Neutral Citation Number: [2018] EWHC 2414 (Admin)

Case No: CO/4908/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/09/2018

Before:

LORD JUSTICE LEGGATT
and
MR JUSTICE GREEN

- -

Between:

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

- -

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

Hearing date: 19 June 2018

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Approved Judgment

LORD JUSTICE LEGGATT (giving the judgment of the court):

1. The issue in this case is whether the Electoral Commission (the statutory body responsible for overseeing elections and referendums in the UK) has correctly interpreted the law which limited spending by participants in connection with the referendum held in June 2016 on whether or not the UK should remain a member of the European Union. More particularly, the issue is whether the Electoral Commission was correct to conclude that, on the proper interpretation of the legislation, certain payments made by Vote Leave Limited were not "referendum expenses" incurred by Vote Leave but only donations made by Vote Leave to meet expenses incurred by another campaigner for a 'leave' outcome of the referendum called Mr Darren Grimes.

The relevant 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"). That legislation imposed restrictions on the level of expenses which any individual or body campaigning for either outcome of the referendum was permitted to incur.

3. Pursuant to section 117(1) of PPERA, the total "referendum expenses" incurred by or on behalf of any individual or body during the "referendum period" could not lawfully exceed £10,000, unless they were a "permitted participant". For an individual or body that was not a permitted participant knowingly to exceed this spending limit was a criminal offence: see section 117(2) and (3) of PPERA. We will set out later the definition of "referendum expenses", which is at the centre of the dispute in this case. The "referendum period" ended on the date of the referendum, 23 June 2016: see Schedule 1, para 1 of EURA.

4. Under sections 105 and 106 of PPERA, 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" simply by giving a notification to the Electoral Commission. Where the notification was given by a body, it had to include the name of the person who would be responsible for compliance on the part of that body with the financial controls contained in the legislation.

5. Pursuant to section 108 of PPERA, one permitted participant was designated as representing those campaigning for each of the two possible outcomes of the referendum. The organisation designated as representing those campaigning for a 'leave' outcome was Vote Leave Limited. Each designated organisation was entitled to receive some assistance from the state including a grant of up to £600,000 from public funds: see section 110. Each designated organisation was also permitted to incur referendum expenses during the referendum period up to a limit of £7 million; for any other permitted participant, the limit was £700,000: see section 118(1) and Schedule 14 of PPERA, as amended by Schedule 1, para 25(2) of EURA. Incurring any referendum expenses in excess of the applicable limit could give rise to a criminal offence under section 118(2) and (3) of PPERA.

6. There were also restrictions (imposed by section 119 and Schedule 15 of PPERA) on donations to permitted participants. The main restrictions were a prohibition on accepting donations from anyone who was not a "permissible donor" and a requirement

that any donation exceeding £7,500 be accompanied by a declaration confirming the donor's identity. Broadly speaking, permissible donors, like permitted participants, had to be individuals registered in an electoral register in the UK or bodies carrying on their activities wholly or mainly in the UK.

7. Under sections 120 and 122 of PPERA, where any referendum expenses are incurred by or on behalf of a permitted participant during any referendum period, the "responsible person" is obliged to make a return and deliver it to the Electoral Commission within six months after the end of the period. Amongst other information, 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: see section 120(2) and Schedule 15, paras 9 to 11. Again, failure to comply with these requirements may constitute a criminal offence: see section 122(4) of PPERA.

8. Under section 145 of PPERA, the Electoral Commission has a duty to monitor and take all reasonable steps to secure compliance with the restrictions and other requirements imposed by the above-mentioned provisions. The Commission has investigatory powers and powers to impose civil sanctions for offences committed by breaches of the restrictions and other requirements imposed by the legislation.

Legislative history

9. Spending limits at elections in the UK are of long standing. Spending limits for referendums, like referendums themselves, are a much more recent creation. The Referendum Act 1975 contained no provision limiting expenses or payments. Nor did the Referendums (Scotland and Wales) Act 1997. The subject 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. This report recommended that individuals and organisations that wished to incur "referendum expenses" of £25,000 or more should be required to register with the Electoral Commission (para 12.50). The Neill Committee advised, however, that it would be impracticable to try to limit spending on referendum campaigns. In the Committee's view (para 12.46):

> "The number of individuals and organisations involved would often be too large. The time-scale would often be too short. Adequate accounting procedures would often be impossible to put in place. The administrative apparatus required would resemble one of Heath Robinson's most outlandish contraptions – and would almost certainly not work."

10. The Government responded to the report in a White Paper on *The Funding of Political Parties in the United Kingdom*, published in July 1999. While adopting many of the Neill Committee's proposals, the Government rejected its advice on spending limits. 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 (para 1.14).

11. It is common ground that this is the underlying purpose of the restrictions on referendum expenses imposed by PPERA and EURA.

The AIQ Payments

12. The subject matter of this claim is a series of transactions involving three parties: (i) Vote Leave; (ii) Mr Darren Grimes, a permitted participant who was also campaigning for a 'leave' outcome of the 2016 referendum; and (iii) AggregateIQ Data Services Limited ("AIQ"), a Canadian firm specialising in online advertising. Three payments are in issue, totalling £620,000, as follows: (i) £400,000 paid on or about 16 June 2016; (ii) £40,000 paid on 20 June 2016; and (iii) £180,000 paid on 21 June 2016. All three payments were made by Vote Leave to AIQ to pay for advertising services purchased from AIQ by Mr Grimes.

13. The following account of the transactions is based principally on emails exchanged between Vote Leave and Mr Grimes which were disclosed in these proceedings.

14. Some time before 9 June 2016 Vote Leave was informed that a third party donor wished to make a substantial donation to it. When calculating its financial position on that date, Vote Leave concluded 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. Vote Leave reported receiving the donation (of £1 million) on 13 June 2016.

15. Some time before 13 June 2016 Vote Leave suggested to Mr Grimes that it might donate funds to him. On 13 June 2016 Mr Grimes sent an email to Vote Leave stating that "Beleave", an unincorporated association set up by him to campaign for a leave outcome, would be "very interested in working with data specialists and analysts like those at [AIQ]" and that it would be very helpful if Vote Leave could send the proposed donation directly to AIQ so that work could begin sooner.

16. On 14 June 2016 Vote Leave's Operations Director sent an email to Mr Grimes confirming its offer to make a donation to his campaign of £400,000 and seeking his instructions as to where the money should go. Mr Grimes replied on 16 June 2016 requesting that the money be paid directly to AIQ and giving the relevant bank account details. The transfer was duly made by Vote Leave.

17. On 17 June 2016 Vote Leave offered "a further donation to BeLeave" of £40,000. Mr Grimes replied asking for the money to be "sent directly to AIQ at the account in our previous correspondence". The sum was paid by Vote Leave to AIQ on 20 June 2016.

