

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT

Claim No:

BETWEEN:

R (GOOD LAW PROJECT)

Claimant

and

ELECTORAL COMMISSION

Defendant

and

DEMOCRATIC UNIONIST PARTY

Interested Party

---

STATEMENT OF FACTS AND GROUNDS

---

**Introduction and Summary**

1. This is a challenge to the refusal by the Electoral Commission ("the Commission") to take action in respect of apparent contraventions of electoral law in relation to spending reported by the Democratic Unionist Party ("DUP") in the 2016 EU Referendum ("the Referendum").
2. The case concerns two underlying matters in respect of which, on publicly-available facts which do not appear to be subject to any material dispute, it appears the provisions of the Political Parties, Elections and Referendums Act 2000 ("PPERA 2000") have been contravened:
  - 2.1 First, the fact that substantial referendum expenses which were reported by the DUP appear in fact to have been incurred by the Constitutional Research Council ("CRC"), an unincorporated association, which did not register as a participant in

the Referendum and did not report its spending and donations as required by Part VII of PPERA 2000.

- 2.2 Second, the fact that the DUP appears to have accepted substantial donations from the CRC without enquiring properly into whether the CRC was a permissible donor, as required by Part IV of PPERA 2000 as a precondition to accepting the donation.
3. As to the first matter:
  - 3.1 The Commission's decision to take no action is based on an error of law.
    - 3.1.1 The Commission has adopted an interpretation of PPERA 2000 under which a person who pays money to discharge another person's liability cannot be treated as incurring a referendum expense, even if the payment is made directly to a supplier in respect of particular campaign-related goods or services and even if the paying party arranged the transaction itself.
    - 3.1.2 The Divisional Court held in R (Good Law Project) v Electoral Commission [2018] EWHC 2414 (Admin) that that interpretation of PPERA 2000 is legally erroneous.
    - 3.1.3 The Commission nevertheless maintains that it is correct and has refused to revisit its decision to take no action.
  - 3.2 Further, to the extent that the Commission has revisited the decision to take no action in light of the Divisional Court's judgment, it has misapplied its own Enforcement Policy in doing so, and/or reached a decision which no reasonable regulator could reach.
    - 3.2.1 Its position, as set out in a letter dated 19 October 2018, is that (i) it is not an appropriate use of resources to take action on the basis of the law as declared on 14 September 2018 unless and until all possible appeals are exhausted, and (ii) even then it may not be appropriate to take action in respect of the CRC's spending because other factors such as "whether a

*strong defence existed to any offence that could be investigated or where the balance of the public interest lies."*

3.2.2 The public interest is overwhelmingly in favour of the Commission taking action. The spending in question was very large, and the vote which it helped to procure continues to exert huge influence over all aspects of political life. There is a strong public interest in ensuring that the records of campaign spending in relation to it are accurate, as the statutory arrangements require. There is also a strong public interest in ensuring that the identity of those spending very substantial sums in the referendum is transparent.

3.2.3 Resource constraints cannot justify a decision to take no action. The Enforcement Policy provides that the Commission will take action "*where it is necessary and proportionate to do so in order to meet our enforcement aim and objectives*", one of which is to "*bring any organisation or individuals failing to adhere to the law into compliance*". There can be no suggestion that an investigation would be disproportionate: the amounts in issue are substantial, the facts are straightforward and appear in large part to have been established already, and the law has already been clarified by the Divisional Court.

3.2.4 Nor can the possible existence of "*defences*" (none having been identified) justify a decision to take no action. Irrespective of whether any offence has been committed, there is a strong public interest in the Commission investigating contraventions (which need not involve any guilt) and taking action to ensure that the records relating to spending in the Referendum are accurate.

3.3 As to the second matter:

3.3.1 Part IV of PPERA 2000 requires participants to verify that all donations come from a permissible donor. If the donor is not a permissible donor, or the recipient is unable to ascertain the donor's identity, s.54 PPERA 2000 requires that the donation be refused.

- 3.3.2 The DUP's own Treasurer is on record as saying that he had "*never heard of*" the CRC before or since receiving the donation, that it was not "*his business*" nor that of "*anybody in our party*" to find out anything about the membership of the CRC before accepting the donation, and that "*the people whose duty it is to monitor and regulate these things*" were "*the Electoral Commission*".
- 3.3.3 Either he was misrepresenting the steps the DUP took to comply with Part IV of PPERA 2000 before accepting the donation, or he was not and the DUP accepted the donation in breach of those requirements.
- 3.3.4 In those circumstances there are clearly reasonable grounds to suspect that a contravention and/or an offence has been committed.
4. There are ample grounds for action in relation to the above matters. At the very least there are grounds for further investigation as to whether:
- 4.1 the CRC contravened Part VII of PPERA;
  - 4.2 having done so it should now be ordered under Schedule 19C paragraph 5 to take steps to file the information it would have been required to file if it had complied;
  - 4.3 the DUP contravened Part IV of PPERA; and,
  - 4.4 having done so it should now be ordered to forfeit the donation.
5. Accordingly, the Claimants seek:
- 5.1 an order quashing the decision(s) of the Commission not to take any further action in respect of the matters above;
  - 5.2 an order requiring the Commission to reconsider whether to open an investigation into, or bring a prosecution against, the CRC, the DUP, or related individuals on the basis of a correct understanding of the law, or otherwise to take appropriate action;
  - 5.3 any further Order that the Court may consider appropriate.

