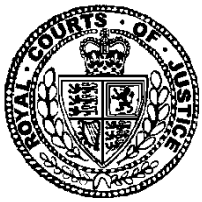

Neutral Citation Number: [2019] EWCA Civ 1567

Case No: C1/2018/2543

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
DIVISIONAL COURT
LEGGATT LJ AND GREEN LJ
[2018] EWHC 2414 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 September 2019

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE SINGH
and
THE RT HON LADY JUSTICE NICOLA DAVIES

- -

Between:

The Queen (on the application of the Good Law Project)	**Respondent**
- and -	
The Electoral Commission	**Appellant**
-and-	
(1) Vote Leave Limited	**Interested**
(2) Mr Darren Grimes	**Parties**

- -
- -

Philip Coppel QC and Gerard Rothschild (instructed by **the Government Legal Department**) for the **Appellant**
Jessica Simor QC and Tom Cleaver (instructed by **Deighton Pierce Glynn**) for the **Respondent**
Timothy Straker QC and James Tumbridge (Instructed by **Venner Shipley**) for the **First Interested Party** by way of written submissions only
The **Second Interested Party** did not appear and was not represented

Hearing date: 4 July 2019

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JUDGMENT

The Lord Chief Justice, Lord Justice Singh and Lady Justice Nicola Davies:

Introduction

1. This is an appeal by the Electoral Commission against an order of the Divisional Court (Leggatt LJ and Green J) by which it granted the Good Law Project's application for judicial review of the Electoral Commission's decision not to open an investigation into campaign spending of, and donations received by, Vote Leave Limited ("Vote Leave") and Mr Darren Grimes in connection with the referendum on membership of the European Union ("EU") held on 23 June 2016. Mr Grimes ran an unincorporated association called BeLeave. The Court held that the Electoral Commission had misinterpreted the definition of "referendum expenses" in section 111(2) of the Political Parties, Elections and Referendums Act 2000 ("the 2000 Act"). The core issue was whether money paid by Vote Leave to discharge Mr Grimes' contractual obligations for advertising should be considered as referendum expenses of Vote Leave as well as donations to Mr Grimes. The Divisional Court, in disagreement with the Electoral Commission, determined them to be referendum expenses of Vote Leave.

2. Hickinbottom LJ granted permission to appeal to the Court of Appeal in an order dated 14 December 2018.

3. The Electoral Commission is the statutory body responsible for overseeing elections and referendums in the United Kingdom ("UK").

4. The referendum continues to be an emotive subject. Strong views are held on all sides of the debate. Our role is to interpret and apply the law, without fear or favour, affection or ill-will. We are concerned with a question of statutory construction of importance not only to the EU referendum but any other. The political context in which the issue arises and the identity of the parties are immaterial.

5. At the hearing of the appeal we heard oral submissions from Mr Philip Coppel QC (who did not appear below and who appeared with Mr Gerard Rothschild) for the Electoral Commission; and from Ms Jessica Simor QC (who appeared with Mr Tom Cleaver) for the Good Law Project. We also had the advantage of reading a skeleton argument of Mr Timothy Straker QC for Vote Leave. We are grateful to all counsel for their submissions.

Factual Background

6. In February and March 2017 the Electoral Commission conducted assessments of the campaign spending returns of Vote Leave and Mr Grimes, both of whom were "permitted participants" in the referendum campaign. Vote Leave was the "designated organisation" recognised by the Electoral Commission as representing those campaigning for a "leave" vote. The Commission's assessments included consideration of the parties' spending in connection with services provided by AggregateIQ Data Services ("AIQ"), a Canadian company specialising in online advertising. The Commission concluded that there were no reasonable grounds to suspect that there had been any incorrect reporting of campaign spending or donations. It decided not to open an investigation into this.

7. A series of three transactions involving Vote Leave, Mr Grimes and AIQ amounting to £620,000, forms the underlying subject-matter of this case. During the referendum period, Vote Leave paid a total of £3.4m to AIQ, although it declared £2.697m in referendum expenses in respect of AIQ. The three payments in issue were made by Vote Leave to AIQ to pay for advertising services purchased from AIQ by Mr Grimes, and none was declared as "referendum expenses" by Vote Leave. The account of the transactions is based principally on emails exchanged between Vote Leave and Mr Grimes which were before the Divisional Court. They were as follows:

   i) £400,000 paid on or about 16 June 2016;

   ii) £40,000 paid on 20 June 2016;

   iii) £180,000 paid on 21 June 2016.

8. Some time before 9 June 2016 Vote Leave was informed that a third party donor wished to make it a substantial donation. Vote Leave calculated that this donation could not be spent without taking it above its £7 million statutory spending limit for the referendum campaign by more than £500,000. Accordingly, at some time before 13 June 2016, Vote Leave suggested to Mr Grimes that it might donate some funds to him. On 13 June 2016 Mr Grimes sent an email to Vote Leave suggesting that it would be helpful if Vote Leave could send the proposed donation directly to data specialists and analysts AIQ on behalf of 'BeLeave', so that his work with them might begin sooner. On 14 June 2016, Vote Leave's Operations Director confirmed its offer to Mr Grimes to make a donation to his campaign of £400,000. Mr Grimes requested that the money be paid directly to AIQ, giving the relevant bank account details, and the transfer was duly made by Vote Leave.

9. On 17 June 2016, Vote Leave offered a further donation to BeLeave of £40,000, and this was again paid directly to AIQ on 20 June 2016.

