CO/ 3214/2018

IN HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N

SUSAN WILSON & OTHERS

Claimants

- and-

THE PRIME MINISTER

Defendant

CLAIMANTS' SKELETON ARGUMENT FOR PERMISSION

References to Hearing Bundle are **[HB1/x/1]**
Essential reading: Skeleton arguments of the parties
Witness statement of Professor Howard HB3/3
Witness statement of Rupert Croft HB3/1
Electoral Commission summary of report 11.5.18 [HB1/227-230 and 254]
Electoral Commission summary of report of 17 July 2018 [HB1/367-370]
Electoral Commission summary of report of 1 November 2018 [HB1/561-565]
ICO report 6 November 2018 [HB1/610-627 and 631-632]
DCMS Interim Report 29 July 2018 [HB1/432-455]
Time estimate: Pre-reading: ½ day. Hearing: 1 day.

Contents

I. INTRODUCTION

1. This skeleton argument consolidates the Grounds and the Reply and updates certain factual circumstances. For that reason it is lengthier than would otherwise be necessary.

2. The claim raises new, difficult and extremely important questions concerning the application of the common law in upholding a fundamental requirement of democracy, namely that in a process of direct democracy, whereby the electorate is asked to vote on a matter as profound as changing the entire constitutional structure of the United Kingdom, the process is carried out lawfully, that is, free of corrupt and illegal practices.

3. It is submitted that this is an essential element of the right to vote or the right to free and fair elections, recognised in this country since the 18th century as a common law right. Legality is moreover, essential to legitimacy, without which the EU referendum 2016 ("the EU referendum") result cannot be considered 'democratic' in any true sense of the word. As stated in *Erlam v Rahman* [201] EWHC 1215 "*if a candidate is elected in breach of the rules…, then he cannot be said to have been "democratically elected*."[1]

4. The background to this case is that had the corrupt and illegal practices that have been found beyond reasonable doubt to have taken place during the EU referendum campaign occurred in the context of the election of a candidate for Parliament or indeed in a local referendum, the election or referendum would pursuant to statute have been declared void and would have had to have been re-run. However, here (likely because the result was merely advisory), there is no statutory provision to void the EU referendum result. The common law remains available to the Court however, to vindicate the Claimants' rights in relation to the legality and democratic legitimacy of the vote and for the purposes of declaratory relief, which is sought by the Claimants in this case: Grounds §6(1)(a).[2]

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[1] §20

[2] The Claimants seek a declaration that the referendum result is vitiated by reason of corrupt and/or illegal practices. Alternatively, that "corrupt and illegal practices took place in the course of the

5. In this context, the question arises as to what happens when the executive *ignores* the advisory nature of the result, treats it as binding and indeed *refuses* to have any regard at all to the corrupt and illegal practices, instead, proceeding on the basis that it is *bound* to give effect to the result regardless. It is submitted that the common law and the constitutional role of the courts provides the means within the unwritten British Constitution to ensure that the fundamental principle of the rule of law and the right to free and fair voting, essential to a true democracy, is upheld.

6. This claim therefore is a challenge to executive decision making in the context of an advisory referendum result that has since been shown to be vitiated by illegal and corrupt practices. The Claimants submit that the decisions of the Prime Minister in response to the letter of Fair Vote dated 5 July 2018 **[HB1/116]** (and on numerous occasions since[3]), not to take any steps in response to the findings of serious offences by the Electoral Commission and other regulatory bodies (as set out below), as well as its referral of individuals and companies to the Metropolitan Police and the National Crime Agency to enable investigations into additional serious offences, were unlawful.

7. On 5 July 2018, Fair Vote wrote to the Prime Minister to raise significant concerns regarding the findings of the Electoral Commission and the Information Commissioner ("ICO") and asking the Prime Minister: "*to reconsider whether in light of what you know now, you would have triggered Article 50…*" **[HB1/116-117].** Fair Vote also asked the Prime Minister to consider taking steps to seek an extension of time in relation to the Article 50 process from the EU 27 in order to do one or more of the following: "*(a) hold another vote, possibly under more strictly controlled conditions; or (b) order an independent speedy investigation into what happened, which would bring together all the different strands of illegality mentioned above and consider how best to conduct another referendum*." The Prime Minister refused to do either and has repeatedly stated that the question of illegality is a matter for the relevant public authorities and is of no

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referendum that would have voided the result had the referendum been a local government referendum or an election"

[3] For example confirmation by the Secretary of State for Exiting the EU in his evidence to the EU Scrutiny Committee on 5 September 2018 **[HB1/150]** and response to petition of 1 August 2018 **[HB1/152**] and response to Claimants' solicitor's letter of 6 November 2018 inviting the Prime Minister to reconsider her position in light of the further report of the Electoral Commission of 1 November 2018 in relation to Leave. EU and Better for the Country **[HB1/154].**

relevance to her decision to take the United Kingdom out of the European Union ("EU").

8. For example, the Government's response to the 'Petition to rescind Article 50 if vote Leave has broken Electoral Laws regarding the 2016 Referendum', dated 1 August 2018 states:

> *'The British people voted to leave the EU and it is the duty of the Government to deliver on their instruction. There can be no attempt to stay in the EU.*
>
> *The result of the referendum held on 23 June 2016 saw a majority of people vote to leave the European Union. This was the biggest democratic mandate for a course of action ever directed at any UK Government.*
>
> *…*
>
> *As the Prime Minister has said: 'This is about more than the decision to leave the EU, it is about whether the public can trust their politicians to put in place the decision they took'. The British people can trust this Government to honour the referendum result and get the best deal possible'* **[HB1/153].**

9. On 5 September 2018, Dominic Raab, Secretary of State for Exiting the EU further stated in the European Scrutiny Committee in response to a question from Darren Jones MP regarding the illegality of the Referendum campaign and the fact that the relevant illegalities which would have voided an election result:

> *"we are going to give effect to the referendum because it was the decision of the British people and I think in fairness notwithstanding the seriousness of any impropriety I don't think any of that would have vitiated or invalidated the decision of the British people"* **[HB1/151].**

10. The Government had an opportunity to clarify or change its response to the Claimants' solicitors' letter of 06 November 2018, which was sent after the Electoral Commission released its report into Leave. EU and Better for the Country and its decision to refer these companies and certain individuals to the National Crime Agency **[HB1/154-157].** The Defendant maintains the same position in her reply of 03 December **[HB, 157:1-157:2]**. Indeed, yesterday in Parliament, the Attorney General was asked about the impact of the illegality on the illegalities by Geraint Davies MP, who said:

> "The European Union (Withdrawal) Bill empowers the Prime Minister to submit an application under article 50 based on an advisory referendum. If that referendum is found to be illegal, and based on lying and cheating, surely it

follows that the advice from that referendum is flawed, and that the Prime Minister should withdraw that application. The same would go for a general election result; such findings would require another election.

11. The Attorney General responded that:

> "If the question was on the nature of the referendum result, and the suggestion that it was procured by some sort of fraud, I do not agree with that. In any event, a case on that is pending in court, so it would be wrong of me to make any substantial further comment on it, but the policy of the Government is that the referendum result must be honoured, and that is what will happen."[4]

12. Accordingly, it appears that the Defendant is proceeding on the erroneous basis that irrespective of the seriousness of any unlawful actions that took place during the referendum, she is bound to give effect to the result because she does not think "*that would have vitiated or invalidated the decision of the British people*": see in particular paragraph 9 above.

13. This decision not to take any steps in response to the recently exposed illegalities, involve three errors of law.

    13.1 First, the Defendant has misdirected herself as to the law to the extent that she considers herself bound to give effect to the referendum result irrespective of whether the referendum process was vitiated by serious illegality. Put another way, the Defendant appears to have proceeded on the erroneous basis that the referendum result is binding on her, when it is merely advisory, and even in circumstances of serious illegality that would have voided an election or local referendum result.

    13.2 Secondly, the Defendant wrongly proceeded on the basis that the relevant illegal and corrupt practices would not have vitiated or invalidated the result. Put another way, that irrespective of the illegalities, the result remained: "*the decision of the British people*". This is wrong as a matter of law since the common law operates to vitiate the result and indeed, that would have been precisely the effect of the relevant conduct in the context of an election or local

[4] https://hansard.parliament.uk/Commons/2018-12-03/debates/67B4BC40-0578-417D-9467-F737BDD5079C/WithdrawalAgreementLegalPosition

referendum. There is no rationale for approaching the position differently in the context of a constitutional referendum; indeed in such a context the need for democratic legitimacy founded on compliance with the law is stronger. Serious breaches of rules concerning spending limits, reporting obligations and prohibitions on foreign donations all undermine the democratic legitimacy of the referendum result as they do of any election in the United Kingdom.

13.3 Thirdly, the Defendant's decision not to take any steps in response to the relevant corrupt and illegal practices on the basis that they would not have '*vitiated or invalidated*' the result was also based on a supposition. The Defendant appears not to have examined the factual or evidential position and indeed denies that she has any obligation to do so. Moreover, she has refused to answer the Claimants' request for further information, which specifically asked her to set out what if any steps she had taken to inform herself of the factual position, the substance of the illegalities and "*their potential for undermining the reliability of the referendum result and popular acceptance of the result as legitimate*" **[HB1/95-96].** Absent steps to inform herself of the nature or seriousness of the relevant corrupt and illegal practices, the Defendant cannot rationally conclude that they would not "*vitiate or invalidate*" the result. Accordingly, the Defendant failed to have regard to a relevant consideration and/or acted unreasonably in the *Wednesbury* sense.

14. In addition, the Claimants submit that the original decision of the Prime Minister to take the United Kingdom out of the EU and to notify the EU of that intention was unlawful. The Prime Minister has repeatedly made clear that the single fact on which she based her decision to exercise her power under s. 1 of the European Union (Notification of Withdrawal) Act 2017 ("the 2017 Act") to notify the EU of the UK's intention to leave the EU was that the result of the referendum established unequivocally that that was the 'will of the people'. For example in her letter to President Tusk she said: 'Today, therefore, I am writing to give effect to the democratic decision of the people of the United Kingdom' **[HB1/110].** Since then it has become clear that that can no longer be said. Put another way, the original decision to take the UK out of the EU was based on a fundamental error of law and fact, albeit one discovered only after the decision was made, namely that the referendum was an

exercise that was conducted lawfully, such that its result could be said to be democratic, legitimate and more likely than not, a true reflection of the will of the people. In truth, the illegal conduct committed during the campaign was of such a serious nature as to undermine not only its democratic legitimacy. Further, the expert evidence of Professor Howard is that one element of the illegal practices found by the Electoral Commission, which he considered, namely the overspend by Vote Leave, more likely than not altered the outcome of the referendum **[HB3/3/§59]**. Accordingly, the Prime Minister's decision that the UK should withdraw from the EU and the notification of that decision was premised on a fundamental error of law and fact, and was therefore unlawful.

