interview. It is also supported by the limited contemporaneous documentation. Both cheques were drawn on the Megastuff Limited's account. They were consecutive cheques. There was no good reason why Mr Dotcom would have drawn two consecutive cheques, both for $25,000, rather than one cheque for $50,000, unless he was asked to do so. Mr Banks, in his police interview, said that he thought $25,000 "about right" to ask, and that if Mr Dotcom wanted to give him more, he could "with other entities". This was not, however, what happened. Both cheques were drawn on the same company – Megastuff Limited. In my view, it is reasonable to infer that Mr Banks requested that the donation be split into two, so that they did not stand out and so that the donations would be consistent with other donations of $25,000 that his campaign team was endeavouring to solicit.

[122] Events thereafter are a little less clear. I doubt that the cheques were written on the day of the lunch. It seems to me more likely that Mr Dotcom said that he would make a donation of $50,000, that Mr Banks asked for two cheques of $25,000, that Mr McKavanagh (who may not have been present on the day) subsequently drew the cheques, and that Mr Dotcom then signed them. It also seems likely that Mr Banks did give deposit slips to Mr Tempero as he left the property, and that those deposit slips were used by whoever banked the cheques into the Team Banksie 2010 account.

[123] The evidence in relation to the circumstances in which the cheques were banked into the campaign's account was even less satisfactory. The primary evidence came from Mr McKavanagh, and his evidence in this regard was confused

and contradictory. He gave two statements to the police, in which he said, in relatively explicit terms, that he took the cheques to Queenstown, and that he banked them in Queenstown. It was clear that that was not the case, and the Crown did not suggest otherwise. Rather, the evidence established, and I accept, that the cheques were put into a drop box at the Westpac Bank at Albany on 14 June 2010. The cheques were accompanied by two deposit slips, each for $25,000. There was no reliable evidence as to who filled out those deposit slips, or who put the cheques and deposit slips in the drop box.

[124] If the evidence stopped at this point, it may have been arguable that Mr Banks did not know that Mr Dotcom, via Megastuff Limited, had actually paid the donation into the campaign's bank account. There is, however, other evidence compelling the conclusion that Mr Banks did know about the donations from Mr Dotcom.

[125] First, Mr Dotcom said that sometime after the lunch, he asked Mr Tempero to check whether the cheques had been cashed. Mr Tempero said that he recalled first asking Mr McKavanagh about this, that Mr McKavanagh did not know, and that he then telephoned Mr Banks. He said he told Mr Banks that Mr Dotcom was asking if the cheques had cleared, and that Mr Banks confirmed that they had, and asked him to thank Mr Dotcom very much.

[126] Secondly, Mr Dotcom gave evidence that sometime after the lunch, Mr Banks rang him. He said that he was on his work bed, and that he took the call on speakerphone. He said that during the conversation, which canvassed the possibility that Mr Dotcom might be able to assist Mr Banks by providing online support for Mr Banks' mayoral campaign, he asked Mr Banks whether he had received the donation. He said that Mr Banks replied, "Yes, thank you very much". Mr Dotcom said that Mrs Dotcom was present during this conversation, and she confirmed this in her evidence. She said that two to three weeks after the luncheon meeting, Mr Banks called Mr Dotcom. She said Mr Banks asked about the internet advertising, and that during the call, Mr Dotcom asked Mr Banks whether he had received the money. She said Mr Banks said, "Yes, I did", and that he thanked Mr Dotcom.

[127] Thirdly, it is noteworthy that Mr Banks accepted in his police interview that he wanted the money and that he would, as usual, have rung up and thanked Mr Dotcom for his support of his mayoral campaign. He maintained that this was his general practice, regardless of whether a particular individual had actually made a donation.

[128] Finally, and most importantly, there was evidence from Mr Dotcom's solicitor, a Mr Gregory Towers. Mr Dotcom was arrested in January 2012. He was placed in Mt Eden Prison. He has a bad back and the prison environment was aggravating the situation. He wanted his own mattress from the Coatesville Mansion. He asked Mr Towers to seek assistance from Mr Banks as the MP for Epsom, in which Mt Eden is situated. Mr Towers gave evidence that on 8 February 2012, he had a half-hour telephone discussion with Mr Banks. Mr Towers said that, prior to that conversation, he had not been aware that Mr Dotcom had provided Mr Banks any electoral support. He said that he rang Mr Banks to ask him, as the MP for Epsom, to try and arrange for the Department of Corrections to provide better bedding for Mr Dotcom. He said that Mr Banks told him that as much as he wished to publically support Mr Dotcom, it might backfire on Mr Dotcom if "it b/comes known about election support etc". Mr Towers recorded this comment in a contemporaneous file note. He was confident that he had recorded the words that were spoken to him as best as he could. There was no evidence of Mr Dotcom having provided any other "election support" for Mr Banks. The various proposals relating to email addresses and use of the internet and social media did not proceed. I was satisfied that the discussion recorded in the file note could only have been a reference to the $50,000 donation by Mr Dotcom to Mr Banks' 2010 mayoral campaign. In my view, Mr Towers' evidence, and the file note, was compelling evidence, from a witness whose testimony was unimpeachable, that Mr Banks knew that the donations had, in fact, been made by Mr Dotcom. It was also consistent with Mr Dotcom's version of what was said at the lunch on 5 June 2010.