10. On 21 June 2016, Vote Leave's Operations Director emailed Mr Grimes saying that Vote Leave was in a position to make a further donation of £181,000. Mr Grimes confirmed this and asked for £180,000 to be transferred to AIQ and £1,000 to his account for travel expenses. The payments were made the same day.

11. Between 14 and 21 June 2016 Mr Grimes, as Chair of BeLeave, entered into four written agreements with AIQ under which AIQ agreed to provide a "targeted social, video and display media campaign" on behalf of BeLeave. Invoices for these services were rendered by AIQ to Mr Grimes and paid with the money which Vote Leave had transferred to AIQ for that purpose.

12. The three payments made by Vote Leave to AIQ ("the AIQ Payments") were reported to the Electoral Commission in the return made by Mr Grimes both as donations received by him and as payments made in respect of referendum expenses incurred by him or on his behalf. The AIQ Payments were not included in the return made by Vote Leave in respect of its referendum expenses.

13. In its February and March 2017 assessments of the campaign spending returns of Vote Leave and Mr Grimes, the Electoral Commission concluded that there were no

reasonable grounds to suspect that there had been any incorrect reporting of campaign spending or donations, and it decided not to open an investigation into this.

14. The Good Law Project, an interest group whose application was financed by crowd-funding, sought permission to bring a claim for judicial review of the decision of the Commission. Permission was granted by the Divisional Court (Leggatt LJ and Holgate J) in respect of one ground only, on 23 March 2018: see [2018] EWHC 602 (Admin).

15. In its substantive judgment, delivered on 14 September 2018, the Divisional Court granted the application for judicial review, finding that the Commission had misinterpreted the definition of "referendum expenses" in section 111(2) of the 2000 Act: see [2018] EWHC 2414 (Admin).

16. On 4 October 2018 the Divisional Court handed down its judgment on ancillary matters, including the form of the declaration which it granted to reflect its judgment: see [2018] EWHC 2553 (Admin). The declaration was in the following terms:

> "On the proper interpretation of the definition of 'referendum expenses' in section 111(2) of the Political Parties Elections and Referendums Act 2000, the three payments totalling £620,000 made by Vote Leave Limited to AggregateIQ Data Services Limited between 16 and 21 June 2016 to pay for advertising services purchased by Mr Darren Grimes were referendum expenses incurred by Vote Leave Limited."

17. After the proceedings in the Divisional Court had begun, but before the judgment was delivered, the Electoral Commission carried out a further assessment review and decided that it would, after all, open an investigation into the spending of Vote Leave and Mr Grimes. The Commission published the report of that investigation on 17 July 2018, finding that Vote Leave and Mr Grimes had breached the campaign finance rules in a number of respects, including in their reporting of the AIQ Payments in issue in this action. However, the Electoral Commission made these findings on a different legal basis from that challenged by the Good Law Project, namely that the payments represented "common plan expenses": see paragraphs 39 et seq and 57 below.

Material legislation

18. The relevant statutory framework was helpfully set out at [2] to [11] of the judgment of the Divisional Court and can be summarised as follows.

19. The law which governed the conduct of the 2016 referendum is contained in the 2000 Act, as modified by the European Union Referendum Act 2015 ("the 2015 Act"). The legislation imposed restrictions on the level of expenses which any individual or body campaigning in the referendum was permitted to incur.

20. Under sections 105 and 106 of the 2000 Act, an individual registered in an electoral register in the UK or a body carrying on its activities in the UK could become a "permitted participant" by giving notification to the Electoral Commission.

21. Under section 160 (the interpretation provision) a "body" includes both incorporated and unincorporated bodies.

22. Under section 107 of the 2000 Act the Electoral Commission is under a duty to maintain a register of all declarations and notifications under section 106, in other words a register of persons and bodies that are permitted participants. Under section 149 of the 2000 Act, the register under section 107 must be made available for public inspection during office hours. In addition, the Electoral Commission registers are kept electronically and are accessible via the internet.

23. At the hearing of this appeal we were informed by Mr Coppel that there was a total of 123 permitted participants in the EU referendum. Of these, 60 favoured answering the referendum question that the UK should leave the EU; and 63 favoured remain.

24. Under section 117(1) of the 2000 Act, any individual or body which was not a "permitted participant" could not lawfully exceed £10,000 of "referendum expenses" during the "referendum period", which began on 15 April 2016 and ended on the date of the referendum: see regulation 4 of the European Union Referendum (Date of Referendum etc.) Regulations 2016 (SI 2016 No. 278). Pursuant to section 117(2) and (3) of the 2000 Act, an individual or body that was not a permitted participant who knowingly exceeded this spending limit committed a criminal offence.

25. Under section 108 of the 2000 Act, one permitted participant was designated as representing those campaigning for each of the two possible outcomes of the referendum. As stated above, Vote Leave was designated as the body representing the 'Leave' outcome. Under section 110, each designated organisation was entitled to receive some assistance from the state, including a grant of up to £600,000 from public funds. Each designated organisation was also permitted to incur referendum expenses during the referendum period up to a limit of £7 million. Other "permitted participants" could incur expenses up to £700,000: see section 118(1) of and Schedule 14 to the 2000 Act, as amended by paragraph 25(2) of Schedule 1 to the 2015 Act.

