Claim No: CO/3220/2017

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

B E T W E E N :

THE QUEEN

(on the application of CIARAN McCLEAN)

Claimant

- and -

(1) FIRST SECRETARY OF STATE

(2) HER MAJESTY'S ATTORNEY GENERAL

Defendants

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT

APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

26 October 2017, 10.30am

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London
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By email dated 7 September 2017, the Court informed the parties that the Claimant's application for permission to apply for judicial review be listed for an oral inter partes hearing with a time estimate of one day.[1]

In addition to the parties' skeleton arguments, the Court is asked to pre-read the documents listed in order of priority at paragraph 10. It is estimated that this will take approximately 3 hours.

A hearing bundle made up of three volumes should be before the Court. References to documents within the bundle take the form [**vol./tab**] or [**vol./tab/page**].

Structure of this Skeleton Argument

The structure of this Skeleton Argument is as follows:

(A) Introduction (§1-10)

Decisions under challenge (§5)

List of issues (§6-9)

Pre-reading (§10)

(B) Background (§11-20)

Procedural history (§11-13)

Chronology of events (§14-19)

List of persons referred to in the claim (§20)

(C) Application for permission (§21-23)

(D) Amenability to judicial review (§24-25)

(E) Grounds for judicial review (§26-55)

Use of public expenditure powers for an improper purpose (§27-47)

Offence under the Bribery Act 2010 (§48-55)

(F) Remedies sought (§56)

(G) Conclusion (§57)

[1] By email dated 6 October 2017, the Government Legal Department agreed with the Claimant that the one-day listing is still appropriate even though the Claimant no longer pursues the application in respect of the Belfast Agreement.

(A) Introduction

1. This Skeleton Argument is filed on behalf of the Claimant, Mr Ciaran McClean, in advance of the hearing of his application for permission to apply for judicial review.

2. The Government Legal Department identified the Defendants as the appropriate defendants to this claim in its response dated 6 July 2017 [**1/7/117-119**] to the Claimant's *Judicial Review Pre-Action Protocol* letters dated 22 June and 29 June 2017 [**1/7/98-106; 1/7/107-108**].

3. By these proceedings, the Claimant seeks to challenge decisions taken by Her Majesty's Government ("**HMG**") in relation to an agreement concluded with the Democratic Unionist Party of Northern Ireland ("**the DUP**") on 26 June 2017.

4. The agreement in question is entitled "*Agreement between the Conservative and Unionist Party and the Democratic Unionist Party on support for the Government in Parliament*", and it is accompanied by an annex entitled "*UK Government financial support for Northern Ireland*" (together, "**the Agreement**") [**3/35**]. As explained in more detail from paragraph 25 below, notwithstanding the title of the Agreement, HMG was, in reality, a party to it and purported to assume obligations under it.

Decisions under challenge

5. The Claimant seeks to challenge the following decisions[2] by HMG (the "**Decisions**"):

   (1) To enter into the Agreement;

   (2) To make the spending commitments contained in the Agreement.

List of issues

6. By letters to the Government Legal Department and the Court dated 5 October 2017, the Claimant's solicitors stated that the Claimant does not intend to proceed with the application for permission in respect of the Belfast Agreement.

[2] The Claimant no longer seeks to challenge the decision (referred to in section 3 of the Amended Claim Form) that HMG continues to hold office and govern pursuant to the terms of the Agreement.

7. The evidential questions in this case are as follows:

   (1) Is party political advantage the true purpose of the spending commitments contained in the Agreement?

   (2) Did HMG intend that the spending commitments would induce DUP Members of Parliament to vote in a particular manner in the House of Commons?

8. The Claimant's case is that both these questions can be answered affirmatively. Neither the Defendants nor HMG have made their position clear. If these matters are in dispute, evidence and cross-examination will be required at the substantive hearing.