18. On 21 June 2016 Vote Leave's Operations Director sent an email to Mr Grimes saying that Vote Leave was in a position to make another donation of £181,000 if he would like it. Mr Grimes replied 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 own account for travel expenses. These payments were made the same day.

19. 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. (As BeLeave was an unincorporated association with no legal personality, these contracts were in law made with Mr Grimes.) 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.

20. The three payments made by Vote Leave to AIQ (which we will refer to for short as "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.

The present proceedings

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

22. The present proceedings were begun by the claimant in October 2017 to challenge that conclusion and the decision of the Electoral Commission not to open an investigation into the spending of Vote Leave and of Mr Grimes. The claimant is an interest group whose legal costs in bringing the claim have been financed by crowdfunding. Four grounds for seeking judicial review were advanced. Following an oral hearing, the court gave permission to proceed with one ground only: see the judgment dated 23 March 2018 at [2018] EWHC 602 (Admin). This ground is that the Electoral Commission misinterpreted the applicable legislation in concluding that the AIQ Payments did not constitute referendum expenses incurred by Vote Leave and hence did not count towards the limit of £7 million on referendum expenses which Vote Leave was permitted to incur during the referendum period.

23. Anyone who follows current affairs in this country knows that the 2016 referendum campaign is still an emotive subject. For groups with a political interest in its outcome such as the claimant and Vote Leave the question whether the law that governed campaign spending in connection with the referendum was complied with may be perceived as having political and not merely legal significance. It goes without saying that the court has no concern with any political implications or perceived implications of that question. Nor is it concerned with the motivations of the parties or the morality of their conduct. Its sole concern in this case is to determine whether the Electoral Commission (itself an independent body) has correctly interpreted the relevant law. In the judgment given following the permission hearing, the court found it necessary to remind those representing the claimant and Vote Leave of this fact. The court emphasised that at the substantive hearing it was essential to focus solely on the legal issues and that the court would not be assisted by any forensic points which were not strictly confined to those issues.

24. We are grateful that this request was heeded. At the hearing the case was properly and very well argued on behalf of the claimant by Ms Simor QC and on behalf of Vote Leave by Mr Straker QC.

The Electoral Commission's subsequent report

25. After these proceedings were begun, the Electoral Commission carried out an assessment review and decided that it would, after all, open an investigation into the spending of Vote Leave and of Mr Grimes. The report of that investigation was published on 17 July 2018, after the substantive hearing of the present claim had already taken place. In its report the Electoral Commission found that Vote Leave and Mr Grimes committed criminal offences by breaking the campaign finance rules in a number of respects, including in their reporting of the AIQ Payments in issue in this action. As we will explain, however, the Electoral Commission has made these findings on a different legal basis from that challenged by the claimant. The question of interpretation raised in these proceedings therefore remains relevant.

The definition of "referendum expenses"

26. It is the claimant's case that on the proper interpretation of the legislation the AIQ Payments were "referendum expenses". "Referendum expenses" are defined in section 111(2) of PPERA 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."

It can be seen that this definition has three elements. The first is that "expenses" are "incurred" by or on behalf of an individual or body. Second, those expenses must fall within Part I of Schedule 13. Part I of Schedule 13 of PPERA is headed "Qualifying Expenses" and covers "expenses incurred in respect of any of the matters set out in the following list." A list of matters is then set out which includes "Advertising of any nature (whatever the medium used)". The third element of the definition is that the expenses are incurred "for referendum purposes". That phrase is itself defined in 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
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> (b) otherwise in connection with promoting or procuring any such outcome."

27. The central issue in dispute is whether the AIQ Payments described above were "expenses incurred" by Vote Leave. At the permission hearing it was common ground that, if they were, then the expenses in question were "referendum expenses". Thus, it was not in dispute that, if expenses were incurred by Vote Leave, they were incurred in respect of one of the matters included in the list set out in Part I of Schedule 13 (namely, advertising) and "for referendum purposes" as defined in section 111(3).

28. At the substantive hearing the Electoral Commission advanced a further argument that, even if Vote Leave incurred expenses in making the AIQ Payments, those expenses were not incurred "in respect of" advertising, so that the second element of the definition of "referendum expenses" was not satisfied. We will consider that argument

in due course. The main issue remains 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 section 111(2) of PPERA?

Common plan expenses

29. Before we address this question, we must mention one other concept used in the legislation.

30. Para 22 of Schedule 1 to EURA makes provision for expenses incurred by persons "acting in concert". Pursuant to para 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
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> (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 –
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> (i) that individual or body, and
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> (ii) one or more other individuals or bodies,
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> 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 labelled "common plan expenses": see 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": see para 22(3). But if one of the individuals or bodies involved was a designated organisation, all such common plan expenses are to be treated as having been incurred by the designated organisation only: see para 22(5).

31. One of the grounds on which the claimant originally sought judicial review was that the AIQ Payments were made in respect of "common plan expenses" incurred in pursuance of a plan or other arrangement between Vote Leave and Mr Grimes. The court refused permission to proceed with this ground on the basis that 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 it had by then opened. In the event, in its report published on 17 July 2018 the Commission has concluded that spending reported by Mr Grimes in a total sum of £675,315.18 (which includes the three AIQ Payments in issue in these proceedings) 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 Schedule 1, para 22 of EURA.

32. In view of that finding, the question whether the Electoral Commission has interpreted the meaning of "referendum expenses" correctly is now of less practical importance than it was. But it remains necessary to determine the meaning of that phrase and whether the Electoral Commission was right to conclude that, unless caught by the

common plan provisions, the three AIQ Payments totalling £620,000 were not referendum expenses incurred by or on behalf of Vote Leave.

Statutory interpretation

33. Save for one point, there is no dispute about the principles of statutory interpretation. The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation. It is generally reasonable to assume that language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion – all the more so where the phrase has been expressly defined.

34. It is also generally reasonable to assume that Parliament intended to observe what *Bennion on Statutory Interpretation* (7th Edn, 2017) in section 27.1 calls the "principle against doubtful penalisation". This is the principle that a person should not be subjected to a penalty – particularly a criminal penalty – except on the basis of clear law. As noted earlier, incurring referendum expenses in excess of the prescribed limit and, in the case of a permitted participant, failing to report referendum expenses correctly are potentially criminal offences. In these circumstances counsel for the Electoral Commission and Vote Leave both submitted that the definition of "referendum expenses" should be construed strictly and any ambiguity or doubt about its meaning resolved in favour of the narrower interpretation so as to avoid doubtful penalisation.

