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Case No: CO/11578/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2010

Before:
LORD JUSTICE THOMAS
MR JUSTICE TUGENDHAT
MRS JUSTICE NICOLA DAVIES DBE

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Between :

Regina on the application of Philip James Woolas	**Claimant**
- and -	
The Parliamentary Election Court	**Defendant**
- and -	
Robert Elwyn James Watkins	**First Interested Party**
- and -	
The Speaker of the House of Commons	**Second Interested Party**

- -

Mr Gavin Millar QC and **Mr Anthony Hudson** (instructed by Steel & Shamash) for the **Claimant**
Miss Helen Mountfield QC and **Mr James Laddie** (instructed by **K & L Gates LLP**) for the **First Interested Party**
Hearing dates: 16 and 17 November 2010

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Approved Judgment

Lord Justice Thomas:

This is the judgment of the court to which we have each contributed.

INTRODUCTION

1. During the nineteenth century, Parliament passed a number of laws to ensure that elections were freely and fairly conducted. That legislation is now reflected in the Representation of the People Act 1983 (the 1983 Act). One of the provisions, s.106(1), originally enacted in 1895, makes a person guilty of an illegal practice if before or during an election for the purpose of affecting the return of any candidate at the election he makes or publishes "any false statement of fact in relation to the candidate's personal character or conduct", unless the person can show that he had reasonable grounds for believing and did believe the statement to be true.

2. On 27 May 2010, Mr Watkins the Liberal Democrat Party Candidate for the Oldham East and Saddleworth constituency in the General Election on 6 May 2010 brought a petition under s.120 of the 1983 Act. He claimed that Mr Woolas, the Labour Party Candidate who had been returned as MP at the General Election by 103 votes was guilty of illegal practices under s.106 by making five false statements in three election leaflets drafted by Mr Woolas' election team and for which he has accepted responsibility.

3. In 1868, Parliament entrusted to a reluctant judiciary, as we explain at paragraph 23 below, the limited task of determining disputes on an election petition. That task has, since the end of that century, been carried out by an election court. Such a court was constituted under s.123 of the 1983 Act from the rota of judges for the trial of Parliamentary Election Petitions. Teare and Griffith Williams JJ were selected and constituted the court (the Election Court) which tried the petition between 13 and 16 September 2010.

4. The function of an election court is very limited, as we explain at paragraphs 31 and 32 below. It determines the issues which have arisen on the petition; the consequences are specified in the 1983 Act. On 5 November 2010, the Election Court found Mr Woolas guilty of an illegal practice by making three false statements in the three leaflets in relation to the personal conduct of Mr Watkins in the election leaflets. The decision is reported at [2010] EWHC 2702 (QB). It found that three of the statements, on the meaning attributed by the Court to them, (i) were statements of fact and not opinion (ii) were in relation to Mr Watkins' personal conduct or character, (iii) were false and (iv) Mr Woolas did not believe two of them to be true (a finding of dishonesty) and had no reasonable grounds for believing one them to be true (a finding of negligence). The reasons for the findings are fully set out in the decision of the Election Court. The findings of fact made by the Election Court included findings as to the meanings of the statements contained in the election leaflets. The Election Court reached these findings by considering what the words would mean to the ordinary and reasonable reader in the constituency.

5. Having made those findings the Election Court declared that the election was void by reason of the operation of s.159(1) of the 1983 Act and certified that to the Speaker under s.144 (1) and (2). It also reported under ss.144 (4), 158 and 160 to the Speaker that Mr Woolas was guilty of an illegal practice. The report had the effect of

compelling him to vacate his seat and barring him from being elected to the House of Commons for three years (s.160(4) and (5)).

6. On the same day, Mr Woolas made an application for permission to bring judicial review proceedings contending that the Election Court had applied the wrong legal test in approaching the question of whether the statements were statements "in relation to the personal character or conduct" of a candidate within the meaning of s.106. They had therefore reached a decision that was wrong in law.

7. The application was refused by the single judge. It was then renewed before us on the basis we would consider the application for permission first and if we granted it, then whether we should grant the relief claimed.

8. The application before us gave rise to two issues:

   i) Can this Court judicially review a determination on a point of law made by an election court for a parliamentary election? This point has never before arisen for decision.

   ii) Did the Election Court apply the correct legal test to its determination that the statements it found had been made were statements "in relation to the personal character or conduct" of Mr Watkins? The last substantial case on this issue was in 1911.

9. It is important to stress that counsel on behalf of Mr Woolas did not seek to challenge the findings of fact made by the Election Court. Mr Woolas strongly disputes those findings, particularly those of dishonesty in relation to two of the three statements, but it is accepted on his behalf that the 1983 Act does not provide for any appeal on any issue of fact and that no challenge can be made to the findings of fact on any judicial review that may be available to him given the limited scope of any such judicial review. We have therefore to consider the issues on the basis of these findings.

Summary of our conclusions

10. The role of the Election Court was very limited. It had to carry out the role imposed on it by Parliament to determine whether there had been an illegal practice under s.106 during the election campaign in the constituency in 2010. Our role was even more limited – to decide, if we had jurisdiction to do so, whether the Election Court had interpreted s.106 correctly. Under our constitution it is for the judiciary to determine the meaning of the law enacted by Parliament (see paragraphs 51-53 below). The consequences of a finding on the correct interpretation of s.106 that there had been an illegal practice by Mr Woolas followed automatically as prescribed by Parliament. The Courts therefore do no more than to discharge these limited functions; it is for the electorate to determine whom it wishes to elect in a free and fair election.

11. We have concluded that we have jurisdiction to determine whether the Election Court was correct in its interpretation of s.106. Our reasons are set out at paragraphs 14 to 62.

12. We have concluded, with the benefit of much fuller argument than was available to the Election Court, on the basis of our interpretation of s.106 that two of the three statements for which Mr Woolas accepted responsibility were false statements in relation to Mr Watkins' personal character or conduct, but that the third was not. We have set out our reasons at paragraphs 63 to 124.

13. In the result, the Certificate to the Speaker and the Report of the Election Court must therefore be upheld. The consequence is that the election of Mr Woolas is void and he is barred from seeking re-election for 3 years.

ISSUE 1: CAN THE DETERMINATION OF THE ELECTION COURT ON AN ISSUE OF LAW BE JUDICIALLY REVIEWED?

(i) The current position in relation to election courts

14. It was the contention advanced by Miss Mountfield QC on behalf of Mr Watkins that the Election Court was not amenable to judicial review. Between 1870 (shortly after the courts were given jurisdiction in relation to Parliamentary election cases) and 1914, the courts heard 151 parliamentary election petitions alleging electoral malpractice; 69 MPs were unseated. Since 1918, there have only been 7 successful petitions; the last time an MP was ousted was in 1924. No one was aware of any occasion on which an attempt had been made to bring judicial review proceedings in respect of the decision of an election court in respect of a parliamentary election (or elections to the European Parliament or National Assembly for Wales which are subject to the same provisions).

15. There is, however, another type of election court – an election court for a local election – in respect of which the issue was considered. Although both types are referred to as election courts in the legislation, it is necessary for the purposes of determining this issue to refer to them respectively as a parliamentary election court and a local election court. In *R v Cripps ex p Muldoon* [1984] QB 68, a Divisional Court (Robert Goff LJ and Mann J) decided that a local election court was amenable to judicial review. That decision has not been called into question; indeed since that decision there have been judicial reviews of local election courts where the issue of jurisdiction has not been questioned: see, for example, *R v Rowe ex p Mainwaring* [1992] 1 WLR 1059.

16. The court in *Muldoon* declined to express any opinion on whether a parliamentary election court was amenable to judicial review; they recognised that it might be thought anomalous that one type of election court could be and the other was not, but pointed out that Lord Widgery CJ had contemplated that conclusion in *R v Election Court ex p Sheppard* [1975] 1 WLR 1319. All that was decided in *Muldoon* was that the local election court was amenable to judicial review for acting in excess of jurisdiction. It was therefore further contended by Miss Mountfield that if a parliamentary election court could be judicially reviewed, then the scope of that review precluded any review, in the circumstances of this case, on issues of law.

17. In *Muldoon* Robert Goff LJ considered that the question of whether an election court could be subject to judicial review was determined by deciding whether the election court was as an inferior court to the High Court; the answer to the question in *Muldoon* was primarily determined on the basis of the relevant provisions of the

Representation of the People Act 1949 (the 1949 Act), a consolidating Act which the 1983 Act, another consolidating Act, re-enacts in materially the same terms.

(ii) The applicable principles

18. It was common ground that we should approach the question of whether this court could judicially review the decision of the Election Court and the scope of any review by reference to the principles recently set out in the decision in *R (Cart) v Upper Tribunal* [2010] 2 WLR 1012 (Div Ct) and [2010] EWCA Civ 859 (CA). In that case the courts were considering the position of the Upper Tribunal and the Special Immigration Appeal Tribunal. After a detailed and scholarly review of the authorities, including *Muldoon,* Laws LJ concluded at paragraph 70 that the approach should be to examine:

> "all the characteristics of the court in question in order, not to dignify it with a name or status, but to ascertain whether in substance it should be subject to the judicial review jurisdiction of the High Court. In the fulfilment of that task various factors may be relevant; the nearest one gets to a general principle is the " underlying policy" to which Robert Goff LJ [in *Muldoon*] refers, namely that tribunals (and the context shows that courts are included) of limited jurisdiction should generally be subject to judicial review."

Laws LJ then made clear that the High Court was itself not subject to review as a court whose jurisdiction was truly unlimited. Designation of a court as a superior court of record was not determinative. Other courts not subject to review:

> "are exceptional cases whose immunity is justified by reason of their "having a status so closely equivalent to the High Court that the exercise of the power of judicial review by the High Court is for that reason inappropriate". While the two courts referred to by Robert Goff LJ were designated superior courts of record by the relevant statutes, in substance it is their possession of this status, their proximity in kind to the High Court, that confers their immunity."