9. The outstanding legal issues in this case are as follows:

   (1) Do the Decisions commit HMG to expend public money for an improper, and so unlawful, purpose thereby constituting a misuse of HMG's public expenditure powers?

   (2) Is HMG right that the expenditure under the Agreement can be validly authorised through the Estimates process under standard procedures?

   (3) Is the claim non-justiciable on account of Parliamentary privilege?

   (4) Do the Decisions involve the commission of an offence under the Bribery Act 2010?

Pre-reading

10. The Court is invited to pre-read the following documents in addition to the parties' skeletons:

    (1) Amended Claim Form [**1/4**];

    (2) Claimant's ASoG dated 21 July 2017, paragraphs 1-25 [**1/4**];

    (3) Defendants' Summary Grounds dated 9 August 2017, paragraphs 1-3 and 25-38 ("**SG**") [**1/6**];

    (4) The Agreement [**3/35**];

    (5) *Porter v Magill* [2002] 2 AC 357 [**2/9**].

(B) Background

Procedural history

11. The Claimant issued proceedings on 10 July 2017 before filing[3] its ASoG on 31 July 2017.

12. The Defendants responded with their SG on 9 August 2017.

13. On 7 September 2017, the parties were notified by the Court that the application for permission to apply for judicial review would be considered by the Divisional Court at this *inter partes* oral hearing [**1/5/77**].

Chronology of events

14. Prior to 8 June 2017, the Rt. Hon Theresa May MP, Prime Minister and the leader of the Conservative and Unionist Party ("**the Conservative Party**"), headed HMG with a Conservative Party majority in the House of Commons.

15. On 8 June 2017, a general election was held in which the Conservative Party won the most seats of any single party but, having secured only 318 seats (out of 650), was eight seats short of a majority in the House of Commons. The DUP won 10 seats.

16. On 9 June 2017, the Prime Minister made a public statement in which she said that she would form a government. She further stated that the Conservative Party would "*continue to work with our friends and allies in the Democratic Unionist Party in particular*" [**3/53**].

17. On 26 June 2017, after several days of negotiations, the Agreement was concluded. Among other things, the Agreement provides that:

    (1) The DUP agrees to support HMG in votes in the UK Parliament in respect of certain issues;

    (2) HMG will provide £1 billion of additional funding for Northern Ireland over the course of the Parliament to be spent on a variety of projects.

[3] With the permission of the Court, by Order dated 31 July 2017 [**1/5/76**].

18. The Agreement is silent as to when the sum of £1 billion will start to be spent, although the inference is that it could be expended immediately given the fact that the DUP has already part-performed the Agreement. The Agreement is also silent on the need for any authorisation for the promised funds to be expended. The current budgetary provisions and departmental allocations for Northern Ireland do not include any of the funding promised by HMG under the Agreement.[4]

19. In July 2017, there was some uncertainty as to whether the £1 billion of further spending was conditional upon the restoration of devolution in Northern Ireland. Speaking to the BBC on this issue, the Hon. Sammy Wilson MP (DUP) said that it had been made clear to his party that the money was available to Northern Ireland as long as the DUP support HMG on certain measures in Parliament. The BBC quotes him as saying that "*as long as we do that, the money is there*" [**3/54/1359**].

List of persons referred to in the claim

20. In addition to the parties themselves, the only other person referred to in the claim is the Prime Minister, the Rt. Hon. Theresa May MP (see also footnote 16 below).

(C) Application for permission

21. The threshold for permission to apply for judicial review was described as follows by the Privy Council in *Sharma v Brown-Antoine & ors* [2007] 1 WLR 780 at 787 (para. 14(4)):

> "*The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy*" [**2/24/670**].

22. For the purposes of this hearing, the quotation above encompasses the test against which to assess the submissions that follow. The Court is invited to find that these submissions

[4] See written Ministerial Statement on Northern Ireland Finances dated 19 July 2017 by James Brokenshire MP [**3/36**].

do disclose arguable grounds for judicial review and, accordingly, to permit this case to proceed to a substantive hearing.