### **Factual background: The CRC's "donation"**

6. Full information about the money in question has not been published because of the effect of s.71 PPERA 2000, which preserves the secrecy of information about donors to Northern Ireland political parties. However, several facts are apparent from published sources and do not appear to be capable of significant dispute.
7. On 24 February 2017 it was reported by the BBC that the DUP had "*confirmed it received a Brexit donation of about £435,000*" from the CRC, and that Sir Jeffrey Donaldson MP had said that "*about £425,000 was spent on the Brexit campaign*", with "*around £9,000 [being] transferred to the party's funds with the agreement of the [CRC]*"<sup>1</sup>.
8. The BBC also provided a breakdown of how that money was spent, apparently drawn from the Commission's records of the referendum expenses declared by the DUP:

*"£282,000 on advertising in Metro newspaper in support of Brexit  
£99,616 on promotional material  
£32,750 with Canadian IT and consultancy firm  
£10,823 spent in Northern Ireland"*.

9. Further, the invoice filed with the Commission in support of the DUP's declared spending of £282,000 makes clear that that amount related to a single advertisement placed in the Metro newspaper on 21 June 2016<sup>2</sup>.
10. On 26 June 2018, BBC Northern Ireland broadcast a documentary ("*Spotlight: Brexit, Dark Money & the DUP*") in which it further reported that:
  - 10.1 The advertisement in the Metro newspaper was arranged directly by Mr Richard Cook of the CRC, rather than by anybody at the DUP; and,
  - 10.2 When interviewed about the donation from the CRC, the DUP's Treasurer (Mr Gregory Campbell) had said: "*How would I be or anybody in our party be expected to know who the individuals are that are involved in the organisation? Why, why would it be my business to find out? [...] This is all nonsense, just nonsense. [...] If the Electoral*

<sup>1</sup> Page 3.155 of the bundle

<sup>2</sup> Page 3.154 of the bundle

*Commission had come back and said there was something seriously amiss here, we would have had to say 'right guys, where did this money come from?' or 'who gave it to you?'"*

11. The interview<sup>3</sup> with Mr Campbell was conducted by SourceMaterial.org, which possesses a full recording. In the full version of the interview, Mr Campbell is recorded:
  - 11.1 being asked who the CRC was (*"they are not a website in their own name, so who are they, apart from your man that was in the papers?"*) and answering: *"Presumably they are a right-of-centre, pro-leave the EU, but if you rewind a year before that, David Cameron initiated a mail shot [...]"*
  - 11.2 being asked whether he had heard of the CRC *"before they came"*, and answering *"I haven't heard of it before and I haven't heard of it since. It doesn't make any difference. The important people are the Electoral Commission"*; and,
  - 11.3 being asked *"You are treasurer of the party, so you can accept money from people you haven't heard of?"* and answering *"And who are the people whose duty it is to monitor and regulate these things? The electoral commission."*
12. After the programme was broadcast, the Commission wrote to the BBC seeking information about the allegations made in the programme. The BBC replied with further information, including (specifically in relation to the question of the Metro advertisement) that a source, which the BBC was not prepared to identify, had confirmed that Mr Cook had booked the advertisement in the Metro newspaper himself, and that neither the DUP nor Mr Cook had denied it<sup>4</sup>.
13. On 2 August 2018 the Commission wrote a letter to BBC Northern Ireland referring to the allegations in the Spotlight documentary and expressing the conclusion that *"we do not have grounds to open an investigation into the allegations about breaches of electoral law"*<sup>5</sup>. That letter was published and no investigation was opened.
14. Further, from documents disclosed by the Commission on 28 September 2018 in response to a Freedom of Information Act request, it appears that on 27 June 2018, a day after broadcast of the Spotlight documentary, the Commission discussed the allegations

<sup>3</sup> Page 3.164 of the bundle

<sup>4</sup> Page 3.111 of the bundle

<sup>5</sup> Page 3.115 of the bundle

concerning the DUP's failure to verify that the donation came from a permissible donor and concluded that "*what [Mr Campbell] appears to have said is sufficient for us to have concerns*"<sup>6</sup>. However, rather than treating those concerns as grounds for opening an investigation into whether a contravention had been committed, the Commission simply wrote to Mr Campbell on 27 June 2018 reminding him of his obligations and saying "*I trust this letter assists you*"<sup>7</sup>.

