IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-4645
[2013] NZHC 3221

BETWEEN	JOHN ARCHIBALD BANKS Applicant
AND	DISTRICT COURT AT AUCKLAND First Respondent
	SOLICITOR-GENERAL Second Respondent

Hearing:	27 November 2013
Counsel:	D P H Jones QC and K M Venning for Applicant No appearance by or on behalf of First Respondent Solicitor-General (M R Heron QC) and A R van Echten for Second Respondent
Judgment:	3 December 2013

JUDGMENT OF HEATH J

This judgment was delivered by me on 3 December 2013 at 4.30pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Parlane Law, Auckland
Crown Law, Wellington
Counsel:
D P H Jones QC, Auckland

The application

[1] The Honourable John Banks is a Member of Parliament, and currently leader of the ACT political party. In October 2010, in the first such election after a major reorganisation of local government in the region, he was a candidate for the Auckland mayoralty.

[2] At material times,[1] a mayoral candidate (whether successful or unsuccessful) was required to make a return of electoral expenses and donations (the Return).[2] During the campaign, Mr Banks had received two donations (together totalling $50,000) from a company associated with Mr Kim Dotcom, a businessman, and one of $15,000 from SKYCITY Entertainment Group Ltd (Sky City). Those donations were not expressly disclosed in the Return. Rather, they appear to have been classified as having been made anonymously.

[3] A member of the public, Mr McCready, decided to initiate a private prosecution, alleging that Mr Banks had transmitted the Return to the electoral officer, knowing that it was false in a material particular.[3] Subsequently, a District Court Judge authorised the issue of a summons to compel Mr Banks to answer the charge.[4] A preliminary hearing took place before Judge Gittos, in the District Court at Auckland, to determine whether there was sufficient evidence to put Mr Banks on trial for the alleged offence. On 16 October 2013, Judge Gittos committed Mr Banks for trial in the District Court.[5]

[4] Mr Banks seeks judicial review of the committal decision. He asks this Court to quash the decision to commit him for trial, to set aside the committal and to issue a declaration that there is insufficient evidence to commit him for trial. The question

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1 Significant amendments were made to the Local Electoral Act 2001 in 2013. They came into force on 29 June 2013. The provisions to which I refer were those in force in 2010.

2 Local Electoral Act, s 109, set out at para [6] below. A new disclosure regime was created when new subparts 1 and 3 of Part 5 of the Local Electoral Act 2001 were inserted from 29 June 2013, by the Local Electoral Amendment Act 2013. The new ss 103A–103L and 112A set out in some detail what must be done when disclosing donations.

3 Local Electoral Act 2001, s 134(1).

4 *McCready v Banks* DC Wellington CRI-2012-085-9093, 16 April 2013 (Judge Mill) at para [46].

5 *New Zealand Private Prosecution Services Ltd v Banks* DC Auckland CRN 12085501798, 16 October 2013 at para [27].

is whether Mr Banks has demonstrated a basis upon which this Court should exercise its undoubted supervisory jurisdiction to quash the committal decision.

The disclosure regime

[5] 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[6] (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 personal donations in exchange for promises of future action once elected".[7] The statutory provisions dealing with the need for disclosure of donations must be read in that context.

[6] Section 109 of the Local Electoral Act 2001 (the Act), while referring in its heading only to electoral expenses, also sets out the requirement to provide a return of donations to the electoral officer. At the material time, s 109 stated:

> **109 Return of electoral expenses**
>
> (1) Within 55 days after the day on which the successful candidates at any election are declared to be elected, every candidate at the election must transmit to the electoral officer a return setting out—
>
> ...
>
> (b) the name and address of each person who made an electoral donation to the candidate and the amount of each electoral donation; and
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> (c) if an electoral donation of money or of the equivalent of money is made to the candidate anonymously and the amount of that donation exceeds $1,000,—
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> (i) the amount of that donation; and
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> (ii) the fact that it has been received anonymously.

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

7 Report of the Royal Commission on the Electoral System *Towards a Better Democracy* (December 1986) at para [8.21]. See also *Peters v Clarkson* [2007] NZAR 610 (HC) at paras [20]–[31] (Randerson, Goddard and Panckhurst JJ).

