IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal No: C1/2018/2543**

ON APPEAL FROM THE HIGH COURT OF JUSTICE **Claim No: CO/4908/2017**
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
(LEGGATT LJ AND GREEN J)

BETWEEN:

R (THE GOOD LAW PROJECT)

Claimant / Respondent

and

ELECTORAL COMMISSION

Defendant / Appellant

VOTE LEAVE LIMITED

MR DARREN GRIMES

Interested Parties / Respondents

CLAIMANT/RESPONDENT'S SKELETON ARGUMENT
FOR HEARING ON 4 JULY 2019

References to "C/x" are to pages of the Core Bundle; "SB/x" to pages of the Supplementary Bundle; "SB2/X" to pages of the Unagreed Supplementary Bundle, and "AB/x" to tabs in the Authorities Bundle.

INTRODUCTION

1. Part 7 of the Political Parties, Elections and Referendums Act 2000 ("**PPERA 2000**") imposes limits on the amount of "*referendum expenses*" which a person may incur during a referendum campaign. S.111(2) defines "*referendum expenses*" as "*expenses incurred by or on behalf of any individual or body which are expenses falling within Part 1 of Schedule 13 and incurred for referendum purposes*" [**AB/2**].

2. The issue raised by this appeal is whether a participant in a referendum campaign that spends money on something which falls within Part 1 of Schedule 13 (such as advertising), and does so for 'referendum purposes' (i.e. for the purposes of promoting or procuring a particular outcome in a referendum), can nevertheless avoid reporting

that spending or counting it towards its statutory limit if it donates the goods and services to another campaigner. In other words, can a person lawfully purchase campaign-related goods and services of a value in excess of its statutory expenditure limit if, instead of using those materials itself, it makes arrangements for them to be used by others campaigning for the same outcome in the referendum?

3. The Appellant ("**the Commission**") submits that such expenditure falls outside the statutory limits simply on the grounds that it amounts to a 'donation'. As it says at paragraph 1 of its Grounds of Appeal): "*The payments in the present case were governed by the donations regime not the expenses regime. Accordingly, they were not 'referendum expenses' […]*" [**C/13**].

4. In other words, its position is that the statutory definition of "*referendum expenses*" must be read as imposing an additional requirement that a referendum expense is only a referendum expense if it does not engage the separate statutory regime governing donations (in relation to which there are no statutory limits at all).

5. The Commission's position on how the legislation should be construed appears to derive from what it claims is a practical concern, namely, that if the expenses regime is not ousted in circumstances where the donations regime applies (rather than the other way around), the aggregation of the expenditure of all participants on one side of the referendum would in some cases show the same expenses declared twice.

6. The Divisional Court rejected the Commission's interpretation, holding that the statutory definition includes no such implied ouster [**C/17**]: a person's "*referendum expenses*" include any expenses incurred in respect of qualifying goods or services for a qualifying purpose, even if other statutory provisions may also require the same spending to be declared as a donation.

7. The Claimant/Respondent ("**the GLP**") submits that the Divisional Court's analysis is correct.

    7.1 **First**, it is consistent with what the statute actually says. S.111 PPERA 2000 [**AB/2**] lays down specific requirements, which, once met, render the expenditure a 'referendum expense'. Nothing in PPERA 2000 provides for these requirements to be set aside when the donations regime applies to same expenditure.

7.2 **Secondly**, there are no practical difficulties which compel a different interpretation. The Commission's case on this point is that without an implied ouster of the expenses regime in the case of donations, a simple aggregation of the headline figures reported by one 'side' would be misleading. But:

7.2.1 The statute imposes limits on expenditure by participants. Except in the limited circumstances of spending carried out pursuant to a 'common plan' (see below), the statute is not concerned with aggregate spending at all.

7.2.2 It only requires publication of the returns submitted by participants. It does not require the publication of aggregate headline spending figures reported by participants on a particular 'side'.

7.2.3 The possibility that the Commission or a third party might choose to analyse the participant-by-participant data in a way which is misleading, for example by simply aggregating the headline figures without looking at the underlying data, is not a reason to strain the meaning of the legislation to remove the requirement to report certain expenditure, still less to remove any restrictions on incurring it.

7.2.4 In fact, in the case of expenditure pursuant to a 'common plan', Parliament has legislated for precisely the consequence that the Commission says is so undesirable. Paragraph 22 of Schedule 1 to the European Union Referendum Act 2015 ("**EURA 2015**") [**AB/3**] provides that where two or more participants (other than one of the two designated campaigns) incur expenditure pursuant to a common plan, any expenditure incurred pursuant to that plan must be treated as incurred by all of them, and declared by each of them in full. Parliament plainly did not see duplicate reporting as fatal to the sensible operation of the statutory scheme. That is unsurprising since Parliament decided there should be no statutory limit on expenditure by either side of a referendum campaign but only on individual participants campaigning on either side.

