Hilary Term
[2019] UKPC 8
Privy Council Appeal No 0030 of 2018

JUDGMENT

Director of Public Prosecutions (Appellant) *v* Jugnauth and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr
Lord Carnwath
Lord Lloyd-Jones
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

25 February 2019

Heard on 15 January 2019

Appellant
David Perry QC
Rashid Ahmine
Victoria Ailes
Medaven Armoogum
(Instructed by Royds Withy King llp)

Respondents
Clare Montgomery QC
Joanna Buckley
Ravindra Chetty SC
Désiré Basset SC
(Instructed by Simons Muirhead and Burton llp)

Co-Respondent
(written submissions only)
Stuart Denney QC
M Roopchand
(Instructed by Independent Commission Against Corruption)

LORD LLOYD-JONES:

1. This is an appeal against a decision of the Supreme Court of Mauritius ("the Supreme Court") quashing the conviction of Mr Pravind Kumar Jugnauth ("the defendant") for an offence of "conflict of interests" contrary to section 13(2) and (3) of the Prevention of Corruption Act 2002 ("POCA") as amended by section 4(b) of the Act No 1/2006.

2. The defendant was convicted of the offence on 30 June 2015 following a trial before the Intermediate Court of Mauritius ("the Intermediate Court") (N Ramsoondar and M I A Neerooa, Magistrates) and on 2 July 2015 he was sentenced to 12 months' imprisonment. On 25 May 2016 the Supreme Court (Hon K P Matadeen, CJ and Hon A A Caunhye, Judge) allowed an appeal and quashed the conviction and sentence. On 22 June 2017 the Supreme Court (Hon K P Matadeen, CJ and Hon A A Caunhye, Judge) granted the prosecution conditional leave to appeal to the Judicial Committee of the Privy Council. On 15 January 2018 the Supreme Court (Hon K P Matadeen, CJ) granted final leave to appeal.

The facts

3. In March 2010, before the defendant entered public office as a minister, the Government of Mauritius approved a project for setting up a National Geriatric Hospital ("NGH"). In April 2010 the Central Procurement Board ("CPB") launched a public call for bids for the NGH project.

4. In May 2010 the defendant became Vice Prime Minister and Minister of Finance and Economic Development, posts which he held until July 2011.

5. Four bids were received including one by Medpoint Ltd ("Medpoint") on 3 June 2010, the deadline for submitting bids. It offered to provide its existing hospital, Medpoint Hospital, as a suitable medical facility. Medpoint was incorporated on 30 May 1990. At the time of incorporation, the defendant was a director and the secretary of the company in which he held 50 shares. His sister, Mrs Shalini Devi Malhotra, was also a director and shareholder in Medpoint. Her husband, Dr Malhotra, managed Medpoint. In 1994 the defendant resigned as director and secretary of Medpoint but retained his shareholding. By 2010 Mrs Malhotra held 86,983 shares out of 368,683 shares in Medpoint, amounting to 23.59% of the shareholding.

6. At a cabinet meeting on 18 June 2010 the NGH project was raised for discussion. The defendant declared a personal interest in Medpoint and left the meeting. In his absence the cabinet agreed that consideration be given to the acquisition of an existing medical facility to accommodate the NGH and that the project should be given high priority with a view to being completed within the calendar year.

7. On 9 July 2010 the sum of Mauritian Rupees ("Rs") 150m was allocated in the Lottery Fund budget in 2010 to fund the NGH project. The defendant informed his senior adviser at the Ministry of Finance and Economic Development ("MOFED"), Mr S Dowarkasing, that he was to deal with the matter and that the defendant was not to be involved.

8. On 14 December 2010 the CPB approved the award of a contract to Medpoint and notified the Ministry of Health and Quality of Life ("MOHQL") of its decision. The contract required a payment to Medpoint of Rs 144,701,300 by 31 December 2010. This amount was determined following assessment by the Valuation Department. It was not suggested by the prosecution that the defendant had taken any part in the deliberations leading to the decision to award the contract to Medpoint, in the valuation process or in the decision that payment would be due by 31 December 2010 as part of the 2010 budget.

9. On 22 December 2010, MOHQL notified Medpoint by letter of the offer of a contract, stating: "Payment will be credited to your company's account upon signature of deed of sale by the Notary Public". Medpoint accepted the offer later that day. On the same day MOHQL made a request to MOFED for the budgeted funds to be made available, by way of departmental warrant, from MOFED's Lottery Fund to finance the acquisition of land and building for the NGH project.