26. Section 119 of, and Schedule 15 to, the 2000 Act impose restrictions on donations to permitted participants. The main restrictions were a prohibition on accepting donations from anyone who was not a "permissible donor" (broadly speaking individuals registered in an electoral register in the UK or bodies carrying on their activities wholly or mainly in the UK) and a requirement that any donation exceeding £7,500 had to be accompanied by a declaration confirming the donor's identity. It is important to note that no financial limit was imposed on the donations that could be given to a permitted participant. Control of permitted participants (and the designated organisation) on each side was exercised through spending limits.

27. At the heart of the dispute in the present case is the meaning of the phrase "referendum expenses". "Referendum expenses" are defined in section 111(2) of the 2000 Act to mean:

> "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".

28. Part I of Schedule 13 to the 2000 Act is headed "Qualifying expenses". It covers "expenses incurred in respect of any of the matters set out in the following list." A list of matters follows which includes "Advertising of any nature (whatever the medium used)". "For referendum purposes" is defined by section 111(3) to mean:

> "(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".

29. Section 113 of the 2000 Act prohibits the incurring of any referendum expense by or on behalf of a permitted participant unless it is incurred with the authority of the responsible person or a person authorised in writing by the responsible person. "Responsible person" is defined in section 105(2). The effect of contravention of this provision is exposure to a civil sanction under section 147 of, and Schedule 19C to, the 2000 Act. There is also the possibility of criminal prosecution: see section 113(2).

30. Where any referendum expenses are incurred by or on behalf of a permitted participant during a referendum period, sections 120 and 122 impose an obligation on the "responsible person" to make a return and deliver it to the Electoral Commission within six months. The return must contain *inter alia* (i) a statement of all payments made in respect of referendum expenses incurred by or on behalf of the permitted participant during the referendum period and (ii) a statement of relevant donations received in respect of the referendum.

31. We have made reference to section 119 of, and Schedule 15 to, the 2000 Act, which govern donations to a permitted participant. Paragraph 1(4) of Schedule 15 provides that a "relevant donation" to a permitted participant means a donation to that person for the purpose of meeting referendum expenses incurred by or on behalf of the permitted participant. This takes one back to the definition of "referendum expenses" in section 111(2).

32. The 2015 Act made a number of amendments to Schedule 15. We note two.

33. Paragraph 39 of Schedule 1 to the 2015 Act imposed a reporting requirement at intervals during the referendum period in relation to donations received by a permitted participant. Registered political parties, other than minor parties, were exempted because they were already under an analogous reporting regime.

34. Paragraph 41 of Schedule 1 to the 2015 Act provided that the donation report which a permitted participant had to deliver to the Electoral Commission under paragraph 39(5) had to be made available for public inspection as soon as reasonably practicable after receipt. This meant that, even during the course of the referendum campaign, members of the public could track who was making donations, and the amount of those donations, to each of the permitted participants.

35. Under paragraph 9 of Schedule 15 the post-referendum report must also include a statement of relevant donations. Therefore, having made periodic statements of donations during the course of the EU referendum period, once that period ended, a permitted participant also had to include a statement of all the relevant donations which it had received during the entire referendum period in its return after the referendum.

36. Where the total amount of referendum expenses exceeds £250,000, a report on the return under section 120 of the 2000 Act must be prepared by a qualified auditor: see

section 121(1). The auditor has a statutory right of access to all books, documents and other records of the permitted participant: see section 44.

37. Since the return under section 120 must also include a statement of relevant donations (paragraph 9 of Schedule 15), the net effect is that, where the total amount of referendum expenses exceeds £250,000, the qualified auditor must also report on the statement of relevant donations.

38. Section 145 of the 2000 Act imposes a duty on the Electoral Commission to monitor and take all reasonable steps to secure compliance with all these requirements. It is given investigatory powers and also powers to impose civil sanctions for breaches of these requirements.

39. Lastly, we mention the concept of "common plan expenses". Paragraph 22 of Schedule 1 to the 2015 Act makes provision for expenses incurred by persons "acting in concert". Pursuant to paragraph 22(1), these provisions apply where:

> "(a) referendum expenses are incurred by or on behalf of an individual or body during the referendum period for the referendum, and
>
> (b) those expenses are incurred in pursuance of a plan or other arrangement by which referendum expenses are to be incurred by or on behalf of –
>
> (i) that individual or body, and
>
> (ii) one or more other individuals or bodies,
>
> with a view to, or otherwise in connection with, promoting or procuring a particular outcome in relation to the question asked in the referendum."

40. Referendum expenses which satisfy these requirements are labelled "common plan expenses": see paragraph 22(2). In general terms, a "common plan expense" is an expense incurred by A in pursuance of a plan or other arrangement with B with a view to promoting or procuring a particular outcome in relation to the question asked in a referendum: see paragraph 22(1) and (2).

41. Paragraph 22(3) sets out the usual position in relation to common plan expenses. Those expenses constitute the expenses of each of the participants in the common plan. Where, however, A or B is a "designated organisation" (as Vote Leave was in the present context) then paragraph 22(3) is displaced by paragraph 22(5). The effect is that the three sorts of expenses mentioned in paragraph 22(5)(a), (b) and (c) are brought into the calculation of only the designated organisation's referendum expense limits.

42. The reporting of common plan expenses is dealt with in paragraph 23(4), which inserted section 120(4A) – (4E) into the 2000 Act for the purposes of the EU referendum. This required common plan expenses to be separately declared and reported, quite distinct from the statement of payments in respect of referendum expenses required generally by section 120(2)(a). The declaration under section 120(4A) is a declaration to be made by a permitted participant who did not actually incur the referendum expense but is

party to a common plan for which that expense was incurred. The declaration must separately identify all the other individuals and bodies in that common plan and the amount of the common plan expenses.

