IN THE HIGH COURT OF JUSTICE **CO Ref: 4908/2017**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

In the matter of an application for judicial review

THE GOOD LAW PROJECT

Claimant

-v-

THE ELECTORAL COMMISSION

Defendant

DEFENDANT'S SKELETON ARGUMENT

FOR THE RENEWED PERMISSION HEARING

[The Defendant adopts the same pagination reference system as the Claimant].

INTRODUCTION

1. The Defendant opposes the Claimant's renewed application for permission to apply for judicial review following the refusal of permission by Lang J on January 18 2018 **[1/80]**.

2. It is respectfully submitted that the application should be refused for the following seven short reasons:

   (i) There is only one ground (Ground 1) that the learned judge held to be arguable. The Claimant has misinterpreted Lang J's reasoning to encompass a conclusion

that the claim was arguable in respect of all the grounds advanced. No such observation was made.

(ii) The Claimant's assertion that there is only one issue (that of whether the claim is or is not academic) is, therefore, misleading insofar as it is premised on Grounds 1, 2 and 3 (the grounds being raised on renewal) all being considered to be equally arguable.

(iii) In fact, properly analysed, Ground 1 is not arguable, The Court on a renewed application for permission is not bound by general *obiter dicta* (and observations unsupported by reasoning) made on the papers in circumstances where, in any event, the application for permission was refused.

(iv) Nor is it accepted that the Court should apply the same threshold test in deciding whether to grant permission where the matter comes before the court on a renewed hearing with both parties present and where the court will hear full argument. It is submitted that in circumstances such as the present it is incumbent on the Claimants to establish a strong case.

(v) If the Claimant cannot establish a basis for securing permission on Ground 1, it cannot do so under Ground 2. Ground 2 is parasitic on Ground 1.

(vi) Similarly, Ground 3 is entirely fact-dependent. The learned judge did not observe that either Ground was properly arguable. These grounds are academic because even in theory they raise no wider issues than the facts of the present case.

(vii) In claiming a proportion of its costs, the Defendant has also inferred incorrectly that Lang J made a finding on Ground 4 (irrationality) in its favour. The learned judge made no such finding. Again, this ground is academic and has been superseded by the investigation that the Defendant is undertaking. It is noted that the Claimant does not seek to resurrect this Ground by way of renewal but it affects the question of costs. The Defendant resists any application for costs for the reasons set out below.

3. The above points are developed below in turn. The Defendant relies on its more detailed reasoning in its Summary Grounds of Defence and in its Response to the Claimant's Reply which will, to the extent necessary, be developed at the permission hearing.

POINT 1 – ONLY ONE GROUND HELD TO BE ARGUABLE

4. At **[18]** of its Skeleton Argument, the Claimant makes the following assertion:

> *'Lang J held that the Claimant's analyses of the statutory scheme were arguable. It follows that the only issue before this Court is whether the claim is academic and/or should not be determined...'* [Underlining added].

5. With respect to the assertion it ignores the fact that the reference to the Claimant's analyses of the statutory scheme being arguable is a reference to Ground 1. Neither Ground 2 nor Ground 3 (nor, indeed, Ground 4) contain any analysis of the statutory scheme.

POINT 2 – MISLEADING ASSERTION

6. In misreading the learned judge's observations the Claimant has elided all the Grounds. The reality is that Grounds 2 and 3 (and for that matter 4 had it been raised) are academic in the conventional sense of their being unnecessary to decide as being confined to the facts of the particular case which facts have been superseded by the decision of the Defendant to undertake further investigation. Only Ground 1 (if it had substance) could – even in theory – raise an issue as to whether that Ground should be accorded permission to apply for judicial review.

POINT 3 – GROUND 1 IS NOT ARGUABLE

7. The Claimant's formulation of Ground 1 is confused and sometimes internally inconsistent. But the two consistent themes running through the argument appear to be that:

   (i) The legislation contains a prohibition against one permitted participant (at least if it is a designated organisation) making a genuine donation to another permitted participant in excess of the designated organisation's statutory

expenditure limits (see Skeleton Argument at **[2.1]**). That is (see the same paragraph of the Skeleton Argument) said to constitute Ground 1.

(ii) It is perfectly possible for the same transaction to involve both a referendum expense and a donation (see Skeleton Argument at **[26]**). The Defendant understands the Claimant to contend that this flows from the broad language of the phrase *'expenses incurred'* in PPERA s. 111.

8. Neither of these submissions, each necessary for the Claimant's argument on Ground 1 to work, is correct.

9. As to (i) there is nothing in the statutory scheme for donations that prevents one permitted participant from making an unlimited donation to another permitted participant. However, in respect of such donations that relate to expenditure being incurred by the recipient of the donation on referendum expenses for referendum purposes the common plan provisions will apply.

