IN THE HIGH COURT OF JUSTICE **Claim No: CO/4908/2017**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN:

R (THE GOOD LAW PROJECT)

Claimant

and

ELECTORAL COMMISSION

Defendant

VOTE LEAVE LIMITED

MR DARREN GRIMES

Interested Parties

CLAIMANT'S SKELETON ARGUMENT
FOR HEARING ON 15 MARCH 2018

References in the form [X/Y/§Z] are to Tab X, Page Y, Paragraph Z of the Hearing Bundle.

Introduction

1. This is the Claimant's renewed application for permission to bring judicial review proceedings against the Electoral Commission ("**the Commission**") in respect of decisions made concerning campaign spending by the official 'Leave' campaign in the period leading up to the 2016 EU Referendum ("**the Referendum**").

2. The case raises important questions as to how Parliament intended to control referendum campaign spending by different groups on the same side of a referendum campaign and the regulation of that spending by the Commission. In particular, the following issues arise:

   2.1 Whether Parliament intended one official referendum campaign (the designated campaign) to be able to use money in excess of its statutory expenditure limits to pay for services to be provided to another referendum campaign seeking to

achieve the same outcome in the referendum. The Commission claims that this is permissible provided the two campaigns do not have a common 'plan'. The Claimant submits that it is not permitted by the legislation and moreover, such an interpretation undermines the statutory purpose of Parliament imposing an expenditure limit. This is Ground 1.

2.2 The meaning and scope of the concept of 'in pursuance of a plan or other arrangement'[1] (the test which governs whether the co-ordinated expenditure of other participants should be treated as counting towards the designated campaign's spending), and in particular, whether on the facts as known (as well as any further disclosure that the Commission must give pursuant to its duty of candour) there was such a 'plan'. This is Ground 2.

3. In addition, the case raises a factual question on which, despite the duty of candour, no disclosure has yet been given, namely whether or not during the referendum period the Commission advised Vote Leave that it could pay for the services provided to other campaigns on the Leave side, over and above its expenditure limit of £7million. In this regard, the Electoral Commission says that such advice would have been correct (Ground 1) but denies that it ever gave that advice. By contrast, Vote Leave claims that, to their surprise, such advice was specifically given: witness statement Jolyon Maugham [**2/4/§14** and **3/204**]. Potentially of significance is the fact that of the £800,000.00 that was declared as donated by one campaign to another during the referendum, £750,315.00 of this was by Vote Leave.[2] This is Ground 3.

4. As set out in the witness statement of Jolyon Maugham [**2/1**], a key reason behind the challenge relates to the future and in particular, ensuring that any future referendum is properly regulated: §§3, 16-17

Permission

5. By her decision of 18 January 2018 [**1/80**], Lang J held that the Claim was arguable. However, she nonetheless refused permission on the basis that although the Commission resisted Grounds 1-3, it had nevertheless decided to open a new investigation, in effect conceding Ground 4; namely that it had acted irrationally in

[1] Schedule 1 EU Referendum Act 2015 [HB/4-64]
[2] http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/215279/2016-EU-referendum-report.pdf §3.66 footnote 59.

deciding not to investigate. She concluded that when the Electoral Commission had reached a decision on that investigation, the Claimants could then bring a further claim. Until then, in her view, the claim should not be heard on the basis that it was academic.

6. Lang J was plainly right to conclude that the claim is arguable.

7. For the reasons set out below, however, she was wrong to hold that until a new decision had been reached, Grounds 1-3 were academic. On the contrary, their resolution is essential:

   7.1 First, in order to avoid the Commission carrying out its investigation on an incorrect legal basis. The Commission continues to contend that the Claimant's analysis of the law is wrong (saying that its decision to open a new investigation "*has no bearing on the legal merits of the claim*" and that the Claimant's analysis is "*misconceived*" [**1/47/§2**]). Accordingly, the Commission's new investigation will be carried out on the basis of an erroneous understanding of the legislative controls on expenditure. The Commission will investigate on a legal basis that not only does the Claimant submit is wrong but that the Court accepts is arguably wrong.

   7.2 Absent a resolution of the legal issues raised, there is therefore a real risk that the work involved in that investigation will be wasted, that the investigation may have to be redone in due course and that with the yet further passage of time it will be more difficult for an investigation properly directed in law to be carried out. As in *R (London Borough of Kensington & Chelsea) v Secretary of State for the Environment* (1987) 19 HLR 161, the disputed legal issues should be determined now so that the investigation is not a wasted exercise.