35. In response, counsel for the claimant cited *R (Junttan Oy) v Bristol Magistrates' Court* [2003] UKHL 55; [2003] ICR 1475, para 84, where Lord Steyn described this principle of statutory interpretation as one of last resort. Other authorities confirm, however, that that description of the principle understates its continued vitality: see e.g. *R v Dowds* [2012] EWCA Crim 281; [2012] 1 WLR 2576, paras 37-38. We think the position was fairly stated by Sales J in *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB), para 48, when he said:

> "The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight."

The competing interpretations

36. We turn to the question of what is meant by "expenses incurred" in the definition of "referendum expenses" in section 111(2) of PPERA quoted at para 26 above. 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. Thus, "expenses" may be "incurred" by voluntarily making a payment which diminishes a person's assets as well as by assuming an obligation or liability to make such a payment. Counsel for the claimant submitted that this interpretation is consistent both with the ordinary dictionary meanings of the words and with the purpose of the legislation.

37. Counsel for Vote Leave advanced a different but equally straightforward interpretation of the words. They submitted that "incurring" an "expense" means incurring a liability. Such a liability would normally be contractual. Thus, an expense is not incurred simply by making a gift. It is Vote Leave's case that the AIQ Payments were made in respect of referendum expenses incurred by Mr Grimes but that no expenses were incurred by or on behalf of Vote Leave, as the only liabilities incurred were incurred by Mr Grimes under contracts made by him with AIQ under which he agreed to purchase services from AIQ. No contractual liability was incurred by Vote Leave.

38. The position of the Electoral Commission on this central issue was somewhat elusive. In its summary and detailed grounds of resistance to the claim, the Commission denied that Vote Leave had incurred expenses by making the AIQ Payments but refrained from identifying any criterion which, if met, would signify that these were "expenses incurred" by Vote Leave. The Commission submitted that making a payment is not the same as incurring an expense and that making a donation is not the same as incurring an expense. But counsel for the Commission did not at that stage offer any positive explanation of what does constitute "incurring" an "expense" within the meaning of the legislation. Such an explanation was eventually put forward in the Commission's skeleton argument for the substantive hearing. It was there submitted that, at least in the specific tripartite situation under consideration, "incurring" an "expense" means "taking on responsibility for payment, not payment itself". Counsel for the Electoral Commission added, enigmatically, that, while "the assumption of responsibility for payment might well typically be achieved by means of contracting, the mere act of contracting is not the correct focus".

39. Applying this criterion, it is hard to see why Vote Leave did not in the Commission's view "take on responsibility" for paying AIQ when it arranged for money to be transferred from its bank account to AIQ's bank account for the purpose of paying AIQ's charges for the services ordered by Mr Grimes. The only sense, so far as we can see, in which Vote Leave did not "take on responsibility" for payment is that it did not enter into a contract with AIQ under which it incurred a liability to pay AIQ. The only person who contracted with AIQ was Mr Grimes. However, if the "mere act of contracting" is not "the correct focus", it is unclear what is the correct focus in the Commission's view.

40. Ultimately, the position of the Electoral Commission on what amounts to an "expense incurred" within the meaning of section 111 of PPERA appeared to offer little improvement on the well known elephant test of "I know one when I see one". That is not a satisfactory approach in circumstances where a person who reports referendum expenses incorrectly is potentially guilty of a criminal offence.

Ordinary meaning

41. As a matter of ordinary English usage, the phrase "expenses incurred" is, we apprehend, most naturally understood in the broad sense contended for by the claimant. 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." The concept is similarly defined in the *Conceptual Framework for Financial Reporting* issued by the International Accounting Standards Board. Under section 121 of PPERA, a permitted participant who incurs referendum expenses exceeding £250,000 during any referendum period is required to appoint an auditor to prepare a report on its return to the Electoral Commission. It would be reasonable to expect an auditor appointed for this purpose, unless otherwise instructed, to apply standard accounting concepts in verifying that the return gives a true and fair view of the expenses incurred by the permitted participant during the referendum period.

42. We do not accept that as a matter of ordinary language incurring an expense means the same as incurring a liability, as was argued on behalf of Vote Leave. An "expense" and a "liability" are different concepts. Certainly, someone who, for example, purchases goods under a contract and thereby incurs a liability to pay for them would naturally be said to have incurred an expense. But so too would someone who makes a donation to a charity. In the ordinary meaning of the words an expense can just as well be incurred by making a payment voluntarily without any obligation to do so as by undertaking an obligation to make a payment: the value of the person's assets is equally diminished in each case. It is also to be expected that, if the intention were to restrict the meaning of "referendum expenses" to expenses which there is a liability to pay, the legislation would say so expressly and that the word "liable" or "liability" would appear in the definition.

43. Counsel for Vote Leave put forward as a counter-example a donation made by a barrister to the Barristers' Benevolent Association and submitted that it is unlikely that HM Revenue would treat the barrister as having incurred an expense. But this seems to us to conflate the question of whether an expense has been incurred with the different question of whether an expense that has been incurred is deductible in calculating profits for tax purposes. In calculating the profits on which a barrister is liable to pay income tax, an expense is only deductible if it was incurred wholly and exclusively for purposes of the barrister's trade. A donation to the Barristers' Benevolent Association would not satisfy that test and would undoubtedly be regarded by HM Revenue as incurred at least partly for a private purpose (of providing charitable assistance to other barristers in need) and not wholly and exclusively for purposes of the barrister's trade. But we see no reason why HM Revenue, or anyone else, would dispute that the barrister had incurred an expense. It is just that the donation would be regarded as a private and not (or not wholly and exclusively) as a professional expense.

44. Nevertheless, we would not go so far as to say that as a matter of language the phrase "expenses incurred" is incapable of being used in the narrower sense contended for by Vote Leave such 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. We accept that, if other indications of legislative intention pointed strongly in that direction, the phrase could be construed in this sense.

Meaning in other contexts

45. Where words are capable of being used in more than one sense, it seldom if ever helps in deciding what the words mean in a particular context to examine how they have been interpreted in another, different context. Thus, the fact that, for example – as counsel for the claimant pointed out – gifts (including gifts to charity) may constitute "expenses

incurred" by a company for the purpose of the Corporation Tax Act 2009, sections 1298-1300, does no more than confirm that the phrase can be used to include gifts. It does not provide a reason to conclude that the words have the same meaning in section 111 of PPERA.

46. We also do not think that in ascertaining what the phrase means in section 111 of PPERA any assistance is to be gained from analysing other electoral legislation. On behalf of Vote Leave Mr Straker QC submitted that electoral legislation has always recognised that "expenses incurred" in connection with an election represent liabilities which give rise to a cause of action against the person who incurred the expense. Mr Straker referred, in particular, to sections 72-79 of the Representation of the People Act 1983, which still governs spending at elections. As originally enacted, section 72(2) of that Act provided that "a contract by which any election expenses are incurred shall not be enforceable against a candidate at the election unless made by the candidate himself or by his election agent." Sections 73 and 74 required (with certain exceptions) every payment made in respect of election expenses, including any personal expenses incurred by the candidate on account of or in connection with or incidental to the election, to be made by or through the candidate's election agent. Section 73(4) as originally enacted stated that:

> "All money provided by any person other than the candidate for any election expenses, whether as gift, loan, advance or deposit, shall be paid to the candidate or his election agent and not otherwise."

