Neutral Citation Number: [2018] EWHC 602 (Admin)

Case No: CO/4908/2017

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2018

Before:

LORD JUSTICE LEGGATT
and
MR JUSTICE HOLGATE

- -

Between:

R (THE GOOD LAW PROJECT)	**Claimant**
- and -	
ELECTORAL COMMISSION	**Defendant**
- and -	
VOTE LEAVE LIMITED	**Interested**
MR DARREN GRIMES	**Parties**

- -
- -

Jessica Simor QC and Tom Cleaver (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Richard Gordon QC (instructed by the **Government Legal Department**) for the **Defendant**
Timothy Straker QC and Mr James Tumbridge (instructed by **Venner Shipley**) for the **First Interested Party**

Hearing date: 15 March 2018

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Judgment Approved

LORD JUSTICE LEGGATT and MR JUSTICE HOLGATE:

1. The claimant in this case is an interest group which seeks judicial review of alleged failure of the Electoral Commission properly to discharge its responsibility to oversee spending of Vote Leave Limited and certain other campaigners in the period leading up to the referendum held in June 2016 on whether or not the UK should remain a member of the European Union. Permission to proceed with the claim was refused when the claim was considered on the papers but the request for permission has been renewed at an oral hearing. These are our reasons, following that hearing, for granting permission to proceed with part of the claim.

The applicable legislation

2. The law governing the conduct of the 2016 referendum is contained in the Political Parties, Elections and Referendums Act 2000 ("PPERA") as modified by the European Union Referendum Act 2015 ("EURA").

3. That legislation imposed restrictions on the persons and organisations who were permitted to incur expenses in campaigning for a particular outcome of the referendum and on the level of expenses which they were permitted to incur. In particular, no individual or body was permitted to incur "referendum expenses" of more than £10,000 during the "referendum period", unless they became a "permitted participant" (section 117(1) of PPERA). We will return later to the definition of "referendum expenses" which is at the heart of the main issue raised by the claim. The "referendum period" ended on the date of the referendum, 23 June 2016 (para 1 of Schedule 1 to EURA). Pursuant to section 108 of PPERA, one organisation campaigning for each outcome of the referendum was designated as the official campaign organisation. In the case of those campaigning in favour of leaving the European Union, that organisation was Vote Leave Limited. The designated organisation received some financial assistance out of public funds and was permitted to incur referendum expenses during the referendum period up to a limit of £7 million; for other permitted participants, the limit was £700,000 (section 118(1) and Schedule 14 of PPERA, as amended by Schedule 1, para 25(2) of EURA). Incurring any referendum expenses during the referendum period in excess of the relevant limit may give rise to a criminal offence (section 118(2) to (3) of PPERA).

4. The legislation also imposed restrictions on donations to permitted participants (section 119 and Schedule 15 of PPERA).

5. Where any referendum expenses are incurred by or on behalf of a permitted participant during any referendum period, sections 120 and 122 of PPERA require the "responsible person" to make and deliver to the Commission within six months after the end of the period a return in respect of such referendum expenses. Amongst other matters, this return must contain (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 (section 120(2) and paras 9 to 11 of Schedule 15). Failure to comply with these requirements may give rise to a criminal offence (section 122(4)).

Factual background

6. The focus of this claim is a series of transactions involving Vote Leave, Mr Darren Grimes (a permitted participant who was also campaigning for a leave outcome), Veterans for Britain (another permitted participant campaigning for a leave outcome) and AggregateIQ Data Services Limited ("AIQ"). AIQ is a firm which specialises in online advertising.

7. The following brief summary of the transactions is derived from an "Assessment Review" published by the Electoral Commission on 20 November 2017. This summary should not be taken to make any finding about the nature of the relevant transactions.

8. Vote Leave reported receiving a £1 million donation on 13 June 2016. When calculating its financial position on 9 June 2016, Vote Leave had determined that this donation, when received, could not be spent without taking Vote Leave above its £7 million spending limit for the referendum campaign by more than £500,000.

9. At some time between 7 and 12 June 2016 Vote Leave indicated to Mr Grimes that it might donate funds to him. On 13 June 2016 Mr Grimes responded to the offer of a donation by telling Vote Leave that he would like to work with AIQ and asked for the donation to be paid directly to AIQ.

