

02/08; [2007] VSC 497

SUPREME COURT OF VICTORIA

**SAUNDERSON v WATSON**

Byrne J

23 November, 7 December 2007 — (2007) 17 VR 584; (2007) 157 LGERA 206

**LOCAL GOVERNMENT – REGISTER OF COUNCILLORS' INTERESTS – COUNCILLOR REQUIRED TO PROVIDE RETURN OF INTERESTS – PARTICULARS OF GIFTS RECEIVED TO BE INCLUDED – COUNCILLOR INCURRED TWO DEBTS TO PRINTING COMPANY FOR PRODUCTION OF ADVERTISING MATERIAL FOR ELECTION CAMPAIGN – SUCH INVOICES PAID BY THIRD PARTY – WHETHER PAYMENT CONSTRUED AS A GIFT – COUNCILLOR CHARGED WITH BREACH OF ACT – FOUND GUILTY BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: LOCAL GOVERNMENT ACT 1989, S81(7)(e).**

S., a local councillor, incurred debts to two printing firms for the production of advertising material for the election campaign of himself and others. The total amount was some \$17,500 which was paid on S.'s behalf by a third party. S. failed to disclose this transaction in his return and was later charged with a breach of s81(7)(e) of the *Local Government Act* 1989 ('Act'). The magistrate found that the donations were gifts, found the charge proved and imposed a monetary penalty. Upon appeal—

**HELD: Appeal dismissed.**

1. The magistrate was required to determine whether the donations in question were gifts under the Act. Central to the definition of "gift" in s3(1) of the Act is that there is a donor and a donee. The definition of "disposition of property" in s3(1) of the Act must relate to the passing of something from one person to another. In the case of the release of a debt, its most obvious application would be the case where a donor, being a creditor of the donee, discharges that debt.

2. In the present case, the gift in question was the act of the donor in paying the invoices. In legal terms, this act discharged the debts owed by S. to the two printing companies. Such an act was clearly a disposition of property and was also a gift within the statutory definition, since the discharge of the debt was made without consideration.

3. The question was whether S. received the gift itself. The disclosure obligation under s81(7) of the Act should not be construed narrowly so as to introduce in 2004 a change which would severely reduce the existing disclosure obligations of councillors with the consequence that disclosable transactions, which are commonly and properly entered into by councillors, should no longer be the subject of disclosure. The proper interpretation of s81(7)(e) must be that a gift received by a councillor includes not only transactions whereby the donor discharges the liability of the councillor to the donor, but also where it discharges the councillor's liability to a third party. Therefore, the disclosure requirements of s81(7)(e) include a requirement to disclose gifts which are received as election campaign donations. Accordingly, the magistrate was not in error in holding that the payments constituted a gift requiring disclosure under s81(7)(e) of the Act.

4. In relation to the *Proudman v Dayman* [1941] HCA 28; [1941] 67 CLR 536 defence that S. genuinely believed on reasonable grounds that the donations which he received were not gifts, the Magistrate found that S. honestly held that belief, but rejected the defence on the ground that it was not held on reasonable grounds. This finding of fact was open on the evidence. In any event the alleged mistake as to whether a donation of this kind fell within the definition of "gift" within the meaning of s81(7) was a mistake of law and, for that reason, did not provide the basis for the suggested defence.

**BYRNE J:**

1. The appellant, David Joseph Saunderson, has, since March 2001, been a member of the Greater Geelong Council. At the election held on 26 November 2004 he stood as a candidate and was again elected as a councillor.

2. Pursuant to the *Local Government Act* 1989 s81(7), Cr Saunderson was required to submit to the Chief Executive Officer of the Council a return containing certain information in relation to the period from July 2004 to 30 June 2005 for inclusion in a register of interests. The information

to be provided included a number of matters relating to the councillor's interests which might, in a given case, give rise to concerns about conflict of interest. It was not suggested in this case that Cr Saunderson had breached any conflict of interest requirement; what was in issue was the accuracy or completeness of his return in one particular.

