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Case No: QB-2019-000945

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2019

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

RICHARD MURPHY	**Claimant**
- and -	
THE ELECTORAL COMMISSION	**Defendant**

- -
- -

Mr Timothy Straker QC and **Mr James Tumbridge** (instructed by **Venner Shipley LLP**) for the **Claimant**
Mr Timothy Pitt-Payne QC and **Ms Hannah Slarks** (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 11 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MURRAY

Mr Justice Murray :

1. I have before me a claim issued by the claimant, Mr Richard Murphy, on 19 March 2019 under CPR Part 8 against the defendant, the Electoral Commission ("the Commission"), in which Mr Murphy seeks a compulsory order for the specific return or destruction forthwith of the spending return and associated documents ("the GOL Return") that had been provided by Grassroots Out Limited ("GOL") to the Commission under section 120 of the Political Parties, Elections and Referendums Act 2000 ("PPERA"). He also seeks exemplary damages.

2. GOL was a company that was set up to campaign in favour of voting to leave the European Union in relation to the referendum that was held in the United Kingdom on 23 June 2016 ("the Referendum"). It was a "permitted participant" under section 105(1) of PPERA in relation to the Referendum. It has since been dissolved.

3. I also have before me an application by the Commission dated 15 April 2019 seeking the strike-out of the claim on the grounds that it is (1) misconceived, (2) premature and (3) an abuse of process ("the Strike-out Application").

The parties

4. Mr Richard Murphy is the "responsible person" for GOL under section 105(2) of PPERA.

5. The Commission is the electoral commission of the United Kingdom. It is an independent statutory body set up by Parliament under section 1 of PPERA to regulate party and election finance and to set standards for how elections and referendums should be run.

Background

6. Mr Murphy, as responsible person for GOL, was required by section 120 of PPERA to "make a return … in respect of referendum expenses" incurred by GOL during its campaign in relation to the Referendum during the "referendum period", which is defined in section 102 of PPERA to mean the period so designated in the Act of Parliament under which the referendum was held. In the case of the Referendum, the referendum period began on 15 April 2016 and ended on 23 June 2016.

7. Section 120 of PPERA sets out requirements for the content of the return and associated documents, and section 122(2) of PPERA, which applies in this case, requires that the responsible person deliver the relevant return and associated documents within three months of the end of the referendum period.

8. Mr Murphy submitted the GOL Return in hard copy on 22 September 2016. The Commission published a copy of the GOL Return on-line on its "PFR" system, as it did for returns and associated documents in respect of other permitted participants.

9. Following the submission of the GOL Return on 22 September 2016, the Commission opened an investigation into GOL in relation to various issues that it considers may constitute offences under PPERA. The Commission has indicated that its internal investigation report is being finalised and that the report will be used to inform any

enforcement action that the Commission may take in that regard under its enforcement policy.

10. On 29 January 2019, Mr Murphy's solicitors, Venner Shipley LLP ("Venner Shipley"), made a request to the Commission under section 124(3)(b) of PPERA that the Commission arrange for the return of the GOL Return to Mr Murphy. The Commission did not do so immediately. It says that it was seeking legal advice before doing so in order to know what it needed to do to comply with its duties. The Commission sent a holding response to Venner Shipley on the following day, confirming receipt of the request and saying that it would respond in due course.

11. Venner Shipley sent a further letter by email to the Commission on 5 February 2019 stating that the Defendant was in breach of its obligations under PPERA and requesting that the Commission comply "immediately" with the request. The Commission replied by email on the following day noting that the legislation provides no timeframe within which it must comply with a request under section 124(3)(b) and that the Commission would provide a substantive response within a reasonable time.

12. Mr Murphy issued this claim on 19 March 2019.

13. On 2 April 2019 the Commission returned the GOL Return to Venner Shipley. In the final paragraph of its covering letter, the Commission said the following:

> "The Commission is currently investigating GO [Grassroots Out Limited] with regard to breaches of electoral legislation. The documents in the original spending return may be required as evidence for the purposes of further investigation or any legal proceedings. Accordingly the Commission intends to return this to you on the basis that Venner Shipley or your client will keep the spending return and underlying documents safely, and to produce them to the Commission if required."