(2) Every return under subsection (1) must be in the form prescribed in Schedule 2 or to similar effect.

(3) If the candidate is outside New Zealand on the day on which the successful candidates are declared to be elected, the return must be transmitted by the candidate to the electoral officer within 21 days after the date of the candidate's return to New Zealand.

(4) It is the duty of every electoral officer to ensure that this section is complied with.

[7] Schedule 2 set out the way in which the candidate was to make a Return.

I, A.B, a candidate at the election held on [insert date], make the following return of all electoral expenses incurred by me or on my behalf at the election and of all electoral donations made to me or to any person on my behalf.

...

ELECTORAL DONATIONS

(*Here set out the name and description of every person or body of persons from whom or which any donation (whether of money or of the equivalent of money or of goods or services or 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 (inclusive of any goods and services tax)) was received by the candidate or by any other person on the candidate's behalf for use by or on behalf of the candidate in the campaign for his or her election. The amount of each donation received is to be set out separately. If a donation of a sum of more than $1,000 was received from an anonymous person, the amount of the donation must be stated and the fact that the person who made the donation is anonymous must also be stated*).

[to be signed and dated by the candidate]

(emphasis in original)

[8] Section 109(1)(b) and (c) applies to an "electoral donation". That term was defined by s 104 of the Act:

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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> (b) includes, if goods or services are provided to the candidate, or to any person on the candidate's behalf, under a contract at 90% or less of their reasonable market value, the amount of the difference between the contractual price of the goods or services and the reasonable market value of those goods or services; but
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> (c) does not include the labour of any person that is provided to the candidate free of charge by that person

[9] Section 109(1)(c) of the Act referred to disclosure of "anonymous" donations. The term "anonymous" was defined by s 5(1) of the Act:

> **anonymous,** in relation to an electoral donation (as defined in section 104), means a donation that is made in such a way that the candidate concerned does not know who made the donation.

[10] Section 134 of the Act created two distinct offences where a candidate has transmitted a return of electoral expenses containing a materially false particular. The more serious (s 134(1)) is proved if a candidate "transmits a return of electoral expenses knowing that it is false in any material particular". It may be prosecuted on indictment. The maximum penalty, if the offence were proved, is a term of imprisonment not exceeding two years, or a fine not exceeding $10,000. Those penalties serve to emphasise the gravity of that type of offending.

[11] By contrast, a lesser offence is created by s 134(2). That offence is committed if a candidate were to transmit "a return of electoral expenses that is false in any material particular", *unless* he or she proves that he or she had no intention to mis-state or conceal the facts *and* that he or she took all reasonable steps to ensure that the information was accurate. A s 134(2) charge is brought in the summary jurisdiction of the District Court.

[12] To establish the s 134(1) charge, a prosecutor must prove beyond reasonable doubt that Mr Banks transmitted the Return, *knowing* that it was false in a material particular. Mr Banks accepts that he signed the Return on 9 December 2010 and immediately caused another person to transmit it to the electoral officer. That being so, the focus is on the time at which the Return was signed, and the state of Mr Banks' knowledge at that time.

The prosecution

[13] Following a formal complaint from the electoral officer on 27 April 2012, a Police investigation was commenced. It concluded that there was insufficient evidence of knowledge of any falsity on the part of Mr Banks. On that view, no charge under s 134(1) could be brought. Nor could any summary prosecution be commenced under s 134(2). The time for laying an information had expired.[8]

[14] On 24 September 2012, Mr McCready (through his company New Zealand Private Prosecution Services Ltd), commenced a private prosecution, alleging that Mr Banks had committed an offence against s 134(1) of the Act. A District Court Judge directed that a summons was to issue. Later, Mr McCready acknowledged that that information had been incorrectly laid.

