N462

Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO 4908/2017
Claimant(s) *(including ref.)*	THE GOOD LAW PROJECT PG/3553/001/PG
Defendant(s)	THE ELECTORAL COMMISSION Z17/26348/SMB/B4
Interested Parties	

Name and address of person to be served

name
THE GOOD LAW PROJECT

address
Deighton Pierce Glynn Solicitors
8, Union Street
London
SE1 1SZ

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim	☑	complete sections B, C, D and F
2. I intend to contest part of the claim	☐	
3. I do not intend to contest the claim	☐	complete section F
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.	☐	complete sections B, C and F
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.	☐	complete sections B and F
6. The applicant has indicated that this is a claim to which the Aarhus Convention applies.	☐	complete sections E and F
7. The **Defendant** asks the Court to consider whether the outcome for the claimant would have been **substantially different** if the conduct complained of had not occurred [see s.31(3C) of the Senior Courts Act 1981]	☐	A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name

address

Telephone no. **Fax no.**

E-mail address

name

address

Telephone no. **Fax no.**

E-mail address

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

See attached summary grounds for contesting the claim and Assessment Review – Review of Assessments – A054626 and A054625 by Louise Edwards, Head of Regulation dated 20 November 2017 referred to therein.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

SECTION E

Response to the claimant's contention that the claim is an Aarhus claim

Do you deny that the claim is an Aarhus Convention claim? ☐ Yes ☐ No

If Yes, please set out your grounds for denial in the box below.

SECTION F

*delete as appropriate

*~~(I believe)~~(The defendant believes) that the facts stated in this form are true.

*I am duly authorised by the defendant to sign this statement.

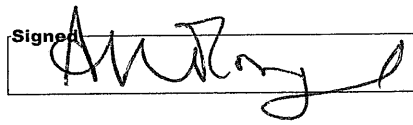
(if signing on behalf of firm or company, court or tribunal)

Position or office held

Employed barrister

(To be signed by you or by your solicitor or litigation friend)

Signed



Date

20 November 2017

Give an address to which notices about this case can be sent to you

name

Sarah Townsend (job-share Alexandra Forgaard, as above)

address

Government Legal Department
Litigation Group
One Kemble Street
London
WC2B 4TS

Telephone no.

020 7210 2902

Fax no.

E-mail address

sarah.townsend@governmentlegal.gov.uk

If you have instructed counsel, please give their name address and contact details below.

name

Richard Gordon QC

address

Brick Court Chambers
7-8 Essex Street
London
WC4R 2LD

Telephone no.

020 7379 3550

Fax no.

E-mail address

richard.gordon@brickcourt.co.uk

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, over the page), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

Administrative Court addresses

- Administrative Court in **London**

  Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

- Administrative Court in **Birmingham**

  Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

- Administrative Court in **Wales**

  Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

- Administrative Court in **Leeds**

  Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

- Administrative Court in **Manchester**

  Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

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 SUMMARY GROUNDS

FOR CONTESTING THE CLAIM

Pt 1: MISCONCEIVED NATURE OF THE CLAIM

1. As explained below, the Defendant has, on the information now available to it, decided to undertake an investigation.

2. However, this decision has no bearing on the legal merits of the claim. The present application for permission to apply for judicial review is misconceived. It is almost exclusively based on the Claimant's (Good Law's) misunderstanding of the statutory scheme regulating the conduct of referendums under the Political Parties Elections and Referendums Act 2000 ('PPERA') as amended by the European Union Referendum Act 2015 ('EURA'). The references to PPERA that follow should be taken to include the modifications made by EURA.

3. By its application, the Claimant seeks relief in respect of an alleged failure by the Electoral Commission ('EC') to investigate, and take action, in respect of the spending of Vote Leave Ltd ('Vote Leave') and/or other campaigners in the period leading up to the European Union Referendum in 2016 ('the Referendum').

4. In essence, the Claimant complains that Vote Leave in paying sums during the 2016 EU referendum to a body known as Aggregate IQ ('AIQ') for services commissioned by Mr. Darren Grimes to be provided by AIQ to Mr. Grimes *incurred* a *referendum expense* which took Vote Leave over its spending limits. The payment should, argues the Claimant, have been declared as a referendum expense by Vote Leave and not (as it was) a referendum expense on the part of Mr. Grimes.

5. The circumstances of the payment (a donation from Vote Leave to Mr. Grimes) were that both Vote Leave and Mr. Grimes were registered campaigners (permitted participants) but that Vote Leave had reached the limit of its referendum expenses and therefore wished to donate its surplus resources to another campaigner seeking the same outcome in the Referendum. Mr. Grimes, on the other hand had not reached the limit of his permitted spending and was, therefore, able (by virtue of what EC accepts to have been a *donation* from Vote Leave to Mr. Grimes) to commission the services from AIQ for which Vote Leave had paid.