[129] I accept the evidence of Mr Tempero, Mr and Mrs Dotcom and Mr Towers in relation to these various post-lunch acknowledgments made by Mr Banks.

[130] Mr Jones put it to me that Mr Dotcom's evidence, and that of Mrs Dotcom, Mr Tempero and Mr McKavanagh (the "Dotcom witnesses"), was a fiction, and part of a larger conspiracy, driven by Mr Dotcom, to try and unseat Mr Banks, destabilise the Government, and bring down the present Prime Minister, Mr Key.

[131] I do not accept Mr Jones's submissions in this regard:

(a) First, I watched each of the Dotcom witnesses carefully while they gave evidence. I did not notice anything in their demeanour to suggest that they were not telling the truth. I considered that each of the Dotcom witnesses (other than Mr McKavanagh) was straightforward in giving evidence. As I have already noted, with the exception of Mr McKavanagh, I consider that they were reliable and credible witnesses.

Mr Dotcom, in particular, was, in my view, a good witness. He answered questions about his criminal history frankly and openly. He did not obviously seek to "gild the lily" in giving evidence and there was no artifice that I could detect.

I accept that, in some respects, Mr Dotcom's evidence was undermined by other evidence given in the course of the hearing. For example, Mr Dotcom was asked whether he had ever said that he would bring down the Government, and destroy Mr Banks. He replied that he had never said this, although he did acknowledge his dislike of the current Government. He said, in effect, that he holds it responsible for what he considers to be illegal spying, and for cooperating with the authorities in the United States in regard to his arrest in this country and the attempts to extradite him. Mr Dotcom's assertions were directly contradicted by evidence given by Mr Mark Mitchell, the MP for Rodney. I accept Mr Mitchell's evidence. However, this did not, in my judgment, detract from the balance of Mr Dotcom's evidence.

By way of further example, I also consider that Mr Dotcom and Mr Tempero (under cross-examination) and Mr McKavanagh (in his evidence-in-chief) erred when they said that the cheques were signed on the same day as the luncheon meeting. In my view, however, this does not support the suggestion that they fabricated their evidence in its totality. It is trite law that witnesses may be mistaken about some details, yet be honest and otherwise reliable witnesses. As I noted above, it was understandable that the witnesses will not have perfect recollection of the detail of events which occurred some four years ago.

(b) Secondly, I record that each of the Dotcom witnesses was subject to fierce cross-examination. With the exception of Mr McKavanagh, none of them buckled under that pressure to any significant extent.

[132] Further, the defence theory of a conspiracy ignores the fact that none of the Dotcom witnesses was under Mr Dotcom's influence or control when they gave evidence.

(a) Mrs Dotcom has recently separated from her husband. As Mr Dotcom put it, if he did have control over his wife, they would still be together.

(b) Mr Tempero struck me as a particularly strong and independent person, who would not readily accede to a request from Mr Dotcom to become part of a conspiracy.

Mr Tempero ceased employment with Mr Dotcom in 2013. The two are now at loggerheads. The evidence disclosed that Mr Tempero has, until recently, been the subject of a "gagging order" obtained by Mr Dotcom, preventing him discussing employment issues he has with Mr Dotcom.

Mr Mitchell told me that Mr Tempero told him that, on a previous occasion, he (Mr Tempero) was asked to lie by Mr Dotcom to take the

"heat off" Mr Dotcom. This issue was not put to Mr Dotcom and Mr Tempero declined to answer any questions in regard to it. Nevertheless, I accept Mr Mitchell's evidence that Mr Tempero did make the comment to him, albeit relatively briefly, and not in any great detail. However, even if Mr Tempero was, on a previous occasion, asked, or was prepared, to lie for Mr Dotcom out of a misguided sense of loyalty, there was no obvious reason for any continued loyalty. It was noteworthy that Mr Mitchell told me that Mr Tempero consented to Mr Mitchell sharing the information that he had disclosed to him with Mr Banks. This was inconsistent with any conspiracy theory. Had Mr Tempero's evidence in this trial been the result of a conspiracy, it is difficult to see why Mr Tempero would have endeavoured to undermine that conspiracy by permitting Mr Mitchell to inform Mr Banks about an alleged prior conspiracy involving Mr Dotcom.

