IN THE COURT OF APPEAL (CIVIL DIVISION) Appeal ref. 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)

B E T W E E N : -

THE QUEEN on the application of
GOOD LAW PROJECT

Claimant / Respondent

and

THE ELECTORAL COMMISSION

Defendant / Appellant

and

(1) VOTE LEAVE LIMITED
(2) MR DARREN GRIMES

Interested Parties / Respondents

APPELLANT'S REPLACEMENT
SKELETON ARGUMENT DATED 6 JUNE 2019

Emboldened references in square brackets are to tabs in the core bundle (CB), supplementary bundle (SB) or authorities bundle (AB).

INTRODUCTION

1. The Appellant Electoral Commission is the independent statutory body established by the Political Parties, Elections and Referendums Act ("**PPERA**") 2000 to oversee elections and regulate political finance in the UK. It seeks permission to appeal against the Divisional Court's Order dated 4 October 2018 ("**the Order**") **[CB/2]** resulting from a judgment dated 14 September 2018 ("**the Judgment**") **[CB/3]** [1] because it is concerned

[1] [2018] EWHC 2414 (Admin) **[CB/3]**. Consequential matters were addressed in [2018] EWHC 2553 (Admin) **[CB/4]**.

about the implications for electoral law which its statutory task is to apply and to keep under review[2].

2. Permission to appeal is sought on two bases:

   (1) The appeal has a real prospect of success. Indeed, the Divisional Court itself held in its judgment on permission to appeal dated 4 October 2018 **[CB/4]** that "*at least some of the submissions advanced in support of the defendant's draft grounds of appeal are reasonably arguable*".[3]

   (2) Further, in any event, there is a compelling reason for an appeal. As elaborated in particular under Ground 4 below, the Judgment has detrimental consequences for other areas of electoral law which the Divisional Court did not consider. Fuller consideration by the Court of Appeal is necessary in order to ensure the coherence of electoral law.

RELEVANT BACKGROUND

3. As the Divisional Court explained in paragraph 1 of its Judgment **[CB/3]**, the issue in this case is one of the correct interpretation of the law – specifically whether on the facts assumed for the purposes of argument certain payments made by Vote Leave Limited (a permitted participant at the 2016 EU referendum) were referendum expenses incurred by Vote Leave Limited. If they were, then Vote Leave Limited would have been required to

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[2] See PPERA 2000, ss. 6 and 145 **[AB/2]**.

[3] [2018] EWHC 2553 (Admin) **[CB/4]** at [10]. The reason why the Divisional Court did not grant permission to appeal was that it considered that "*an appeal must be directed at the order made by the court and not simply aspects of its reasoning*". The reason why the draft grounds of appeal were not directed at the order ultimately made by the Divisional Court was that they were submitted as directed before the Divisional Court had settled the form of order (the Divisional Court ultimately making the order in a form different from that proposed by the parties). The version of the grounds of appeal attached to the Appellant's Notice before this Court **[CB/1]** now includes one additional ground (Ground 1) and text explaining why each of the grounds is directed at the order which the Divisional Court ultimately made.

report them and they would have to be counted against Vote Leave Limited's statutory spending limit of £7m.[4]

4. The payments in question are described in paragraph 12 of the Judgment **[CB/3]**. It is common ground as there described that Mr Grimes had purchased relevant advertising services from AggregateIQ Data Services Limited ("**AIQ**"). It is accepted by the Divisional Court in paragraph 95 of the Judgment **[CB/3]** that Mr Grimes had incurred £620,000 of referendum expenses by purchasing (i.e. contracting for) those advertising services from AIQ. The issue is whether by making payments to AIQ in respect of that purchase, Vote Leave Limited was <u>also</u> incurring referendum expenses, or merely making a donation to Mr Grimes' campaign. In other words, should the £620,000 be counted twice as a total of £1.24m of referendum expenses?

5. The Appellant submits that (on the facts assumed for the purposes of argument[5]) Mr Grimes correctly reported the payments in question as donations to his campaign, and Vote Leave Limited was correct not to report the payments as referendum expenses which it had incurred.

6. Vote Leave Limited's payments were in respect of a donation. The donation was for the purposes of meeting referendum expenses incurred by Mr Grimes. Accordingly, on the Appellant's case, only £620,000 of referendum expenses needed to be reported.

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[4] The possibility of these being 'common plan' expenses pursuant to a plan or arrangement between Vote Leave Limited and Mr Grimes for the purposes of paragraph 22 of Schedule 1 to the European Union Referendum Act ("**EURA**") 2015 **[AB/3]**, and therefore deemed incurred and reportable by Vote Leave Limited as a designated organisation, was examined separately by the Appellant and was therefore outside the scope of the Divisional Court's consideration. See Judgment **[CB/3]**, paras. 29 to 32.