   7.3 Secondly, the issues are in any event of broader and ongoing significance. Currently, the Commission is regulating on a legal basis that the Court has found is arguably wrong, which is unsatisfactory from every perspective.

   7.4 The Commission is charged with regulating spending in elections and referendums and has published guidance covering what the rules require and permit (albeit that the Commission has never clearly stated that one campaign may purchase services for another campaign above its expenditure limits, which

it claims in this action to be lawful). Indeed, in its 2016 Report on the Referendum the Commission itself expressed concern about the uncertainty in its understanding and the understanding of participants of the relevant spending provisions and has recommended clarification of these provisions by Parliament.[3] Unless these issues of law are determined by the Court, there is a real likelihood that any future election or referendum will be conducted under the shadow of an "*arguable*" dispute as to whether the Commission has misunderstood the rules which it is charged with applying. That is a classic case of wider public interest in which the Court should grasp the nettle even if it considers (the Claimant says wrongly) that the issue may no longer be necessary to determine the case before it: see for example *R (Sacupima and others) v Newham London Borough Council* [2001] 1 WLR 563.

7.5 Both parties and the public in general have an interest in the case being fully argued so that the correct meaning and application of the provisions can be determined. There is no difficulty in that happening in this case. The Commission maintains its position on the law and the Claimant disputes it. There is therefore no reason to defer these issues for another occasion and to leave the Commission (and those whom it regulates) in doubt in the meantime.

7.6 This point was made by the Claimant in its letter of 24 January 2018 to the Claimant. The Claimant pointed out that the Commission might be expected, as the relevant regulator, to want to know the answers to the issues raised, so that it could be confident that it was discharging its regulatory function correctly both in relation to the existing investigation but perhaps more importantly, in relation to any future referendum or election: [**3/281**]. No reply was received to that letter.

8. The Claimant therefore seeks permission to bring judicial review proceedings in respect of Grounds 1-3 as set out in the Statement of Facts and Grounds [**1/10**]. If permission is granted it also seeks (i) a degree of expedition in the determination of the claim, and (ii) a cost-capping order ("CCO") for the reasons explained in the witness statement of Jolyon Maugham [**2/10 – 2/12**].

[3] http://www.electoralcommission.org.uk/__data/assets/pdf_file/0008/215279/2016-EU-referendum-report.pdf See recommendations 2 and 7 and §§3.60-3.69, particularly 3.64 and 3.66.

9. In any event, as envisaged by Lang J in her Order, the Claimant seeks its costs of the proceedings up to the service of the Commission's Summary Grounds, on the basis that its request for a reopening of the investigation, resisted in pre-action correspondence, has now succeeded.

Overview of the dispute

10. The facts of the dispute are set out at [**1/13 - 1/17**] and the legal framework at [**1/17 – 1/24**]. In outline, the claim concerns the proper enforcement of campaign spending limits, and in particular the question of whether certain major spending by the Leave campaign should or should not have been counted towards its limit. The core of the dispute is as follows.

    10.1 During the campaign period, Vote Leave (the designated official Leave campaign) paid more than £3.4m to AggregateIQ ("**AIQ**"), a Canadian data and marketing consultancy.

    10.2 If that money is counted towards Vote Leave's spending limit, then Vote Leave broke the law, exceeding its limit of £7 million by almost £500,000.

    10.3 Vote Leave accepts that most of the £3.4m should be counted towards its limit. However, it maintains that £725,000 of it falls outside its campaign spending altogether because, although it was paid directly by Vote Leave to AIQ just like the rest, the payments were made at the request of two other campaigners to whom Vote Leave had decided to 'donate' the money in the final days of the campaign when it was clear that it would have surplus funds beyond its £7million spending limit.

    10.4 The two 'donees' were Mr Darren Grimes, a 23-year-old student involved in Vote Leave's campaign [**3/33**], and 'Veterans for Britain' ("**VfB**"), one of several 'For Britain' campaign groups established to campaign for a 'Leave' outcome in the Referendum. Mr Grimes reported cash donations of £625,000 from Vote Leave and spending of £625,000 and VfB reported £100,000; both reported equivalent amounts of spending on on AIQ's services.

    10.5 Neither 'donee' ever actually received any money from Vote Leave or paid any money to AIQ. According to Vote Leave they were offered the money and both

independently happened to choose to ask Vote Leave to spend it on the same data consultancy firm that Vote Leave had already spent more than £2 million on, and to make the payments directly to it. As pointed out by Jolyon Maugham in his witness statement it is unclear whether AIQ sent out Vote Leave content to BeLeave and VfB's audiences and if not, how content was produced in the short time left before the Referendum [**2/7**].