23. In any event, the Claimant invites the Court to grant permission in the public interest based on the importance of the issues involved in this case. The public expenditure provisions in the Agreement have generated intense public interest, and it is right that these issues should be considered by the Court in detail at a substantive hearing. In *R (Gentle) v Prime Minister* [2007] QB 689 at paragraph 1, the Court of Appeal granted permission to apply for judicial review of the government's decision to refuse to hold a public inquiry into the Iraq war. In so doing, the Court noted that permission was granted not on the basis that the application for judicial review had a real prospect of success, but because of the importance of the issues involved [**2/25/692**].

(D) Amenability to judicial review

24. In any given case, the Court must, of course, be satisfied that the decisions subject to challenge are amenable to judicial review. In the present case, the Defendants have conceded[5] that the conclusion and/or continuing operation of the Agreement involves a decision of a public body which could be susceptible to challenge by judicial review.

25. That concession was rightly made. The Agreement includes numerous statements which are plainly made on behalf of HMG. These include outlining HMG's beliefs, stating its intentions, and committing HMG to future spending in Northern Ireland. Accordingly, there can be no doubt that, in reality, HMG is a party to the Agreement and did make a decision to be so. Further, HMG has purported to assume financial obligations under the Agreement. Those financial obligations amount to a commitment to expend public funds to ensure that HMG remains in power.

[5] Para. 2 of the Defendants' SG [**1/6/83**].

(E) Grounds for Judicial Review

26. The Claimant's grounds for judicial review are considered in turn below. In summary, they are as follows:

    (1) Use of public expenditure powers for an improper purpose;

    (2) Offence under the Bribery Act 2010.

Use of public expenditure powers for an improper purpose

27. The first ground for judicial review is that the Decisions by HMG commit HMG to misuse its public expenditure powers.

28. There is one simple fact that underpins this ground and that should not be lost in the legal analysis: by its Decisions, HMG has committed itself to spend £1 billion of taxpayers' money purely in order to service the political expediency of the Conservative Party.[6]

Porter v Magill [2002] 2 AC 357 [**2/9**]

29. In *Porter v Magill*, the House of Lords confirmed the general principle of public law that powers conferred on a public authority may be exercised for the public purpose for which those powers were conferred and not otherwise (per Lord Bingham at [19(1)]). The House of Lords also confirmed that such power may not lawfully be exercised to promote the electoral advantage of a political party (per Lord Bingham at [19(5)]). Indeed Lord Scott stated at [132] that selective use of powers in this manner represents "*political corruption*".

30. The House of Lords held that Westminster Council's policy of using its power to sell council homes in eight marginal wards to likely Conservative Party voters was unlawful: it was directed to the pursuit of electoral advantage and not the achievement of proper

[6] Under the Agreement, HMG also agrees to "*permit any remaining funding from previous allocations for shared education and housing to be dispersed flexibly with this spending period*". The basis upon which HMG is entitled to permit such reallocation is entirely unclear. It is understood that the spending captured by this clause amounts to some £500 million [**3/55/1364**].

housing objectives (per Lord Bingham at [25]). Assessing the policy, Lord Scott stated at [143]-[144]:

> "*It is clear that the policy was adopted…not in order to achieve sales city-wide but in order to achieve…sales…in the eight key wards. And those sales were for the purpose of replacing probable Labour voters with probable Conservative voters. The city-wide policy was no more than a cloak to give apparent legality to the sales in the eight key wards…*
>
> *…there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage.*"

Porter v Magill applied to the present case

31. Contrary to the unexplained assertion at paragraph 37 of the Defendants' SG [**1/6/96**], the Agreement in the instant case is factually similar and legally indistinguishable from the policy of Westminster Council in *Porter v Magill*:

    (1) Both cases are underpinned by the principle that it is improper for public resources to be used for the purpose of party political advantage.