10. In the course of internal discussions at MOFED, it was considered that, although the project had initially been earmarked for payment from MOFED's Lottery Fund budget, the project being of a capital nature, identified savings of Rs 200m on capital projects in MOHQL's 2010 budget should be reallocated to the NGH project. On 23 December 2010, a minute ("Minute 6") to that effect was accordingly addressed by Mr Ramchurn, a senior analyst at MOFED, to the defendant in his capacity as Minister of Finance, to seek his approval for the reallocation of budgeted funds. The minute was submitted through analyst, Mr Ramyead; budget co-ordinator, Mr Acharaz; director, Mr Yip, and financial secretary, Mr Mansoor, all of whom initialled the minute before it was submitted to the defendant. The defendant approved this decision by affixing his signature and writing "Approved" to Minute 6.

11. On 24 December 2010, MOFED accordingly informed MOHQL that approval had been given to reallocate the sum of Rs 144,701,300 to its budget for payment to

Medpoint for the acquisition of land and building for the NGH project, using MOHQL's savings under capital projects. On 27 December 2010 the budgets were reallocated, so that the sum due to be paid out of the Lottery Fund was released to be used in other ways. Instead, Medpoint was paid from the Consolidated Fund and the payment was charged against the MOHQL 2010 budget.

The proceedings

12. On 22 September 2011 the defendant was arrested and provisionally charged with an offence contrary to section 13(2) and (3) POCA. The information, dated 14 March 2014, which formed the basis of the charge at trial, stated:

> "That on or about 23 of December 2010 at New Government Centre, Port Louis, in the District of Port Louis, one Pravind Kumar Jugnauth, aged 50 years, Barrister and residing at No 16, Angus Road, Vacoas, did whilst being then a public official, whose relative had a personal interest in a decision which a public body had to take, wilfully, unlawfully and criminally take part in the proceedings of that public body relating to such decision."

The particulars of the charge were as follows:

> "On or about the aforesaid date and place, the said Pravind Kumar Jugnauth whilst being then the Vice Prime Minister and Minister of Finance and Economic Development approved the reallocation of funds amounting to Rs 144,701,300 to pay Medpoint Ltd in which company the sister of the said Pravind Kumar Jugnauth, one Mrs Shalini Devi Malhotra, born Jugnauth, held 86,983 shares out of 368,683 shares."

13. In its judgment of 30 June 2015, convicting the defendant, the Intermediate Court made findings of fact including the following:

> (1) The defendant's sister had a direct personal interest in "whatever decision" affecting Medpoint, including the ministerial decision to "find funds so as to pay Medpoint".
>
> (2) Had no source of funds been identified urgently, the Government would not have been able to pay Medpoint within the fiscal year 2010.

(3) By affixing his signature and approving the request after having considered Minute 6, the defendant had taken part in the decision-making process which led to the decision to request MOHQL to reallocate funds from identified savings to enable payment to Medpoint for the acquisition of land and building for the NGH project.

(4) Although the word "Medpoint" did not appear in Minute 6, "various correspondences" in the file in which Minute 6 was found mentioned the word "Medpoint" and Medpoint was always mentioned in respect of the NGH project so the link between Medpoint and NGH would and should have been easily and reasonably made by the defendant.

14. On appeal the Supreme Court allowed the appeal on the following grounds:

(1) The Intermediate Court was wrong to treat the offence under section 13(2) and (3) POCA as an absolute offence involving strict liability.

(2) The Intermediate Court was wrong to hold that the defendant's sister's shareholding in Medpoint meant that she had a personal interest in a decision relating to that company.

(3) The Intermediate Court erred in holding that section 13(2) POCA was concerned with the perception of bias and that it was not necessary to prove any actual conflict of interest.