[5] The Appellant has conducted separate investigations since the claim for judicial review was commenced which have led to findings of breaches of electoral law by Mr Grimes and Vote Leave Limited.

GROUND 1: DONATING AND INCURRING REFERENDUM EXPENSES ARE DISTINCT – SEE PARAGRAPH 1(4) OF SCHEDULE 15 TO PPERA 2000

7. The Divisional Court ignored paragraph 1(4) of Schedule 15 to PPERA 2000 **[AB/2]**, which separates the concepts of (a) making a donation and (b) incurring referendum expenses.

8. Schedule 15 to PPERA 2000 **[AB/2]** contains the regulatory regime for "*relevant donations*", being all types of donation (cash or otherwise) which fall to be reported by permitted participants.[6] Paragraph 1(4) defines "*relevant donation*" for the purposes of Schedule 15 as follows, a definition which repays close attention:

> "*'Relevant donation', in relation to a permitted participant at a referendum, means a donation to the permitted participant for the purpose of meeting referendum expenses incurred by or on behalf of the permitted participant.*"

9. Accordingly, a donation is for the purposes of meeting referendum expenses incurred. The donor does not by virtue of making a donation incur referendum expenses.

10. There are similarly worded provisions elsewhere in PPERA 2000 which are concerned with defining "*relevant donations*" in other contexts as being for the purpose of meeting expenses incurred by or on behalf of the recipient.[7]

11. The Divisional Court considered that "*it does not follow from the fact that separate sets of rules apply to donations made to permitted participants and to referendum expenses incurred by permitted participants that there cannot be transactions to which both sets of rules apply*".[8] The Appellant disagrees.

12. The wording of PPERA 2000 is consistent with a payment by way of donation never amounting to the incurring of referendum expenses. "*Referendum expenses*" are defined

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[6] The reporting obligation is in PPERA 2000, Sch. 15, para. 9.

[7] See in particular: Sch. 11, para. 1(4) (donations to recognised third parties); and Sch. 16 inserting Sch. 2A, para. 1(3) into the Representation of the People Act 1983 (candidate expenses).

[8] Judgment **[CB/3]**, para. 59.

in section 111(2) of PPERA 2000 **[AB/2]** as "... *expenses falling within Part I of Schedule 13*". Part I of Schedule 13 relates to expenses incurred "*in respect of any of the matters*" there listed. Donations are not included in that list, nor is "*meeting expenses incurred by or on behalf of a permitted participant*".

13. Moreover, no practical purpose is served by allowing overlap between the regulatory regime for donations and the regulatory regime for referendum expenses. Indeed, Grounds 2 to 5 below explain why overlap is detrimental.

14. The Divisional Court focused on the meaning to be given to the word "*incurred*" without addressing the logically prior question of whether within this statutory scheme a donor can "*incur*" referendum expenses at all.

15. In the Appellant's submission, the payments in the present case are governed by the donations regime not the expenses regime. Accordingly, they were not "*referendum expenses*", and the declaration in paragraph 1 of the Order **[CB/2]** is incorrect.

GROUND 2: THE JUDGMENT UNDERMINES THE POLICY OF TRANSPARENCY TO THE PUBLIC

16. The Divisional Court's interpretation of "*referendum expenses*" undermines the policy of transparency to the public which is of central importance in modern electoral law. That policy supports the Appellant's interpretation and the declaration which the Appellant asks this Court to substitute for that in paragraph 1 of the Order.[9]

17. Section 124 of PPERA 2000 **[AB/2]**[10] specifically provides for the public inspection of returns made under section 120, and reflects the underlying policy of transparency to the public of referendum expenses, which is a core feature of the Appellant's functions.

18. On the facts of this case, £620,000 was spent on AIQ services but on the Divisional Court's analysis £1.24m needed to be reported. Accordingly, the effect of the Judgment

[9] See section 9 of the Appellant's Notice **[CB/1]**.

[10] As amended by EURA 2015 **[AB/3]**.

is to duplicate the total sum of reported referendum expenses in the category of cases under consideration.

19. Reporting in publicly available data that £1.24m was spent in the present case does not further transparency. There is no legal obligation on participants in referendums to provide data to the Appellant which will allow these figures to be disentangled. 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. This undermines transparency.

20. To the extent that doubled sums result from the "*common plan*" provisions, these can be identified because there are specific rules in section 120(4A) to (4E) of PPERA 2000 **[AB/2]** providing for the requisite associated data to be supplied to the Appellant. However, there are no provisions requiring the supply of data by which any other type of double reporting can be identified by the Appellant, and therefore no way in which the public can be expected to understand such double reporting.