### **The legal framework in outline**

#### *The Political Parties, Elections and Referendums Act 2000 ("PPERA 2000") and the European Union Referendum Act 2015 ("EURA 2015")*

15. PERA 2000 lays down rules in relation to the conduct of referendums, including limits on expenditure of participants and non-participants, requirements as to who may authorise payments and obligations to provide detailed information in expenditure returns to the Commission.
16. EURA 2015 provided for the holding of the referendum, and also made provision in Schedule 1 specific to the Referendum, partly modifying PERA 2000 for the purposes of the Referendum and partly freestanding.
17. Section 117 PERA 2000 provides that save where an individual or body has registered as a 'permitted participant', it is prohibited from incurring referendum expenses in excess of £10,000 during the referendum period, breach of which constitutes a criminal offence. Section 105 provides for individuals and bodies to become permitted participants by making a declaration to the Commission to that effect, in accordance with section 106. The DUP was a 'permitted participant' within the meaning of PERA 2000, but the CRC was not.
18. The term "*referendum expenses*" is defined in s.111(2) PERA 2000 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."*

<sup>6</sup> Page 3.19 of the bundle

<sup>7</sup> Page 3.107 of the bundle

19. The expenses falling within Part 1 of Schedule 13 are extremely broad, and include "*advertising of any nature*" and "*market research*".
20. S.111(3) provides, in summary, that an expense is incurred for "*referendum purposes*" if it is incurred in connection with promoting or procuring a particular outcome in a referendum.
21. S.120(2) PPERA 2000 requires permitted participants to submit a return after the end of a referendum period which contains, among other things, "*a statement of all payments made in respect of referendum expenses incurred by or on behalf of the permitted participant during the referendum period in question*".
22. It is an offence under s.118(2) PPERA 2000 for:
  - 22.1 a permitted participant which is a "*body*" to incur expenses above the statutory limit; and,
  - 22.2 the designated "*responsible person*" of such a body to authorise such expenses to be incurred, if he knew or ought reasonably to have known that the expenses would be incurred in excess of the limit.
23. It is also an offence under s.122(4) PPERA 2000 for a person without reasonable excuse to deliver a return which does not comply with the requirements of s.120(2) PPERA 2000.

*Rules relating to donations*

24. Section 54 PPERA 2000 provides that a registered party must not accept a donation if either (i) the donor is not a permissible donor, or (ii) the party is unable to ascertain the donor's identity. Section 58 empowers the Commission to apply for an order that a donation received in breach of that provision be forfeited.
25. Where a donation is said to be made by an unincorporated association (such as the CRC), it is particularly important for the recipient to establish whether that is in fact the case or whether the donation is in truth being made by one or more individuals. That is because without such a requirement it would be open to individuals to circumvent the requirement to declare their own involvement by giving the name of a purported



organisation which has no legal existence. To that end, the Commission's published guidance on "*Permissibility checks for political parties*" states, among other things, that:

- 25.1 an unincorporated association is a permissible donor if it has more than one member, the main office is in the UK, and it is carrying on business or other activities in the UK;
- 25.2 an unincorporated association should generally have an identifiable membership, rules or a constitution, and a separate existence from its members; and,
- 25.3 recipients "*should consider whether the donation is actually from individuals within it (rather than the association) or if someone within the association is acting as an agent for others. If you think this is the case, you must check the permissibility of all individuals who have contributed more than £500 and treat them as the donors.*"

#### *The Commission's powers and duties*

26. Section 145 PPERA 2000 provides that the Electoral "*Commission must monitor and take all reasonable steps to secure, compliance with the restrictions and other requirements imposed by or by virtue of*" (emphasis added), among other things, Part 7 of PPERA 2000 (concerning referendums and in which all the above-cited provisions of PPERA 2000 appear). Schedule 1 para. 2 PPERA 2000 provides that: "*[t]he Commission may do anything (except borrow money) which is calculated to facilitate, or is incidental or conducive to, the carrying out of any of their functions.*" Accordingly, the Commission's powers and duties involve both supervisory and enforcement functions.
27. Specific investigatory powers, backed by criminal sanctions,<sup>8</sup> are provided in section 146 and Schedule 19B to PPERA 2000, including power to:
  - 27.1 require disclosure from any permitted participant: para. 1 Sch. 19B;
  - 27.2 carry out inspections pursuant to a warrant: para. 2 Sch. 19B;
  - 27.3 issue a notice to any person requiring them to produce information or documentation where the Commission has reasonable grounds to suspect that a person has committed a criminal offence or contravention: para. 3 Sch 19B;

<sup>8</sup> Para. 13 Sch 19B PPERA

- 27.4 obtain an order from the High Court/Court of Session for document disclosure or the provision of information following non-compliance with the aforesaid notice: para. 4 Sch. 19B;
- 27.5 retain and make copies of documents and records obtained pursuant to the abovementioned order: paras. 6 and 7 Sch. 19B.
28. It is an offence under Schedule 19B paragraph 13 for a person to fail to comply with such a requirement without reasonable excuse.
29. Section 147 PPERA 2000 by reference to Schedule 19C provides for civil sanctions in relation to the commission of offences under the Act and the contravention of restrictions or requirements imposed by or the Act. This includes the power to issue 'stop notices', breach of which constitutes a criminal offence and to accept enforcement undertakings: Sch 19C, Part 3, para. 10 and Part 4, para. 15 PPERA 2000 respectively.
30. Section 148 also establishes offences concerning the withholding or concealment of information or documents that are disclosable pursuant to the other provisions of the Act.