Section 76(1) set a limit on election spending by providing that "[n]o sum shall be paid and no expense shall be incurred by a candidate at an election or his election agent ... in respect of the conduct or management of the election" in excess of a specified maximum amount.

47. These provisions certainly indicate that, in the context of the 1983 Act, expenses may be incurred by making a contract and that the incurring of an expense does not necessarily coincide with the payment of an expense. The same is true, as we will soon discuss, under PPERA. But we can see nothing in the 1983 Act to indicate that a person who makes a donation to a candidate does not thereby incur an expense. The difficulty which arises in the present case of how to analyse a tri-partite situation in which a third party pays a supplier directly for goods or services purchased by a campaigner does not arise under the 1983 Act. The problem is avoided under the 1983 Act by the provisions which require all donations to be paid to the candidate or his election agent and all payments of election expenses to be made by or through the candidate's election agent. Payments made directly to a supplier by a third party are therefore prohibited. Under these arrangements it does not matter whether such payments would be treated as expenses incurred by the third party and the statutory provisions do not bear on that question. Nor does any question arise under the 1983 Act of whether a donation constitutes an election expense. The object of an election campaign is the election of a particular candidate and there is no reason why one candidate would want to donate campaign funds to another. The situation is not analogous to a referendum where many different individuals and bodies may be campaigning for the same outcome and there is no prohibition against them making donations to each other.

48. In these circumstances we do not consider that any inference can be drawn that in the 1983 Act the words "expenses incurred" must be understood to mean liabilities incurred, still less that the words bear that meaning in PPERA.

"Incurring", "paying" and "contracting"

49. A distinction is drawn in PPERA between "incurring" and "paying" referendum expenses. Thus, section 114(1) provides:

> "No payment (of whatever nature) may be made in respect of any referendum expenses incurred or to be incurred by or on behalf of a permitted participant unless it is made by—
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> (a) the responsible person, or
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> (b) a person authorised in writing by the responsible person."

Section 115(1) of PPERA provides:

> "A claim for payment in respect of referendum expenses incurred by or on behalf of a permitted participant during a referendum period shall not be payable if the claim is not sent to—
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> (a) the responsible person, or
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> (b) any other person authorised under section 113 to incur the expenses,
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> not later than 30 days after the end of the referendum period."

Section 115(2) requires such a claim to be paid not later than 60 days after the end of the referendum period. Section 116 deals with what is to happen where a claim is disputed.

50. In addition, the return in respect of referendum expenses which the responsible person is required to make under section 120 of PPERA must contain a statement of "all payments made in respect of referendum expenses incurred by or on behalf of the permitted participant during the referendum period in question", along with a statement of all disputed claims and a statement of any unpaid claims.

51. These provisions differentiate between "incurring" referendum expenses and "making payments in respect of" referendum expenses. They also make it clear that referendum expenses may be incurred before payment in respect of them is made. The manifest purpose of the provisions is to seek to ensure that the limit on the amount of the referendum expenses which a permitted participant is allowed to incur during the referendum period is not circumvented by delay in payment. Suppose, for example, that during a referendum period a permitted participant purchases some campaign leaflets on terms that payment is due within 30 days of the receipt of an invoice and that the payment date falls after the end of the referendum period. It would defeat the object of limiting spending for referendum purposes by any permitted participant if the

expense incurred in purchasing the leaflets were treated as incurred on the date when payment is due or when it is made.

52. It does not follow, however, from the fact that the legislation distinguishes between the concepts of "incurring" and "paying" referendum expenses that referendum expenses can never be incurred by making a payment. Nor does it follow that "incurring" referendum expenses means or necessarily involves making a contract under which referendum expenses are payable. Indeed, a distinction is also drawn in the legislation between the latter two concepts. For example, para 21 of Schedule 1 of EURA applies where:

> "(a) a contract is made or an expense is incurred in connection with the referendum, and
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> (b) the contract or expense is in contravention of a relevant provision."

For this purpose a "relevant provision" is defined in para 21(2) as a provision of Part VII of PPERA which prohibits:

> "(a) payments or contracts for payments,
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> (b) the payment or incurring of referendum expenses in excess of the maximum amount allowed by that Part, or
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> (c) the incurring of referendum expenses without the authority mentioned in section 113(1) of [PPERA]."

It can therefore be seen that in these provisions the concepts of making a contract, incurring an expense and making a payment are all treated as different.

53. It may also be noted that on the accounting definition of incurring an expense an expense incurred pursuant to a contract is not necessarily incurred at the time when the contract is made. Suppose that an organisation which is a permitted participant makes a contract to purchase some campaign leaflets, which are then printed and delivered to the organisation a few days later. Applying the accruals principle which is a standard basis of accounting, the expense is incurred when the goods or services contracted for (in this case the campaign leaflets) are received, and not (unless the dates happen to coincide) when the contract is made or when payment for the goods or services is due or when payment is actually made.

54. We conclude that the fact that the distinctions which we have noted are drawn in the legislation does not provide an answer to the question in dispute in this case. They are equally consistent with the claimant's interpretation whereby a payment of money made as a gift to a permitted participant is an expense incurred by the donor or with Vote Leave's interpretation whereby an expense is incurred only when a liability is incurred.

Expenses and donations

55. The most substantial argument made on behalf of the Electoral Commission and endorsed by Vote Leave is that PPERA imposes separate controls on referendum expenses and on donations and that it would be inconsistent with the scheme of the

legislation if donations received by a permitted participant also constituted referendum expenses incurred by the donors. This view of how the legislation is intended to operate seems to us to be fundamental to the approach taken by the Electoral Commission, as its interpretation of the phrase "referendum expenses" and its view that the AIQ Payments were not referendum expenses incurred by Vote Leave unless they were common plan expenses appears to have been driven by a conviction that a donation cannot also be a referendum expense incurred by the donor (except by reason of the common plan provisions).

56. As described earlier, the legislative scheme includes the following structural features:

(1) There is no overall limit on the expenses which may be incurred by all those campaigning for a particular outcome of a referendum.

(2) There is a limit on the maximum amount of referendum expenses which any one individual or body may incur.

(3) By contrast, there is no limit on the amount which an individual or body may donate nor on the amount of donations which an individual or body may receive; the only restrictions concern the persons from whom donations may be accepted by a permitted participant.