6. Put shortly (the reason why the Claimant cannot succeed on its claim as formulated) is that PPERA does not operate to prevent one campaigner (permitted participant) from donating surplus money to another campaigner (permitted participant) seeking the same outcome in a Referendum.

7. The Claimant advances four Grounds in support of its allegation. Expressed shortly, and as understood by the Defendant, they are that:

   (i) The payment of money by a permitted participant in the Referendum that falls within the wide definition of the term *'referendum expenses'* constitutes a referendum expense incurred by that participant. The EC erred in law in

considering that because Vote Leave's expenditure was a donation it could not, irrespective of its purpose or use, also be a referendum expense incurred by Vote Leave unless the EC could be satisfied that two relevant participants were 'working together'. (Ground 1).

(ii) In fact, and in any event, there was a joint plan (working together) by Vote Leave and another permitted participant Mr. Grimes. (Ground 2).

(iii) If and to the extent that the EC advised Vote Leave that it could make a lawful donation it erred in law and this constituted a failure to undertake its supervision responsibilities in a manner that was lawful (Ground 3).

(iv) In any event, the EC acted unreasonably in failing to investigate further (Ground 4).

8. The Defendant's short response to the application is that each of the four Grounds that constitute the claim is, as formulated, either premised on the Claimant being correct on Ground 1 or (Ground 3) simply wrong as a matter of fact. If Ground 1 fails (as it must) the others are also, necessarily, misconceived.

9. In its application the Claimant has:

(i) mistakenly asserted that a lawful donation under PPERA is, at one and the same time, capable of being a referendum expense;

(ii) failed entirely to make mention of (and, therefore, to analyse) the statutory scheme for permissible donations.

10. These errors are interrelated and also affect Grounds 2 and 4.

11. The remainder of these Summary Grounds outline: (i) the questions for resolution; (ii) the statutory scheme and (iii) the reasons why each of the Claimant's Grounds must fail. If, as the Defendant respectfully submits, this is a claim without substance questions of further disclosure do not arise.

Pt 2: THE QUESTIONS FOR RESOLUTION

12. As mentioned above, the Claimant advances four Grounds of Claim. By reference to those Grounds of Claim, they raise the following questions:

    (i) Even in the absence of a common plan (joint working) should EC have considered whether the donation made by Vote Leave for the benefit of Mr. Grimes constituted a *referendum expense* attributable to Vote Leave and not to Mr. Grimes? ('Question (1)').

    (ii) Are EC's reasons for considering that there was not a common plan legally erroneous? ('Question (2)').

    (iii) Did EC fail in its regulatory obligations to supervise referendum expenditure during the course of the referendum? ('Question (3)').

    (iv) Did EC act irrationally in failing to investigate further? ('Question (4)')

13. If Ground 1 is flawed as a submission, the Claimant's remaining arguments of principle are circular. Having disavowed the need to establish a joint plan (the assumption in Ground 1), the Claimant then asserts that there was, in any event, a joint plan by adopting the same premise that they cannot establish as relevant if they are wrong on Ground 1, namely that the statutory scheme does not permit a lawful donation in circumstances where one permitted participant wishes to donate surplus funds to another permitted participant.

Pt 3: THE STATUTORY SCHEME

14. It is important to understand how the legal framework operates in a case such as the present. The Claimant has put the scope and meaning of the phrase *referendum expenses* to the fore of its arguments. However, the core question is not the meaning of the term *referendum expenses* (the cost of services intended to be used in the referendum campaign is plainly a *referendum expense)* but, rather, how the intended statutory regimes of *referendum expenses* and *donations* are intended to work alongside each other. Without any attempt to address that part of PPERA that provides for donations, the Claimant appears to posit that a donation permitted by

PPERA (see Detailed Grounds at [2.1]) can also be a referendum expense of the donor *(in casu* Vote Leave). With respect to the argument, it is simply wrong. This is because the Claimant has failed to engage with the statutory regime governing donations.

15. The relevant statutory provisions as to donations are, for present purposes, contained in PPERA Pt VII, s. 119 and Schedule 15 (incorporating s. 54). The important point for analysis is the statutory meaning and effect of the term *'donation'* as applied to Vote Leave's payments for services from AIQ to be provided to Mr. Grimes.

16. PPERA s. 119 provides that *'[s]chedule 15 has effect for controlling donations to permitted participants that either are not registered parties or are minor parties.'*

17. Both Vote Leave and Mr. Grimes were *permitted participants* within the meaning of PPERA s. 105.

18. Schedule 15 [1](4) 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.'*

19. EC took the view that the expenses of securing the services of AIQ constituted referendum expenses incurred by or on behalf of Mr. Grimes. Certainly, as foreshadowed earlier, the cost of services is a referendum expense; a key question of interpretation (again not engaged with by the Claimant) is whether or not that expense was *incurred* by Vote Leave or by Mr. Grimes.

