**PERMISSION HEARING 15/3/2018 CPR 54 CO/4908/2017**

**R (GOOD LAW PROJECT) v ELECTORAL COMMISSION**

**OBSERVATIONS BY AN INTERESTED PARTY: VOTE LEAVE LTD**

**Prior reading should include these observations including the schedule, the statement placed before the Court by Vote Leave and the grounds from both of the parties.**

A. **Introduction and summary: An unincorporated association, which has modestly named itself the Good Law Project and which is upset by the result of the referendum in June 2016, has been refused leave to move for judicial review but renews the application against the Electoral Commission, which is doing what the Claimant wants it to do. Consequently, the proceedings are futile.**

B. **In any event there are overwhelming objections to the grant of leave, most of which were not drawn to the attention of Lang J. They are set out below.**

C. **In essence: the statutory machinery for the referendum should be allowed to work as set out in the legislation, which**

**includes alternative remedies, which also preclude judicial review.**

**D. Further, a civil court should not usurp the role of a criminal court.**

**E. In any event the construction contended for (that donation is synonymous with expense incurred) is obviously wrong.**

**F. Vote Leave Ltd will be attending the permission hearing.**

**G. Further, as it so conspicuously has a separate interest from the Electoral Commission and has identified important matters not hitherto brought to the attention of the Court, Vote Leave Ltd seeks its costs. The Court is empowered to accede to that request.**

**H. In any event to enable the Project, an overtly political body, to litigate at the public expense is wrong.**

**I. This document had been substantially prepared prior to receipt of the Project's skeleton argument and has not to any significant degree been altered in consequence of its receipt.**

J. **The Project's skeleton reveals that the Project has not comprehended the character of the case it seeks to pursue and has not understood the legislation or the established approach to such legislation. Further, the skeleton misrepresents certain matters and attributes to Vote Leave statements and actions never made by Vote Leave. The skeleton does reveal delay and a failure to appreciate the requirement to move quickly in electoral matters.**

K. **A small clip of documents has been assembled to show the Court that those responsible for Vote Leave were responsible, respectable people who ran Vote Leave on prudent lines and took advice from the Electoral Commission as to how to proceed and acted upon such advice. The clip also shows the multiplicity of transactions on the Remain side. Their participants shared agencies and donated funds used to pay expenses.**

L. **A short schedule to this document collects a number of observations on the Project's skeleton. It, the schedule, is not intended to be exhaustive.**

## Immediate Background

1. Part VII, i.e. sections 101 to 129, of the Political Parties, Elections and Referendums Act 2000 applies to referendums in the United Kingdom: section 101(1)(a). Part VII contemplates, as for the 2016 referendum which decided that the United Kingdom should leave the European Union, that any particular referendum would be in pursuance of another Act of Parliament: section 101(2)(a).

2. The European Union Referendum Act 2015 was given Royal Assent on 17 December 2015 and the referendum, as provided for by the 2015 Act, came to be held on 23 June 2016.

3. Any further referendum, whether referable to the European Union or otherwise would require further legislation, which may or may not reflect, adopt or vary the legislation that provided for the referendum of June 2016. No further referendum can be held under the 2015 Act. Accordingly, it is idle to suppose that the prospective judicial review (in CO/4908/2017) would aid the administration of a subsequent referendum, cf. the Claimant's contention at 1-75, paragraph 24.

## Multiple permitted participants

4. Section 105 of the 2000 Act provides for 'permitted participants' at referendums. Section 105(1)(b) of the 2000 Act was substituted by a provision given for the 2016 referendum by paragraph 2 of schedule 1 of the 2015 Act.

5. Consequently, the following, among others, were able (at the 2016 referendum) to be permitted participants: any individual resident in the United Kingdom or Gibraltar or registered companies incorporated within the European Union and

carrying on business in the United Kingdom or a trade union, building society, limited liability partnership or any unincorporated association of persons carrying on business or other activities mainly in the United Kingdom : see s. 105 (1) and s. 54(2)(b),(d),(e),(f)(g)and (h).

6. In addition the following, amongst others, could have been (and no doubt some were) permitted participants: any body falling within paragraphs (b) and (d) to (g) of section 54(2A) of the 2000 Act, any body incorporated by Royal Charter not falling within section 54(2) of the 2000 Act, charitable incorporated organisations falling within legislation relating to England and Wales, Scotland and Northern Ireland and any partnership under the law of Scotland carrying on business in the United Kingdom.

