

RESTORING INTEGRITY TO DEMOCRACY

A D V I C E

1. We have been asked to summarise our opinion, as given at the conference last Friday with bob Watt.
2. At issue is whether it is possible to mount a private prosecution against Vote Leave, or named individuals associated with Vote Leave, under Section 115(2)(b) of the Representation of the People Act 1983, arising from the Referendum vote last year as to whether to remain a member of, or to leave, the EU.
3. Section 115(2) provides that a person shall be guilty of undue influence if:
 - “(a)
 - (b) *If by abduction, duress, or any fraudulent device or contrivance he impedes or prevents, or intends to impede or prevent the free exercise of the franchise of an elector or proxy for an elector or so compels induces or prevails upon, or intends so to compel, induce or prevail upon an elector or proxy for an elector either to vote or refrain from voting.”*
4. Although this section is somewhat archaic in its drafting, it has been considered comparatively recently in the case of **R v ROWE, ex parte MAINWARING AND OTHERS [1992] 1WLR 1059**.
5. Mainwaring involved local government elections in which Liberal Democrat supporters had prepared and printed a leaflet designed to look as if it had been produced by the

Labour Party, and whilst the document had to be endorsed with the name and address of the agent of the party publishing it, this was only reproduced in miniscule print. It was deliberately distributed only a day or so before the election so there would be little time for the Labour Party to react to it.

6. Whilst the claim under Section 115(2) by unsuccessful candidates failed on the evidence adduced in that case, the Court had little doubt that the leaflet showed an intention to deceive:-

“I agree with the Divisional Court that in the present case the leaflet was a fraudulent device in that it falsely represented itself to be issued by or on behalf of the Labour Party and to indicate policies which that party wished to emphasise. It follows that I agree also that the commissioner erred in concluding that because the contents were, as such, true there was no fraudulent device, but that does not affect the outcome. To offend against Section 115(2)(b) there must not only be a fraudulent device, but that device must be shown to have impeded or prevented the free exercise of an elector.”

(Per Parker LJ, p.1071).

7. Mainwaring would, of course, be decided differently today because Section 115(2)(b) was amended in 2006 to add in “*intends to impede or prevent*”, to reverse the effect of that decision. Consequently it is now not necessary to prove that in fact a voter was “*impeded*” or “*prevented*” from exercising his or her vote.

8. What is meant by “*impeding or preventing*” the free exercise of the franchise was also discussed in MAINWARING, in particular by Farquharson LJ, who considered the difference between the two concepts:-

“I think it is more likely that the difference between “impeding” and “preventing” lies in the effect which the device has on the voter’s choice of candidate. As I see it, an improper influence which is brought to bear on the mind of a voter and causes him to vote as the person exercising that improper influence intended (when otherwise he would not) “prevents” the free exercise

of his franchise. A voter who, though influenced by the impropriety, is not thereby caused to vote in the way intended, either because he was going to vote that way anyway, or because the device did not cause him to change his allegiance, is impeded” in the free exercise of his franchise.”

(pp 1064-1065).

Consequently it seems to us that the key question is whether through the use of a dishonest device, the Vote Leave Campaign intended to influence voters to vote for Brexit.

9. In this case there are broadly five categories of statements in Vote Leave literature that are alleged to have contravened Section 115(2)(b). They are:-

1. Membership of the European Union costs the UK £350 million a week, and leaving the EU will free that sum to spend on the National Health Service;
2. Such information was being provided by a neutral and objective source;
3. Certain public and private organisations support leaving the EU (when in fact they are neutral or support remaining in the EU);
4. Certain high profile and influential individuals support leaving the EU (when in fact they support remaining in the EU); and
5. Turkey is joining the EU.

Plainly all these statements were designed to influence voters in making a decision as to whether to remain in the EU or leave it. The issue is whether they were made and/or maintained dishonestly by those in the Leave campaign. For the purposes of a prosecution we would have to show that those involved either knew the relevant statement was false, or were reckless as to whether it was or not.

10. It seems to us that if made dishonestly, then the representations are capable of contravening the terms of Section 115(2) (b). A powerful piece of evidence to support this contention would be the fact that the Vote Leave Campaign persisted with the relevant statement, despite authoritative sources pointing out that it was misleading.

11. One of the hurdles we will have to surmount is the limitation bar on prosecuting offences under the 1983 Representation of the People Act, contained in Section 176 (1) and (2) of the Act:

“(1) A proceeding against a person in respect of any offence under any provision contained or made under this Act shall be commenced within one year after the offence was committed

(2) For the purposes of this section –

- (a) in England and Wales, the laying of an information;*
- (b) In Scotland, the granting of a warrant to apprehend or cite the accused (if, in relation to an offence alleged to have been committed within the United Kingdom, such warrant is executed without delay; and*
- (c) In Northern Ireland, the making of a complaint shall be deemed to be the commencement of a proceeding.*

Consequently we advised that it would be vital to establish which of these five statements were still being promoted at the date of the Referendum, either on websites, in literature, or indeed on the Leave Campaign bus. This can only be done by obtaining clear evidence from witnesses as to what was still in circulation. That is the starting point. False statements made earlier in the campaign (e.g. in April or May) but then abandoned may prove much more difficult to prosecute because defeating the time bar will be problematic.

12. Equally we pointed out that we will need evidence to establish that the statements were false, but nonetheless maintained by the Leave Campaign. For the purposes of criminal proceedings statements made or quoted in newspapers are not sufficient. So, for instance, we need statements from Paul Kahn (President of Airbus), Paul Polman (CEO of Unilever) and Mark Elborne (President and CEO of GE UK and Ireland) confirming that the quotes attributed to them in the Independent newspaper are accurate.

13. We also stressed that obtaining evidence was important for another reason. A complaint was made to the DPP in October 2016, but rejected. We can anticipate, therefore, that one tactic employed by anyone we prosecute, will be to invite the DPP to intervene, take over any proceedings, and then discontinue them. There is no doubt that the DPP has this power, pursuant to Section 6(2) of the Prosecution of Offences Act 1985. If this happened our only challenge would be by way of judicial review. However the clearer the evidence we obtain, the more difficult it will be for the DPP to exercise this power successfully.

14. We realise, of course, that time is short. Ideally we will need the evidence to

show:-

- (a) that there is a realistic prospect of a conviction (i.e. on the evidence it is more likely than not that the tribunal of fact, properly directed, would convict) and
- (b) it was in the public interest to prosecute.

It would assist in limb (b) to obtain evidence that someone voting had taken into account the alleged false statements when voting.

15. At present, until we see what evidence can be put before a Court, it is not possible for us to give a definitive answer to the question as to whether proceedings should be instituted, and if so, against whom. Given the ramifications in costs that could follow an information being dismissed as without merit, we would like to review the evidence that we have obtained before making any final decision.

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