He concluded at paragraph 77 that the question was:

> "should either institution properly be regarded in all the circumstances as having a status so closely equivalent to the High Court that the exercise of the power of judicial review by the High Court is for that reason inappropriate? Put another way, and to use the language of my earlier discussion of the exclusion of judicial review by statute does either body constitute in effect an *alter ego* of the High Court? There has to be an impartial authoritative judicial source of statutory interpretation, independent both of the legislature and of the persons affected by the application in practice of the relevant texts. Such a source is either the High Court or its *alter ego.*"

19. The Court of Appeal based its approach primarily on the policy of the legislation, particularly in relation to the scope of any review: the court said at paragraph 35:

> "Judicial policy in this context can and should correspond with legal principle. It seems to us that there are two principles which need to be reconciled in order to arrive at a proper judicial policy. One is the relative autonomy with which Parliament has invested the tribunals as a whole and the [Upper Tribunal] (UT) in particular. The other is the constitutional role of the High Court as the guardian of standards of legality and due process from which the UT, for reasons we have given, is not exempt. Although central government has opposed this appeal, its interest in ensuring that departures from legality and due process do not occur is at least as great as that of private individuals."

We should add that we were not referred on this issue to any decisions of the Scottish courts; the law of Scotland appears to be different – see the decision of the Inner House delivered by the Lord President in *Eba v Advocate General for Scotland* 2010 S.L.T. 1047.

20. Miss Mountfield founded her argument on three main propositions – (i) the origins of the legislation showed that Parliament did not intend judicial review to be available; (ii) the language of the 1983 Act was clear in excluding judicial review; (iii) although the parliamentary election court was accepted not to be the same as the High Court, its status showed it was not inferior to the High Court.

21. We will first set out an account of the origin of the election court and the legislation governing it as this was relied on by both parties. We will then address the issue applying the principles in *Cart* by reference to the following: (a) the powers of the parliamentary election court and the limits of its jurisdiction, (b) the composition of the parliamentary election court and its designation as a court of record, (c) the provisions in relation to the statement of a case, (d) the effect of the provision as to finality and (e) the constitutional relationship between the election court, the House of Commons and the High Court.

(iii) The constitutional origins of the election court

22. In 1604, after a disputed election in Buckinghamshire, the Court of Chancery ordered a new election which took place; after the new election, the issue was referred to a Committee of the Commons which challenged the right of the Court of Chancery to annul an election to the Commons. The House and the King agreed a compromise reflected in a document drafted by the Commons Committee entitled *The Form of Apology and Satisfaction* passed on 20 June 1604 which concluded:

> "Fifthly, That there is not the highest standing Court in this land that ought to enter into competency [competition], either for dignity or authority, with this High Court of Parliament, which with your Majesty's royal assent gives laws to other Courts but from other Courts receives neither laws nor orders.

> Sixthly and lastly, We avouch that the House of Commons is the sole proper judge of return of all such writs and of the election of all such members as belong to it, without which the freedom of election were not entire: And that the Chancery, though a standing Court under your Majesty, be to send out those writs and receive the returns and to preserve them, yet the same is done only for the use of Parliament, over which neither the Chancery nor any other Court ever had or ought to have any manner of jurisdiction ..."

23. From that time until 1868, the House of Commons was the sole judge over disputed elections. Many different procedures were tried. In 1848, the House established a Committee of Elections which adopted a procedure which was intended to give a legal character to the resolution of election disputes. The system was not considered satisfactory. In 1867, after a bill had been introduced to reform the system again, a select committee to whom the Bill had been referred recommended that the power to try disputed elections be transferred to the Court of Queen's Bench; the Committee voted at first in favour of a provision reserving points of law for consideration by an Election Court of Appeals and then against it. A Bill was introduced in 1868 to give effect to the recommendations. The judiciary initially expressed very strong opposition to undertaking this work in a letter from the Chief Justice to the Lord Chancellor dated 6 February 1868. After referring to the confidence of the public in the impartiality of the judiciary, the letter continued:

> "This confidence will speedily be destroyed, if, after the heat and excitement of a contested election, a Judge is to proceed to the scene of recent conflict, while men's passions are still roused, and, in the midst of eager and violent partisans, is to go into all the details of electioneering practices, and to decide on questions of general or individual corruption, not unfrequently supported or resisted by evidence of the most questionable character. The decision of the Judge given under such circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict, that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs."

24. The bill was later reintroduced in its original form with the only successful amendment being to give the judge trying an election petition power to reserve a question of law for the decision of the court; see the introduction to William H Birley: *The Parliamentary Elections Act 1868* (1868).

25. The bill became the Parliamentary Elections Act 1868 (the 1868 Act). It provided in summary:

    i) A petition challenging an election was to be presented to the Court of Common Pleas. The trial was to be conducted before a judge of one of the

three superior courts of common law – Queen's Bench, Common Pleas and Exchequer to be chosen from a rota selected by the judges (s.11(1)).

ii) If a petition raised an issue of law, an application could be made to the Court of Common Pleas to state it as a special case; the Court of Common pleas could then direct that it be stated as a special case and heard before the Court of Common Pleas (s.11(9), (16)).

iii) In all other cases, the judge chosen from the rota would hear the trial in open court without a jury. At the conclusion of the trial (s.11(13)) that judge would:

> "determine whether the Member whose Return or Election is complained of, or any and what other Person, was duly returned or elected, or whether the Election was void, and shall forthwith certify in Writing such determination to the Speaker, and upon such Certificate being given such Determination shall be final to all Intents and Purposes"

iv) S.12 gave effect to the amendment to the bill allowing a question of law to be reserved:

> "Provided always, that if it shall appear to the Judge on the trial of the said Petition that any Question or Questions of Law as to the Admissibility of Evidence or otherwise require further Consideration by the Court of Common Pleas, then it shall be lawful for the said Judge to postpone the granting of the said Certificate until the Determination of such Question or Questions by the Court, and for this purpose to reserve any such Question or Questions in like manner as Questions are usually reserved by a Judge on a Trial at *Nisi Prius*"

v) On the receipt of the Certificate of the judge and any report from the judge, the House of Commons would enter this into their journal and give the necessary directions consequent on the Certificate (s.13)

vi) Ss.28-30 made provision for the power and jurisdiction of the judge and constituted the court a court of record:

> "29. On the trial of an Election Petition under this Act the Judge shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a judge of one of the superior Courts and as a Judge of Assize and *Nisi Prius*, and the Court held by him shall be a Court of Record.
>
> 30. The Judge shall be attended on the Trial of an Election Petition under this Act in the same manner as if he were a judge sitting at *Nisi Prius* …"

26. The court established to try parliamentary election petitions was not referred to as an "election court" in the 1868 Act. A court referred to as "the election court" was constituted under the Corrupt Practices (Municipal Elections) Act 1872 (the 1872 Act) which established a procedure for petitions questioning local elections. The trial

of the petition was to be heard by an election court before a barrister appointed in the manner set out in s.14; the court was to make a determination by certificate which was to be "final to all intents and purposes as to the matters at issue on the petition" (s.15(4)). S.14(5) provided that the judge of the local election court should have the same powers as the judge on the trial of a Parliamentary election petition under the 1868 Act. In *R v Mayor of Maidenhead* (1881) LR 9 QBD 498, the Court of Appeal held that the effect of this section and s.29 of the 1868 Act was to make a local election court a court of record. It was thus clearly distinguished from what the 1872 Act referred to as the "superior court", defined in s.2(1) as the Court of Common Pleas, to which the certificate and any report were to be addressed and to which matters of law could be referred. S.15(6) provided powers for stating a special case very similar to those set out in s.11 (9) and (16) of the 1868 Act and by s.15(7) a power to postpone the making of a certificate until a question of law had been determined by the superior court in terms very similar to s.12 of the 1868 Act.

27. Under the provisions of the Judicature Act 1873, the jurisdiction of the Court of Common Pleas was transferred to the newly created High Court. The Parliamentary Elections and Corrupt Practices Act 1879 amended the 1868 Act so as to provide that parliamentary election petitions be tried by two judges of the High Court instead of one. There is no reference to an election court in s.13 of the Supreme Court of Judicature Act 1881 which set out the procedure for selecting judges to be placed on the rota for the trial of parliamentary election petitions or in s.14 of that Act which made provision for an appeal from the High Court. The decision of the High Court on any question of law under the 1868 and other Acts was made conclusive, unless special leave was given to appeal to the Court of Appeal.

28. The first Act which referred to "the election court" as the tribunal constituted under the 1868 Act was the Corrupt and Illegal Practices Act 1883 which related to parliamentary elections – see for example ss.4, 22, 23. The election court is defined in s.64:

> "The expression "election court" means the judges presiding at the trial of an election petition, or if the matter comes before the High Court, that court."

29. The procedure for reserving a question of law under s.12 of the 1868 Act was replaced sometime after 1873 by the procedure for stating a case. It is not clear how this change in practice came about but in *Thornbury Division of Gloucestershire* (1886) 16 QBD 739 a parliamentary election court (Field and Day JJ) stated a case under s.12 of the 1868 Act for the Queen's Bench Division in relation to the validity of ballot papers. It appears from the argument of the respondent's counsel that the election court gave a judgment and then stated the case by way of appeal at the request of the petitioner. The respondent took the position that it was more convenient to argue the case at that stage than to await the judgment on the petition and argue it in court. Lord Coleridge CJ is reported as commenting that the court's assent to hearing the case was not to be treated as a precedent for the procedure to be adopted. He added that it was not intended that judges should reserve difficult questions of law for the Divisional Court.

30. There were no material changes until the 1949 Act which consolidated the provisions in the earlier Acts to which we have referred, repealing the material parts of s.11, s.12

and s.29 of the 1868 Act and the material sections of the 1872 Act. It is not necessary to refer to the provisions of that Act as the present law is set out in the 1983 Act which re-consolidates the earlier legislation in very similar terms to the 1949 Act.