21. Accordingly, the Divisional Court erred in paragraph 64 of the Judgment **[CB/3]**, in particular by indicating in the first sentence that there was "*no objection in principle to an analysis which has the consequence that two permitted participants may each incur referendum expenses in connection with the same purchase of goods or services.*" The final sentence of that paragraph is also inapposite in suggesting that double reporting of common plan expenses is comparable; as noted in paragraph 20 above, there is a special regime to avoid confusion resulting from such double reporting.

GROUND 3: INSUFFICIENT BASIS FOR DISTINGUISHING BETWEEN GENERAL DONATIONS AND SPECIFIC DONATIONS

22. The Judgment adopts a novel and unprecedented distinction between "*general*" and "*specific*" donations (see paragraph 80 **[CB/3]**). No such distinction is to be found in the statute. The distinction is rather the Divisional Court's own creation, based on apparent policy considerations, but those policy considerations do not justify it. Rather, as set out under Ground 2 above, the distinction is inconsistent with the policy of transparency.

23. In paragraph 74 of the Judgment **[CB/3]**, the Divisional Court refers to "*the underlying purpose of the restrictions on the amount of referendum expenses which a participant*

may lawfully incur" as being "*to prevent any one individual or body from obtaining disproportionate attention for their views because of the wealth which they have available to spend.*" The Court continues that: "*... it would defeat the purpose of the legislation if an individual or body (A) could go on spending after it had reached its limit by the expedient of agreeing with another permitted participant (B) that B would purchase qualifying goods or services to be used for referendum purposes on the basis that A would pay for them.*"

24. This does not justify treating general donations differently from specific donations because both would be problematic from the policy perspective described in paragraph 74. The Appellant considers that the problem can adequately be addressed by the Appellant's existing approach to what it calls "*sham donations*" – i.e. where campaigner A purports to donate money to another campaigner B but, on an objective view, expenses were in fact incurred by or on behalf of campaigner A.

25. PPERA 2000 does not impose limits on the amount of donations. One consequence of requiring "*specific*" donations to be accounted for as referendum expenses (as the Divisional Court's Judgment does) would be in effect to impose a cap on the amount of such donations. There is no evidence that Parliament intended such a result.

26. A distinction between "*general*" and "*specific*" donations is unlikely to work well in practice. Some permitted participants have a limited purpose or narrow focus of activity. The likely use of unconstrained donations to such entities is obvious to the donor – and so practically no different from the type of donation under consideration in the present case – yet under the categorisation in the Judgment they will be considered to be "*general*" donations and not reportable as expenses incurred by the donor. Many donors will express an unenforceable wish as to how their donation should be spent, leading to a categorisation of the consequent donation as "*general*", yet in practice such wishes are respected by grateful recipients and so the result is much the same as a "*specific*" donation.

27. Absent a distinction between general and specific donations, the declaration made in paragraph 1 of the Order **[CB/2]** cannot stand. Otherwise, the making of any donation

would also be the incurring of referendum expenses by the donor, which even the Divisional Court could not countenance.[11]

GROUND 4: THE JUDGMENT DOES NOT ANALYSE PPERA 2000 AS A WHOLE

28. The Appellant is the regulator for all areas of election spending and has serious concerns about the effect of the Judgment in other contexts.

29. Although the Judgment directly concerns only the provisions of PPERA 2000 on referendum expenses, similarly-worded provisions in PPERA 2000 (and earlier legislation which PPERA 2000 amended) regulate other areas of election spending. Accordingly, the Judgment necessarily affects the application of those provisions and that broader picture should have informed the Divisional Court's decision.[12] Despite this, the Divisional Court focused when interpreting the common language on policy considerations which arise only in the specific context of referendums.[13]

30. Political parties, candidates and third party campaigners would all appear to be detrimentally affected. In particular, the Judgment may have a significant impact on their donors, who could inadvertently become campaigners by giving money with some conditions attached, and therefore be subject to regulation by the Appellant. This will add to the regulatory burden on campaigners and could have the unfortunate effect of discouraging some to make donations or to campaign at all. The Appellant is particularly mindful about the impact on smaller non-party campaigners such as charities, faith groups or individuals.

31. Some further examples of the consequences on other areas of regulation are given below.

32. Campaign expenditure: Part 5 of PPERA 2000 **[AB/2]** relates to control of campaign expenditure. Section 72(2) of PPERA 2000 defines "*campaign expenditure*" in relation

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[11] See Judgment **[CB/3]**, para. 58.

[12] See paragraph 33 of the Judgment **[CB/3]**: "*It is generally reasonable to assume that language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion ...*".