43. Further, by section 120(4B), there must be a declaration made by the permitted participant who did incur the referendum expense in question. That person will already have recorded that expense in its own statement under section 120(2)(a). But under section 120(4B) that person must also prepare a separate declaration which identifies all the other individuals or bodies in the common plan and the amount of the common plan expenses.

44. In considering the common plan expenses regime the Divisional Court did not expressly refer to the requirement for separate declarations in section 120(4A) or (4B). This may have been because the Divisional Court proceeded on the premise that the expenses in the present case were not in fact common plan expenses. Be that as it may, in our view, the existence of these additional requirements is of some significance to the question of interpretation which arises in the present appeal.

Judgment of the Divisional Court

45. The Divisional Court granted the application for judicial review. The Court concluded that the Electoral Commission had misinterpreted the definition of "referendum expenses" in section 111(2) of the 2000 Act: [94]. (References are to paragraph numbers in the Divisional Court's judgment).

46. The Divisional Court began with the "ordinary English usage of the term" "expenses incurred". It was of the view that a person incurs an expense whenever they have spent money (including making a donation to charity) or incurred a liability which in either case reduces their financial resources. An "expense" and a "liability" are different concepts, and so it was wrong for Vote Leave to run them together: [41] to [44].

47. The Court then turned to the terminology used in the 2000 Act itself. The Court noted that a distinction is drawn between "incurring" and "paying" expenses, for example in sections 114 and 115. But it did not follow from that fact that referendum expenses can never be incurred by making a payment. Nor did it follow from the use of "contract" and "expense" as alternatives in paragraph 21 of Schedule 1 to the 2015 Act that the two are treated as coterminous in the 2000 Act. The Court accordingly concluded that the existence of such distinctions was inconclusive, being consistent with both of the rival interpretations: [49] to [54].

48. The Court examined the key arguments advanced by the Electoral Commission and endorsed by Vote Leave. They argued that the 2000 Act imposes separate controls on referendum *expenses* and on *donations*, thereby rendering it inconsistent with the scheme of the legislation if donations received by a permitted participant were also to constitute referendum expenses incurred by the donors. In omitting to place an overall limit on the expenses which may be incurred by *all* those campaigning for a particular outcome in a referendum, Parliament can be reasonably assumed to have decided against restricting the total amount of donations a donor may make: [55] to [58]. Similarly, the Commission argued that it would result in unnecessary duplication of reporting requirements if the same payment had to be reported both by the donee (as a donation received) and by the donor (as a referendum expense incurred): [60].

49. The Court accepted that it cannot sensibly have been intended that all donations should also constitute referendum expenses. But the Court held that it does not follow that no donation can ever also be a referendum expense incurred by the donor. The rules governing donations in Schedule 15 to the Act look at the transactions in question from the point of view of the recipient. There is no reason why some transactions which constitute donations seen from this point of view should not also constitute referendum expenses when looked at from the point of view of the donor: [59] and [61].

50. The Court held that the meaning of the words "expenses incurred" must be understood in the context of the other elements of the definition of "referendum expenses", which requires the expenses to be a "qualifying" expense within the meaning of Part 1 of Schedule 13: [67]. Moreover, it was important to understand the provisions in line with the underlying policy of the legislation: [74]. Where A transfers money directly to the supplier to pay for goods or services which B has contracted to buy, A has chosen to spend its own money to fund the cost of purchase of those particular goods or services with the aim of promoting or procuring a particular outcome of the referendum. It accorded with the policy of the legislation to treat the expenses incurred by A as counting towards its spending quota.

51. Further, where A transfers the money to B, the critical consideration is in the degree of control A has over how the money is used. Where one campaigner pays for campaign-related advertising services, that payment is "in respect of" that service, even if the services are provided to a different campaigner on the same side. This can be expressed as the following: where there is a legal obligation for B to use the money in a particular way, that will mean that there is reason to treat the expenditure as counting towards the amount that A is permitted to spend. In this sense, the Court stated that "general" donations (to be used in whichever way the donee pleases) do not count towards the donor's referendum expenses, but "specific" ones (to be used to discharge a liability of the donee to pay for goods or services) do count: [75] to [81].

52. In arriving at the interpretation which it did the Divisional Court was clearly influenced by its understanding of the underlying legislative policy behind the 2000 Act. Earlier in its judgment the Court set out the legislative history at [9] to [11]. It observed that spending limits at elections in the UK are of long standing but that spending limits for referendums, like referendums themselves, are a much more recent creation. The first referendum took place in 1975 (concerning whether the UK should remain within what was then the European Economic Community, which it had joined in 1973). The Referendum Act 1975 contained no provision limiting expenses or payments. Nor did the legislation which governed the referendums in relation to Scottish and Welsh devolution in the Referendums (Scotland and Wales) Act 1997.

53. Subsequently the matter was considered by the Committee on Standards in Public Life chaired by Lord Neill of Bladen QC, in its Fifth Report on the Funding of Political Parties in the United Kingdom, issued in October 1998. The Neill Committee was of the view that it would be impracticable to try to limit spending on referendum campaigns. The Government's response in a White Paper on the Funding of Political Parties in the United Kingdom, published in July 1999, adopted many of the Neill Committee's proposals but rejected its advice on spending limits.