(c) Nor does Mr McKavanagh fit easily into any conspiracy theory. While he did meet with Mr Dotcom a few days before he gave his police statement, he denied discussing his evidence with Mr Dotcom. Similarly, Mr Dotcom denied instructing Mr McKavanagh on what to say. At the time the statement was given, Mr McKavanagh was not employed by Mr Dotcom. Indeed, he was only employed by Mr Dotcom for a relatively brief period. He left Mr Dotcom's employment in May 2011, and he described the termination of his employment as being "a little bit acrimonious". At the time he gave his statement, he still had an issue with Mr Dotcom. He was still trying to get his last month's pay from Mr Dotcom.

[133] Also in contradiction of any conspiracy theory, there is some corroboration which backs up the evidence of the Dotcom witnesses.

(a) As I have already noted, the fact that two sequential cheques for $25,000 each were drawn on Megastuff Limited's account, is consistent with Mr Dotcom's evidence and that of Mrs Dotcom and

Mr Tempero, namely that Mr Banks asked for the donation to be split into two cheques.

(b) Mr Banks did have an ongoing relationship with Mr Dotcom after the donations were made. It was clear from Mr Banks' police interview that he had quite a few discussions with Mr Tempero about his mayoral campaign, and in particular, Mr Dotcom's offer to assist with the provision of email assistance. At one stage, Mr Dotcom raised the prospect of giving free subscriptions to the Megastuff website to people who supported Mr Banks. Mr Tempero sought legal advice in this regard, and ultimately, the proposal did not proceed. It was also Mr Dotcom's evidence that he had a number of discussions with Mr Banks about the firework display that he was proposing to put on on New Year's Eve, if and when he obtained residency in this country. He said that Mr Banks offered to assist in obtaining the various permits required. It was clear from Mr Banks' police interview that he was enthusiastic about this display, and also that he attended at a post-display party which Mr Dotcom hosted. Mr Banks and his wife met Mr Dotcom and his wife in the foyer to the hotel where the party was being held shortly after the display, albeit relatively briefly. Further, Mr Banks and his wife were invited to Mr Dotcom's birthday party in January 2011. Mr Banks proposed a toast to Mr Dotcom at that party. Subsequently, Mr Banks asked Mr Dotcom to recommend a hotel for him in Hong Kong. Mr Dotcom offered to let Mr Banks use a floor which he had rented at the Hong Kong Grant Hyatt. Mr Banks declined that offer, but Mr Dotcom contacted the manager of the hotel, and arranged for Mr Banks to be given preferential treatment, and discounted rates.

(c) Finally, there was the evidence of Mr Towers which I have already summarised.

[134] Having considered all of the relevant evidence that I considered to be reliable, I was satisfied beyond reasonable doubt that the return of electoral expenses

was false in a material particular, because the identity of Megastuff Limited as a donor to the mayoral campaign was not set out in the return of electoral expenses transmitted to the electoral officer, notwithstanding that Mr Banks knew about the two donations, each of $25,000, made by Megastuff Limited on behalf of Mr Dotcom.

Did Mr Banks know of the falsities?

[135] As I have noted, Mr Hutchison prepared the return at issue in these proceedings. It was in his handwriting. I have already set out above the process followed by Mr Hutchison in preparing the return.[46]

[136] Ms Boag told me that Mr Hutchison sought a meeting with her and showed her the return of electoral expenses and donations once it had been completed. She focussed on the expenditure side, because of the prescribed legal limits on spending. She said there was a general review of expenses. She said that she might have flicked through the donations part of the return, but that she did not consider it necessary for her to note every single donation, because she did not have a complete picture about the donations which had been raised.

[137] Mr Hutchison then arranged to meet Mr Banks for coffee on 9 December 2010. They sat together at a table in a café. Mr Hutchison told me that Mr Banks did not look at or read the return, but that they did talk about the expenses part of the return. He said that Mr Banks' main concern was making sure that small things, like the cost of morning teas and the like incurred at the Town Hall, had been included, because Mr Banks did not want there to be any perception that the campaign had not paid its way. He said that Mr Banks was concerned about the spending cap. He said that they spent perhaps three to four minutes talking about the expenses part of the return.