### *Enforcement Policy*

31. Pursuant to PPERA 2000, the Commission is required to prepare and publish guidance as to the use of its powers to investigate and sanction potential offences and contraventions of PPERA 2000. The relevant latest Guidance on Enforcement was published in April 2016. As stated in paragraph 1.2 of that Enforcement Policy, the Commission is required to have regard to it when exercising its enforcement functions.
32. The Enforcement Policy provides:
- 2.1 The aim of our enforcement activity is to ensure that the PPERA rules on party and election finance are complied with, and that people throughout the UK are confident in the integrity and transparency of party and election finance.
- 2.2. In order to meet that aim, we have the following enforcement objectives:
- ensure that there is transparency about party and election finance
  - ensure that the rules on party and election finance are followed

- eliminate any benefit those we regulate may obtain from failing to comply with the law
- bring any organisation or individuals failing to adhere with the law into compliance
- deter non-compliance

2.3. Our approach to our enforcement activity is that we will:

- Regulate in a way that is effective, proportionate and fair.
- Use advice and guidance proactively in order secure compliance and to give those we regulate a clear understanding of their regulatory requirements.
- Undertake supervisory work to ensure that regulated organisations and individuals meet their legal requirements.
- Take enforcement action, including using investigatory powers and sanctions, where it is necessary and proportionate to do so in order to meet our enforcement aim and objectives.
- Take the facts of each situation into account.

#### **The Commission's erroneous interpretation of PPERA 2000**

33. In October 2017 the Good Law Project commenced judicial review proceedings challenging the Commission's decision to take no action in respect of certain spending declared to have been incurred in relation to the Referendum by various 'Leave' campaigners on services provided by the Canadian company Aggregate IQ.

34. The principal issue of law in those proceedings concerned the circumstances in which a person is to be treated as 'incurring referendum expenses' under s.111 PPERA 2000.

34.1 The material facts of the case were that:

34.1.1 Mr Darren Grimes, a 'Leave' campaigner, had submitted returns declaring that (i) he had incurred around £625,000 of referendum expenses in relation to Aggregate IQ, and (ii) he had received equivalent sums as donations from Vote Leave, the official 'Leave' campaign, on or around the same dates;

34.1.2 it was apparent from documents in the Commission's possession that the money declared by Mr Grimes as having been spent by him had in fact been paid directly by Vote Leave to Aggregate IQ, without ever entering Mr Grimes's hands;

- 34.1.3 because of Vote Leave's other spending, it could not lawfully have incurred the relevant expenditure itself: if the expenses declared as having been incurred by Mr Grimes had in fact been incurred by Vote Leave, Vote Leave would have substantially exceeded its statutory spending limit.
- 34.2 The Good Law Project also alleged that the expenses had in fact been incurred pursuant to a common plan or arrangement between Mr Grimes and Vote Leave within the meaning of paragraph 22 of Schedule 1 to the European Union Referendum Act 2015 ("EU RA 2015"), and that the Commission had acted unreasonably in refusing to investigate an apparent contravention in that regard. Following the issue of proceedings the Commission opened such an investigation, and later concluded that there had indeed been such a contravention, but for the purposes of the hearing before the Divisional Court it was assumed that there was no such common plan and that Mr Grimes had decided to spend the money on Aggregate IQ's services himself.
- 34.3 The Commission's position was, in summary, that Vote Leave had not incurred any expenses within s.111 PPERA 2000: (a) Mr Grimes had incurred the expenses by purchasing the services, (b) Vote Leave had made a donation to Mr Grimes by defraying his liability for those services, and (c) because Vote Leave was to be treated as a donor in relation to the cost of those services, it could not also be treated as having incurred referendum expenses.
- 34.4 The Good Law Project submitted that that approach was wrong in law, and that the true test was whether the statutory criteria in s.111 PPERA 2000 were met, namely (i) whether Vote Leave had incurred an expense, (ii) whether the expense fell within Part 1 of Schedule 13 to PPERA 2000, and (iii) whether it had incurred the expense for referendum purposes (i.e. with a view to procuring a particular outcome in the Referendum). The expense related to advertising services and so plainly fell within Part 1 of Schedule 13, and it had on any view been incurred with a view to promoting a 'Leave' outcome, so the only issue was whether Vote Leave had incurred an expense. Since it had brought upon itself an outflow of economic benefit (by spending the money), that criterion was also satisfied, and it was to be treated as having incurred a referendum expense.