54. As the Divisional Court put it at [10]:

> "… The Government accepted that it was not possible, by the imposition of spending limits, to ensure a level playing field between those urging one outcome of a referendum and those urging the other. Nevertheless, the Government considered it desirable and practicable that spending limits should operate, in a similar way as at elections, to discourage excessive spending by political parties and others and to ensure that individual organisations do not obtain disproportionate attention for their views because of the wealth behind them …"

The Court regarded that as "the underlying purpose of the restrictions on referendum expenses" imposed by the 2000 and 2015 Acts.

55. On the facts of the present case, the Court found that the evidence (including the email communications passing between the parties) showed that all the AIQ payments were donations by Vote Leave to meet referendum expenses which were incurred by purchasing advertising services from AIQ. On proper analysis, Vote Leave also "incurred expenses" by making the payments "in respect of" advertising, therefore making them "referendum expenses" within the meaning of section 111(2) of the 2000 Act. Accordingly, the Court granted the application for judicial review: paras. [94] to [99].

56. Earlier in its judgment the Divisional Court had set out the material facts at [12] to [20]. We have drawn on that summary in setting out the factual background. Those are the facts which formed the basis for the declaration which was made by the Divisional Court. They also have formed the basis on which the present appeal has come before this Court. We do not consider that it is appropriate for this Court to go beyond that summary of the facts. At the hearing before us we were invited by counsel on behalf of the Good Law Project to do so but we decline that invitation. It is unnecessary for the purposes of resolving the issue of statutory interpretation which arises in this appeal.

57. We have noted that the factual basis on which the Electoral Commission reached its initial decision had materially changed by the time of the decision of the Divisional Court. The Court summarised the position as follows, at [31] and [32]. One of the grounds on which the Claimant had originally sought judicial review was that the AIQ payments were made in respect of "common plan expenses" between Vote Leave and Mr Grimes. The Divisional Court refused permission on that ground since it did not raise a question of law and turned entirely on questions of fact which the Electoral Commission would be considering in the course of the investigation which by then it had opened. In the event, in its report published on 17 July 2018, the Commission concluded that spending reported by Mr Grimes (which included the three AIQ payments) was incurred in pursuance of a common plan with Vote Leave and should therefore have been treated as incurred by Vote Leave by reason of the provisions of paragraph 22 of Schedule 1 to the 2015 Act. In view of that finding, the question whether the Electoral Commission had interpreted the meaning of "referendum expenses" correctly was accordingly of less practical importance than it had been. But the Court concluded that it remained necessary to determine the meaning of that phrase.

58. This also had the consequence that the factual basis on which the Divisional Court reached its interpretation was that there was no common plan between Vote Leave and Mr Grimes. Although that has turned out to be incorrect on the facts of this particular

case, those facts have to be assumed to be true for the purpose of testing whether the interpretation reached by the Divisional Court is the right one.

59. The Electoral Commission has brought the present appeal before this Court principally because the issue of statutory interpretation which arises has potentially wider implications, not only in connection with any future referendum, but also in relation to elections. That is because the phrase at the heart of this appeal ("expenses incurred") is to be found in many places throughout the legislation which governs both referendums and elections.

Grounds of Appeal

60. In its application for permission to appeal the Electoral Commission was given permission to argue all five grounds of appeal, although Hickinbottom LJ was doubtful whether the fifth ground was a separate ground of appeal, as it appeared to be a summary of the other four grounds. The five grounds of appeal are as follows:

(1) The Divisional Court ignored paragraph 1(4) of Schedule 15 to the 2000 Act, which separates the concepts of (a) making a donation and (b) incurring of referendum expenses. A relevant donation is one made for the purposes of meeting referendum expenses incurred. The donor does not by virtue of making a donation also incur referendum expenses. The regulatory regime for donations is distinct from the regulatory regime for expenses. The two do not overlap. 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 was incorrect.

(2) 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.

(3) The Divisional Court's distinction between "general" and "specific" donations is not found in the statute. Mr Coppel submits that it is novel and unjustified. It is difficult to apply in practice. Absent that distinction, the making of any donation would then also be the incurring of referendum expenses by the donor.

(4) The judgment does not analyse the 2000 Act as a whole. Other parts of the 2000 Act use similar wording. The phrase "expenses incurred" is not one that is contained only in the legislation relating to referendums construed by the Divisional Court. Its origins lie in legislation dating back to the middle of the nineteenth century and, submits Mr Coppel, election legislation is "peppered" throughout with references to that phrase. The judgment necessarily affects the application of those provisions and that broader picture should have informed the Court's decision. This would have shown the impracticality of the Divisional Court's interpretation of "referendum expenses".

(5) The Divisional Court's analysis leads to surprising results even in the context of the referendum provisions in the 2000 Act. Again, submits Mr Coppel, this shows the impracticality of the Divisional Court's interpretation of "referendum expenses".

61. At the hearing before us Mr Coppel in effect ran all of those grounds of appeal together into one primary submission. He submits that, in broad terms, the effect of the

legislative scheme in the 2000 Act is that money donated to a permitted participant has to be recorded under the Schedule 15 regime; whereas money spent by a permitted participant must be recorded under the Schedule 13 regime. He submits that, when the legislation is read harmoniously and as a whole, the two regimes governing donations and expenses are mutually exclusive and do not overlap.