[138] Mr Hutchison said that there was no significant discussion about the donations part of the return, and that Mr Banks simply made the comment that nearly a million dollars had been raised, and that it had been a waste of money. He said that

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[46] See above at [71]–[80].

Mr Banks also asked about a handwritten comment which had been recorded on the last page of the return. That comment read:

> Donations received were over a period of more than 12 months and applied to election expenses both before and after the 3 months accountable period.

Mr Hutchison said that he had his hand on the bottom left-hand corner of the return, that he flicked through the five pages on which the donations were recorded "just like counting money". He said that he told Mr Banks that he had to sign the return. He said that Mr Banks asked him whether everything was true and correct, or words to that effect, and that he (Mr Banks) then signed the return. He said that Mr Banks would not have been able to physically read the donations part of the return as he flicked through it, and that the only page that Mr Banks would have been able to read was the final page – page five – where his signature appeared.

[139] I have already concluded that Mr Banks knew that SkyCity and Megastuff Limited, on behalf of Mr Dotcom, had made donations to his campaign. It can reasonably be inferred that Mr Banks knew that the amount of the SkyCity donation was likely to be more than $1,000. He knew that Mr Dotcom was donating $50,000 to his mayoral campaign, by way of two cheques, each of $25,000.

[140] The evidence established that Mr Banks knew that Mr Hutchison would be preparing the electoral return, and that he knew that the return would be prepared on the same basis as it had been in previous elections. Mr Banks knew that Mr Hutchison would be making the decision as to whether or not donations should be declared as anonymous. Mr Banks must have known that, unless Mr Hutchison was told about the donation from SkyCity, and the donations from Mr Dotcom, the identity of the donors would not be disclosed in the return, for the simple reason that Mr Hutchison would not know about them. The accuracy of the return was dependent on the information Mr Banks provided to his campaign team.

(a) The SkyCity donation

[141] It was clear that Mr Banks did not expressly discuss the detail or circumstances of this donation with anyone in his campaign team. Specifically, he did not speak to either Mr Hutchison or Ms Boag about it. Nevertheless, in my view,

I can reasonably infer that the fact that a meeting was to be held between Mr Morrison and Mr Banks must have been known not only to SkyCity employees, but also by personnel in Mr Banks' campaign team. The meeting had been arranged by someone. There was no evidence to suggest that it was arranged with Mr Banks personally. It seemed likely that it would have been arranged with a member of his staff. Further, the initial SkyCity cheque payable to Mr Banks personally had to be cancelled, and a new cheque in favour of Team Banksie 2010 had to be written. The instructions to issue a new cheque came from Mr Gaukrodger. He could not remember exactly how he became aware of the need for a change, but he imagined that it would have come from someone in Mr Banks' campaign team. It seemed to me that he could only have been told about the matter by somebody within Mr Banks' campaign team. I infer not only that the fact that Mr Banks was to meet with Mr Morrison was known to members of the campaign team, but also, that it was known to members of the campaign team that SkyCity was going to make a donation to the campaign. Otherwise, there never would have been a discussion about the name of the payee on the cheque.

[142] Mr Gaukrodger also gave evidence that he had one or two phone calls with Mr Hutchison at the time – probably before the cheque was issued. He said that they were about "the practical matters of the donation".

[143] As I have already noted, when Mr Banks returned with the envelope, he handed it to Mr Campbell, and he asked Mr Campbell to give it to Mr Hutchison. Mr Banks did not give Mr Campbell any other instructions regarding the envelope. He did not tell Mr Campbell how the envelope had been received or what it contained. Nevertheless, the evidence established that the envelope was a SkyCity envelope, with the company's name on it. Mr Hutchison was in charge of finances, and I infer that Mr Banks, in instructing that the envelope should be given to Mr Hutchison, did so, because he knew that it contained a donation.

[144] In my judgment, it is a reasonable possibility that Mr Banks believed that Mr Hutchison did know about the donation and that Mr Banks had received it directly.