7. Consequently, Parliament contemplated that there could, at the 2016 referendum, be a huge number of permitted participants. Parliament also contemplated that the permitted participants would largely depend on volunteers and donations. Parliament did not disable participants from being donors.

**Designated participant**

8. One, but only one, permitted participant was designated as an organisation to which assistance, in the shape of a grant from the Electoral Commission, was available under section 110 of the 2000 Act: section 108 ibid and paragraph 9 of schedule 1 of the 2015 Act.

9. Vote Leave Ltd was so designated and consequently was able, by virtue of paragraph 1(2)(a) of schedule 14 to the 2000 Act and paragraph 25(2)(a) of schedule 1 of the 2015 Act to spend £7 million on referendum expenses at the 2016 referendum.

Such a sum was far in excess of assistance provided under section 110. Accordingly, Vote Leave Ltd depended on donations and volunteers.

10. Although Vote Leave Ltd was designated there were still able to be (and were) a multitude of other permitted participants. These participants also depended on donations and volunteers. Further, quite apart from permitted participants Parliament clearly contemplated participation by millions of others. The voters consisted of the adult population and both large and small donations were expected.

**Referendum expenses**

11. Chapter II of part VII of the 2000 Act deals with referendum expenses, which phrase is defined by section 111 (2). They are expenses incurred by any body being within part 1 of schedule 13 and incurred for referendum purposes. Financial limits are imposed on referendum expenses: see sections 117, 118 and schedule 14.

**Donations, dealt with separately, different meaning**

12. Donations are dealt with separately by section 119 and schedule 15. The schedule (at paragraph 2) defines donation. Donations are gifts and the like. There are controls on donations given by part II of schedule 15. There are requirements to return certain donations.

13. However, no requirement to return a donation arises in consequence of a permitted participant spending up to the limit imposed on referendum expenses for that participant. (It would no doubt be regarded as very unfair if someone gave money so as to stimulate the electorate to vote one way or the other only to find that the donation languished because

unknown to the donor the (donee) permitted participant had reached its expenditure limit. Effectively, the Claimant is writing in a provision to preclude, whatever the circumstance, a donee from being a donor. (The Court has no particular means of knowing whether such an approach would aid a particular side but it would appear to favour the status quo over ad hoc organisations more likely to be affected by exigencies precluding volunteers from doing what they otherwise would do).

14. The Electoral Commission are correct in saying that the legislation does not prevent a permitted participant from giving (surplus) money to another permitted participant: see paragraph 6 of the Commission's grounds of opposition. It is noted that the Project has just served a skeleton argument in which it (erroneously) represents that important questions arise including whether a permitted participant could donate its money to another. The Court should be alive to what the Project, whose side was far better funded in the referendum, is seeking to do. It is an attempt to inhibit an expression of view sought to be effected by a donor who by chance is faced by an expenditure limit on the part of the done participant.

15. By section 120 there has to be a return as to referendum expenses. This has to be accompanied by a declaration: s.123. A person commits an offence if a false declaration is made or there is no signed declaration: s.123 (4).

16. Sections 150-154 and schedule 20 make provision in respect of offences. Schedule 20 provides that the punishment under s.123(4)(a)or(b) is on summary conviction either the statutory maximum fine or 6 months' imprisonment; on indictment the punishment is an unlimited fine or I year's imprisonment.

17. Criminal offences are also committed if referendum expenses are incurred in excess of the financial limits: see sections 117 and 118 of the 2000 Act. The sanctions are as set out in the preceding paragraph. It is noted that the Project seeks, see ground 1 of its skeleton argument, to persuade the Court, presumably on a balance of probabilities that an interested party has committed a criminal offence. This, frankly, is an outrageous thing to do.

**Who can prosecute?**

18. There is no inhibition as to who may prosecute such an offence. Indeed the Act contemplates that others beside the Commission may prosecute for by section 154 of the 2000 Act the court on a conviction has to notify the Commission.

**A constitutional principle**

19. The basic constitutional principle (see the case of Gouriet) is that in the absence of any specific provision a private prosecution can always be brought. In Gouriet Lord Wilberforce said [1978] AC 435, 477

> The individual … who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority. This is the true enforcement process ….

