

BETWEEN:

R (THE GOOD LAW PROJECT)

Claimant

and

ELECTORAL COMMISSION

Defendant

VOTE LEAVE LIMITED
MR DARREN GRIMES

Interested Parties

REPLY TO DEFENDANT'S
SUMMARY GROUNDS OF DEFENCE

Introduction

1. In its Summary Grounds for Contesting the Claim (Summary Grounds/SG) the Electoral Commission informed the Claimant that contrary to its earlier decision not to investigate Vote Leave, including its refusal to do so in response to the Claimant's pre-action protocol letter, it had now changed its mind. The Electoral Commission claims however, that this has nothing to do with the Claimant's application for permission for judicial review and continues to contest every one of the Claimant's grounds. Indeed, at paragraph 2 of its Summary Grounds it states that the decision to undertake an investigation "*has no bearing on the legal merits of the claim*". Despite that, the Electoral Commission has nevertheless asked the Claimant to withdraw his action and bear its own costs. Notably, it has done this without providing any disclosure at all, let alone the disclosure requested in the pre-action letter or pursuant to its duty of candour.
2. The position of the Electoral Commission remains therefore that it made no error of law in its approach to the legality of the relevant expenditure and declarations under the Political Parties, Elections and Referendums Act 2000 ("PPERA") when it decided on 22 March 2017 that there was no reason to suspect a breach of PERA. Rather, it says that some new facts have come to light that justify re-opening an investigation but that it intends to conduct and conclude its investigation on the basis of its previous (in the Claimant's submission, erroneous) approach to the law.
3. The new investigation is welcomed. However, three points must be noted. First, the evidence referred to by the Electoral Commission is in fact material that it has had for many

months; nothing new is referred to in its letter or Assessment Review.¹ Secondly, its investigation now needs to proceed particularly swiftly in light of the significant time that has passed since it received the relevant information from the permitted participants. Thirdly, it is essential that the Electoral Commission proceeds on a correct legal basis, both in analysing information and reaching conclusions.

4. It follows from the latter point that this judicial review remains of paramount importance. If the Electoral Commission is wrong in its understanding of the statutory regime, as the Claimant submits it is, then that needs to be known sooner rather than later. Indeed, if the Electoral Commission makes determinations following its investigations on the basis of its current understanding of the law, those determinations will, in the Claimant's submission, be vitiated by illegality (and yet more time will have passed).
5. It follows that this judicial review requires to be determined and determined quickly. Indeed, one could go further; a correct understanding of the statutory scheme potentially affects the issues that the Electoral Commission should be investigating and what questions it should be asking, as well as raising important public interest issues. This, it is submitted is not a reason for the Electoral Commission to put its investigation on hold; it should proceed with it vigorously and quickly. It is however, a reason for this judicial review also to proceed quickly.
6. Accordingly, the Claimant is not willing to withdraw his claim, as the Electoral Commission requests. On the contrary, in light of the interpretation of the statutory provisions which the Electoral Commission has advanced in its Summary Grounds, it remains essential that the issues raised in this claim as to the proper interpretation of these statutory provisions are resolved.
7. Further, although the Claimant's application for expedition was refused on the papers by Cockerill J on 6 November 2017 (prior to the service of the Summary Grounds), the Court may consider that in view of the stance now adopted by the Electoral Commission - in particular that an investigation will now proceed on the basis of its current, and in the Claimant's submission mistaken, understanding of the law - expedition should now be granted.

¹ For example, the information regarding the payments made by Vote Leave to AIQ for services provided to Veterans for Britain was on the Electoral Commission web-site.

8. The Claimant submits that none of the responses provided by the Electoral Commission undermines the Grounds of Claim. Brief response submissions are set out below.

Ground 1: On the facts already known, Vote Leave incurred a 'referendum expense'