15. Finally, it is submitted that Parliament did not and cannot have intended by s. 1 of the EU Withdrawal (Notification) Act 2017 to empower the Prime Minister to take the UK out of the EU on the basis (and only on the basis) of a referendum result obtained by a referendum vitiated by corrupt and illegal conduct, conduct that would have nullified any binding Referendum or election. Nor did or could Parliament have put that question of *vires* beyond the jurisdiction of the Court.

II. GROUNDS

16. There are therefore essentially four grounds of claim (see also Claimants' Grounds **[HB1/3-4]**):

17. **First**, the Claimants seek a declaration in respect of the corrupt and illegal practices that took place during the referendum campaign. As explained in the pre-action protocol letter, this could have been sought by way of Part 8 application but it was considered sensible to seek it as part of the judicial review challenge **[HB1/121/§7].** It is therefore sought as Relief in paragraph 6(1)(a) of the Grounds **[HB1/12].**

18. **Secondly,** that the Prime Minister's decision to refuse to take any steps in response to the findings of the Electoral Commission of serious offences and its referral for investigation to the Metropolitan Police and the NCA of further potential offences was unlawful as involving a misdirection of law, a failure to take into account a relevant consideration and was otherwise unreasonable in the *Wednesbury* sense. The Claimants rely on the fact that had the illegal conduct been found to have taken place

in the context of a local or national election, such conduct would have constituted '*corrupt and illegal practices*' (as provided in the Representation of the People Act 1983 ("the 1983 Act") and similar legislation) and would have vitiated the results, rendering them void.

19. **Thirdly**, that the Prime Minister's decision to notify the EU of the UK's intention to leave, pursuant to her powers under Section 1(1) of the 2017 Act, was based on a fundamental error of law and fact, namely that the referendum had been conducted lawfully and democratically and that its result could be relied upon as constituting the legitimate and democratic 'will of the people'. Having regard to the expert evidence of Professor Howard, in addition it appears that the over-spend by Vote Leave did affect the referendum outcome.

20. **Fourthly**, that the Prime Minister's decision to take the United Kingdom out of the EU and to notify the EU to that effect pursuant to s. 1 of the 2017 Act was ultra-vires, Parliament having empowered the Prime Minister to take that decision only on the basis of a lawful and legitimate referendum result; the process having been unlawful in significant respects cannot have produced a democratic result.

III. FACTS

(a) <u>The Referendum</u>

21. Parliament provided for the EU referendum in the EU Referendum Act 2015 ("the 2015 Act") **[HB2/1031-1097]** which gave effect to parts of the Political Parties Elections and Referendum Act 2000 ("PPERA"). In particular, section 3 of the 2015 Act provides that Part 7 of PPERA, as well as Schedule 1 (Campaigning and Financial Controls), Schedule 2 (Control of loans etc. to permitted participants) and Schedule 3 (Conduct of the referendum) to the Act applied to the Referendum.

22. The outcome of the referendum was advisory in the sense that no automatic consequences flowed from its result.[5] In that important sense it differed from the

[5] By way of contrast, the Parliamentary Voting System and Constituencies Act 2011 provided, in section 8 **[HB2/967]**, that in the event of a specified result the Prime Minister was to give effect to certain legal provisions scheduled to that Act.

election of a candidate for office, where the automatic consequence of the candidate achieving the majority of the votes is that the candidate is elected, subject only to a successful election petition.

23. However, despite not being binding, the EU referendum contained part of the UK's constitutional requirements for the purposes of Article 50 of the Treaty of the European Union ("TEU"): *Shindler and another v Chancellor of the Duchy of Lancaster and another* [2017] QB 226, §§ 13 & 19.

24. On 23 June 2016, 51.89% of those voting in the referendum, voted in favour of the United Kingdom leaving the EU. 48.1% voted in favour of the United Kingdom remaining in the EU.[6] Following the result the Government stated that it intended to abide by the Conservative Party's manifesto commitment to honour the result of the referendum **[HB2/688-692]** and thus intended to notify the EU Council of the United Kingdom's intention to leave the EU under Article 50 TEU pursuant to a prerogative power.

25. That decision was subject to a successful challenge before the Divisional and Supreme Court, both of which held that the Prime Minister had no prerogative power to notify the EU of the UK's intention to leave the EU. The Supreme Court held that because the departure of the UK from the EU would involve a fundamental change to the Constitutional structure of the UK, a structure that Parliament had provided for by way of the European Communities Act 1972 ("the 1972 Act"), the Prime Minister required statutory authority to initiate the departure of the UK by way of a notification under Article 50: *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61.

(b) The 2017 Act

26. Accordingly, the Government laid legislation before Parliament which empowered the Prime Minister to decide that the United Kingdom should leave the EU and to notify

[6] https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information

the EU under Article 50 of the Treaty of the European Union of such a decision: s.1 of the 2017 Act **[HB1/1098].**

27. On 31 January 2017, at the bill's second reading in the House of Commons the then Secretary of State for Exiting the European Union, Mr David Davis MP, introduced it as follows:

> *"I beg to move, that the Bill be now read a Second time. … The Bill responds directly to the Supreme Court judgment of 24 January, and seeks to honour the commitment the Government gave to respect the outcome of the referendum held on 23 June 2016. It is not a Bill about whether the UK should leave the European Union or, indeed, about how it should do so; it is simply about Parliament empowering the Government to implement a decision already made – a point of no return already passed. We asked the people of the UK whether they wanted to leave the European Union, and they decided they did. At the core of this Bill lies a very simple question: do we trust the people or not? The democratic mandate is clear: the electorate voted for a Government to give them a referendum. Parliament voted to hold the referendum, the people voted in that referendum, and we are now honouring the result of that referendum, as we said we would…*
>
> *This Bill provides the power for the Prime Minister to begin that process and honour the decision made by the people of the United Kingdom on 23 June last year, and I commend it to the House. Trust the people."* (emphasis added)

28. Royal Assent was given to the 2017 Act on 16 March 2017.

(c) The Prime Minister's decision to notify

29. Pursuant to the power afforded to her under s. 1, the Prime Minister decided that the Government should honour the manifesto commitment and give effect to the referendum result by notifying the EU of the United Kingdom's intention to leave the EU.

30. On 29 March 2017 the Prime Minister proceeded to notify the EU of her decision by way of a letter to the President of the European Council **[HB1/110-115].** As she submitted before the Divisional Court in *Webster* [*R (on the application of Webster) v Secretary of State for Exiting the European Union* [2018] EWHC 1543 (Admin); [2018] 6

WLUK 193; [2018] A.C.D. 78; that decision was hers and hers alone; "*[u]nquestionably the notification is a decision to withdraw*".[7]

31. The Divisional Court, per Lord Justice Gross, agreed:

> "*13…. Its authorisation to the Prime Minister to notify under Art.50(2), plainly contemplated and encompassed the power to take a decision to withdraw and conferred that power expressly on the Prime Minister; there would indeed be no point in notifying under Art.50(2), absent a decision to withdraw under Art.50(1)….*
>
> *15. Even putting the Referendum to one side, this is* the language of decision not of notification alone, in vacuo, *so to speak. The Prime Minister's letter itself contains a decision; backed by the authority of the 2017 Act, that decision complies with the requirements of* Miller." (emphasis added)

32. In her letter of 29 March 2017 to the President of the Council, the Prime Minister gave the following reasons for her decision:

> "*On 23 June last year, the people of the United Kingdom voted to leave the European Union…Today, therefore, I am* writing to give effect to the democratic decision *of the people of the United Kingdom. I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union*".
> (emphasis added)

33. The Prime Minister and the Secretary of State have repeatedly stated that the basis for the Prime Minister's decision to withdraw the UK from the EU was that a majority of those who voted in the referendum voted in favour of leaving the EU and the Government had promised to honour the result of the referendum. It necessarily follows that her decision proceeded on the assumption that the result had in all material respects been obtained following a lawful and legitimate referendum process, which produced a legitimate democratic result capable of properly reflecting the 'will of the people'.

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[7] Transcript of hearing on 12 June 2018, at page 33B

34. On 12 July 2018, Her Majesty's Government reiterated this in its white paper *'The Future Relationship between the United Kingdom and the European Union'*. The Prime Minister introduced the paper as follows:

> *"In the referendum on 23 June 2016 – the largest ever democratic exercise in the United Kingdom – the British people voted to leave the European Union. And that is what we will do – leaving the Single Market and the Customs Union, ending free movement and the jurisdiction of the European Court of Justice in this country, leaving the Common Agricultural Policy and the Common Fisheries Policy, and ending the days of sending vast sums of money to the EU every year. We will take back control of our money, laws, and borders, and begin a new exciting chapter in our nation's history."* **[HB1/361]**

(d) The corrupt and/or illegal practices and other illegalities in the course of the referendum

35. The Electoral Commission has made the following findings in relation to the referendum:

35.1 On 17 July 2018, Vote Leave was found on a standard of beyond reasonable doubt to have committed serious offences, including joint working between the lead campaigner, Vote Leave and another campaign group BeLeave. BeLeave was found to have spent £675,315.18 with Aggregate IQ under a common plan with Vote Leave. This spending should have been declared by Vote Leave. It means Vote Leave exceeded its legal spending limit of £7 million by £449,079, around 6% **[HB1/363-400, at 368].** Vote Leave's judicial review challenge to the Electoral Commission's investigation was dismissed on the papers on 21 November 2018 **[HB1/683-687].**

35.2 Further, on 11 October 2018, the Divisional Court found that the Electoral Commission had wrongly advised Vote Leave that it could donate goods and services (amounting to referendum expenses within the meaning of PPERA) to other referendum campaigns without having to declare its expenditure on those goods and services as part of its return: *R (on the application of the Good Law Project) v Electoral Commission* [2018] EWHC 2553 (Admin) **[HB1/497-521].** Accordingly, in addition to the £675,000 of expenditure on AIQ that Vote Leave should have declared on the basis that it involved 'working together' with

BeLeave, a further £100,000 spent on AIQ but given by way of donation to Veterans for Britain should also have been declared: (see Electoral Commission Reported dated 17 July 2018 **[HB1/363-400]** and §4 and §5 *R (The Good Law Project) v Electoral Commission v Vote Leave Limited, Mr Darren Grimes* [2018] EWHC 2553 (Admin)).

35.3 On 11 May 2018, Leave.EU, a registered participant, was found to have failed to include at least £77,380 in its spending return, thereby exceeding its spending limit by more than 10%, being fees paid to the company Better for the Country Limited as its campaign organiser **[HB1/224-254].** The Commission stated that it was satisfied that the actual figure of overspend was in fact greater, given the failure to report an appropriate proportion of the cost of services provided by Goddard Gunster (see below) [see par. 1.9, at **HB1/228]**. Leave.EU also failed correctly to report three loans from Arron Banks totalling £6m, failed to evidence 97 payments totalling £80,224 and failed to declare a proportion of the costs of services provided by US campaign strategy firm Goddard Gunster **[HB1/228-229].**

35.4 On 1 November 2018, Leave.EU, Better for the Country ("BFTC") and a number of other companies associated with Arron Banks and Leave.EU were referred to the National Crime Agency ("NCA") on the basis that the Electoral Commission suspected criminal offences to have taken place **[HB1/561-565].** A total of £8m in funding was provided to BFTC and Leave.EU to be available for paying expenses incurred by one or other of them in the EU Referendum. This included £6m provided to Leave.EU (paid on its behalf to BFTC to use for Leave.EU's referendum spending), and £2m provided to BFTC.