8. **Thirdly**, the Commission's interpretation would produce highly undesirable consequences. It would render expenditure limits on participants easily avoidable, opening a loophole Parliament cannot have intended. For example, a participant would be able to purchase campaign materials of a value many times in excess of its statutory limit, exercising full control over the design of the materials and the slogans printed on them, and then donate those materials to other participants/campaign groups without having to declare any of the costs as part of its campaign expenditure. That would entirely undermine the statutory purpose, which is to control the expenditure of individual participants so as to prevent any one participant from exercising particular influence over a referendum campaign.

9. The GLP accordingly submits that the appeal should be dismissed.

Factual background

10. The specific factual background to this appeal concerns spending by Vote Leave (the official 'Leave' campaign in the 2016 Referendum) on advertising services provided by the Canadian company AggregateIQ. In summary:

    10.1 Vote Leave paid a total of £3.4m to AggregateIQ during the referendum period. However, in its statutory return it only declared referendum expenses of £2.697m in respect of AggregateIQ [**SB2/81**].

    10.2 The rest of the payments were declared by others as expenses incurred by them. A private individual named Darren Grimes reported referendum expenses of around £625,000 relating to AggregateIQ's services [**SB2/63**], and an organisation named Veterans for Britain similarly declared referendum expenses of £100,000 [**SB2/106**].

    10.3 From explanations subsequently provided by Vote Leave and Mr Grimes of the dealings between them, their position appears to be as follows [**SB2/91**]:

        10.3.1 Shortly before the end of the referendum campaign, Vote Leave found itself with excess funds it was unable to spend because of its statutory spending limit.

10.3.2 It offered to make some of that money available to Mr Grimes for use in the campaign.

10.3.3 Mr Grimes told Vote Leave that he would like to spend the money on AggregateIQ's services.

10.3.4 Having been told how much was available, Mr Grimes commissioned AggregateIQ to provide services of that amount.

10.3.5 AggregateIQ issued invoices for those services, and the payments were made by Vote Leave directly to AggregateIQ.

10.4 In other words, even on Vote Leave and Mr Grimes' presentation of the facts:

10.4.1 No cash was ever transferred to Mr Grimes: the money passed directly from Vote Leave to the supplier.

10.4.2 Vote Leave knew, before committing any funds, what the funds were going to be used for.

10.4.3 Vote Leave retained full control of the funds up until the point of payment.

11. The Commission also opened an investigation into Veterans for Britain as a result of this judicial review, but the Divisional Court's analysis concerns the expenses declared as incurred by Mr Grimes.

12. After the Referendum, Mr Grimes initially reported that he had received three cash donations from Vote Leave totalling just over £625,000 and had incurred expenses in identical amounts [**SB2/65-66**]. The Commission assessed his return in late 2016 and concluded that that was inaccurate, because [**SB2/67-68**]:

> "*donations were in fact paid directly to a supplier who, in turn, provided Mr. Grimes with digital marketing services. This is a donation of a service. […]*
>
> *Mr. Grimes reported these donations as cash and did not declare the nature of the donations. I am therefore satisfied that Mr. Grimes has failed to comply with section 120(2)(d) of PPERA.*"

13. However, the Commission also concluded that the failure to comply was minor, and that the payments did not otherwise call for investigation [**SB2/70**]. It reached that

conclusion apparently on the grounds that it was obviously in Vote Leave's interests to act in this way so as to make effective use in the campaign of money it was legally prohibited from spending [**SB2/80**]:

> *"It seems reasonable that an organisation finding itself with money it can't spend would want to donate it to a like-minded group. Although Darren Grimes might be low profile, the organisation he chaired was running an online campaign prior to receiving the donations and an online campaign would be an effective way to spend such a large amount of money in a short period of time."*

14. In October 2017, following the public disclosure of documents relating to the Commission's investigation, the GLP sought judicial review of the Commission's decisions to take no further action. The grounds of challenge included that the Commission should have treated the whole sum paid by Vote Leave to AIQ as a 'referendum expense' incurred by Vote Leave [**SB/7-8**].