Section 124 of PPERA

14. Section 124 of PPERA reads in its entirety as follows:

> "(1) Where the Commission receive any return under section 120 they shall—
>
> (a) as soon as reasonably practicable after receiving the return, make a copy of the return and of the documents accompanying it available for public inspection; and
>
> (b) keep any such copy available for public inspection for the period for which the return or other document is kept by them.
>
> (2) If the return contains a statement of relevant donations in accordance with section 120(2)(d), the Commission shall secure that the copy of the statement made

> available for public inspection does not include, in the case of any donation by an individual, the donor's address.
>
> (3) At the end of the period of two years beginning with the date when any return or other document mentioned in subsection (1) is received by the Commission—
>
> (a) they may cause the return or other document to be destroyed; but
>
> (b) if requested to do so by the responsible person in the case of the permitted participant concerned, they shall arrange for the return or other document to be returned to that person."

Evidence

15. This case turns principally on questions of statutory interpretation in relation to section 124 of PPERA. In relation to evidence in support of the claim, Mr Murphy has provided a witness statement dated 8 March 2019 of Mr David Pountney, a solicitor at Venner Shipley, together with relevant correspondence between Venner Shipley and the Commission.

16. Mr Murphy has also provided his own witness statement dated 10 October 2019, but that primarily addresses his reason for bringing the claim and the impact on his health caused by the Commission's indication that it is investigating GOL for possible breaches of electoral legislation. It does not assist in relation to the issues that I need to resolve to determine the claim and the Strike-out Application.

17. In support of its defence to the claim and in support of the Strike-out Application, the Commission has provided a witness statement dated 4 April 2019 of Ms Catherine Seldon, a lawyer in the Government Legal Department, together with relevant correspondence and some statutory and case law material.

Issues

18. A number of issues are raised by the claim as it has been developed by the pleadings and in correspondence between the parties. In my view, the issues are the following:

    i) Does Mr Murphy have a private law cause of action for breach of statutory duty by reason of:

        a) the Commission's failure to return the GOL Return to Mr Murphy before 2 April 2019; and/or

        b) the Commission's failure to destroy all copies it has of the GOL Return including any digital copies; and/or

        c) the Commission's failure to cease publishing the GOL Return on its website?

ii) Does Mr Murphy have a private law cause of action for the tort of conversion by reason of any of the failures referred to in (i) above?

iii) If Mr Murphy has a private law cause of action for the tort of breach of statutory duty and/or conversion, is the claim made out on the evidence?

iv) If the claim is made out, is Mr Murphy entitled to exemplary damages by reason of "oppressive, arbitrary or unconstitutional action" by the Commission?

The proper interpretation of section 124 of PPERA

19. Before considering the nature of the cause of action that Mr Murphy has against the Commission, if any, it is necessary to consider the proper interpretation of section 124 of PPERA.

20. Mr Timothy Straker QC, for the claimant, submits that it is clear from the terms of section 124 of PPERA that upon Mr Murphy, as responsible person, having requested the return of the GOL Return under section 124(3)(b), the Commission was obliged to (i) return the original of the GOL Return to Mr Murphy promptly, (ii) return or destroy any other copies of the GOL Return that it had and (iii) cease publishing a digital copy of the GOL Return on its website. He maintains that Mr Murphy was entitled to the return of the GOL Return once two years had expired after the Commission received the GOL Return in accordance with sections 120 and 122(2) of PPERA.

21. As noted in the details of the claim, by letters dated 29 January 2019 and 5 February 2019, Mr Murphy requested that the GOL Return be returned and all other copies be destroyed. Mr Straker submits the Commission did not return the GOL Return promptly. Although section 124(3)(b) does not specify a time within which the return must be made by the Commission, Mr Straker noted that section 12(1) of the Interpretation Act 1978 requires that:

> "[w]here an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

22. Mr Straker submitted that the original of the GOL Return, encompassed within a slim paper folder (which was held up for my inspection during the hearing), required no more than to be taken off a shelf, put in an envelope and posted or otherwise delivered to Mr Murphy. The Commission's having taken several weeks to do this, from 29 January 2019 to 2 April 2019, cannot be said to have complied with its statutory duty to return the GOL Return "from time to time as occasion requires" and therefore the Commission, but its belated return of the GOL Return, breached that statutory duty.

23. Mr Straker further submitted that, when section 124 is read in light of its legislative history, it is clear that section 124 requires the Commission to return or destroy any *copies* of the GOL Return that it has. He referred to section 89 of the Representation of the People Act 1983 ("the 1983 Act"), which was an Act consolidating earlier

legislation, including the Representation of the People Act 1949 ("the 1949 Act"). Section 77 of the 1949 Act was a provision comparable to section 124 of PPERA and section 89 of the 1983 Act. The 1949 Act itself consolidated earlier legislation, including the Ballot Act 1872.