20. Two other questions arise in the context of a donation. The first is the category of donation into which the payment by Vote Leave to AIQ for the benefit of Mr. Grimes might fall. This is answered by PPERA Schedule 15 [2](1)(c) which stipulates as a relevant donation *'any money spent (otherwise than by or on behalf of the permitted participant) in paying any referendum expenses incurred by or on behalf of the permitted participant.'* Here, the evidence showed that the securing of services by AIQ to Mr. Grimes (the relevant referendum expense) had been incurred by Mr. Grimes who had commissioned those services. The donation by Vote Leave is reflected in the money spent by Vote Leave

21. The second question is whether Vote Leave was a *permissible donor*. By virtue of PPERA Schedule 15[6] there is a prohibition on accepting donations from an impermissible donor. [6](1)(a) provides that *'[a] relevant donation received by a permitted participant must not be accepted by the permitted participant if – (a) the person by whom the donation would be made is not, at the time of its receipt by the permitted participant, a permissible donor falling within section 54(2)...'*

22. Materially, Vote Leave *is* a permissible donor within the meaning of [6](1)(a) above because it falls within PPERA s. 54(2)(b) as a company that is registered under the Companies Act 2006, is incorporated within the United Kingdom and carries on business in the United Kingdom. Although s. 54 would not otherwise apply to donations under Schedule 15 (coming, as it does, under a different Part of PPERA and applying to a different set of statutory donation) it is expressly incorporated into Schedule 15 *mutatis mutandis*.

23. There is, thus, no prohibition on a permitted participant making a donation to another permitted participant including (subject to the common plan provisions for which see below) a donation relating to expenditure being incurred by the donee on referendum expenses for referendum purposes. Had Parliament intended such a prohibition it would have provided for it.

24. Nor, for that matter, is there any statutory limit placed on the number of registered campaigners or therefore, on the aggregate ('global') amount that may be spent by one side in a referendum as opposed to the other. Put shortly, there is no necessary statutory equality in terms of each side's overall referendum financial resources.

25. Although there are no statutory constraints that prohibit as a donation the payment made by Vote Leave in the circumstances of this case there are two independent statutory constraints on, or relating to, financial spending in a referendum that are potentially relevant under PPERA.

26. The two relevant constraints in PPERA are those created by: (i) the direct constraint imposed by the term *referendum expenses* being statutorily curtailed in terms of the amount that individual registered campaigners may spend in terms of their own referendum campaigning and (ii) the indirect constraint provisions as to *'common plan'*. Each is contained in Pt VII. Each complements the other.

27. The term *referendum expenses* is defined in PPERA s. 111(2) as *'expenses incurred by or on behalf of any individual or body which are expenses falling within Part 1 of Schedule 13 and incurred for referendum purposes.'*

28. As to the component elements of the definition, *'expenses'* is very broadly defined in PPERA (see Schedule 13 Part 1). It cannot, sensibly, be doubted that the cost of provision of services by AIQ constituted a referendum expense.

29. Similarly, the expression *'referendum purposes'* is broadly drawn and encompasses (see PPERA s. 111(3)) any expenses incurred *'in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to any question asked in the referendum'* or *'otherwise in connection with promoting or procuring any such outcome.'* Again, it is incontrovertible that whether or not the cost of the services of AIQ were incurred by Vote Leave or by Mr. Grimes they were, on any view, expenses incurred for referendum purposes.

30. As already indicated, there are spending limits that operate to 'cap' the amount of referendum expenses that may be incurred by any one individual campaigner. Specifically, these are limits are (in the case of the EU referendum) £700,000 for a permitted participant such as Mr. Grimes (see EURA Schedule 1 [25](2)(c)) and £7 million for a permitted participant who was also (as was Vote Leave) a body or person designated under PPERA s.108 as a 'lead' campaigner (see PPERA Schedule 14 [1](2)(a) as amended by EURA Schedule 1 [25](2)(a)).

31. EURA contains anti-avoidance provisions designed to prevent collusion between campaigners. However, they do not operate to prevent the giving of donations within the statutory scheme.

32. In outline, by virtue of EURA Schedule 1 [22(1)] persons are essentially prevented from *'acting in concert'* so as to incur referendum expenses *'in pursuance of a plan or other arrangement'* (underlining added) by which referendum expenses are to be incurred by on or behalf of one or more individuals or bodies. If there is 'joint working' of that kind then where (as would be the case here if there were joint working) one of the parties to the plan or other arrangement is a designated body

under PPERA s. 108 the aggregate value of the expenses so incurred is to be regarded as having been incurred by that body *(in casu* by Vote Leave).

33. Finally, various criminal offences are created by PPERA for non-compliance with the statutory requirements; most notably those in respect of making incorrect returns and incurring referendum expenses beyond the prescribed limit (see, respectively, PPERA ss. 118(2), 122(4)).

Pt 4: QUESTION (1) – EVEN IN THE ABSENCE OF A COMMON PLAN SHOULD EC HAVE CONSIDERED WHETHER THE DONATION MADE BY VOTE LEAVE FOR THE BENEFIT OF MR. GRIMES CONSTITUTED A REFERENDUM EXPENSE ATTRIBUTABLE TO VOTE LEAVE AND NOT TO MR. GRIMES?.