35.5 BFTC used this money to spend at least £2.9m in the regulated campaign period for the 2016 EU Referendum, either by making donations to other campaigners, or by other spending. Leave.EU informed the Electoral Commission that Arron Banks was the only other party to the £6m loans, and that the moneys were loans from him. BFTC told the Commission that it was funded by Mr Banks and his group of insurance companies and that Mr Banks was the source for the other £2m. Following it investigation, the Electoral Commission concluded that it had reasonable grounds to suspect the commission of various criminal

offences based on the following: that: (a) Mr Banks was not the true source of the £8m reported as loans; (b) the parties to the financial transactions that led to the £8m being paid into BFTC's bank account included a non-qualifying or impermissible company, Rock Holding Limited, which was incorporated in the Isle of Man; (c) Leave.EU, Elizabeth Bilney (the responsible person for Leave.EU), BFTC, Mr Banks, and possibly others, concealed the true details of these financial transactions, including from the Electoral Commission , and also did so by knowingly making statutory returns/reports which were incomplete and inaccurate, and/or false. It is submitted that significant issues arise as to the source of the funding, the use of the funding, the exceeding of spending limits (Leave.EU was restricted to £700,000 in spending) and the non-registration of BFTC, which was not registered as a participant. The details of the criminal matters under consideration have not been disclosed to any great extent by the Commission.

36. The full detail is set out in three Reports by the Electoral Commission (the most recent being dated 1 November 2018 in relation to payments to Leave.EU and BFTC, which was not available at the time that the Claim was issued, but which was sent to the Prime Minister on 6 November 2018 **[HB1/154-157]** and in respect of which the Claimants have received no substantive response, although the letter was acknowledged by a letter dated 03 December 2018 **[HB1/157:1-157:2]**).

36.1 **Report on an investigation in respect of the Leave.EU Group Limited** (Concerning pre-poll transaction reports and the campaign spending return for the 2016 referendum on the UK's membership of the European Union) dated 11 May 2018 ("the Leave.EU Report") **[HB1/224-254].**

36.2 **Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain** (Concerning campaign funding and spending for the 2016 referendum on the UK's membership of the EU), dated 17 July 2018 ("the Vote Leave & Others Report") **[HB1/363-400].**

36.3 **Report on investigation into payments made to Better for the Country and Leave.EU** (Concerning certain payments made to Better for the Country Limited (BFTC) and Leave.EU Group Limited (Leave.EU) for the purposes of

meeting expenses incurred by BFTC (including on behalf of Leave.EU) in the 2016 EU Referendum, which the Commission had reasonable grounds to suspect involved a number of criminal offences, so referring the matter to the NCA, dated 1 November 2018) **[HB1/561-565].**

37. The Electoral Commission used its maximum fining powers to impose the following fines:

37.1 £61,000 imposed on Vote Leave, the official designated campaign to leave the EU (analogous to the candidate in an election), in respect of three offences[8].

37.2 £20,000 imposed on Mr Darren Grimes, the founder and responsible person for BeLeave, in respect of two offences.

37.3 £250 imposed on Mr David Banks, the responsible person for Veterans for Britain, because the Commission determined that he had committed an offence[9] under section 122(4)(b) PPERA in that he failed, without reasonable excuse, to deliver a referendum spending return that included an accurate report of relevant donations received.

37.4 fines of £70,000 imposed on Leave.EU, in respect of four offences – a total sum which was constrained by the cap on the Commission's fines.

38. In addition, the Electoral Commission:

38.1 Has made referrals of individuals to the Metropolitan Police in respect of all of the above.

38.2 Has made referrals of a number of companies and individuals including Leave.EU, Better for the Country, Arron Banks and Elizabeth Bliney to the NCA on the basis that the Electoral Commission had found that on the

[8] The conduct in question included serious offences, including joint working between Vote Leave and another campaign group BeLeave. BeLeave was found to have spent more than £675,000 with Aggregate IQ under a common plan with Vote Leave.

[9] There was reasonable doubt as to whether £100,000 that Vote Leave had paid to Aggregate IQ on 20 June 2016 (declared as a donation to Veterans for Britain on 20 May 2016) took the same form as the donation to Darren Grimes, i.e. expenditure by Vote Leave – subject to further investigation.

evidence it had reasonable grounds to suspect that the transactions, and the returns/reports made to it (and required) under the legislation, were designed to conceal the use of prohibited funds for campaigning in the EU Referendum. The sums of money involved are significant, amounting to £8m, which included loans of £6m to Leave.EU, a registered campaigner in the EU Referendum. BFTC was loaned £2m, and put at least £2.9m into the referendum campaign. The financial transactions investigated include companies incorporated in Gibraltar and the Isle of Man. The Electoral Commission states that: *"[a]s this is now a criminal investigation, only limited information can at this stage be made public about the evidence we hold, our analysis and the potential offences that may have been committed."* **[HB1/566-568]**

39. The misconduct in those Reports is compounded by further findings of the Information Commissioner in relation to Facebook, Cambridge Analytica and others on 11 July 2018 **[HB1/298-356]** and 6 November 2018 **[HB1/569-682]**, as well as the findings of the Department for Digital, Cultural, Media, and Sport ("DCMS") on 24 July 2018 **[HB1/405-493].** On 24 November 2018, DCMS took the unprecedented step of seizing documents relevant to the data breach and Cambridge Analytica from a Facebook employee visiting London.[10] The DCMS Committee is due to complete and publish imminently its final report of its inquiry, *Disinformation and 'fake news'*.

e) Further contextual facts

40. A detailed exposition of information that has come to light since the Grounds were originally filed is set out in the witness statement of Rupert Croft of 30 November 2018 **[HB3/1].** These include further factual matters that, whilst they do not (currently) form any of the Electoral Commissions current investigations, the Court should be aware of.

41. Russian influence via Mr Banks and more generally:

[10] https://news.sky.com/story/facebook-documents-seized-in-unprecedented-move-by-uk-parliament-11562952

41.1 The DCMS, in its interim report **[HB1/305-493]** found that Mr Banks appears to want to hide the extent of his connection and contacts with Russia (at §186). This is supported by the affidavit of Mr Christopher Kimber dated 28 February 2018 made in proceedings in the High Court of South Africa, suggesting that the funds raised by Mr Banks, from Russian sources were used in funding Mr Banks' campaigning for Brexit **[HB2/702-738].**

41.2 More generally a report, "*Social Media, Sentiment and Public Opinions: Evidence from #Brexit and #USElection*", authored by three data scientists from Swansea University and the University of California, Berkeley and issued in May 2018, suggests that there was direct Russian interference by social media in the EU Referendum, although not at anything like the same levels of the subsequent US presidential elections **[HB2/796-835].** The *Times* newspaper reported that the report tracked 156,252 Russian accounts which mentioned #Brexit and found Russian accounts posted almost 45,000 messages pertaining to the EU Referendum in the 48 hours around the vote.

42. Donations to the DUP:

42.1 On 26 June 2018, BBC Northern Island broadcast its Spotlight programme, *Brexit, Dark Money & the DUP* (available at https://www.youtube.com/watch?v=Fe1uRdNTKWQ) concerning a £435,000 donation to the DUP, which was said to be the largest ever political donation in Northern Island. The bulk of the donation, £280,000, was spent in June 2016 on a 4-page "wrap around" advertisement with The Metro – a free newspaper for London commuters, but not available in Northern Ireland where the DUP is based – which urged people to "Take back control" and "Vote to leave". £32,000 of the donation was spent with AIQ in the last two days of the campaign **[HB2/880-881].**

42.2 The DUP's campaign, which they termed "DUP Vote to Leave", spent £32,000 of the donation of £435,000 with AIQ on digital advertising in the last two days of the referendum campaign. Facebook has released to the DCMS Committee spreadsheets giving the details of advertisements placed with it by AIQ on behalf of the various "leave" campaigns **[HB2/882/901].** With respect to the

DUP and the ads placed on Facebook by AIQ on behalf of the DUP, those spreadsheets show the following:

(1) The DUP ran 40 adverts in total between 21-23 June 2016. Of these, 24 adverts were targeted at Facebook users in Great Britain (i.e outside Northern Ireland) and 16 were targeted at an audience of Facebook users based in Northern Ireland.

(2) The DUP's Facebook ads received between 2,319,000 and 5,040,960 impressions (the number of times an ad is displayed to users). Those ads targeted at Great Britain (i.e. excluding Northern Ireland) received between 1,960,000 and 4,179,976 impressions (c. 83%-85%) and those targeted at Northern Ireland received between 359,000 and 860,984 impressions (c.15%-17%).

42.3 Whilst on 3 August 2018 the Electoral Commission concluded that it did not have grounds to open an investigation into the matters raised by the Spotlight programme, the Good Law Project's have brought or will shortly be bringing a claim for judicial review against the Electoral Commission for failure the investigate the relevant donation to the DUP (according to its website). A previous judicial review of the Electoral Commission by the Good Law Project **[HB1/497-521]** appears to have been instrumental, at least in part, in the Electoral Commission re-opening their investigation into the overspending during the Referendum by Vote Leave and Mr Grimes, which resulted in the Electoral Commission's report dated 17 July 2018.

f) The Expert evidence of Professor Howard

43. The Claimants have obtained an expert report from Dr. Philip N Howard, Director of the Oxford Internet Institute and Professor or Internet Studies on the impact or otherwise of the unlawful overspending on digital advertising by the Vote Leave and BeLeave campaigns **[HB3/3].** He concludes that the consequence of the illegal over-spend in the last 10 days of the campaign would more than likely have been sufficient to convert more than the 634,751 people needed to produce a remain result:

[HB3/3/paras 58-59]. In that regard, he notes that he has made conservative assumptions in his modelling and has based it solely on Vote Leave data. He concludes: "*On the basis of this evidence I consider it very likely that the referendum result was the outcome of excess spending by Vote Leave and BeLeave*".

44. The Court is referred to that evidence, which does not begin to address the consequence of the other serious offences that have been found, in particular the very serious over-spend and unlawful donations to Leave.EU and the further £100,000 paid to AIQ by Vote Leave on the basis that it was a donation to Veterans for Britain.

IV. THE LAW GOVERNING THE PARTICIPATION OF THE PEOPLE IN THE DECISION MAKING OF THE STATE

45. The right to vote in free elections was created before the era of universal suffrage. Article 8 of the Bill of Rights 1688 provides:

"*The Subject's Rights*.