[145] Mr Hutchison, in his evidence-in-chief, seems to have taken a curious view of anonymity in regard to the SkyCity donation. He stated as follows:

> Q. Now just in respect of the envelope for the moment, and you say it was sealed?
>
> A. Yes.
>
> Q. As far as you were concerned – was it significant about whether it was sealed or not?
>
> A. Ah, yes, 'cos if it was sealed it means no one knows how much the donation might have been inside.
>
> Q. Would it be – if you look at the envelope did it say, "SkyCity" on the outside?
>
> A. I can't remember but I presume it would have.
>
> Q. So the SkyCity part wasn't anonymous but the amount was anonymous?
>
> A. That's right.
>
> Q. Did you regard that as a significant distinction?
>
> A. Ah, no 'cos like I said the reading, reading of the letter of law, if you look at, if I looked at it on a return if it was 15,000 there, I would say there's, for the test that we did when I was doing the return, would the candidate know who made that donation, and the answer is no, because he didn't know the amount. And it is possible the cheque could have been for less than a thousand and didn't need to be declared.

I doubt that Mr Hutchison's view of the law in this regard was correct, but it is not necessary for me to deal with this issue. It was clear that Mr Hutchison did not ask Mr Banks about the SkyCity donation. Nor was there any evidence suggesting that Mr Banks instructed Mr Hutchison to treat the donation as he did.

[146] It is unfortunate that Mr Hutchison did not check the position with Mr Banks. He should have done so. It is even more unfortunate that Mr Banks did not give rather fuller instructions to Mr Campbell and/or to Mr Hutchison. Nevertheless, I cannot exclude the possibility that Mr Hutchison interposed with his own (erroneous) judgement about whether the SkyCity donation should be treated as being anonymous. It follows that I cannot be sure that Mr Banks actually knew that the return was false in this regard at the time it was transmitted. Mr Banks might

have thought that Mr Hutchison knew enough to record that the donation came from SkyCity, and he might have abstained from further inquiry when he signed the return, simply because he was careless and not because he knew what the answer was going to be. As noted by the Court of Appeal in *Crooks*, that is not enough to establish wilful blindness.[47]

[147] Accordingly, I am not persuaded beyond reasonable doubt that Mr Banks knew that the return was false, because it did not record SkyCity's name as a donor to the campaign in the sum of $15,000.

(b) The Dotcom donations

[148] The position, however, is different with the Dotcom donations.

[149] The evidence established that Mr Banks did not disclose anything about Mr Dotcom or Megastuff Limited to any of his mayoral campaign members. Specifically, he did not mention them to Mr Hutchison or Ms Boag, and neither had heard of Mr Dotcom or Megastuff Limited at the time the return of expenses was prepared, signed and transmitted.

[150] When he signed the return on the basis of Mr Hutchison's assurances, Mr Banks knew that he had not provided Mr Hutchison with the critical information, namely that he knew about the donations from Mr Dotcom.

[151] Mr Towers' file note of his discussion with Mr Banks in February 2012 was telling. In my judgment, the file note constituted an acknowledgement by Mr Banks, not only that he knew that Mr Dotcom had made a donation to his mayoral campaign, but also that he was aware that that donation had not been publicly disclosed. Why else would Mr Banks have said that it might backfire on Mr Dotcom if it *became known* about his electoral support?

[152] While Mr Jones enjoined me to find that Mr Towers' file note referred only to "election support", and not to a donation, I did not agree that it could be construed so narrowly. As I have already noted, the evidence did not disclose any other election

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[47] *Crooks*, above n 20, at [59].

support which Mr Dotcom provided to Mr Banks. While there were discussions about digital campaigning, the provision of email addresses, placing ads for Mr Banks' mayoral campaign on Mr Dotcom's websites and providing free membership to MegaUpload for persons who agreed to support Mr Banks, none of those possibilities eventuated. The only other possibility was that there was evidence suggesting that Mr Banks asked Mr Dotcom to support the ACT Party, perhaps sometime in early 2011. However, the evidence was also that Mr Dotcom refused to do so. Other than Mr Dotcom's donations to the 2010 mayoral campaign, there was no other election support which the words carefully noted down by Mr Towers could refer to.

[153] I consider that, in relation to the Dotcom donations, Mr Banks engineered the situation. He had the opportunity to check the returns. He refrained from doing so. Rather, he sought to insulate himself from actual knowledge of the falsity of the return by seeking an assurance from Mr Hutchison.

[154] I am satisfied, beyond reasonable doubt, either:

(a) that Mr Banks had actual knowledge that, at the time he signed it and at the time it was transmitted, the return of electoral expenses was false in a material particular in relation to the Dotcom donations, because he knew that he had not given to Mr Hutchison or anybody else in the campaign team the information that was required if the return was to be accurate, or

(b) that Mr Banks deliberately chose not to check the return to see whether the Dotcom donations were properly disclosed, because he had no real doubt as to what the answer was going to be, and because he wanted to remain in ignorance.

[155] For these reasons, I found the charge proved.

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Wylie J