34. The insuperable obstacle facing the Claimant's analysis on its core point is that it simply ignores the statutory effect of the donation provisions altogether and focuses solely on what it (correctly but irrelevantly) perceives to be the breadth of the concept of *referendum expenses*. The donation provisions are not even referred to in the Detailed Grounds beyond the citation of PPERA s. 112 which is not material as it is a provision concerned with the valuation of donations. No question here arises as to valuation.

35. It is not disputed that the provision of services by AIQ constitutes a referendum expense. The only relevant question is whether the cost of this service was incurred by Vote Leave or by Mr. Grimes.

36. As to this, the Defendant advances five short points.

37. First, as explained above, 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.

38. As earlier submitted, 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, subject only to the common plan provisions that is not what Parliament has done. Accordingly, the

starting point for analysis is, and must be, that there nothing to prevent such donation from being given by one permitted participant to another.

39. Secondly, it is not obvious why a permitted participant would make a donation to another permitted participant in relation to expenditure being incurred by the recipient on referendum expenses for referendum purposes *without* intending to allow other independent campaigns to use money that is surplus to the donor's (legislatively permitted) requirements. After all, if the donor had not reached its own spending limits why would it not wish to use all its funds for the purpose of its own campaign?

40. Thirdly, the Claimant's argument does not grapple with the fact that there is a statutory regime specifically designed to address the unlawful aggregation of referendum expenses by candidates working together. The Claimant's argument seeks to deny any statutory 'space' for the incurring of referendum expenses by one separate campaigner using a lawful donation gifted by another campaigner. Yet this is precisely what PPERA permits.

41. Fourthly, the word *'incurred'* is common to both the donations and the referendum expenses provisions in PPERA. This is because the two are inextricably linked. A donation can only be made to a permitted participant by another permitted participant where the recipient participant incurs a referendum expense. Thus, the word *incurred* must bear the same meaning in both the donations and the referendum expenses provisions. Only one permitted participant can incur an identified referendum expense. It follows that the word *incurred* must have a meaning that allows permitted participants to give donations to other permitted participants. Such meaning is not possible if the Claimant is right because the logic of the Claimant's argument is, and can only be, that once one permitted participant donates its surplus funds to another then, whether or not there is joint working, there cannot be a lawful donation.

42. Fifthly, and relatedly, the concept of joint working necessarily implies that concept having a distinct and separate statutory effect. Thus, there must be something more to the notion of joint working than the scenario of one permitted participant making a donation relating to expenditure on referendum expenses for referendum purposes to be incurred by another permitted participant. Yet, the Claimant's arguments lead to the situation where referendum expenses incurred by two entirely separate

campaigners as the result of a donation would lead to there being an automatic finding of joint working between the campaigners.

43. The Claimant fails to confront these points. (see Detailed Grounds at [35]-[50]). In outline and by reference to the Detailed Grounds:

(i) The Claimant contends (see Detailed Grounds at [35]) that because the term *referendum expenses* is broadly defined it follows that payment of money by a donation from a permitted participant in respect of the indirect provision of services commissioned by another party is a referendum expense. However, this point (as explained earlier) simply ignores the concept of a donation and focuses (at the wrong end of the tunnel) on the meaning of *referendum expense*. As explained above, it is incontestable that the securing of services for an electoral purpose is a referendum expense but the question is who incurs it.

(ii) The second argument of the Claimant (see Detailed Grounds at [36]) amounts to the submission that where two independent campaigners seek to achieve the same outcome and one makes a donation to the other with the object of achieving the same outcome in the referendum, there is a necessary circumvention of the requirements of PPERA. However, any donation from one permitted participant to another permitted participant on the same side will inevitably have the objective of achieving the same referendum outcome. This takes the Claimant no further because if such donation (where it related to expenditure by the donee on referendum expenses for referendum purposes) constituted a circumvention of the statute Parliament would not have allowed permitted participants to make unlimited donations one to the other or would only have allowed this in very limited and prescribed circumstances. Subject to the joint plan provisions, Parliament has not chosen to take either of these courses.

(iii) The third argument of the Claimant (see Detailed Grounds at [37]-[38]) is that a donation from one permitted participant to another may be, at one and the same time, a donation and a referendum expense on the part of the donor (here Vote Leave). Subject to there being joint working engaging the joint plan provisions this is incorrect. The relevant question is who <u>incurs</u> the expenditure. A

donation can only be a donation within the terms of PPERA if the expenses for which the donation is given is incurred by the recipient. If the expense is not incurred by the recipient there is, on the wording of the statute, no donation. But the Claimant does not purport to argue that there is no donation.

(iv) The fourth argument of the Claimant (see Detailed Grounds at [39]) is that the expenditure was to achieve the same referendum outcome. But, as explained earlier, a donation will invariably be made to achieve the same referendum outcome. That does not prevent it from being a lawful donation within the statutory scheme. Nor does a donation to achieve the same outcome of itself engaging the joint working rules.