10.6 Under the applicable statutory provisions, a "*referendum expense*" is treated as counting towards Vote Leave's spending limit if either (i) it is incurred by Vote Leave, or (ii) it is incurred by another campaigner pursuant to a common plan under which both are to incur expenses in pursuit of the same preferred referendum outcome (referred to by the Commission as "*working together*"), in which case Vote Leave would have to account not just for the sum that it contributed to the common plan but for the entire cost of that common plan.

10.7 The Claimant submits that:

10.7.1 Applying the language of the statute, sums paid by Vote Leave to AIQ in return for campaign-related services constitute a referendum expense incurred by Vote Leave, even if the services themselves were to be provided to another campaigner.

10.7.2 In any event, the sums in question constituted expenses incurred pursuant to a 'plan or other arrangement'. Proceeding from the admitted facts, an arrangement was clearly made under which Darren Grimes commissioned services for which Vote Leave would then pay (there being no suggestion that he would have commissioned services of such value without having the money to pay for them). The purpose of the arrangements was to allow Vote Leave to make use of as much money as possible in the campaign, enabling it to incur expenditure up to its spending limit whilst at the same time reaching a wider or larger audience through the common arrangement or plan. It may well be that exactly the same is true of Veterans for Britain; it is enough that it is true of Darren Grimes.

11. In March 2017, having asked a few questions in correspondence of those involved, the Commission concluded that there were no reasonable grounds to suspect any "*working together*", and closed its investigation. It did not address the question whether money paid by Vote Leave to AIQ in return for campaign-related services constituted the incurring of a referendum expense by Vote Leave. Nor did it consider the position of Veterans for Britain.

12. In October 2017, following the public disclosure of documents relating to the Commission's investigation and its closure, the Claimant sought judicial review of the Commission's decisions to take no further action, on four grounds [**1/10**]:

    12.1 First, the Commission should have treated the £725,000 paid by Vote Leave to AIQ as a 'referendum expense' incurred by Vote Leave;

    12.2 Second, the Commission should in any event have concluded on the facts available that the £725,000 was expenditure pursuant to a common plan and that it is therefore to be treated as incurred by Vote Leave under the 'working together' rules;

    12.3 Third, the Commission, having misdirected itself in law, had failed to regulate the Referendum in accordance with the law, and in particular had acted unlawfully in (according to the Campaign Director of Vote Leave) advising Vote Leave that it was permitted to proceed in this way; and,

    12.4 Fourth, in any event it was unreasonable in all the circumstances for the Commission to have concluded that there was no reason even to suspect a breach, given the extreme implausibility that there was no co-ordination involved in both 'donees' happening to choose to spend their money on the same little-known Canadian consultancy firm used by Vote Leave, particularly as Vote Leave held the purse-strings throughout.

13. On 20 November 2017, the Commission served Summary Grounds resisting the claim on all four grounds. Separately, it gave notice that (allegedly prompted by "*further information that has come to light*", although it has declined to identify any information it did not already possess) it would in fact open a new investigation into spending by Vote Leave and Mr Grimes [**1/61**].

14. On 29 November 2017 the Claimant served a Reply in which it noted that the issues of law remained live and responded to the Commission's submissions on those issues [**1/69**]. The Commission responded on 5 December 2017 [**1/76**].

15. Lang J refused permission on 18 January 2018 [**1/80**], holding:

> *"The claim has been overtaken by events as the Defendant decided on 20 November 2017 to undertake an investigation into potential improper referendum spending by Vote Leave. Thus the Defendant's original decision, which formed the basis of the claim for judicial review, will be superseded. Although there remains a dispute between the parties as to the operation of the statutory scheme, and the Claimant's analysis is arguable, this Court will not embark upon an academic examination of the law. If there are grounds to do so, then the Claimant may bring a further claim once the Defendant makes its new decision."*

16. She also noted that in view of the Commission's decision, "*the question arises whether the Defendant should pay a proportion of the Claimant's costs of the claim, since the Claimant's ground 4 has prompted the new decision, and to that extent the claim has succeeded*."

17. On 24 January 2018, the Claimant wrote to the Commission noting that as the regulator of elections and referendums it had an interest of its own in the Court resolving an arguable issue as to the proper interpretation of the law, and inviting it either to join with the Claimant in seeking declaratory relief, or to publish guidance recording for the benefit of the public the views expressed by it in the litigation as to the meaning of the relevant provisions so that the Claimant could challenge the lawfulness of the guidance [**1/88**]. There has been no reply.

The grounds

18. 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. To inform that decision a short explanation is provided of the grounds of challenge for the assistance of the Court.