3. The information which is required by s81(7) to be included in the return includes the following:

(e) particulars of any gift of or above the amount or value of \$500 received by him or her from a person other than a person related to him or her by blood or marriage; ...

On 21 July 2005, Cr Saunderson submitted his ordinary return for the period to 30 June 2005. On 17 August 2006 he was charged with a breach of s81(7)(e) in that he failed to disclose in his return a gift above the amount of \$500. At the hearing before the Magistrates' Court on 15 February 2007, he pleaded not guilty but was convicted and fined \$1000 with a stay to 15 May 2007.

4. By notice of appeal dated 13 March 2007, Cr Saunderson appeals against this order pursuant to s92 of the *Magistrates' Court Act* 1989 upon the following questions of law:

1. Whether the conduct the subject of the charge disclosed an offence under s81(7)(e) of the *Local Government Act* 1989 (the Act).

2. Whether election campaign donations are gifts within the meaning of s81(7)(e) of the Act.

3. Whether at the time of the alleged offence the amount or value of a gift requiring disclosure under s81(7)(e) of the Act was \$500 or \$2,000.

4. Whether a payment to a third party can, and on the evidence did, constitute a gift requiring disclosure under s81(7)(e) of the Act.

5. Whether the learned Magistrate erred in law in holding on the evidence that the defendant's belief that election campaign donations were not gifts within the meaning of s81(7)(e) of the Act was not reasonable.

5. In order to understand the questions in issue in this case, it is necessary to look to some legislative changes which were made to the *Local Government Act* concerning the obligations of councillors and candidates with respect to gifts received.

6. The *Local Government Act*, when it was first enacted in 1989, contained s81 which required councillors to include information in the register of interests broadly similar to that in the current legislation. Councillors in their ordinary returns were required by s81(7) to include in their return:

(e) Particulars of any gift of or above the amount or value of \$2,000 received by him or her from a person other than a person related to him or her by blood or marriage; ...

It will be noted that this is in identical terms to the provision here said to have been breached, except for the higher value threshold of the gift. There was in the statute no definition of gift. Subject to the threshold amount, this is how things stood as at the date of the 2004 election and, as will be seen, at the date upon which Cr Saunderson is said to have received the undisclosed gift.

7. In 2003, Parliament enacted the *Local Government (Democratic Reform) Act* 2003, which introduced new provisions to and which amended the *Local Government Act*. Among the new provisions was a new Division 9 of Part 3 dealing with electoral campaign donations. Notwithstanding that the amending statute was enacted in 2003 and that many of its provisions came into force in December of that year, s30, which enacted the new Division 9, and s31, which enacted consequential changes, did not come into force until 31 December 2004.

8. Among the consequential changes which came into force in December 2004 were new definitions which were introduced into s3(1):

**"gift"** means any disposition of property otherwise than by will made by a person to another person without consideration in money or money's worth or with inadequate consideration, including—

(a) the provision of a service (other than volunteer labour); and

- (b) the payment of an amount in respect of a guarantee; and
- (c) the making of a payment or contribution at a fundraising function;

**“disposition of property”** means any conveyance, transfer, assignment, settlement, delivery, payment, gift or other alienation of property including—

- (a) the allotment of shares in a company;
- (b) the creation of a trust in property;
- (c) the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property;
- (d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property;
- (e) the exercise by a person of a general power of appointment of property in favour of any other person;
- (f) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the person’s own property and to increase the value of the property of any other person;

9. Another amendment made by the 2003 Act was the reduction of the disclosable gift threshold in s81(7) from \$2,000 to \$500. This amendment was made by s63(f) of the 2003 Act, which came into force on 31 July 2004.

10. The facts of this case were not in issue. Indeed, a statement of agreed facts was before the Magistrate. They include the following:

6. At a meeting on an unspecified date between August 2004 and November 2004, Cr Saunderson discussed with Mr Robert Harris (Mr Harris), National Development Manager for Lascorp Development Group (Aust) Pty Ltd (Lascorp), financial assistance in relation to the electoral campaigns in the Greater Geelong City Council elections.