(v) Finally, the 'wrap-up' arguments of the Claimant in the Detailed Grounds at [40]-[41] are reducible to the twin propositions that: (a) because the payment of a donation by Vote Leave left Vote Leave with *pro rata* less financial resources, that expenditure was necessarily incurred by Vote Leave; (b) Vote Leave incurred those sums on referendum expenses for referendum purposes. It is apparent that these arguments depend upon the fact of *payment* by Vote Leave (which the Claimant treats as synonymous with Vote Leave *incurring* the expenditure) whereas it is clear from the definition of a donation that a donation may engage the payment of the referendum expenses of the recipient by the donor. In such circumstances, the donor by making the donation does not *incur* the expense although the donor makes a *payment* of the donation for the purpose of meeting the referendum expense that is incurred by the recipient. The relevant definition of 'donation' applying to the evidence in the present case is apposite because it makes the distinction between *paying* a referendum expense and *incurring* a referendum expense abundantly clear (see PPERA Schedule 15 [2[(1)(c) cited above at paragraph 19).

Pt 7: QUESTION (2) – ARE EC'S REASONS FOR CONSIDERING THAT THERE WAS NOT A COMMON PLAN LEGALLY ERRONEOUS?

44. On its Ground 2, the Claimant argues that, whether or not it is right on Ground 1, there was here a common plan and that EC applied the wrong legal test in its assessment in finding that there was not.

45. The core premise on which EC undertook its assessment was that it had to decide a single question, namely whether Vote Leave had made a *bona fide* donation to Mr. Grimes as a separate permitted participant (registered campaigner) and with no co-ordination of their campaigns.

46. If that premise is correct (i.e. if EC is correct in its analysis of Ground 1) then, on the information then available to it, EC undertook a detailed assessment and concluded having made numerous inquiries that Vote Leave did, indeed, made a *bona fide* donation and that this was permitted by PPERA. Accordingly, there was, in respect of the donation the subject of these proceedings, no joint working.

47. It is uncontentious that it is unnecessary for there to be a specific plan in order for the joint working provisions to engage. As the Claimant observes the statutory language refers to a *'plan or other arrangement'*.

48. It is contended by the Claimant that EC fell into legal error by requiring evidence at too high a threshold, namely evidence of an agreement. But the argument here is no more than syntactical.

49. What, in fact, EC said in its response to the PAPL was that *'there will only be a "plan or other arrangement" if there is some agreement reached as to how expenses incurred will be used.'* EC did not mean (and could not reasonably be understood to have meant) by these words that it was looking for evidence of a formal agreement. It looked merely for an evidential indication of a common intent (however informally arrived at) between Vote Leave and Mr. Grimes to bring about a consequence that was contrary to the object and purpose of PPERA. There was, ostensibly, knowledge on the part of Vote Leave that the expenses incurred by Mr. Grimes would be spent in a certain way (how otherwise could it have paid AIQ and how else could Mr. Grimes have had sufficient resources to incur the cost of services from AIQ?) but this does not mean that Vote Leave and Mr Grimes were acting in concert

50. Against that background, if the Claimant loses on Ground 1 the success or otherwise of Ground 2 is not advanced by the three points made by the Claimant in the Detailed Grounds at [58].

51. As to these (and assuming the analysis of Ground 1 to be correct):

(i) The fact that (see Detailed Grounds at [58.1] *'the whole purpose of the arrangement'* was to enable Vote Leave to ensure that its surplus funds did not go to waste does not, of itself, mean that there was joint working.

(ii) The fact that (see Detailed Grounds at [58.2]) Vote Leave could not itself have spent further money on securing services from AIQ does not, of itself, mean that there was joint working.

(iii) The fact that (see Detailed Grounds at [58.3]) if it had not reached its spending limits Vote Leave would not have made a donation to Mr. Grimes does not, of itself, mean that there was joint working.

Pt 8: QUESTION (3) - DID EC FAIL IN ITS REGULATORY OBLIGATIONS TO SUPERVISE REFERENDUM EXPENDITURE DURING THE COURSE OF THE REFERENDUM?

52. The separate success or failure of this Ground depends upon the Claimant establishing that EC erroneously advised Vote Leave that it could lawfully make the donation it did.

53. The short answer to this Ground is that, as far as EC is aware, no such advice was ever given.

Pt 9: QUESTION (4) – DID EC ACT IRRATIONALLY IN FAILING TO INVESTIGATE FURTHER?

54. Again, if the analysis in respect of Ground 1 is correct, EC, on the information then before it, acted rationally. The Claimant has not sought to challenge the existence of a donation permitted by PPERA. However, EC's consideration of joint working necessarily encompassed consideration of whether there was collaboration between Vote Leave and Mr. Grimes.

55. Nothing in the Claimant's case comes close to establishing irrationality in declining to investigate further on the information available to the Defendant when making its decision.