[15] A new information was filed on 9 December 2012. On 16 April 2013, having received written submissions from both Mr McCready and counsel for Mr Banks, Judge Mill determined that a summons should issue and the prosecution should be transferred from Wellington to Auckland.[9]

[16] At the relevant time, committal hearings were rare. They were only held if an oral evidence order had been obtained.[10] Otherwise, committal was dealt with by the Registrar of the District Court, on the papers, with no submissions from the parties. In this case an oral evidence order was made, and four witnesses were called by the prosecutor at the committal hearing. They were Mr Dotcom; Mr Tempero, Mr Dotcom's head of security; Mr Towers, Mr Dotcom's solicitor; and Mr Morrison, the Chief Executive Officer of Sky City. In addition, Mr Banks elected to call evidence from one witness, Mr Hutchison. He had been the treasurer for Mr Banks' mayoral campaign.

[17] At the conclusion of the committal hearing, Judge Gittos determined, on the basis of both written statements and the oral evidence adduced, that there was

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8 Summary Proceedings Act 1957, s 14.

9 *McCready v Banks* DC Wellington CRI-2012-085-9093, 16 April 2013 (Judge Mill) at para [46].

10 The procedure is summarised by Keane J in *Pandey-Johnson v District Court at New Plymouth* HC New Plymouth CIV-2010-443-508, 30 November 2010 at paras [18]–[23].

sufficient evidence to commit Mr Banks to the District Court at Auckland for trial. He said:[11]

> [26] The task of the Court on a committal hearing is not to evaluate the comparative quality and credibility of the evidence. Section 184G of the Summary Proceedings Act provides that the Court should commit the defendant for trial if the Court is of the opinion that the evidence adduced by the prosecutor is sufficient to put the defendant on trial for an indictable offence. The test is whether at the conclusion of all the evidence to be tendered at the preliminary hearing the evidence is such that a reasonable tribunal could convict the defendant on it. In *Auckland City Council v Jenkins* [1981] 2 NZLR 363 it was expressed in this way:
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> > A tribunal deciding whether or not there is a case to answer must decide whether a finding of guilt could be made by a reasonable jury or a reasonable judicial officer sitting alone on the evidence thus far presented.
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> [27] In my view this test has been met. I am satisfied that sufficient evidence has been presented to commit the defendant for trial and he will be committed for trial accordingly.

[18] At the time the committal order was made, Mr McCready had carriage of the prosecution. After committal, the Solicitor-General elected to assume responsibility for it. As a result, the judicial review application is brought against both the District Court at Auckland and the Solicitor-General.

Analysis

(a) Was the committal process "fundamentally flawed"?

[19] There is no doubt that the High Court, exercising its supervisory jurisdiction over Courts and tribunals of limited jurisdiction, has power to review the committal decision. As the Court of Appeal made clear in *Auckland District Court v Attorney-General*[12] this Court's jurisdiction "is based on the fundamental premise that statutory [powers] can be validly exercised only within their true limits. It is the task of the High Court to determine those limits and it does so by the process of judicial review". In making the committal order, Judge Gittos was exercising a statutory power of decision conferred by s 184G of the Summary Proceedings Act 1957.

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[11] *New Zealand Private Prosecution Services Ltd v Banks* DC Auckland CRN 12085501798, 16 October 2013 at paras [26] and [27].

[12] *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 (CA) at 133 (Cooke P, Richardson, Gault, McKay and Thomas JJ).

[20] While jurisdiction to review exists, there is more scope for argument about the circumstances in which this Court, exercising civil jurisdiction, should intrude upon specific (and alternative) processes that are designed to safeguard the interests of any person who has been charged with an indictable offence. In *C v Wellington District Court*,[13] the Court of Appeal set a high threshold, indicating that review was limited to "truly exceptional circumstances". Delivering the judgment of the Court, Henry J said:[14]

> As a matter of general principle truly exceptional circumstances will be required for the Court to entertain an application for judicial review of a decision to commit for trial under s 168 of the Summary Proceedings Act 1957 where the sole ground is a challenge to the sufficiency of the evidence. That principle should apply even if an identifiable question of law (other than sufficiency of evidence) is said to arise. The Crimes Act 1961 provides a person committed for trial with an alternative, adequate, and convenient procedure to obtain the same remedy. There is a comprehensive statutory procedure included in Part XII of the Crimes Act 1961 governing indictable trials which is directed to their just and expeditious disposal, and in a situation such as the present there is no cause for the Court's wider review process to be brought into play and thereby to interfere with that process.