15. The prosecution appeals to the Judicial Committee of the Privy Council on four grounds which are formulated as follows:

(1) Whether, as the Supreme Court held, the state is, for the purpose of establishing guilt under section 13(2) POCA, required to prove that an accused knew that he possessed a conflict of interests and, with that knowledge, intended to act in breach of his duty not to take part in the proceedings of the relevant public body or whether it is sufficient for the state to prove that the accused knew each of the objective facts and circumstances that a reasonable person would regard as giving rise to a conflict of interests and that he failed thereafter to abstain from participation in those proceedings;

(2) Whether the Supreme Court erred in law in holding that it was a defence for an accused charged with an offence under section 13(2) POCA to establish, on a balance of probabilities, that he had acted in good faith, namely that he had

acted under an honest and reasonable belief as to circumstances which, if true, would have rendered his act devoid of guilty intent;

(3) Whether, as the Supreme Court held, for the purpose of establishing the existence of a conflict of interests pursuant to section 13(2) POCA, the expression "personal interest" in section 13(2) is to be construed, in its statutory context, as preventing the state from relying on the shareholding of the relative of a public official in a company;

(4) Whether, as the Supreme Court held, once a contract has been awarded by a public body to a company in which the relative of a public official holds shares, that public official possesses no conflicting interest in decisions relating to the execution of the contract, such as internal arrangements relating to payment of the purchase price, and may participate in them without infringing section 13(2) POCA.

The legislation

16. Section 13 POCA has a marginal note "Conflicts of interest" and reads as follows:

> "(1) Where -
>
> (a) a public body in which a public official is a member, director or employee proposes to deal with a company, partnership or other undertaking in which that public official or a relative or associate of his has a direct or indirect interest; and
>
> (b) that public official and/or his relative or associate hold more than 10% of the total issued share capital or of the total equity participation in such company, partnership or other undertaking,
>
> that public official shall forthwith disclose, in writing, to that public body the nature of such interest.
>
> (2) Where a public official or a relative or associate of his has a personal interest in a decision which a public body is to take, that

public official shall not vote or take part in any proceedings of that public body relating to such decision.

(3) Any public official who contravenes subsection (1) or (2) shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years."

Section 2 defines "public official" as including ministers and defines "relative" as including a brother or sister.

17. The avoidance of situations giving rise to a conflict of interest is clearly part of the purpose of the offences created by section 13. The offence created by section 13(1) and (3) creates a wide-ranging prohibition and is committed where an official fails to declare an interest in relation to an entity with which the public body to which he belongs proposes to deal. The offence created by section 13(2) and (3), with which we are concerned, creating a duty not to vote or take part in proceedings relating to a relevant decision, is equally wide-ranging. It is, for example, irrelevant whether the decision made by the public body favours or is counter to the interests of the public official, relative or associate. These provisions are intended to prohibit the situations in which corruption might operate. In establishing lines which must not be crossed they are necessarily broadly drafted and wide in their scope of application. It is important to have these considerations in mind when interpreting this legislation.

<u>The elements of the offence under section 13(2)</u>

18. In order to prove the commission of an offence contrary to section 13(2), as applicable to the present case, the prosecution is required to prove to the criminal standard the following elements which form the actus reus of the offence:

(1) That the defendant was at the material time a public official;

(2) That a public body has taken a decision;

(3) That a relative of the defendant had a personal interest in the decision; and

(4) That the defendant has taken part in proceedings of the public body relating to the decision.

This was common ground before us. The first three elements relate to factual circumstances, whereas the fourth element is the conduct element of the offence.

19. The Board notes that the Supreme Court considered that the Intermediate Court erred in that it convicted the defendant on the basis of an apparent conflict of interest. This was one of the grounds on which the Supreme Court allowed the appeal. This arises out of a passage in the judgment of the Intermediate Court in which it addressed the question as to what constitutes a conflict of interest. In particular, the Intermediate Court observed:

> "The offence is committed as soon as an accused places himself in such situation where his public duty clashes with his personal interest or appears, to a reasonable man, to so clash. The appearance of influence or perception of bias is sufficient to constitute the offence of conflict of interest." (Original emphasis.)

Read in isolation the passage appears inconsistent with an obligation on the prosecution to prove all of the elements of the offence contrary to section 13(2) as identified above. The Board does not consider, however, that the Intermediate Court was there seeking to define the elements of the offence. When read in context it appears that it was discussing the mischief which that provision is intended to avoid, namely that an official should not put himself in a situation where he has a conflict of interest. The discussion begins with the observation that there is no requirement that the defendant's sister should have been favoured in a decision and that the wording of the enactment is such that the elements of the offence are proved when a public official takes part in any decision-making process in which his relative has a personal interest. Furthermore, it concludes with the statement that the facts of the present case establish the elements of the offence beyond reasonable doubt. In the Board's view, the Intermediate Court did not apply principles of apparent conflicts of interest in substitution for the elements of the offence as identified above. Nevertheless, the Supreme Court was clearly correct in its statement that it is incumbent on the prosecution to prove beyond reasonable doubt that the defendant took part in proceedings relating to a decision in which the relative had an actual personal interest and that this is not a situation where an apparent interest perceived by a fair-minded observer would give rise to a criminal conviction under section 13(2).