62. In case he is wrong in his primary submission, Mr Coppel also advanced an alternative submission. At one time it was not in dispute that, if the AIQ Payments were "expenses incurred" by Vote Leave (the central issue in these proceedings), then the expenses in question were "referendum expenses", being incurred in respect of advertising purposes as set out in Part 1 of Schedule 13 to the 2000 Act for "referendum purposes" within the meaning of section 111(3). However, at the hearing of the appeal, Mr Coppel submitted that, even if the donations made by Vote Leave to Mr Grimes also constituted "expenses incurred by or on behalf of" Vote Leave, they could not be "referendum expenses" because they were not incurred in respect of any of the items listed in Part 1 of Schedule 13. This is said to be because they were incurred in respect of "donations" and that concept does not appear in the list in Part 1 of Schedule 13.

63. We do not accept that submission. In our view, the critical issue in this case flows from Mr Coppel's primary submission: were the donations made by Vote Leave also to be regarded as expenses incurred by or on behalf of Vote Leave? If the answer to that question is "no", the alternative submission made on behalf of the Electoral Commission does not arise. If the answer is "yes", the alternative submission cannot be right: the expenses would then be in respect of the underlying item mentioned in the list in Part 1 of Schedule 13, for example advertising. There would be no need for that list to mention "donations".

64. We will therefore consider what we regard as the real issue in this case, namely whether it is possible as a matter of law for a donation to a permitted participant also to be an expense incurred on or on behalf of the donor. Before we do so we will briefly summarise the submissions for Vote Leave and the Good Law Project.

Submissions for Vote Leave

65. Although Vote Leave did not appear and was not represented at the hearing before this Court, we have read a skeleton argument filed on its behalf, which was written by Mr Timothy Straker QC. It adopts what it describes as a "straightforward" interpretation of section 111(2): that expenses cannot be said to have been "incurred" unless there is a legal liability to pay them on the part of the person said to have incurred them. Parliament, it is submitted, did not seek to disable permitted participants from becoming donors, whether or not their donation is "general" or "specific". It clearly envisaged the person incurring a referendum expense as incurring a legal liability, and that is inconsistent with including a voluntary donation. This is exemplified by section 115, under which a claim for payment in respect of referendum expenses incurred by or on behalf of a permitted participant shall not be payable if the claim is not sent to the responsible person not later than 30 days after the referendum.

66. Accordingly, Vote Leave supports the appeal by the Electoral Commission.

Submissions for the Good Law Project

67. The Good Law Project submits that the Divisional Court's analysis is correct in three key respects. First, it is consistent with the statutory wording. Nothing in the statute suggests that the definition of "referendum expenses" can only apply to a situation if the separate statutory regime governing donations does not apply, as the Electoral Commission contends. The fact that one regime applies does not mean the other is entirely ousted.

68. Secondly, there are no practical difficulties which compel a different conclusion. The possibility that the Commission or a third party might choose to analyse the data by aggregating the headline figures (and for example reaching a calculation of £1.24m by double-counting) is not a reason to strain the meaning of the legislation. Indeed, paragraph 22 of Schedule 1 to the 2015 Act provides that, where two or more participants create 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.

69. Thirdly, the Commission's interpretation would produce undesirable consequences, rendering expenditure limits avoidable and creating a loophole Parliament cannot have intended. It would be very easy for the limits on expenses imposed by the legislation to be circumvented by arrangements made by permitted participants.

70. Accordingly, the Good Law Project invites this Court to dismiss the appeal.

Analysis

71. The Divisional Court recognised that not all donations can be regarded as "expenses incurred" by the donor. This is why it drew a distinction between what it called "general donations" and "specific donations".

72. The position was encapsulated at [98]:

> "The position would have been different if the money had been given to Mr Grimes for him to use however he chose in promoting a 'leave' outcome of the referendum. Such general donations would not in our view have constituted referendum expenses incurred by Vote Leave. If it be said that distinguishing between such general donations and specific donations is not fully satisfactory, it is, we consider, necessary in order to make the best sense possible of a statutory scheme which, while setting no limit on donations as such, limits spending on campaign activities with the object of preventing any individual or body from using its wealth to gain disproportionate attention for its views."

73. The Divisional Court recognised that its creation of the concepts of general and specific donations was not "fully satisfactory" but nonetheless necessary to meet a statutory intention which otherwise it considered would be undermined. Its reasoning flowed from the conclusion that the natural and ordinary meaning of the phrase "expenses incurred by or on behalf of" is capable of including at least some donations to a third party: [41]. The Divisional Court recognised, at [44], that, as a matter of language, the phrase "expenses incurred" is also capable of being used in the narrower sense contended for by Vote Leave so that only a sum of money which a person becomes

liable to pay (typically by making a contract) is to be regarded as an expense incurred by that person. When choosing which of the rival interpretations was correct, the Divisional Court was heavily influenced by the underlying statutory purpose, in particular the imposition of limits on expenses incurred, with the object of preventing any individual or body from using its wealth to gain disproportionate attention for its views. The Divisional Court thought that it would be easy for that limit on expenditure to be circumvented if no donation could ever also be an expense incurred.

74. Despite those powerful arguments, we have come to the conclusion that the interpretation reached by the Divisional Court is wrong. This is essentially for the following reasons.

75. First, the distinction between "general donations" and "specific donations" does not appear anywhere in the 2000 Act itself. It had to be introduced by the Divisional Court (even if it is simply to be regarded as a shorthand to refer to expenses incurred "in respect of" the activities listed in Part 1 of Schedule 13) because it was recognised by the Court that not all donations can properly be regarded as an expense incurred by the donor. A distinction had to be drawn between those donations which will also be expenses incurred by the donor and those which will not. However, in our view this led the Divisional Court to cross the line between interpretation and the creation of a different scheme from that in the legislation.