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

19. The Political Parties, Elections and Referendums Act 2000 ("**PPERA 2000**") imposes rules governing the conduct of elections and referendums, and the European Union

Referendum Act 2015 ("**EURA 2015**") made provision governing spending in the Referendum itself.

20. In summary, (i) anybody wishing to incur more than £10,000 of referendum expenses was required to register as a participant, (ii) registered participants were permitted to incur referendum expenses up to £700,000, and (iii) the two bodies designated by the Commission as the official campaigns for either of the possible referendum outcomes were permitted to incur up to £7 million.

21. The statutory provisions which determine whether or not an expense is to count towards one of those spending limits are broadly expressed.

    21.1 S.111(2) PPERA 2000 defines 'referendum expenses' as "*expenses incurred by or on behalf of any individual or body which are expenses falling within Part I of Schedule 13 and incurred for referendum purposes.*"

    21.2 S.111(3) PPERA 2000 defines "*referendum purposes*" as expenses incurred (i) 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, <u>or</u> (ii) otherwise in connection with promoting or procuring any such outcome.

    21.3 Part 1 of Schedule 13 encompasses all "*expenses incurred in respect of any of the matters set out in the following list*". The list is very broad and includes "*Advertising of any nature (whatever the medium used)*" and "*Market research or canvassing conducted for the purpose of ascertaining polling intentions*". The words "*in respect of*" are significant; they are broader than (for example) "*in return for*".

    21.4 S.112(2) provides that where property or services are provided to a referendum campaign free or at a discount of more than 10%, the market value of those services or goods shall be treated as having been incurred. Accordingly, there is no need to any liability to arise, nor for any money to be paid in order for a referendum expense to be incurred.

22. The combined effect of those provisions for present purposes is that any expense incurred in respect of any advertising or market research carried out in connection with promoting or procuring a 'Leave' or 'Remain' vote is a referendum expense.

23. The Commission accepts that the cost of AIQ's services is a referendum expense within the above definition [**1/50/§14**].

24. It submits, however, that the issue is "*how the intended statutory regimes of referendum expenses and donations are intended to work alongside each other*" [**1/50/§14**]. In other words, its submission is not based on anything to do with the meaning of the words used in s.111 PPERA 2000. Rather, the submission is that (i) PPERA 2000 creates a regime governing expenses and a regime governing donations, and (ii) if something is a donation then it cannot be an expense: see in particular [**1/54/§§37-40**]. As elaborated in its Response, it submits that there is a two-stage analysis, with the first stage being to determine whether the transaction is a donation; if it is, then there is no need to inquire into whether it is an expense [**1/78**].

25. That analysis is wholly unsupported by the statutory scheme. There is nothing whatsoever in the statute to suggest that:

    25.1 a transaction can only involve a donation <u>or</u> an expense, the two being mutually exclusive;

    25.2 if the transaction is capable as a matter of statutory language of being considered <u>either</u> a donation or an expense, then the 'donation' regime trumps the 'expenses' regime (rather than the other way around); or,

    25.3 that either of those things is so clearly the object of the statute that the words of s.111 should be strained to accommodate them even where, as a matter of language, a referendum expense has plainly been incurred by Vote Leave.

26. It is perfectly possible for the same transaction to involve both an expense and a donation.[4] Indeed, that is how the Commission originally interpreted <u>this</u> transaction when it first examined the spending returns in November 2016. It disagreed with Mr Grimes's declaration that he had received donations of cash from Vote Leave, concluding instead that he should have declared "*non-cash donations of digital marketing*" [**1/14/8.5**]. In other words, it took the view that Vote Leave had purchased digital marketing services from AIQ and donated them to Mr Grimes. That purchase was

[4] The Commission is simply wrong to suggest at [**1/78**] that the Claimant's position is that if there was an expense there cannot have been a donation. The Claimant's position is that there is no reason to think, in the absence of any provision to that effect, that one regime is intended to oust the other.

plainly an expense incurred in respect of advertising, and was plainly incurred for referendum purposes. That is so notwithstanding that Vote Leave then donated the services it had purchased to another 'Leave' campaigner. Indeed, the Commission appears itself to have taken that view that this was the very reason Vote Leave made the donation, as set out in its case assessment form of 20 September 2016, where it stated that it was reasonable for Vote Leave "*finding itself with money it cannot spend [because of the expenditure limit] to donate it to a like-minded group…running an online campaign…[and to] consider that an online campaign would be an effective way <u>to spend</u> such a large amount of money in a short period of time*" (emphasis added) [**3/154**]

27. Not only is there no reason to construe one regime as ousting the other but such an approach would undermine the statutory purpose of the regime. But in any event, the Commission does not explain the assumption it makes that the donations regime rather than the expenses regime that takes priority. The purpose of imposing a spending limit is to ensure that wealth cannot be used to distort the outcome of elections and referendums. Consistently with that purpose, if any priority is to be given to one regime over another (and there is no reason why it should be) priority ought to be given to the rules that control expenditure rather than the rules aimed at ensuring donations come from a lawful source.