20. Throughout the present proceedings, the prosecution has not submitted that the offence is one of absolute liability or even of strict liability. The Board considers that this concession was correctly made. The presumption that Parliament does not intend to make criminals of persons who are in no way blameworthy leads to the proposition that every component element of the actus reus of a statutory offence should be associated with a corresponding mens rea unless the legislative context otherwise requires (*Sweet v Parsley* [1970] AC 132; *Gammon (Hong Kong) Ltd v Attorney*

General of Hong Kong [1985] AC 1; *R v Brown (Richard)* [2013] UKSC 43; [2013] 4 All ER 860). The presumption is particularly strong where, as in the present case, the offence is clearly of a serious character and punishable by a lengthy term of penal servitude. In the present case the presumption is not rebutted by any express provision or by necessary implication. As a result, there is an obligation on the prosecution to prove mens rea in relation to each element of the actus reus of the offence contrary to section 13(2). The Board accepts the submission of the prosecution, which once again was not controversial before us, that the resulting obligation is to prove the following mental elements to the criminal standard:

(1) That the defendant knew that he was a public official;

(2) That the defendant knew, or was reckless as to the fact, that the public body was taking the relevant decision;

(3) That the defendant had knowledge of, or was reckless as to the existence of facts giving rise to, his sister's personal interest in the decision;

(4) That the defendant intentionally or recklessly carried out the act which amounted to participation in the proceedings of the public body relating to the decision.

Here recklessness connotes subjective recklessness. It should also be emphasised that where knowledge of or recklessness as to factual circumstances is required to be proved, this relates to primary facts and not to their characterisation or their significance as a matter of law. Thus, for example, while a lack of knowledge that a relative owned shares in a company awarded a contract could provide a defence, it would be irrelevant whether a defendant realised that this would constitute a personal interest in law.

21. The Supreme Court held that the Intermediate Court had erred in law in treating the offence contrary to section 13(2) as an absolute offence which created an absolute prohibition. In the view of the Supreme Court the Intermediate Court had failed to consider the requisite mens rea and, as a result, its legal approach was vitiated and defective from the outset. Accordingly, the Supreme Court allowed the appeal on this further ground. The Supreme Court's conclusion on this matter seems, however, to be founded on a misapprehension as to the approach of the Intermediate Court. That court did not expressly address the question of absolute liability in the case of a statutory offence or the authorities referred to above in relation to the presumption that an offence requires mens rea. It did, however, at various points in its judgment use the word "absolute" and it seems that it is this which has given rise to the Supreme Court's conclusion that an erroneous approach was adopted. Thus, the Intermediate Court observed that whether the approval by the defendant was to be construed as an

individual or a collective one was irrelevant because "the explicit wording of the present offence has created an absolute prohibition for a public official to take part in any proceedings when a situation of conflict of interest arises, so that it matters not whether it is a collective or individual decision". Here the reference to "absolute prohibition" is used not in the context of absolute or strict liability but in the distinct context of which sorts of participation are within the prohibited conduct. As Mr David Perry QC put it on behalf of the prosecution, "absolute" is correctly read here as synonymous with "comprehensive" or "total". Later in its judgment the Intermediate Court referred back to this earlier passage and observed that "the prohibition to take part in any proceedings is an absolute one … so that even if the accused acted in *good faith* it would not constitute any defence" (original emphasis). This observation was made in the context of the defendant's contention that he thought he had no choice but to approve the reallocation. This again, it seems to the Board, was an observation on the nature of the prohibition on participation. Moreover, an assertion that the defendant believed that no offence would be committed, given the circumstances in which he found himself, would not have been a basis for challenging any element of mens rea which the prosecution had to prove. Furthermore, to the extent that the Intermediate Court was here addressing a possible defence of acting in good faith, the Board considers, for reasons stated below, that no such defence was available. In any event, the Intermediate Court did make the following findings: it found that the defendant knew that his sister had shares in Medpoint, that he knew that the decision related to Medpoint and that he knew what he was doing when he approved Minute 6. These findings would have been unnecessary had the Intermediate Court considered the offence to be one of absolute liability.