> *And thereupon the said Lords Spirituall and Temporall and Commons pursuant to their respective Letters and Elections being now assembled in a full and free Representative of this Nation takeing into their most serious Consideration the best meanes for attaining the Ends aforesaid Doe in the first place (as their Auncestors in like Case have usually done) for the Vindicating and Asserting their auntient Rights and Liberties, Declare*
> …
>
> *That Election of Members of Parlyament ought to be free.*
>
> …
>
> *And they doe Claime Demand and Insist upon all and singular the Premises as their undoubted Rights and Liberties and that noe Declarations Judgements Doeings or Proceedings to the Prejudice of the People in any of the said Premisses ought in any wise to be drawne hereafter into Consequence or Example.* "

46. Before that even, the Magna Carta 1215 (as still in force under the 1297 statute), provides: "*We will sell to no man, we will not deny or defer to any man either Justice or Right.*"

47. The right to vote was upheld as a common law right over which the courts had jurisdiction (rather than the House of Commons as was claimed) and in respect of which they would grant a remedy: *Ashbey v Whyte* (1703) 92 ER 126. The dissenting judgment of Lord Holt CJ was upheld by the House of Lords by a vote of 50:16. He stated:

> *"every man, that is to give his vote on the election of members to serve in Parliament, has a several and particular right in his private capacity, as a citizen or burgess. And surely it cannot be said, that this is so inconsiderable a right, as to apply that maxim to it, de minimis non curat lex. A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature…*
>
> *If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal...*
>
> *To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation...*
>
> *Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents; but on the reason of the law, and* ubi eadem ratio, ubi idem jus. *This privilege of voting does not differ from any other franchise whatsoever. If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections, but we must not be frighted when a matter of property comes before us, by saying it belongs to the Parliament; we must exert the Queen's jurisdiction. My opinion is founded on the law of England.*

48. The principle expounded in *Ashbey v Whyte* that the right to vote is a self-standing constitutional right at common law remains the case despite the extension of the franchise by statute. In *Watkins v Secretary of State* [2006] 2 AC 395 at paragraph 25 Lord Bingham described the right as: "*basic, fundamental or constitutional*" and at 61 Lord Rodger noted that "*[a]lthough embodied in a statute, in a system of universal suffrage today the right to vote would fall within everyone's notion of a "constitutional right"*." Further, he considered that "*the principle of legality would apply in construing any statutory provision which was said to have abrogated that right*." A fortiori, the principle of legality applies in relation to executive action that affects or cuts across the right to vote. See further *Moohan v Lord Advocate* [2014] UKSC 67 per Lord Hodge §33.

49. In the latter case, Lord Hodge reiterated not only the fundamental constitutional nature of the right to vote but also in that context, the "*constitutional function of [the judiciary of] adapting and developing the common law through the reasoned application of established common law principles in order to keep it abreast of current social conditions*." He further added that in so doing, it was not "*controversial to suggest that judges can take into account rules of international law which are binding on the United Kingdom when interpreting statutes and in developing the common law*" citing: *R v Lyons* [2003] 1 AC 976, Lord Bingham at para 13, Lord Hoffmann at paras 27-28; *R (Osborn) v Parole Board* [2014] AC 1115, Lord Reed JSC at para 62. In *R (Chester) v Secretary of State for Justice*; *McGeoch v Lord President of the Council* [2014] AC271, para 121 and quoting Lord Sumption JSC in the latter case where he stated:

> "*The courts have for many years interpreted statutes and developed the common law so as to achieve consistency between the domestic law of the United Kingdom and its international obligations, so far as they are free to do so.*" "

50. In that case Lord Hodge accepted that the common law could not set aside statutory regulations in respect of the franchise, but stated this far-reaching conclusion:

> *35 While the common law cannot extend the franchise beyond that provided by parliamentary legislation, I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful. The existence and extent of such a power is a matter of debate, at least in the context of the doctrine of the sovereignty of the United Kingdom Parliament."*

51. The need for the common law to step in to safeguard democracy was emphasised by Lord Kerr, (dissenting only in respect of another aspect of the case), who stated:

> *86 The common law can certainly evolve alongside statutory developments without necessarily being entirely eclipsed by the latter. And democracy is a concept which the common law has sought to protect by the incremental development of a system of safeguarding fundamental rights. In this regard, it marches in step with other European states: see, for instance, Lautenbach, The Concept of the Rule of Law and the European Court of Human Rights (2013), p 209: "in European states the protection of human rights, democracy and the rule of law are interwoven and all part of the domestic [and legal] system."*

52. These general constitutional principles of democracy are also reflected in constitutional conventions and expressed in the language of the Cabinet Manual,

which states that the United Kingdom is a parliamentary democracy and states in particular:

> *'Parliament is central to the democracy of the United Kingdom. It is through Parliament that ministers are accountable to the People.'* **[HB2/1010]**
>
> *'The House of Commons has primacy over the House of Lords. It is the democratically elected institution of the United Kingdom and the Government derives its democratic mandate from its command of the confidence of the Commons'***. [HB2/1011]**

a. Regulation of elections and referendum (the right to vote) so as to ensure democratic legitimacy

53. The reform of elections and the suffrage in the nineteenth century brought about important legislative initiatives for the protection of the fairness and integrity of elections. The Ballot Act 1872 introduced a requirement for secret ballots. The Corrupt and Illegal Practices Prevention Act 1883 sought to protect voters from intimidation, made it a crime to bribe voters and limited the amount of money that could be spent on election expenses. It was repealed and replaced by the Representation of the People Act 1949 and the Election Commissioners Act 1949, which was in turn repealed and replaced by the Representation of the Peoples Act 1983 ("RPA"). The current law of general elections and referendums is set out in the RPA and in the Political Parties, Elections and Referendums Act 2000 ("PPERA ").

54. The electoral law created by the Victorian anti-corruption laws and maintained by the RPA and PPERA protects more than the physical act of voting; it protects the true nature of a democratic vote, namely that it is 'free and fair'. Put another way, it lays down rules and regulations considered by Parliament to be necessary in order to ensure that votes cast are cast freely and fairly in the context of the electoral process. In that regard, the Electoral Law Reform Committee, noted that electoral irregularities are not just private wrongs, but '*attempts to wreck the machinery of representative government' and 'an attack upon national institutions*.'[11]

[11] (1947-8) Cmd 7286. See further HF Rawlings, *Law and the Electoral Process* (1988)

55. Thus, the 1983 Act maintains and builds on a system of rules, deriving originally from the common law, to enable 'effective political democracy'. For example, voters must register as electors (s. 1, RPA), candidates must appoint electoral agents (s. 67 RPA) and observe obligations of transparency by making a return on their spending (s. 81, RPA), while they must not exceed specified spending limits (s. 76, RPA). The electoral law is completed by PPERA, which introduced rules for the registration, funding and the campaign spending of political parties, as opposed to individual candidates. Again, these are mandatory rules.

56. Referendums are a relatively novel and undeveloped democratic tool in the United Kingdom. As the Report on the Independent Commission on Referendums (The Constitution Unit, UCL, July 2018) **[HB1/522-536]** noted "*While referendums have at times been successfully used to entrench constitutional decisions, and to avoid over-hasty or partisan decision-making on these matters by parliament, the lack of a codified constitution in the UK means that decision-making through referendum is itself far less regulated and protected than in many other democracies. This opens up risks, which should be carefully considered and addressed*."

57. Part VII of PPERA makes provision for national referendums. This part of the Act applies to referendums held throughout the UK, or in any of England, Northern Ireland, Scotland, Wales or in a region in England. A referendum is defined as a referendum or poll held under an Act of Parliament, on one or more questions or propositions specified in that Act, or an order under it.

b. Judicial control of elections and referendums

58. As far back as *Ashby v Whyte* electoral obligations have been monitored by the courts rather than by the Commons. The role of the courts is not any 'less democratic' for not having been elected. Lord Bingham explained the role of courts in upholding the rules of democracy in *A v Secretary of State for the Home Department* [2005] 2 AC 68, as follows (at para 42):

> "*I do not . . . accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. . . . But the function of independent judges charged to interpret and apply the law is universally recognised as*

> *a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.*"

59. The leading case on the powers of a court to void an election under the 1949 Act[12] was *Morgan v Simpson*. At a local government election 44 ballot papers had not been stamped with an official mark and were therefore correctly rejected by the returning officer. If the 44 ballot papers had been counted, the result would have been different. The Divisional Court held (Milmo and Bean JJ.) [1974] Q.B. 344, dismissed the petition on the ground that nothing in section 37 (1) of the 1949 Act expressly required an election to be declared invalid if non-compliance with the rules had affected the result; that the modest number of errors which had affected the result did not constitute a sufficient reason for declaring it invalid since the non-observance of the rules was not so great as to amount to conducting the election in a manner contrary to the principle of an election by ballot and not so great as to satisfy the court that the majority of the voters in the election had been or might have been affected; and that therefore the petition failed.

60. Lord Denning gave a general account of the law on national elections (now in ss.23(3) and 48(1) of the 1983 Act):

> "*I suggest that the law can be stated in these propositions: (1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not. That is shown by the* Hackney *case, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote. (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the Islington Case where 14 ballot papers were issued after 8 p.m. (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated. That is shown by* Gunn v. Sharpe, *where the mistake in not stamping 102 ballot papers did affect the result.*"

[12] Election also governed by the London Government Act 1963 and the Local Government Act 1972 and the Local Elections (Principal Areas) Rules 1973

61. The RPA, (which updates prior statutes that codified parts of the common law), lays down two statutory bases for the voiding of an election.

61.1 First, under section: 159(1) "If a candidate who has been elected is reported by an election court personally guilty or guilty by his agents of any corrupt or illegal practice his election shall be void."

61.2 Secondly, under section 164, which derives from s. 142 of the 1949 Act, an election is voided for reasons of general corruption. It provides:

> (1) Where on an election petition it is shown that corrupt or illegal practices or illegal payments, employments or hirings committed in reference to the election for the purpose of promoting or procuring the election of any person at that election have so extensively prevailed that they may be reasonably supposed to have affected the result—
>
> (a) his election, if he has been elected, shall be void, and
>
> (b) he shall be incapable of being elected to fill the vacancy or any of the vacancies for which the election was held.
>
> (2) An election shall not be liable to be avoided otherwise than under this section by reason of general corruption, bribery, treating or intimidation.
>
> (3) An election under the local government Act may be questioned on the ground that it is avoided under this section."