10. It would have been an easy matter for the legislator to have prohibited one permitted participant from providing certain types of donations to another or in imposing constraints on such donations. But, that is not what Parliament has done.

11. The logic of the Claimant's case is, and can only be, that: (a) despite permitting donations as between permitted participants Parliament intended to cap them at a figure below the donor permitted participant's spending limits or that (b) despite permitting donations as between permitted participants Parliament intended to cap donations from a designated organisation in excess of its spending limits.

12. There is, with respect, no logic to either of these theoretical positions. As to (a), if one permitted participant cannot use all of its donations the statutory regime plainly permits it to make a donation of its excess funds to another permitted participant. The recipient participant will, in turn, be constrained by its own spending limits and by the common plan provisions.

13. As to (b), there is no logic to the submission (if advanced) that there is an implied constraint that lies solely on a designated organisation (as opposed to other permitted participants). To read in such an implied constraint would be to read the same words in the statute in completely different ways according to whether the donor permitted participant was a designated organisation. Had Parliament intended such a distinction to be made it would have legislated to that effect.

14. If the Claimant loses on point (i) it cannot succeed on Ground 1.

15. Additionally, however, (point (ii) above) the Claimant does not contend that a genuine donation could not on the facts have been made by Vote Leave to Mr. Grimes. The claim is, rather, that (subject to the operation of the common plan provisions which only apply following a donation) a genuine donation could have been made but that, at one and the same time, the donation could have constituted a referendum expense incurred by Vote Leave.

16. That submission flies in the face of the statutory language which makes it clear that the incurring of a referendum expense by the recipient is necessary for a donation to take place.[1]

17. This follows from PPERA schedule 15 [1](4) which provides that *'"[r]elevant donation, in relation to a permitted participant at a referendum, means a donation to the permitted participant for the purpose of meeting referendum expenses incurred by or on behalf of the permitted participant.'* (Underlining added).

18. Thus, the term *donation* is, in the present context, linked, by definition, to referendum *expenses incurred by the recipient* (*in casu* Mr. Grimes).

19. In the present case, the Defendant took the view on the information then before it that the expenses of securing the services of AIQ constituted referendum expenses incurred by or on behalf of Mr. Grimes. That was a conclusion open to it on the facts. The relevant point is not, as the Claimant supposes, that the generality of the language in

[1] To such extent as may be necessary the Defendants will refer to other provisions of the legislation at the oral hearing to demonstrate the implausibility of a referendum expense being capable of being incurred by the donor of a donation as opposed to the recipient of the donation.

PPERA s. 111 establishes that the referendum expenses must have been incurred by Vote Leave. Rather, the generality of the statutory language has the consequence that referendum expenses may as a matter of law – depending on particular facts - be incurred by or on behalf of the recipient of a donation where the donor makes a payment for services commissioned by the recipient of the donation.

POINT 4 - RELEVANT THRESHOLD TEST

20. The Claimant necessarily implies that because the learned judge observed *obiter* and without stating reasons that Ground 1 was arguable this Court must, on a renewed hearing, take this as an axiom.

21. This is not correct. A renewed hearing of an application for permission to apply for judicial review is just that. The question before the Court is whether, having heard oral argument, permission should be granted. If it concludes, as is respectfully submitted it should, that properly analysed Ground 1 is not arguable then it is not in any way bound – by principles of judicial comity or otherwise – from determining that Ground 1 is not arguable.

22. The position is no different in principle from that of the Court on a renewed hearing deciding that a case which the judge has, on the papers, decided is not arguable, is in fact arguable. Indeed, this is the very course that the Claimant urges on this Court in respect of the 'academic' issue.

23. Further, and in any event, the Defendant contends that this Court should approach permission by applying a higher threshold test than that of whether Ground 1 is 'arguable'. A renewed hearing can be different in kind from a paper permission hearing. For example in *Mass Energy v. Birmingham City Council* [1994] Env LR 298 Glidewell L,J observed that in the context of that case the Court should on a renewed hearing only grant permission if the Claimant's case was not merely arguable but *'strong'*.

24. This case is *a fortiori* in a context where the Claimant is also claiming a costs capping order (for which see ss. 88-90 of the Criminal Justice and Courts Act 2015). Elementarily, for such a claim to be made out the public interest must, amongst other things, require the issue to be resolved. In the present case it is accepted that if Ground

1 raised a point of real and immediate substance that was required to be resolved in the public interest then permission would follow. What is not accepted is that a putative public interest Claimant can successfully obtain permission by simply raising a point that (though not accepted here) is at best merely arguable. It is submitted that in the present context the threshold test for obtaining permission to apply for judicial review is a high one.