22. So far as proof of the mental elements identified above is concerned, before the Intermediate Court there was no issue that the defendant knew that he was a public servant so (1) above was satisfied. So far as (2) above is concerned, the Intermediate Court found that the defendant knew that the decision related to Medpoint. It will be necessary to consider further (3) above, following further consideration of this requirement as to circumstances.

23. The Supreme Court drew particular attention to the mental element referred to in (4) above. It noted that the Intermediate Court in pronouncing sentence had stated that there was ample evidence that the defendant wilfully and recklessly took part in the decision-making process. The Supreme Court considered, however, that there was no finding in the judgment below that the offence had been committed wilfully. It stated that this added to the confusion in the approach to the exact mental element required for this offence to be proved. The information averred that the defendant had "wilfully, unlawfully and criminally" taken part in the proceedings relating to the relevant decision. The use of the word "wilfully" alleges that the defendant acted intentionally or recklessly in taking part in the proceedings (*R v Sheppard* [1981] AC 394; *R v D* [2008] EWCA Crim 2360; [2009] Crim LR 280). This is entirely appropriate in the context of this offence and in accordance with the obligation on the prosecution to prove mens rea as identified above. Furthermore, there can be no doubt that the act of signing and approving the minute was a deliberate one. In these circumstances, there is no basis

for concluding that the defendant may have been misled by the averment or that the Intermediate Court may have misapplied the law in this regard.

24. The Supreme Court also held that the Intermediate Court erred in a further respect concerning the mental element of the offence. It considered that the Intermediate Court had wrongly construed section 13(2) as precluding the defendant from establishing that he had acted in good faith by showing, on the balance of probabilities, that he had acted with an honest and reasonable belief in a state of facts which would render his performance of the prohibited acts devoid of any guilty intent. The Supreme Court considered that the Intermediate Court could not rule out, in law, the defence of good faith invoked by the defendant. In its view, the members of the Intermediate Court had declined to apply their minds to the defence of good faith and to determine, whether, at the material time, the defendant was led by any honest and reasonable exculpatory belief.

25. The Supreme Court founded this conclusion on authority in a number of Commonwealth jurisdictions in which it has been held that such a defence was available, in order to mitigate what would otherwise be an offence of strict or absolute liability. It referred, in particular, to *Hin Lin Yee v HKSAR* [2010] HKCFA 11; (2010) 13 HKCFAR 142 (Hong Kong Special Administrative Region); *Maher v Musson* (1934) 52 CLR 100; *Proudman v Dayman* (1941) 67 CLR 536; *He Kaw Teh v The Queen* (1984-1985) 157 CR 523 (Australia); *Civil Aviation Authority v Mackenzie* [1983] NZLR 78 (New Zealand); *R v City of Sault Ste Marie* (1978) 85 DLR (3d) 161; [1978] 2 SCR 1299 (Canada). These authorities accept that, in appropriate cases, where the presumption of full mens rea has been displaced, the courts might nevertheless read into a statutory offence a proviso affording a defence where the defendant can show that he acted under an honest and reasonable mistake as to fact. Different views have been expressed in the authorities as to the nature of the burden on a defendant. This approach has been referred to as "a half-way house". It has not found favour in the United Kingdom. The Board understands that the question whether such a defence is available in principle in Mauritius has not previously been decided.

26. This point may be dealt with briefly. The Supreme Court held and the prosecution concedes that in the case of the offence created by section 13(2) the presumption that mens rea is required is not rebutted and, accordingly, the appropriate mens rea must be proved in relation to each element of the offence. In these circumstances there is no scope for resort to a half-way house principle. As the extracts from the authorities cited by the Supreme Court demonstrate, it is only if the presumption of mens rea is displaced that the question of a possible defence of honest and reasonable mistake of fact can arise. If the prosecution is required to prove mens rea, no purpose is served by such a defence. Accordingly, the Supreme Court erred in concluding that the defendant had been deprived of an opportunity to rely on a defence relating to his mental state. In these circumstances, it would not be appropriate for the Board to express any view as to whether a defence of honest and reasonable mistake of

fact may be available in the law of Mauritius in another context, as the point does not arise in this case and the matter has not been fully argued before us.