CONCLUSION

56. For the above-mentioned reasons it is respectfully submitted that this application for permission to apply for judicial review should be dismissed.

EVENTS SINCE THE DECISION COMPLAINED OF AND ACADEMIC NATURE OF THE PRESENT CLAIM

57. Following the decision complained of the Defendant has undertaken a review of the decision not to proceed to the investigation stage that is challenged in these proceedings. This review has been prompted by further information that has come to light since the decision the subject of this challenge.

58. The decision to proceed to the investigation stage supported by detailed reasons is annexed to these Summary Grounds.

59. In the light of the fact that the Defendant has decided to investigate, the present application is, aside from being devoid of legal merit, wholly academic and serves no useful purpose. Accordingly, the Claimant is invited to withdraw the application for permission to apply for judicial review before further costs are incurred by the Defendant and valuable court resources are wasted.

RICHARD GORDON QC

The Electoral Commission

Assessment Review

Review of assessments - A054626 and A054625

The Electoral Commission has undertaken a review of the assessments it conducted in February and March 2017 into the potential incorrect reporting of joint referendum spending by two registered campaigners in the June 2016 referendum on the UK's membership of the EU, Vote Leave Limited and Darren Grimes.

The Commission has the power to review previous assessments at any time. This review, carried out by the Head of Regulation in line with the Commission's procedures, has been conducted as part of its ongoing work on current regulatory issues. It was commenced after internal consideration of the papers while responding to a judicial review initiated by the Good Law Project of the decision not to investigate following the original assessments.

Under the Commission's Enforcement Policy, where allegations of offences under the Political Parties, Elections and Referendums Act 2000 (PPERA) have been made, the Commission may conduct an assessment. The purpose of the assessment is to determine whether to conduct an investigation. The Commission may open an investigation where:

- it has reasonable grounds to suspect an offence under PPERA has been committed; and
- it is justified in the public interest to investigate.

Original assessments

1. Mr Darren Grimes and Vote Leave Limited were both permitted participants in the June 2016 EU Referendum, The Commission conducted assessments in respect of three amounts reported by Mr Darren Grimes as donations from Vote Leave, received and accepted in June 2016. The amounts were reported as non-cash donations paid by Vote Leave to Aggregate IQ (AIQ).

2. The assessments looked at whether the Commission had reasonable grounds to suspect that Mr Grimes and/or Vote Leave had committed offences under s122(4)(b) PPERA of delivering an incomplete spending return. In particular, one assessment looked at whether Mr Grimes' spending

return contained spending on AIQ that was in fact incurred under a common plan or arrangement with Vote Leave and thus ought not to have been included. The other assessment looked at the fact that as designated lead campaigner, Vote Leave had to report all spending under a common plan or arrangement with other campaigners, and whether it had correctly not reported the same spending with AIQ.

3. The assessments concluded that the Commission did not have reasonable grounds to suspect such incorrect reporting.

4. The review of the assessments has noted the following from the original assessment files:

   - Vote Leave reported receiving a £1m donation on 13 June 2016. Vote Leave advised the Commission that the donation was unexpected, although it was aware that the donation was on its way when it calculated its financial position on 9 June 2016 and determined that taking this and post-referendum commitments into account it would have over £500,000 remaining over and above its £7m spending limit for the referendum campaign.

   - At some point between 7 and 12 June 2016 Vote Leave indicated to Mr Grimes that it might donate funds to him. On 13 June 2016 Mr Grimes responded to the offer of a donation by telling Vote Leave he would like to work with AIQ, and asked for the donation to be paid directly to AIQ.

   - On 14 June 2016 Vote Leave formally decided to donate the surplus funds to Mr Grimes. On the same day Vote Leave advised Mr Grimes, via email, that it had decided to donate £400,000, and asked where the funds should go. Mr Grimes provided details of his AIQ reference and account number.

   - Vote Leave offered Mr Grimes a further donation on 17 June 2016, and he asked for this to be paid to AIQ. The amount was paid to AIQ on 20 June 2016.

   - On 21 June 2016 Vote Leave offered a third donation, of £181,000, to Mr Grimes. He responded – 22 minutes later – confirming that he would be able to use the funds and asking for £180,000 to be transferred to AIQ and £1,000 to his account for travel expenses.

- Mr Grimes reported donations from Vote Leave being received on 13, 20 and 21 June 2016. He reported a further donation from Mr Clake as having been received on 16 June 2016.

- AIQ provided "insertion orders" made out to Mr Grimes dated 14, 17, 20 and 21 June 2016.

5. During the original assessments, Vote Leave advised the Commission that the request for a donation and the decision to give one were made "without conditionality, collaboration or coordination".