25. For the avoidance of doubt it is, to such extent as may be necessary, additionally submitted that Ground 1 does not fall into this category.

POINT 5 – GROUND 2 IS ACADEMIC

26. No separate issue of law arises under Ground 2. If the Claimant succeeds on Ground 1 it would not need Ground 2. But if it cannot succeed under Ground 1 it cannot succeed under Ground 2.

27. The short point in relation to Ground 2 is that it is, as with Ground 1, dependent for its success on the proposition (already contained in Ground 1) that a permitted participant may not use surplus funds in excess of its spending limits without subverting the statutory scheme (see the formulation in the Claimant's Skeleton Argument at **[35.2]**) and compare it with the assertion at **[2.1]**). The sole difference in the respective assertions appears to be that even if there was a lawful use of excess funds to make a lawful donation, the use of such funds would nonetheless inevitably amount to an unlawful joint plan.

28. With respect to the argument it is unreal. Either the legislation allows for surplus moneys to be used for donations or it does not. If it does (the effect of the Claimant losing on Ground 1) it is an impossible submission that the effect of a lawful donation allowed for by PPERA is nonetheless as a matter of law caught by the joint plan provisions.

29. In reality, the Claimant's submissions on Ground 2 constitute an impermissible attempt to raise a factual issue by seeking to disguise it as a relevant issue of law. Indeed, it is to be noted that in its Grounds of Claim the Claimant links the argument directly with

Ground 1 (see Grounds at **[2.2]**) by asserting that there was common plan expenditure because Vote Leave as a designated participant was required to *'have declared the expenditure as part of its own expenditure.'* That is the very issue raised by Ground 1.

30. Nor is the Claimant's position in its Skeleton Argument at **[35]** understood. There, the Claimant appears to concede the legitimacy of a continuing investigation in terms of determining fact but at the same time implicitly to contend that there is no need for further investigation because an offence has been demonstrated to have been committed. That is a difficult submission given that the Claimant has sought an investigation and does not seek to argue that it should be discontinued.

31. Further and in any event it would be wholly inappropriate, given the continuing investigation, to pre-empt its result by delving into issues of fact that as the Claimant appears to accept do not reflect the whole factual picture and which the Claimant hopes that the Defendant will *'address... fully in its new investigation'*.

POINT 6 – GROUND 3 IS ACADEMIC

32. Ground 3 is self-evidently a question of fact and raises no wider issues beyond the present case. The Claimant appears to contend that as a matter of fact Mr. Cummings or Vote Leave received written advice from the Defendant that Vote Leave was permitted to make the payments concerned. The Defendant has not produced such advice but maintains that despite the Defendant making clear that it has no record of such written advice being given that there is a *prima facie* case that 'such' advice was given (see Claimant's Skeleton Argument at **[40]**). Not only is this a mere question of fact but it appears to be based on nothing more than the statement that Mr. Cummings *'appears to be categorical'*.

33. If the Defendant had a record of having given written advice to Mr. Cummings or Vote Leave or indeed oral advice it would, as a responsible public body, be under a duty to disclose such advice. It confirms that it has no record of any such advice having been given. Moreover, the Defendant has already made extensive disclosure under the Freedom of Information Act.

POINT 7 – IRRATIONALITY AND COSTS

34. It is simply fallacious to equate the fact of the Defendant deciding to undertake an investigation with its conceding Ground 4. Nor did the learned judge do so.

35. The Defendant decided to undertake an investigation not because it considered that it had acted irrationally in respect of its earlier assessments but, rather, because of material obtained through separate enquiries that came to its attention after its earlier reviews. This material is outlined at **[3-246-247].**

36. Accordingly, there is no warrant for the payment of any of the Claimant's costs to the Defendant let alone a proportion thereof.

COSTS CAPPNG ORDER

37. Whether or not a costs capping order should be made is dependent on whether permission to apply for judicial review is granted and, if it were to be granted, the basis on which permission were to be granted (i.e. the threshold test applied) as well as the wider considerations referred to in the 2015 Act.

38. In the circumstances the Defendant respectfully suggests that if permission is granted the parties liaise with a view to determining whether costs capping is or is not acceptable in principle and if so in what amounts. Failing agreement the parties could make further written submissions to the Court.

EXPEDITION

39. It is not accepted that this case is suitable for expedition. The Claimant has provided no compelling reasons for expedition.

RICHARD GORDON QC