9. The Electoral Commission concedes that Vote Leave's payments to AIQ in respect of the services AIQ provided to Darren Grimes' campaign 'BeLeave' were "referendum expenses". Indeed, it accepts that they were "*plainly a referendum expense*" (emphasis added) (SG §14, §35, §§27-29). In its Assessment Review the Electoral Commission goes even further, stating: "*it is clear beyond any doubt that the payments made by Vote Leave to AIQ constituted referendum expenses:*" (§19).
10. However, it argues that even though Vote Leave paid for these referendum expenses, they cannot be considered to have been 'incurred' by Vote Leave. Instead, it says, they must be viewed as 'donations' (in the form of services donated to Darren Grimes), which Darren Grimes was obliged to declare as '*non-cash donations of digital marketing*' (see §8.5 Statement of Facts and Grounds), and to declare as 'referendum expenses' incurred by Darren Grimes (and not as referendum expenses incurred by Vote Leave). Put shortly, because the expenditure incurred by Vote Leave in relation to AIQ's services was for services provided to Darren Grimes for his BeLeave campaign, the cost of those services had to be deemed to have been 'incurred' by Darren Grimes, even though they were paid for by Vote Leave. Not only is this counter-intuitive, it is not warranted by the relevant statutory language. Vote Leave Ltd both (i) purchased the services, thereby incurring the expense, and (ii) donated the services to Darren Grimes, thereby making a registrable donation.
11. Essentially, the Electoral Commission's argument appears to be that because there is a statutory regime that governs 'donations', the first question an individual/campaigner has to ask itself is whether a payment is a donation. If it is 'donation' within the statutory definition then *ipso facto* it cannot constitute an expense 'incurred' by the donor and thus, does not have to be declared as such by a permitted participant (see in particular SG §§37-40). The Electoral Commission does not explain why it takes the view that 'donations' and 'referendum expenses' are mutually exclusive. Nor, even assuming they are mutually exclusive, which is denied, does it explain why the first question is whether a payment constitutes 'a donation' under Schedule 15 of PPERA, rather than whether it constitutes 'the incurring of a referendum expense'. Nor does it explain why a referendum expense cannot be declared by two participants. Instead, the Electoral Commission merely asserts that this was not "*how the intended statutory regimes of referendum expenses and donations are intended to*

work alongside each other" (SG, §14). The only explanation for its statutory interpretation is the bold statement that "the word 'incurred' must have a meaning that allows permitted participants to give donations to other permitted participants": SG §41.

12. The basic misconception of the Electoral Commission stems from it ignoring the fact that there are two distinct statutory regimes serving two distinct statutory purposes. First, there is a statutory regime that governs the question how much a permitted participant is allowed to spend in a referendum (expenditure limits). Secondly, there is a statutory regime that governs the question of who is permitted to donate money to influence the result of a referendum. Parliament has provided for two types of control on, to put it neutrally, transfers of money or money's worth. The fact that a particular transfer of money or money's worth does not offend against one of these controls tells one absolutely nothing about whether that transfer of money or money's worth offends against the other control. This makes sense having regard to the statutory architecture, it is right as a matter of statutory language, and it is basic common sense. The Electoral Commission's position simply ignores it.
13. In this case, depending on how the admitted facts are analysed, it is already clear that Vote Leave Ltd either (a) paid a sum of money to AIQ in return for services to be provided to Mr Grimes; or (b) assumed an obligation to Mr Grimes to pay a sum of money to AIQ, in the knowledge that he would use the purchased services to promote a 'Leave' outcome. In either case, it is difficult to see how such spending does not fall within s.111 PPERA 2000 and the Electoral Commission has notably failed to advance any reason.² The same applies in relation to Vote Leave's payments to AIQ in respect of services to Veterans for Britain.
14. Moreover, far from it being problematic for an expense incurred by a designated participant also to be a 'donation', such an interpretation ensures that the statutory spending limits are complied with. Any donations by permitted participants, which amount to referendum expenses as defined in PPERA must be within the spending limits laid down by Parliament. That is an entirely sensible and understandable objective of the legislation. It makes sense from the perspective of both regulating the expenditure of permitted participants and of regulating donations.

² Further, there remains the possibility that Vote Leave in fact purchased these services for its own purposes, using Darren Grimes as an agent, or indeed not using him at all.

15. Nor does it conflict with the rules of 'common plan expenditure', as set out in subsequent legislation, namely paragraph 22 Schedule 1 of European Union Referendum Act 2015. As explained in paragraphs 22.1-22.2 of the Statement of Facts and Grounds this provides that where one of the parties to a common plan or arrangement is a designated participant, it must account for the entirety of the expenditure when declaring its referendum expenses. In all other cases, each party to the plan or arrangement must account for the entirety of the value of the expenditure.
16. Thus, here, absent a common plan, there was nothing in the statutory scheme that prevented or militated against Vote Leave and Darren Grimes both accounting for relevant expenditure. In the case of a common plan, it would have been only Vote Leave that would have had to account for the relevant expenditure. In either case however, in accordance with the statutory purpose, namely to ensure that permitted participants do not exceed a certain level of spending in pursuing a particular referendum outcome, the expenditure had to be declared by Vote Leave.
17. Finally, it should be noted that given that the Electoral Commission's position essentially rests on the meaning given to the word 'incurred' in s.111 PPERA 2000, it is surprising that it has advanced no view whatsoever in its Summary Grounds on this point. Instead it simply says (at SG §41) that "*the word 'incurred' must have a meaning that allows permitted participants to give donations to other permitted participants*".
18. The normal meaning of the word 'incurred' (namely, to bring upon oneself an expense or to render oneself liable or subject to an expense) encompasses arrangements like those adopted by Vote Leave Ltd in this case: see paragraph 10 above. That interpretation of the word 'incurred' does not have the effect of preventing permitted participants from making donations altogether. But in any event, the Claimant does not accept the Electoral Commission's premise that the meaning of 'incurred' in s.111 PPERA 2000 must yield to its perceived need to allow permitted participants to make donations to other permitted participants without regard to the relevant statutory restrictions, in particular the regime governing spending limits of permitted participants. This is particularly so where such an interpretation would cut across the applicable requirements regarding the declaration of referendum expenses.
19. Finally, in its Assessment Review the Electoral Commission says that the services were "*procured by Mr. Grimes for use in respect of his campaign*": §20. Accordingly, the Electoral