7. Specifically, Cr Saunderson requested financial assistance from Mr Harris with the production of advertising material in relation to the Greater Geelong City Council election campaign scheduled for November 2004. Cr Saunderson also told Mr Harris that any financial contribution made would be for himself and others.

8. On an unspecified date prior to November 2004, Mr Harris spoke to Cr Saunderson and told him that Lascorp was willing to make a financial contribution towards the election campaign on production of invoices from printers.

9. Cr Saunderson subsequently produced invoices from Kosdown Printing Company and Coa Press Printing and provided them to Mr Harris.

10. Mr Harris arranged the Lascorp accounts department to pay the invoices by cheque direct to the relevant printing companies.

The two invoices which were dealt with in this way were from Kosdown Printing Co dated 17 November 2004 addressed to Cr Saunderson in the sum of \$8,393 and from Coa Press Printing dated 17 November 2004 addressed to Cr Saunderson in the sum of \$9,233.84. The evidence showed that these invoices were paid on 1 December 2004 and 2 December 2004 respectively by Ocean Grove Commercial Pty Ltd, a company apparently associated with Mr Harris.

11. The notice of appeal sets out five questions of law for my consideration. The first appears to be in very general terms and may well be picked up by the more specific ones which follow. Accordingly, I move directly to question 2.

### **Question of Law 2. Election Campaign Donations**

12. The first point taken on appeal was that election campaign donations are not gifts. The Magistrate found that the donations here in question were gifts. The argument before me was that s81 had no operation with respect to campaign donations, for these were covered by Part 3 Division 9 and their disclosure was required by s62 of that part to be made by a candidate, whether successful or not, within 60 days after the election date. This s62 return, however, is concerned with gifts received during the period since the last election. The provision in s62 comparable with s81(7)(e) is the following:

- (2) An election campaign donation return must—
  - (a) be in the prescribed form; and
  - (b) contain the prescribed details in respect of any gifts received during the donation period, by the

candidate or on behalf of the candidate, to be used for or in connection with the election campaign—

- (i) the amount or value of which is equal to or exceeds \$200; or
- (ii) being goods or services the amount or value of which is equal to or exceeds \$200.

(3) Despite sub-section (2), a candidate is not required to specify the relevant details of an amount in a return if the amount was a gift made in a private capacity to the candidate for the candidate's personal use and the candidate has not used, and will not use, the gift solely or substantially for a purpose related to the election.

(4) The reference in sub-section (2) to a gift made by a person includes a reference to a gift made on behalf of the members of an unincorporated association.

(5) For the purposes of this section, 2 or more gifts made by the same person to or for the benefit of a candidate are to be taken to be one donation.

13. There is nothing in either the pre-existing s81 or in the new Division 9 to indicate an intention in Parliament that the two regimes were mutually exclusive. While it may be correct that, if they are not, a successful candidate may have to disclose a gift to the Chief Executive Officer in both the return made under s62 and that made under s81, this does not carry with it the suggested implication of mutual exclusivity. The purpose of each of these returns is different; the terms of the return, and the disclosable matters and the period of disclosure covered by the return, are different; the date upon which the return is to be lodged is different; and the rights of inspection of the information disclosed are different.

14. This, however, does not dispose of the point raised. Cr Saunderson in his s81 return for the year ending June 2004 was required to disclose gifts. This obligation was regulated by the ordinary meaning of the word gift. In 2005, his obligation was subject to a new definition which had come into force in July 2004. And it is to this new definition that I now turn in order to determine, not whether campaign donations as such are gifts, but whether the donations here in question are gifts.

15. The donations in this case took the form of the donor paying the two printing invoices as a contribution to the electoral campaign of Cr Saunderson and, it would seem, of other candidates associated with him.