[21] The Court of Appeal, in *C,* also observed:[15]

(a) The principal purpose of a committal hearing is to ensure that a citizen is protected from an improper prosecution by ascertaining whether there is sufficient evidence for the person accused to be put on trial.

(b) The committal hearing is not a source of definitive rulings that govern a trial. No issues are determined. The hearing is in the nature of an inquiry into the sufficiency of evidence to put an accused on trial. For that reason, there is no right of appeal against a committal decision.

(c) An application to review the committal decision is directed to the decision itself. The reasons for the decision are "largely irrelevant". The "validity of the reasoning in a particular case does not determine

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13 *C v Wellington District Court* [1996] 2 NZLR 395 (CA) (Gault, Henry, Keith, Blanchard and Doogue JJ).

14 Ibid, at 400.

15 Ibid, at 397.

the correctness of the committal". Further, as the Court noted, "[detailed] reasons are not required, and usually not given in practice".

[22] Recognising the formidable hurdle before him, Mr Jones QC, for Mr Banks, contended that this was a case in which "truly exceptional circumstances" had been established.[16] Two distinct points are raised. The first is that the decision was "fundamentally flawed", meaning that no committal decision was, in fact or in law, made. The second concerns the impact of the committal decision on a person in Mr Banks' position.

[23] As I understand it, Mr Jones' argument to demonstrate "truly exceptional circumstances" reduces to four propositions:

(a) The committal was invalid due to substantial factual errors made by the Court in reaching to its decision.

(b) Mr Banks is a sitting Member of Parliament who has had to resign his position as a Minister of the Crown as a direct result of the committal decision.

(c) The effect of the committal decision on Mr Banks has been substantial, "[generating] political fodder for his adversaries".

(d) The evidence was, in any event, insufficient to justify committal.

[24] I am not satisfied that there was any fundamental flaw in the process adopted by the District Court Judge. He heard oral evidence from those witnesses in respect of whom orders had been made. Opportunities were available for counsel for Mr Banks and Mr McCready to cross-examine witnesses called by the other side. The Judge considered the witness statements and the oral evidence and came to a conclusion that there was sufficient evidence to put Mr Banks on trial. While Mr Jones is right to point to a number of factual errors that the District Court Judge

[16] See para [20] above.

made in his reasons for decision, I am not satisfied that they contributed either to an unfair process or an incorrect decision. I deal with the points raised by Mr Jones later, when considering his arguments on evidential sufficiency.[17]

[25] I accept that the consequences of the committal order on Mr Banks are serious. Anyone in Mr Banks' position would be concerned about facing trial for an offence that carried a maximum sentence of imprisonment, if the charge were proved. But, in many respects, for any person of standing in the community, reputational issues are to the forefront. Those concerns are especially acute when an accused holds an elected public office.

[26] Mr Banks has already felt the effects of the committal order. While remaining as Member of Parliament for Epsom, he has resigned ministerial portfolios. If he were to be convicted of the s 134(1) offence, his parliamentary seat would become vacant.[18]

[27] For someone who has been in public life in New Zealand for over 30 years, most notably as a former Mayor of Auckland, a long-time Member of Parliament and a Cabinet Minister, the mere fact of committal does have a significant effect. That said, Mr Banks' position is not materially different from any person of good standing in the community who is charged with a serious criminal offence. The relatively recent prosecution of former Cabinet Ministers in relation to a failed finance company illustrate that point.[19] In the absence of any fundamental problem with the decision to commit, on evidential sufficiency grounds, reputational factors are not sufficient for the Court to intervene by way of judicial review.

[28] Leaving to one side the evidential sufficiency point, I do not consider that "truly exceptional circumstances" of the type contemplated in *C v Wellington District Court*[20] have been made out because:

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17 See paras [29]–[46] below.
18 Electoral Act 1993, s 55(1)(d).
19 See *Jeffries v R* [2013] NZCA 188, in relation to charges arising out of the collapse of Lombard Finance and Investments Ltd.
20 *C v Wellington District Court* [1996] 2 NZLR 395 (CA) at 400, set out at para [20] above.