15. In addition, the GLP argued that the Commission had acted irrationally in concluding that there were no grounds for investigating whether the expenditure was incurred pursuant to a common plan. In response, the Commission reopened its investigation. Accordingly, that aspect of the challenge did not proceed. Subsequently, in July 2018 (after this judicial review had been heard) the Commission concluded that Vote Leave's claimed cash 'donation' to Darren Grimes had in fact involved Vote Leave and Darren Grimes in a 'common plan' ("acting in concert"), such that the expenditure should have been declared by Vote Leave [**SB2/113**]. (Although the same cash 'donation' mechanism was used, namely payment by Vote Leave direct to AggregateIQ for Facebook advertising services provided to Veterans for Britain, the Commission held that it did not have sufficient evidence to establish a 'common plan' in relation to Vote Leave and Veterans for Britain and found only that Veterans for Britain had incorrectly declared the 'donation' [**SB2/125**].)

16. The judicial review thus proceeded only on the issue of whether such spending by Vote Leave (in purchasing and donating goods and services) constituted 'referendum expenses' in any event, absent any 'common plan'.

17. In the course of the dispute about this particular item of spending, it became apparent that the Commission had in fact advised Vote Leave (there is no suggestion that similar

advice was given to the lead Remain campaigner), in an otherwise undisclosed interpretation of the statute, that any spending that fell within the donation regime (and did not involve a 'common plan') was excluded from the expenses regime.

17.1 No such interpretation is or was set out in any Commission guidance. Vote Leave claimed however, that it had been told by the Commission that it was entitled to act as it had and maintained that it had been given such advice in writing. At the permission stage the Commission denied having ever given such advice and gave no disclosure [**SB2/48-50**].

17.2 Two days before the permission hearing, Vote Leave disclosed an email dated 20 May 2016 [**SB2/1-3, 9-10**] in which the Commission had advised it that if it provided branded materials such as banners and flags to another campaigner for use in the referendum campaign, it "*would not need to report the cost of the material in your spending return unless you use the material yourself*".

17.3 That is the position which the Commission continues to adopt in these proceedings.

The Legislative Framework

18. Part 7 of PPERA 2000 [**AB/2**] imposes limits on the "*referendum expenses*" that may be incurred by permitted participants during the referendum period. The relevant limits for the purposes of the 2016 Referendum were established by EURA 2015 [**AB/3**], and were (i) £7 million in the case of the two official campaigns, and (ii) £700,000 for all other permitted participants.

19. The term "*referendum expenses*" is defined in s.111(2) PPERA 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."*

20. That imposes a 'nature' criterion and a 'purpose' criterion in re spect of any incurred expense.

20.1 The 'nature' criterion is that the expense must fall within Part I of Schedule 13. Paragraph 1 of Schedule 13 provides that "*the expenses falling within this Part of this Schedule are expenses incurred in respect of any of the matters set out in the following*

list". The list includes things such as "*advertising of any nature*" and "*market research*".

20.2 The 'purpose' criterion is that the expenses must be incurred for "*referendum purposes*". That term is defined in s.111(3) PPERA 2000 as including expenses incurred:

> *"(a) in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to any question asked in the referendum, or*
>
> *(b) otherwise in connection with promoting or procuring any such outcome."*

21. Section 112 further provides that certain expenses are to be treated as having been incurred by the participant for the purposes of statutory reporting and the expenditure limits. Those expenses include, in broad terms, any services which are made available to the participant free of charge and are used in the campaign (in which case the market value of the services is treated as having been incurred), and any services which are made available at an undervalue and are used in the campaign (in which case the difference between the market value and the agreed price is treated as having been incurred).

22. S.120(2) PPERA [**AB/2**] requires permitted participants to submit a return after the end of a referendum period which contains, among other things:

22.1 "*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*" (s.120(2)(a);

22.2 "*a statement of relevant donations received in respect of the referendum*", unless the participant is a political party (which is already required to report its donations) (s.120(2)(d));

22.3 "*all invoices or receipts relating to the payments mentioned in subsection (2)(a)*" (s.120(3)(a)); and,

22.4 "*in the case of any referendum expenses treated as incurred by virtue of section 112, any declaration falling to be made with respect to those expenses in accordance with section 112(6))*" (s.120(3)(b)).

'Common plan' expenditure

23. Paragraph 22 of Sch. 1 EURA [**AB/3**] makes provision for the aggregation of expenses incurred by persons "*acting in concert*" in the referendum. Sub-paragraph (1) sets out the circumstances in which persons will be regarded as having acted in concert, i.e. where they have both incurred referendum expenses pursuant to a plan or other arrangement with a view to, or otherwise in connection with, promoting or procuring a particular outcome of the referendum: 'common plan' expenditure.