(4) A permitted participant is required to file a return reporting details of (a) payments in respect of referendum expenses incurred by the participant and (b) donations received by the participant. By contrast, there is no requirement on a donor to report information to the Electoral Commission.

57. Counsel for the Electoral Commission submitted that it is implicit in this scheme that a donation is not intended to be classified as a referendum expense incurred by the donor. At a textual level they also emphasised that, in the language used by the legislature, the donor "spends money" or "transfers money or other property" and does not "incur expenses". In particular, the term "donation", in relation to a permitted participant, is defined in Schedule 15, para 2(1) as including:

> "(c) 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;"

A contrast is drawn in this provision between the referendum expenses which are incurred by or on behalf of the permitted participant and the money spent by a donor in paying such expenses. The implication – it was suggested – is that individuals or bodies who make donations of this kind do not thereby themselves incur referendum expenses.

58. We agree that it is implicit in the scheme of the legislation that making a donation will not necessarily or as a general rule involve incurring referendum expenses. It is clearly not intended that anyone who donates more than £10,000 to one or more permitted participants should, just by reason of that fact, have to register as a permitted participant themselves and make a return to the Electoral Commission. It is equally clear that there is not intended to be any overall restriction on the total amount of donations as such which a permissible donor may make. Had Parliament intended to impose such a requirement or restriction, it is reasonable to assume that it would have done so

explicitly and directly and not tacitly and indirectly. But we do not think it possible to deduce from the scheme or the text or the purpose of the legislation that the same transaction can never constitute both the making of a donation and the incurring of a referendum expense. Indeed, had that been the intention, it might also reasonably be expected that the legislation would say so in terms.

59. It does not follow from the fact that separate sets of rules apply to donations made to permitted participants and to referendum expenses incurred by permitted participants that there cannot be transactions to which both sets of rules apply. The rules governing donations in Schedule 15 of PPERA look at the transactions in question from the point of view of the recipient. There is no reason in principle or based on the structure or terms of the legislation why some transactions which constitute donations seen from this point of view should not constitute referendum expenses when looked at from the point of view of the donor. That is particularly so when, as the Electoral Commission has emphasised, the legislation does not prohibit one permitted participant making donations to another. Nor does the fact that donations are defined in terms of spending or transferring money or property and that the definition of a donation includes money spent in paying referendum expenses incurred by a permitted participant demonstrate that such expenditure cannot also constitute a referendum expense incurred by the donor.

Double reporting

60. A related argument made by counsel for the Electoral Commission is that it would result in unnecessary and potentially confusing duplication of reporting 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 and if a donation made to meet a referendum expense incurred by the recipient had also to be reported as a referendum expense incurred by the donor. It was argued that this would mean that many of those required to register as permitted participants would not actually be campaigners, but merely the financial backers of campaigners. It was further submitted that this would make returns far from transparent and that the public would be given a confused picture of referendum expenses because the reported figures for expenses incurred would be mixed up with campaign funding by donors and there would be replication of the same expenses in the returns of the donor and the donee. The upshot would be an increased regulatory burden without any discernible benefit.

61. Again, it seems to us that this argument has force as a reason why it cannot sensibly have been intended that all donations should also constitute referendum expenses. If every donation was a referendum expense incurred by the donor, there would be no need for separate rules designed to prevent the acceptance of donations from impermissible donors, as the suitability of donors would be controlled by the rules which determine who is eligible to be a permitted participant. If the position is, however, that many donations do not constitute referendum expenses, the controls on donations serve a useful purpose even if there is some overlap between the regimes. In such a situation the restrictions on who is eligible to be a permitted participant would not be sufficient to prevent the acceptance of donations from impermissible foreign sources. To achieve that aim, rules are needed which restrict the persons from whom funding may permissibly be accepted and – in order to police that restriction – which require individuals or bodies that incur a significant level of referendum expenses to report the sources of their funding.

62. We cannot see that it matters if the consequence of having two sets of rules is that some payments or other transactions are required to be reported as donations by the recipient and as referendum expenses by the donor. As already discussed, the two regimes are looking at the transactions from different points of view. Nor do we see any substance in the suggestion that treating some donations as referendum expenses would present a confused picture to the public because it would mix up expenses incurred by campaigners with campaign funding by the financial backers of campaigners. This assumes that there is a clear distinction between campaigners and people who provide financial backing to campaigners. Yet on the Electoral Commission's own case there is no such clear distinction. As already noted, the legislation does not prohibit one permitted participant from making a donation to another permitted participant. A donor may therefore itself be a campaigner.

63. In any case, while there is nothing wrong with the Electoral Commission using the term "campaigner", as it has in its published guidance, as a popular description of someone who engages in activities intended to promote a particular outcome of a referendum, it is not a term used in the legislation itself. The legislation does not limit expenses that may be incurred by "campaigners". The relevant restrictions are on the amount of referendum expenses which an individual or body who (a) is not a "permitted participant", (b) is a "permitted participant" or (c) is a "designated" organisation may incur during the referendum period. To be "referendum expenses" qualifying expenses do not even need to be incurred in connection with the conduct or management of any campaign; it is sufficient that they are incurred "otherwise in connection with promoting or procuring" a particular outcome in relation to any question asked in the referendum (see the second limb of the definition of "for referendum purposes" in section 111(3) of PPERA). If expenses satisfy this test, they are subject to the statutory spending limits whether or not the person who incurs them would popularly be described as a "campaigner" or as the "financial backer" of a campaigner (another term which does not appear in the legislation).

64. We also see no objection in principle to an analysis which has the consequence that two permitted participants may each incur referendum expenses in connection with the same purchase of goods or services. As already discussed and as counsel for the Electoral Commission themselves emphasised, Parliament has capped the referendum expenses that may be incurred by <u>each</u> permitted participant individually, not the aggregate of referendum expenses that may be incurred by all those promoting a particular outcome of the referendum. Thus it is not the aim of the legislation to measure or monitor the total amount of referendum expenses incurred in promoting each outcome. In these circumstances there is no reason to presume that the same transaction should never have to be reported as a referendum expense in the return of more than one participant. Indeed, the common plan provisions mentioned earlier specifically require that in some circumstances there should be such double reporting.

Distinguishing among donations

65. It is notable that, even on Vote Leave's interpretation, "expenses" may be "incurred" in making a donation. It is perfectly possible, and by no means uncommon in the case of charitable donations, for a potential donor to enter into a contract with a prospective donee under which the donor agrees to make one or more donations, either unconditionally (under a deed of covenant) or on terms which the donee agrees to observe in return for receiving the donation(s). The donor thereby incurs a legal

liability which, on Vote Leave's interpretation, amounts to "incurring expenses". It is another objection to this interpretation that there is no obvious reason why, if donations made pursuant to a contractual liability are capable of constituting referendum expenses, other donations should not be.