6. Mr Grimes advised the Commission that the only discussion he had with Vote Leave about the purpose to which he intended to put the money was that it was for his "digital campaign" and that was why he asked them to pay it to AIQ. He advised that he was aware of AIQ's work on the Vote Leave campaign from socialising with Vote Leave staff, and of their work on a US campaign for Ted Cruz, and had been impressed. Vote Leave corroborated this to the extent that they confirmed Mr Grimes had been volunteering with them and new staff members and of their work with AIQ.

7. Both Vote Leave and AIQ told the Commission that details of the work AIQ conducted for one campaigner was not discussed with any other.

Application of the provisions concerning "donations", "referendum expenses", and "common plan expenses" in this context

Donations

8. Schedule 15 paragraph 1(4) provides that a *'"[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.'*

9. Under PPERA Schedule 15 paragraph 2(1)(c), one category of such donations is *'any money spent (otherwise than by or on behalf of the permitted participant) in paying any referendum expenses incurred by or on behalf of the permitted participant.'*

10. The Commission is satisfied that the payments by Vote Leave to AIQ would constitute such donations if the expenses concerned were incurred by Mr Grimes.

11. By virtue of PPERA Schedule 15 paragraph 6 there is a prohibition on accepting donations from an impermissible donor. Paragraph 6(1)(a) provides that *'[a] relevant donation received by a permitted participant must not be accepted by the permitted participant if – (a) the person by whom the donation would be made is not, at the time of its receipt by the permitted participant, a permissible donor falling within section 54(2)…'*.

12. Vote Leave is a permissible donor within the meaning of paragraph 6(1)(a) above because it falls within PPERA s. 54(2)(b) as a company that is registered under the Companies Act 2006, is incorporated within the United Kingdom and carries on business in the United Kingdom.

13. There is no prohibition on one permitted participant making a donation to another permitted participant.

14. Nor is there any prohibition on one permitted participant making such a donation in respect of funds that are surplus to its legislatively permitted requirements. The spending limits (set out in PPERA Schedule 14 paragraph 1(2)(a) as amended by the European Union Referendum Act 2015 Schedule 1 paragraph 25(2)(a)) only apply to individual campaigners. There are no spending limits on the amount spent in aggregate by all campaigners for the same outcome.

15. It therefore follows that the payments to AIQ were properly reportable as donations by Vote Leave **if** they were made in respect of referendum expenses incurred by Mr Grimes. The latter point is addressed below.

Referendum expenses

16. The term *referendum expenses* is defined in PPERA s. 111(2) as *'expenses incurred by or on behalf of any individual or body which are expenses falling within Part 1 of Schedule 13 and incurred for referendum purposes.'*.

17. The term *'referendum expenses'* is broadly defined in PPERA (see Schedule 13 Part 1).

18. The expression *'referendum purposes'* is also broadly drawn and encompasses (see PPERA s. 111(3)) any expenses incurred *'in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to any question asked in the referendum'* or *'otherwise in connection with promoting or procuring any such outcome.'*

19. It is clear beyond any doubt that the payments made by Vote Leave to AIQ constituted referendum expenses.

20. As to who "incurred" these referendum expenses, the Commission is satisfied that there was sufficient evidence gathered during the original assessments to indicate that the services from AIQ were being procured by Mr Grimes for use in respect of his campaign. It ought to be stressed that the fact that Vote Leave **paid** for these services does not necessarily mean that it was Vote Leave that **incurred** the expenses, for the reasons set out above (and the wording of Schedule 15 paragraph 2(1)(c) puts this beyond doubt).

21. Accordingly, the Commission is satisfied that, on the evidence there was, it was open to the Commission to conclude that the payments constituted donations by Vote Leave, in respect of referendum expenses incurred by Mr Grimes, for the purposes of PPERA.

Common plan expenses

22. Under EURA Schedule 1 paragraph 22(1), persons are essentially prevented from *'acting in concert'* so as to incur referendum expenses *'in pursuance of a plan or other arrangement'* by which referendum expenses are to be incurred by on or behalf of one or more individuals or bodies. If there is 'joint working' of that kind then where (as would be the case here if there were joint working) one of the parties to the plan or other arrangement is a designated body under PPERA s.108 the aggregate value of the expenses so incurred is to be regarded as having been incurred by that body (i.e. by Vote Leave in this instance).

23. The Commission is satisfied that the assessments interpreted the law correctly in determining whether these payments might have constituted common plan expenses. They considered whether there was a "plan or other arrangement" between Vote Leave and Mr Grimes in connection with those payments, and concluded that there was insufficient evidence that such a plan or arrangement had existed.

24. However, as noted above the Head of Regulation for the Commission has now reviewed the matter to determine whether the decisions on the evidence, including any new evidence, may (taken together) merit further consideration.

Review of the Assessments

25. As stated above, the original assessments concluded that the evidence provided by Vote Leave and Mr Grimes is, on the face of it, consistent with the amounts being donations to Mr Grimes and reportable as spending by him. There are no direct indications of the campaigners working together, and that the explanation given by Mr Grimes of how he came to hear of AIQ is plausible. This remains the case.