62. Thus in the context of elections, the provision set out in s. 164(2) supersedes the common law by which an election might be avoided for general bribery or treating in favour of the successful candidate or general intimidation, whether or not the successful candidate or his agents were responsible for the bribery, treating or intimidation.[13]

[13] Bradford Case (No 2) (1869) 19 LT 723, 1 O'M & H 35; and see eg Beverley Case (1869) 20 LT 792, 1 O'M & H 143; Lichfield Case, Anson v Dyott (1869) 20 LT 11 at 14, 1 O'M & H 22 at 26; Guildford Case (1869) 19 LT 729 at 731, 1 O'M & H 13 at 14–15; Bridgewater Case (1869) 1 O'M & H 112 at 115 (bribery); Ipswich Case, Packard v Collings and West (1886) 54 LT 619, 4 O'M & H 70 (bribery and treating); Tamworth Case, Hill and Walter v Peel and Bulwer (1869) 20 LT 181, 1 O'M & H 75; Pontefract Case, Shaw v Reckitt (1893) 4 O'M & H 200 at 201, Day 125 at 129 (treating); Drogheda Borough Case (1869) 21 LT 402, 1 O'M & H 252; Stafford Borough Case (1869) 21 LT 210 at 211, 1 O'M & H 228 at 229; Staleybridge Case, Ogden, Woolley and Buckley v Sidebottom (1869) 20 LT 75 at 78, 1 O'M & H 66 at 72; Dudley Case (1874) 2 O'M & H 115; Durham County, Northern Division Case (No 2) (1874) 2 O'M

63. Parliament has provided for a more limited restriction on when a referendum cannot be voided under the common law, namely in the context of local referendums. Thus, Regulations provide that a local authority referendum[14] may be questioned by petition (a 'referendum petition') in so far as relevant: (1) on the ground that the referendum was avoided by corrupt or illegal practices[15] and (2) on the grounds that corrupt or illegal practices or illegal payments, employments or hirings, committed with reference to the referendum for the purpose of promoting or procuring a particular result in the referendum, have so extensively prevailed that they may be reasonably supposed to have affected the result.[16] In that context s. 164(2) of the RPA applies to prevent such a referendum from being avoided, otherwise than under the relevant provisions, by reason of general corruption, bribery, treating or intimidation. Where a petition is presented and leave is granted, the petition has suspensive effect in relation to any action that was to be take pursuant to it.[17]

& H 152; Re Gloucestershire, Thornbury Division, Election Petition (1886) 4 O'M & H 65 at 67; South Meath Case (1892) Day 132 at 140; East Kerry Case (1910) 6 O'M & H 58 (intimidation); Hartlepools Case (1910) 6 O'M & H 1 at 8.

[14] Ie a referendum held, in relation to Wales, under the Local Authorities (Conduct of Referendums) (Wales) Regulations 2008, SI 2008/1848, or, in relation to England, under the Local Authorities (Conduct of Referendums) (England) Regulations 2012, SI 2012/323.

[15] Local Authorities (Conduct of Referendums) (Wales) Regulations 2008, SI 2008/1848, reg 11(1)(b); Local Authorities (Conduct of Referendums) (England) Regulations 2012, SI 2012/323, reg 15(1)(b). The text refers to such corrupt or illegal practices within the meaning of the Representation of the People Act 1983 as are relevant to referendums, in relation to Wales, by virtue of the Local Authorities (Conduct of Referendums) (Wales) Regulations 2008, SI 2008/1848, regs 8, 11(8), or, in relation to England, by virtue of the Local Authorities (Conduct of Referendums) (England) Regulations 2012, SI 2012/323, regs 8, 11, 13, 15(8) (see the text and notes 6–8).

[16] Local Authorities (Conduct of Referendums) (Wales) Regulations 2008, SI 2008/1848, reg 11(1)(c); Local Authorities (Conduct of Referendums) (England) Regulations 2012, SI 2012/323, reg 15(1)(c). The text refers to the grounds provided by the Representation of the People Act 1983 s 164 (avoidance of election for general corruption etc: see PARA895), as applied for these purposes, in relation to Wales, by the Local Authorities (Conduct of Referendums) (Wales) Regulations 2008, SI 2008/1848, reg 11(8), and, in relation to England, by the Local Authorities (Conduct of Referendums) (England) Regulations 2012, SI 2012/323, reg 15(8) (see the text and notes 6–8)

[17] Local Authorities (Conduct of Referendums) (Wales) Regulations 2008, SI 2008/1848, reg 12(3)(b); 12(4) and 12(6) Local Authorities (Conduct of Referendums) (England) Regulations 2012, 16(4).

c. Corrupt and illegal practices

64. The RPA codifies existing law on 'illegal and corrupt' practices. In relation to campaign spending 'corrupt practices' are as follows:

64.1 **False declarations knowingly made as to election expenses incurred**: s. 82(6) RPA. In *Attorney General v Jones* [1999] 3 All ER 436 the candidate was convicted pursuant to s. 82(6) and accordingly lost her seat pursuant to s. 173(1)(b) and s. 160(4)(b), the latter of which provides that "*if already elected to a seat in the House of Commons, or holding any such office, shall vacate the seat or office as from the date of the report*".

64.2 **Unauthorised expenses**, i.e. not by the candidate, his agent or persons authorised in writing by the election agent, with a view to promoting or procuring the election of a candidate.: s. 75(5) RPA, previously s. 63(1) 1949 Act. This includes procuring or aiding expenditure by another person. It provides:

(5) "If a person—

(a) incurs, or aids, abets, counsels or procures any other person to incur, any expenses in contravention of this section, or

(b) knowingly makes the declaration required by subsection (2) falsely,

he shall be guilty of a corrupt practice"

64.3 In *DPP v Luft; DPP v Duffield* [1977] AC 962 the House of Lords held that to establish an offence under s. 63(5) 1949 Act, it was not necessary to prove that the expense was incurred with the intention of promoting or procuring the election of one particular candidate but it was sufficient to establish an intention on the part of the person incurring the expense to prevent the election of a particular candidate or particular candidates. Further, Lord Diplock held that this did not have to be the dominant objective of the expenditure holding that: "*the offence under s 63(1) to (5) is committed by the accused if his desire to promote or procure the election of a candidate was one of the reasons which played a part in inducing him to incur the expense*."

65. Offences in respect of election expenses are 'illegal practices' as set out below:

65.1 **Failure by a candidate or election agent to make a return or declaration of election expenses which the statute requires**: ss. 81, 82, 84 RPA.

65.2 **Submission of a defective return is also an illegal practice**: *Cheltenham Case* (1911) 6 OM. and H. 194; *Northumberland, Bannick-upon-Druid Division*, Case (1923) 7 OM. and H. 1; *Oxford Borough Case* (1924) 7 OM. and H. 49.

65.3 **Knowingly paying any sum or incurring any expense by a candidate or election agent, before, during or after an election in excess of the maximum permitted sum**: s. 76 RPA.

66. Vote Leave, Leave.EU, Darren Grimes/BeLeave have been found by the Electoral Commission to have committed analogous offences under PPERA, namely Vote Leave and Leave.EU were found to have committed offences under s. 118(2)(c)(i) and (ii) PPERA. Darren Grimes/BeLeave was found to have committed an offence under s. 117(3) and (4) respectively. Further, Vote Leave, Leave.EU, Veterans for Britain and Darren Grimes/BeLeave were all found to have committed offences under s. 122(4)(b) involving erroneous spending returns. These offences amounted in substance to corrupt and/or illegal practices.

d. Law relating to the 2015 referendum

67. By the 2015 Act Part VII of PPERA was applied to the EU Referendum with necessary adaptations. Thus, the 2015 Act provided a threshold level of expenditure prior to registration as a permitted participant being required, maximum spending levels for permitted participants of £700,000 and for the designated campaign: £7million. Further, spending and donation returns had to be made in accordance with the strict rules laid down. Donations could only be accepted from permissible sources: see ss. 101-122 PPERA as applied by the 2015 Act.

68. By s. 4 of the 2015 Act, the Minister was empowered to adopt regulations in relation to the conduct of the referendum, which he did by way of the European Union Referendum (Conduct) Regulations 2016, SI 219/2016 ("the 2016 Regulations"). By Regulation 79 and Schedule 1 of those Regulations, the Minister brought into effect parts of the 1983 Act for the purposes of the EU referendum. Schedule 1 applies the

existing electoral offences in paragraphs 13 to 23 and 25 to 32 of the 1983 Act to the referendum with the necessary modifications.

69. The 2015 Act did not provide for any specific means to challenge the referendum result on the basis that it was conducted unlawfully or otherwise vitiated by illegality, including for corrupt and illegal practices. In particular, the Secretary of State did not adopt the provisions of s. 164 of the RPA and therefore, whilst the 2015 Act did not provide for a statutory means to void the referendum result for corrupt and illegal practices, it did not exclude the application of the common law in relation to corrupt and illegal practices, as is provided for by s. 164(2) RPA.

e. International standards for campaign expenditure, transparency and remedy

70. The rules laid down by Parliament regarding controls on expenditure and transparency accord with international standards, to which the Courts may have regard in interpreting statute and applying the common law: see Lord stated in *R (Chester) v Secretary of State for Justice*; *McGeoch v Lord President of the Council* [2014] AC 271 referred to in paragraph 49 above.

71. The Venice Commission Code of Good Practice on Referendums 2007 [HB1/198], which so far as possible is intended to "echo the Code of Practice in Electoral Matters" and which applies to "*all referendums – national, regional and local – regardless of the nature of the question they concern (constitutional, legislative or other)*": **[HB1/208/§1]** provides that:

71.1 **Procedural rules must be complied with**: Rule I 3.2(b)(ii),

71.2 **campaign funding must be transparent**, particularly when it comes to campaign accounts: Rule I 2.2(g)[18] and that the general rules on the funding of political parties and electoral campaigns must be applied: Rule II 3.4.[19] In the

[18] See Explanatory Memorandum §24 [HB1/212]

[19] See Explanatory Memorandum §24 [HB1/212]

event of failure to abide by the statutory requirements, for instance if the cap on spending is exceeded by a significant margin, the vote must be annulled.[20]

71.3 **A right of appeal must be provided to an effective appeal body**, which must be either a Commission or electoral court but in any case a "final appeal to a court must be possible": Rule 3.3(a). The appeal body must be competent to deal with the sphere covered by the Venice guidelines but in particular with respect for suffrage and the results of the ballot: Rule 3.3(d). Crucially, it must be able to annul the result: Rule 3.3(e)-(f) provide:

> *"The appeal body must have authority to annul the referendum where irregularities may have affected the outcome…In the event of annulment of the global result, a new referendum must be called.*
>
> ***All voters must be entitled to appeal.**"*[21]

72. The Venice Commission has been referred to on numerous occasions by the domestic courts: see *Arron Banks v The Commissioners for Her Majesty's Revenue & Customs* [2018] UKFTT 617 (TC); [2018] 10 WLUK 512 (Judge Ashley Greenbank referred to the Venice Commission Guidelines approvingly in his reasoning (paragraph 115); *R. (on the application of Barclay) v Secretary of State for Justice* [2009] 3 W.L.R. 1270 [88] and [93] Lord Collins cited the Venice Commission Explanatory Report; *AXA General Insurance Ltd and others v HM Advocate and others* [2011] 3 W.L.R. 871, at [118] Lord Hope referred to the Venice Commission with approval when considering its definition of the rule of law; *Regina (Preston) v Wandsworth London Borough Council and another* [2013] 2 W.L.R. 733, per Mummery LJ at [66] referring to the fact that member states can choose the franchise for out of country voting, as provided in the Venice Commission's Report on Out-of-Country Voting (24 June 2011).