66. Of course, even if some or all donations are "expenses incurred" by the donor, it does not follow that these expenses are "referendum expenses". That will only be so if the expenses are also "qualifying" expenses (i.e. expenses falling within Part I of Schedule 13 of PPERA) and incurred "for referendum purposes". As we have noted, the definition of "for referendum purposes" is very broad and encompasses any expenses incurred in connection with promoting or procuring a particular outcome in relation to any question asked in the referendum. It is hard to imagine that anyone would make a donation to a permitted participant unless they were motivated by a shared desire to promote a particular outcome in relation to such a question. Accordingly, if any donations to a permitted participant constitute "expenses incurred" by the donor, those expenses will almost inevitably have been incurred "for referendum purposes". Whether or not they are "referendum expenses" will therefore depend on whether they are "qualifying" expenses.

67. What this shows is that the meaning of the words "expenses incurred" in the definition of "referendum expenses" cannot be determined without also considering the scope of the other elements of the definition. In particular, in determining whether the words "expenses incurred" should be interpreted broadly as encompassing all donations (as the claimant has argued) or given the narrower interpretation contended for by Vote Leave, a key question is whether, if the words are understood in the broader sense, the second element of the definition which requires the expenses to be "qualifying" expenses provides a rational basis for discriminating among donations and classifying some donations made for referendum purposes but not others as "referendum expenses" incurred by the donor.

Qualifying expenses

68. As noted earlier, expenses are "qualifying" expenses falling within Part I of Schedule 13 of PPERA if they are incurred "in respect of any of the matters set out in the following list". The list that follows includes referendum campaign broadcasts, advertising of any nature, unsolicited material addressed to electors, other campaign material, market research, the provision of services or facilities in connection with press conferences or other dealings with the media, transport of persons to any place with a view to obtaining publicity in connection with a referendum campaign and rallies and other events connected with a referendum campaign.

69. The Electoral Commission has advanced an argument that, even if (contrary to its primary position) the payments in issue in this case were expenses incurred by Vote Leave, they were not incurred "in respect of" advertising but only in respect of making donations to Mr Grimes. Counsel for the Commission submitted that a distinction should be drawn in this regard between "proximate connection" and "ultimate association". Even if the AIQ Payments were ultimately used to purchase advertising, this was not their proximate function. Consequently, they do not fall within Part I of Schedule 13 of PPERA.

70. We agree that it is necessary to distinguish between cases where the connection between the incurring of expenses and a qualifying matter listed in Part I of Schedule 13 is sufficiently close or proximate for it to be said that the expenses were incurred "in respect of" that matter and other cases where the connection is too remote to satisfy this requirement. If, for example, a person donates money to a permitted participant to be used for any referendum purpose that the donee wishes and the donee subsequently decides to spend the money on buying advertising, it would be plausible to say that the donor had not paid money or incurred expenses "in respect of" advertising, even though that was what the donation was ultimately used for.

71. By contrast, the expenses incurred by someone who purchases and pays for advertising services would plainly be incurred "in respect of" advertising. But the words "in respect of" are wide words, apt also to include cases where the connection between the expenses incurred and the qualifying matter is less direct. In *Albon v Naza Motor Trading Sdn Bhd* [2007] EWHC 9 (Ch), para 27; [2007] 1 WLR 2489, Lightman J quoted with approval the observation of Mann CJ in *The Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110, 111, a case in the Supreme Court of Victoria, that:

> "The words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer."

72. Thus, a payment made to a supplier of advertising services to defray the cost of such services purchased from the supplier seems to us on any reasonable understanding of the words to be a payment made "in respect of" advertising, even if the person who makes the payment is not the person who contracted to purchase the services. Indeed, it would also be natural to describe a payment <u>to the purchaser</u> as a payment "in respect of" advertising if it is made specifically in order to fund the purchase of advertising. At least in the first of these cases, to deny that the payment to the supplier has been made "in respect of" advertising seems perverse. Counsel for the Electoral Commission did not put forward any reason for denying that there is a sufficient connection in such a case other than that, on the assumed facts, the payment would constitute a donation to the purchaser for the purposes of Schedule 15 of PPERA. It is apparent that, as with its interpretation of the first element of the definition of "referendum expenses", the Commission has been led to attribute an implausible meaning to the statutory language by its *a priori* conviction that, if a payment is a donation, it <u>cannot</u> be a referendum expense. We have indicated why in our opinion that conviction is misplaced.

Legislative purpose

73. Counsel for the Electoral Commission sought to defend its approach by citing *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 29-36, a case concerning the meaning of a statutory provision which imposed criminal liability on a person who "causes ... any ... polluted matter to enter any controlled waters." Lord Hoffmann (who gave the judgment of the House of Lords) made the point that one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. In the same way, Mr Gordon QC submitted, in order to determine what connection between an expense and a matter falling within Part I of Schedule 13 of PPERA is sufficiently proximate to justify treating the expense as incurred "in respect

of" that matter, it is necessary to have regard to the legislative purpose underlying this requirement.

74. We agree that it is always necessary in interpreting statutory language to consider not just the ordinary meaning of the words used but the context in which the words appear and the underlying policy of the legislation. However, we do not accept that those considerations justify adopting the implausible interpretation of the words "in respect of", as they are used to define "qualifying" expenses, for which the Commission contended. As noted earlier, the underlying purpose of the restrictions on the amount of referendum expenses which a participant may lawfully incur is to prevent any one individual or body from obtaining disproportionate attention for their views because of the wealth which they have available to spend. That policy is engaged, as it seems to us, by any spending which an individual or body chooses to devote to a particular qualifying matter for referendum purposes. It is just as applicable if an organisation chooses to use its resources to pay for campaign leaflets or advertising which someone else has ordered as where the organisation orders the leaflets or advertising itself. Indeed, it would defeat the purpose of the legislation if an individual or body (A) could go on spending after it had reached its limit by the expedient of agreeing with another permitted participant (B) that B would purchase qualifying goods or services to be used for referendum purposes on the basis that A would pay for them.

75. The case where A (with the agreement of B[1]) transfers money directly to the supplier to pay for goods or services which B has contracted to buy is, in our opinion, a straightforward case. Not only is A's payment naturally described as a payment "in respect of" the relevant goods or services, but 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 accords with the policy of the legislation to treat the expenses incurred by A as counting towards its spending quota. It makes no difference in this regard whether the payment is made after the goods or services have already been supplied or whether – as appears to have happened in the present case – payment is made by A to the supplier before the goods or services have been supplied to B.