24. It is clear, Mr Straker submitted, that in the days before technology had advanced to the point where copies, in particular, digital copies, are easily and cheaply made the purport and effect of analogous provisions such section 77 of the 1949 Act and its predecessors was that the relevant documents referred to in those provisions were to be returned or destroyed, and no copies were to be kept. This interpretation is consistent with a policy of finality in relation to an election, once an appropriate period of time after the election has passed within which to deal with any issues relating to the conduct of the election.

25. Mr Straker submitted that Parliament should be presumed not to have intended to change the law "casually" when enacting section 124 of PPERA using words comparable to the words used in section 77 of the 1949 Act and earlier legislation. In this regard, Mr Straker referred me to para 754 of vol 96 (Statutes and Legislative Process) of *Halsbury's Laws of England* (2018).

26. Mr Straker submitted that, accordingly, it is clear that section 124 of PPERA requires that not only must the original of a return and accompanying documents be returned to the relevant responsible person on request after two years from the time of submission of those documents to the Commission, but also that the Commission must destroy any copies and cease to publish any of the relevant documents on-line.

27. Mr Timothy Pitt-Payne QC, counsel for the Commission, submitted that section 124(1) makes clear that the Commission has a duty to make and make available to the public a copy of each return and any accompanying documents it has received under section 120, and the Commission has both the duty and the power to do this "for the period for which the return and other document is kept by them".

28. Mr Pitt-Payne noted that section 124(1) distinguishes between the original of a return and accompanying documents and copies of each such document. He submitted that section 124(3)(a) gives the Commission a power, but does not impose a duty, to destroy any copies it may have, before or after it has returned the original of the "return or other document" to the relevant responsible person. He noted, in passing that it is clear that "or other document" means any accompanying document. He also noted that there is no reference in section 124(3) to a return of copies and that there is no compulsory language in section 124(3) or elsewhere in section 124 requiring a destruction of any copies of a return or any accompanying document.

29. Mr Pitt-Payne noted that the Commission's power to continue to hold and to make public copies of the GOL Return is confirmed by para 2 of Schedule 1 of PPERA, which provides that:

> "The Commission may do anything (except borrow money) which is calculated to facilitate, or is incidental or conducive to, the carrying out of any of their functions."

30. Under section 145(1) of PPERA the Commission is obliged to monitor and to take reasonable steps to ensure compliance with various provisions of PPERA, including Part 7 of PPERA, which is the Part of that Act dealing with referendums. The Commission is conducting an investigation into possible failures of compliance with electoral law by GOL and Mr Murphy in relation to the Referendum. Retaining a copy of the GOL Return, Mr Pitt-Payne submitted, is "calculated to facilitate" and "is incidental or conducive to" its carrying out of its function of monitoring and ensuring compliance or taking appropriate action in relation to a failure of compliance.

31. Mr Pitt-Payne submitted that, as to continued publication of the GOL Return, holding and publishing the GOL Return, even after the investigation and appeal is concluded, will be conducive to securing compliance with the restrictions and requirements imposed by PPERA. He submitted that transparency concerning a campaigning organisation's expenses and how they are considered by the Commission creates clear incentives for future compliance.

32. As to this last point, Mr Pitt-Payne relied on a passage in an unreported judgment by Swift J in *R (Vote Leave Limited) v Electoral Commission* (CO/4150/2018), having sought and obtained permission of Swift J for his judgment to be relied upon by the Commission in further proceedings, subject to its being noted that his order in that case is subject to appeal to the Court of Appeal. I understand that the Court of Appeal heard the case earlier this month, but judgment was reserved and has not yet been handed down.

33. In the *Vote Leave* case, Swift J denied the claimant, Vote Leave Limited ("Vote Leave"), permission to apply for judicial review of the Commission's publication of its report concerning the investigation it conducted into Vote Leave's expenses relating to the Referendum. Swift J found that the Commission had the necessary power to publish its report, reading section 145 of PPERA together with para 2 of Schedule 1 to PPERA. Swift J concluded at [9]-[10] of his judgment that the Commission had the power to publish information where this is:

> "9. … conducive to securing compliance with the restrictions and requirements imposed, amongst other matters, by Part 7 of the 2000 Act (the part of the Act which deals specifically with referendums). In addition, publication of the July 2018 report serves to assist the function of securing compliance with those requirements to the extent that it indicates, to the public at large, the thorough and methodical approach of the Electoral Commission to complaints of malpractice.
>
> 10. … A report like this, necessarily deals with past events, but publishing that information is still logically capable of assisting public understanding of the legislation, and public understanding of the functions of the Commission in terms of ensuring compliance with the legislation. It tends towards encouraging future compliance with restrictions under the Act. …"

34. Mr Pitt-Payne argued that the same reasoning applies in this case. Holding and publishing the GOL Return will help to explain the Commission's investigation into GOL and help to secure future compliance with the relevant provisions of PPERA and electoral law more generally.