24. Sub-paragraphs (2) to (6) provide that:

    24.1 if one of the participants in the common plan was one of the two designated 'official' campaigns, then certain expenses incurred pursuant to the plan "*are to be treated for the purposes of sections 117 and 118 of and Schedule 14 to the 2000 Act as having been incurred during the referendum period by or on behalf of the designated organisation only*" (paragraph 22(5)); and,

    24.2 otherwise, all of the expenses incurred by any participant pursuant to a common plan "*are to be treated […] as having **also** been incurred during the referendum period by or on behalf of* [emphasis added]" the other participants in the common plan (paragraph 22(3)).

Donations

25. Part IV of PPERA 2000 [**AB/2**] controls donations to political parties. In the case of participants in referendums, similar provisions are applied by s.119, which provides: "*Schedule 15 has effect for controlling donations to permitted participants that either are not registered parties or are minor parties.*"

26. Schedule 15 imposes restrictions which require, for example, that donations must be from a permissible source. There is no limit on the amount that a person may donate or receive, but the return which a permitted participant must submit under s.120 must include a statement of all "*relevant donations*", defined in Schedule 15 paragraph 1 as "*a donation to the permitted participant for the purpose of meeting referendum expenses incurred by or on behalf of the permitted participant*".

27. Schedule 15 paragraph 2 provides that the term 'donation' includes not only gifts of cash but also sponsorship, the provision of goods or services other than on commercial terms, and "*any money spent (otherwise than by or on behalf of the permitted participant) in paying any referendum expenses incurred by or on behalf of the permitted participant*".

Pre-legislative background

28. The Divisional Court, upon granting permission, asked the parties to consider whether there was anything of relevance in the material leading up to the enactment of the above provisions. There is nothing of any substance in relation to the question of how s.111 itself should be interpreted. However, in view of the argument advanced by the Commission – and in particular the difficulties said to arise in relation to the reporting of aggregated spending data – it is instructive to note that any intention to legislate in respect of aggregated spending was specifically disclaimed.

    28.1 In October 1998, the Committee on Standards in Public Life, chaired by Lord Neill of Bladen QC ("**the Neill Committee**") issued its Fifth Report on the Funding of Political Parties in the United Kingdom (Cm 4057, "**the Neill Committee report**"). The Neill Committee recognised the significance of election and referendum spending, but advised the Government against imposing spending limits in the context of referendum campaigns on the basis that the different nature of such campaigns would make it extremely difficult in practical terms to make expenditure limits effective.

    28.2 The Government responded in July 1999 in a White Paper, The Funding of Political Parties in the United Kingdom (Cm 4413, **"the White Paper"**), in which it rejected the Neill Committee's advice. In particular, it said at paragraph 1.14:

> "*The Government […] accepts that it is not possible, by the imposition of spending limits on parties and organisations, to ensure a level playing field in terms of spending between those urging one outcome of the referendum and those urging the other. Nevertheless, in the Government's view, there is no reason in principle why spending limits should not operate, in a similar way as at elections, to discourage excessive spending by the political parties and others and to ensure that **individual organisations do not obtain disproportionate attention for their views** because of the wealth behind them* [emphasis added]."

The correct analysis of the statutory scheme

29. Applying the normal meaning of the words of s.111 PPERA 2000 [**AB/2**], there are three relevant questions in determining whether a person must report a referendum expense:

    29.1 First, has that person incurred an expense?

    29.2 Second, is the expense of a particular type (set out in Schedule 13 to PPERA 2000)?

    29.3 Third, has the expense been incurred for a 'referendum purpose' (i.e. to promote or procure a particular outcome in the referendum)?

30. There is no dispute that Vote Leave spent its money with a view to promoting a 'Leave' outcome in the referendum. The third criterion is therefore obviously satisfied.

31. Before the Divisional Court, the argument principally revolved around the first criterion, i.e. the circumstances in which a person could be said to have 'incurred an expense'.

    31.1 The GLP's position was that a person incurs an expense when he brings upon himself an outflow of economic benefit. As a matter of ordinary language the concept of incurring an expense does not require the creation of a contractual or other relationship, and the provisions of Schedule 13 make clear that no such requirement was envisaged.

    31.2 As the Divisional Court recorded in its judgment at paragraph 38, the Commission was unable to articulate any clear case as to what it said the concept of 'incurring an expense' meant in this context [**C/25**].

    31.3 At paragraph 41 the Divisional Court agreed with the Claimant [**C/26**] that "*As a matter of ordinary English usage […] it is natural to describe a person as having incurred an expense whenever he or she has spent money or incurred a liability which in either case reduces his or her financial resources*."