76. In cases where money is transferred by A to B (rather than directly to the supplier), the critical consideration in terms of the legislative policy is the degree of control which A has over how the money is used. The greater the degree of such control, the more reason there is to treat the expenditure as counting towards the amount which A is permitted to spend to gain attention for its views. Other policy aims which it is reasonable to attribute to the legislature are that it should be possible to establish with certainty whether expenses are qualifying expenses and, as discussed earlier, the avoidance of doubtful penalisation.

77. In our view the test which best satisfies these criteria is one of legal obligation. The relevant obligation may be owed by A (the donor) or by B (the donee). A relevant obligation is owed by A where B purchases qualifying goods or services in reliance on the agreement of A to pay or reimburse to B the cost of purchase. Where A transfers

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[1] We have included this qualification because, as a matter of law, a voluntary payment made by A to C to discharge B's debt to C will not be effective to do so unless B has authorised A to pay C on B's behalf (or subsequently ratifies the payment): see e.g. *Crantrave Ltd v Lloyds Bank Plc* [2000] EWCA Civ 127; [2000] QB 917.

money to B in performance of such an obligation, the nexus between A's spending and the goods or services purchased is of such strength as to require treating the expenses incurred by A as part of A's quota.

78. A relevant obligation is owed by B in circumstances where A transfers money to B on terms which oblige B to use the money to pay for particular qualifying goods or services or to purchase qualifying goods or services of a particular kind. Such an obligation could be contractual or it could be an equitable obligation arising under a specific purpose trust of the type recognised in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. If A has a legal right to insist that the money is spent by B on a particular matter listed in para 1 of Schedule 13, then not only can it naturally be said that A has incurred expenses "in respect of" that matter, but it again accords with the policy of the legislation to treat the expenses as counting towards A's spending limit. The position is otherwise if B is free to choose how to spend the money.

79. Such a test does not catch cases where the donee merely hopes or expects that the cost of particular referendum spending will be funded or reimbursed or where the donor merely hopes or expects that money given as a donation will be used by the donee for a particular campaign purpose. There may be a thin line between cases where a non-binding understanding exists or a non-binding wish is expressed which (in either case) is in practice likely to be respected and cases where a relevant legal obligation is established. It may be objected that the spending limit can too easily be bypassed if the donor's spending counts towards that limit only where the test of legal obligation is met. Nevertheless, we consider that any less stringent test would be too uncertain in its application and would also infringe the principle that, where more than one interpretation of penal legislation is possible, the narrower interpretation should be preferred.

General and specific donations

80. In this way we consider that, while giving the words "expenses incurred" their natural meaning, a coherent distinction can be drawn, which accords with the language and purpose of the legislation, between donations which are referendum expenses incurred by the donor and those which are not. The distinction is between what we will as a shorthand call "general" and "specific" donations. The standard instance of an ordinary, "general" donation is a gift of money made to a permitted participant to be used in whatever way the recipient chooses in seeking to promote a particular outcome of the referendum. Such a donation will be an "expense incurred" by the donor "for referendum purposes". But the expense will not be incurred "in respect of" a matter falling within Part I of Schedule 13 of PPERA. The donor will therefore not have incurred any "referendum expenses". The donation of £1 million which Vote Leave reported receiving on 13 June 2016 (referred to at para 14 above) would appear to fall in this category.

81. If, on the other hand, money (i) is paid directly by the donor (by agreement with the donee) to discharge a liability of the donee to pay for goods or services falling within Part I of Schedule 13 of PPERA or (ii) is paid pursuant to an agreement to pay or reimburse the donee for the cost of such goods or services purchased by the donee, or (iii) is given on terms (binding on the donee) that it is to be used to purchase or pay for particular qualifying goods or services, then the expenses incurred in making such a

"specific" donation are appropriately regarded as incurred "in respect of" a matter falling within Part I of Schedule 13 of PPERA and hence as "referendum expenses".

Travel and accommodation expenses

82. An example discussed in oral argument which provides a good means of testing these conclusions is a case involving 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.

83. The matters set out in the list of qualifying expenses in para 1 of Schedule 13 include:

> "(7) Transport (by any means) of persons to any place or places with a view to obtaining publicity in connection with a referendum campaign.
>
> ...
>
> (8) Rallies and other events, including public meetings ... organised so as to obtain publicity in connection with a referendum campaign or for other purposes connected with a referendum campaign.
>
> Expenses in respect of such events include costs incurred in connection with the attendance of persons at such events ..."

Also relevant is Schedule 13, para 2 (headed "Exclusions"), which provides:

> "Nothing in paragraph 1 shall be taken as extending to —
>
> ...
>
> (c) any expenses incurred in respect of an individual by way of travelling expenses (by any means of transport) or in providing for his accommodation or other personal needs to the extent that the expenses are paid by the individual from his own resources and are not reimbursed to him."

84. The latter exclusion has the effect that in Scenario A the travel and accommodation expenses incurred in connection with the attendance of the volunteers at the event are not qualifying expenses. It also carries the clear implication that the expenses <u>are</u> qualifying expenses in Scenario B, where the travel and accommodation expenses are reimbursed to the volunteers by the campaign organisation. Furthermore, the only sensible interpretation is that they are expenses incurred by the campaign organisation, which has borne the cost, and not by the volunteers. It would make no sense if the

volunteers were treated as having incurred qualifying expenses in this scenario, where they are reimbursed, when the effect of the exclusion is that they are treated as having not incurred qualifying expenses in Scenario A, where they bear the cost themselves. Scenario C must logically be analysed in the same way as Scenario B. It would be irrational if the campaign organisation were treated as having incurred qualifying expenses when it funds the travel and accommodation costs by reimbursing the volunteers but not if it does so by paying the costs directly.

85. This analysis coincides with guidance published by the Electoral Commission on 28 April 2016 on "Spending for EU referendum campaigners". The guidance explained that:

> "overhead or administrative costs associated with people's travel or accommodation (provided you don't reimburse them or directly pay for them) don't need to be reported. If you do reimburse or pay directly for people's travel or accommodation costs, including hotel rooms, this will count as referendum spending."

In addition, a list of activities which, according to the guidance, do not "count towards your spending limit" includes:

> "people's travel, food and accommodation costs while they campaign, unless you reimburse them or pay for them directly"

86. It is not easy to see how, on the Commission's case in these proceedings, its own guidance can be correct. In Scenario B it is the volunteers who contract with the railway company and the hotel and are therefore contractually responsible for paying their travel and accommodation expenses. The same could be true in Scenario C, if the volunteers book their own accommodation but the campaign organisation then settles the bill directly with the hotel on their behalf. The latter case seems indistinguishable from the actual facts of the present case, where Mr Grimes contracted with AIQ to purchase advertising but AIQ's charges were paid directly by Vote Leave.