20. The fact the criminal law underpins this matter is significant. Please note that Lord Wilberforce describes the matter as one of remedy. Each member of the Judicial Committee spoke and no one expressed a different view from Lord Wilberforce.

**Alternative remedy precludes judicial review**

21. Judicial review should not issue if an alternative remedy exists. There is a wealth of authority to such effect; R v Birmingham ex parte Ferrero is one such case: [1993] 1 All ER 530. Taylor LJ said with the agreement of the other members of the Court of Appeal

> … where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only exceptionally that Judicial Review should be granted.
>
> [And later he said]
> [The judge] should have asked himself what, in the context of the statutory provisions, was the real issue to be determined and whether a Section 15 appeal [the alternative remedy in that case] was suitable to determine it.

22. If the true concern is whether a false declaration had been made the remedial action is a prosecution. Although the application for permission is directed against the investigative steps of the Electoral Commission the gravamen of the application is to require the Commission to consider a prosecution (paragraph 4.2 of the statement of facts and grounds) on the footing that certain donations were referendum expenses (and not declared as such, hence criminal)(ibid paragraph 35 et seq.).

23. Further, it must be remembered that the Electoral Commission have an investigative role that may lead to a prosecution. In other words this is a matter where process is under way. Effectively, the Project is asking the Court to supplement a statutory scheme that is clearly intended to be a complete scheme or code. The Court should resist such a request especially when made at the behest of an overtly political project. The leading spirit, Mr Maugham QC, behind the Project says that he campaigned for ‘remain’ and continues to believe the country’s interests would be better served by remaining,

contrary to the established policy of HM Government, in the European Union.

24. Further, Mr Maugham claims he has caused the 're-opening of the investigation' into Vote Leave, BeLeave and Veterans for Britain. Such was so stated by him after Mr Justice Supperstone had dismissed a renewed application for judicial review in respect of Government papers relating to Brexit. Mr Maugham also claimed that he crowdfunded before Gina Miller emerged, that he could not deliver in Ireland but that he had forced the Commission to reopen as stated above and that all other cases were unresolved. It can be noted that the opportunity for judicial review of the referendum has passed: see paragraph 38 of these observations.

**Civil courts and criminal courts**

25. A civil court should not ordinarily set out to interpret the criminal law if criminal proceedings are possible or likely, still less if process is under way. In Imperial Tobacco v Attorney General [1981] AC 718 the Court of Appeal had declared (in respect of spot cash advertising) that no crime was committed. In the House of Lords Viscount Dilhorne said:

> That decision, if it stands, will form a precedent for the Commercial Court and other civil courts usurping the functions of the criminal courts. Publishers may be tempted to seek declarations that what they propose to publish is not a criminal libel or blasphemous or obscene. If in this case where the declaration sought was not in respect of future conduct but in respect of what had already taken place, it could properly be granted, I see no reason why in such cases a declaration as to future conduct could not be granted. If this were to happen, then the position would be much the same as it was before the passing of Fox's Libel Act 1792 when judges, not juries, decided whether a libel was criminal, blasphemous or obscene.
>
> Such a declaration is no bar to a criminal prosecution, no matter the authority of the court which grants it. Such a declaration in a case such as the present one, made after the commencement of the prosecution, and in effect a finding of guilt or innocence of the offence charged, cannot found a plea of autrefois acquit or autrefois convict, though it may well prejudice the criminal proceedings, the result of which will depend on the facts proved and may not depend solely on admissions made by the accused. If a civil court of great authority declares on admissions made by the accused that no crime has been committed, one can foresee the use that might be made of that at the criminal trial.

> The justification for the Court of Appeal taking this unusual and unprecedented course - no case was cited to us where a civil court had after the commencement of a prosecution, granted a declaration that no offence had been committed - was said to be the length of time it would have taken for the matter to be determined in the criminal courts. I can well see the advantages of persons being able to obtain rulings on whether or not certain conduct on which they propose to embark will be criminal and it may be a defect in our present system that it does not provide for that. Here, I wish to emphasise, it was not a question whether future conduct would be permissible but whether acts done were criminal. It was said that the administration of justice would belie its name if civil courts refused to answer reasonable questions on whether certain conduct was or was not lawful. I do not agree. I think that the administration of justice would become chaotic if, after the start of a prosecution, declarations of innocence could be obtained from a civil court.