28. Further, despite having been asked specifically to do so, the Commission has made no effort to explain how its interpretation is consistent with the statutory language or purpose. It simply asserts that a donation <u>cannot</u> constitute a referendum expense and that the legislation must be interpreted accordingly.

29. The closest it has come to advancing an argument on this issue is in its Summary Grounds at [**1/55/§41**], where it says that the word which must be given a purposive interpretation is 'incurred' ("*the word 'incurred' must have a meaning that allows permitted participants to give donations to other permitted participants*"). That is entirely circular and question-begging; it does not explain <u>what</u> meaning the Commission submits should be given to the word 'incurred', or what criterion it is said to impose (and which Vote Leave's payments to AIQ in respect of campaign-related services did not meet).

30. Replying to that submission, the Claimant pointed out at [**1/73/§17**] that even though the 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." The Commission's Response [**1/76**] was again completely silent on that issue, instead simply maintaining that there is a difference between 'incurred' and 'paid' without explaining what that difference is.

31. The Claimant submits that there is no good reason to give the word 'incur' any meaning other than 'bring upon oneself'[5]. In particular, there can be no suggestion that (i) an expense can only be 'incurred' where an obligation to pay is assumed independently of payment being made (because if that were right, the purchase of a train ticket or of goods in a shop would fall outside the expenses regime), or (ii) an expense can only be 'incurred' if a sum of money is paid or promised in return for a service provided directly to the party paying or promising it (because several of the examples in Schedule 13 are inconsistent with any such suggestion, such as the payment of transport expenses for campaigners (paragraph 1(7)) and costs incurred in connection with the attendance of persons at rallies or other events (paragraph 1(8))). Indeed, the fact that services given for free must be accounted for as expenses 'incurred' puts an end to any argument that some special meaning must in this context be given to the meaning 'incurred'.

32. In this case, depending on how the admitted facts are analysed, it is already clear that Vote Leave Ltd either:

    32.1 paid a sum of money to AIQ in return for services to be provided to Mr Grimes; or,

    32.2 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.

33. Either way, it is difficult to see any interpretation of s.111 of PPERA 2000 which does not embrace that spending.

[5] Oxford English Dictionary, 'incur', sense 4a: "*To run or fall into (some consequence, usually undesirable or injurious); to become through one's own action liable or subject to; to bring upon oneself.*" All other senses apart from 1c ("*To devolve or accrue; to supervene*") are listed as obsolete.

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

34. Paragraph 22 of Schedule 1 to EURA 2015 [**4/64**] makes provision for expenses incurred by persons 'acting in concert' and their treatment under the spending limits. In short:

    34.1 persons will be regarded as having acted in concert where expenses are incurred by or on behalf of two or more individuals or bodies "*in pursuance of a plan or other arrangement…with a view to, or otherwise in connection with, promoting or procuring a particular outcome of the referendum*"; [para. 22(1)(a)].

    34.2 where a designated official campaign acts in concert with another person, all expenses incurred by either of them pursuant to the plan or arrangement are treated as incurred by the designated official campaign.

35. There is clearly a factual question as to the extent to which Vote Leave directed or coordinated the spending of the 'donated' money on AIQ, and it is hoped that the Commission will address that question fully in its new investigation. However, even leaving that aside and focusing on the facts already established, the Claimant submits it is clear that the expenses were incurred in concert and should therefore be treated as incurred by Vote Leave under paragraph 22 of Schedule 1.

    35.1 There was clearly a plan or arrangement for the incurring of expenses by the 'donees'. Mr Grimes would not have been in a position to commission £625,000 worth of services from AIQ unless he had first been promised the money; in other words, a plan or arrangement as to the provision of the money was a necessary precondition to any expenses being incurred [**1/31/53.2**]. Second, it is clear from contemporaneous emails that Vote Leave was aware that the money would be spent on AIQ's services before it had even decided how much it would donate, let alone communicated that decision to Mr Grimes; in other words, the nature of the expenses to be incurred was discussed before the arrangements were put in place. [**3/5**].