76. This can be illustrated by the terms of the Divisional Court judgment at [81] where the Court was driven in effect to set out detailed rules for when a donation will also count as an expense incurred by the donor. That passage in effect has to be read as if it were contained in a statute.

77. Furthermore, the distinctions which the Divisional Court had to draw in order to define the boundaries of the concept of a "specific donation" themselves give rise to potentially complicated and difficult questions of civil law: see e.g. [78], where the Court referred to an obligation being either contractual or "an equitable obligation arising under a specific purpose trust of the type recognised in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567." These concepts are far removed from those with which electoral law is concerned.

78. This leads us to the second reason for reaching our conclusion. The statutory provisions which have to be interpreted in this case are ones which create potential criminal liability on the part of individuals. Section 117(1) and (2) of the 2000 Act create a criminal offence in circumstances where an individual exceeds the limit on expenditure of £10,000 unless they are a "permitted participant". Someone who gives a donation of over £10,000 without being a permitted participant will be liable to criminal prosecution if (on the Divisional Court's analysis) they have not simply made a donation but have also incurred an expense within the meaning of section 111. The Divisional Court recognised that this context was one in which the statutory principle against "doubtful penalisation" comes into play: see e.g. [40]. However, we respectfully consider that the Divisional Court did not give sufficient weight to this consideration in reaching its interpretation.

79. The third reason is that the legislation needs to be read and given effect in a way which can be applied in a practical way by all those concerned. This will include individuals as well as bodies which wish to make a donation. It will also include the Electoral

Commission and other officials who have to administer the legislation. It will potentially include magistrates, trial judges and jurors, who may have to apply the legislation if criminal proceedings are brought. With great respect to the Divisional Court, we do not consider that the concepts which it introduced into this area of law (and which we have outlined above) will be capable of ready application by those who have to administer the law "on the ground".

80. The fourth reason is as follows. The Divisional Court recognised that Parliament has enacted provisions to cater for the situation where there is a "common plan". Nevertheless, we consider that the Divisional Court did not give sufficient weight to the implications of that part of the legislation for the interpretation of the 2000 Act more generally. What that part of the legislation illustrates (albeit it was introduced for the purposes of the EU referendum in the 2015 Act) is that, when Parliament wished to enact specific provisions for circumstances in which it might otherwise be said that limits on expenditure could be circumvented, it expressly said so. Where Parliament has chosen not to do so, either generally or because the specific provisions relating to common plans do not apply (as was the presumed basis of fact on which the Divisional Court proceeded), the courts should not interpret legislation in effect to create further circumstances in which the donor can also be regarded as having incurred expenses which potentially exceed the statutory limit on expenditure by that person.

81. Fifth, the reasoning of the Divisional Court appears to have been heavily influenced by the fact that, as it happens, the donor in question in this case was Vote Leave, which was itself not only a permitted participant but a "designated organisation". However, the reasoning of the Divisional Court and the interpretation to which it came will be equally applicable to any person, whether or not they are a designated organisation or a permitted participant. This is why, as we have said, it could capture an individual donor who makes a transparent donation of just over £10,000, knowing that there is no limit on the amount of donations that they can make, but could lead to that individual becoming liable to criminal proceedings because they have, on the Divisional Court's interpretation, also incurred an expense for referendum purposes. We do not consider that that interpretation can be right.

82. Sixth, we bear in mind that the terms that fall for interpretation in this case do not arise only in the context of referendums. As Mr Coppel reminded us, the phrase "expenses incurred" is to be found throughout election legislation and dates from the middle of the nineteenth century. So far as we are aware it has not caused any great difficulty in practice. Certainly, no authority was cited to us to suggest that it has.

83. Mr Coppel drew our attention to the decision of the Election Court in the *Cockermouth Division* case (1901) 5 O'M & H 155. What that case illustrates is that it is not only expenses incurred directly by, for example, a parliamentary candidate which will be caught by the limits on expenditure. That limit will also include expenses incurred by a third party on behalf of the candidate: see in particular the concurring judgment of Channell J at p.158, where he said:

> "If another person pays an expense, and that expense is one of the ordinary expenses of the candidate, so that the doing of that by the third person relieves the candidate from part of his election expenses, then the candidate must treat that assistance as given to him in respect of his election expenses, and must treat the expenses as part of his expenses."

84. The public can therefore have assurance that all relevant expenses incurred in favour of a particular point of view, for example in a referendum campaign, will be subject to a limit and will be transparent. The public can also be reassured that all relevant donations will be transparent. On the Divisional Court's interpretation, some donations will also count as expenses incurred by the donor and not only by the donee. We do not consider that that interpretation is required by the underlying purposes of the legislative scheme.

85. Our seventh reason is that we do not share the Divisional Court's understanding of the ordinary meaning of the phrase "expenses incurred" found in [41] to [44] of its judgment. The Divisional Court accepted the submission which had been advanced on behalf of the Good Law Project. At [41] it said that:

> "… 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. This is also the sense in which accountants typically use the term – albeit with greater precision than in ordinary usage. For example, FRS 102, the financial reporting standard applicable in the UK, defines 'expenses' as 'decreases in economic benefits during the reporting period in the form of outflows or depletions of assets or incurrences of liabilities that result in decreases in equity, other than those relating to distributions to equity investors'."