26. Lords Edmund-Davies and Scarman agreed with Viscount Dilhorne and Lord Lane. Lord Fraser of Tullybelton expressly concurred. Lord Fraser said:

> …this is not a case in which the discretion of the court should have been exercised to make the declaration. By doing so the civil court, in my opinion, improperly intruded into the domain of the criminal court, notwithstanding that criminal proceedings had already been begun. We were not referred to any reported cases where such intrusion had occurred and in my opinion it ought not to be permitted except possibly in some very special circumstances which are not found here.

27. Lord Lane said:

> What effect in law upon the criminal proceedings would any pronouncement from the High Court in these circumstances have? The criminal court would not be bound by the decision. In practical terms it would simply have the inevitable effect of prejudicing the criminal trial one way or the other.
>
> Where there are concurrent proceedings in different courts between parties who for practical purposes are the same in each, and the same issue will have to be determined in each, the court has jurisdiction to stay one set of proceedings if it is just and convenient to do so or if the circumstances are such that one set of proceedings is vexatious and an abuse of the process of the court. Where, however, criminal proceedings have been properly instituted and are not vexatious or an abuse of the process of the court it is not a proper exercise of the court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged by the prosecution do not in law prove the offence charged.

## Statutory construction

28. A criminal provision should be interpreted strictly so as to tend towards liberty rather than oppression. The Claimants say that the definitions should be interpreted widely: paragraph 35 of the statement of facts and grounds. They say that one must

have regard to what they call the statutory architecture: paragraph 12 of the reply to the Defendant's summary grounds of defence.

29. It is not known what is meant by statutory architecture. However, it should be noted that according to Halsbury's Laws of England a section of an Act is the primary indication of the legislature's meaning and intention. Further, the learned editors record that a section is designed with great care so that it deals with a single point; the way sections are organised is to be taken as a reliable guide to legislative intention: paragraph 1099, volume 96, 5th edition 2012. Different sections deal with different matters; expenses incurred are different from donations made.

30. The same volume, at paragraph 1088, says that where the application of one of the opposing constructions of an enactment would produce a result detrimental to the subject that is a factor against that construction.

31. Further, the same volume, at paragraph 1158, says it is a principle of legal policy that no one should be penalised except under clear law, or in other words one should not be put in peril upon an ambiguity.

**Approach to electoral law**

32. None of the preceding points has hitherto been considered. Equally unconsidered is this incontestable matter. It is an established feature of election law that those administering elections apply the rules strictly and not on a discretionary basis. The rationale, beyond straightforwardness of operation, is plain. If it were otherwise those conducting the administration of elections –and this point holds good for

judges as well as returning officers and their officials – could be accused of partiality.

33. No election case is intended, in consequence of the Representation of the People Act 1983 (section 157), to go beyond the Court of Appeal. In R v Tower Hamlets ex parte Begum Sir Anthony Clarke MR, with the agreement of the other members of the Court of Appeal said:

19 As already indicated, the Act makes no provision for the High Court to make orders for judicial review in the course of an election. Mr Straker does not however submit that the High Court has no jurisdiction to grant relief. He recognises that the High Court has, or may have, jurisdiction under section 31 of the Supreme Court Act 1981 , for example to grant a mandatory, prohibiting or quashing order under section 31(1)(a) or a declaration or injunction under section 31(1)(b) . As I see it, the judge was invoking the power to grant a mandatory injunction when he ordered the returning officer to countermand the poll.

20 Mr Straker submits that such an order should, as he put it, hardly ever be made. I agree. That was the approach of Scott Baker J in *R (De Beer) v The Returning Officer for the London Borough of Harrow [2002] EWHC 670* (Admin), where he said at paragraphs 37 and 38, in the context of a submission, that the court would have jurisdiction to interfere with a decision by a returning officer that a nomination paper was invalid:

"37. It has not been argued before me that the court cannot interfere by way of judicial review, although it is fair to say that neither party was aware of any case where there has been a successful application for judicial review against a returning officer.

"38. In my judgment, although judicial review does lie, this is an area in which the courts should be extremely slow to interfere with the decision of a returning officer. No doubt where a returning officer has plainly acted unlawfully relief will lie. But ordinarily returning officers should be left to conduct the election process as provided by Parliament."