10. On 14 June 2016 Vote Leave advised Mr Grimes by email that it had decided to donate £400,000 to him and asked where the funds should go. Mr Grimes provided details of his AIQ reference and account number, to which the funds were remitted by Vote Leave.

11. Vote Leave offered Mr Grimes another donation on 17 June 2016 and he asked for this to be paid to AIQ. An amount of £40,000 was paid by Vote Leave to AIQ on 20 June 2016.

12. On 21 June 2016 Vote Leave offered a further donation of £181,000 to Mr Grimes. He responded confirming that he would be able to use the funds and asking for £180,000 to be transferred to AIQ and £1,000 to his account for travel expenses.

13. Invoices for the work done by AIQ in return for these payments were rendered by AIQ to Mr Grimes. The payments made by Vote Leave to AIQ were included 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 payments were not included in the return made by Vote Leave in respect of its referendum expenses.

14. In February and March 2017 the Electoral Commission conducted assessments of the campaign spending returns of Vote Leave and of Mr Grimes which included consideration of their spending in connection with services provided by AIQ. Those assessments concluded that there were no reasonable grounds to suspect that there had been any incorrect reporting of campaign spending or donations.

The present proceedings

15. This claim for judicial review was begun on 24 October 2017. Four grounds have been put forward, which we will consider in more detail shortly. In overview, the first two grounds allege that, in assessing the transactions involving Vote Leave, Mr Grimes and AIQ, the Electoral Commission has misinterpreted the relevant statutory provisions and has therefore failed to apply the law correctly. The third ground alleges that the Electoral Commission gave incorrect advice to Vote Leave during the referendum campaign. The fourth ground alleges that it was irrational for the Electoral Commission to conclude when it carried out its assessments that there were no reasonable grounds to suspect any breach of the relevant spending restrictions and on that basis not to open an investigation.

16. On 20 November 2017 the Electoral Commission filed summary grounds for contesting the claim. In those grounds the Commission submitted that the claim has

no legal merit but nevertheless stated that it had now decided to undertake an investigation into whether offences under PPERA were committed. This decision was said to have been prompted by "further information which has come to light" since the original decision was taken.

17. On the same day the Commission published the Assessment Review already mentioned. This explained that the Commission had undertaken a review of the assessments conducted in February and March 2017 into the potential incorrect reporting of joint referendum spending by Vote Leave and Mr Grimes. The review stated that, since those assessments were undertaken, further information had come to light. This was said to include the fact that Veterans for Britain also reported a donation of £100,000 from Vote Leave which was made on or around 29 June 2016 and paid by Vote Leave directly to AIQ. The review concluded (at para 31):

> "The possible inferences set out above raise a reasonable suspicion that a common plan or arrangement may have been in place between Vote Leave and one or both other campaigners, Mr Grimes and Veterans for Britain. If this was the case then the amounts reported as donations should have been reported as spending by Vote Leave, as designated leave campaigner, irrespective of whether they were donated to Mr Grimes and Veterans for Britain. Alternatively, it is possible that some or all of these payments may in fact have amounted to referendum expenses incurred by Vote Leave, and were reportable as such."

The Commission also stated that it is satisfied that it is in the public interest to investigate these matters and that its Head of Regulation has therefore authorised the opening of an investigation.

18. On 17 January 2018 Mrs Justice Lang refused permission to proceed with the claim following consideration of the papers. Her principal reasons were:

> "The claim has been overtaken by events as the [Commission] decided on 20 November 2017 to undertake an investigation into potential improper referendum spending by Vote Leave. Thus the [Commission]'s original decision, which formed the basis of the claim for judicial review, will be superseded. Although there remains a dispute between the parties as to the operation of the statutory scheme, and the claimant's analysis is arguable, this Court will not embark on an academic examination of the law. If there are grounds to do so, then the claimant may bring a further claim once the [Commission] makes its new decision."

19. The claimant has exercised its right to renew its application for permission at an oral hearing. At the hearing Ms Jessica Simor QC for the claimant submitted that the claim raises important questions of law about the meaning and effect of the legislation which governs campaign spending. Ms Simor submitted that those questions have not been rendered academic by the Commission's decision to open an investigation because they are not going to be addressed by that investigation. She further

submitted that it is in the public interest that these questions should be resolved now by the court because otherwise there is a real risk that the Electoral Commission will continue to apply the law wrongly when assessing whether there have been breaches of the spending rules.