73. The need for spending limits in order to secure "the free expression of the will of the people" was recognised by the European Court of Human Rights in *Bowman v UK*, in which it stated:

[20] See Explanatory Memorandum §24 [HB1/212]

[21] See further Explanatory Memorandum §22-23 [HB1/211]

"43….it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature"."

74. The recent Council of Europe Report: Updating Guidelines to ensure Fair Referendums in Council of Europe Member States of 4 October 2018 emphasises "*88. How a referendum campaign is conducted is fundamentally important for the democratic quality of the process as a whole."* Further, in section 10 the report explains the fundamental importance of spending, donation and transparency rules to democratic fairness. These rules are provided for in PPERA and the 2015 *Act.*

"98. The Code of Good Practice on Referendums currently has little to say on other aspects of campaign finance. In fact, it has only two provisions:

"Political party and referendum campaign funding must be transparent." (section I.2.2.g)

"The principle of equality of opportunity can, in certain cases, lead to a limitation of spending by political parties and other parties involved in the referendum debate, especially on advertising." (section I.2.2.h)

99. These points should be developed further. Transparency is of paramount importance in democracy. Concerns about corruption and attempts to buy undue influence are widespread, and transparency is an essential first step for addressing them.

Such transparency should apply both to the sources of campaign funds and to how those funds are spent. In particular:

- *at the very least, the sources of campaign funds should be revealed to an independent regulator. For donations, this should apply to donations above a minimum threshold;*

- *there should be rules on who may contribute to campaign funds: foreign donations, for example, are often prohibited. Disclosure of funding sources should enable the independent regulator to police these rules;*

- *in addition, donations above a minimum threshold (which may be higher than the threshold above) should be made public: voters have a right to know if individuals or bodies provide substantial resources to political campaigns;*

- *campaigners that spend more than a minimum threshold should be required to submit detailed spending returns. These should make it clear what money has been spent on and whom services have been purchased from.*

> *100. There is no harm in one side being able to outspend the other if it has greater popular support and/or greater support among elected representatives: voters are perfectly entitled to let what others think influence their own views, so the strength of the campaign on each side may be useful information. Nevertheless, if one side can overwhelmingly outspend the other, that may inhibit free choice, particularly if much of that funding comes from a small number of wealthy sources. Beyond transparency, therefore, constraining spending through spending limits, donation limits, or both, is also desirable. The rules applied should, so far as possible, be consonant with other rules and traditions in the country concerned.*
>
> *101. Campaign and party finance in relation to all electoral processes is a wide ranging subject and is of such importance that it should probably be addressed by the Venice Commission in a document separate to its Code of Good Practice in Electoral Matters and its Code of Good Practice in Referendums, which could set out good and bad practice without being unduly prescriptive. As such, it should therefore be considered as a separate matter from this report, although it has to be referred to as it remains a significant element of referendums and their conduct.*

f. Analogy between referendums and general elections

75. The Venice Commission (above) has made clear that the same principles largely apply to referendums and elections, such that its Code in relation to Referendums echoes its Code in relation to Elections, (which can be found at **[HB1/161]).** The Electoral Commission has unsurprisingly therefore, argued that as a matter of law reform the same principles ought to apply to breaches of campaign rules in general elections and referendums:

76. In its Interim Report on Election Law, the Electoral Commission, 2016 stated:

> *14.13 As to challenging the outcome of referendums, we considered that a single set of grounds should be set out. These would be in line with those governing elections, save in one respect. Since there is no "candidate", the commission by anyone of a corrupt or illegal practice cannot serve to annul the validity of the referendum in the same way that conduct by or attributable to a candidate vitiates his or her election. The only ground that is intelligible in the referendum context is that of "extensive" corruption at the referendum which may reasonably be supposed to have affected the outcome."*[22]

[22] Interim Report on Election Law, Electoral Commission, 2016, para 14.13 http://www.lawcom.gov.uk/app/uploads/2016/02/electoral_law_interim_report.pdf

77. Similarly the 2014 Joint Law Commission, Scottish Law Commission and Irish Law Commission review of the law governing the conduct of elections and referendums in the UK,[23] stated:

> *"13.56 Reasonable supposition is not certainty, however. In a close election won by a narrow margin, if extensive corruption for the winning candidate is shown, the requirement may be very easily satisfied. Widespread corruption is a flexible term, and courts can interpret the provision so that the more serious the corruption shown, the less will be needed reasonably to suppose that it affected the result. However, Commissioner Mawrey QC also thought that proof of widespread fraud in favour of the winning candidate should result without more in the annulment of the election, which is a different point.*
>
> *14.80 A notable absence from the grounds of challenge set out above is that none enables the election court to annul a referendum result for breach of referendum rules. Section 23 of the 1983 Act is not incorporated into the referendum regulations, which simply state that referendums are to be conducted in accordance with referendum rules. While it appears that the election court can correct the outcome of the referendum based on votes cast, it appears that it cannot investigate whether a breach – such as turning voters away at close of polls, or opening a polling station late – was fundamental or affected the result of the referendum.*
>
> *14.81 Since the conduct rules are in secondary legislation, and it plainly cannot be the case that a fundamental breach of referendum laws which they set out cannot be challenged at all, we consider that the High Court would be able to scrutinise the referendum by way of judicial review. In our view, this is an unintended consequence, since the policy is clearly for the election court to have jurisdiction to review the referendum, and it does not make sense to limit its jurisdiction to errors which manifest themselves only in votes cast.* (emphasis added)

g. Position in Ireland

78. The Irish case law on referendums is important because the Supreme Court of Ireland has grappled with the question of when the Court is under a duty to intervene when there are corrupt or illegal practices in the course of a referendum. The Supreme Court has stressed that voting constitutes a fundamental underpinning for the legitimacy of decisions of the representative branches. It has held that whilst the democratic process should not be too readily stopped and ballot results upset by courts, seriously flawed processes must not be beyond effective challenge by citizens if those results are to be accepted as legitimate; an essential tenet of democracy.

[23] Law Commission, Scottish Law Commission, Northern Ireland Law Commission - Joint Consultation Paper LCCP 218 / SLCDP 158 / NILC 20 (2014)

79. The Supreme Court of Ireland has therefore held that the rules relating to the voiding of elections, including the common law must apply equally to referendums. In the Constitutional and Statutory context of a referendum held for the purposes of amending the Irish Constitution, the Supreme Court has held that the relevant test for setting aside a referendum petition is whether "*a reasonable person could not have a doubt about, and would trust, the provisional outcome of the referendum*": *Joanna Jordan v the Minister for Children and Youth Affairs, Government of Ireland, Ireland and the Attorney General* [2015] IESC 33 per Denham C.J. §136.

80. In his concurring Judgment, O'Donnell J. stated:

> *"But what is to happen if that decision has been achieved after a referendum campaign which has not been conducted in accordance with the law relating to the referendum including, in this case, the law to be found in the Constitution itself as interpreted by the judicial arm of government in performance of its own constitutional function? That question raises fundamental issues about the structure and functioning of a State established with an eloquent assertion of popular sovereignty …"*

81. O'Donnell J. also referred at paragraph 39 to the law as stated by Palles C.B in *In Re Pembroke Election Petition* [1908] 2 I.R. 433:

> *"Of the many classes of irregularity in the count of an election two are material in consideration of the question here:-*
>
> *First – Those cases in which, by reason of the irregularity, the conduct of the election is contrary to the principles laid down in the body of the Ballot Act. In such a case, to use the words of Lord Coleridge, in* Woodward v. Sarsons *(1), the election is 'not really conducted under the subsisting election laws,' of which the Ballot Act is one of the principal and most important.*
>
> *Consequently, according to the common law affecting elections, as laid down in that case, as well as by what I regard as the clear construction of the Ballot Act, such an election ought to be declared void.*
>
> *The second class of irregularity is where, though the conduct of the election has been in accordance with the principles laid down in the body of the Ballot Act, and of the other existing election statutes, yet there has been a breach of the rules or forms of the schedule to the Ballot Act, or there has been a breach of some of the subsidiary provisions of those statutes; but where there has not been a corrupt or illegal practice by the candidate.*
>
> *Speaking generally, an irregularity of this second class will not, per* se, *avoid the election. Avoidance in such a case depends not upon the statute, but upon the common*

law affecting elections; and avoidance or non-avoidance depends upon whether such irregularity had, or might have, affected the result. This, too, is the effect of the decision in Woodward v. Sarsons (1)." (p.448)

82. Further, at 38:

"*The decision of the Court of Appeal of England and Wales in* Morgan v. Simpson *is also important for a more general argument which counsel sought to advance. The judgment of Lord Denning M.R. contains a very useful and lucid account of the history of the Ballot Act 1872 and in particular s.13. He explains that prior to 1868 any election disputes were determined by parliament which had the power to determine the result, and if necessary to direct a fresh election. The approach taken by parliament was discretionary, and less formal than that which might be taken by a court. Indeed, at that time, election at common law was open and not by secret ballot, and in the words of Lord Denning M.R:*

"*…was disgraced by abuses of every kind, especially at parliamentary elections. Bribery, corruption, treating, personation, were rampant. These were not investigated by the courts of law. They were the subject of petition to parliament itself. Often members were unseated and elections declared invalid. If you should wish to know what happened, you will find it in Power, Rodwell & Dew Reports of Controverted Elections (1848-1853) and in Charles Dickens' account of the election at Eatanswill [in the Pickwick Papers, Chapter 13]". (p. 162)*

In 1868 election disputes were for the first time to be determined by the courts under the Parliamentary Elections Act of that year. Then in 1872 the Ballot Act was enacted which revolutionised the system of voting at elections and provided for voting by secret ballot and prescribed rules and set out forms of ballot papers. The degree to which elections were now prescribed by detailed statutory rules meant that there was a risk that elections could be too easily set aside for breach of those rules. It was therefore thought necessary to have a saver in the form of s.13 which has been reproduced in subsequent legislation ever since. To this extent it appears the statutory law followed the practice in parliament prior to 1868 in that parliament exercised a degree of discretion on a petition. To that extent it was perhaps correct to say that the section was enacted ex abundante cautela. However the true principle was set out by Lord Denning M.R. at page 164:

"*Collating all these cases together, I suggest that the law can be stated in these propositions:*

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. … …

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. …

3. But, even though the election is conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated. …",

83. And further:

59 The central difficulty in this case is that the Court is required to identify a test which sets a balance between two values which have significant constitutional weight, and which may on occasion conflict. Very significant weight must be given to the importance of upholding the law, and in particular the constitutional law, regulating the holding of elections and referenda. Those laws exist in part to prevent a potentially beneficial collective intelligence becoming a damaging group think. They also exist to promote trust in the process and confidence in the result. On the other hand, as has just been discussed, there is a significant constitutional weight to be given to the decision of the people. The Court cannot allow one to decisively outweigh the other. While some might assert that courts should not properly engage in what can be seen as a political question, withdrawal from decision making is not an option which is consistent with the balance set by the Irish Constitution, which after all, goes to some lengths to regulate by its own terms the electoral process. Even those theories of judicial review which lay emphasis on the separation of powers and the importance of recognising both the limits of the judicial power and the consignment by the Constitution of certain matters to the other branches, nevertheless stress the importance of positive enforcement of constitutional guarantees in respect of voting since that is a fundamental underpinning for the legitimacy of decisions of the representative branches. The Court must find the point of constitutional equilibrium. The democratic process should not be too readily stopped and ballot results upset by courts, but seriously flawed processes must not be beyond effective challenge by citizens. For present purposes it is enough to observe that the Constitution permits and indeed requires that more be established than a breach of the rules regulating a referendum or election and that a threshold of the electoral effectiveness must be passed before a referendum result is invalidated.