16. The definition of "gift" which is now to be found in s3(1) is a true definition: the word is said to bear the specified meaning, not that its meaning includes certain matters. It is defined to mean "any disposition of property... made by a person to another person..." Central to the concept of gift is that there is a donor and a donee. It is significant that, in this definition, neither this terminology nor anything analogous has been adopted by the drafter. Reference is simply made to unidentified persons.

17. The definition of "disposition of property" is also a true definition. But it also includes a list of different kinds of ways in which property may be disposed of, including "payment" and, perhaps not very helpfully, "gift". The concept of disposition is, however, enlarged by the list of six matters which the definition includes. Significantly for present purposes, these include:

(d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property;

(f) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the person's own property and to increase the value of the property of any other person;

18. In the context of its incorporation into the definition of gift, this definition of disposition of property must relate to the passing of something from one person to another person. And so, in the case of the release of a debt, its most obvious application would be the case where the donor, being a creditor of the donee, discharges that debt. Likewise, in the case of the beneficial transaction referred to in part (f), the case where the donor enters into a transaction which diminishes the value of the donor's property and increases the value of the donee's property. But the legislation is not, in terms, limited to this situation. It speaks of the discharge of any debt without specifying who might be the debtor and who might be the creditor and, indeed, who might be the person who discharges the debt. Likewise, in part (f) the identity of the person whose property value is increased and the person whose property value is diminished is not specified. It should be noted,

too, that the expression “disposition of property” has no use in the *Local Government Act* other than as a component of the definition of “gift”.

19. In the present case, the gift in question is the act of the donor in paying the invoices. In legal terms, this act discharged the debts owed by Cr Saunderson to the two printing companies. Such an act is clearly a disposition of property, since it falls within part (d) of the extended definition. It is also a gift within the statutory definition, since the discharge of the debt was made without consideration.

20. But this may not be the end of things. By s81(7)(e) what must be disclosed are the particulars “of any gift... received by him or her” [the councillor] from a non-family member. Cr Saunderson has certainly received the benefit of the gift because his personal liability to the two printing companies was thereby extinguished. But, has the councillor in this case received the gift itself?

21. This point was not taken before the Magistrate and I do not, therefore, have the benefit of his Honour’s views upon it. Counsel for Cr Saunderson, however, embraced it when it was raised and urged me to conclude that, where the suggested gift is the discharge of a debt or liability, the statute requires disclosure only of a transaction whereby the debt which is discharged is the debt owed by the councillor to the donor. In a case such as the present, this might occur where the printing companies themselves forgave Cr Saunderson’s debts, so that they became the donors, or where Mr Harris or his company gave a cheque to Cr Saunderson which he used to pay the printing bills, in which case Mr Harris or his company would be the donor.

22. I have reserved this judgment for a time which is rather greater than the other points warranted because I was troubled by this point. I am mindful that this is a criminal prosecution, so that Cr Saunderson should not be convicted unless the charge, including its legal aspects, is clearly made out. I am, however, concerned that the interpretation that he would have me adopt would mean that the evident purpose of the legislation would be largely defeated. I remind myself that s81(7) is remedial legislation which ought not to be construed in an unduly technical way.

23. I am mindful, too, that this decision may have implications in this State beyond the present case<sup>[1]</sup> and, perhaps, beyond this State.<sup>[2]</sup> A further consideration is that s81(7) has operated for some 12 years without a definition of “gift” and that a payment of the kind presently under consideration would have been included in the ordinary meaning of that word. From the perspective of the donor, the gift or gifts in question here bear all the hallmarks of a common law gift, including an intention on the part of Mr Harris or his company to confer a benefit upon Cr Saunderson, and indirectly, through him upon the cause which he represented. It is unlikely that Parliament intended in 2003 to reduce the disclosure obligations of councillors under s81 when it introduced a definition of “gift”. In the explanatory memorandum to the 2003 bill this definition was said to have been introduced as part of the legislation consequent upon the introduction of the campaign donation legislation in Division 9.