21 I agree with Scott Baker J that the court should be extremely slow to intervene. It should only do so in a most exceptional case. Parliament has conferred duties (but not discretions) on returning officers and has made express provisions as to how any decision of a returning officer might be challenged, namely by petition before an election court after the election. Save in a wholly exceptional case the court should in my opinion allow the statutory machinery to work as set out in the Act and the rules. 22 It is not easy to think of circumstances in which it might be appropriate for the court to intervene. …

34. In this matter the Claimant says the High Court should exercise a discretionary, supervisory jurisdiction in respect of a highly contentious political subject where many are striving to reverse the decision to leave the European Union and to seek the most favourable circumstances for that political cause.

35. The Claimant says the Electoral Commission should be muscular in the exercise of its statutory obligations: paragraph 3 of the witness statement of Mr Jolyon Maugham QC. This appears to suggest that if there is any semblance of choice on the part of the Commission then it should be exercised in a 'muscular fashion'. It is not known how such advice would aid the work of the Electoral Commission.

36. No doubt there are many and various ways to criticise the approach and language of the Claimant but the Court-the law being interested in substance rather than form- should particularly note what the Claimant is trying to do. The Master of the Rolls (in Begum's case) said:

> Save in a wholly exceptional case the court should in my opinion allow the statutory machinery to work as set out in the Act and the rules.

**The statutory machinery should be allowed to operate**

37. The statutory machinery was set out in the 2000 Act, the 2015 Act and regulations including the European Union Referendum (Conduct) Regulations 2016, SI 2016/219, which, amongst other things applied provisions of the Representation of the People Act 1983: regulation 79 and schedule 1. We can be sure that what the Master of the Rolls said in Begum (and what appears from other election cases) can be taken as applicable to the referendum of 2016.

38. The Chief Counting Officer was the Chairman of the Electoral Commission or the person appointed by the Chairman: section 128(2). Provision was made for a challenge to the referendum result: see paragraph 19 of schedule 3 to the 2015 Act. However, after 6 weeks no court may entertain any proceedings for questioning the votes cast in the referendum: ibid.

39. The Electoral Commission are given enforcement and investigative powers: paragraph 44 of schedule 1 to the 2015 Act. Public inspection of returns has to be possible: section 120 of the 2000 Act and the Commission's registers are available for public inspection: section 149.

40. Criminal offences are created: a number have been specified in earlier paragraphs.

41. It is therefore perfectly clear how the statutory machinery, to use the Master of the Rolls's phrase, is intended to work. A referendum occurs, subject to highly detailed rules and a chief counting officer, a limited opportunity for challenge with further investigation by the Electoral Commission, publicity to occur and remedies in the hands of the public through the criminal law.

42. Such an approach, which was not before Lang J, precludes the grant of permission. Such preclusion is independently supported by the observations about alternative remedies and the relationship between civil courts and criminal process, which were also not before Lang J.

**Brief relevant facts**

43. The relevant facts are brief. Vote Leave Ltd received before the 23rd June 2016 legitimate donations so that Vote Leave Ltd had more than £7 million. The legislation requires in certain circumstances donations to be returned. This was not such a circumstance.

44. Accordingly, Vote Leave Ltd had money which was not (and was not going to be) spent on expenses incurred by or on behalf of Vote Leave Ltd for referendum purposes.

45. Vote Leave Limited was lawfully able to donate money to others participating in the referendum and decided to do so. This was done to Beleave (Mr Grimes) and Veterans for Britain. The donees were subject to no control by the donor. There was no co-ordination or common plan. It so happened that certain participants in the referendum had used and incurred liabilities towards Aggregate IQ, an internet (on line) advertising agency. This is hardly surprising given the role played by such advertising in the referendum. Vote Leave Limited was one such user as were Beleave and Veterans for Britain.

46. The Electoral Commission have correctly recognised that donations, including last minute donations to other campaigners are allowed, just as suppliers may be common to participants: see hearing bundle p3-98. There is, accordingly, nothing untoward about late donations, which may go to a common supplier. At page 3-162 the Commission note as unsurprising the use by Vote Leave and others of the same supplier, namely AiQ.

47. The donations were used in respect of the expenses incurred with that agency by Beleave and Veterans for Britain. This is said by the Claimant to be suspicious but it is no more suspicious than candidates in a constituency using the same printer for their election material and one candidate donating money to another which is used to meet printing expenses incurred by the other.