Commission argument made there appears to be that ‘incurred’ within s. 211 of PPERA means ‘procured’ (albeit that no further explanation is given as to what ‘procured’ means). This argument is not repeated in its Summary Grounds.

Ground 2: On the facts already known, Vote Leave and Mr Grimes incurred expenses pursuant to a common plan

20. The Electoral Commission’s accepts that for a “*a plan or arrangement*” to exist it is sufficient for there to be “*a common intent (however informally arrived at)*” SG §49. It then says however, that the provisions are only engaged if there is common intent “*to bring about a consequence that was contrary to the object and purpose of PPERA*”. This is not understood. The legislation contains nothing to suggest that its provisions are only engaged where participants have those provisions in mind and deliberately intend to breach them. The statutory question is one of fact; was there a plan or arrangement. The facts here point only one way.
21. As to the facts, at SG §51 the Electoral Commission points to the various factual matters relied on by the Claimant and says that each of them “*does not, of itself, mean that there was joint working*”. But the Claimant does not contend that each fact in isolation means that there was common plan expenditure. As explained in the Statement of Facts and Grounds, the facts already admitted by Vote Leave and Mr Grimes satisfy each cumulative element of the statutory test. On that issue, the Electoral Commission has wholly failed to give any answer.

Ground 3: The Electoral Commission failed in its regulatory obligations

22. The Electoral Commission denies that it “*advised Vote Leave that it could ‘donate’ to other ‘Leave’ campaigns sums in excess of Vote Leave’s statutory spending limit of £7 million, without committing an offence*”, albeit that it claims in relation to Ground 1 that such advice would have been correct. The basis for the claim is a public statement from the Campaign Director of Vote Leave Ltd (see Statement of Facts and Grounds, §60) and further statements that supported that claim: see Statement of Facts and Grounds §§ 9.1-9.2. It is understood in that regard that there is further correspondence on this issue, for example with Carole Cadwalladr.³
23. In circumstances where the Electoral Commission is resisting Ground 3 on the facts, it is incumbent on it to be candid about what advice it actually gave and to provide copies of any communications with Mr Cummings or anybody else at Vote Leave about the permissibility of any donation or type of donation. This is particularly so in circumstances

³ <https://www.theguardian.com/politics/2017/nov/25/vote-leave-dominic-cummings-online-guru-mystery-letter-dark-ads>

where it is denying that it gave advice that it says would have been correct, in circumstances where there is a direct claim that it was asked the question and responded to it. Put another way, since on its case, had it been asked the question by Vote Leave as to whether Vote Leave could donate above its expenditure limits to other Leave campaigns it would have answered in the affirmative and since Vote Leave says it did answer in the affirmative to just such a question, the Electoral Commission is under a duty to be significantly more candid about precisely what happened.

Conclusion

24. The Claimant sought an order requiring the Electoral Commission to "reconsider whether to open an investigation into, or bring a prosecution against Vote Leave UK and any other participant on the basis of a correct understanding of the law" (emphasis added): §4.1 Statement of Facts and Grounds. The Electoral Commission has decided to open its investigation but has made it clear that it intends to do so on the basis of its existing understanding of the law, which the Claimant submits is incorrect. For the reasons set out above, the factual investigation needs to proceed swiftly. In parallel it is important that the issues of statutory interpretation raised in this claim are resolved, so as to avoid the investigation and its conclusion being vitiated by illegality. Moreover, there is an important issue of public interest relating to how the referendum was regulated and should be regulated, as raised in Grounds 1 and 3, which requires to be resolved and which may be important for subsequent referendums.

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29 November 2017