20. On behalf of the Commission, Mr Richard Gordon QC submitted that none of the grounds for seeking judicial review is properly arguable and that permission to proceed with the claim should therefore be refused.

21. Two days before the hearing, lengthy written observations were submitted on behalf of Vote Leave by Mr Timothy Straker QC, together with a witness statement from Mr Matthew Elliott, the founder and former chief executive officer of Vote Leave, now its company secretary. Amongst other objections, the written observations argued that permission should be refused because, if the court were to decide the legal issues raised by the claim, this would interfere with the machinery for investigation and criminal prosecution established by the applicable legislation. Because Vote Leave, although served with the claim, chose not to file an acknowledgment of service, it had no right to take part in this hearing. We did not in these circumstances allow Mr Straker to make oral submissions but we have nevertheless taken into account the written observations and evidence submitted on behalf of Vote Leave.

Ground 1: expenses incurred

22. It is the claimant's case that, on the facts already found by the Electoral Commission, the Commission should have concluded that Vote Leave incurred "referendum expenses" by making the payments to AIQ referred to above, which Vote Leave failed to report in its return made under section 120 of PPERA. It is argued that the reason why the Electoral Commission has not drawn this conclusion is that the Commission has misinterpreted and failed correctly to apply the relevant statutory provisions.

23. "Referendum expenses" are defined in section 111(2) of PPERA. The definition has three elements. It applies where (i) "expenses are incurred by or on behalf of any individual or body" which (ii) fall within Part I of Schedule 13 and (iii) are incurred "for referendum purposes". Expenses fall within Part I of Schedule 13 if they are "incurred in respect of any of the matters set out in the following list" (Schedule 13, para 1). The list of matters set out includes "advertising of any nature (whatever the medium used)". The phrase "for referendum purposes" is broadly defined in section 111(3) as:

> "(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."

24. The claimant contends that each element of the definition of "referendum expenses" is satisfied in this case. First of all, by making payments to AIQ Vote Leave incurred expenses. The claimant submits that in this context to "incur" an expense simply means to "bring upon oneself an expense or render oneself liable to an expense". In

paying for the services which Mr Grimes commissioned from AIQ, Vote Leave incurred expenses because it bore the cost of those services. Second, the expenses fell within Part I of Schedule 13 as they were incurred in respect of advertising, which is one of the matters included in the list set out in Part I of Schedule 13. Third, the expenses were incurred "for referendum purposes" as defined in section 111(3).

25. There is no dispute that, if the payments that Vote Leave made to AIQ were made in respect of expenses incurred by or on behalf of Vote Leave, then those expenses satisfied the second and third requirements of the definition of "referendum expenses" because they fell within Part I of Schedule 13 and were incurred for referendum purposes. The issue between the parties concerns the correct interpretation of the first element of the definition. What is the meaning of "expenses incurred" by or on behalf of an individual or body, as that phrase is used in PPERA?

26. The view taken by the Commission is that the payments made by Vote Leave to AIQ for services provided to Mr Grimes represented donations made by Vote Leave in respect of referendum expenses incurred by Mr Grimes, and that this shows that the payments cannot have been payments in respect of referendum expenses incurred by or on behalf of Vote Leave. Mr Gordon QC took the same approach in his skeleton argument and in his oral submissions.

27. There are three steps in this analysis. The first is to say that, in commissioning services from AIQ for use in his campaign, Mr Grimes incurred referendum expenses. The second step is to characterise the payments made by Vote Leave to AIQ as donations made by Vote Leave to Mr Grimes. In support of this characterisation the Commission places particular reliance on two provisions of Schedule 15 of PPERA, which contains rules for controlling donations to permitted participants. Paragraph 1(4) of Schedule 15 defines a "relevant donation" in relation to a permitted participant at a referendum as:

> "a donation to the permitted participant for the purposes of meeting referendum expenses incurred by or on behalf of the permitted participant."