(a) First, no definitive ruling was made by Judge Gittos that will govern the trial process. That is the reason why no appeal lies from such a decision. Indeed, if Judge Gittos had declined to commit Mr Banks for trial, it would have remained open to the prosecutor to apply to the High Court for consent to file an indictment. That course was successfully followed in *Wallace v Abbott*,[21] another case arising from a private prosecution.

(b) Second, Mr Banks may challenge the sufficiency of the evidence to put him on trial by making an application under s 347 of the Crimes Act 1961. On an application under that provision, at which both prosecutor and defence may put additional evidence before the Court, a Judge sitting alone determines whether there is sufficient evidence for a reasonable fact-finder, correctly applying the controlling law, to find the accused guilty.

(c) Third, an application under s 347 would serve the same purpose as the present application for judicial review. This Court should not encourage attempts by those who have been charged with serious offending to challenge, in the civil jurisdiction of this Court, decisions in respect of which there are procedural safeguards built into the criminal justice system. While I do not suggest that Mr Banks is using the judicial review procedure for this purpose, the potential for those charged with criminal offending to delay the criminal justice process would be heightened if the availability of the judicial review procedure were not heavily circumscribed.

(d) Although Mr Banks has resigned ministerial portfolios while the trial process is undertaken and is (no doubt) concerned and anxious about the trial process, his situation is not materially different from that faced by many accused who are seen as persons of good standing in their community. Public interest concerns arising out of his position

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[21] *Wallace v Abbott* (2002) 19 CRNZ 585 (HC) (Elias CJ).

as a Member of Parliament can be addressed by expediting the trial process.[22]

(b) Sufficiency of evidence

[29] Having regard to the way in which Mr Jones presented his argument, I offer some observations on the sufficiency of evidence point. Deliberately, I will be relatively brief. As I have concluded that there was sufficient evidence to commit Mr Banks for trial, it is better that I keep any comments on the merits to a minimum.

[30] The question for the District Court Judge was whether, on the evidence available to him or her, a reasonable fact-finder *could* find the defendant guilty of the charge before the Court.[23] That is the test that Judge Gittos applied. It was not for Judge Gittos to determine whether any of the witnesses from whom he heard were credible or reliable. Those are questions for the fact-finder, at trial.

[31] In my view, the errors of fact to which Mr Jones drew attention are not sufficient to impugn the committal decision. I deal with each of his points in turn.

[32] First, Judge Gittos found that two cheques were given to Mr Banks at a meeting with Mr Dotcom.[24] I agree with Mr Jones that there was no evidence to support a finding that the cheques were provided to Mr Banks by Mr Dotcom personally, or that they were provided at the particular meeting to which the Judge referred. The evidence is that a representative of Mr Dotcom later sent them to Mr Banks' campaign team by post.

[33] Second, Mr Jones submitted that the Judge erred in holding that the occasion when the cheques were handed over would have been "memorable", because of the fact that Mr Banks was transported to Mr Dotcom's home by helicopter.[25] The evidence is that Mr Dotcom's decision to donate was made at a later meeting. As

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22 See *R v Banks* [2013] NZHC 3223 at para [5].
23 *Auckland City Council v Jenkins* [1981] 2 NZLR 363 (HC) at 365.
24 *New Zealand Private Prosecution Services Ltd v Banks* DC Auckland CRN 12085501798, 16 October 2013 at para [19].
25 Ibid, at para [12].

indicated earlier, the cheques were, in fact, sent by mail subsequently. That being so, I agree that there was no evidential foundation for this finding.

[34] Third, the Judge stated that that part of the electoral expenses return comprised four pages,[26] whereas it contained five. Further, the Judge referred to the listed donations as comprising 67 in all, 45 of which were shown as having been made anonymously.[27] I accept Mr Jones' submission that there were 89 entries in that part of the return, 45 of which were shown as having been made anonymously. The fact that the Judge omitted to count one of the pages of the return accounts for this error.