34.5 The Divisional Court agreed with the Good Law Project. It held at §41 and §80 that the words “*expenses incurred*” should be given their “*natural meaning*” and understood as referring to a reduction of financial resources. At §§80-81 it explained that the statutory criteria in s.111 PPERA 2000 needed to be read together:

*“80. In this way we consider that, while giving the words ‘expenses incurred’ their natural meaning, a coherent distinction can be drawn, which accords with the language and purpose of the legislation, between donations which are referendum expenses incurred by the donor and those which are not. The distinction is between what we will as a shorthand call ‘general’ and ‘specific’ donations. The standard instance of an ordinary, ‘general’ donation is a gift of money made to a permitted participant to be used in whatever way the recipient chooses in seeking to promote a particular outcome of the referendum. Such a donation will be an ‘expense incurred’ by the donor ‘for referendum purposes’. But the expense will not be incurred ‘in respect of’ a matter falling within Part I of Schedule 13 of PPERA. The donor will therefore not have incurred any ‘referendum expenses’. The donation of £1 million which Vote Leave reported receiving on 13 June 2016 (referred to at para 14 above) would appear to fall in this category.*

*81 If, on the other hand, money (i) is paid directly by the donor (by agreement with the donee) to discharge a liability of the donee to pay for goods or services falling within Part I of Schedule 13 of PPERA or (ii) is paid pursuant to an agreement to pay or reimburse the donee for the cost of such goods or services purchased by the donee, or (iii) is given on terms (binding on the donee) that it is to be used to purchase or pay for particular qualifying goods or services, then the expenses incurred in making such a ‘specific’ donation are appropriately regarded as incurred ‘in respect of’ a matter falling within Part I of Schedule 13 of PPERA and hence as ‘referendum expenses’.”*

34.6 It therefore held that the Commission had misapplied the law, holding at §94: “*The source of its error is a mistaken assumption that an individual or body which makes a donation to a permitted participant cannot thereby incur referendum expenses. As a result of this error, the Electoral Commission has interpreted the definition in a way that is inconsistent with both the language and the purpose of the legislation.*”

35. As of 14 September 2018 (the date of the Divisional Court's judgment), that is the correct interpretation of s.111 PPERA 2000.
36. It is also correct in principle. Briefly:
- 36.1 Unlike the Commission's interpretation, it is consistent with the statutory language: it involves the application of the three criteria which are apparent on the face of s.111 PPERA 2000. By contrast, the Commission's interpretation involves the assumption that the 'donation' regime was intended to oust the 'expenses' regime altogether (such that any transaction which involves a donation cannot involve the donor incurring an expense even if the statutory criteria governing expenses are satisfied), an assumption for which there is no statutory basis.
- 36.2 It reflects the reality of the situation. If X 'donates' to Y but imposes a condition as to when and on what Y is to spend the 'donation' the reality is that X is not a donor but is incurring expenditure.
- 36.3 It also prevents the circumvention of the statutory rules concerning expenditure limits. If the Commission's interpretation were adopted, it would be possible for a wealthy campaigner to circumvent the spending limits by purchasing large amounts of campaign-related goods and services for use by other campaigners seeking the same outcome.

#### **Issue 1: The CRC's spending**

37. Applying the law as declared by the Divisional Court, it appears to be indisputable that the CRC contravened the provisions of PPERA 2000 by failing to declare its referendum expenses.
- 37.1 The available evidence appears to show that around £425,000 of the DUP's declared referendum expenses, or in any event certainly the £282,000 spent on advertising in the Metro newspaper, were in fact directed and controlled by the CRC, which also provided the necessary funds.

37.2 The simple application of the law as declared by the Divisional Court to those facts compels the conclusion that the CRC incurred referendum expenses. Taking the Metro advertisement by way of illustration:

37.2.1 The CRC plainly incurred an expense (as the Divisional Court has explained that concept should be interpreted): it provided the money and so it brought upon itself an outflow of financial resources.

37.2.2 The expense was plainly incurred for referendum purposes: the advertisement was explicitly aimed at promoting a 'Leave' outcome in the Referendum.

37.2.3 The expense was plainly within Part 1 of Schedule 13: it related to advertising services.

37.2.4 Further, the CRC's spending was plainly referable to that qualifying expense in the sense described by the Divisional Court at §§80-81 of its judgment. Indeed, this is an even clearer case than that which the Divisional Court was considering.

37.2.4.1 In the case of Vote Leave and Mr Grimes, the relevant services had at least been commissioned by Mr Grimes himself, albeit that Vote Leave had then incurred a referendum expense by making a payment directly referable to those services.

37.2.4.2 In the case of the Metro advertisement, as the Commission was notified by the BBC on 17 July 2018, it was Mr Cook on behalf of the CRC who actually placed the order for the advertisement.

37.2.5 In those circumstances there is no proper basis in the statute for treating the CRC as not having incurred referendum expenses in relation to the cost of the Metro advertisement.