24. I have had regard, too, to the new s62(2) for which the definition was said to have been introduced. This provision speaks of “any gifts received... by the candidate or on behalf of the candidate”. It is perhaps regrettable that the drafter did not at the same time see fit to add the words “or on behalf of him or her” in s81(7)(e).

25. Weighing up these matters, I return to the point on which I must focus attention, the words in which Parliament has chosen to express its legislative intention. I am of opinion that the disclosure obligation under s81(7) should not be construed narrowly so as to introduce in 2004 a change which would severely reduce the existing disclosure obligations of councillors with the consequence that disclosable transactions, which are commonly and properly entered into by councillors, should no longer be the subject of disclosure. The proper interpretation of s81(7) (e) must be that a gift received by a councillor includes not only transactions whereby the donor discharges the liability of the councillor to the donor, but also where it discharges the councillor’s liability to a third party.

26. I conclude, therefore, that the disclosure requirements of s81(7)(e) include a requirement to disclose gifts which are received as election campaign donations. This conclusion also disposes of Point of Law 4.



**Point of Law 3. The \$500 threshold**

27. This point arises from the sequence of amendments to the *Local Government Act* which I have outlined. The point is not a significant one since the evidence shows that the amount of Cr Saunderson's printing debts which were paid by the donor was some \$17,500. The Magistrate was unimpressed by the contention advanced on his behalf that this printing was for other candidates so that his share fell below the \$2,000 threshold. His Honour was entitled to reject that submission; I, also, would do so. The point, however, loses any significance when the precise issue is identified.

28. Cr Saunderson was required by legislation to lodge his s81 return in July 2005. At the time this requirement was to be complied with, the threshold was \$500, a situation which had existed since July of the preceding year. The obligation of the councillor lodging the return was to comply with s81 as it then stood. It matters not that the legislation may have been different at the time of receipt of a payment which was to be included. In the present case, of course, it was not different.

29. It is convenient that I deal at this point with another argument which was raised in the course of the appeal. This was that the interpretation given to the legislation by the Magistrate involved the attributing of retrospective operation to s81(7). This is not correct. The law to be applied is the law applicable to the activity which is said to breach it.<sup>[3]</sup> This is not a case of retrospective operation of the legislation. The activity in question was the act of Cr Saunderson in July 2005 in lodging a return in the form which he did.

**Question of Law 5. The Defence of Mistake**

30. Cr Saunderson raised before the Magistrate a *Proudman v Dayman*<sup>[4]</sup> defence that he genuinely believed on reasonable grounds that the donations which he received were not gifts. The Magistrate appeared to be of opinion that Cr Saunderson honestly held that belief, but his Honour rejected the defence on the ground that it was not held on reasonable grounds. Although this finding was attacked before me, it is, in truth, a finding of fact and it was open on the evidence. In any event the alleged mistake as to whether a donation of this kind falls within the definition of "gift" within the meaning of s81(7) is a mistake of law and, for that reason, does not provide the basis for the suggested defence.

31. It follows from this that the appeal must be dismissed. Having regard to the submissions on the question of costs made before me, I would also include in the order an order that the appellant pay the costs of the respondent of the appeal including any reserved costs.

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<sup>[1]</sup> See also *Local Government Act* 1989 s62B, *Electoral Act* 2002 s206.

<sup>[2]</sup> Similar provisions are in place in New South Wales, *Election Funding Act* 1981 ss4, 87 and in Western Australia, *Electoral Act* 1907 ss175, 175O.

<sup>[3]</sup> See *Geschke v Del-Monte Home Furnishers Pty Ltd* [1981] VicRp 80; [1981] VR 856 at 859–60, per Gobbo J; *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23 at 26; (1986) 6 AAR 160, per Toohey J.

<sup>[4]</sup> [1941] HCA 28; (1941) 67 CLR 536.

**APPEARANCES:** For the appellant Saunderson: Dr K Hanscombe SC and Mr GP Mullaly, counsel. Andrew George solicitors. For the respondent Watson: Mr S Grant, counsel. Victorian Government Solicitor.

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