Public official

27. At the date of the acts alleged to give rise to the offence the defendant was Vice Prime Minister and Minister of Finance and Economic Development and was accordingly a public official within section 2 of POCA.

A public body has taken a decision

28. Before the Supreme Court it was submitted on behalf of the defendant that the act of signing the minute addressed to him on reallocation of funds did not amount to his voting or taking part in "any proceedings" relating to a "decision which a public body is to take" within section 13(2). It was submitted that the defendant's signature was a mere administrative act which approved a proposal or recommendation made by other officials of MOFED in furtherance of decisions already taken by the Government in cabinet for the acquisition of land and buildings to set up the NGH.

29. In the Board's view the Supreme Court was correct in concluding that the defendant's conduct in signing the minute did amount to taking part in proceedings relating to a "decision which a public body is to take". The use of the words "any proceedings" in section 13(2) and the underlying policy of the provision strongly suggest that these words are to be given a wide interpretation so as to include any proceedings, including a single event, which are capable of leading to a situation of conflict of interest of the sort described in that provision. In particular, the words are sufficiently wide to include both acts leading up to the formation of a contract and acts performed in the execution of a contract once concluded. Furthermore, the signing of the minute in this case was not a merely procedural or administrative act. The evidence before the Intermediate Court established that the approval of MOFED was required because the originally identified source of funds was MOFED's Lottery Fund and the Financial Management Manual provided that any subsequent reallocation of funds from one Ministry to another required the prior approval of MOFED. In this case the Financial Secretary had referred the matter to the defendant for his final approval.

A relative of the defendant had a personal interest in the decision

30. The Board considers that the crucial issue in the present appeal is whether the defendant's sister, Mrs Malhotra, had a personal interest in the decision within section 13(2). Here, it is important to focus on what was the relevant decision. As we have seen, the particulars of the charge in the information stated that the defendant had approved

the reallocation of funds to pay Medpoint. Similarly, in a letter dated 19 January 2015, in response to a request by the defendant's legal advisers for further particulars of the information, the Independent Commission against Corruption ("ICAC"), which at that time had the conduct of the prosecution, stated:

> "The 'decision' was the approval on 23.12.10 by the accused, in his capacity as Minister of Finance and Economic Development, of the request for re-allocation of funds."

The Board also notes that section 13(2) refers to "a personal interest in a decision which a public body is to take". This is prospective and, accordingly, cannot refer to a decision which has previously been taken.

31. The Supreme Court considered that the Intermediate Court's decision on the issue of "personal interest" was "glaringly flawed" because it failed to appreciate the "crucial distinction" that the ministerial decision was not one to "find funds" but one to approve the reallocation of funds, which had previously been earmarked, from one source to another. The Board, however, does not consider that the Intermediate Court fell into the error alleged. While it is correct that it found that:

> "It is clear that, had no source of funds been identified urgently, the Government would not have been able to pay Medpoint Ltd within fiscal year 2010, hence the importance of this decision."

it made clear elsewhere in its judgment that it correctly appreciated, and indeed emphasised, that it was concerned with the reallocation of funds:

> "The re-allocation of funds which is the subject matter of the present information before this court and in respect of which decision was allegedly taken by the accused is in relation to the source of funds from which payment to Medpoint Ltd would be effected." (Original emphasis.)

> "… [T]here has been a change in the source of financing of the NGH Project, ie from 'Lottery Fund' to 'MOHQL's identified savings'. This is the re-allocation of funds subject matter of the present information." (Original emphasis.)

and, referring to the terms of Minute 6:

> "From the above, it is obvious that the re-allocation of funds in question is in fact in respect of change of source of funds for the acquisition of land and building for the setting up of NGH." (Original emphasis.)

32. The Supreme Court considered that the use of the word "personal" to qualify "interest" in section 13(2) was purposive and crucial in several respects. In its view, it made clear that not any interest would suffice to create criminal liability for an offence under section 13(2). Had it been the intention of the legislature to encompass any other interest, direct or indirect, such words would have been expressly included and spelt out in section 13(2). From this the Supreme Court drew two conclusions. First, the wording of section 13(2) is not concerned with any remote interest but clearly relates to such personal interest of a relative which may, accordingly, give rise to a conflictual situation confronting the public official at the time of his participation in the decision-making process. Secondly, although a relative may have an interest as a shareholder, he would have no "personal" interest in a decision of Government to allocate funds to a company which is, in law, a different entity. Accordingly, it concluded that the Intermediate Court was wrong in simply inferring from the defendant's sister's shareholding in the company that she had a "direct personal interest in whatever decision affecting Medpoint Ltd". This finding was generalised and ignored the need to analyse and assess each specific decision individually to determine whether the sister had a personal interest in it.