    35.2 The only issue is therefore whether the plan or arrangement also involved Vote Leave incurring any referendum expenses. Even if (contrary to Ground 1) the purchase of AIQ's services did not itself constitute a referendum expense incurred

by Vote Leave, the avowed purpose of the arrangement was to allow Vote Leave to use its money without it counting towards its own spending limits [**3/194**] – in other words, to allow it to incur <u>other</u> referendum expenses up to £7m without having to account for the £725,000 paid to AIQ [**1/31/53.3**]. That is inherent in a plan, the purpose of which was to ensure that Vote Leave's surplus funds could be spent on the campaign.

35.3 That being so, it is clear on the facts already known that there was a plan or arrangement pursuant to which both Vote Leave and Mr Grimes were to incur referendum expenses in pursuit of a 'Leave' outcome. Mr Grimes's expenditure must therefore be treated as Vote Leave's, and Vote Leave exceeded its limit.

36. The Electoral Commission's case on Ground 2 is unclear. It accepts that "*[t]here 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?)*" [**1/58/§49**]. However, it then simply lists a number of factors which do not "*of itself mean that there was joint working*" [**1/58/§51]**. But it has not articulated any answer to the proposition that the known facts, as set out above, together mean that expenditure was incurred pursuant to a common plan or arrangement.

Ground 3: The Electoral Commission failed in its regulatory obligations

37. If the Electoral Commission misdirected itself and/or gave incorrect advice to participants in the Referendum, then it will have failed in its duty to supervise the conduct of the Referendum.

38. There are strong reasons to believe that it did give incorrect advice to Vote Leave on issues relevant to Grounds 1 and 2. In particular:

38.1 On 30 January 2017, Dominic Cummings (the Campaign Director of Vote Leave) published a post on his personal blog entitled "*On the referendum #22: Some basic numbers for the Vote Leave campaign*", in which he itemised "*the £13.5 million we spent*", saying: "*5% was given to other campaigns (this was suddenly allowed in the last few weeks of the campaign by the Electoral Commission).*"

38.2 On 18 September 2017, Mr Cummings wrote on Twitter.com in response to discussion about the lawfulness of the way in which the 'donation' to Mr Grimes had been treated: "*u seem unaware (not blaming u no reason u wd know) of a crucial fact: the EC gave us written permission in advance for what we did"*

38.3 From documents subsequently disclosed it appears that Vote Leave wrote to the Commission on 19 August 2016 in response to an enquiry about the donations to Mr Grimes, saying: "*We wish to be open and clear in our explanations to you and so let me first set out how we as an organisation approached donations. During the campaign Vote Leave sought guidance from you on making a donation and we were grateful for the guidance given by [REDACTED] of May 20th 2016. […] We were mindful of the advice you gave on the meaning of 'working together and coordination' and the required 'honest assessment' of whether making donations might amount to co-ordination*."

39. The Commission's response to this ground of challenge is extremely short: "*The short answer to this Ground is that, as far as EC is aware, no such advice was ever given*." [**1/59/§53**] In other words, it resists the claim on the facts. It is therefore notable that it has refused to give disclosure of what it <u>did</u> say to Mr Cummings or anybody else at Vote Leave on this issue, and that it has expressly refused to provide any disclosure on the grounds that the claims are unarguable: "*If, as the Defendant respectfully submits, this is a claim without substance questions of further disclosure do not arise.*" [**1/49/§11**]

40. Mr Cummings appears to be categorical that "*written permission in advance*" was given to Vote Leave "*for what we did*". There is clearly a prima facie case that such permission was given. If the Commission considers Mr Cummings to be wrong then there is no reason why it cannot disclose, unredacted, the written correspondence which it <u>did</u> have with Vote Leave, so that the Claimant and the Court can determine which of them is mistaken.

41. It is not consistent with the Commission's duties to the Court for it simply to assert that the claim has no factual substance and then to rely on that alleged lack of factual substance as a reason for withholding the relevant facts.

The claim is not academic

42. The issues raised by the above grounds are not academic; they remain disputed and live and have a direct bearing on the investigation the Commission is conducting or about to conduct.

43. This is not a case where the need to resolve the issue has fallen away because the issues do not or can no longer arise (such as R (Ali and Murshid) v Inner London Education Authority [1990] COD 317, where the defendant authority was shortly due to be abolished). Nor is it a case where the claim would serve no purpose because the Defendant has accepted the Claimant's allegations or analysis of the law.

44. Rather, it is a case where (i) there are issues of ongoing importance which remain unresolved notwithstanding the Commission's decision to reopen the investigation, and (ii) the reopened investigation may proceed on a legally incorrect basis if the issues are not determined now. Both of those factors militate in favour of the Court granting permission and hearing the claims.