32. This issue does not appear to be pursued by the Commission on appeal. Instead, the focus of its submissions on the statutory language is now on the second criterion, i.e. whether or not the expense in question falls within Part 1 of Schedule 13 [**AB/2**].

32.1 As set out above, Part 1 of Schedule 13 provides that an expense falls within that Part if it is an expense incurred "*in respect of*" one of a number of specified items, such as advertising.

32.2 The GLP submits that a payment made by one campaigner for specific campaign-related advertising services is a payment in respect of advertising, even if the services are provided to another campaigner on the same side.

32.2.1 That is clear as a matter of language: it would be absurd to say that a payment which is made in the knowledge that it is the purchase price of a particular service, and which is made so that that service will be provided, is not a payment "*in respect of*" that service. The statute does not say "*in return for*", nor specify to whom the service must be provided. (Of course, it is in the nature of a referendum with two sides that if a participant pays for particular services that assist its side of the campaign, they are 'referendum expenses' for its benefit even if it is not strictly speaking the recipient of the service.)

32.2.2 It is moreover consistent with the policy objectives of the expenditure control regime for the question of whether a person is or is not to be treated as having incurred a referendum expense in their own right to depend on the degree of control exercised over how the money is spent. If a donor makes a simple cash donation to a campaigner without seeking to dictate in any way how that cash is used, then it is not a payment in respect of anything falling within Schedule 13 (and not a referendum expense) – it may indeed not be spent at all. On the other hand, if a donor exercises control over the use of the money by spending it or dictating that it be spent on a particular 'referendum expense' as defined in Schedule 13, that person is subject to regulation as a participant as well as a donor.

32.3 The Divisional Court adopted the same analysis, expanding upon the consequences in paragraphs 80 and 81 of the judgment in a passage dealing with what it called, by way of shorthand, 'general' and 'specific' donations [**C/36-37**]. A 'general' donation is one which is not a payment "*in respect of*" a Schedule 13 matter, and is therefore incapable of amounting to a referendum expense incurred

by the paying party. A 'specific' donation is one which is "*in respect of*" a Schedule 13 matter (for example because of the degree of control as to how the money will be spent), which is capable of amounting to a referendum expense.

32.4 The Commission submits that that analysis is wrong, on the blunt ground that a donation is not a Schedule 13 matter. At paragraph 12 of its skeleton argument the Commission says that donations are not included in the list at Part 1 of Schedule 13 [**C/56-57**]; at paragraph 6 it says "*Vote Leave Limited's payments were in respect of a donation*" [**C/55**].

32.5 That analysis is difficult to reconcile with the Commission's conclusion (see paragraph 12 above) that Vote Leave made a donation of services and not of cash [**SB2/67-68**]. Its payment was a payment for services, which it donated. But in any event, whether or not the payments were 'in respect of a donation' is not the question posed by the legislation. The question is whether or not the expense was incurred in respect of a Schedule 13 matter. The Commission has not identified any good reason for treating Vote Leave's payments for AggregateIQ's services as not constituting payments "*in respect of*" those services.

The AIQ spending: facts

33. The analysis of the facts found by the Electoral Commission compels the conclusion that Vote Leave incurred referendum expenses in acting as it did.

34. As mentioned above, Mr Grimes originally declared the £625,000 as a cash donation from Vote Leave. The Electoral Commission investigated in August/September 2016 and concluded that that was wrong [**SB2/72**]: the donations should have been declared as "non-cash donations of digital marketing" from Vote Leave. The Commission explained that Vote Leave had donated services not cash.

35. On that analysis, Vote Leave purchased digital marketing services from AggregateIQ in order to donate them to Mr Grimes; it had to purchase those services in order to donate them, because it was not a provider of digital marketing services itself.

36. The consequences are:

36.1 Vote Leave plainly incurred an expense: it purchased services in return for money.

36.2 The expense plainly related to a matter within Schedule 13: advertising.

36.3 The expense was plainly incurred for referendum purposes: the services were donated to another 'Leave' campaigner for use in seeking to persuade voters in the final days of the referendum campaign.

36.4 All three of the criteria in s.111 PPERA 2000 [**AB/2**] are therefore satisfied and Vote Leave should have recorded the sums paid as referendum expenses incurred by it.

36.5 Mr Grimes also incurred referendum expenses in the same amounts, but by virtue of the operation of s.112 PPERA 2000: he received services at less than market value and made use of them for referendum purposes.

37. The same analysis applies to the position in relation to Vote Leave's purchase at the same time of £100,000 of AggregateIQ services which it then donated to Veterans for Britain.