In addition, paragraph 2(1)(c) of Schedule 15 of PPERA identifies one category of donation in relation to a permitted participant as:

> "any money spent (otherwise than by or on behalf of the permitted participant) in paying any referendum expenses incurred by or on behalf of the permitted participant;"

It is said that these provisions make it clear, first of all, that the fact that Vote Leave paid for the services provided by AIQ does not necessarily mean that Vote Leave thereby incurred referendum expenses; and, second, that once it is recognised that referendum expenses were incurred by Mr Grimes, the payments made by Vote Leave fall within these provisions and therefore constituted donations. The final step of the analysis is to reason that the effect of PPERA is to treat "donations" and "expenses incurred" as mutually exclusive so that the donation made by Vote Leave to Mr Grimes could not also be an "expense incurred" by Vote Leave.

28. In her submissions on behalf of the claimant Ms Simor QC focussed on the third step in the argument. She submitted that it is perfectly possible for a payment (or other transfer of value) to constitute both a donation and an expense incurred by the donor. She argued that the purpose of the controls on donations in Schedule 15 is different from the purpose of the restrictions on referendum expenses in sections 117 and 118 of PPERA. The former restricts the persons from whom relevant donations may lawfully be accepted by permitted participants, whereas the latter restrict the referendum expenses which an individual or body may incur. The fact that Parliament has used the term "expenses incurred" in both regimes does not of itself indicate that "donations" are excluded from the meaning of "referendum expenses" in sections 117 and 118.

29. At this stage of the proceedings we are unable to accept the Commission's contention that the regime in Schedule 15 of PPERA renders ground 1 unarguable. There is no statutory provision which explicitly states that the same payment cannot be both a donation to a permitted participant and a payment made in respect of a referendum expense incurred by or on behalf of the donor. It is true that if making a donation of the kind described in paragraph 2(1)(c) of Schedule 15 also involves incurring a referendum expense, then only permitted participants could make such donations exceeding £10,000, and only the designation organisation could make such donations exceeding £700,000, without contravening the rules restricting campaign spending. But the fact that the claimant's contention would appear to have this consequence does not by itself demonstrate that it is wrong.

30. Another question to which the answer is by no means obvious is whether the same payment can be made in respect of a referendum expense incurred by or on behalf of two different individuals or bodies. Mr Gordon submitted that it cannot. Where paragraph 22 of Schedule 1 to EURA applies (the "common plan" provision, which we discuss further below), expenses incurred by or on behalf of one individual or body are treated in some circumstances as having also been incurred on behalf of another individual or body. Mr Gordon sought to draw an inference that it is only where this provision applies that the same expense can be regarded as having been incurred by or on behalf of more than one individual or body. But we do not think this necessarily follows. Mr Gordon also made a submission that an expense cannot be incurred by or on behalf of a permitted participant (or other individual or body) unless that person has a liability to make a payment (or other transfer of value). We found this submission difficult to follow. There is no obvious reason why incurring an expense should necessarily involve incurring a liability. Moreover, it would be surprising if a permitted participant who chooses, for example, to pay the hotel or travel costs of volunteers campaigning for it, even though not under any legal liability to do so, could make such payments without being treated as having incurred any referendum expenses.

31. All these and other matters merit closer consideration. We are satisfied that ground 1 does raise arguable points of statutory construction which should be resolved in the present proceedings. In its review decision, the Commission decided to investigate further the factual circumstances of the payments made by Vote Leave in order to determine whether paragraph 22 of Schedule 1 to EURA applies in this case. That does not touch upon the prior question of whether the Commission's decision that no expenses were incurred by Vote Leave with the meaning of section 111 was or was

not legally correct. Furthermore, the legal arguments under ground 1 raise a point of general public importance, namely whether donations by one permitted participant to another fall outside the regime which restricts the total amount of referendum expenses which may be incurred by the donor.

32. We do not accept the submissions made by Mr Straker QC that we should decline to permit a claim for judicial review to proceed because the court ought not to decide a question of law which may arise in criminal proceedings and because, if the Commission concludes that no offence has been committed, the claimant has an alternative remedy available consisting in the ability to bring a private prosecution. The former submission was based upon *Imperial Tobacco v Attorney General* [1981] AC 718, where the House of Lords held that, at a time when a company was being prosecuted in a criminal court, it had not been a proper exercise of discretion for a civil court to grant a declaration that the company had acted lawfully. As explained by Simon Brown LJ (as he then was) in *R v DPP, ex parte Camelot Group plc (No.2)* (1998) 10 Admin LR 93, the possibility of a criminal prosecution does not represent a jurisdictional bar to judicial review and the court should adopt an essentially flexible approach to the exercise of its declaratory jurisdiction in this field, the only rigid rule being that the civil courts should not intervene where criminal proceedings have *already* been instituted.