    (2) Both cases involve the misuse of public resources to purchase votes: the votes of the electorate in *Porter v Magill* and the votes of the DUP in the present situation.

    (3) As in the case of Westminster Council's policy in *Porter v Magill*, the Agreement purports to be something that it is not. The spending commitments in the Agreement are explained and justified by reference to "*the unique circumstances of Northern Ireland's history and the effect this has had on its economy*". However, such purported explanation is merely a "*cloak to give apparent legality*"; it is a spurious justification which, had it been sincere, would have rendered such commitments legitimate. However, it cannot hide the reality that HMG's decision to commit to the spending plans was made purely for naked

political advantage. Ultimately, it is for the Court to decide at the substantive hearing on all the evidence what is the true purpose of the expenditure.[7]

32. Accordingly, the Agreement can properly be described as an example of political corruption. It is on its face unlawful because it makes provision for the expenditure of public funds for party political advantage.

Parliamentary authorisation

33. HMG has the power to expend public monies only if authorised to do so by Parliament. Such power must be exercised for the proper purposes for which the power is conferred.

34. It is clear that, as of today, Parliament has not authorised the spending of any sums for the purpose of securing for HMG the support of the DUP in the House of Commons. That being the case, absent valid Parliamentary authorisation permitting particular funds to be expended for that particular purpose, ministers would be acting *ultra vires* and/or abusing their existing public expenditure powers by implementing the spending commitments under the Agreement.

35. The Defendants contend at paragraph 35(4) of their SG that valid authorisation can be achieved through "*standard procedures*" [**1/6/96**]. This betrays a misunderstanding of those procedures: the Estimates process, upon which the Defendants rely, cannot do the job.

36. As set out in Erskine May: Parliamentary Practice (24th ed., 2011), "[f]*or each Request for Resources contained within the Estimate, Part I…gives a formal description, known as the 'ambit', of the services to which resources may be applied. The title of each Request for Resources and its ambit are reproduced in the Appropriation Act and thus provide the statutory description of the purposes for which the Supply sought in the Estimate is authorized. No expenditure or other use of resources can therefore properly be incurred or undertaken on any service which is not covered by the ambit*" [**3/46/1163**].

37. In other words, there is no scope in the Estimates process for Parliament to authorise the true purpose of expenditure such as that to which HMG commits itself in the Agreement.

[7] See by analogy *R v Secretary of State for Foreign & Commonwealth Affairs ex p World Development Movement Ltd.* [1995] 1 WLR 386 at 401H per Rose LJ [**2/14/424**].

It is only capable of providing authority for the superficial purpose: the services to which the resources are to be applied. Consequently, expenditure of funds with the obvious primary purpose of party political advantage can never be authorised merely through the Estimates process.

38. This holds true in the particular case of the Estimates for the Northern Ireland Office. Such Estimates do not break down the majority of the expenditure by category. Instead, a lump sum is authorised by Parliament to be paid into the Northern Ireland Consolidated Fund "*for the delivery of transferred public services*"[8]. From that Fund, sums "*shall be appropriated to the public service of Northern Ireland by Act of the Assembly*"[9]. Such a mechanism plainly cannot authorise the party-political purpose behind HMG's spending commitments contained in the Agreement. Such a purpose would remain an improper – and, therefore, unlawful – purpose, notwithstanding the passage of supply and appropriation legislation.

39. It is clear, therefore, that HMG's proposal to use the Estimates process as the means of authorising the expenditure outlined in the Agreement would not work. However, such a proposal is not only ineffective; it also misses a fundamental point. The point is that the Agreement is, on its face, corrupt under the clear principles set out by the House of Lords in *Porter v Magill*. The Agreement was corrupt when it was made, and it remains a corrupt (and unlawful) agreement today. The Estimates process alone cannot save it.