RESPONSES TO THE GROUNDS OF APPEAL

38. Against the above background, the GLP turns to address the grounds advanced by the Commission.

Ground 1: the donation regime ousts the expenses regime

39. The Commission's main reason for taking a different view from that set out above is that there is a separate statutory regime within PPERA governing permissible donations, and so the regime governing expenses must be interpreted so as to make room for it.

40. The short answer to this submission is that the expenses regime and the donations regime are two separate regimes involving different tests and different consequences. The fact that one applies does not mean that the other is entirely ousted.

41. **First**, there is nothing objectionable in principle about a situation where a set of facts engages two statutory provisions. The fact that one regime applies to a particular transaction does not prevent the other regime from applying.

42. **Secondly**, there is nothing in the legislation which provides that one regime is ousted by the other. Still less is there anything which says that it is the donations regime which ousts the expenses regime rather than the other way around.

43. **Thirdly**, that is unsurprising, because the two regimes serve different purposes and can readily coexist.

43.1 The objective of the expenditure rules is to ensure that each individual campaign does not spend above set limits on the referendum purpose it pursues, ensuring that no individual voice can exercise disproportionate influence.

43.2 The objectives of controlling donations are (a) to ensure transparency for voters as to who has backed individual campaigns and (b) to prevent donations from sources that Parliament has prohibited.

43.3 A pure gift of cash from one participant to another would not constitute a referendum expense. That is not because one regime is ousted by the other: it is because, applying the statutory language, a cash gift (with no strings attached) cannot be said to be an expense incurred in respect of one of the matters in Schedule 13 [**AB/2**]: the donor surrenders control of the money and the recipient is then (if the donation is genuine) free to spend it on anything it likes.

43.4 However, where a person provides resources for use by a campaigner in a manner over which he retains control (for instance by being able to determine how the money is spent or the slogan a particular piece of campaign material should bear), there is no obvious reason why he should not be subject to regulation both in relation to the provision of resources and the expenditure of those resources. It is easy to see why Parliament might have been prepared to allow people to make no-strings-attached cash donations without being treated as participants in the campaign themselves, but not to allow a well-funded person to escape any regulation as a participant by entering into arrangements whereby they agree to pay sums on behalf of other participants but retaining control of the purse-strings.

43.5 Put shortly, if a participant is able to control the use to which its donee puts money, without that money counting as its expenditure, the participant is subject to no effective spending limit at all.

44. The Commission's submissions on the statutory language rest on paragraph 1(4) of Schedule 15 to PPERA 2000 [**AB/2**], which defines 'relevant donation' as meaning "*a donation to the permitted participant for the purpose of meeting referendum expenses incurred by or on behalf of the permitted participant*". That is said to be "*consistent*" with the idea that a payment by way of donation can never amount to the incurring of referendum expenses. However, whilst it might be 'consistent' with such an idea, it is equally consistent with the opposite interpretation and simply adds nothing of substance either way. At most it recognises that a person who receives a donation will generally (but not necessarily) incur referendum expenses.

45. The definition of 'relevant donation' in paragraph 1(4) concerns the donations that must be reported under s.120 [**AB/2**]. It includes pure cash donations, where the donor exercises no control over expenses incurred. There is no basis for saying, however, that that fact somehow precludes a 'relevant donation' from being treated as the incurring of a referendum expense.

46. Ultimately, the Commission's submission is about what it considers the legislation ought to say rather than what it does say. But even more problematically, what the Commission believes the legislation ought to say would in fact undermine what Parliament intended to achieve by limiting referendum expenses of participants. Ground 1 should be dismissed.

Ground 2: undermining of transparency

47. The Commission submits that the Divisional Court's interpretation undermines transparency because:

    47.1 S.124 PPERA 2000 [**AB/2**] requires that the returns submitted by participants are made available for public inspection;

    47.2 If Vote Leave's spending on services donated to Mr Grimes/Veterans for Britain were treated as an expense incurred by both Vote Leave and the recipient of the service, the spending returns for Vote Leave and Mr Grimes/Veterans for Britain would both include that spending;

    47.3 "*The result will be a mistaken impression on the part of the public that the doubled sum was in fact the amount spent by that side of the debate*" [**C/58**].

48. The premise of the Commission's argument is therefore that people could misinterpret or misrepresent the data that Parliament has required it to publish, namely the expenditure of individual participants, by aggregating the data of individual participants on each side of the campaign and claiming that these sums represent the total expenditure on each side.

49. For reasons explained below that is misplaced, but in any event it is not a reason for construing the legislation as meaning something other than what it says.