33. In the present case it seems to us that the function which the court will be performing is the classical function of judicial review, namely to determine whether a public body is interpreting correctly the law which it has to apply. No criminal proceedings have been instituted and the question which the court is being asked to decide about the meaning of "expenses incurred" will not involve making any finding about whether or not any criminal offence has been committed. The fact that referendum expenses were incurred in excess of a relevant limit does not by itself give rise to an offence under section 117 or 118 of PPERA. Similarly, absence of reasonable excuse is a necessary ingredient of an offence under section 122 of PPERA. For this reason as well as the fact that it is a far more restricted and cumbersome procedure, we also do not consider that the theoretical possibility of bringing a private prosecution represents a realistic alternative remedy.

Ground 2: common plan expenses

34. The claimant argues that, if it is wrong on ground 1 such that, on the proper interpretation of the legislation, the relevant payments made by Vote Leave to AIQ were made solely in respect of referendum expenses incurred by or on behalf of Mr Grimes, nevertheless on the facts already known those expenses were "common plan expenses". Accordingly, by reason of paragraph 22 of Schedule 1 to EURA, these expenses fall to be treated as having been incurred by Vote Leave.

35. Paragraph 22 of Schedule 1 to EURA 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 –
>
> (1) that individual or body, and
>
> (2) 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."

Referendum expenses which satisfy these requirements are referred to as "common plan expenses" (para 22(2)). As a general rule, common plan expenses are treated as having been incurred by or on behalf of each individual or body which was a party to the "plan or other arrangement" (para 22(3)). But if one of the individuals or bodies involved was a designated organisation and the other was a permitted participant, all such common plan expenses are to be treated as having been incurred by the designated organisation only (para 22(5)).

36. The claimant's argument proceeds on the basis that: (1) in commissioning services from AIQ to a value of £625,000, Mr Grimes incurred referendum expenses in this amount; and (2) those expenses were incurred pursuant to a plan or other arrangement whereby Vote Leave donated to Mr Grimes sums totalling £625,000 which it paid to AIQ so as to enable him to commission services to that value from AIQ. On this basis, the question whether the expenses were common plan expenses depends upon whether it was part of the same plan or arrangement that referendum expenses were to be incurred by or on behalf of Vote Leave.

37. The claimant contends that it was. Ms Simor submitted that, on the facts already known, one purpose of the plan or arrangement pursuant to which Vote Leave made donations to Mr Grimes was to allow Vote Leave to incur <u>other</u> referendum expenses up to its spending limit of £7 million without having to include the sums paid to AIQ as part of its own campaign spending.

38. It seems to us that in this regard it would be relevant to consider, for example, whether: (1) before Vote Leave agreed to make a particular payment to AIQ for the benefit of Mr Grimes, Vote Leave (a) had not yet reached its spending limit of £7 million and (b) had been intending to use some of its available funds to commission further services from AIQ; (2) Mr Grimes knew this; and (3) it was understood between Vote Leave and Mr Grimes that the result of Mr Grimes commissioning services from AIQ for which Vote Leave agreed to pay would be to enable Vote Leave to incur referendum expenses on other campaign activities.

39. These, however, are questions of fact. We understand them to be included in the questions which the Electoral Commission will be considering in the course of its current investigation. We have seen nothing to suggest that the Commission has misinterpreted the statutory provisions concerning common plan expenses or that there is any issue of law about the meaning of those provisions. In these circumstances, we refuse permission to pursue this ground of judicial review.