This in substance accepted the submission made on behalf of the Good Law Project and recorded at [36]:

> "… The claimant's case is that in the definition the term 'expense' means no more than an outflow of economic benefit and that to 'incur' an expense simply means to bring upon oneself an expense or render oneself liable to an expense. …"

86. The consequence was that the Divisional Court concluded that anyone who makes a donation to a charity can be said to have incurred an expense in the ordinary meaning of those words: [42]. It was of the view that whenever a person's assets are "diminished", it can be said that that person has incurred an expense. We respectfully disagree. We do not think that the financial reporting standards in accountancy assist in interpreting this statute and would observe that few would consider themselves as having incurred an expense when, as countless thousands do every day, they donate money to charity.

87. In our view, the Divisional Court fell into the error of assuming that the phrase "expenses incurred" means simply the same thing as "spent". "Expenses" are not necessarily the same as "expenditure" or spending. Furthermore, we consider that the Divisional Court gave insufficient weight to the inclusion in the phrase "expenses incurred" of the word "incurred". We agree with Mr Coppel that that introduces a flavour of some responsibility, even if not strictly speaking legal liability, to pay the expense in question.

88. In this context, we note that at [44] the Divisional Court acknowledged that the interpretation to be given to the phrase "expenses incurred" contended for by Vote Leave was one which was a possible interpretation as a matter of language. Our view is that, when the legislation is read harmoniously and as a whole, the interpretation contended for by the Electoral Commission (and supported by Vote Leave) is the correct one.

89. There is no difficulty in the statutory scheme with the same money being treated both as a donation by one person and as a referendum expense by the recipient. The difficulty caused by the Divisional Court's analysis is that a donation may be treated also as a referendum expense *by the donor* as well as being a referendum expense by the donee. The consequence will be that a single amount of money will count twice towards different people's limits on expenses. It is in this sense that Mr Coppel submits that "double counting" is inconsistent with the statutory scheme. This has the consequence that an examination of the public records of donations and expenses during the referendum campaign would give an exaggerated picture of what was spent. The fact that the statutory approach to common plan expenses can lead to this anomaly does not mean that it should be introduced more widely into the scheme particularly when the common plan expenses regime was specific to this referendum, by virtue of the 2015 Act, and does not apply more widely in electoral law.

90. We heard argument about the impact of the competing definitions on the activities of volunteer campaigners and their expenses which had been considered by the Divisional Court between [82] and [90] of its judgment.

91. At [82] the Divisional Court said:

> "An example discussed in oral argument which provides a good means of testing these conclusions is a case involving the spending for referendum purposes on travel and accommodation. Suppose that during a referendum campaign volunteers affiliated with a particular campaign organisation (which is a permitted participant) travel from London to Birmingham by rail to attend a public meeting and stay in a hotel overnight. Travel and accommodation costs are thereby incurred. It is useful to distinguish three different scenarios. In the first (Scenario A) the volunteers pay for their travel and hotel expenses from their own resources and are not reimbursed. In Scenario B the volunteers pay for their travel and hotel expenses themselves but are reimbursed by the campaign organisation. In Scenario C the campaign organisation purchases the train tickets and settles the hotel bill directly so that the volunteers never have to part with any money."

92. As the Divisional Court acknowledged, scenario A can be put to one side because the volunteer campaigners meet their own travel expenses and are not reimbursed. In that situation paragraph 2(c) of Schedule 13 to the 2000 Act expressly excludes the expense from the definition of "referendum expenses".

93. In scenario B the volunteer campaigners meet their own travel expenses and are reimbursed by the campaign organisation, which the Divisional Court described as a

permitted participant. In scenario C the permitted participant pays for the travel expenses of the volunteer campaigners directly. At [90] the Divisional Court concluded that: "In Scenarios B and C we think it plain that the campaign organisation incurs expenses in bearing the cost of travel and accommodation."

94. Mr Coppel submits that the analogy with travel expenses of this sort does not assist. We agree. One of the difficulties with the suggested scenarios is that, in the present context, Mr Grimes (unlike the volunteer campaigners in the hypothetical scenarios) was himself also a permitted participant. Another difficulty is that Mr Grimes did not make the contracts with AIQ under any agreement with Vote Leave so that it could be said that he had incurred expenses "on behalf of" Vote Leave. Rather, as was recorded by the Divisional Court at [19], AIQ agreed to provide the media campaign on behalf of BeLeave (the unincorporated association run by Mr Grimes).

95. In the hypothetical scenarios the campaign organisation contemplated by the Divisional Court would not be under a duty to report the payments made by it as donations because they would not be donations to permitted participants. In the present context, Vote Leave did have to report the donations to Mr Grimes because he was a permitted participant.

96. Moreover, in the hypothetical scenarios, the volunteers would not be under a duty to report their travel expenses as referendum expenses because they would not be permitted participants. In the present context, Mr Grimes was under a duty to report the £620,000 as referendum expenses.

97. In our view, the correct interpretation of the legislation read as a whole is that a donation to a permitted participant cannot also be an expense incurred by the donor. This interpretation accords both with the natural and ordinary meaning of the 2000 Act and its underlying objectives. It would provide clarity for all those concerned who have to interpret and apply the legislation in a practical way. It would not introduce potentially complicated and subtle concepts of civil law into what is a criminal context.

Conclusion

98. In the result we allow this appeal and set aside the order made by the Divisional Court, including the declaration it made.