49.1 The statutory requirement is that the Commission make available <u>the returns</u> submitted by individual participants. That reflects the legislative focus on the ability of <u>individual</u> participants (rather than aggregated groups or 'sides') to influence the debate through greater spending.

49.2 The statute makes <u>no provision at all</u> for the publication of aggregated data about the spending by a particular group or 'side'. It is simply irrelevant to the statutory scheme. That accords with Parliament's decision <u>not</u> to limit the expenditure on either side of a referendum, so allowing numerous diverse groups and individuals to express their views in different ways and without co-ordination.

49.3 The fact that Parliament decided not to limit expenditure on either side of a referendum militates against any interpretation dependent on the possible misunderstanding of how much was spent on either side, a metric which in any event has limited importance because of the vast array of different types of expenditure and campaigning that may be covered (ranging from meetings at City Institutions and Law Firms, to Womens' Institute meetings to multi-million pound targeted Facebook campaigns).

50. The Commission's practical objection is further undermined by the following:

50.1 As the Commission recognises at paragraph 20 of its skeleton argument [**C/58**], Parliament has expressly provided that in some circumstances spending by multiple participants will be treated as having been incurred by all of them. Far from being unacceptable, the kind of duplication on which the Commission relies is <u>expressly incorporated</u> into the statutory regime.

50.2 The Commission's response is that sections 120(4A) to (4E) [**AB/2**] require participants to declare the amount of expenditure which is treated as incurred by them by virtue of the common plan provisions [**C/58**]. This, it is said, means that the information is available to allow an aggregate figure to be produced which avoids any double-counting.

50.3 Exactly the same applies to expenses falling within the Divisional Court's analysis.

50.3.1 Where a donor is treated as incurring a referendum expense, it is because the relevant economic value flows from the donor rather than the recipient. The basis on which the <u>recipient</u> is treated as having incurred an expense is the deeming provision in s.112 [**AB/2**].

50.3.2 s.120 provides that a return must include not only expenses deemed incurred by reason of the common plan provisions, but also expenses deemed incurred by reason of s.112.

50.3.3 Further, s.120 requires participants to provide with their return a statement of all payments made in respect of referendum expenses, and all invoices or receipts relating to those payments. In the case of a payment by a donor which is treated as amounting to a referendum expense by both, the same payment will be declared in both returns. The published information will therefore contain everything necessary to produce an aggregate figure without duplication.

51. The Commission's approach results in <u>far less</u> transparency than the Divisional Court's interpretation. Applying the Commission's interpretation, it would not be apparent that spending in a particular campaign originated from and was controlled by a single source; the reported donations might show a large amount of money from a single source but would fail to expose that its use had also been controlled by that source.

52. The Commission's approach could also produce absurd consequences that do not arise applying the Divisional Court's interpretation, for example in cases involving economies of scale in the purchase of campaign resources.

52.1 Take for example a campaign bus which is available to be hired for a monthly cost of £5,000 and a daily hire cost of £500. Participant A hires the bus for a month and

decides on the slogan to be painted on it. For 10 days it makes the bus available to Participant B, which is campaigning for the same outcome. For the other few weeks it uses the bus itself.

52.2 Participant A has clearly incurred a referendum expense. It has spent money (or incurred a liability to spend money) on hiring a bus, has arranged for the bus to bear the slogan it wishes to promote, has arranged for the bus to be used in campaigning for a particular referendum outcome, and has actually used it for most of the period.

52.3 Participant B has also incurred a referendum expense. It has had the benefit of a bus which it would have had to pay £5,000 to hire for 10 days, and by operation of s.112 PPERA 2000 [**AB/2**] it is deemed to have incurred referendum expenses of £5,000.

52.4 It is not clear how the Commission contends the participants should report their expenditure in such a scenario. The consequence of its position that the donation regime ousts the expenditure regime would appear to be that Participant B must declare the £5,000 donation, and that Participant A's reported expenditure should be reduced accordingly, either to zero or to reflect the period in which it used the bus itself. But Participant A has spent £5,000 in campaigning, has exercised total control over its use, and has used it for longer than Participant B has: why should its reported expenditure be lower than Participant B's, or even zero?

53. This example illustrates the fact that it may be necessary, and indeed even desirable, for the aggregate value of the amounts declared by individual campaigners potentially to over-state the total amount paid for goods and services. It is a consequence of the statutory requirement that resources obtained for free or below market value should not fall outside the expenditure limits. It is not, as the Commission contends, a consequence that must be avoided by straining the words of the legislation beyond their natural and ordinary meaning.