87. When asked to address these scenarios during oral argument, the initial response of Mr Gordon QC on behalf of the Electoral Commission was to decline to do so on the ground that he did not want to comment on hypothetical examples. That response was unconstructive, as the use of hypothetical examples is a standard method for testing the logic of a legal argument. When further pressed and after taking instructions, Mr Gordon submitted that the correct analysis of Scenarios B and C would depend on whether the volunteers were members of the campaign organisation which reimbursed or paid their expenses or of a different organisation. In the former case the expenses would be referendum expenses incurred by the campaign organisation which paid them; but in the latter case the payments would not be expenses incurred by that organisation but donations made to the other organisation of which the volunteers were members.

88. No such distinction is drawn in the Electoral Commission's own guidance and we are unable to see any rational basis for it. Mr Gordon was unable to offer one. Such a distinction seems in the first place unworkable in practice since campaign organisations do not necessarily have formal membership criteria and there is nothing to prevent volunteers from assisting more than one organisation. The suggested distinction is also

arbitrary as there is nothing in the legislation nor in any interpretation of "expenses incurred" proposed in these proceedings which warrants treating costs incurred in connection with the attendance of persons at a public meeting as expenses incurred by a campaign organisation which funds the costs if the persons attending the meeting are members of that organisation but not as expenses incurred by the campaign organisation if the persons attending the meeting are members of a different organisation campaigning for the same outcome of the referendum. Drawing such a distinction would also be a recipe for abuse of the spending restrictions. It is difficult to resist the conclusion that in seeking to draw this distinction the Electoral Commission was, in Aristotle's phrase, "maintaining a thesis at all costs".[2]

89. By contrast, the analysis put forward by Mr Straker QC on behalf of Vote Leave was clear and consistent with its overall case. Mr Straker submitted that in Scenarios B and C there would inevitably be an agreement between the volunteers and the campaign organisation whereby the organisation agreed to reimburse the volunteers or pay directly for their travel and accommodation expenses. Hence the payments made by the campaign organisation would be "expenses incurred" by the organisation, as the payments would be discharging liabilities incurred towards the volunteers. Furthermore, the expenses would be "referendum expenses", as they would also be qualifying expenses falling within Part I of Schedule 13 and incurred for referendum purposes.

90. The interpretation contended for by Vote Leave recognises that an expense may be incurred by incurring a liability towards a person who makes use of goods or services (the volunteers in this example) even though no liability is incurred towards the supplier of the goods or services (the railway company and the hotel proprietor). But although Vote Leave's interpretation of the phrase "expenses incurred" will in many cases lead to the same result as the claimant's interpretation of the phrase, we do not think that it provides a satisfactory explanation of the scenarios under discussion. In Scenarios B and C we think it plain that the campaign organisation incurs expenses in bearing the cost of the travel and accommodation. The relevance of an agreement to reimburse the volunteers is that it establishes the requisite connection between the expenses and their subject matter to satisfy the second element of the definition. In Scenario C that connection is in our view established even in the absence of any such agreement. If the organisation pays the hotel bill of a volunteer, there seems no good reason why the expenditure should count towards its spending quota only if the payment was previously promised.

The common plan provisions revisited

91. It is also appropriate to check that our interpretation of the term "referendum expenses" is consistent with the common plan provisions contained in para 22 of Schedule 1 to EURA. Although the effect of those provisions (summarised at paras 34-35 above) is not directly in issue, they are a relevant part of the statutory context. Their clear purpose is to extend the scope of the spending restrictions by classifying as "referendum expenses" incurred by an individual or body certain expenses which would not otherwise be so classified. An interpretation of the basic statutory definition of "referendum expenses" in section 111(2) of PPERA would therefore be open to

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2 Nichomachean Ethics, I.5.

objection if it already captured all or most "common plan expenses" and hence made para 22 of Schedule 1 to EURA wholly or largely unnecessary.

92. No such objection arises, however, as we interpret the definition of "referendum expenses". The common plan provisions are not confined to a situation of the kind that we have been considering where one individual or body bears the cost of goods or services purchased by another. They apply where two or more individuals or bodies each purchase and pay for separate goods or services bearing the cost themselves but do so in pursuance of a common plan or arrangement. In such cases, in the absence of the common plan provisions, the referendum expenses incurred by each individual or body would not be treated as referendum expenses incurred by the other, as we interpret the basic statutory definition of the term.

93. Thus, although on our analysis some referendum expenses incurred by making specific donations may also be common plan expenses, the common plan provisions cast the net wider than the definition of "referendum expenses" in section 111(2), as we have construed it, and serve an additional function. In these circumstances we do not regard the existence of such an overlap as a reason to adopt a narrower interpretation of the phrase "referendum expenses" than is otherwise warranted.

Conclusion

94. For the reasons given, we conclude that the Electoral Commission has misinterpreted the definition of "referendum expenses" in section 111(2) of PPERA. The source of its error is a mistaken assumption that an individual or body which makes a donation to a permitted participant cannot thereby incur referendum expenses. As a result of this error, the Electoral Commission has interpreted the definition in a way that is inconsistent with both the language and the purpose of the legislation.

95. The email communications which we summarised at paras 12 – 20 above show that Vote Leave made each of the AIQ Payments (totalling £620,000) at the request of Mr Grimes for the agreed purpose of paying for advertising which Mr Grimes ordered from AIQ. We see no reason to doubt that the payments were, as they were said to be, donations made by Vote Leave to Mr Grimes to meet referendum expenses which he incurred by purchasing advertising services from AIQ. But it is also clear that, on the proper interpretation of the statutory provisions as we have analysed them, Vote Leave "incurred expenses" by making the payments, that those expenses were incurred "in respect of" advertising (one of the matters listed in Part I of Schedule 13 of PPERA) and that the expenses were incurred "for referendum purposes" within the meaning of section 111(3) of PPERA. They were therefore "referendum expenses" as defined in section 111(2) of PPERA irrespective of whether they were also "common plan expenses" within the meaning of para 22 of Schedule 1 of EURA, as the Electoral Commission has now found.

96. It was suggested on behalf of the Electoral Commission that this is not a rational conclusion because Vote Leave could equally well have sent the money to Mr Grimes to enable him to pay AIQ instead of paying AIQ itself directly and that, even on the claimant's case, Vote Leave would then have avoided the regulatory control on referendum expenses because the expenses would not then have been qualifying expenses falling within Part I of Schedule 13 of PPERA. It was suggested that it is not

reasonable to adopt an interpretation which leads to such an arbitrary difference in result.

97. However, if Vote Leave had sent the money to Mr Grimes on the agreed basis that he would use it to pay for services ordered from AIQ, the result would not have been different. In that case too, as we interpret the statutory test, the payments would also have been referendum expenses incurred by Vote Leave.

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.

99. We will make a declaration which records our conclusion.