84. In that regard, the Irish Supreme Court has had regard to the Venice Commission Code referred to above:

"83….Finally, it is noteworthy that the European Commission for Democracy Through Law (Venice Commission) Code of Good Practice on Referendums (CDL-AD (2007)008) which was referred to in the judgments in McCrystal was also referred to in this case. One of the principles at paragraph 3.3(e) provides that there must be an effective appeal body which "must have authority to annul the referendum where irregularities may have affected the outcome" (emphasis added). None of these statements are necessarily advertent and directed to the precise issue which arises in this case, but they are instructive in that they suggest a consensus, not perhaps overly analysed or debated, but significant nonetheless, that where the outcome of an election is in real doubt by reason of some irregularity of interference with the process, it must be re-run.

84 This conclusion in my view follows as a matter of not just textual analysis and precedent, but also as a matter of constitutional principle. Modern liberal democracy

involves the ascertainment of the will of the people which it is accepted will be determined by the decision of the majority of them. But democracy depends as much if not more upon the consent of the minority and their acceptance of the result. Part of the consent of the minority is based on acceptance of, and trust in, the process by which the result has been arrived at. Where an irregularity has occurred which is an interference in the conduct of an election or referendum, then there will come a point at which it can be said that a reasonable person will no longer have the requisite confidence in the outcome to allow the result to be accepted as the basis upon which society should collectively proceed. In such circumstances it will be necessary to re-run the election or referendum notwithstanding the difficulties and imperfections of that course.

The Test

85 Accordingly, I would hold that "material effect on the outcome of a referendum" involves establishing that it is reasonably possible that the irregularity or interference identified affected the result. Because of the inherent flexibility of this test, it may be useful to add that the object of this test is to identify the point at which it can be said that a reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election or referendum.

85. Clarke J. specifically agreed with this test. Further, he stated at paragraph :

"3.2 It is a fundamental requirement of fair procedures that any party potentially affected by a finding adverse to their rights and obligations should have an opportunity to be heard in an appropriate way on the issue in question."

V. LEGAL SUBMISSIONS

Ground 1: The referendum campaign involved corrupt and/or illegal practices that had they taken place in the context of an election or a local government referendum would have been sufficient for the Court to void the result.

86. The Claimants submit that the offences, which the Electoral Commission found beyond reasonable doubt had taken place as well as those referred to the Metropolitan Police and NCA for further investigation amount to corrupt and/or illegal practices or otherwise involve general corruption that vitiate or otherwise undermine the result of the referendum as a matter of common law. The Claimants as voters have a democratic right to such a finding, which the Court has inherent jurisdiction to make. If characterised as an advisory declaration (rather than a right to have one's fundamental democratic right to vote vindicated by a ruling of this Court), then this is a paradigm example of circumstances where it is not only appropriate but necessary for the Court to exercise its jurisdiction to give such an opinion. Here there is a plain public interest in the Defendant, Parliament and the people knowing whether, as a matter of common

law, the result of the referendum is vitiated, that whether as a matter of law, the result cannot properly be said to represent the 'democratic will of the people': *London Borough of Islington v Camp* (1999) [2004] LGR 58; *R (Customs and Excise Commissions) v Canterbury Crown Court* [2002] EWHC 2584 (Admin) at [27] per Laws LJ.; *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2759 (Admin) at [46-47]. As stated in the Woolf Report Access to Justice (1996) at 252 advisory declarations should be given when in the public interest "*but limited to cases where the issue of public interest is defined in sufficiently precise terms and where the appropriate parties were before the Court*".

87. Further, such an approach (the vindication of the democratic rights of the Claimants and the public interest in the correct legal position being stated) properly gives effect to the requirement within the Venice Commission Code for a remedy to be available in respect of breaches of procedural and substantive rules in the course of referendums.

88. It is submitted that the evidence before the Court is more than sufficient to provide an arguable case that must be examined by the Court to establish the nature of the relevant practices for the purposes of electoral law, as a matter of constitutional right, as explained above.

89. In that regard, the lack of any statutory power by the Court to invalidate or quash the result, is of no relevance. The referendum result was in any event only advisory. The Court's role is to uphold legality, which underpins public faith in democracy, such that it is submitted that it should examine and determine this question. Indeed, the finding of the Court will be essential for Parliament to discharge its function. This was precisely the reason that the Scottish Court of Session made a reference to the CJEU in relation to the revocability of Article 50 TEU in *Andy Wightman MSP and others v Secretary of State for Exiting the EU* in which the Court stated that:

> "*while the form of the proceedings and their effect is different from the traditional application of the supervisory jurisdiction, the underlying purpose is to ensure that those charged with voting on issues of vital importance to the United Kingdom are properly advised on the existing state of the law. That in my opinion falls squarely within the fundamental purpose of the supervisory jurisdiction.*"

90. In the Advocate General's Opinion of 4 December 2018, the Government's submission that the Court should not rule on the question because of its potential political implications was roundly rejected. The Advocate General stated:

> *"53. Furthermore, as in other cases of special sensitivity for the Member States the Court cannot relinquish its obligations, evading answering a question that is correctly formulated…solely on the ground that that answer may be read from a political, and not a strictly legal perspective."*

91. It is submitted that the same principles apply here. It is essential that Parliament (and the executive) understand the legal and constitutional status of the result of the referendum in order for them to discharge their constitutional functions, namely in deciding what weight to give to the result of the referendum vote, which was purely advisory.

92. The Claimants will rely on established case law, including that set out above and the case of *Erlam v Rahman* [2015] EWHC 1215 in which Richard Mawrey QC stated:

> *"…If a candidate is elected in breach of the rules for elections laid down in the legislation, then he cannot be said to have been 'democratically elected'. In elections, as in sport, those who win by cheating have not properly won and are disqualified. Nor is it of any avail for the candidate to say 'I would have won anyway' because cheating leads to disqualification whether it was necessary for the victory or not. In recent election cases, for example, it has been proved that candidates were elected by the use of hundreds (in Birmingham, thousands) of forged votes: would anyone seriously claim that those candidates had been 'democratically elected'?"*

93. Further, the Claimants will rely on their right under the common law to relief, which is in-line with the Venice Commission Code on Referendums.

Ground 2: it is unlawful for the Prime Minister to refuse to take any steps in response to the findings of corrupt and illegal practices; it involves a misdirection of law and a failure to take account of a relevant consideration and/or is otherwise unreasonable.

94. As set out in paragraphs 29 to 31 above, the decision to take the United Kingdom out of the EU was a decision taken by the Defendant; it was an executive decision amenable to judicial review. The basis of that decision was explained by the Defendant to be two-fold: (1) the commitment of the government to 'honour' the result; and (2) the belief that the result reflected the legitimate 'will of the people'. Since the date of

the notification, the Defendant has repeatedly stated that she is 'bound' or in some sense 'obliged' to respect the result.

95. It is for that reason that, as set out in paragraphs 7 to 10 above, the Prime Minister has repeatedly insisted that she will not take any steps in response to the findings of the Electoral Commission of serious offences and its referral of individuals and organisations to the Metropolitan Police and the NCA for the investigation of further criminal offences. The Defendant's position is that she is *obliged* to give effect to the referendum result *irrespective* of any illegalities that took place during it and *irrespective* of the likelihood of criminal convictions taking place in the future. Indeed, the Defendant has refused even to countenance *considering* whether the result of the referendum can legitimately be treated as representing the 'will of the people'. She will not consider the existence of the offences, their seriousness or their potential impact on the result.

96. That approach involves a misdirection of law. Since the referendum was only advisory, the Defendant is under no obligation to give effect to its result; she is wrong to treat it as legally mandatory.

97. Further, the Defendant's approach involves a failure to take into account a relevant consideration and/or is unreasonable in the *Wednesbury* sense. The Claimants rely on the fact that the illegal conduct constitutes corrupt and/or illegal practices and/or general corruption under the common law, which moreover, had it taken place in the context of a local or national election would have resulted in the result being declared void and a re-run. That too is the position applying the rules set out in the Venice Commission Code, set out above. This is a relevant consideration for the Defendant that she must take into account in exercising her powers lawfully in relation to taking the UK out of the EU. For the Defendant to refuse to have regard to these facts is wholly unreasonable having regard to the enormous implications of the relevant decision. These include not just the departure of the UK from the EU but also, the faith of the people in the democratic process. For such a momentous decision to be taken on the basis of a procedure vitiated by illegality and fraud, will necessarily undermine faith in democracy and the rule of law.

98. It follows that the Defendant has erred in law in treating herself as obliged to give effect to the numerical outcome of the referendum vote only. Instead, she should have treated the referendum result as advisory only, which necessarily requires her to consider the democratic legitimacy of the process and the implications of corrupt and illegal practices during the campaign and the criminal investigations now taking place by the Metropolitan Police and the NCA, in light of the electoral law of the United Kingdom and the basic constitutional principles of parliamentary democracy.

Ground 3: the Defendant is proceeding on the basis of a fundamental error of law and fact, namely that the referendum had been conducted lawfully and democratically.

99. The Prime Minister's repeated decisions to refuse to take any steps in response to the new information and her original decision to notify the EU of the UK's intention to leave, pursuant to her powers under Section 1(1) of the 2017 Act, were based on a fundamental error of law and fact, namely that the referendum had been conducted lawfully and democratically and that its result could be relied upon as constituting the legitimate and democratic 'will of the people'. On the balance of probabilities, having regard to the relevant illegalities, the result of the referendum is open to significant doubt. That is supported by the analysis carried out by Professor Howard as to the likely consequences of the significant undeclared over-spend by Vote Leave on AIQ during the last 10 days of the referendum. As he explains this expenditure was important to the social media campaign of Vote Leave. Its possible reach, taking the figures provided by Vote Leave, is likely to have had the consequence of changing the result, which required only a swing of 634,751 votes **[HB3/3/15/§59].** To that should be added the fact that Professor Howard did not take into account the additional £100,000 that Vote Leave spent on AIQ but which it declared as a 'non-cash' donation to Veterans for Britain, in exactly the same way as had taken place in relation to the payment to AIQ declared by Vote Leave to Darren Grimes. In both cases, as found by the Divisional Court the expenditure was that of Vote Leave: see *R (Good Law Project) v Electoral Commission and Vote Leave* [2018] EWHC 2414 **[HB1/497/§§95-98].** Nor did Professor Howard take into account the significant over-spend by Leave. EU.