37.3 The same would appear to apply to the remainder of the CRC's 'donation'.

37.3.1 Sir Jeffrey Donaldson MP's account (as reported by the BBC on 24 February 2017) of the sum of £9,000 being "transferred to the party's funds with the agreement of the Constitutional Research Council"

suggests that the remaining £426,000 was never transferred into the DUP's possession. It would appear to follow that the CRC must have made any payments to suppliers directly, referable to particular goods and services.

37.3.2 In any event, from Mr Campbell's subsequent account in the SourceMaterial interview - "*we got an amount of money to use as an advert in the referendum campaign, we used it to the purpose it was given and accounted for it after we had spent it*" - it would appear to follow that the payment was made (in the High Court's language) specifically in order to fund the purchase of advertising, and thereby constituted a referendum expense incurred by the CRC for that reason too.

37.4 It is also more consistent with the inherent probabilities of the situation that the CRC, rather than the DUP, made the relevant purchasing decision(s). In particular:

37.4.1 It is implausible in principle that the DUP, if given a 'no strings' donation of £435,000 (apparently the largest political donation in the history of Northern Ireland), would have taken receipt of only £9,000 of it to use for the purposes of defraying party expenses or in any electoral campaigns, instead spending almost all of it immediately in the 2016 Referendum.

37.4.2 It is particularly implausible that the DUP if given a free choice would have chosen to spend £282,000 - a sum more than twice as large as its total declared party spending across the last three Parliamentary general elections combined - on a single newspaper advert aimed at commuters in London.

37.4.3 By contrast, there is an obvious reason why persons wishing to spend money with a view to procuring a particular outcome in the Referendum would have wanted to channel that spending through the DUP while retaining control of it: namely, the prospect of preserving their anonymity because of the existence of s.71E PPERA 2000 if the amounts were properly to be treated as donations to the DUP.

38. The consequence of the above is that:



- 38.1 The CRC (or, if different, whoever in fact was responsible for the relevant 'donations') incurred referendum expenses during the referendum period of very substantially above a level which required it to register as a permitted participant under s.117 PPERA 2000;
- 38.2 It therefore contravened the spending limits set out in PPERA 2000 by incurring those expenses without registering;
- 38.3 If it had registered as it was required to do, it would have had to file a return as required by s.120 PPERA 2000 which recorded full details of all referendum expenses incurred, and (by virtue of s.120(2)(d) PPERA 2000) all relevant donations received by it.
39. Even if that were not clear, the information available at the very least gives rise to reasonable grounds for suspecting that contraventions (and possibly offences) have been committed.
40. The action which the Commission is empowered to take in relation to the CRC's apparent contravention would include (under Schedule 19C paragraph 5(c)) ordering that steps be taken "to secure that the position is, so far as possible, restored to what it would have been if the offence or contravention had not happened" (Schedule 19C paragraph 5(c)). That would include ordering the CRC to file the return it would have had to file under s.120 PPERA 2000 if it had registered a permitted participant as it was required to do, including details of all referendum expenses incurred and all relevant donations received, so that spending and donations relating to the 2016 Referendum are properly recorded and reported.
41. To the extent that the Commission's inaction to date was based on the mistaken belief that money treated as a donation to the DUP could not also be treated as a referendum expense incurred by the donor, that has now been confirmed to be erroneous in law. The Commission has not identified any other reason for disputing the above analysis.

*The Commission's decision to take no action*

42. On 5 October 2018, the Claimants wrote to the Commission inviting it to take action in respect of the CRC's apparent contravention, and threatening judicial review proceedings if it did not.

43. The Commission replied on 19 October 2018 saying that *"the proposed claim is without merit"*. At §§13-14 of its letter it set out its position as follows:

"13. Your claim suggests there has been unreasonable delay by the Commission in opening an investigation since the High Court delivered its judgment on 14 September, some four weeks ago. There has been no delay by the Commission. Rather, as your clients are aware, the Commission is in the early stages of appealing that judgment and the time for filing an application to the Court of Appeal has not expired. The Commission does not consider it sensible or a good use of its limited resources to pre-empt the outcome of any application it makes to the Court of Appeal by embarking on an investigation before the outcome of application that is filed is known. It is open to you to make representations to the Court of Appeal asking that it expedite its consideration of the permission application once it is filed.

14. Further, your claim presupposes that, even if the judgment were to be upheld, the Commission will necessarily be required to open an investigation. As a responsible regulator the Commission will consider when and if appropriate to do so the implications of the judgment for donations given during the EU Referendum campaign. Whether this would lead to an opening of an investigation will depend on the facts as assessed in line with our Enforcement Policy including whether a strong defence existed to any offence that could be investigated or where the balance of the public interest lies. Should the Commission open an investigation disclosure of such investigation and any findings will be published, in accordance with our Enforcement Policy. In short, your complaint is (if nothing else) premature."