48. This is not at all fanciful; quite apart from ordinary impulses of generosity many county or borough divisions were two member constituencies; a candidate would have his or her own expenses to declare but might be happy to donate to the campaign of another candidate. Donors often pay for expenses incurred by campaigners; such donors may, at elections, be campaigning in other divisions, wards or constituencies. This is

no different in kind from an indulgent parent meeting his child's bills, when both use the same merchant.

49. Donors do not incur or authorise expenditure; a donor does not incur liability to pay. If a friend gives someone money to pay for his car to be repaired then the friend incurs no liability to the garage whether or not he pays the garage directly. A parent who pays tuition fees for an undergraduate may do so out of natural love and affection but has not incurred any liability for such fees. A friend may pay such fees. The friend or parent cannot be sued by the garage or the university. The examples are legion because the principle is plain. There is a difference between contractual liability and the actions of a donor.

50. This matter has been twice investigated, reviewed and assessed by the Electoral Commission. The position has been accepted as correct. The Commission are looking-unnecessarily and wrongly- at the matter again. Vote Leave Ltd has a substantial complaint about the steps taken by the Electoral Commission but that is nothing to do with the Project or its purported claim, save that it emphasises that the legislative system should not be interfered with by third parties such as the Project. (For the avoidance of doubt nothing in this document inhibits any proper step being taken by Vote Leave Ltd (or others) against the Electoral Commission. None the less, Vote Leave Ltd has conspicuously co-operated with the Commission and continues to do so.)

51. An incidental point can be noted. It is well known that the Law Commission has recommended changes to electoral law. In the course of the consideration of such changes attention was paid to the process of petition and the constraints on who could be a petitioner. Serious concern was expressed about enabling any form of public body to be able to pursue petitions; not merely

would it bring the public body into the political arena but there would be political pressure to pursue or discontinue action.

52. It should be noted that the campaign at the 2016 referendum seeking to uphold the status quo was called the 'Remain campaign'. Four donors were responsible for £6 million of donations to 8 Remain campaigns. Spending and donation returns show numerous instances of donations between campaigns and payments to common suppliers. This is hardly surprising since Mr Cameron's former Director of Communications records in '*Unleashing Demons'* that the multiple Remain campaigns had a conference call each morning to co-ordinate strategy.

53. Accordingly, the Project's approach is not shared by Vote Leave Ltd, whose approach has been endorsed by the Electoral Commission or the Remain campaign (at least as conducted). The treatment of expenditure and donations was the same on both sides. Further, each side had advertising agencies, whether digital or otherwise, who were used by various of the participants.

**Expenses incurred different from a donation**

54. The Commission are plainly right to say that 'expenses incurred' by or on behalf of somebody is different from a donation. The Claimant's approach ignores the language and turns all those who are donors into persons incurring referendum expenses, which is absurd.

55. It is sufficient here to invite the Court to consider the approach to the definitions put forward by the Commission and to point to the folly of the Claimant's construction.

**Further objections**

56. There are yet other objections to this prospective litigation. The party most potentially damaged is Vote Leave Ltd. It will be appreciated that a party lodging a return can ask for it back after two years. This provision plainly had in mind the law relating to elections whereby offences (subject to an exceptional circumstance extension) cannot be prosecuted after a year and all election documents have to be destroyed after a year.

57. Further, Vote Leave Ltd was set up for the 2016 referendum and has been substantially wound down after the referendum. (This is hardly a surprise given the announcement HM Government made that it would implement the result of the referendum and that Parliament has legislated to do so).In due course the company will be dissolved.

58. However, the prospective litigation necessarily imposes costs on Vote Leave Ltd and has a chilling effect on political discourse. Participants may be reluctant to come forward if more than merely the statutory mechanics are to be worked out or if it is known that political opponents can seek to use the court process to force investigations to be re-opened or to incur, well after the referendum, continuing costs. Whether or not the so called Good Law Project has this intention is by the by but it would be foolish not to take notice of the fact that there are those who seek (amongst other things) a further referendum.

59. The Court will appreciate that elections and referendums depend on volunteers. This is especially true for those questioning the status quo. A volunteer can be taken to have accepted what is laid down as a comprehensive system in the duly enacted legislation but has not accepted and may be

deterred by misguided (and futile) attempts to extend the system.