Ground 3: failure to supervise

40. Ground 3 alleges that the Commission failed to carry out its statutory duty to supervise referendum expenditure during the referendum campaign. Although not specifically identified in the claimant's grounds, we understand the statutory duty relied on to be the duty of the Commission under section 145 of PPERA to "monitor and take all reasonable steps to secure compliance with the restrictions and other requirements imposed by or by virtue of" provisions that include those referred to earlier in this judgment. The particular complaint made is that the Commission gave advice to Vote Leave during the referendum campaign that it could donate to other "leave" campaigns without breaching the £7 million limit on its expenses and that this advice was wrong in law.

41. When the claim was commenced, the claimant had no direct knowledge of any advice given by the Commission to Vote Leave during the referendum campaign and relied on hearsay evidence suggesting that Vote Leave had relied on such advice. In its summary grounds for contesting the claim, the Commission stated that, as far as it was aware, no advice was ever given that Vote Leave could make the donation it did. However, the witness statement of Mr Matthew Elliott, referred to earlier, exhibited (amongst other documents) an email dated 20 May 2016 from Mr Kevin Molloy, "Guidance Adviser", sent on behalf of the Commission to Vote Leave responding to "some questions in relation to campaign expenditure". In response to a question about whether the cost of providing branded materials such as banners and flags to other 'leave' campaigners would be treated as part of Vote Leave's campaign expenditure, the answer given was as follows:

> "If you are supplying material to other campaigners without having a co-ordinated plan or agreement then the material is likely to be a donation from you to the other campaigner. If the donation is over £500 it will be reportable by the other campaigner. You would not need to report the costs of the material in your spending return unless you use the material itself."

42. At the hearing Ms Simor QC submitted that, although this advice was addressing the supply of materials, there can be no difference in principle between the supply of materials and the supply of services to another campaigner, and if one should treated as a donation and not as an expense incurred, then so must the other. She also protested stridently that the Commission ought to have disclosed the email of 20 May 2016 pursuant to its duty of candour and that the statement in its summary grounds referred to above was misleading. Ms Simor further submitted that the advice given in the email was wrong and that the question whether the Commission was in breach of its statutory duty ought to be determined at a full hearing.

43. The Electoral Commission rejected the accusation that the statement made in its summary grounds about which the claimant complains was misleading. In a witness statement made by Ms Louise Edwards, Head of Regulation at the Electoral Commission, addressing this complaint, Ms Edwards says that the words "no such advice was ever given" must be read in the context of the reference in the immediately preceding paragraph to advice that Vote Leave "could lawfully make the donation it did". In other words, all that the Commission was denying was that it had

given advice to Vote Leave that the specific payments to AIQ would not need to be reported as referendum expenses. Ms Edwards also stated that the email of 20 May 2016 was disclosed as part of a Freedom of Information Act disclosure made on 31 October 2017 and posted on the Electoral Commission's website on that date.

44. We agree with Ms Simor that the supply of services is analogous to the supply of materials. The advice given to Vote Leave in the email dated 20 May 2016 was thus consistent with the view which the Commission has taken at all relevant times and is maintaining in these proceedings. That being so, it seems to us that, in asserting that it had never given advice that Vote Leave could lawfully make the donation it did, the Commission was making a statement which, though literally true, was misleading. It was true that the Commission had not given advice to Vote Leave that the specific payments to AIQ would not need to be reported as referendum expenses. But the Commission had given advice to Vote Leave which, when applied to the payments to AIQ, carried that clear implication (provided there was no common plan). The fact that the Commission had posted the email of 20 May 2016 on its website in response to a request for disclosure under the Freedom of Information Act made by someone other than the claimant is nothing to the point, when the first time that the Commission drew attention to that fact in these proceedings was at the permission hearing.

45. All that said, we do not consider that it would be appropriate or serve a useful purpose for the court to embark on a factual investigation of what advice was and was not given by the Commission to Vote Leave or any other campaigner for the purpose of assessing whether or not any such advice was consistent with the Commission's regulatory responsibilities. The essential question of law for the court to determine is that raised by ground 1. The relief sought by the claimant does not include any relief particular to ground 3 and Ms Simor confirmed in the course of argument that the only relief which the claimant could seek in relation to ground 3 would be declaratory. We see no sufficient reason in these circumstances to grant permission to pursue ground 3.

Ground 4: failure to investigate

46. The final ground of challenge relates to the Commission's conclusion that it did not have sufficient grounds to open an investigation into whether there was a contravention of the spending rules. As a result of the Commission's decision in November 2017 to carry out an investigation, this ground has fallen away.