100. Had the Prime Minister known when she decided to take the UK out of the EU and notify the EU to that effect what is known now, namely that the referendum involved corrupt and illegal practices, potentially involving serious criminal conduct, she could

not confidently have proceeded on the basis that 51.89% of those who voted and 34.73% of the electorate were in favour of the UK leaving the EU. Nor should or could she have considered herself bound by a promise to honour or respect a result obtained in that way. Indeed, the significance of the matters set out above is such that the result cannot lawfully or rationally be characterised as '*democratic*', binding or in accordance with the UK's constitutional requirements.

101. The discovery of the error of fact on which basis a decision was taken after the decision, does not a fortiori render the original decision lawful; a court is entitled to review an error of fact taking into account new evidence: *R (A) v Croydon LBC* [2009] UKSC 8. In such circumstances the Court has held that four tests apply in order for the Court to hold that the decision was unlawful: a) the mistake must be on some fact, b) the fact must be uncontentious, c) the claimant must not be responsible for the mistake, and d) the mistake must have been material in the decision: *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] Q.B. 1044). All of these apply in this case.

102. In so far as the Defendant says that the Prime Minister was aware of the illegalities [SGD §§44-45, **HB1/70],** the Claimants sought further information in relation to that claim by way of a request for further information **[HB1/93-95],** to which the Defendant has refused to respond. If the Defendant's position is that she knew of the nature and scale of the illegalities, then this is something that requires to be examined by the Court and will presumably be disclosed pursuant to the duty of candour – as yet no disclosure at all has been provided. It should be noted however, that at the time that the Defendant took her decision to notify, the Electoral Commission had closed its investigation into Vote Leave: see paragraph 111 below.

103. Accordingly, it is submitted that both the original decision to take the UK out of the EU and to notify and the subsequent decisions not to take any steps in response to the discovery of serious illegalities in the course of the referendum were based on an error of law and fact, namely that the result of the referendum properly reflected the democratic 'will of the people'.

Ground 4: that Parliament did not intend by s. 1 of the 2017 Act to confer on the Prime Minister the power to take the United Kingdom out of the EU on the basis of a referendum result that was not procured by way of a lawful referendum process.

104. Finally, the Claimants submit that the power conferred by s. 1 of the 2017 Act was not given to the Prime Minister to enable her to take the United Kingdom out of the EU on the basis of a referendum result based on a process that involved serious illegalities, including significant over-spend by one of the designated campaigns. Parliament must be taken to have intended that the Prime Minister act only on the basis of a lawful and democratic referendum result.

105. It follows that notification and to notify the EU to that effect pursuant to s. 1 of the 2017 Act was ultra-vires.

Permission issues

Timing

106. Supperstone J. refused permission on the basis that the claim was substantially out of time, taking the view that the claim should have been filed within three months of 29 March 2017 when the Prime Minister notified the President of the EU Council of her decision to take the UK out of the EU. In his view, no good reason had been advanced for an extension of time and further, the delay was detrimental to good administration (s.31(6)(a), SCA 1981), in particular, having regard to the fact that the UK is now in the later stages of negotiations with the EU.

107. In so holding, the Judge failed to have regard to two important facts.

107.1 First, that this is a challenge not only to the decision of 29 March 2019 but also to the recent and repeated decisions of the Prime Minister to refuse to take any action in response to the findings of the Electoral Commission and other regulatory bodies regarding the serious illegalities committed during the referendum. There can be no question of the latter being out of time.

107.2 Secondly, to the fact that as regards the original decision to notify, no challenge could have been brought to that decision until the Electoral Commission had made its findings. As soon as those findings were made proceedings were

commenced promptly, indeed within less than four weeks. On 1 November 2018 a further extremely significant and serious decision was made by the Electoral Commission to refer matters to the NCA.

108. In so far as the Judge says that the Prime Minister was aware that there were allegations of illegality at the time that she decided to take the UK out of the EU, the Claimants sent the Prime Minister a request for further information in relation to this **[HB1/93],** to which she has refused to respond. If the Prime Minister was aware of the serious offences that have now been established by the Electoral Commission or indeed of the matters that have been referred to the NCA this is a matter of grave concern. It is submitted that it too would vitiate her decision.

109. In so far as the Defendant purports to rely on the time limits set out in paragraph 19 of schedule 3 to the 2015 Act, this provision relates to "*any proceedings for questioning the number of ballot papers counted or votes cast in the referendum as certified by the Chief Counting Officer or a Regional Counting Officer or counting officer*". Accordingly, it is irrelevant to this claim, which is not a challenge to the number of ballot papers counted or votes cast: see Grounds para 21(2).

110. As to the suggestion at paragraph 28 of its SGR that the Claimants should have brought this claim at a time before the Electoral Commission reached its findings in respect of Vote Leave and Leave.EU, it is submitted that such a claim would have been rejected as being premature, academic and/or for failure to pursue an alternative remedy.

111. In that regard, the Defendant fails to mention that the Electoral Commission twice closed its investigations into Vote Leave spending on 4 October 2016 and the second on 21 March 2017 just before the Prime Minister notified the EU of her decision. On 23 October 2017 following the release of information obtained in September 2017 from FOIA requests to the Electoral Commission, a judicial review challenge was brought to those decisions by the Good Law Project, arguing inter alia that on the evidence available it was clear that the relevant offences (relating to 'working together' had taken place). In addition, the Good Law Project raised issues regarding the Electoral Commission's lack of progress in relation to its investigation into Leave.EU, which had been opened by the Commission on 21 April 2017.

112. As a result of the Good Law Project claim, on 20 November 2017 the Electoral Commission decided to re-open its investigation into Vote Leave and Darren Grimes. It also opened a new investigation into Arron Banks. Those investigations were not concluded until May and July 2018, as set out in the Grounds in this case. Because the Electoral Commission re-opened its investigation, the Good Law Project was refused permission for judicial review in relation to Ground 2 of its grounds of claim, namely that on the evidence available to the Electoral Commission, the Commission should have found that the relevant offences had been committed. The Court refused permission on paper and following an oral hearing, on the basis that the determination of that question was a matter for the Electoral Commission. The Court stated that the Claimant would have to await the outcome of the Commission's findings before that part of its challenge could be heard, since to do so before then would be academic and premature.

113. Seen in this light, it is inconceivable that this claim could have been brought on the basis of speculation as to what the Electoral Commission might or might not find in relation to conduct in the referendum.

114. As regards the contention at para. 33 SGR that this Court should refuse permission on a separate ground that "even if part of this claim could be regarded as having been brought within time, it has been brought with obvious undue delay" such that relief should be refused pursuant to s. 31(6)(a) Senior Courts Act 1981 on the basis that to grant permission would "plainly be detrimental to good administration", the Claimants submits:

114.1 First, this was brought extremely swiftly following the Electoral Commission releasing its findings and the decision of the Prime Minister not to take any steps in response. A claim could not have been brought before those findings for the reasons set out above.

114.2 Secondly, a core part of the Claimants' case is that the failure of the Defendant to respond in any way to the findings of illegal and corrupt practices, which undermine the legitimacy of the referendum, is plainly detrimental not only to good administration but to democracy and the rule of law. This Claim raises issues of fundamental constitutional importance, namely the effect of

significant corrupt activities in breach of referendum/election laws upon a democratic vote. This plainly goes to the heart of 'good administration'.

114.3 Thirdly, it is wrong for the Defendant to suggest that this claim impinges on negotiations with the EU27 in any impermissible sense; it is concerned with the legality of domestic executive action. Moreover, at paragraph 36 of her Grounds the Defendant misquotes the Claimants. The Claimants nowhere say that relief is being sought to keep the UK in the EU. The relief presumably being referred to is that set out in paragraph 6(3)(c) Grounds, namely "lawfully to consider extending the date of 'exit day' under s. 20(4) of the European Union (Withdrawal) Act 2018." That discretionary power relates to the retention of the application of the EU Act 1972 after 29 March 2019.

Other grounds on which Supperstone J. refused permission.

115. Supperstone J. considered the claim was unarguable on two bases:

115.1 First, that the Claimants' case proceeded on the basis that the decision to give the Article 50 notice was founded on a premise that there had been compliance with campaign finance requirements. His view was that that wrong because allegations of breaches of campaign finance limits during the Referendum campaign had been in the public domain for some time and were being investigated by the Electoral Commission.

115.2 Secondly, that the Claimants' case relied on the contention that the Electoral Commission reports of breaches of campaign finance or other requirements identified in the reports meant that the result of the Referendum was "procured by fraud", or that the outcome of the Referendum was affected by any wrongdoing or unlawful conduct. The Claimants could not establish that that was so.

116. Neither of these findings is correct.

117. As to the first, as a matter of fact, the Electoral Commission closed its investigation into Vote Leave on 17 March 2017 finding that there was no basis for further investigation. But in any event, the fact that there are allegations of breaches of campaign financing

is quite different from a situation where findings have both been made and those findings amount to serious violations, rather than technical or small breaches that would not affect the legitimacy of the result. As already stated, if the true position is that the Prime Minister knew of both the nature and seriousness of the offences by Vote Leave and Leave.EU, then that is a matter of serious concern, which warrants investigation by the Court. As already stated, the Prime Minister has refused to reply to a RFI on this issue **[HB1/93].**

118. As to the second, the Judge misunderstood how the Claimants put their case. The argument is not that the referendum result was procured by fraud and thus vitiated, rather it is that having regard to the nature and seriousness of the offences and the fact that as a matter of common law they amount to corrupt and illegal practices and in the context of an election or local referendum would by statute lead to the result being voided, it was not reasonable for the Prime Minister to refuse to take any steps in response to those findings. The Claimants do not and have never contended that the Electoral Commission found 'corrupt and illegal practices'; that is not within their mandate. The Claimants' submission is that this Court has jurisdiction under the common law to consider the nature of the conduct at issue in considering whether it amounted to corrupt and illegal practices. The Claimants' submission is that it does.

119. Finally, Supperstone J. found that the claim was now academic because the decision that the UK will leave the EU on 29 March 2019 has now been approved by Parliament. It is submitted that that is no answer to the grave constitutional matters raised by this claim. Parliament is sovereign and entitled to have the guidance of the Court as to the correct legal position. The result of the referendum was advisory only. Parliament is entitled to know whether it was vitiated by corrupt and illegal practices and to pursue whatever route it chooses having regard to that position. The role of the Court is to ensure the protection of legality that underpins democracy. It is for Parliament and the executive then to decide what to do. It matters not therefore what Parliament has done to date. That is all the more so when the European Union (Withdrawal) Act 2018 ('the 2018 Act') was enacted on 26 June 2018, prior to the Electoral Commission's Report of 17 July 2018 into Vote Leave Limited ('Vote Leave') and others.

VI. CONCLUSION

120. The Claimants respectfully request the Court to grant permission for the claim and to expedite it. Expedition has only become necessary because permission was refused on the papers. It is now however, a matter of extreme urgency having regard to the decisions being made in Parliament, which may include the question of whether another vote should take place.

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ADAM WAGNER

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4 December 2018