60. Further, the Claimant seeks to load costs on other parties without taking responsibility for such costs. Vote Leave Ltd has a separate interest from that of the Electoral Commission and the Court should so record. The Good Law Project does not volunteer to pay Vote Leave Ltd's costs or even accept potential responsibility for costs but rather seeks a cap on costs so as to pursue (political) points at public expense.

61. Further, attention should be drawn to *Erlam v Rahman* [2014] EWHC 2766 and the decision of Supperstone and Spencer JJ on the 7th August 2014. A protective costs order had been sought in an election petition, they said at paragraph 49

> that [counsel] could well be correct in his submission that the protective costs regime is inapt for an election petition. Elections and election petitions, they continued, are specially provided for with their own legislative regime, which includes provisions as to costs. They [and they were the rota judges at the time] understood that a protective costs order had never been made in an election case. They said there were good reasons why that was so but that, as it happened, it was unnecessary for them to decide the point.

62. It follows that the application for permission to seek judicial review should be refused. The Court is able to and should require the Claimant to pay Vote Leave's costs. A schedule will be produced. Vote Leave undoubtedly has a separate interest from that of the Electoral Commission and has pointed out in this document a range of reasons why permission should not be given, most of which were not brought to the attention of Lang J.

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SCHEDULE: SOME COMMENTS ON THE CLAIMANT'S SKELETON

1. Paragraph 1 does not reveal that the aim is to damage the interested parties by implicating them or securing a holding against them of criminality.

2. Paragraph 2 assumes that donation is payment for services by the donor. Further, the paragraph asserts, without any intellectual support, that donations, whether or not they enabled donees to acquire goods or services, undermined the statutory purpose of Parliament imposing an expenditure limit.

3. Please note that Parliament provided for an infinite number of participants each of which had an expenditure limit with none being disabled from being a donor or donee. Paragraph 2 also reveals that the Claimant is seeking a finding of criminality.

4. Paragraph 3 misrepresents Vote Leave as having said something, which it did not say. It says that 'Vote Leave claims' but fails to observe that the statement relied upon is one made by Dominic Cummins in January 2017 when no longer a member of Vote Leave Ltd and necessarily away from Vote Leave documents. It will be appreciated that Vote Leave took advice from the Electoral Commission prior to the referendum and acted on that advice.

5. It can be noted that the Project has sought elsewhere to refer to tweets and such like not being from Vote Leave as representing the position of Vote Leave.

6. Paragraph 4: as noted in the observations above new legislation would be required for any new referendum. The paragraph reveals, inferentially, the true reason for the purported proceedings namely to have any subsequent referendum on terms that most suit the Project –Remain was far better resourced than Leave, which it outspent- and diminish the ability of those who wish to uphold what is now the established policy of HM Government.

7. Paragraphs 5 and 6: Many important matters were not brought to the attention of the judge, e.g. relevant electoral law and practice, the law as to alternative remedies and the restraint that should be shown when dealing with a criminal matter.

8. Paragraph 7 does not advance the matter save to reinforce the point that the Project persists in wrongly describing donations as the purchase of services for another. There is no wider public interest in CO/4908/2017.

9. Paragraphs 8 and 9: cost capping would be illegitimate, the Project should be required to bear the costs of both the Commission and Vote Leave.

10. Paragraph 10 misstates the facts in a number of ways.

11. 10.6 appears to suggest that 'working together' is achieved by participants incurring expenses in pursuit of the same preferred outcome. The referendum with an infinite number of participants provided for a binary choice. All participants preferred one or other outcome and all will have incurred expenses in doing so. To do that was not to act, cf. para 10.6, pursuant to a common plan or to be working together. It is notorious that many national figures although working to the same end flatly refused to speak to one another or appear with the other.

12. 10.1 refers to AiQ as a Canadian data and marketing consultancy. Such language is used on a number of occasions. It is a digital advertising agency. The Court will appreciate that the days have past when advertising could be divided into outdoor, posters, buses, stations, etc., and indoor, principally television. A digital advertising agency secures that a message is received on digital platforms such as Facebook. There is a limited number of such agencies in the world and it is no surprise that AiQ came to be used, just as certain agencies were used by multiple participants on the Remain side. (AiQ enhanced its reputation by having acted for the most successful Republican nominee other than Mr Trump).

13. In 10.3 the Project appear, although it is not made clear, to be basing themselves on tweet exchanges well after the referendum between Mr Cummings and Mr Maugham.