[13] See in particular paragraph 74 of the Judgment **[CB/3]**.

to a registered party (subject to certain exceptions) as "*expenses incurred by or on behalf of the party which are expenses falling within Part I of Schedule 8 and so incurred for election purposes*". The definition is analogous to the definition of "*referendum expenses*" which was under consideration in the present case. Accordingly, if a registered party were to commission services from AIQ for £620,000, and a donor to pay AIQ's bill in the same sum, the effect of the Judgment appears to be that both the registered party and the donor would have incurred campaign expenditure "*by or on or behalf of the registered party*", in the total sum of £1.24m. All of that sum would have to be accounted for by the registered party in its campaign expenditure return. This could cause serious difficulties for the registered party in taking it over its spending limit set out in Schedule 9 of PPERA 2000, for no obvious policy reason. True it is that section 75 requires campaign expenditure to be incurred with the authority of the treasurer or deputy treasurer or someone authorised by them, but in this example it would have been.

33. Candidate expenses: In paragraph 47 of the Judgment **[CB/3]**, the Divisional Court considered briefly the provisions in the Representation of the People Act ("**RPA**") 1983 **[AB/1]** regarding candidate expenses (which were amended by PPERA 2000). The Divisional Court there erred in dismissing their relevance with the following statements, which are incorrect:

(1) The Judgment states: "*The problem is avoided under the 1983 Act by the provisions which require all donations to be paid to the candidate or his election agent and all payments of election expenses to be made by or through the candidate's election agent. Payments made directly to a supplier by a third party are therefore prohibited.*"

That statement is incorrect, in particular because paragraph 2(1)(c) of Schedule 2A to the RPA 1983 **[AB/1]** expressly envisages payments made directly to a supplier by a third party, by providing for the following category of donation:

"*any money spent (otherwise than by the candidate, his election agent or any sub-agent) in paying any election expenses incurred by or on behalf of the candidate*".

In other words, "*through the election agent*" does not mean that the payment has to be made by the election agent.

(2) The Judgment further states: "*Nor does any question arise under the 1983 Act of whether a donation constitutes an election expense. The object of an election campaign is the election of a particular candidate and there is no reason why one candidate would want to donate campaign funds to another.*"

That statement is incorrect insofar as the second sentence seeks to justify the first. It is fairly common for political parties to donate to candidates. The extent to which such donations may constitute election expenses is affected by the Judgment.

34. In summary, fuller consideration of other aspects of PPERA 2000 would have shown the impracticality of the Divisional Court's interpretation of "*referendum expenses*" leading to the declaration in paragraph 1 of the Order **[CB/2]**.

GROUND 5: THE DIVISIONAL COURT'S ANALYSIS LEADS TO SURPRISING RESULTS FOR REFERENDUMS

35. The Divisional Court's analysis leads to surprising results even in the context of the referendum provisions in PPERA 2000. Again, this shows the impracticality of the Divisional Court's interpretation of "*referendum expenses*" leading to the declaration in paragraph 1 of the Order.

36. For example:

(1) Where an organisation settles a bill for a volunteer working for it, if the volunteer incurs over £10,000, it would appear that the volunteer would under the reasoning in the Judgment need to register as a permitted participant because he/she will be incurring referendum expenses exceeding the statutory threshold for registration. This could impose significant burdens on volunteers and has the potential to deter some volunteers from becoming involved in campaigning at all. The general understanding has been that the volunteer is acting on behalf of the permitted participant (as set out in the Appellant's submissions recorded in paragraph 87 of the Judgment **[CB/3]**).

(2) A "*specific*" donation at the 2016 EU referendum by a designated organisation to another permitted participant, whereby it was agreed that the former would pay for services and the latter would contract for them (as on the assumed facts of the

present case), would have amounted to a "*common plan*" for the purposes of paragraph 22 of Schedule 1 to EURA 2015 **[AB/3]**. Accordingly, the designated organisation would have been required to account for both the expenses of the payment and the expenses of the contract. On the assumed facts, the designated organisation would have to account for £1.24m in respect of a contract entered into by the other permitted participant for only £620,000.

(3) Where two permitted participants A and B (neither of which is a designated organisation) enter into an arrangement whereby A will contract for services costing £620,000 and B will pay for them, there is a common plan for the purposes of paragraph 22 of Schedule 1 to EURA 2015 **[AB/3]** and therefore:

(a) A will account for £620,000 as its own referendum expenses.

(b) B will also account for £620,000 as its own referendum expenses.

(c) A will also account for £620,000 as common plan expenses.

(d) B will also account for £620,000 as common plan expenses.

In total, the reports will show £2.48m of expenses. The utility of this result is wholly unclear.

CONCLUSION

37. For all the above reasons, the Appellant respectfully requests permission to appeal. An appeal has a real prospect of success, and in any event there is a compelling reason for an appeal, namely to ensure the coherence of electoral law.

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23 October 2018 [bundle references inserted 6 June 2019]