(iv) The relevant factors

(a) The powers of the parliamentary election court and the limits of its jurisdiction under the 1983 Act

31. The relevant provisions of the 1983 Act can be briefly described:

i) A parliamentary election court (with its origins in the 1868 Act) is constituted under s.123 of the 1983 Act to try parliamentary election petitions presented to the High Court in accordance with ss.120 and 121. S.123 provides:

> "(1) A parliamentary election petition shall be tried by—
>
> (a) two judges on the rota for the trial of parliamentary election petitions, and the judges for the time being on that rota shall, unless they otherwise agree, try the election petitions standing for trial according to their seniority,
>
> (b)..,
>
> and the judges presiding at the trial of a parliamentary election petition are hereinafter referred to as the election court.
>
> (2) The election court has, subject to the provisions of this Act, the same powers, jurisdiction and authority as a judge of the High Court (or, in Scotland, a judge of the Court of Session presiding at the trial of a civil cause without a jury) and shall be a court of record."

ii) A local election court (with its origins in the 1872 Act) is constituted under s.130 (1) which provides that a petition questioning a local election in England and Wales is to be tried by an election court of a person qualified and appointed under that section of the 1983 Act. The person is a person who meets the criteria for judicial appointment (s.130(2)); he is appointed from amongst those selected by judges on the rota for parliamentary election petitions (s.130(5)). The 1983 Act provides by s.130(5) that

> "The election court has for the purposes of the trial the same powers and privileges as a judge on the trial of a parliamentary election petition".

iii) The 1983 Act refers to both types of election court as an "election court". They generally have the same broad powers. The procedure of the elections courts are set out in sections 138-146 and s.157. S.140(1) provides that:

> "Witnesses shall be summoned and sworn in the same manner as nearly as circumstances admit as in an action tried

> in the High Court, but this subsection does not apply to Scotland in relation to an election of councillors."

iv) Various provisions give the High Court powers to determine issues such as the amount of security for costs (s.136) and the power to fix the date for the hearing of the petition (Rule 9 of The Election Petition Rules 1960 (as amended)). However, it is not necessary to set them out, as they are not of any determinative significance. They are, as the court concluded in *Muldoon*, provisions dealing with matters where it is not practicable for an election court to deal with them, as it may not have been constituted.

v) At the end of the trial of a parliamentary election petition a very similar provision for finality and certification to the Speaker by the election court as was made in the 1868 Act (as set out under paragraph 25.iii) above) is made by s.144:

> "(1) At the conclusion of the trial of a parliamentary election petition, the election court shall determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected or whether the election was void, and the determination so certified shall be final to all intents as to the matters at issue on the petition.
>
> (2) The election court shall forthwith certify in writing the determination to the Speaker.
>
> (3) If the judges constituting the election court—
>
> (a) differ as to whether the member whose election or return is complained of was duly elected or returned, they shall certify that difference and the member shall be deemed to be duly elected or returned;
>
> (b) determine that the member was not duly elected or returned but differ as to the rest of the determination, they shall certify that difference and the election shall be deemed to be void."

The section then provides that the House of Commons shall enter the Certificate and any report in their journals and give directions consequent upon the Certificate and any report.

vi) The parliamentary election court has no power over the consequences of its certificate and report. These are a matter for Parliament or follow automatically from the certificate and report (see for example the provisions to which we have referred in paragraph 5 above). It cannot in any way mitigate the consequences of its findings.

32. The provisions which we have set out point, in our view, to each type of election court having a specific and limited jurisdiction – essentially to determine at the trial of the

petition issues of fact and law (subject to the provisions to which we refer at paragraph 37 below). Although the parliamentary election court is given the powers, jurisdiction and authority of a judge of the High Court, the powers and the jurisdiction are made subject to the provisions of the Act. This means that that the court can exercise the same powers as the judges of the High Court but within the limited jurisdiction of the election court; they are not exercising their powers and jurisdiction as High Court Judges.

(b) The composition of the parliamentary election court and its designation as a court of record

33. Even though the judges may not be exercising their powers as High Court judges, it is clear from *Muldoon* and *Cart* that a factor to be taken into account is whether High Court Judges sit in the court. That is because it may be considered inappropriate that a Divisional Court of the Queen's Bench Division should exercise powers of judicial review over a tribunal comprising other judges of the Queen's Bench Division. Indeed this factor seems to have influenced Lord Widgery CJ in expressing his view in *ex p Sheppard* that a parliamentary election court was not amenable to judicial review. This is a powerful factor, but we agree with the view expressed in *Muldoon* that it is not conclusive: see pages 84 and 88 and the authorities there cited, particularly *Baldwin & Frances Ltd v Patents Appeal Tribunal* [1959] AC 663.

34. Another factor is the designation of the court in the statute that creates it. The court created under the 1868 Act was referred to in that Act (see paragraph 25.vi) above) as a court of record, not a superior court of record; and the local election court was held to have that status for the reasons explained in paragraph 26 above. The provisions have been re-enacted in the 1983 Act by s.123(2).

35. Courts can be designated as "superior" or "inferior" or as "courts of record" or as "courts not of record" (see *Halsbury's Laws of England* vol. 10 para. 306- 9). The High Court is a superior court of record, but the county court is a court of record. The significance of these designations in relation to review by the High Court is set out in paragraphs 44 and following of the judgment of Laws LJ in *Cart.* It is plain from the provisions of the 1872 Act which created the local election court that a distinction was drawn between the election court and the superior courts - the Court of Common Pleas (see paragraph 26 above). One clear reason for the distinction was the fact that the judge was a barrister and not a judge of the Court of Common Pleas. However, such distinctions are historic and the law relating to them of uncertain import as Sedley LJ observed in *Cart* at paragraph 16 and the judgment of Laws LJ demonstrates. For example, even though the County Court is an inferior court for most purposes, it has been treated as a superior court in the exercise of its jurisdiction under the Bankruptcy Acts 1883 and 1890 (see *Muldoon* at page 86-7). We do not consider therefore that its designation as a court of record given the history and uncertainty to which we have referred is a factor of real weight in favour of it being an inferior court to the High Court. If the designation of the election court as a court of record was to be taken as a designation of it as a superior court of record, we would agree with the views of Laws LJ in *Cart* at paragraphs 28-33, that such a designation would not amount to a clear ouster of the jurisdiction of the High Court.

36. In *Peart v Stewart* [1983] 2 AC 109, an appeal concerned with the powers of courts to commit for contempt under legislation where a distinction was drawn between

"superior" and "inferior" courts, Lord Diplock considered the status of an election court as an example of a "superior court" (see page 17). Although, we have taken this observation (which was rightly not referred to by counsel) into account, we cannot attach weight to it, as Lord Diplock found this example after the conclusion of argument, he did not have the benefit of the analysis subsequently made in *Muldoon* and *Cart* and the analysis of Robert Goff LJ in respect of the observation is in our view correct.

(c) The provisions in relation to the statement of a case

37. We next turn to consider the effect of the provisions relating to the power to state a special case. Provisions very similar to s.11(9) and (16) and s.12 of the 1868 Act (set out in paragraph 25.ii) and 25.iv) above) are made in s.146(1) and (4) of the 1983 Act:

> "(1) If, on the application of any party to a petition made in the prescribed manner to the High Court, it appears to the High Court that the case raised by the petition can be conveniently stated as a special case, the High Court may direct it to be stated accordingly and the special case shall be heard before the High Court.
>
> (4) If it appears to the election court on the trial of an election petition that any question of law as to the admissibility of evidence or otherwise requires further consideration by the High Court, the election court may postpone the granting of a certificate until the question has been determined by the High Court, and for this purpose may reserve the question by stating a case for the decision of the High Court."

Provision is made for an appeal from the High Court to the Court of Appeal under s.157(1):

> "No appeal lies without the special leave of the High Court from the decision of the High Court on any question of law, whether on appeal or otherwise, under the foregoing provisions of this Part of this Act, and if leave to appeal is granted the decision of the Court of Appeal in the case shall be final and conclusive."

38. The procedure enacted under s.12 of the 1868 Act for reserving a point of law (see paragraph 25.iv) above) was the method then used by the courts of common law for determining points of law. The special case procedure adopted by the latter part of the nineteenth century for the parliamentary election court (as we have described at paragraph 29) and embodied in the 1949 and 1983 Acts had different origins.

39. When an error of law was made on the face of a decision of an inferior court such as Quarter Sessions or of an arbitrator, the superior courts of common law had assumed a jurisdiction to quash it by the use of the writ of *certiorari* in the manner described by Laws LJ in *Cart* at paragraph 50. By the middle of the nineteenth century Quarter Sessions had developed a practice of making its order in the form of a special case where a point of law had arisen; this model was adopted for arbitrations by the

Common Law Procedure Act 1854 (see Lord Diplock's Alexander Lecture [1978] Journal of the Institute of Arbitrators 107). The procedure has been adopted in a large number of different circumstances as a means of a tribunal or court seeking the decision of the High Court on a point of law. Indeed it would seem that, with the exception of the specific provisions relating to the Crown Court, the bodies that can state a case for the High Court are all plainly inferior to the High Court.

40. Whatever may have been the status of reserving a point under the 1868 Act, the adoption of the special case procedure is, in our view, a strong pointer to the relationship of the election court to the High Court as being one where the proceedings of the election court on issues of law are amenable to determination by the High Court; the election court is not the final arbiter of questions of law.

41. We therefore do not accept Miss Mountfield's characterisation of the power to state a special case as a case management provision having its origins in times when legal materials were not readily available in a constituency where the petition might be tried. It is plainly a provision for referring a point of law to a superior court for decision. It is of interest to note that in *the Attercliffe Division of Sheffield Case* to which we refer at paragraph 87.ii) below the petitioner asked the parliamentary election court after it had dismissed the petition for the decision to be stated in the form of a special case with view to an appeal; the court refused on the basis that their decision did not involve the interpretation of the statutory provision. The report does not suggest that there was no power to do so.

42. Nor can we accept the further submission that the implication to be derived from s.146(4) is that the only circumstance in which the High Court can review an issue of law is where it is referred by way of case stated. As we discuss at paragraph 59 below, the failure to ask the election court to state a case may be a ground for this court to exercise its discretion to refuse an application for judicial review. However we decline to make the implication suggested. If for example one of the parties before a parliamentary election court asked the court to state a case but it declined despite the fact that there was an important disputed issue of law, we do not consider that Parliament could have intended that the High Court to which such questions were to be referred was to be powerless to order the election court to state a case. Such an implication would be contrary to the statutory scheme under which the High Court, subject to appeal, was to be the final decision maker on issues of law.

(d) The effect of the provision as to finality

43. We next turn to consider the effect of the provisions as to finality and whether they are to be read as excluding a power of judicial review. At the conclusion of the trial of a parliamentary election petition a very similar provision for finality and certification to the Speaker by the election court as was made in the 1868 Act (as set out under paragraph 25.iii) above) is made by s.144 which we have set out at paragraph 31 v).