14. In 10.4 the suggestion, basing themselves on the Daily Mail and a T shirt, is that Mr Grimes, to whose age attention is drawn as if it were relevant, was somehow part of Vote Leave Ltd or somehow part of its campaign. The Court will appreciate that someone wearing an Arsenal football shirt is not necessarily part of the Arsenal football club.

15. The Court will also appreciate that someone who habitually wears an Arsenal football shirt is not precluded from setting up his own football club sharing a common aim with the Arsenal. Mr Grimes was perfectly able, although more youthful than many barristers, to have and did have his own campaign. He was entitled to receive donations and Vote Leave Ltd was entitled to make donations. If someone hopes for a donation he may incur a liability anticipating the donation. However, the donor has incurred no liability and has left matters in the hands of the donee. The Court will also appreciate that all these matters were declared, i.e. the donations received and the expenses incurred.

16. Mr Maugham's speculations about the workings of digital advertising are re-hashed at paragraph 10.5 and do not advance the Court's knowledge of this matter. The submissions in 10.7 are wrong.

17. Paragraph 11 fails to draw attention to the fact that investigations are put by law in the hands of the Commission and that this matter had therefore concluded in March 2017. No attention is drawn to the fact that Vote Leave Ltd had substantially wound down or the fact that elections and referendums run on a tight timetable.

18. Paragraph 18 suggests that Lang J viewed the Claimant's analyses of the statutory scheme as arguable. She only ever referred to analysis in the singular.

19. In their legal submissions the Project repeat what they set out in their grounds. Accordingly, no paragraph by paragraph approach is adopted hereafter.

20. The Project continue to misunderstand that a donation is not synonymous with incurring an expense. (They have plainly not considered the regime for expenses of candidates at elections, which cf paragraph 31, reveals that incurred has its ordinary, contextual meaning). They continue (paragraph 25.3) to say that construction should be strained to suit what they say is the object of the legislation. Such an approach is completely inappropriate for penal legislation.

21. They fail (paragraph 26) to understand that a categorisation does not affect whether the substance is a donation. If someone hopes or expects to receive a gift and then incurs a liability that person still incurs the expense whether or not the donor meets the aspiration of the donee. As a matter of fact Veterans for Britain were let down by a donor who had indicated that a donation would be made, the veterans incurred a liability and then the donor let them down.

The Project's argument attacks the first (non) donation and precludes any second donation.

22. Vote Leave Ltd has shown the Court that it sought and received advice from the Electoral Commission. Vote Leave observes that the statutory regime provides for documents to be made available. No one suggests that Vote Leave has failed in its obligations under the Act in respect of lodging documents for the purposes of the necessary returns. It is wholly wrong for the Project to use litigation for which they do not have permission to seek to extract from the Electoral Commission documents relating to other persons and a referendum that occurred in June 2016.

23. It is clear the claim is futile. None of the legal texts cited by the Project bears on the matter at hand. They have failed to appreciate the statutory machinery, the exhortations of the Court of Appeal and the penal character of the legislation.

24. Paragraph 46 should be noted. It reveals a number of factors. First, it says the outcome of the referendum exerts influence on political life. However, the Court is invited to intervene. This is despite the statutory machinery and despite the High Court and Court of Appeal stating that statutory machinery should be allowed to work itself out and drawing attention to the perception of partiality.

25. Second, it says that if the Leave campaign did break the spending limits this could be taken into account by policymakers and public. This emphasises that the aim of the Project is political; they want to have an exercise conducted in the High Court about the Leave campaign (in general). The evidence before the Court is that the remain campaign conducted itself in a like fashion. However, it lost. It also shows that the Project want to bypass the statutory mechanisms and the criminal law so as to achieve a political advantage for remain. The language to describe the approach of the Project must be tempered. However, the approach appears to be abusive.

26. The second part of paragraph 46 further emphasises the political character of the presently unpermitted claim. It also ignores the fact there would have to be further legislation. It is not for the Court to write that legislation.

27. The cost capping order says nothing about the costs of those interested parties who the Project seeks to have labelled criminal. It is presumed the Project have supposed they can rely on the usual proposition that an interested party is a

volunteer rather than a conscript. It is submitted that cost capping was never intended for and should not be used for litigation of this character, whether or not it is categorised, as it should be categorised, as political litigation.

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