44. In other words, its position is that:

44.1 It would not be *"sensible or a good use of [the Commission's] limited resources"* to apply the law as declared by the Divisional Court unless and until the possibility of an appeal to the Court of Appeal has been exhausted;

44.2 Even if the law were as declared by the Divisional Court, the Commission applying its Enforcement Policy might in any event decide not to take any action, having regard to facts including *"whether a strong defence existed to any offence that could be investigated or where the balance of the public interest lies."*

45. The starting point is that the Divisional Court's judgment represents the law unless and until it is overturned. The possibility that it might be overturned on appeal would not of itself justify the Commission taking no action at all in the meantime.
46. That being so, the Commission's decision is in substance a decision that, having regard to all the circumstances - one of which is the possibility that the Divisional Court's analysis of the law might in due course be held by the Court of Appeal to be wrong - it would not be consistent with the Enforcement Policy to take any action.
47. In adopting that position, the Commission has (i) misapplied the Enforcement Policy, and (ii) acted unreasonably.
- 47.1 The Enforcement Policy provides at paragraph 2.3 that the Commission will "*Take enforcement action, including using investigatory powers and sanctions, where it is necessary and proportionate to do so in order to meet our enforcement aim and objectives.*"
- 47.2 It would plainly not be disproportionate to take action in respect of the apparent contravention, in view of the significance of the contravention and the relatively straightforward facts.
- 47.2.1 The CRC's spending, if treated only as a donation to the DUP (as the Commission contends it should be), constitutes the largest political donation in the history of Northern Ireland. Further, £282,000 of it - a sum more than twice as large as the DUP's total declared party spending across the last three Parliamentary general elections combined - was spent on a single advertisement in the Metro newspaper in the days immediately before the Referendum.
- 47.2.2 The Referendum itself is one of the most important political events in living memory, and continues to exert huge influence over all aspects of political life. It is of great importance that the finance and spending that contributed to the outcome are properly recorded in accordance with the statutory provisions so as to be transparent.
- 47.2.3 The resources required to carry out an investigation into these facts would not appear to be unusually great. The facts are straightforward,

and it is clear on the law as recently declared by the Divisional Court that those facts involve a contravention.

- 47.3 Further, the existence of a possible defence is not a consideration capable of supporting a decision to take no action. First, no defences have been identified so the point is hypothetical. Second, even if there were a defence, the consequence would only be that no criminal sanction could result from the investigation: there would still have been a contravention of the statute and the record would still be incorrect. Given the sums involved there is a freestanding public interest in ensuring that major errors are corrected, even if those errors were (ex hypothesi) innocently made.
48. Accordingly, the Commission's decision to take no action should be quashed and an order should be made requiring it to reconsider.

*Issue 2: The DUP donations*

49. As noted above, Mr Campbell is recorded as saying the following in his interview with SourceMaterial:

"Q. The organisation was the constitutional research council... so who are they, apart from your man that was in the papers?

"A. Presumably they are right of centre, pro-leave the EU [...]"

"Q. Had you heard of the CRC before they came?

"A. I haven't heard of it before and I haven't heard of it since. It doesn't make any difference. The important people are the Electoral Commission [...] And who are the people whose duty it is to monitor and regulate these things? The Electoral Commission. It's their verdict that counts. Not what you think, or what I think, or what somebody else thinks. [...]"

"A. How would I or anybody in our party be expected to know who the individuals are that are involved in the organisation? Why would it be my business to find out?"

50. On 27 June 2018, Louise Edwards of the Commission referred internally to a discussion of the allegations made in the programme, saying: *"Note the programme only broadcast partial comments, with no context. Nonetheless we think that what he appears to have said is sufficient for us to have concerns. We are preparing a letter to Mr Campbell to go in my name that reminds him very clearly of his legal responsibilities under the permissibility rules. This letter will go to Mr Campbell today."*
51. The Commission wrote to Mr Campbell on 27 June 2018 referring to the comments attributed to him in the Spotlight documentary, and saying:
- "There is a duty on the party and you as registered treasurer to ensure that any donation accepted by the party is from a permissible source (section 56 PPERA). If the party and treasurer do not comply with the legislation relating to the permissibility, and the acceptance or return of a donation, the party and the registered treasurer may each be guilty of a criminal offence.*
- When reporting donations to the Commission, you as the registered treasurer are required to make a declaration as to the completeness and accuracy of the report that you are delivering to us. Anyone knowingly or recklessly making a false declaration under this section commits an offence.*
- As you will appreciate from this reminder of your legal obligations as treasurer, it is not correct to say that the Electoral Commission is responsible for ensuring your party only accepts permissible donations.*
- I trust this letter assist you. If you have any further questions regarding your obligations as registered treasurer, regarding donations or any other aspect of the rules, please do not hesitate to contact our advice service on 0333 103 1928."*
52. Mr Campbell replied on 3 July 2018 asserting that he was "fully aware" of his legal duties in relation to the permissibility of donations. He did not, however, say anything about what steps he or his party actually took to discharge those duties.
53. The Commission then announced on 2 August 2018 that it had no grounds for opening an investigation into the DUP's apparent non-compliance with its obligation to take reasonable steps to check donor permissibility pursuant to s.56 of PPERA 2000.