26. However, the Commission is now aware from separate enquiries that there was a further instance of Vote Leave providing funds to another registered campaigner that were spent on services from AIQ. The campaigner Veterans for Britain has reported a donation of £100,000 from Vote Leave made on or around 29 June 2016 and paid direct to AIQ. Consequently, the Commission is now aware that there were two campaigners who apparently independently decided to use Vote Leave donations for AIQ services at or around the same time. The Commission notes also that Vote Leave spent considerable sums with AIQ. It may on investigation be possible to infer from this that these similar payments were more than a coincidence, and that the common denominator in both instances, Vote Leave, may have had some influence or control over how the amounts were used.

27. The Commission has also taken into account its increased knowledge of the financial interconnections between certain campaigners for the 'leave' outcome in the referendum. Further, the Commission notes its increased awareness of the significance of digital campaigning as a key technique in the referendum amongst an overlapping group of campaigners, including Vote Leave, Mr Grimes and Veterans for Britain, and the use of a small number of providers, including AIQ, for that campaigning. The Commission has also liaised with the Information Commissioner's Office in recent months and notes that agency's interest in the EU referendum campaign.

28. Given this new information, together taken with the existing evidence, the Commission has considered whether there were inferences that might on investigation be drawn from the evidence obtained that did indicate a plan or arrangement was in place, or that the payments were in fact expenses incurred by Vote Leave.

29. It may be possible on investigation to infer from the sequence of events summarised above that there may have been additional communication, verbal or in writing, between Vote Leave and Mr Grimes, particularly around the amounts to be transferred, of which the Commission is unaware. This can

be inferred from the fact that for each of the donations Mr Grimes was in a position to commission services from AIQ either in advance of being advised, in writing, by Vote Leave of the amounts it intended to donate, or very shortly afterwards. The Commission is not aware of what any such communication contained and whether it indicated a common plan or arrangement was in place. The Commission notes the following:

- On the account provided by Vote Leave and Mr Grimes, it appears that Mr Grimes was in a position to make arrangements with AIQ to provide services to him on 13 June, the day when he asked for the donation to be paid to AIQ, before receiving confirmation of the amount to be donated.

- On 17 June Mr Grimes asked Vote Leave to transfer funds to AIQ without, according to the papers, knowing what amount was due to be transferred. He received an insertion order for services coming to that amount from AIQ on the same day.

- The amount apparently offered by Vote Leave on 21 June 2016 appears to be the exact amount that Mr Grimes needed to pay AIQ for services he had apparently already agreed with them, despite there being a gap of only 22 minutes between the offer and his asking for it to be paid to AIQ.

30. For the sake of completeness, the Commission notes that Vote Leave also provided an amount, of £10,000, to a third campaigner, Muslims 4 GB. This was reported by Muslims 4 GB as a cash donation accepted on 20 June 2016. Muslims for GB declared nil spending in the referendum campaign.

Conclusions

31. The review of the assessments has concluded that the Commission does have reasonable suspicion of PPERA offences having been committed. The possible inferences set out above raise a reasonable suspicion that a common plan or arrangement may have been in place between Vote Leave and one or both other campaigners, Mr Grimes and Veterans for Britain. If this was the case then the amounts reported as donations should have been reported as spending by Vote Leave, as designated lead campaigner, irrespective of whether they were donated to Mr Grimes and Veterans for Britain. Alternatively, it is possible that some or all of these payments may in fact have amounted to referendum expenses incurred by Vote Leave, and were reportable as such.

The Electoral Commission

32. Vote Leave reported spending of £6,773,063.47 against a spending limit of £7m. If it is the case that some or all of the spending with AIQ reported by Mr Grimes and Veterans for Britain should have been reported by Vote Leave, it may have exceeded its spending limit.

33. Consequently the Commission has reasonable grounds to suspect the following:

- That Mr Grimes may have delivered a return that was incorrect in relation to the donation and spending reports, committing offences under s122(4)(b) PPERA.
- That Vote Leave may have delivered a return that was incorrect in relation to spending, committing an offence under s122(4)(b) PPERA.
- That Vote Leave may have exceeded its spending limit in the referendum, committing an offence under s118(2) PPERA.
- That Veterans for Britain may have delivered a return that was incorrect in relation to the donation and spending reports, committing offences under s122(4)(b) PPERA.

34. The Commission is also satisfied that it is in the public interest to investigate these matters. The referendum was an important electoral event. There is significant public interest in being satisfied that the facts are known about Vote Leave's spending on the campaign, especially as it was a lead campaigner with a greater spending limit than anyone else on the 'leave' side. For these reasons the significance of the public interest in the matter beyond doubt.

35. The Commission has considered the above conclusions in line with its Enforcement Policy. The Commission is satisfied that it has reasonable grounds to suspect offences under PPERA have been committed and that it is in the public interest to use its resources to investigate if offences were committed. The Head of Regulation has therefore authorised the opening of an investigation into these matters.

Louise Edwards
Head of Regulation
20 November 2017