33. An "interest" within section 13(2) is required to be "a personal interest". In the Board's view, "personal" is intended to limit the meaning of "interest" to the following extent. It draws a distinction between the individual interest of a public official, his relative or associate and the more general interest shared by members of the public at large in decisions made by public officials. This reading is consistent with and furthers the objective of the provision which is to prohibit participation in decision-making where the official, his relative or associate has an interest which gives rise to a conflict. There is no good reason to give the word "personal" a more limiting effect. Moreover, the interest is not required to be a financial interest; for example, a public official, his relative or associate may have a "personal interest" in the award of an honour which would be sufficient to bring that case within the mischief at which the provision is directed.

34. The Supreme Court accepted the submission on behalf of the defendant that the Intermediate Court had erred in holding that the defendant's sister's shareholding in Medpoint meant that she had a personal interest in the decision relating to the payment to the company. In its view, the Intermediate Court had wrongly conflated the defendant's sister's interest in Medpoint with that company's interest in its contract with the Government. In this regard, it referred to number of decisions concerning the distinct legal personality of a company: *Macaura v Northern Assurance Co Ltd* [1925] AC 619, 626-627, per Lord Buckmaster; *Prest v Petrodel Resources Ltd* [2013] 2 AC

415, para 8 per Lord Sumption; *Bromfield v Bromfield* [2015] UKPC 19; [2016] 1 FLR 482.

35. The distinct legal personality of a company and the fact that its rights and liabilities are distinct from those of its shareholders are, subject to very limited exceptions, fundamental principles. However, in the Board's view they have no application to the present situation. Section 13(2) addresses situations in which a person has an interest in a decision, not an interest in an entity or an asset. It is perfectly possible that both a company and its shareholders will have an interest in a decision falling within section 13(2). Thus, for example, the decision to award the contract to Medpoint, a decision in which the defendant did not participate, was undoubtedly a decision in which both Medpoint and Mrs Malhotra, as a director and owner of 23% of its shares, had a personal interest. Two further considerations are relevant here. First, as explained above, the interest is not necessarily a financial interest. Secondly, although the Intermediate Court found that Mrs Malhotra had "a direct personal interest in whatever decision affecting Medpoint Ltd", section 13(2) does not require that the interest be direct. Nor can any assistance, in interpreting "interest" in section 13(2), be derived from the reference in section 13(1) to "direct or indirect interest" as that relates to an interest in "a company, partnership or other undertaking". As the Supreme Court pointed out in its judgment, section 13(2) is intended to relate to such personal interest of an official, his relative or associate in a decision as may give rise to a conflictual situation confronting the public official at the time of his participation in the decision-making process. To restrict the scope of section 13(2) in the manner proposed by the Supreme Court would be totally inconsistent with its own statement of principle. The Board therefore accepts the submission by Mr Perry that the Supreme Court's reading confuses property rights with interest and represents an artificially narrow approach to the statutory language which would undermine the clear meaning and purpose of the provision.

36. The Supreme Court was correct, however, in emphasising the need to analyse and assess each specific decision individually in order to determine whether the official, relation or associate had a personal interest in it. In the present case the relevant decision was the decision to reallocate the source of the funds to be paid to Medpoint. On behalf of the prosecution, Mr Perry accepts that the immediate decision, as he puts it, concerned the decision to reallocate funds and that the Government was contractually bound to pay Medpoint. Nevertheless, he maintains that the finding of the Intermediate Court was that, in practice, it was the reallocation of funds which enabled payment actually to be made within the financial year 2010. He submits that, for this reason, the decision to reallocate funds was, in fact, important to Medpoint and hence to Mrs Malhotra. There would not have been any payment, had it not been for reallocation of funds. Here, he relies in particular on the following passage in the judgment of the Intermediate Court:

> "We also have no doubt that MOFED had to decide on the issue of re-allocation of funds following the correspondence from Mr Jeewooth [a witness in the Intermediate Court proceedings] on 22-12-10 so as to identify the funds to enable payment to Medpoint Ltd for the acquisition of land and building for the NGH Project.