[35] Fourth, the Judge found that there was evidence that Mr Banks had "glanced" at the return at the time it was signed. The evidence was more nuanced than that. Mr Hutchison said in evidence that he had filled out the form, Mr Banks read that part of the return dealing with expenses, but did not read the section in which donations were listed. Mr Hutchison deposed that Mr Banks asked him if that part of the return was true, and he confirmed that it was. In answering questions from Mr McCready, Mr Hutchison accepted that Mr Banks "might have glanced" at the donations section of the return but that "he didn't read them".[28]

[36] Fifth, Mr Jones criticised the Judge's finding that it was "apparent on the face of the [Return] that minimal attention to the form would be required to see whether the two $25,000 donations from Mr Dotcom's company had been correctly attributed".[29] I accept that one cannot readily see, from a perusal of the form, where the relevant donations are to be found. It is clear however that donations from Mr Dotcom or Sky City are not listed. A "glance" at the pages listing donations (depending for how long) might have revealed that fact.

[37] Mr Jones submitted that the "knowledge" point was effectively resolved in favour of Mr Banks by Mr Hutchison's evidence.[30] That submission, with respect, is based on a false premise. There is no warrant to regard Mr Hutchison's evidence as

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26 Ibid, at para [25].
27 Ibid.
28 Ibid.
29 Ibid.
30 See para [35] above.

being of any different character from that given by any other witness at a committal hearing, whether by written statement or orally. It is no function of a committal Judge to determine questions of credibility and reliability, whether the evidence is or is not challenged in cross-examination.[31] It is for the fact-finder at trial to make findings on credibility and reliability. Mr Hutchison's evidence moved marginally under brief questioning from Mr McCready, and it would be speculative to proceed on the footing that it might not be further refined under more meaningful cross-examination. For present purposes, Mr Hutchison's evidence was simply part of the pool of evidence on which the District Court Judge was required to decide whether Mr Banks should be committed for trial.

[38] Even allowing for the Judge's errors of fact, the Solicitor-General (Mr Heron QC) submitted that the evidence was sufficient to commit Mr Banks for trial. Mr Heron submitted that the Judge's errors were immaterial. He contends that there were many facts from which a Judge conducting a committal hearing was entitled to conclude that Mr Banks was aware of the identity of Mr Dotcom and Sky City as donors to the mayoral campaign and had transmitted the signed Return knowing that those donations had not been disclosed.

[39] In particular, Mr Heron pointed out that there was evidence, *if accepted at trial*, to support the Judge's view that a reasonable fact-finder *could* find the "knowledge" element of the charge proved beyond reasonable doubt. In particular:

(a) Mr Banks met Mr Dotcom at his Coatesville residence over lunch, in the company of Mr Tempero, and perhaps others. During this meeting Mr Dotcom mentioned what could be done to improve Internet connectivity in New Zealand and told Mr Banks that he and his family were applying for residency in New Zealand.[32]

(b) At a further meeting in June 2010, Mr Dotcom offered to donate $50,000 to Mr Banks' mayoral campaign. Mr Banks accepted the

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31 None of the prosecution witnesses were cross-examined and Mr Hutchison was questioned briefly by Mr McCready.

32 *New Zealand Private Prosecution Services Ltd v Banks* DC Auckland CRN 12085501798, 16 October 2013, at para [19]. The Judge referred to the meeting but not to the detail of what was said. He may have conflated the initial meeting with this one.

offer but indicated that it would be better to split the donation into two cheques of $25,000.[33]

(c) Mr Dotcom says that Mr Banks told him that he wanted the donation split into two cheques because "then he would not have to declare where it came from". Mr Dotcom states that Mr Banks told him that he wanted to help and could do so more effectively if no one knew about the donation.[34]

(d) Mr Dotcom caused two cheques to be issued, each for $25,000. They were made out to "Team Banksie" and were sent by Mr Dotcom's chief financial officer, Mr McKavanagh, by mail. The cheques were made out on the account of Megastuff Ltd, a company associated with Mr Dotcom.[35]

(e) Mr Dotcom and Mr Tempero each give evidence of a telephone conversation with Mr Banks during which he confirmed receipt of the donations. Mr Banks was aware that donations had been made by or on behalf of Mr Dotcom.[36] An inference could be drawn that Mr Banks had always intended to disclose those donations as having been made anonymously.[37]

[40] In addition, the Judge noted that the donation portion of the Return contained a definition of "anonymous",[38] which reflected the definition set out in s 5(1) of the Act:[39]

> Anonymous means a donation made in such a way that the candidate does not know who made the donation.