    44.1 As to the first factor, see for example R (Sacupima and others) v Newham London Borough Council [2001] 1 WLR 563. The applicants were homeless persons who alleged that their local authority had not discharged its statutory duty to provide suitable accommodation. By the time the matter reached the Court of Appeal, the applicants had been provided with suitable accommodation. The Court of Appeal nevertheless agreed to hear the case, because although the dispute was "*now a matter of history*" for the applicants, *"From the council's point of view, the issues in these proceedings are of considerable practical importance. It is concerned that Dyson J's judgment would place in jeopardy their ability to use, as was the case in relation to all these applicants, bed and breakfast accommodation outside London as a temporary expedient while determining what, if any, duty was owed, and how to meet it [….] Despite the fact that in one sense the issues in these appeals are academic, all parties agree that they are ones which this court can and should properly resolve, bearing in mind their practical ramifications"* (see 566A).

    44.2 Similarly, in R v Sunderland Juvenile Court [1988] 1 WLR 398, the Court of Appeal agreed to hear a judicial review claim concerning the lawfulness of the juvenile court's decision to disclose a document to a social worker. Balcombe LJ held at

402: *"The first question which arises on this appeal is whether we should entertain it at all, having regard to the fact that the particular relief claimed is academic, the report having been long since disclosed. However, we were told that the question whether the report of a guardian ad litem should be disclosed to an 'independent' social worker instructed on behalf of the parents is one of some general interest: that seven cases are awaiting our decision in the Sunderland, Middlesbrough and Houghton-le-Spring districts alone. In any event, we clearly have power to grant a declaration in an appropriate case: see R.S.C, Ord. 53, r.1. In my judgment, it is right that we should entertain the appeal and, whether or not we grant a declaration, should try and give guidance to justices who may be faced with this question in the future."*

44.3 In 'Judicial Remedies and the Constitution' (MLR 1994, 57(2), 213-227), Sir John Laws identified a "*clear distinction between a case where the claimant seeks in effect the court's advice only so that he can further his own private interests, and one where he seeks judicial guidance for the future fulfilment of duties which he owes or (as in Gillick[6]) are actually or putatively owed to him*", arguing that in the latter situation it is far more appropriate for the Court to hear and determine the issue. This case is clearly in the latter category, because it concerns the discharge of the Commission's duties in respect of the regulation of campaign spending. If anything, it is a clearer case than that identified by Sir John Laws, because the guidance would not relate to the future fulfilment of duties but to the proper scope and conduct of investigations which the Commission is conducting now.

44.4 As to the second factor, see *R (London Borough of Kensington & Chelsea) v Secretary of State for the Environment* (1987) 19 HLR 161. An inquiry had been opened in respect of compulsory purchase orders made by the local authority in respect of property owned by Nicholas Van Hoogstraten. In an interlocutory decision, the inspector conducting the inquiry had excluded evidence of Mr Van Hoogstraten's harassment and intimidation on the grounds that it was irrelevant. The local authority sought judicial review of that decision, and the claim was resisted on the grounds (among others) that it was premature while the inquiry was underway. Taylor J dismissed that argument and upheld the claim, saying at 174: *"Practically the whole and certainly the main thrust of the applicant's case at the inquiry, has by the*

[6] *Gillick v West Norfolk & Wisbech AHA* [1986] AC 112, in which the House of Lords entertained a challenge to a memorandum of guidance from the DHSS concerning circumstances in which contraception might be prescribed to children under 16 without reference to the parents.

challenged ruling been blocked as irrelevant, in my judgment, wrongly so. To decline to intervene now would not only postpone redress for a long time, and until much money has been spent, but it would stultify the presentation of the applicant's real case; the inquiry would be a barren exercise, and if it had to be repeated and reconvened, witnesses' memories would be stale and faulty." The same considerations apply in this case; since the Commission has agreed to investigate, there is every reason to resolve these issues so that the investigation can take place on a correct legal basis and so that the risks identified by Taylor J can be avoided.

45. To put it another way, if the Commission had published in a guidance document the views it has expressed in its pleadings in this case – and had explained, for instance, its view that a transaction which falls within the donation regime is thereby deemed to fall outside the expenses regime, or the significance which it attaches to the word "*incurred*" – there would be no doubt that the Claimant would be entitled to seek a ruling that that guidance was wrong. As Lord Bridge held in Gillick at 193: "*if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration*." The only reason the Commission is in a position to argue that the claim is academic is because, despite having a statutory power to publish guidance in relation to these matters (Schedule 13 PPERA 2000, paragraph 3), it has withheld from publication its view on these issues. Indeed, as explained above it has expressed concern as to their lack of clarity.