It is also essential here to highlight the fact that this was by no means a simple decision. Firstly, the substantial sum involved is reflective of the nature and substance of *the decision*: secondly, the urgency of *the decision* since Mr Jeewooth had clearly specified in his correspondence dated 22-12-10 … '… *to enable payment to be effected within fiscal year 2010*/ 1 Jan 2010 to 31 December 2010 …' and it was already 23-12-10; lastly the importance of this decision is evident from the memorandum attached to the virement certificate dated 27-12-10. … The relevant paragraph in the memorandum reads as follows:

> '… this was necessary to enable the disbursement of funds under the appropriate item of expenditure to settle the land acquisition deal for the setting up of a National Geriatric Hospital …'

It is clear that had no source of funds been identified urgently, the Government would not have been able to pay Medpoint Ltd within fiscal year 2010, hence the importance of this decision." (Original emphasis.)

37. The Supreme Court came to a very different conclusion. After referring to this conclusion of the Intermediate Court it continued:

> "The above finding poses two problems. Firstly, it confirms the trial court's misconception that funds had to be '*identified'* whereas, as we have stated above, the decision was rather one of '*reallocation'* of existing funds. Secondly, there is purely and simply no evidence on record to support the finding that the Government would not have been able to pay Medpoint Ltd within financial year 2010 … had the [defendant] not taken the decision which he did. On the contrary, there is evidence that the Financial Secretary had, in November 2010, directed that the project needed to be implemented and the payment needed to be effected before the end of December 2010. To that extent, we agree with the submission of learned Queen's Counsel for the [defendant] that, had the reallocation decision not been taken, the default position would have been that the existing source of payment (MOFED's Lottery Fund) would have been a source of payment. No evidence was adduced showing the contrary."

The Board has explained above that, in its view, the Intermediate Court did not, in fact, err on the first point and correctly appreciated that the decision was a reallocation. Nevertheless, that leaves the question whether there would have been a payment but for the reallocation of funds.

38. At the oral hearing we invited Mr Perry to refer us to the evidence in support of his submission. He drew the Board's attention to a number of matters and provided further references following the hearing. These show that officials wished to make the payment before the end of the financial year 2010 because that would enable them to utilise unused funds in the MOHQL budget for 2010. However, they do not show that there was any lack of funds or that payment could not have been made but for the reallocation of funds. On the contrary, the evidence was that on 9 July 2010 Rs 150m had been allocated in the Lottery Fund budget for this project and on 9 November 2010 there was a direction that payment be effected before the end of December 2010. As the Supreme Court pointed out, the evidence was clear that if payment could not be made from the MOHQL surplus, payment would have been made from the original source of payment, the Lottery Fund. The reallocation decision was solely concerned with whether the money paid should be booked to MOFED's 2010 Lottery Fund budget or MOHQL's 2010 budget.

39. The Board considers that Mrs Malhotra cannot have had a personal interest within section 13(2) in the decision whether the payment should be made from MOFED's or MOHQL's budgeted funds. The decision, whichever way it went, cannot have affected any interest of Mrs Malhotra or the company in any way. There was already a binding contract and a legal commitment to pay the money. The funds to make the payment were available. The only question was from which pocket the funds should come. The money would have been paid from the Consolidated Fund in any event. No doubt, which internal account it came from would have been a matter of total indifference to them. The Supreme Court was, therefore, correct to conclude that the decision taken by the defendant to approve a reallocation of funds at the stage after funds had been identified, after the payment deadline had been determined, after the contract had been awarded and after the contract amount had been determined was not a decision in which his sister had any personal interest. It was merely concerned with a choice between two available internal sources of funding.

40. The Board notes that the Independent Commission against Corruption, which initiated this prosecution, now accepts in its written case on this appeal that it is difficult to see how "an internal reallocation of payments source for the external contract" would be a decision in which Mrs Malhotra would have a personal interest.

41. This is sufficient to dispose of this appeal. The prosecution has failed to establish that the defendant's sister had a personal interest in the decision, an element of the actus reus of the offence contrary to section 13(2). However, it should also be noted that, by

the same token, the defendant could not have had knowledge of the existence of facts giving rise to a personal interest in the decision in his sister, because there were none.

42. For these reasons, the appeal will be dismissed.