40. In *R v Secretary of State for the Home Department ex p Fire Brigades Union* [1995] 2 AC 513 [**2/17**], the fact that Parliament had approved funds under the Appropriation Act 1994 for the tariff scheme was not enough to save that scheme in the face of a finding by the House of Lords that the tariff scheme was unlawful (as an abuse of Executive power under the prerogative). Similarly, any Parliamentary authorisation of the expenditure of public funds under the Agreement by a relevant Supply and Appropriation Act cannot cure the unlawfulness of that Agreement.

41. HMG seeks to obtain authorisation for the spending commitments in the Agreement by relying upon the very corrupt agreement which the Claimant seeks to impugn. It is clear

[8] See, for example, the 2017/2018 Main Estimate for the Northern Ireland Office [**3/37/863**].

[9] Section 57 of the Northern Ireland Act 1998 [**3/28/751**].

from the above that HMG's proposal to use "*standard procedures*" is hopelessly inadequate. This is unsurprising: it cannot be right that Ministers are able to load a set of political bribes onto the financial vehicle (the Estimates) by which they hope to secure Parliamentary authorisation for that improper expenditure. This is particularly so given that, as the Main Estimates 2017/18 show, there is very little scrutiny by Parliament of the Estimates.[10] It is obviously inappropriate (as well as ineffective) for HMG to propose to authorise the spending commitments in the Agreement by such an ordinarily inconspicuous process, and thereby seek discretely to render as proper what is, in fact, a corrupt and improper purpose. This is another case in which "*Parliament must squarely confront what it is doing and accept the political cost*" (*R(Simms) v Secretary of State for the Home Department* [2000] 2 AC 115, per Lord Hoffmann at 131E) [**2/26/735**].

42. Accordingly, what *is* required for a valid Parliamentary authorisation is an Act of Parliament which (i) specifically approves the true purpose of the expenditure under the Agreement and/or (ii) explicitly reverses the common law rule of proper purpose as set out in *Porter v Magill* ("**Valid Parliamentary Authorisation**").[11] Only such an authorisation will do, and only then can Ministers lawfully take steps to implement the spending commitments in the Agreement (such as requesting the relevant sums in the Estimates, or making a payment into the Consolidated Fund of Northern Ireland under section 58 of the *Northern Ireland Act 1998* [**3/28/752**]).

43. It follows from the above that any payment of monies by the Secretary of State into the Consolidated Fund of Northern Ireland under section 58 of the *Northern Ireland Act 1998* to cover the spending commitments in the Agreement would be unlawful and *ultra vires* section 58. The Secretary of State cannot properly determine for the purposes of section 58 that monies provided by Parliament be paid into the Consolidated Fund when the reason for paying those monies into the Consolidated Fund is to expend those monies for the improper purpose of party political advantage.

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[10] Section 3 [**3/37/855**]. See also section 4 of Briefing Paper 08028 dated 30 June 2017 entitled "The Estimates Process and 2017-18 Main Estimates" [**3/38/903-4**].

[11] See for example (by analogy) s. 79 of the *Health and Social Care Act 2008* and section 261 of the *Health and Social Care Act 2012* which (necessarily) contain provisions expressly overriding the common law notwithstanding a general statutory authorisation [3/**32; 3/33**]. See also 21 of the *Criminal Justice and Courts Act 2015* where the relevant common law is, by subsection (5), to be disregarded [**3/56**].

Parliamentary privilege

44. The Defendants also argue at paragraph 25 of their SG[12] that the claim is non-justiciable because it seeks to impugn what is essentially a political act intended to regulate the behaviour of politicians in Parliament [**1/6/92**]. This argument is simply wrong: the claim does not call into question anything done in Parliament. Instead, the claim concerns the lawfulness of the extra-parliamentary Agreement under which HMG has promised additional funding in exchange for the votes of the DUP. Whether, in fact, DUP Members of Parliament choose to vote in accordance with the Agreement is nothing to the point. The claim does not depend on, or call into question, what the DUP do or do not do in Parliament. The issue is whether the additional financial support for Northern Ireland constitutes the expenditure of public funds for an improper purpose.