44. In the case of a local election court, though the procedure is different, the determination as to whether a person was duly elected or whether the election is void must be certified and "so certified shall be final to all intents as to the matters at issue on the petition".

45. It was contended by Miss Mountfield that s.144(1) with its express reference to finality was a provision which excluded judicial review after a certificate had been given by the election court. S.144 (1) cannot have been intended to exclude the right of appeal as there is no right of appeal given by the statute; that conclusion was the stronger in the light of s.157(1) (set out at paragraph 37 above) which permitted a right of appeal from the High Court to the Court of Appeal. Thus it followed, in her submission, that if the language of s.144(1) was to be given a meaning it can have had no purpose other than to exclude a right of judicial review. This conclusion was strengthened by the other sub-sections of s.144 which provide for a process under which, on delivery of the certificate, Parliament would proceed to determine the consequences without delay.

46. There can be no doubt that s.144(1) was intended to provide finality. Election Petitions must be determined with urgency. Finality in the determination is of great importance for not only must the electors have a representative in Parliament, but in times when majorities are small, the absence of a Member can be significant. The finality of the certificate was made clear in respect of the corresponding provisions of the 1868 Act by the Court of Common Pleas in *Waygood v Jones* (1869) LR 4 CP 361. The background to that decision was that at the conclusion of the trial of an election petition the election court had certified to the Speaker that the member elected had been guilty of bribery and that his opponent had not. The House of Commons then erased the name of the member who had been elected and entered the name of his opponent as the member. When a fresh petition was lodged alleging that the opponent had been guilty of bribery, the opponent sought to have it stayed. The court stayed the petition out on the basis that s.11 (13) of the 1868 Act (the equivalent to s.144(1)) had made the decision final as regards the election and no further petition could be brought. The status of the member originally elected had been declared by the judge on the petition and that decision was binding on everyone; Brett J (as he then was) summarised its effect as "a judgment *in rem* binding against all the world".

47. However the fact that the decision of an election court as a judgment declaring the status of the election is a judgment *in rem* and in that sense is final and binding on the whole world does not mean that it cannot be challenged, if the judgment has been reached on the basis of a wrong interpretation of the law. Although it is plain that Parliament intended that a lawful decision of the election court must be final in all respects, we do not consider that Parliament intended to provide that a decision that had been made on a wrong interpretation of the law could not be challenged. An express provision to that effect would have been required.

(e) The constitutional relationship between the election court, the House of Commons and the High Court

48. Two matters are clear from the brief account of the creation of the election court which we have set out. The court was created by Parliament for a very limited purpose and it has always had a unique relationship to the House of Commons.

49. It was contended by Miss Mountfield that the history of its creation had a wider significance, as it demonstrated that Parliament had only conferred on the courts a limited adjudicative role; the parliamentary election court was to operate as "the servant of Parliament". It was simply to carry out the role previously undertaken by the Committee of Elections; immediately a parliamentary election court had made its

determination the matter would be placed back in the hands of the Speaker and the other consequences mandated in the 1983 Act would follow.

50. As we have set out at paragraph 32 above, we accept that the election court has a very limited jurisdiction; no right of appeal was given, as it was plainly intended that the election court be the final decision makers on issues of fact.

51. However, it is clear from the terms of s.12 of the 1868 Act and s.144(4) of the 1983 Act in relation to the statement of a special case for the decision of the High Court that Parliament did not intend to preclude the High Court in contradistinction to a parliamentary election court from determining a point of law which arose on an election petition. Indeed these provisions indicate that Parliament expected the courts to ensure that the law in cases of difficulty was determined by the High Court rather than the election court and that there be a right of appeal to the Court of Appeal with leave of the High Court.

52. This is entirely consistent with the constitutional principles derived from the separation of powers and the rule of law that it is for the courts to determine the meaning of the law enacted by Parliament. Whilst it may be possible to characterise the fact finding role of the election court as a role it carries out in discharging a limited function for the House of Commons, the provisions relating to the stating of a special case are consistent only with the constitutional principle that it has always been the role of the High Court and the appellate courts to determine the meaning of the law as enacted by Parliament. In our view, the provisions in respect of the stating of a special case are consistent only with Parliament's clear acknowledgement of that principle. Review by the courts of an issue of law arising out of a determination of an election court, in our judgment, far from being in any way inconsistent with the constitutional relationship between Parliament and the High Court, is what Parliament plainly regarded as entirely appropriate, as the rule of law requires interpretation of the law by the ordinary courts.

53. That Parliament did not regard it as inappropriate for the courts to have such a role is evident from the course adopted by the Speaker in *Attorney-General v Jones* [2000] QB 66. Mrs Fiona Jones was elected an MP in the 1997 General Election; she was then convicted of making a false declaration as to her election expenses. The effect of the conviction was to vacate the seat. Very shortly thereafter the conviction was quashed by the Court of Appeal Criminal Division. No writ had been moved for a new election. The Attorney General, on behalf of the Speaker, sought from the court the determination of the question of whether Mrs Jones was entitled to resume her seat. The details of the reasons why the court answered the question in the affirmative are immaterial; what is significant is that the House of Commons sought the decision of the court on the meaning and effect of the 1983 Act.

(v) Conclusion

54. As is clear from *Muldoon* and the decisions of the Divisional Court and Court of Appeal in *Cart* we have to weigh all the factors to which we have referred and discern the policy Parliament intended in the legislation. It is a significant factor that the judges of a parliamentary election court are judges of the Queen's Bench Division and we are only a Divisional Court of the Queen's Bench Division. However there are two important factors that point to the opposite conclusion. First, the jurisdiction of

the election court is limited. Second, the legislation has always allowed for a reference to the High Court on an issue of law. This is by way of contrast to the Restrictive Practices Court referred to in *Muldoon* as a court that was plainly not an inferior court (see page 84); the right of appeal from that court is to the Court of Appeal. These two factors together with the evident policy of the legislation has led us to the conclusion that the relationship of a parliamentary election court to the High Court is such that it should be regarded as an inferior tribunal so that its actions can be the subject of judicial review.

55. Furthermore the distinction drawn in by Lord Diplock *Re Racal Communications Ltd* [1981] AC 374 at 384 between decisions of judges of the High Court acting in that capacity and a court of limited jurisdiction can be made in respect of a parliamentary election court.

> "There is in my view, however, also an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court acting in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his jurisdiction, nor, as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all."

In our view, despite the fact that a parliamentary election court is comprised of judges of the High Court, they do not act in that capacity; they are constituted as a tribunal of limited jurisdiction with the attributes we have set out. In our view therefore the right of judicial review is not excluded.

56. Although, as we have set out, the origins of the local election court and the parliamentary election court are separate, each is designated as an election court in the 1983 Act and each has broadly similar powers. The main distinguishing feature between them is their composition. That in our view is not of sufficient weight in itself to be a ground for saying that the local election court is subject to judicial review and the parliamentary election court is not. Whilst it might be said that for one to be subject to judicial review and the other not can be explained on that basis, that would create an anomaly that in our view is not justified either as a conclusion that can be discerned from the legislation. As the consequences of a finding by an election court are of such significance for the individual found guilty of an illegal practice and

for the electorate, it would not be right that an error of law could not be corrected by the High Court.

(vi) The scope of judicial review

57. As we have set out, the conclusion in *Muldoon* was that the scope of the review was directed at an excess of jurisdiction and not at an error of law made in the determination. As we have set out at paragraph 16, it was Miss Mountfield's alternative contention that any judicial review of the Election Court was confined to an excess of jurisdiction in the sense of exceeding its jurisdiction and not in the sense of getting the law wrong (see the distinction as summarised by Laws LJ in *Cart* at paragraph 78).

58. It is clear from the statutory provisions which we have set out that Parliament never intended an election court to be the final arbiter of the law, though it was to be the final arbiter of fact. It was always envisaged that this would be the function of what is now the High Court. Thus in our judgment the parliamentary election court was not the type of court described by Lord Diplock in *Racal* at page 383 as a court where Parliament intended it to be the final arbiter of questions of law. On that basis, the jurisdiction in judicial review is not confined to an excess of jurisdiction in the narrow sense but extends to correcting errors made in the law it has to apply.

(vii) Should a request have been made for a special case under s.146(4)?

59. In the ordinary course of a hearing of an election petition, it would be expected that if any disputed issue of law arose during the course of the hearing which was considered to be such that it should be determined by the High Court, then an election court should be asked to state a special case using the procedure under s.146(4).

60. If this procedure were not followed, there would ordinarily be very strong reasons for the High Court declining to exercise its jurisdiction on the basis that Parliament had provided a means for the resolution of issues of law which it intended be used so that when the certificate was made by the election court, the processes set out in the legislation could be followed without delay.

61. In the present case, we have carefully considered whether we should decline to grant permission on this basis. It is clear that the Election Court was referred to the authorities on which Mr Woolas relies but, from a close examination of the transcript, it is evident that there was a misunderstanding between his counsel and the Election Court such that it was not evident the important point of law under s.106 of the 1983 Act was thought to be in issue.

62. As the point is important not only to Mr Woolas but to the conduct of elections and it was not thought by his counsel to be in issue, we consider that we should exceptionally grant permission.

ISSUE 2: DID MR WOOLAS MAKE FALSE STATEMENTS OF FACT IN RELATION TO A CANDIDATE'S PERSONAL CHARACTER OR CONDUCT?

(1) The decision of the Election Court on the meaning of s.106

63. S.106 (1) of the 1983 Act provides:

> "A person who, or any director of any body or association corporate which—
>
> (a) before or during an election,
>
> (b) for the purpose of affecting the return of any candidate at the election,
>
> makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true."