35. Leaving aside, for the moment, the submissions of Mr Pitt-Payne that I have just summarised dealing with continued retention and publication of the GOL Return after conclusion of the Commission's investigation into GOL and Mr Murphy in relation to possible breaches of PPERA, I agree with Mr Pitt-Payne's submissions on the proper interpretation of section 124.

36. While Mr Straker's submissions on the proper interpretation of section 124 were attractively made, the objective meaning of the words used in section 124 is clear. There is no need to consider the legislative history in order to interpret it, and no reason to conclude that it has a meaning other than the ordinary and natural meaning of the words used.

37. As noted at para 754 of volume 96 of *Halsbury's Laws of England* to which I have referred above, the principle that the law should not be subject to casual change may assist in interpretation where "the legal meaning of an enactment is doubtful". In my view, however, the words of section 124(3) are clear. I express no view on the meaning of any of the analogous provisions of earlier legislation to which Mr Straker referred.

38. In light of my conclusion as to the correct interpretation of section 124, no cause of action arises based on an alleged breach of statutory duty for failing to destroy copies of the GOL Return or for failing to cease publishing the GOL Return or for the tort of conversion as a result of any of those failings. The Commission has no duty under section 124 of PPERA to destroy copies of the GOL Return or to cease publishing the GOL Return "for the period for which the return is kept by them". In my view, as long as the Commission has a legitimate reason to keep the GOL Return, it is clear under section 124 that it may continue to publish it.

39. I am also of the view that as long as the Commission has not concluded its investigation of GOL and Mr Murphy, it has a legitimate reason to keep the GOL Return, in accordance with its purpose, function, duties and powers under PPERA.

40. It is not necessary for me to go further than that and decide whether the Commission has the right to continue to publish the GOL Return after its investigation and any related appeal are decided, and I do not do so. Accordingly, while I have noted the submissions made by Mr Pitt-Payne in relation to any such future use, regarding which he relies on the reasoning of Swift J in his judgment in the *Vote Leave* case, I do not need to express a view on that in order to reach the conclusions I have set out above as to the proper interpretation of section 124.

Does Mr Murphy have a private law cause of action for breach of statutory duty?

41. It is clear under section 124(3)(b) that the Commission had a statutory duty to return the GOL Return at the end of the two-year period that began on 22 September 2016 upon Mr Murphy's request for the return, which was made on 29 January 2019. The question arises whether, if the Commission breached its statutory duty under

section 124(3)(b) by failing to return the GOL Return until 2 April 2019, that failure gave rise to a private law cause of action for the tort of breach of statutory duty.

42. Mr Straker submitted that the claim is based on a clear breach of statutory duty, which founds a common law cause of action. Moreover, that breach sounds in damages, which should be exemplary as the breach is arbitrary, unconstitutional and unconscionable.

43. Mr Pitt-Payne says that the requirements for a tortious breach of statutory duty are not made out in this case, having regard to the principles summarised by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731C-G:

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action … . However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach … ."

44. In relation to the application of these principles to this case, Mr Pitt-Payne made the following submissions:

    i) The Commission's duty under section 124(3)(b) to return "the return or other document" to a responsible person was not imposed "for the protection of a limited class of the public".

ii) Section 124 is part of an overall statutory scheme for regulating the conduct of referendums in the interest of the public generally, rather than for the benefit of those who participate in referendums.

iii) However, even if it is viewed as having been imposed to protect a limited class, namely, those who participate in referendums, there is no indication that Parliament intended to confer a private right of action for breach of statutory duty.

iv) There would be no need for Parliament to confer a private right of action for breach of statutory duty, as the Commission's public duties under PPERA can be enforced by a claim for judicial review.

45. Mr Straker submitted in his reply to Mr Pitt-Payne's submissions on this point that it is clear that the section 124 obligation to return the original return and related documents upon request (and, he would say, the obligations to destroy any copies and to cease publishing them) are for the benefit of a limited class of people, namely, those permitted participants and their responsible persons referred to in PPERA. It does not matter why a responsible person might want the return and accompanying documents returned to him.