45. The analogy with bribery cases is instructive: Parliamentary privilege does not prevent criminal proceedings being taken against MPs who are bribed to act in a particular way in Parliament (see, for example, *R v Greenway* (unrep., 25 June 1992), per Buckley J, referred to by Lord Phillips in *R v Chaytor* [2011] 1 AC 684 at [42]-[44] [**2/10/328-9**]). In *Greenway*, Buckley J held that it was not a necessary ingredient of the crime of bribery that the bribe had the intended effect. Similarly, it is not a necessary part of the claim in this case to enquire as to how the DUP actually vote in Parliament, and the Claimant eschews any such enquiry.

46. There can also be no question of the Claimant inviting the Court to encroach onto Parliamentary territory. Far from amounting to an interference with the proper functions of Parliament (cf. *R(Wheeler) v Prime Minister* [2008] EWHC 1409 (Admin) [**3/11**]; *R(Unison) v Secretary of State for Health* [2010] EWHC 2655 (Admin) [**3/12**]), review by the Court of the legality of the Agreement may, in fact, be of assistance to Parliamentarians (*R (Smedley) v HM Treasury* [1984] 1 QB 657 [**3/13**]).

47. For all reasons given above, it is submitted that the first ground for judicial review – use of public expenditure powers for an improper purpose – is at least arguable and has a realistic prospect of success at a substantive hearing.

[12] In reliance on Article 9 of the Bill of Rights 1689 [**3/30/774**].

Offence under the Bribery Act 2010

48. The second ground for judicial review is that the Decisions by HMG involve the commission of an offence under the Bribery Act 2010 (the "**Act**") [**3/31**], and a declaration is sought to that effect (see paragraph 56(2) below).

49. For the avoidance of doubt, it is clear that declarations may be granted relating to criminal conduct and that, at the substantive hearing, the question should be judged on the balance of probabilities (*R (Haynes) v Stafford Borough Council* [2007] 1 WLR 1365, per Walker J at [13]-[21] [**2/22/633-4**]; *Financial Services Authority v John Edward Rourke* [2002] C.P. Rep. 14, per Neuberger J at page 9 [**2/23/657**]).

50. For present purposes, the mechanism by which an offence is committed under the Act is as follows:

    (1) Under sections 1(1) and (2) of the Act, it is an offence a person ("P") to offer, promise, or give a financial or other advantage to another person where P intends that advantage to induce a person to perform improperly a relevant function or activity.

    (2) By section 1(4), it does not matter whether the person to whom the advantage is offered, promised, or given is the same person as the person who is to perform the function or activity concerned.

    (3) Pursuant to section 3(1), a function or activity is a relevant function or activity for the purposes of the Act if it is any function of a public nature or any activity performed by or on behalf of a body of persons (whether corporate or unincorporate), *and* any one of Conditions A-C are satisfied:

        (A) The person performing the function or activity is expected to perform it in good faith;

        (B) The person performing the function or activity is expected to perform it impartially;

(C) The person performing the function or activity is in a position of trust by virtue of performing it.[13]

(4) By section 4 of the Act, a relevant function or activity is performed improperly if it is performed in breach of a relevant expectation. The relevant expectation in respect of Conditions A and B above is cited in the wording of those conditions. The relevant expectation in respect of Condition C is any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.