64. The Election Court on the basis of the findings it had made, to which we will refer in more detail, interpreted s.106 by reference primarily to *The North Division of the County of Louth* (1911) 6 O'M and H 103 (the decision of a parliamentary election court sitting in Ireland before the grant of its independence) and *Fairbairn v Scottish National Party* [1979] SC 393 (a decision of Lord Ross sitting in the Outer House). The Election Court concluded at paragraphs 31-35 that a false statement of fact might relate to the personal character of a candidate, even though it also related to his public or political character, conduct or position. A statement in relation to a candidate's political position could do so, if the false statement related directly to the personal character or conduct in the sense of amounting to an attack on his "honour, veracity or purity". The last words were taken from a passage in the judgment of Gibson J in *North Louth* at page 163:

> "A politician for his public conduct may be criticised, held up to obloquy: for that the statute gives no redress; but when the man beneath the politician has his honour, veracity and purity assailed, he is entitled to demand that his constituents shall not be poisoned against him by false statements containing such unfounded imputations."

65. It was contended by Mr Millar QC on behalf of Mr Woolas that this interpretation of s.106 was wrong. The court had to decide whether the statement related to the personal character or conduct or as related to the public character conduct or position. It could not characterise the statement as relating to both. It was, he contended, contrary to the case law and to the plain meaning of the section. If the Election Court was right, it would infringe Article 10 of the Human Rights Convention and "chill free speech".

(2) The facts as found by the Election Court

(i) The background

66. The constituency of Oldham East and Saddleworth was a new constituency in 1997. It is the largest one in Greater Manchester. The electorate in 2010 was 70,984 and in

2001 a census identified 9% of the population as Asian and 8.5% as Muslim. In 2001, there were race riots in Oldham in the run-up to the General Election.

67. Mr Woolas was elected to Parliament in 1997. He was a member of the Labour Party. In 2003, he was appointed Deputy Leader of the House of Commons, in 2005, Minister of State with responsibility for local government, in 2007, Minister for the Environment and in 2008 Minister of State for Borders and Immigration. Mr Woolas' election agent was Mr Fitzpatrick.

68. Since May 1998 Mr Watkins has worked as a personal assistant and business adviser to Sheikh Abdullah Ali Alhamrani. From May 2004 to 18 March 2010, Mr Watkins was the councillor for the Healey ward of the Rochdale Metropolitan Borough Council. In September 2007 he was selected as the Liberal Democrat Party candidate for the constituency. He stood as the Liberal Democrat Party candidate in the 2010 General Election.

69. Mr Woolas accepted that he had published the leaflets complained of and had done so for the purposes of affecting the return of a candidate at the election. The Petition made complaint as to five statements. The Election Court held that Mr Watkins had failed to prove his case in relation to two. We only need therefore set out the facts in relation to three.

(ii) The first statement: Choose

70. The first statement was published on 21 April 2010 in a coloured leaflet entitled "*Choose*"; this is, as are the others, appended to the judgment of the Election Court. The leaflet included on the second page the following in a box:

> "**Did you know?**
>
> **Interesting facts about our Lib Dem candidate**".

Three matters were set out. The text in respect of the second read:

> "He's reneged on his promise to live in the constituency. He had said, "I've got my eye on Lees – you can still get tripe in the Co-Op". You can't of course but he does talk it."

71. The Election Court was satisfied that this was a statement of fact that Mr Watkins had reneged on his promise to live in the constituency. It concluded at paragraph 109 that it was a statement in respect of his personal character:

> "It has been submitted on behalf of [Mr Woolas] that this was a criticism of his political conduct. His promise to live in the constituency was "part of the campaign", made to establish his commitment to the constituency and to establish his credibility with the electorate. However, the statement also relates directly to his personal character or conduct. A person who breaks his promise is untrustworthy. To say that someone is not worthy of trust is to attack his "honour, veracity and purity". It was described by [Mr Woolas] in evidence as a politician's promise.

> Whilst we accept that promises made by politicians may not be honoured because of changes in political circumstances, this particular promise cannot fall into any such category. The performance of [Mr Watkins'] promise was within his control and so a failure to honour it reflected on his personal trustworthiness."

(iii) The second statement: The Examiner

72. The second statement was contained in a coloured leaflet published on 30 April 2010 in the form of a newspaper paper entitled "*The Saddleworth and Oldham Examiner*". On the second page was a heading:

> **"Extremist Muslim activists target Woolas.**

Under that heading was a large photograph of demonstrators holding placards the most prominent being one which stated:

> **"BEHEAD THOSE WHO INSULT ISLAM"**

Under that picture was a box which contained the following:

> "Watkins accused of wooing extremist vote
>
> Voters of Oldham East and Saddleworth are asking the question, "why are the extremists urging a vote for Watkins?" In face of Woolas ' tough stance and a Conservative candidate who is against their views, the extremists are backing the Liberal Democrat. In his attempts to woo the vote he has called for Israel to be isolated from arms sales – but not Palestine.
>
> Woolas told a rally of moderate Muslims in Clarksfield "The Lib Dems are weak and blow with the wind. Don't let them pander to extremists". The rally gave him a standing ovation!"

A picture of Mr Watkins was alongside the text.

73. The Election Court held that the ordinary and reasonable reader would understand "extremist vote" referred to in the article to be Muslim extremists who advocated violence. At paragraphs 75 and 76, it held:

> "75. We have reached the clear conclusion that the statement that [Mr Watkins] attempted to woo, that is, to seek the electoral support of Muslims who advocate violence, in particular to [Mr Woolas], is one of fact. The statement describes certain conduct by [Mr Watkins], namely, that he sought the electoral support of persons who advocate violence, in particular to [Mr Woolas]. It does not appear to us to be a value laden judgment in its context. By contrast, the statement in the adjacent article that "if militants are allowed to succeed no moderate MP of any party will be safe" is a comment. But

> when *The Examiner* sought to establish a link between extremist Muslims and [Mr Watkins] it did so by alleging that he had made attempts to woo the extremist vote. It is true that the conduct relied upon as evidencing such attempts was a political statement by [Mr Watkins], namely, calling for arms sales to Israel to be stopped. But *The Examiner* did not limit itself to stating that [Mr Watkins] had called for arms sales to Israel to be stopped. It went further and alleged that in making that call [Mr Watkins] had a particular intention or purpose, namely, to woo, that is to attract, the vote of extremist Muslims. We do not consider that that further statement is a value laden judgment. It clearly ascribes a particular intention or purpose to [Mr Watkins] when he called for arms sales to Israel to be stopped. As has been said more than once in the law reports a statement about a man's intention can be a statement of fact.
>
> 76. To refer to someone as an extremist can of course be a value laden judgment. However, in the context of the article of which complaint is made, "the extremist vote" is simply shorthand for Muslims who advocate extreme violence. We do not consider that the use of the word adjective "extremist" in the article prevents its meaning from being a statement of fact."

74. At paragraph 207(i) the Election Court summarised the statement as:

> "[Mr Watkins] had attempted to woo the vote, that is, that he had attempted to seek the electoral support, of Muslims who advocated violence, in particular to [Mr Woolas]."

75. On the basis of these findings, the Election Court concluded that the statement amounted to a statement in respect of his personal character or conduct at paragraph 82:

> ".... In our judgment, to say that a person has sought the electoral support of persons who advocate extreme violence, in particular to his political opponent, clearly attacks his personal character or conduct. To adopt the language of Gibson J. in the *North Louth Case*, as did Lord Ross in *Fairbairn,* such a statement attacks his "honour" and "purity" in that it suggests that he is willing to condone threats of violence in pursuit of personal advantage. That is also an attack on his political conduct (because the advantage sought was an electoral victory) but that does not put the attack outside the protection afforded by s.106 if his personal character is also attacked."

(iv) The third statement: Labour Rose

76. The third statement was made in a coloured leaflet entitled the "*Labour Rose*" published in the week of the election. The leaflet consisted of two pages. On the first page was printed a headline:

> **"Extremists rant as Phil Woolas defies death threats"**

Under it was an article with sub headings:

> **"Sick competitions**
>
> One extremist website has even created a competition for the most imaginative ways to kill Phil Woolas. You would think that any serious politician should condemn such actions. But you'd be wrong.
>
> **"Lib Dem Pact with the devil**
>
> One of these groups has endorsed the Liberal Democrat candidate Elwyn Watkins. It is remarkable that neither he nor any other Liberal Democrat has rejected this endorsement or condemned the group's actions. Maybe it's because the Liberal Democrats are giving amnesty to thousands of illegal immigrants."

Underneath the text was the same picture of demonstrators as had been used in *The Examiner*

77. The Election Court held at paragraph 101 that:

> "101. ...Reading the first page as a whole we consider that the ordinary and reasonable reader would understand the *Labour Rose* to be saying, not that [Mr Watkins] had actually made an agreement with Muslim extremists, but that he had not rejected their endorsement of him and was refusing to condemn their threats of violence. A "refusal" conveys the meaning that [Mr Watkins] knew of the threats of violence.
>
> 102. The statement "it is remarkable" that [Mr Watkins] had not rejected the endorsement of him by an extremist group is a comment. However, it is a comment as to a fact, namely, that [Mr Watkins] had not rejected the endorsement of him by an extremist group or condemned their actions. That was a statement of fact.
>
> 103. The group which had endorsed him was stated as a fact to be "one of these groups", that is, one of the groups which had threatened violence to [Mr Woolas]. The question, "Why is Elwyn Watkins refusing to condemn the extremists", implies a statement of fact, namely, that he has so far refused to condemn the threats of violence said to have been made by the extremists. The use of the word "refusing" implies a further statement of fact, namely, that he was aware of the threats of violence; otherwise, how could he refuse to condemn their actions? Although these are implied statements we consider that they would be so appreciated by the ordinary and reasonable reader on a first reading of the *Labour Rose*."

78. It summarised its conclusion at paragraph 207(ii):

> "[Mr Watkins] had refused to condemn extremists who advocated violence against [Mr Woolas]"

79. On the basis of these findings, the Election Court concluded that the statement amounted to a statement in respect of his personal character or conduct at paragraph 104:

> "To say that [Mr Watkins] was aware that an extremist group had threatened violence to his political opponent and had refused to condemn such threats is, in our judgment, an attack on the personal character or conduct of [Mr Watkins]. It is an attack on his "honour" or "purity" because, like the statement in *The Examiner*, it suggests that he is willing to condone threats of violence in pursuit of personal advantage. That is also an attack on his political conduct (because the advantage sought was an electoral victory) but that does not put the attack outside the protection afforded by section 106 if his personal character is also attacked."