54. In this regard, it is important to note that there is no submission that any part of the statutory scheme is frustrated by the Divisional Court's analysis or that any provision enacted by Parliament is rendered inoperable. This is therefore a submission about what

Parliament should have done rather than what it in fact did, and for that reason, in addition to the reasons set out above, should be rejected.

Ground 3: insufficient basis for distinguishing between general and specific donations

55. The Commission submits that the Divisional Court's analysis introduces a "*novel and unprecedented distinction between 'general' and 'specific' donations*" which is not found in the statute [**C/58**].

56. As the Divisional Court made clear at paragraphs 80 to 81 [**C/36-37**], it adopted those terms as a shorthand for the implications of the statutory requirement that an expense must be incurred "*in respect of*" a Schedule 13 matter in order to qualify. The distinction between 'general' and 'specific' simply explains the effect in practice in a particular situation of a requirement which is plain on the face of the statute.

57. It is also obviously correct. The Commission has advanced no alternative analysis or interpretation of that part of the statutory definition. It has simply posited certain 'edge cases' in which it might be difficult to apply. That is no reason for disapplying it altogether or for declining to apply it to facts where there is a clear answer.

Ground 4: the judgment does not analyse PPERA 2000 as a whole

58. The Commission submits that the Divisional Court failed to consider the consequences of its judgment, including in contexts such as elections.

59. The main point advanced by the Commission, at paragraph 30 of its skeleton argument [**C/60**], is that the judgment could have the effect of discouraging some people to make donations or to campaign. But any regulatory requirement exists to ensure that the regulated activity takes place either within the relevant restrictions or not at all. Whether or not the regulatory requirement will have the effect of discouraging activity which ought to be allowed is a policy judgment for the legislature.

60. The other points concerning the implications of the Divisional Court's analysis for the rules relating to elections were not advanced below and it is not open to the Commission to raise them now. But in any event, as the Commission acknowledges, those provisions are different: their interpretation may well raise different issues which do not arise in relation to the provisions concerning referendums.

Ground 5: the Judgment produces surprising results for referendums

61. Under this final Ground the Commission identifies a series of surprising or undesirable consequences which it says are produced by the Divisional Court's interpretation.

62. It is important to note at the outset the highly undesirable consequences which the Commission's interpretation would produce, which it does not acknowledge in its submissions and which is a question of real substance going to the heart of the regime rather than an oddity that might arise in some scenarios. That is the fact that its interpretation would allow a permitted participant standing behind the scenes to purchase campaign materials of a value far in excess of its expenditure limit as long as it then gave them to other campaigners whom it knew were campaigning for the same outcome. Taking the facts of this case, for example, Vote Leave could on the Commission's analysis have spent an unlimited amount – hundreds of millions – on its own advertisements on Facebook, the cost of which it would not have had to declare if it 'donated' those advertisements to other leave campaigns. Such an interpretation renders spending limits entirely otiose (Vote Leave would have been acting entirely lawfully and thus not circumventing spending limits) - a bizarre outcome entirely inconsistent with the plain legislative purpose of the expenditure limits.

63. With that in mind, the answers to the Commission's scenarios [**C/62-63**] are as follows:

63.1 Paragraph 36(1): if a volunteer incurs expenses of over £10,000 at the direction of and under the control of a permitted participant, then the entity which is incurring the expense is the permitted participant: the volunteer is simply the person through whom the permitted participant acts. If the volunteer incurs expenses of over £10,000 of their own accord then it is obviously right that they should be subject to regulation in respect of that activity.

63.2 Paragraph 36(2): this concern applies only to the effect of the 'common plan' provisions, which were enacted separately and later than the other provisions in question. No such point was raised below (indeed the Commission's approach throughout was that the 'common plan' provisions did not apply) but it would be reasonable to interpret the 'common plan' provisions as relating to the aggregation of <u>different</u> outflows of economic benefit, and as not intended to apply to an expense which already falls to be treated as reported by more than one

participant by reason of other provisions. In any event, even if it were the case that the 'common plan' provisions had unusual consequences in some situations, that should not drive the interpretation of Part 7 of PPERA as enacted.

63.3 Paragraph 36(3): this appears to be the same as the example posited at paragraph 36(2) and the response is the same.

CONCLUSION

64. For all the reasons set out above, the Claimant submits that the appeal should be dismissed. The Divisional Court's interpretation of the legislation is correct; it (a) applies the natural meaning of the words of the statute; (b) it does no violence to the statutory language and (c) it gives effect to the statutory purpose of ensuring that individual participant expenditure is limited so as to ensure that individuals cannot exert disproportionate influence over campaigns by reason of their wealth.

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30 April 2019

[bundle references inserted 21 June 2019]