(5) Section 5(1) of the Act provides that the test of what is to be expected for the purposes of sections 3 and 4 is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

51. In the present case:

(1) HMG is P[14] and the advantages offered are (i) the financial package to the people of Northern Ireland identified in the Agreement and (ii) participation on a "*co-ordination committee*" for the DUP also set out in the Agreement (together, the "**Advantages**").[15]

(2) The relevant function or activity is the function/activity of the DUP MPs voting in the House of Commons. This is plainly a function of a public nature and/or an activity performed by DUP MPs on behalf of the DUP and/or their constituents.[16]

(3) As set out below, the function/activity of voting in the House of Commons meets each of the Conditions A-C (although it is only necessary for one such condition to be satisfied for the purposes of the offence), and HMG intended that provision

[13] Joint Committee on the Draft Bribery Bill, HC 430-I, HL 115-I (28th July 2009) at [23] [**3/52/1253**]; Hansard HL Col GC 33 [7th Jan 2010] [**3/45**].

[14] The Claimant does not maintain that the Prime Minister is P (cf. ASOG/14 [**1/4/61**]).

[15] For reference, see *The Bodmin Case* (1869) 1 O'M&H 121 [**3/21**].

[16] Pre-Bribery Act jurisprudence assists in understanding the approach of the Act. MPs are plainly public officers: they discharge a duty in which the public are interested and are paid out of public funds (*R v Whitaker* [1914] 3 KB 1283 at 1296 [**2/19/608**]; Hansard HL Col 1088 (Dec 9th 2009) [**3/43**]); also see for reference Public Bodies Corrupt Practices Act 1889 [**3/34**].

of the Advantages would induce DUP MPs to perform such function/activity improperly by reference to each relevant expectation.

52. *Condition A: the person performing the function or activity is expected to perform it in good faith*

(1) It is axiomatic that MPs are under a pre-existing duty to vote in good faith. Further, an expectation that someone will act in good faith may exist notwithstanding a contractual freedom to act otherwise.[17] Accordingly, even if (which is denied) MPs have the freedom to act other than in good faith, the expectation of good faith exists nevertheless.

(2) DUP MPs will be in breach of the expectation that they cast their votes in the House of Commons in good faith whenever they vote with the purpose of complying with the Agreement which, on its face, is corrupt under *Porter v Magill* principles. HMG intended that the Advantages offered would induce the DUP MPs to vote in this manner. Accordingly, the offence of bribery is made out by reference to Condition A.

53. *Condition B: the person performing the function or activity is expected to perform it impartially*

(1) Paragraph 12 of the MPs' Code of Conduct ("**the Code**") [**3/39/917**][18] provides as follows:

> "*The acceptance by a Member of a bribe to influence his or her conduct as a Member, including any fee, compensation or reward in connection with the promotion of, or opposition to, any Bill, Motion, or other matter submitted, or intended to be submitted to the House, or to any Committee of the House, is contrary to the law of Parliament.*"

[17] Law Commission (Law Com No 313), 'Reforming Bribery' (19 November 2008) at paragraph 3.146-3.147 [**3/40/992**]

[18] The Code was approved by the House of Commons on 12 March 2012 and 17 March 2015. In paragraph 17 of the ASoG, the Claimant mistakenly referred to paragraph 11 of an older version of the Code [**1/4/62**]. Paragraph 11 of the old Code and paragraph 12 of the 2015 Code are, however, identical.

(2) Accordingly, MPs are expected to vote impartially, in that they are expected to vote without the influence of a bribe as defined in the Code. The narrow definition of "*impartially*" in this context means that, contrary to the Defendants' case at paragraph 31 of their SG [**1/6/94**], the "*entirely standard features of political life*" are unaffected. Moreover, the Defendants' allegation of circularity of reasoning in this regard at paragraph 32 of their SG [**1/6/94**] is similarly misplaced, for it proceeds on the basis that a bribe for the purposes of the Act and a bribe for the purposes of the Code are one and the same. Plainly, that is not correct.