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33 Ibid. The Judge erred in recording the meeting at which this discussion occurred.
34 Ibid.
35 Ibid, at para [7]. The Judge erred in recording the manner in which the cheques were forwarded to Mr Banks' campaign team but the evidence establishes that they were sent by mail.
36 Ibid, at para [22]. While not expressly recorded, receipt of the donations is implicit.
37 Ibid, at para [23].
38 Ibid, at paras [8] and [9].
39 See para [9] above.

Whether or not Mr Banks read the donation portion of the Return, he must be taken as knowing the legal definition. Ignorance of the law is no excuse.[40]

[41] Viewed as a whole, I am satisfied that the decision to commit for trial was open to the District Court Judge. It is quite possible that a fact-finder at trial might accept Mr Hutchison's evidence that Mr Banks did not read that part of the Return that dealt with donations (or at least only glanced at it) and Mr Banks genuinely relied on Mr Hutchison's assurances. However, an alternative inference, that Mr Banks always intended to falsely record the donations as having been made anonymously might also be open to a fact-finder at trial. Much will depend on the way in which the evidence unfolds at trial.

[42] At trial, 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.[41] On that type of analysis, "knowledge" may be proved by "wilful blindness" on the part of the alleged offender.

[43] The concept of "wilful blindness" was discussed in some depth in judgments given by members of the Court of Appeal in *Millar v Ministry of Transport.*[42] Cooke P and Richardson J described the "wilful blindness rule," if carefully applied, as "a major safeguard against spurious claims of lack of knowledge".[43] McMullin J added:[44]

> ... 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: *R v Crabbe* (1985) 59 ALJR 417. But where a defendant has been found to have acted honestly but mistakenly, there is no room for importing the notion of wilful blindness to take away from him something which he has already been held to have, namely an honest belief. ...

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40 Crimes Act 1961, s 24.

41 Generally, see *R v Crooks* [1981] 2 NZLR 53 (CA) at 58, *R v Sweeney* [1982] 2 NZLR 229 (CA) at 230 and *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 669 (Cooke P and Richardson J), 674 (McMullin J) and 678 (Casey J).

42 *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA).

43 Ibid, at 669.

44 Ibid, at 674.

[44] I am not satisfied that the errors of fact made by the District Court Judge had any material impact on his ultimate decision to commit Mr Banks for trial. The critical part of the Judge's decision was based on Mr Banks' receiving the donations, knowing they had come from both Mr Dotcom's interests and Sky City and with an intention that they not be disclosed in the Return.[45] On the Judge's view, a fact-finder could infer that Mr Banks deliberately refrained from checking the donations part of the Return so that he could distance himself from claims that he had knowledge of the failure to identify the two donors in question. Whether or not that can be proved beyond reasonable doubt by the Crown at trial is an entirely different issue.

[45] There is no real challenge to the evidence before the District Court Judge on the question of the Sky City donation. I am satisfied that there was evidence on which the District Court Judge could act to find that Mr Banks was aware that Sky City had made a donation and either knew that it had not been disclosed expressly in the Return, or deliberately refrained from inquiring whether it had been. On that basis there was evidence on which he could be committed for trial in relation to the Sky City donation.

[46] In those circumstances, there is no basis on which I should interfere with the District Court Judge's decision to commit Mr Banks for trial.

Result

[47] The application for judicial review is dismissed. I did not hear submissions on the question of costs. They are reserved. If costs are sought, a memorandum shall be filed and served on or before 13 December 2013. On receipt of any memorandum, the Registrar shall allocate a telephone conference before me so that further directions can be made.

[48] I emphasise the preliminary nature of the decision to commit for trial. On the evidence adduced to date a fact-finder at trial may or may not find "knowledge" proved beyond reasonable doubt. At this stage, Mr Banks is entitled to the

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[45] *New Zealand Private Prosecution Services Ltd v Banks* DC Auckland CRN 12085501798, 16 October 2013 at paras [22]–[23].

presumption of innocence that applies to any person charged with a criminal offence in New Zealand.

[49] I thank counsel for their assistance.

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P R Heath J

Delivered at 4.30pm on 3 December 2013