Application for expedition

46. The Claimant applies for expedition of the substantive claim if permission is granted.

46.1 The outcome of the Referendum continues to exert an extremely powerful influence over UK political life. If the Court were to uphold the claim, and to hold that the Leave campaign did break the campaign spending limits, that might well be a factor which policymakers and the public would wish to take into account in deciding how to give effect to the referendum result.

46.2 Second, it is not at all unlikely that there may be another referendum or election in the near future. It is important that the legal position be settled well in advance of the start of any campaign so that the Commission can regulate the campaign properly. It is unlikely that the Court would be able to resolve any such dispute sufficiently quickly if a referendum or election is announced; indeed campaigning activity would be likely to begin immediately. It follows that it is in the public interest for the issues to be clarified and resolved now so as to enable both the Commission, participants and the public to understand the regulatory regime.

47. Whilst the claim may not be as urgent as some before this Court, in view of the very significant time that has already elapsed since the Referendum and the Commission considering these issues and expenses declared, it is suggested that a substantive hearing should take place in the Easter term 2018.

Cost capping order

48. Assuming permission is granted, the Claimant applies for a CCO under s.88 Criminal Justice and Courts Act 2015 and CPR r.46.17, limiting its liability for the Defendant's costs of the proceedings at £5,000, with a cap of £40,000 on its ability to recover its costs from the Defendant if successful. The reasons for seeking that order are set out in the witness statement of Jolyon Maugham at [2/10/§40-42]. In summary:

48.1 The Claimant is a campaigning organisation with no substantial assets of its own except what it can raise through crowdfunding in respect of individual proposed cases.

48.2 To date it has raised a total of £48,662 from 1,723 members of the public to pursue this case (or approximately £45,742 after deducting the crowdfunding platform's commission).[7]

48.3 Its lawyers are working at reduced rates. Nevertheless even with this significant reduction in fees insufficient funds would be available to satisfy an adverse costs order if made. The result is that unless a costs capping order is made it is unlikely that they Claimant will be able to continue with the proceedings.

[7] The current progress of the crowdfunding campaign is visible at https://www.crowdjustice.com/case/did-vote-leave-break-spending-limits/

48.4 The case raises issues of general public importance concerning not only one of the most significant political events in living memory but also the proper interpretation of spending limits generally, which are capable of having an effect on the outcomes and democratic legitimacy of elections and referendums in future. The public interest requires that the issues be resolved; it is vital that participants in an election and referendum have a clear understanding of the rules that apply to them and that the Commission understands the rules it must enforce.

48.5 That clarity and understanding can only come through the Court resolving the differences of analysis which have arisen, and these proceedings provide an appropriate means of doing so. Indeed, but for these proceedings the Commission would never even have set out its position as to the interface between the donation regime and the expenses regime, and in particular its understanding that once a payment is treated as a donation any application of the spending limits is ousted altogether.

48.6 Finally, the Claimant confirms that it does not stand to gain financially or in any other private respect of the relief sought, nor is it aware of any respect in which those who have contributed to the crowdfunding campaign could do so.

Costs

49. Either way, the Claimant should have its costs up to the service of the Commission's Summary Grounds on 20 November 2017, when the decision to commence a new investigation was announced.

49.1 As Lang J held on 18 January 2018, "*the Claimant's ground 4 has prompted the new decision, and to that extent the claim has succeeded*".

49.2 The Claimant specifically invited the Commission in pre-action correspondence to reopen its consideration of these cases [**3/259**]. That invitation was rejected [**3/268-269**]. It was only after the proceedings were prepared and issued that the Commission revisited that decision.

49.3 Although the Commission has suggested in its Summary Grounds at [**1/60/§57**] that the investigation "*has been prompted by further information that has come to light since the decision the subject of this challenge*", it has not at any point identified any

information which it did not have at the point at which in pre-action correspondence it refused to reconsider. There does not appear to be any reason why it could not have done so earlier, and its failure to do so was inappropriate and contrary to the Judicial Review Pre-Action Protocol.

Conclusion

50. The Claimant therefore invites the Court to:

50.1 Grant permission on Grounds 1-3;

50.2 Make directions leading up to a hearing of the claim in the Easter term 2018;

50.3 Make a CCO in the terms of the draft at [**1/42**]; and,

50.4 Order the Commission to pay the Claimant's costs up to and including 20 November 2017.

JESSICA SIMOR QC

Matrix Chambers

TOM CLEAVER

Blackstone Chambers

8 March 2018.