(v) Findings as to Mr Woolas' dishonesty and negligence

80. The Election Court found in respect of the statements in *The Examiner* and *The Labour Rose* at paragraphs 194-6 that not only did Mr Woolas have no reasonable grounds for believing that Mr Watkins had sought the support of Muslim extremists who had advocated violence or that Mr Watkins had refused to condemn the actions of Muslims who had advocated violence, but also that he did not believe that Mr Watkins had sought such support or so refused to condemn. These were clear findings of dishonesty and not findings of a lack of care.

81. In respect of the statement in "*Choose*" that Mr Watkins had not moved to the constituency, Mr Woolas accepted that at the time the Election Address was distributed he did not believe that Mr Watkins did not live in the constituency. He contended that the statement in the Election Address meant that Mr Watkins had gone back on his promise between April 2007 and February 2010. The Election Court held that is not what the statement meant. The Election Court also found Mr Woolas' election team had no reasonable grounds for the belief. It appears that this was a finding of negligence and not a finding of dishonesty.

(3) The approach to the construction of s.106

82. It is next necessary to consider how s.106 should be interpreted. We consider that there are five factors we should take into account.

(i) The penal nature of the provision requires certainty

83. It is a provision which also a carries a penal sanction on conviction as a person convicted before a criminal court of an illegal practice, including making a false statement under s.106, is liable under s.169 to a fine. The provision therefore must have the requisite certainty.

(ii) The imposition of criminal liability for negligent statements

84. Although findings of dishonesty were made in the present case in respect of two of the statements, it is sufficient on the language of the section that the statements were negligent. Indeed that is why Mr Woolas was found to have made a false statement in *Choose* in relation to Mr Watkins not moving to the constituency. The wording of s.106 "unless he can show that he has reasonable grounds for believing, and did believe, the statement to be true" are identical in effect to the provision of the Misrepresentation Act 1967 "unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true". In short, s.106 makes it a crime to make or publish the specified statements carelessly, even if they were made or published honestly.

(iii) The scope of those affected

85. The section applies to any person who makes or publishes a statement and not just to candidates or their agents.

(iv) The effect of Parliament's re-enactment of the cases in the light of decisions on its meaning

86. The fourth factor is the effect of the earlier decision on the equivalent provision to s.106 in earlier legislation. On 6 July 1895 Parliament enacted what is now the provision in s.106 of the 1983 Act as to false statements of fact in relation to the personal character or conduct of a candidate by s.1 of the Corrupt and Illegal Practices Act 1895 (the 1895 Act). This Act amended the Corrupt and Illegal Practices Act 1883; during the passage of that Act an attempt had been made to include a provision as to false statements, but it had not been included. The provision in the 1895 Act was consolidated into the 1949 Act and retained in the same form in the 1983 Act. The consolidations were made not only in the light of the decisions in *North Louth* (1911) *and Fairbairn* (1979) but also in the light of *Bayley v Edmunds* (1895) 11 TLR 537, *The Borough of Sunderland* (1896) 5 O'M & H 61, *The Cockermouth Division of the County of Cumberland* (1901). It is well established that the presumption is that Parliament has adopted the meaning given by the courts; the principle is established by *Barras v. Aberdeen Sea Trawling and Fishing Co Ltd* [1933] AC 402, at 411 and is set out in *Bennion on Statutory Interpretation (Fifth Edition)* at p.711, section 235:

> "Parliament is normally presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions. If therefore Parliament has a subsequent opportunity to alter the effect of a decision on the legal meaning of an enactment, but refrains from doing so, the implication may be that Parliament approves of that decision and adopts it. This is an aspect of what may be called tacit legislation."

87. In our view what is clearly established in relation to the meaning of "a statement of fact in relation to the candidate's personal character or conduct" by the cases can be summarised as follows:

i) No court has laid down a general definition

ii) A distinction must be drawn between a false statement of fact which relates to the personal character or conduct of the candidate and a false statement which relates to the political or public position, character or conduct of the candidate. In giving the judgment in *Cockermouth*, Darling J said:

> "I think the Act says that there is a great distinction to be drawn between a false statement of fact, which affects the personal character or conduct of the candidate, and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind this statute would simply have prohibited at election times all sorts of criticism which was not strictly true, relating to the political behaviour and opinions of the candidate. That is why it carefully provides that the false statement must relate to the personal character and conduct. One can easily imagine this kind of thing. To say of a person he was fraudulent bankrupt, it would be necessary, probably, to give examples; but that sort of thing would undoubtedly be within the statute..."

In *the Attercliffe Division of the City of Sheffield* (1906) 5 O'M & H 218 Grantham J said much the same at 221:

> "It is a great pity that in elections at the present time so many false statements are made and that votes are obtained in that way. We cannot go beyond the language of the Act, which is limited to false statements made with reference to the personal character or conduct of the candidate, leaving him therefore to be still exposed to unfriendly attacks with regard to his political views. But if his opponent goes beyond that and makes false statements of fact with regard to the private conduct of his rival, then the Legislature has said that it is an illegal practice, which will vitiate the election."

Similarly Madden J said in *North Louth* at page 166:

> "Reading the section I find that the false statement must relate to personal character or conduct, "personal" as distinguished from "public" and it must be one of fact. In the present instance the contrast is between "personal" and "political"...
>
> The primary object of this statute was the protection of the constituency against acts which would be fatal to the freedom of election. There would be no true freedom of election, no freedom of opinion of the constituency if votes were given in consequence of the

> dissemination of a false statement as to the personal character or conduct of a candidate."

iii) The facts of *Cockermouth* illustrate what can clearly be viewed as statements in relation to political conduct. During the election campaign of 1900 in the middle of the second Boer War statements were made about a sitting MP who was a candidate for re-election that he did nothing other than taking the part of the Boers (page 163) and he had voted against money and supplies for the Boer War when the enemy was besieging British towns and wrecking British homes (page 164). In *The Attercliffe District of Sheffield* a statement in respect of a candidate's conduct of "hounding" a popular councillor by ensuring his prosecution for corruption (which others had tried to hush up) were thought by Walton J obviously to relate to public acts and public conduct only; they did not impute any personal advantage to the candidate.

iv) Some statements may without much argument be said to relate to the personal character or conduct. In *Bayley v Edmunds* (a case decided a few days after the 1895 Act was enacted) the statement alleged that the candidate hypocritically, feeling in his conscience he was doing wrong, locked his workmen out not caring whether he starved them; that sometime later he found his conscience reproved him and he would not starve them any longer. The very brief report indicates that the view of Lord Esher MR was that the Act was intended to strike at something derogatory to the personal character of the candidate and that the statement made was such a statement. It was in fact a statement as to his conduct as a businessman, not as a politician. Similarly the statements in *Sunderland* related to the conduct of the candidate as a businessman and thus in respect of his personal conduct.

v) What may in certain circumstances be perfectly innocent statements may come within the prohibition if spoken about a candidate without reference to a political issue. As Pollock B said in *Sunderland* at page 62:

> "Supposing any gentleman in a country constituency was to say of his adversary that he had shot a fox and, he said it for the purpose of working upon the minds of the constituency during an election, that would certainly come within the meaning of the Act. Again if any person in a constituency, where one of the Members was a temperance man, were to say that he had seen him drink a glass of sherry – a perfectly innocent act - that would also bring him within the Act."

vi) It is clear from *Cockermouth* that one cannot simply imply from a statement attacking the political position of a candidate that the statement also reflects on his personal character – i.e. he was supporting the Queen's enemies.

88. We shall return at paragraph 107 to the decisions in *North Louth* and *Fairbairn* where there is argument as to what they in fact established.

(v) The effect of Article 10

89. The fifth factor is the effect of Article 10 of the Human Rights Convention which guarantees the right of freedom of expression. Any court considering whether there has been a breach of s.106 is obliged to have regard to it. As was said by the Strasbourg Court in *Bowman v United Kingdom* (1998) 26 EHHR 1 at paragraph 42:

> "...Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system....The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the "conditions" necessary to "ensure the free expression of the opinion of the people in the choice of the legislature .... For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely..."

90. Although we have referred to this decision of the Strasbourg Court, it is important to stress that the principle that elections should be free, far from being introduced into the law of the United Kingdom by the Human Rights Convention, has for centuries been the basis of our democracy. The Statute of Westminster (1275) 3 Edw 1 ch 5 ("... elections ought to be free ..."), and the Bill of Rights Act 1688 art 8 ("That Election of Members of Parliament ought to be free") are both in force to this day. The 1895 Act was one of a series of measures designed to ensure that elections were conducted in a manner that ensured that elections were free.

91. The Election Court took Article 10 into account, concluding as we shall explain that its interpretation of it was consistent with Article 10 and that the Convention and in particular Articles 8, 10 and Article 3 of the First Protocol did not justify some particularly strict interpretation of s.106. Miss Mountfield submitted that the Election Court had been correct. The language of s.106 was compatible with the Convention. The need to protect electors' rights under Article 10 and Article 3 of the First Protocol, and the need to protect the dignity and interests of a candidate under Article 8 overlapped. It was proportionate and necessary to have penalties for unjustified misuse of free speech to distort the democratic process at election time.

92. Leaving aside dishonest statements to which we return at paragraph 105, we cannot accept the submission that the Convention does not also mandate a strict approach to s.106.

93. The Election Court accepted that Mr Woolas' rights under Article 10 were engaged, as under the provisions of s.12 of the Human Rights Act 1998 relief consequent upon a finding of guilt under s.106 might affect the exercise of the Convention right to freedom of expression. By s.12(4), a court has to have particular regard to the importance of the Convention right of freedom of expression. The Election Court derived three conclusions from this:

i) The restrictions under s.106 of the 1983 Act were consistent with Article 10(2) on the basis of the guidance given by Lord Bingham in *R v Shayler* [2003] 1 AC 247 at paragraph 23 and the judgment of the Strasbourg court in *Bowman*

v United Kingdom at paragraph 42. S.106 was directed at protecting the right of the electorate to express its choice at an election on the basis of facts and competing policy arguments rather than on false assertions as to the personal character or conduct of the candidates. As false statements of that kind might distort the electorate's choice and, as the section did not interfere with the right to make statements which related to the public or political character of a candidate, it was a proportionate interference. It was therefore not necessary to give the section any different meaning to that which it had been given in the cases (see paragraphs 36-47).

ii) The court should only find an illegal practice in clear cases (see paragraphs 74-5).

iii) The court should determine whether the consequences were proportionate (see paragraphs 208-9).