Costs

47. The claimant says that it has succeeded on ground 4, irrespective of the outcome of the rest of its claim for judicial review, and that the court should therefore order the Commission to pay the claimant's costs up to and including 20 November 2017, the date of the decision to open a new investigation. We disagree. The Commission has said that it decided to investigate in the light of "further information which has come to light". That point is disputed and requires more detailed consideration than can be given within the scope of this permission hearing. In any event, the claimant's "success" under ground 4 is qualified by the fact that we have refused permission to pursue grounds 2 and 3 and ground 1 has yet to be determined. We consider that no order about liability for costs should be made at this stage of the proceedings.

Costs capping order

48. The claimant has applied for a costs capping order limiting its potential liability to pay the Commission's costs of these proceedings (and vice-versa) to a maximum sum of £10,000. That application is resisted by the Commission. The conditions which must be satisfied before a costs capping order is made and matters to which the court must have regard when considering whether to make such an order (and, if so, on what terms) are set out in sections 88 to 89 of the Criminal Justice and Courts Act 2015. Evidence that an applicant is required to provide is specified in CPR 46.18. Important matters on which information is needed include:

    (1) The status, membership and functions of the claimant. The application for a costs capping order is supported by a witness statement made by Mr Jolyon Maugham QC who describes the claimant as "an organisation I set up". He does not identify the claimant's legal status. The claim form names the claimant as "The Good Law Project", which suggests that it is an unincorporated association, but in the letter before claim it was named as "Good Law Project Limited", suggesting that it is in fact a limited liability company. No further information about its membership, constitution and objects has been given.

    (2) The amount of money which has been raised to fund the claim (the evidence about this is now some five months old).

    (3) The financial resources of the claimant or its members or those who provide financial support to it and the ability of such persons to provide financial support for these proceedings.

    (4) An explanation of why it would be appropriate for the claimant to represent "the interests of other persons or the public interest generally".

49. We consider that, if the application for a costs capping order is to be pursued, the claimant should provide up to date evidence in support of its application which includes information about the matters identified above, and the parties should then see whether they are able to reach agreement on (a) the principle and (b) amount of any cap. If they are unable to do so, the Commission should respond to the application and it should be referred to a judge for a decision to be made on the papers.

Expedition

50. The claimant has asked for expedition in the event that permission is granted, and has suggested that the substantive hearing should take place during the Easter term, which ends on 25 May 2018. Although this case is not of pressing urgency, we agree that, in relation to the important issue of law raised by ground 1, it is desirable to establish sooner rather than later whether the Commission is interpreting and applying the law correctly. We will direct that the case should be listed for hearing no later than mid-July. In fixing the hearing date, priority will have to be given to the availability of court time rather than the availability of the parties' preferred counsel.

Approach to the arguments

51. We feel obliged to mention some unsatisfactory aspects of the hearing before us so that they do not recur at the substantive hearing. The hearing of the renewed application for permission was originally listed for 22 February 2018 with a time estimate of 1 hour. The claimant sought an adjournment on the basis that a half day was needed, even when the court increased the time estimate for 22 February to 2 hours. The hearing was then re-listed for half a day on 15 March, which should have been ample time to determine whether the claim should be allowed to proceed to a full hearing. It was disappointing that in presenting the claimant's case time was taken up, despite discouragement from the court, in making forensic points and even grandstanding, rather than focussing on an objective analysis of the legislation and the relevant questions of statutory interpretation. Similar criticisms can be made of the written observations submitted on behalf of Vote Leave. This only served to make the court's task in determining whether the grounds raised properly arguable questions of law more difficult and time-consuming than it ought to have been.

52. It is well understood that the issues raised by this case have sensitive implications for participants in the referendum campaign and the general public. It should be equally well understood, however, that the court's role is strictly confined to determining the meaning and effect of the relevant legislation and that the advocates' submissions should therefore be similarly confined. For the substantive hearing the court would be assisted by counsel researching such matters as relevant case law on the language used in PPERA and EURA, antecedent legislation and admissible parliamentary materials. The court will not be assisted by rhetorical points which have no relevance to the legal issues and expects counsel to eschew such points in accordance with their duty owed to the court to act with independence.