(3) Construed with paragraph 12 of the Code, DUP MPs will be in breach of the expectation that they cast their votes in the House of Commons impartially whenever their conduct as MPs in respect of any particular Bill or Motion is influenced by the Advantages offered by HMG under the Agreement. Such Advantages constitute a "*compensation or reward*" for the purposes of paragraph 12 of the Code. As is self-evident from the terms of the Agreement, HMG intended that the Advantages offered would influence the DUP MPs in this manner. Accordingly, the offence of bribery is made out by reference to Condition B.

54. *Condition C: the person performing the function or activity is in a position of trust by virtue of performing it*

(1) As a preliminary point, it must be noted that, as set out in the Law Commission's Report 'Reforming Bribery', the phrase "position of trust" should not be construed narrowly. It does not merely refer to recognised trust 'relationships' such as exists between banker and client, doctor and patient and so forth.[19]

(2) There can be no doubt that Members of Parliament are in a position of trust. This is expressly recognised by paragraph 7 of the Code which provides that "*Members should act on all occasions in accordance with the public trust placed in them*" [**3/39/915**].

(3) As set out at paragraph 50(4) above, the relevant expectation under Condition C means any expectation as to the reasons for which the function or activity will be

[19] Law Commission Report at paragraph 3.157 [**3/40/994**].

performed that arises from the position of trust. As stated in paragraph 3.166 of the Law Commission's Report:

> "*... it can amount to a betrayal of trust that one acted for the wrong reason, and not solely that one's action was in itself wrong. In other words, acting in accordance with a position of trust does not mean simply conforming one's conduct to an external requirement, such as issuing a visa at a particular time to a particular person, awarding a contract to the highest bidder, or making a grant from a fund to a beneficiary entitled to it. It may in some instances mean avoiding doing these things for the wrong reason (an advantage offered or provided), even if in themselves they are the right things to do.*" (emphasis in original) [**3/40/996**].

(4) On the facts of the present case, there is a relevant expectation that DUP MPs will cast their votes in the House of Commons for lawful reasons, and will not vote by reference to an agreement which is, on its face, corrupt under *Porter v Magill* principles. HMG intended that the Advantages offered would induce the DUP MPs to vote for the wrong reasons: namely in order to support HMG as per the Agreement. Accordingly, the offence of bribery is made out by reference to Condition C.

55. For the reasons given above, it is submitted that this second ground for judicial review is at least arguable and has a realistic prospect of success at a substantive hearing.

(F) Remedies sought[20]

56. At the substantive hearing, the Claimant will seek declaratory relief to the following effect:

[20] The declaratory relief sought expands upon the declaratory relief identified in paragraph 3 of the ASoG [**1/4/54**], and the Claimant does not press for a prohibiting order on the basis of the long-standing convention that HMG will respect and give effect to the decisions of the Court.

(1) The Agreement, on its face, makes provision for the expenditure of public funds for an improper, and so unlawful, purpose;

(2) The Agreement is unlawful as it involves the commission of an offence under the Bribery Act 2010;

(3) By the Agreement, HMG offered financial advantages to the DUP with the intention that such advantages would induce DUP Members of Parliament to perform improperly their function of voting in the House of Commons;

(4) The Defendants do not have power to expend any monies contemplated by the Agreement in the absence of an Act of Parliament which (i) specifically approves the true purpose of the expenditure under the Agreement and/or (ii) explicitly reverses the common law rule of proper purpose as set out in *Porter v Magill* ("**Valid Parliamentary Authorisation**");

(5) Absent Valid Parliamentary Authorisation, any departmental request for public funds pursuant to the Agreement is unlawful and/or not effective;

(6) Absent Valid Parliamentary Authorisation, the Secretary of State cannot lawfully determine under section 58 of the Northern Ireland Act 1998 that any monies intended to be spent under the Agreement be paid into the Consolidated Fund of Northern Ireland.

(G) Conclusion

57. For the reasons given above, the Court is invited to grant the Claimant permission to apply for judicial review at a substantive hearing.

DOMINIC CHAMBERS Q.C.

JOHN COOPER Q.C.

EDWARD GRANGER