94. Although we agree with the Election Court that Article 10 has to be taken into account, we do not consider that the basis on which the Election Court did so was correct. There would, in our view, appear to be little scope for any reading down of the statutory consequences of a finding of an illegal practice under s.106 to make it compatible with the Convention. As we have explained at paragraphs 31-32, the function of a parliamentary election court is a limited one. It must determine whether there has been an illegal practice and then certify and report to Parliament; it is not its function to determine the consequences; those are either for Parliament or follow automatically under the 1983 Act.

95. It must therefore follow that as an election court cannot mitigate the consequences of its findings, any disproportionate consequence of the findings of the court must be taken into account at an earlier stage, in particular in the election court's determination of whether or not the court should find there has been an illegal practice under s.106. In our view this goes not merely to the standard of proof (which is determined by the nature of the case), but to the interpretation placed in s.106.

96. We therefore turn to examine whether Article 10 necessitates a strict approach to s.106 on the basis that that s.106 (and the consequences that flow from a finding under it) applies to statements made honestly, but negligently. There is nothing fanciful about the idea that people believe things about others, in particular about candidates at an election, without having any reasonable grounds for that belief. As Lord Diplock said in *Horrocks v Lowe* [1975] 1 AC 135 at p150:

> "In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of the conclusions they reach."

97. Although Article 10(2) provides protection for the reputation of an individual, that protection has to be balanced against the necessity of freedom of political debate which is at the heart of any democratic society. In *Lingens v Austria* (1986) 8 EHRR 407 the Strasbourg Court said at paragraph 42 that:

> "... freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."

98. Since the decision in *Lingens* there have been several cases in which the Strasbourg Court has developed its jurisprudence in relation to reputation. A number of cases were cited to us, including the concurring opinion of Judge Loucaides in *Lindon, Otchakovsky-Laurens and July v. France* - 21279/02 [2007] ECHR 836; (2008) 46 EHRR 35:

> "The main argument in favour of protecting freedom of expression, even in cases of inaccurate defamatory statements, is the encouragement of uninhibited debate on public issues. But the opposite argument is equally strong: the suppression of untrue defamatory statements, apart from protecting the dignity of individuals, discourages false speech and improves the overall quality of public debate through a chilling effect on irresponsible journalism. Moreover, such debates may be suppressed if the potential participants know that they will have no remedy in the event that false defamatory accusations are made against them. The prohibition of defamatory speech also eliminates misinformation in the mass media and effectively protects the right of the public to truthful information. Furthermore, false accusations concerning public officials, including candidates for public office, may drive capable persons away from government service, thus frustrating rather than furthering the political process".

99. It is not every statement about a politician's reputation which engages his rights under Article 8. A useful illustration is provided by *Karakó v Hungary* (application no 39311/05, ([2009] ECHR 712) as explained in *Guardian News and Media Ltd & Ors, Re HM Treasury v Ahmed & Ors* [2010] UKSC 1; [2010] 2 WLR 325 at paragraphs 37 to 41 (reputation is an Art 8 right). Lord Rodger summarised the facts of *Karakó* as follows:

> "...the applicant was a politician. During an election campaign an opponent had said in a flyer that the applicant was in the habit of putting the interests of his electors second. The applicant accused his opponent of criminal libel, but the prosecutor's office terminated the investigation on the ground that the flyer concerned the applicant as a candidate rather than as a public official and so its publication was not a matter for a public prosecution. Then, acting as a private prosecutor, the applicant submitted an indictment for libel. The district court dismissed the indictment on the ground that the opponent's statement was a value judgment within the limits of acceptable criticism of a politician. The applicant complained of a violation of his article 8 rights. The European Court held that there had been no such violation."

100. The flyer read as follows:

> "Dr. László Karakó, in his capacity as a member of the Fidesz... in the Regional General Assembly, regularly voted against the interests of the county. Moreover, in the debate concerning the route of the M3 highway, he did not support the version favourable to the county, with which – aside from the county – he probably harmed his own electoral district the most."

101. The Strasbourg Court said at paragraph 23:

> "For the Court, personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual, whereas in matters of reputation, that evaluation is decisive: one may lose the esteem of society – perhaps rightly so – but not one's integrity, which remains inalienable. In the Court's case-law, reputation has only been deemed to be an independent right sporadically (see *Petrina v. Romania*, no. 78060/01, 14 October 2008, and *Armonienė v. Lithuania*, no. 36919/02, 25 November 2008) and mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life. However, in the instant case, the applicant has not shown that the publication in question, allegedly affecting his reputation, constituted such a serious interference with his private life as to undermine his personal integrity. The Court therefore concludes that it was the applicant's reputation alone which was at stake in the context of an expression made to his alleged detriment".

102. It found that there was no breach of Article 8, explaining, at paragraph 28 that:

> "A limitation on freedom of expression for the sake of the applicant's reputation in the circumstances of the present case would have been disproportionate under Article 10 of the Convention."

103. It is necessary to consider how, taking these decisions into account, an election court should determine whether a statement relates to the candidate's personal character or conduct. The determination involves no discretion, but it does require judgment, which might be referred to as a value judgment. It is in the carrying out of this judgment that the court could, and in our judgment should, give effect to its obligation to have regard to the Article 10 rights of the maker or publisher of the statement (and the other Convention rights which must be balanced with or against it).

104. We will return to a consideration of this in the context of the specific statements made in this case. But it might be helpful if we gave an illustration of the way in which Article 10 might be taken into account. If the manner in which a false statement relates to the personal conduct or character of the candidate is in reality insubstantial, though on its ordinary reading s.106 might apply, it may well be inconsistent with Article 10 for a court to construe s.106 as applying to it.

105. We must now return to the reservation we made at paragraph 92 in relation to false statements in relation to personal character or conduct made dishonestly. We accept Miss Mountfield's submission that Article 10 was not engaged in relation to the statements in *The Examiner* and *Labour Rose* which the Election Court found were made dishonestly. Dishonest statements are aimed at the destruction of the rights of the public to free elections (Article 3 of the First Protocol) and the right of each candidate to his reputation (Article 8(1)). Article 10 does not protect a right to publish statements which the publisher knows to be false; similarly Article 17 which provides:

> "Nothing in the Convention may be interpreted as implying for any ... person any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

106. The right of freedom of expression does not extend to the publishing, before or during an election for the purpose of affecting the return of any candidate at an election, of a statement that is made dishonestly, that is to say when the publisher knows that statement to be false or does not believe it to be true. It matters not whether such a statement relates to the political position of a candidate or to the personal character or conduct of a candidate when the publisher or maker makes that statement dishonestly. The right to freedom of expression under Article 10 does not extend to a right to be dishonest and tell lies, but s.106 is more limited in its scope as it refers to false statements made in relation to a candidate's personal character or conduct.

(4) Our conclusion in relation to the statements made

(i) North Louth and Fairbairn

107. There was much discussion in the argument about certain passages in the judgments in *North Louth* and an observation made in *Fairbairn.* It is sufficient to state in relation to the relevant facts of the petition in *North Louth* that the false statement made accused the candidate of placing his relatives in government posts or as Mr Millar put it, of jobbery. The meaning and import of the passages most discussed in

argument were those in the judgment of Gibson J at 157-8 and Madden J at 171. First the passage from the judgment of Gibson J:

> The word "personal" no doubt in reference to character and conduct is restrictive, but I doubt if the sole antithesis is "political". "Public," or any other position to which comment and criticism would apply, would equally well fit the distinction. A general recommending officers for promotion who had lent him money, a Minister who betrayed Cabinet secrets to a foreign friend, would be guilty of official and political misconduct, which, as a matter of public concern, would merit comment; but such conduct would at the same time involve personal delinquency. If such person was candidate at an election, and a false charge of the above character was made, would it not be a false statement as to both personal character and conduct?
>
> ...For the purpose in hand, the only difference between corruption and wilful and dishonourable breach of duty is one of degree not principle. Each relates to personal character and personal conduct.
>
> If a candidate at an election professed to have been a consistent supporter by his vote of Old Age Pensions or of Trade Unions, and a leaflet falsely charged him with having opposed them by his votes, would not the statement affect his veracity and honour even more than his political character?
>
> As the Lord Chief Baron observed in *O'Shee's Case* [there is no surviving report], there is no sharp dividing line separating what is personal from what is political or otherwise.

The passage from the judgment of Madden J:

> "... to represent a candidate who comes forward as a member of a Parliamentary party, bound by pledge to seek no favours from any administration, as a place-hunter, obtaining from the Government of the day lucrative employments for himself and his family and friends, is to accuse him of political misconduct. Whether he has sought for and obtained such favours is a question of fact, and a question of fact relating to his personal conduct. A false statement of fact relating to his personal conduct may be used for the purpose of representing a candidate as guilty of either private immorality or public immorality, political or otherwise, and it is in either case equally within the statute"

108. In *Fairbairn*, Lord Ross in the Outer House had to consider an application by Sir Nicholas Fairbairn MP during the 1979 General Election for an interdict against the publication of a statement by the Scottish National Party which referred to the staff of the House of Commons Post Office complaining that his uncollected mail was threatening to take over the entire space of the post room. He contended that this meant that he failed to deal with his constituents' mail and was a false statement in respect of his personal character or conduct and amounted to an illegal practice under

s.106. Lord Ross concluded that the words complained of reflected on Fairbairn's public or political character as a political representative and not on his personal character or his "honour, veracity or purity". In the course of his judgment he accepted by way of observation the submission that

> "every false statement in relation to the public character of a candidate may in one sense reflect upon the candidate's personal character, but before there can be an illegal practice in terms of the statute, the false statement of fact must be directly related to the personal character of conduct of the candidate"

(ii) Our view

109. Although we accept that we must interpret s.106 by applying the principle set out in paragraph 86 above that Parliament re-enacted it in the light of decisions on its meaning, the passages in the judgments in *North Louth* do not, in our view, justify the adoption by the Election Court of the construction of s.106 that a false statement can at the same time relate both to a candidate's public and personal character. The judgments in *North Louth* began by drawing a distinction between public and personal character and on its facts, the conduct complained of plainly related to the personal conduct of the candidate. We agree with Mr Millar that the passage which we have cited at paragraph 63 in which Gibson J used the phrase "the man beneath the politician" probably means no more than the candidate in his personal character or conduct. In so far as passages went beyond drawing the distinction between public and personal, they are far from clearly expressed and plainly were not necessary for the decision in the case. The passages cannot therefore justify the conclusion that Parliament re-enacted the provision in the light of those passages. Nor in our view does the observation of Lord Ross in *Fairbairn* support the interpretation adopted by the Election Court; Lord Ross does no more than to make clear that the statement made must relate directly to the personal character or conduct of the candidate. Finally we consider that the better course is to use the statutory language and not to continue to use terms such as "honour" or "purity".