46. It is also clear, Mr Straker submitted, that a responsible person has a private right of action under the statute to enforce the obligation. It should not be necessary to have to bring a judicial review application in the High Court to have this enforced. Parliament clearly intended that a responsible person could obtain the necessary relief by seeking an order from the County Court to enforce section 124 of PPERA. Accordingly, this private law of action in tort for breach of statutory duty is available.

47. On this point, I accept that it is arguable that section 124(3) confers a benefit on a limited class of the public, namely, those who participate in referendums as campaigners, however I find no "indicators" (to use Lord Browne-Wilkinson's term in the case of *X (Minors)*) that support the conclusion that Parliament intended to confer a private right of action on any member of that class. A member of that class can seek a remedy for a breach of the obligation under section 124(3) by making an application for judicial review. While that is not necessarily decisive, as noted by Lord Browne-Wilkinson, I can see no basis, as a matter of construction, for concluding that Parliament intended members of that class to have a private remedy. There is no analogy, even remotely, between such members and the example given by Lord Browne-Wilkinson of employers in relation to factory premises. There is simply no need, much less any policy justification, for such a private remedy.

48. Accordingly, I conclude that Mr Murphy has no private law cause of action for breach of a statutory duty against the Commission.

Does Mr Murphy have a private law cause of action for conversion?

49. The claim was not pleaded expressly on the basis of the tort of conversion, but the Commission appears to have interpreted the pleading on that basis. In responding to the Commission's arguments regarding this point, Mr Straker has not backed away from the idea that an action for conversion might lie.

50. The tort of conversion only arises in relation to chattels, namely, physical, tangible property: *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 (HL) at [95]-[107], [321]. It clearly cannot relate to the information contained in the GOL Return. It could, however, relate to the GOL Return viewed as a physical object.

51. To establish the tort of conversion, however, Mr Murphy would have to establish that the Commission wholly deprived him of possession and use of the original of the GOL Return. That clearly did not happen, and there was no realistic prospect, on these facts, of that happening. As soon as it received his request under section 124(3)(b) of PPERA for a return of the GOL Return, the Commission acknowledged the request and simply indicated that it was considering its position.

52. There is no arguable case on these facts that Mr Murphy has a private law cause of action for conversion in relation to the original of the GOL Return, nor in my view did he have one when he made this claim. In any event, it seems to me that this claim was pleaded on the basis of statutory duty, not on conversion, even if Mr Straker did not seek to distance the claimant's position from that theory once it had been raised by the defendant.

Loss and exemplary damages

53. Given my conclusions on the claim, I do not need to consider what loss Mr Murphy has suffered or what damages he would be entitled to for such loss. I simply note in passing that it seems to me that a delay of a few weeks in returning the GOL Return is far from oppressive, arbitrary or unconstitutional in circumstances where the Commission acknowledged that it had received the request, had indicated that it was considering its position (including whether it needed to retain the originals in light of its duties under section 145 of PPERA) and ultimately did return the originals of the GOL Return, which, as I have found, was its only duty under section 124 of PPERA at issue in this case.

54. Accordingly, we are far from a situation where it would be appropriate to consider awarding exemplary damages in accordance with the principles set out in *Rookes v Barnard* [1964] AC 1129 (HL) in relation to cases falling into the first category discussed by Lord Devlin at 1226 of that judgment in respect of "oppressive, arbitrary or unconstitutional action by the servants of government".

Conclusion

55. In light of my conclusion that Mr Murphy has no private law cause of action against the Commission, the Strike-out Application must succeed on the basis that the private law claim is misconceived.

56. The claim is also an abuse of process given that the only proper claim for a breach of the Commission's statutory duty under section 124(3)(b) to return the original Return would have been a public law claim brought by way of judicial review. This principle is sometimes referred to as the "procedural exclusivity rule" or the "exclusivity" principle. As to the justification for it, see *O'Reilly v Mackman* [1983] 2 AC 237 (HL) at 285 (Lord Diplock), which was said by the Court of Appeal in *Trim v North Dorset DC* [2010] EWCA Civ 1446, [2011] 1 WLR 1901 (CA) at [20] to have established the principle and where the principle is discussed by Carnwath LJ at [20]-[30].

57. Had Mr Murphy brought a public law claim in the Administrative Court on these facts, he might well have been met with the defence that his claim was premature when made and, of course, that it became academic on 2 April 2019. This claim, however, if brought at all, should have been brought in the Administrative Court, and therefore the Strike-out Application also succeeds on the basis that it is an abuse of process.

58. The claim is struck out pursuant to CPR 3.1 and 3.4.