54. The Claimants' letter to the Commission of 5 October 2018, referred to above, challenged this decision of 2 August 2018 as unlawful. It made clear that it would challenge as unlawful any decision to maintain this refusal to investigate.
55. In its response of 10 October 2018 the Commission maintained this refusal. It attached an Annex to its response providing some information about: a) the *routine compliance work* it undertook in August/September 2016 after the DUP had filed its donation report disclosing the substantial CRC donations and b) an investigation it opened on 21 October 2016 into the CRC's failure to declare the donations.
56. By its response and Annex the Commission suggests it has satisfied itself that the DUP took reasonable steps to check the permissibility of the donor/s behind the CRC donations. In particular the Commission relies upon a letter of 27 September 2016 which it received from the DUP which said *how long it has been aware of the CRC and its work*.
57. The content of the obligation imposed on a political party to check donor permissibility is plainly context specific. What may be regarded as reasonable steps in one situation may be regarded as inadequate in another situation. There are a number of features of this donation/purported donor which indicate that the DUP's obligation was significantly more onerous than normal.
- 57.1 The total amount of the donation appears to have been well in excess of previous donations to the DUP or other Northern Irish political parties, by a single donor.
- 57.2 This was not a conventional donation to a Northern Irish political party, for the purposes of its party political activities. This is apparent from the way in which the donation was made and the money almost immediately defrayed. The donation was made in the course of the referendum campaign, in June 2016. The bulk of the money was defrayed directly on referendum campaigning. Substantial payments to Canadian IT companies and to meet the cost of an expensive advertisement in a London "freesheet" (the Metro) are not normally the stuff of Northern Irish party political activities. The fact that only around £10,000 of the donation was spent by the DUP in Northern Ireland confirms the unconventional nature of the exercise.

57.3 The choice of the DUP as notional recipient of this highly unconventional “political party” donation guaranteed that the media as the “watchdog” of the public would not find out about it and begin to question it. This was because in 2016 information about donations reported to the Commission as having been received by Northern Irish political parties could not be disclosed publicly. They were effectively secret. See s.71E of PPERA 2000.

58. The considerations that should lead the Commission properly to investigate the DUP in the way contended for are also fact-specific. There are a number of obvious considerations in this case which point strongly towards a proper, targeted investigation (not merely *routine compliance work*):

58.1 The Annex to the Commission’s response suggests that the entity described as the “CRC” received *gifts* of more than £7,500 in the eighteen months before the donations were made in June 2016 referendum. The implication is that the CRC had been established as, or had become, a vehicle for third party donations to the Leave side of the referendum campaign which would not be identifiable as coming from those third parties and whose identities/status would remain obscure (being hidden behind the CRC entity as the purported donor).

58.2 Further the Annex makes clear that the upshot of the Commission’s 21 October 2016 investigation was a finding that the CRC had disregarded an important obligation placed upon it by PPERA 2000, namely to identify itself to the Commission as an unincorporated association that had made a donation to a political party of over £25,000. See Schedule 19A, paragraphs 1 and 2, of PPERA 2000. This is significant. The Annex explains that the Commission ultimately formed the view that such a notification of the donation would also have been protected from public disclosure by s.71E of PPERA 2000 (because the recipient happened to be a Northern Irish political party). But this is not an obvious or straightforward interpretation of the legislation and it is possible that the CRC considered its donation notification (had it given one) would have been published.

58.3 The subsequent admission by the DUP’s Treasurer in the SourceMaterial interview that he had not even heard of the CRC before the donations (and had not heard of it since) draws into question the suggestion, apparently made in the DUP letter to the Commission of 27 September 2016 that it had been aware of the

work of CCRC for some time. This inconsistency alone might be thought to merit some investigation.

59. The continuing refusal of the Commission to properly investigate the DUP's apparent non-compliance with its obligation to verify donor permissibility is, again, therefore a misapplication of the Enforcement Policy and unreasonable. It appears that Mr Campbell and his party did not take reasonable steps in all the circumstances to establish (i) that the CRC had more than one member, (ii) that it had its main office in the UK, (iii) that it carried on business or other activities in the UK, (iv) that it had an identifiable membership, rules, or a constitution, and a separate existence from its members, or (v) whether the donation was in truth from the association or from one or more individual members of it.

#### **Relief**

60. The Claimant accordingly seeks:
- 60.1 an order quashing the decision(s) of the Commission not to take any further action in respect of the matters above;
  - 60.2 an order requiring the Commission to reconsider whether to open an investigation into, or bring a prosecution against, the CRC, the DUP, or related individuals on the basis of a correct understanding of the law, or otherwise to take appropriate action;
  - 60.3 any further Order that the Court may consider appropriate.

**GAVIN MILLAR QC**

**TOM CLEAVER**