110. In our view, the starting point for the construction of s.106 must be the distinction which it is plain from the statutory language that Parliament intended to draw between statements as to the political conduct or character or position of a candidate and statements as to his personal character or conduct. It was as self evident in 1895 as it is today, given the practical experience of politics in a democracy, that unfounded allegations will be made about the political position of candidates in an election. The statutory language makes it clear that Parliament plainly did not intend the 1895 Act to apply to such statements; it trusted the good sense of the electorate to discount them. However statements as to the personal character of a candidate were seen to be quite different. The good sense of the electorate would be unable to discern whether such statements which might be highly damaging were untrue; a remedy under the ordinary law in the middle of an election would be difficult to obtain. Thus the distinction was drawn in the 1895 Act which is re-enacted in s.106 and which is reflected in the decisions to which we have referred a paragraph 87.ii).

111. In our judgment, as Parliament clearly intended that such a distinction be made, a court has to make that distinction and decide whether the statement is one as to the personal character or conduct or a statement as to the political position or character of the candidate. It cannot be both.

112. Statements about a candidate which relate, for example, to his family, religion, sexual conduct, business or finances are generally likely to relate to the personal character of a candidate. In our view, it is of central importance to have regard to the difference between statements of that kind and statements about a candidate which relate to his political position but which may carry a implication which, if not made in the context of a statement as to a political position, impugn the personal character of the candidate.

113. For example, a statement made simply about a candidate's conduct as a businessman might imply he is a hypocrite (as in *Bayley v Edmonds* or *Sunderland).* As his conduct as a businessman relates to his personal conduct, such a statement is within s.106, subject to possible issues of proportionality under Article 10 to be determined in relation to the seriousness of the allegation. However, a statement about a candidate's political position may well imply that he is a hypocrite or untrustworthy because of the political position he is taking. That is not a statement in relation to his personal character or conduct. It is a statement about his political position though it might cast an imputation on his personal character. We do not consider that Parliament intended that such statements fall within s.106, particularly bearing in mind the fact that criminal liability attaches for statements made negligently. It would be difficult to see how the ordinary cut and thrust of political debate could properly be carried on if such were the width of the prohibition. In any event it would also be difficult to reconcile such a broad construction with the balance that Article 10 mandates be achieved.

114. However, a statement about a political position can go beyond being a statement about his political position and become a statement that is a statement about the personal character or conduct of a candidate. A clear illustration is to accuse a candidate of corruption, even if that corruption involves the conduct of a public or political office. What is being said about the candidate is not a statement in respect of the conduct of a public office, but a statement that he is personally dishonest and committing a crime. The statement is not to be characterised as one about his political position, but one in relation to his personal character.

115. Before turning to the statements found by the Election Court to have been made which illustrate the distinction that a court must draw, we must briefly consider the further submissions made after the conclusion of the hearing by Miss Mountfield. She submitted that, unburdened by authority, the correct approach was to treat s.106 as applying to a candidate as an individual as distinct from a statement about a political party or a group. As was apparent from the case law and the illustrations discussed in argument, the distinction between personal and political might be viewed as illusory; it was therefore better to consider s.106 as referring to statements which directly related to the individual candidate for whom the electorate was asked to vote.

116. We cannot accept this submission. It is, in our view, possible to draw a distinction, as the framers of the 1895 Act intended, between a statement relating to the personal character or conduct and a statement as to the political character, conduct or position of a candidate for the reasons we have set out. The difficulty that has arisen, and which Miss Mountfield has sought to meet by her further submission, is the confusion, originating in the language of the *North Louth* decision (such as references to the man "beneath the politician" and his "honour" and "purity"), that a statement can at the same time be both as to personal and political character or conduct. Once it

is clear that a court must choose as to which it is, as we believe it can and as the facts of this case illustrate, then the difficulties are illusory. To take the example in *Fairbairn,* criticism of Fairbairn for not opening his constituency post would have been personal on the construction put forward by Miss Mountfield, but on the correct analysis as applied by Lord Ross it was a criticism of him in his political conduct.

(iii) The allegation in Choose: reneging on a promise in respect of a political position

117. We turn first, in the light of the distinction we consider must be drawn to the statement in *Choose* set out at paragraph 70 in relation to Mr Watkins in relation to reneging on his promise to live in the constituency. It was accepted that this was a statement about Mr Watkins' political position; whether a candidate lives or does not live in the constituency is not a matter relating to his personal character or conduct, but to his political position. A statement that the candidate has reneged on his promise to live there does, we accept, cast an imputation on the candidate's trustworthiness, as the Election Court held, but it is in respect of his trustworthiness in relation to a political position. To hold that such a statement fell within the prohibition would have a significant inhibiting effect on ordinary political debate, as candidates, particular those who have been MPs, are sometimes criticised for going back on promises on a political issue. This is particularly important as s.106 does not only prohibit untrue statements that are dishonestly made, but untrue statements that are carelessly made.

118. To take into account the fact that candidates are not infrequently said by their opponents to have reneged on promises made about a political matter, the Election Court sought to draw a distinction in paragraph 109 (quoted at paragraph 71 above) between promises by a politician he could not carry out because of changes in political circumstances and the promise to live in a constituency which was within his personal control. An enquiry into the reasons why a politician has not carried out a promise relating to a political matter cannot safely be dissected in this way. To do so, would moreover, take judges into the heart of political issues in a way that could not have been intended by Parliament. Take by way of example a statement about a candidate reneging on a policy in relation to subsidised education or housing which was the subject of a promise which had been made by a pledge or by signature to a petition prior to an earlier election that was not carried out. Is an enquiry to be made as to why he reneged? Would breach of the promise because of disobedience to a party whip be within his control? Would changing his mind because he saw political advantage to his party be within his control? Would the prospect of losing ministerial office be in his control? Some would say that to make such statement falsely related to the personal character of the candidate, as it reflected on his personal trustworthiness, as none of the examples given would in fact excuse the breach of his promise to the electorate.

119. We therefore conclude, with the benefit of much fuller argument than that available to the Election Court, that it reached a mistaken conclusion in relation to this statement as it had not construed s.106 correctly.

(iv) The statements in The Examiner and Labour Rose

120. We turn next to the statements in *The Examiner* and *Labour Rose.* If the statement made had been that Mr Watkins was wooing the extremist vote, that would not, in our

judgment, go beyond being a statement in respect of the political position of the candidate in the conduct of an election. A statement about the votes that a candidate is wooing is plainly a statement about his political position as it relates to the way he is conducting the election. Characterising those whom he is wooing as "extremist", assuming this is a statement of fact, is no more than political hyperbole. The characterisation of supporters as extremists is, in a political context, a statement about the political position of those he is wooing and the wooing of the votes of extremists is a statement about the political conduct of the person wooing such political support.

121. However when it was asserted in *The Examiner* that those whose votes were being wooed by Mr Watkins were those who were not simply extremists but those who advocated extreme violence, in particular against Mr Woolas, it plainly suggested, as the Election Court found, that Mr Watkins was willing to condone threats of violence in pursuit of political advantage. It was not then a statement about the type of support he was wooing, but a statement that he was willing to condone threats of violence. That further statement took the statement from being a statement as to Mr Watkins' political position to a statement about his personal character – that he condoned criminal conduct. It is not simply an implied statement in relation to a political matter, but a statement that goes to his personal character as a man who condones extreme violence.

122. Similarly where the statement in *Labour Rose* went on to say Mr Watkins had not rejected the endorsement of him by those who advocated violence and was refusing to condemn their threats of violence, this was again a statement that Mr Watkins was a man whose personal character was such that he refused to condemn threats of violence. In the same way as the statement in *The Examiner* it ceased to be a statement about the political support he was wooing, and became a statement about his personal character as a man who refused to condemn threats of violence.

123. Although in the present case, it might be said that Parliament can have been in little doubt that a person who like Mr Woolas on the findings of the Election Court made such statements in *The Examiner* and *Labour Rose* of the nature described about a candidate which were made dishonestly should be guilty of an illegal practice, it is necessary to test our conclusion on the basis that the statements were negligently made, as our interpretation of the law applies not only to untrue statements that are dishonestly made but to untrue statements that are made carelessly.

124. There is in our judgment a very significant difference between a statement that goes to the political conduct of a candidate and one that goes beyond it and says something about his personal character. We can think of no reason why Parliament cannot have intended that where a statement was made about the personal character or conduct of a candidate, it did not intend due care to be exercised. Freedom of political debate must allow for the fact that statements are made which attack the political character of a candidate which are false but which are made carelessly. Such statements may also suggest an attack on aspects of his character by implying he is a hypocrite. Again, imposing a criminal penalty on a person who fails to exercise care when making statements in respect of a candidate's political position or character that by implication suggest he is a hypocrite would very significantly curtail the freedom of political debate so essential to a democracy. It could not be justified as representing the intention of Parliament. However imposing such a penalty where care is not taken in making a statement that goes beyond this and is a statement in relation to the

personal character of a candidate can only enhance the standard of political debate and thus strengthen the way in which a democratic legislature is elected.

125. Nor in our judgment for the reasons we have expressed would the conclusion we have reached in any way infringe the balance that Article 10 requires. The statements made were not of a trivial nature; they were a serious personal attack on a candidate by saying he condoned violence by extremists and refused to condemn those who advocated violence.

Conclusion

126. We consider that we should therefore grant Mr Woolas permission to bring judicial review, but, although he is entitled to have one of the findings made against him set aside, this does not affect the certificate as the findings of an illegal practice in relation to the other two matters cannot be impugned on our view as to the law.